Human Rights Law Centre

Edition 76, August 2012

RIGHTS AGENDA

Monthly Bulletin of the Human Rights Law Centre

SEIZING THE OPPORTUNITY FOR A MORE HUMANE APPROACH TO ASYLUM SEEKERS

The Asylum Seeker Resource Centre's campaign co-ordinator, **Pamela Curr**, believes our collective respect for the sanctity of human life is undermined by policies which place lives at risk.

NEWS: SRI LANKA'S ENVOY MUST BE RECALLED

There are calls for the Sri Lankan High Commissioner to Australia to be recalled amid accusations that he was complicit in the shelling of civilian targets.

CASE NOTES: RIGHT TO PROTEST

Relying on the rights to freedom of expression, association and peaceful assembly, a magistrate has dismissed charges against protesters targeting a Max Brenner chocolate bar.

IF I WERE ATTORNEY-GENERAL…

Barrister **Greg Barns**, warns of rampant surveillance powers in the absence of adequate human rights protections.

TABLE OF CONTENTS

OPINION

Seizing the opportunity for a more humane approach to asylum seekers

Last week I received a text message from a man in Indonesia who had just lost his brother in the recent boat tragedy. He said “I come soon by boat. I lost faith in UNHCR. I have no choice.”

This man like many others has been in detention in Indonesia since last year, waiting for the UNHCR to interview him. In June he texted me that 35 people in the detention centre had paid the guards and “escaped”. He said that he would wait and go the “right way”. After nine months he was finally moved out of an Indonesian detention prison to a hostel. He has been anxiously following Australian politics and asking if and when the government may change and whether a new government will “close the door”. Last week he decided to wait no more.

Meanwhile the language of deterrence to “stop the boats” continues to underpin Australian policy and obsess our politicians. It is extraordinary that politicians cannot see that the natural deterrents facing asylum seekers have not stopped them taking the decision to risk the boat trip. If seeing family members lose their lives is not enough, what can we do that is worse?

In any other area of policy, discussions of harm minimisation and alternatives to failed policies might be considered. However so toxic and entrenched has the debate about a few thousand people arriving by boat become, that there is no consideration for anything but rabid cries to “stop the boats”. Asylum seekers have been so dehumanised that any trauma visited upon them raises barely a ripple of dissent. A public, which can be rightly roused to anger and distress over a teenage lad being murdered on a night out in Kings Cross, cares little for the drowning of other families’ sons as they try to escape being murdered for political and religious reasons.

The Asylum Seeker Resource Centre (ASRC) recently took the opportunity – along with more than 60 other legal, academic, church and human rights groups – to put forward plans for a change of policy to the Government’s expert panel on asylum seekers.

Successive governments have rolled out punitive legislation and regulations to make the lives of people seeking asylum as miserable as possible. But for the first time since 1992, when mandatory detention was introduced to deter people from seeking asylum onshore in Australia, we now glimpse a moment when change might be possible and we must seize the opportunity.

Some would see this optimism as supreme folly, but feelings run deep on the issue of human rights and asylum seekers. What we lack in numbers we have in stubborn commitment, though many of us will be dead by the time an apology for the brutal harshness to refugees and asylum seekers is read out publicly in the Parliament.

The ASRC submission asks for measures to save lives. Our plan involves the immediate resettlement of 1000 refugees of the 1200 people in Indonesia who have been assessed and approved as refugees and who are currently waiting for resettlement. We know that these people will risk their lives on the boats if they have no alternative. We recommend an increase in places to 25,000 annually and that these come from the region.

We sought also to include 4000 refugees from Malaysia, and that this number must include those who are stateless. We made this recommendation to demonstrate to both Indonesia and Malaysia that Australia was moving away from a position where we saw our neighbours as nothing more than a dumping ground for the humans we do not want.

The ASRC plan advocates an increase in funding to the UNHCR in Indonesia and our regional neighbours, with monitoring to ensure that this funding is directed at processing the applications

within a reasonable time frame. Most importantly there must be an end to processing without resettlement. This is Australia's responsibility. Neither the Nauru nor Malaysian proposals include resettlement.

The submission recommends an immediate negotiation with Indonesia to codify and regularise the search and rescue response of both Indonesia and Australia in order to save lives. The current situation, under which Indonesia is responsible for the area extending 230 nautical miles from the Indonesian coastline to the 12 nautical mile limit surrounding Christmas Island and Cocos Island, has failed. If we want to save lives at sea we must immediately put more resources into maritime rescue operations. We must also provide alternatives to dangerous boat journeys through formal and safe avenues to resettlement.

Our submission also highlights those measures which we think put lives at risk. We reject both the Malaysian and Nauruan plans on the basis that they fail the safety test. Both require people seeking asylum to place their lives at risk by boarding dangerous boats in order to trigger rescue and removal to an offshore place. This solution is morally repugnant as it is predicated on risk of deaths in order to be a deterrent to others.

The ASRC submission, like many others, outlined a mix of short, medium and long term measures to prevent loss of life at sea. None of these are possible if our political leaders continue to denigrate and dehumanise the people seeking asylum. An acknowledgement that this is a right under the international conventions to which Australia is a signatory, is needed to replace the incorrect "illegals" dialogue.

Political and moral leadership has never been more needed in this area of national responsibility. It is so lacking even while the rancid voices of hate and division grow louder. This multicultural nation of migration may yet rue the day we allowed these voices to be unleashed. Our collective respect for the sanctity of human life is undermined by policies which place lives at risk.

Pamela Curr *is the campaign co-ordinator at the Asylum Seeker Resource Centre.*

NEWS IN BRIEF

Man deported from Australia "recants" torture claims after 16 hour interrogation in Sri Lanka

An asylum seeker who fled Sri Lanka saying he had been tortured by the army due to his links to the Tamil Tigers has been deported by Australia to Sri Lanka despite an urgent attempt to intervene by the UN. Upon being returned, the man was held for 16 hours and interrogated by Sri Lankan authorities before appearing at a government press conference to "recant" his claims, a decision which refugee advocates believe is likely to be a result of duress.

Sri Lanka's envoy must be recalled

There are calls for the Sri Lankan High Commissioner to Australia, the former Admiral Thisara Samarasinghe, to be recalled amid accusations that he was complicit in the shelling of civilian and hospital targets at the end of civil war in Sri Lanka.

Dangers in revisiting UN refugee convention

Australia's outgoing human rights chief, Catherine Branson QC, has warned there are real dangers in revisiting the United Nations Convention on Refugees following Coalition immigration spokesman Scott Morrison's suggestion that the treaty was out of date.

Indonesians acquitted over people smuggling charges

Two Indonesians who have been incarcerated for the last 21 months were found by a jury to be not guilty of aggravated people smuggling. The men will now go back into detention until they are deported to Indonesia.

Offshore processing stalemate set to continue

The political deadlock over offshore processing of asylum-seekers appears unlikely to be resolved by the expert panel appointed by the PM as both the Coalition and the Greens have ruled out adopting recommendations at odds with their own policy while the Government has only committed to seriously and sympathetically examine the panel's recommendations – not to implement them in their entirety. Meanwhile, the Indonesian government confirmed that it would not accept the Coalition's policy of towing asylum seeker boats back to Indonesian waters.

Suite of wide reaching surveillance powers flagged

The telephone and internet data of every Australian will be retained for up to two years and intelligence agencies would be given increased access to social media sites, under a suite of new proposals from Australia's intelligence community. But Attorney-General Nicola Roxon is yet to be convinced that the benefits of the proposals are worth the costs to civil liberties.

Varied progress for marriage equality

Immigration Minister Chris Bowen has become the latest Labor MP to declare he will vote against gay marriage, while Opposition leader Tony Abbott recently rejected Malcolm Turnbull's calls for

civil unions to be legislated in Parliament. The discussions come at a time when the Scottish government plans to introduce legislation to allow same-sex marriages and New York celebrates one year since the legalising of same-sex marriage.

One-third enter jail with mental illness

A study has found almost one-third of prisoners entering jail are already mentally ill – a rate that is more than double that of the general population.

Call to allow conjugal visits for teen prisoners

A doctor at Canberra's youth detention centre says teenage detainees should be allowed conjugal visits as many detainees aged between 14 and 18 are sexually active and a safe place for detainees to have sex needs to be considered.

Anger as NSW axes youth drug court

Legal experts are baffled by a NSW Government decision to axe a special youth court that sent young offenders to counselling and rehabilitation programs instead of jail. The Government said the court's price tag was too much, but advocates say the court is a lot cheaper than the alternative: long-term imprisonment.

Cop-cams to be trialled

Victorian police will wear video cameras attached to their uniforms as part of a trial set to begin next month.

Indigenous leader urges Green vote

At a NAIDOC gathering in Darwin, respected Arnhem Land elder Dr Djiniyini Gondarra has urged Aboriginal voters to back the Greens to protest against Labor's continuing commitment to the Howard government's dramatic intervention policies. At another NAIDOC event in Hobart, Aboriginal Affairs Minister Jenny Macklin was booed and heckled off stage by Indigenous people over a 10-year extension of the controversial program.

Carr quietly raises human rights with Indonesia

Australia's Foreign Minister Bob Carr says he is quietly working with Indonesia on the issue of human rights following last month's violence in Papua. Meanwhile, a landmark investigative report by Indonesia's National Commission on Human Rights has declared that Indonesia's anti-communist purge of the mid-1960s was a gross violation of human rights.

David Hicks to keep all profits from tell-all Guantanamo book

The Commonwealth has dropped its attempt to seize the proceeds of David Hicks's memoir. Mr Hicks said he hoped the decision meant the "Government acknowledges that Guantanamo Bay and everything connected with it is illegal."

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

Australia leads Human Rights Council to break new ground on NHRI participation

In a groundbreaking resolution, the United Nation's premier human rights forum, the Human Rights Council, has called for Paris Principles-compliant national human rights institutions (NHRIs) to be able to participate in other UN meetings and forums, including the UN General Assembly.

Led by the Australian Permanent Mission in Geneva, the resolution was co-sponsored by more than 100 States and enjoyed consensus support at the Council's 20th session, held in Geneva from 18 June to 6 July 2012.

"The resolution affirms the critical importance of NHRIs and the valuable contribution they make to the international human rights system," said Benjamin Lee, who represented the APF at the meeting.

"Further, the recommendation that NHRIs be given participation opportunities in meetings of the General Assembly and other UN bodies reflects the high level of international support that NHRIs enjoy," he said.

"If implemented, it would mean that NHRIs could contribute their independent expertise to human rights discussions and inform policy development in a much broader range of settings."

In addition, the Council's resolution:

- welcomed the strengthening of contribution opportunities for Paris Principles-compliant NHRIs at the Council via the Human Rights Council's five-year review
- welcomed the contribution of NHRIs to the ongoing treaty body strengthening process
- welcomed the UN Secretary-General's recognition of the contributions that Paris Principles-compliant NHRIs have made to the work of the Commission on the Status of Women, the Conference of States Parties to the Convention on the Rights of Persons with Disabilities and the Open-ended Working Group on Ageing
- welcomed the efforts of the Secretary-General to encourage NHRIs to continue to interact with and advocate for independent participation in all relevant UN mechanisms
- expressed appreciation for the work of regional bodies of NHRIs, including the APF.

The APF and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) contributed to the development of the resolution and were present for its adoption by the Council.

Source: www.asiapacificforum.net

United Nations Committee against Torture appeals to Australian Government to prevent deportation of Tamil asylum seeker

The United Nations Committee against Torture has sought to intervene in the case of "Mr X", a Tamil asylum seeker who was forcibly deported from Australia.

Ramesh Fernandez, CEO of Refugees, Survivors and Ex-Detainees said “Despite being a victim of torture at the hands of the Sri Lankan Government, and suffering extreme ongoing physical and mental trauma as a result of this abuse, the Australian Government decided to forcibly remove Mr X and return him to the regime that tortured him”.

RISE has been acting for Mr X and appealed to Minister Chris Bowen to intervene. Following his forced removal, RISE made a submission to the United Nations Committee against Torture, and based on Mr X's documented history, the Committee’s Chairperson made an immediate and direct request to the Australian government to prevent the return of Mr X to Sri Lanka.

The United Nations contacted the Australian Embassy in Thailand directly as well as the Australian Mission in Geneva. An appeal to the UN Special Rapporteur on Torture, Juan Mendez, has been awaiting response from the Australian Government since October, 2011.

“Australia is a party to the Convention Against Torture, and as such is legally bound, under international law, to adhere to the provisional measures order issued not to deport Mr X” said Fernandez.

He continued, “Mr X's family and many members of the Tamil community are severely distressed by the deportation. Victims of torture who have been forcibly returned to Sri Lanka have been subjected to further abuse and have even been killed.”

“The Tamil community in Melbourne, including Mr X's family, hold grave concerns for his safety once he is delivered to the regime that subjected him to such horrific torture."

“The Australian Government's action was unconscionable and essentially involved hand-delivering victims of torture back to their abusers."

Mr Fernandez was grateful for the UN’s prompt appeal on behalf of Mr X, and was hopeful it would not fall on deaf ears.

"The Committee has recognised that the Australian Government is doing business with a dangerous regime. I hope their request will cause them to review their decision and realise that a man's life hangs in the balance."

“The communication from the United Nations on behalf of Mr X is not simply an appeal but binding under international law - if Australia takes its international law obligations seriously, it is bound to comply.”

Source: www.riserefugee.org

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Government fails on children’s rights

Australia’s treatment of suspected people smugglers who said that they were children has breached international human rights law and raised serious questions about the resilience of our criminal justice system, Australian Human Rights Commission President Catherine Branson QC said.

Ms Branson has released *An Age of Uncertainty*, the report of her Inquiry into the treatment of suspected people smugglers who said that they were children. In releasing the report, Ms Branson said that between late 2008 and late 2011, Australian authorities apparently gave little weight to the rights of these young Indonesians.

"The events outlined in this report reveal that, between 2008 and 2011, each of the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department engaged in acts and practices that led to contraventions of fundamental rights; not just rights recognised under international human rights law but in some cases rights also recognised at common law, such as the right to a fair trial," Ms Branson said.

"It seems likely that some of those acts and practices are best understood in the context of heavy workloads, difficulties of investigation and limited resources.

"Others, however, seem best explained by insufficient resilience in the face of political and public pressure to 'take people smuggling seriously'; a pressure which seems to have contributed to a high level of scepticism about statements made by young crew on the boats carrying asylum seekers to Australia that they were under the age of 18 years."

Ms Branson said the authorities involved failed seriously to question practices and procedures that led to young Indonesians who are now known to have been children or to have been highly likely to have been children, being held in detention in Australia for long periods of time, in many cases in adult correctional facilities.

She said the Australian Federal Police and the Commonwealth Director of Public Prosecutions continued to rely on wrist x-ray analysis as evidence of age despite increasing evidence indicating that the process was uninformative of whether a young person was over the age of 18 years. Wrist x-ray analysis continued to be used for age assessment purposes despite the fact that the Royal Australian and New Zealand College of Radiologists, the Australian and New Zealand Society for Paediatric Radiology, the Australasian Paediatric Endocrine Group, and the Division of Paediatrics, Royal Australasian College of Physicians advised that the technique was unreliable and untrustworthy.

"The Office of the CDPP also failed to identify that it was under a duty to examine whether it could continue to maintain confidence in the integrity of the evidence being given by the radiologist most commonly engaged by the Commonwealth as an expert witness, and under an obligation to disclose to the defence the material in its possession that tended to undermine his evidence," Ms Branson said.

She said the federal Attorney-General's Department failed to review the contemporary literature which critically examined the technique, failed to seek independent expert advice and failed to provide informed and frank policy advice to the Attorney General – including advice concerning the risk that reliance on the technique had led, and would continue to lead, to children wrongly being identified as adults.

"The dogged reliance on wrist x-ray analysis, together with inadequate reliance on other age assessment processes, resulted in the prolonged detention, sometimes in adult correctional facilities, of young Indonesians who it is now accepted were, or were likely to have been, children at the time of their apprehension."

Ms Branson said she hoped that her Inquiry would also lead to 'mature' reflection on the strengths and weaknesses of the criminal justice system more generally.

"The Inquiry has revealed that this system may be insufficiently robust to ensure that the human rights of everyone suspected of a criminal offence are respected and protected," she said.

"To this end, I urge all of the agencies involved to give consideration to how the human rights of this cohort of young Indonesians came to be breached in the ways outlined in this report."

The report makes a number of recommendations to assist in creating a lasting environment in which the rights of young Indonesians suspected of people smuggling are respected and

protected in every interaction they have with Australian authorities. Key among these is the recommendation that the Crimes Act be amended so that wrist x-ray analysis can no longer be used as evidence that a person is over the age of 18 years.

“Careful consideration should also be given to the steps that need to be taken to ensure that in the future Australia does respect the human rights of all who comes into contact with our system of criminal justice,” Ms Branson said.

The report is available online at http://www.humanrights.gov.au/ageassessment/report/

Source: Australian Human Rights Commission

Australia considers joining leading security and human rights initiative

The Australian Government is considering whether Australia should join the Voluntary Principles on Security and Human Rights, an extractives sector initiative that addresses human rights risks associated with the security of companies' operations.

The principles are an international voluntary soft law initiative that aims to address human rights-related risks associated with the security of extractives sector assets. They were developed by participating business enterprises, governments and NGOs to assist companies to maintain the security of their operations within an internationally accepted human rights framework.

As a voluntary standard, the principles are not legally binding. However, participating companies are expected to implement the principles and share information with other participants by reporting at least annually on their progress. This occurs on a non-attribution basis and is subject to a confidentiality regime.

The principles have four key components:

- Stakeholder engagement: The principles emphasis the importance of engagement with all stakeholders, and recommend that companies consult on an ongoing basis with host governments and local communities.
- Human rights risk assessment: The principles require companies to conduct human rights risk assessment, and recommend that companies consider relevant political, economic and social factors.
- Relations with public security forces: The principles encourage companies to communicate human rights policies to public security providers and take steps to ensure compliance with these policies.
- Relations with private security forces: The principles recommend that companies' expectations of private security providers be reflected in their contractual arrangements.

The principles assist companies to manage a broad range of risks associated with security and human rights-related issues that may present in a company's home or host country. These include litigation exposure, financier issues and project financing risks, shareholder issues and reputational risks. Many companies already use the principles, either as formal participants or otherwise, to manage the human rights risks associated with their security arrangements and also their community relations strategies, and to support local political stability.

The Australian Government is currently considering submissions on the value of joining the principles as a Participant Government in light of the participation criteria. If it becomes a participant, Australia will be expected to

- promote the principles and proactively implement or assist in their implementation; and

- share information with, and respond to reasonable requests for information from, other principles participants (subject to legal, confidentiality, safety, and operational concerns).

By participating in the principles, the Australian Government will strengthen support for the implementation of the principles in emerging economies and developing countries where Australian businesses are active. Broad implementation of the principles will further assist to level the playing field for companies investing in these markets.

If Australia becomes a signatory to the principles, it will join the United States, the United Kingdom, Canada, Switzerland, Norway, the Netherlands and Colombia, all of which are current principles participants.

Further information about the principles can be found at http://voluntaryprinciples.org/.

Catie Shavin *is a Lawyer and member of Allens' International Business Obligations team.*

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Victorian prisoner to argue duty to provide clean needles

A Victorian prisoner is preparing proceedings against the State Government alleging that it has failed to protect him from exposure to hepatitis C during his time in jail.

Prisons have been described as a "hot bed" for blood-borne viruses such as hepatitis C, with more than 40 percent of Victorian prisoners carrying the virus. Coupled with the prevalence of intravenous drug use in Victorian prisons, a failure to provide clean needles and syringes may amount to a breach of the state's common law duty of care and obligations under the Victorian Charter of Human Rights and Responsibilities.

At present, Victorian prison authorities are giving inmates bleach to clean syringes, a measure described by experts as inadequate.

Various peak health organisations, including the Australian Medical Association, the Royal Australasian College of Physicians and Anex, a group working with Sir Gustav Nossal and Professor Doherty to reduce drug related harm, have called upon the State Government to introduce needle and syringe programs in prisons. The widespread support follows findings that needle and syringe programs in prisons have significantly reduced disease transmission in 10 countries, including Switzerland and Spain.

The Human Rights Law Centre has been advised on the issue by leading senior barristers and law firms and believes that it is only a matter of time before a prisoner successfully sues a prison and government for exposing them to infectious diseases. If a case is successful, exposure to further legal action may force the Government to consider implementing needle and syringe programs to protect the health of prisoners, who are known to be injecting drugs with dirty equipment.

Media reports, such as the Saturday Age's recent feature piece, 'Within these walls', indicate that Corrections Victoria presently has no plans for a needle and syringe program.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Magistrate dismisses charges against protesters to uphold rights to freedom of expression, association and peaceful assembly

Victoria Police v Anderson & Ors (2012) Magistrates' Court of Victoria (23 July 2012)

Summary

In the Magistrates' Court of Victoria, Magistrate Garnett dismissed charges against the 16 accused for the offences of trespass and besetting premises under the *Summary Offences Act 1966* (Vic) (the SOA) in relation to a demonstration that occurred at Max Brenner's chocolate bar in Melbourne. Relevantly, in dismissing the charge of trespass, Magistrate Garnett took into account the protection of the rights to freedom of expression and association under sections 15 and 16 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This case note focuses in particular on the Charter aspects of the decision.

Facts

In this case, the 16 co-accused were charged with offences under the SOA arising out of their involvement in a pro-Palestinian demonstration at Max Brenner's Chocolate Bar at QV Melbourne on 1 July 2011. The court heard evidence that:

- on this date, 150–200 protesters gathered in QV Square to take part in the protest;
- prior to the demonstration, members of Victoria Police, QV management and others had held a number of planning meetings, and Victoria Police had obtained legal advice as to the powers they had in relation to the protesters should certain events occur;
- on the evening of 1 July 2012, Mr Appleford, the operations manager of the QV shopping centre, made an announcement at the request of Victoria Police to the protesters purporting to revoke their licence to be on the property, which included the words "You are demonstrating disapproval of the political or social interests of a retail tenant of this shopping centre. Accordingly you are breaching an express condition of entry to this property not to perform this kind of protest activity"; and
- written notices were also placed in and around QV to this effect.

The accused were charged with wilful trespass contrary to section 9(1)(d) of the SOA, and wilfully and without lawful authority besetting premises contrary to section 52(1A) of the SOA. In addition, eight of the accused were charged with assaulting, resisting or hindering police in the execution of their duties contrary to section 52(1) of the SOA.

Decision

Besetting premises charge

Magistrate Garnett held that, on the evidence before the Court, the charges against all accused of besetting the premises was not made out, as "they did not surround the premises with hostile intent or demeanour nor did their actions obstruct, hinder or impede any member of the public who wished to enter, use or leave Max Brenner's chocolate bar".

Trespass charge

Relevantly, in their defence against the trespass charge, the accused submitted that it would not be compatible with the Charter rights of freedom of expression and association in sections 15 and 16 to interpret section 9(1)(d) of the SOA in the manner put forward by the prosecution so as to

allow the owner/occupier of a public place the authority to revoke a licence of a person to be in that place because of an expression of political opinion that is at odds with that of the owner/occupier.

In support of this argument, the accused adverted to section 32(1) of the Charter which requires statutory provisions to be interpreted in a way that is compatible with human rights, as well as relevant Australian and United Kingdom case law including *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91, *Momcilovic v The Queen* [2011] HCA 34 and *Hammond v DPP* [2004] EWHC 69.

Magistrate Garnett accepted these submissions, holding that:

- the protesters did not enter QV square without lawful excuse, wilfully or without a legitimate purpose; rather, they entered for the purpose of a political demonstration and had the lawful right to enter QV Square;
- to interpret section 9(1)(d) as submitted by the prosecution would contravene the protesters' right to freedom of expression, and a finding that a refusal to leave after being requested to do so on the basis that the protesters were "demonstrating disapproval of the political or social interests of a retail tenant of this shopping centre" constituted trespass would not be compatible with the rights to freedom of expression and association in sections 15 and 16 of the Charter; and
- while the Charter contemplates lawful restrictions on the right of freedom of expression, as provided in section 15(3), although the actions of the protesters may have caused some inconvenience to members of the public, the nature and extent of this inconvenience was not such as to warrant a prohibition of their right to demonstrate and express their political opinions.

No breach of the peace

Further, although this was not contended by the prosecution, his Honour stated in obiter that he would also not categorise the behaviour of the protesters as a significant breach of the peace or threat to public order so as to justify a lawful restriction on their human rights as contemplated by section 15(3)(b) of the Charter. His Honour referred to the decision of the New Zealand Supreme Court in *Brooker v Police* [2007] NZSC 30 in support of this proposition.

Application of the Victorian Charter

This decision is an example of the emerging body of case law considering the application and relevance of Charter rights in different legislative contexts, including in criminal proceedings involving the SOA. In particular, the case demonstrates that the rights of freedom of expression and association, which are protected under the Charter, will be highly relevant in cases involving demonstrations or protests.

Further, the case evinces a judicial willingness to be guided by relevant decisions from other jurisdictions such as the United Kingdom and New Zealand dealing with similar human rights legislation.

The decision can be found online at:
http://www.magistratescourt.vic.gov.au/sites/default/files/Publications/VPOL_v_Anderson_%26_Ors.pdf

Madeleine Ellicott *is a lawyer at Allens Linklaters.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Retention of photographs by police violated the right to privacy

R (on the Application of RMC and FJ) v Commissioner of Police of the Metropolis [2012] EHWC 1681 (22 June 2012)

Summary

In the recent case of *R (on the Application of RMC and FJ) v Commissioner of Police of the Metropolis and Others* (*RMC and FJ*), the High Court of England and Wales held that the indefinite retention of photographs of persons who are arrested, but not subsequently prosecuted, breaches the right to private life protected in article 8 of the European Convention on Human Rights. The case applies and extends the earlier European Court of Human Rights decision of *S v United Kingdom* (2009) 48 EHRR 50, which concerned the retention of DNA samples and fingerprints.

Facts

The two claimants in *RMC and FJ* were RMC, a middle-aged woman arrested on suspicion of assaulting a police community support officer, and FJ, who had been arrested at age 12 on suspicion of raping his second cousin. Police officers had interviewed each claimant and taken their photographs, fingerprints and DNA samples, but had subsequently decided not to prosecute. RMC and FJ later unsuccessfully sought to have their data destroyed. They also sought judicial review challenging its retention. Judicial review was denied for their fingerprints and DNA samples, but granted for their photographs. FJ was also granted judicial review of the decision to retain information about his arrest on the Police National Computer.

The policies governing the retention of photographs and other personal information are set out in the Guidelines on Management of Police Information (the Guidelines) and the Code of Practice on Management of Police Information (the Code of Practice), which specify that:

- Police are required to hold personal information for a minimum period of six years.
- The information will continue to be held subject to scheduled review for some period after that, as long as its retention is proportionate to a set of broadly defined "policing purposes".
- The total length of time information will be held for and the frequency of review varies depending on the classification of the crime.

FJ's crime was placed in the most serious category, and his information was to be held until he was 100 years old, subject to "regular" review. RMC's crime was classed as less serious than FJ's, and her information was to be reviewed every ten years. A third category of crimes is to be reviewed every five years. Information would also be reviewed if requested by subjects. Potentially, however, information could be retained indefinitely whatever the category.

Additionally, under section 64A of the *Police and Criminal Evidence Act 1984* (UK), information kept by police can be used only for the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or for the enforcement of a sentence.

Decision

Lord Justice Richards, with whom Justice Kenneth Parker agreed, held that the retention of the photographs interfered with the right to respect for private life protected in article 8(1) of the Convention, and that this interference was not justified under article 8(2) of the Convention.

The scope of the right to privacy under article 8(1) of the Convention

In relation to article 8(1) of the Convention, while Lord Justice Richards acknowledged that there was a line of ECHR authority stating that the retention and use of photographs by police did not interfere with the right to respect for private life, his Honour considered that these cases needed to be reassessed in light of the decision in *S v United Kingdom*. His Honour instead extended general principles laid down in more recent authority, including the ECHR case of *Reklos v Greece* [2009] EMLR 16, and the UK case of *R (on the application of GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21. In doing so, Lord Justice Richards emphasised that photographs, like fingerprints, could uniquely identify a person. It therefore considered that there was no reason for distinguishing photographs from biometric data such as fingerprints and DNA samples, and concluded that the right to respect for private life had been interfered with.

Notably, Lord Justice Richards also considered that the test applied in older UK case law, which asked whether claimants had a "reasonable expectation of privacy", was no longer "the only or determinative factor" in determining whether article 8(1) rights had been interfered with. However, his Honour did not expand on this reasoning, noting instead that article 8 would be engaged in this case even on the "reasonable expectation of privacy" test. In support of this position, his Honour referred to *JR 27's Application* [2010] NIQB 143, where the High Court of Northern Ireland held that a 14 year old boy arrested for burglary could reasonably expect that the police would not hold photographs of him indefinitely.

Justification of an interference with privacy under article 8(2) of the Convention

Lord Justice Richards further held that the interference with RMC and FJ's privacy could not be justified under article 8(2). This provision requires that an interference be in accordance with law, and necessary in a democratic society for, among other things, the prevention of disorder or crime. The "in accordance with law" limb requires that the interference be in accordance with laws that satisfy rule of law principles, including accessibility and precision. The "necessary in a democratic society" limb is commonly understood as a proportionality test.

Lord Justice Richards considered that the retention of RMC and FJ's photographs failed both limbs of article 8(2). His Honour found that the interference was in accordance with a sufficiently precise law, because the Code of Practice and the Guidelines formed a "clear and detailed framework" for retaining photographs under section 64A of the Act. However, his Honour had significant concerns in relation to the accessibility of the law. His Honour pointed out that it was unclear that the Code of Practice and the Guidelines were in fact the applicable policies, and that the retention policy presented a "confused picture" consisting of many different policy documents, not all of them available online. Additionally, his Honour found that the retention policy was disproportionate to the aim of achieving effective policing because it made no distinction between convicted persons, acquitted persons and persons not prosecuted; it was for a long and potentially indefinite period of time; and it was applied even to minors such as FJ.

Orders made

For these reasons, the Court made a declaration that the retention of FJ and RMC's photographs was unlawful, and granted the defendant a "reasonable further period" to revise its policy and review the claimants' documents. However, it dismissed FJ's claim in relation to records in the Police National Computer, stating that striking out the details of FJ's arrest would leave a

misleading record of FJ's dealings with the police, and finding that any interference would be small and plainly proportionate.

Commentary

Article 8 of the Convention is analogous to section 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which protects rights to privacy, family, home, and correspondence against unlawful or arbitrary interference. In Victoria, police retention of personal information is also governed by the *Information Privacy Act 2000* (Vic), which mandates compliance with a set of Information Privacy Principles. The Court's findings on the scope of the right to privacy under the Convention may provide useful guidance on when the protection under the Information Privacy Principles may be supplemented by rights-based claims.

It is less certain whether the Court's analysis of article 8(2) will be directly applicable to the Charter. There is currently split authority in the Victorian Supreme Court over whether or not this "unlawful or arbitrary interference" standard requires a proportionality test such as that used in article 8(2) of the Convention, or whether it merely protects against entirely capricious interferences (compare *Patrick's Case* [2011] VSC 327, [85]; *WBM v Chief Commissioner of Police* [2010] VSC 219, [57]). Should the former be the case, *RMC and FJ* may be relevant in applying the proportionality test to analogous fact situations. However, only a small handful of cases have considered the privacy limb of Charter section 13, and whether the differences in wording between the Convention and the Charter will require differences in the way they are applied remains unclear.

The decision is available online at http://www.bailii.org/ew/cases/EWHC/Admin/2012/1681.html

***Suzanne Zhou** is a Vacation Clerk at Allens Linklaters.*

Human Rights Committee finds that right to freedom of religious belief extends to protection of conscientious objection

Atasoy and Sarkut v Turkey, UN Doc CCPR/C/104/D/1853-1854/2008 (19 June 2012)

Summary

The UN Human Right Committee recently decided that Turkey's actions in response to Atasoy and Sarkut's refusal to be drafted for compulsory military service on grounds of conscientious objection was incompatible with article 18 of the International Covenant on Civil and Political Rights.

Facts

Atasoy and Sarkut are both Jehovah's Witnesses. Atasoy had repeatedly submitted petitions to the Military Recruitment Office explaining his conscientious objection to military service on the basis of his religious faith. He was told that under articles 10 and 72 of the Turkish Constitution he could not be exempted and was served with "Evasion of Enlistment Status Certificates" on each occasion for failure to attend military dispatch procedures. He was called before the Penal Court in respect of his latest failure to attend.

Sarkut also filled petitions seeking exemptions from military service on the basis of his religious faith. In response to his failure to participate, the Military Recruitment Office advised his employer to terminate his employment. In support of their claim that all domestic remedies have been exhausted Atasoy and Sarkut cited decisions of the Military Supreme Court which ruled that exemption from military service on the basis of conscientious objection on religious grounds was not possible.

Turkey argued that under its Constitution, the exercise of the freedom of conscience, religious belief and conviction could not be valued above the duty of military service. As exemption from military service was not possible under Turkish law, Turkey argued that this case fell into the "margin of appreciation of the domestic authorities". Alternatively, it challenged Atasoy and Sarkut's right to conscientious objection under article 18 of the ICCPR, arguing that no such tacit or express guarantee for this right exists. Turkey relied upon the ICCPR's *travaux preparatoires* and a negative implication from article 8 which, unlike article 18, expressly refers to conscientious objection.

Decision

Considerations of admissibility

Turkey argued that Atasoy and Sarkut had failed to exhaust all domestic remedies and so their communication was inadmissible. However, the Committee agreed with Atasoy and Sarkut that their cases could not be appealed past their current level in the Turkish court system and ruled both communications admissible.

Article 18

The Committee noted that Turkey had failed to argue contrary to Atasoy and Sarkut's allegation that they had been criminally prosecuted for their failure to participate in compulsory military service in breach of article 18 of the ICCPR. Turkey had instead solely denied the right to conscientious objection.

The Committee recalled its general comment No 22 (1993) to affirm the fundamental character of the article 18 ICCPR freedoms. These cannot be derogated from even in times of public emergency, as stated in article 4, paragraph 2, of the ICCPR. The Committee clarified its earlier position and considered that although the right to conscientious objection is not explicitly noted in article 18, it is a right that derives from this provision. This is justified on the basis that "being involved in the use of lethal force may seriously conflict with the freedom of conscience". Therefore "the right of conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion". The Committee stated that the State party cannot coerce actions that would be in breach of this right. It can, however, compel the objector to undertake a civilian alternative which is not of a punitive nature and is "compatible with respect for human rights".

As Atasoy and Sarkut's religious beliefs were genuinely held, the prosecution for the failure to participate in compulsory military service breached their right to religious freedom under article 18 of the ICCPR. Under article 2, paragraph 3 (a) of the ICCPR, the Committee notified Turkey of its obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation.

Commentary

Section 14 of the *Victorian Charter* provides a right to freedom of thought, conscience, religion and belief. This is slightly broader than article 18 of the Covenant in that it expressly extends to "beliefs". Since conscientious objection is an attempt to fulfil a person's beliefs, a Court may find that this right also exists under section 14 of the Victorian Charter.

The decision is available online at: http://daccess-ods.un.org/TMP/207736.268639565.html

***Aman Gaur** is a Winter Clerk with the King & Wood Mallesons Human Rights Law Group.*

Prisoner wage deductions for work outside prison do not breach of human rights

S & Anor, R (on the application of) v Secretary of State for Justice [2012] EWHC 1810 (Admin) (3 July 2012)

Summary

The England and Wales High Court has held that a discretion held by prison governors to levy deductions from a prisoner's earnings where the prisoner is working for a private employer on a release scheme outside prison is not incompatible with their human rights having regard to the margin of appreciation afforded to States.

Facts

This case concerned two claims for judicial review of two Prison Service Instructions (PSIs) issued by the Secretary of State for Justice to governors of prisons which conferred discretion on prison governors to levy deductions from a prisoner's earnings where the prisoner was working for a private employer on a release scheme outside prison. The deductions could be of an amount up to 40 per cent of the excess of weekly wages above £20 and were paid to Victim Support, a body providing support for victims of crime. The policy was that governors should make deductions at the full 40 per cent rate, subject only to a narrow class of exemption in "exceptional" or "very exceptional" circumstances.

The claims were brought by S, a male prisoner and KF, a female prisoner. Both parties submitted that the PSIs were unlawful on the grounds that they violated article 1 of Protocol 1 (A1P1) (protection of property) of the European Convention on Human Rights as incorporated into domestic law.

Further, KF submitted that the PSIs violated:

- Article 7 of the Convention (no punishment without law) because they had the effect of imposing a heavier penalty than the one applicable at the time KF's criminal offence was committed; and
- Article 14 of the Convention (prohibition of discrimination) because although on their face the PSIs were applicable equally to men and women in prison, in practice they had an excessive and disproportionate detrimental impact on women.

The claimants also submitted that the PSIs coupled with such a narrow class of exemption was an intrusive interference with prisoners' rights under the Convention. They submitted that in order to be lawful, the PSIs should allow prison governors a much greater discretion to respond to the individual circumstances and needs of prisoners.

Decision

The Court dismissed the challenges to the PSIs on all grounds. The reasons for its decision are as follows:

- In regards to the exercise of discretion by the prison governors, his Honour considered that from the evidence, it appeared that prison governors were prepared to consider requests by prisoners for a waiver of levy based on the circumstances and merits of their personal situation. For example, S was granted a partial exemption from the full effect of the levy, to assist him with fuel costs associated with running his car. On this basis, his Honour concluded that the prison governors did not treat the PSIs as having

the practical effect of eliminating substantially all discretion in deciding whether the full 40 percent levy should be deducted from prisoner earnings.

- As to the challenge based on A1P1 and the claim that the PSIs interfered with prisoners' "possessions" in the form of money earned by them, his Honour found that the deductions from prisoners' wages were analogous to a tax to be levied on them for the purpose of securing funding for the support of victims of crime. His Honour noted that the Strasbourg case law indicates that a State is afforded a wide margin of appreciation under A1P1 in setting rules in contexts which call for broad social and economic judgements – in other words, the European Court of Human Rights will only find that the State has acted in violation of A1P1 if it proceeded on the basis of a judgment in relation to action taken to promote legitimate public interest which was "manifestly without reasonable foundation". In this case, his Honour's view was that a reasonable relationship of proportionality between the means employed and the aim sought to be realised and that a fair balance was struck between the general interests of the community and the requirements of the protection of the individual prisoners' fundamental human rights. Accordingly, he held the PSIs did not violate A1P1.
- In coming to the above conclusion, his Honour rejected the claimant's submission that the international doctrine did not apply in domestic proceedings. His Honour considered domestic courts are required to "take into account" the case law of the Strasbourg Court and thus concluded the margin of appreciation should be applied.
- His Honour also rejected the submission that the deduction regime breached article 7 by imposing a heavier penalty than one that was applicable at the time of the offence. His Honour found that there was no connection between the offence committed and the application of the deductions regime, nor did the regime have elements which indicated that it was punitive in its object or effect. His Honour stated that: "It is not because of his commission of his offence that a prisoner becomes subject to the deductions regime … rather, it is because he makes a choice when in prison to seek work on release from prison that the deduction regime will be applicable to him."
- His Honour also rejected the submission that the PSIs breached article 14 because they apply the same deductions regime to men and women without considering the special needs of women. His Honour found there was no discrimination but rather "the impact in any individual case will depend upon the particular circumstances of that case, and it is difficult to generalise … to say that female prisoners … are more likely than male prisoners … to be detrimentally affected by application of the deductions rules."

Commentary

Discussion of the "margin of appreciation" afforded to States formed a significant part of his Honour's decision. In particular, cited in this judgment was Laws LJ in the Court of Appeal in *SRM Global Fund LLP v Commissioners of HM Treasury* [2009] EWCA 788. In that case, Laws LJ stated that the margin of appreciation available to the legislature in implementing social and economic policies should be a "wide one" that "will respect the legislature's judgement as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation." The reason for this being that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be compatible with the protected human rights.

Essentially, the doctrine respects the elected arms of government and arguably Australia's separation of powers. Accordingly, the margin of appreciation doctrine may inform decisions

relating to matters of discretion and public policy when interpreting rights under the Victorian Charter.

The decision is available online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/1810.html

Katherine Barrie *is a seasonal clerk at Lander & Rogers.*

Local authority's actions in relation to children in foster care declared "unlawful" under UK Human Rights Act

A & S (Children) v Lancashire County Council [2012] EWHC 1689 (Fam) (21 June 2012)

Summary

In this case, brothers aged 16 and 14 took action under the *Human Rights Act 1998* (UK) in relation to their treatment while in the care of the Lancashire County Council.

The England and Wales High Court declared that the Council and one of its employees, an Independent Reporting Officer, had acted incompatibly with the boys' right to respect for private and family life, their right to a fair trial and the prohibition of torture.

Facts

A (aged 16) and S (aged 14) were placed into the care of the Council in 1998 when they were 2¾ years and 6 months old. Their parents had separated, their father was homeless and their mother had abandoned them. Their father later died of an overdose and in 1999 the boys were placed in foster care.

In 2001 "freeing orders" were made in respect of the boys, the effect of which was to extinguish their membership with their birth family and entrust sole parental responsibility to the Council as an adoption agency. These orders (which are no longer available) could only be made where there was a real prospect of a family being found within 12 months.

The Council failed to find the boys an adoptive home. Over a 14 year period A and S were moved from one foster family to another, becoming increasingly unsettled and disturbed. A had moved backwards and forwards between placements 77 times in his 16 years of life, and S had moved 96 times in his 14 years of life. The boys suffered physical and sexual abuse while in foster care.

Over time the situation of the boys' mother improved and in 2002 she applied for revocation of the freeing orders, but withdrew the application in 2003 in the face of opposition from the Council and the Children's Guardian.

The Council ultimately abandoned its search for an adoptive family, but no application was ever made by it to revoke the freeing orders. The boys were, in effect, rendered "statutory orphans".

Throughout this history the boys were subject to some 35 internal Council reviews, known as "Looked After Child Reviews", but the issue of the boys' legal status was not remedied. The Officer chaired 16 of these reviews.

Decision

Section 6 of the Human Rights Act renders it unlawful (subject to certain exceptions) for a public authority to act incompatibly with the European Convention on Human Rights. Where a public authority acts unlawfully the court may grant "such relief or remedy, or make such orders within its powers as it considers just and appropriate" (section 8).

The Council and the Officer accepted that they had breached the boys' right to respect for private and family life (article 8), the right to a fair trial (article 6) and the prohibition of torture (article 3) and submitted to a declaration to that effect.

The Court enumerated 10 specific human rights breaches by the Council and the Officer. In relation to article 8, the Court held the Council had a continuing positive obligation to promote the boys' right to respect for private and family life, and that the early history of delays in the boys' case management significantly damaged the prospect of the boys finding a permanent adoptive placement.

The failure to resolve the issue of the boys' legal status was also significant. The Court observed that, had the freeing orders been revoked, the Council would have been required under relevant legislation to permit and promote reasonable contact with the boys' birth family, or otherwise apply to the Court for permission to refuse contact. The effect of the Council's failure to apply for revocation of the freeing order was to deprive the boys of these statutory protections, contact with their mother and other family members, and access to the Court. This amounted to a breach of articles 6 and 8.

The Court also found that the Council had (among other things) permitted A and S to be subject to degrading treatment and physical assault (articles 3 and 8), failed to provide accurate information to the Officer regarding their legal status (article 8) and failed to promote A and S's rights to independent legal advice (article 6).

The Court further declared that the Officer had breached the boys' human rights in failing to identify that the boys' human rights had been and were being infringed (articles 6 and 8), failing to ensure that Council acted upon the recommendations of the Looked After Child Reviews (article 8), and failing the refer the boys' case to the Children and Family Court Advisory and Support Service (article 8).

Claims for damages under the Human Rights Act were transferred to the Queens Bench Division to be heard with A and S' claims for breach of statutory duty and negligence against the Council.

Commentary

Each of the rights engaged in this case have counterparts in the Victorian Charter. Section 10 of the Victorian Charter contains the protection from torture and cruel, inhuman or degrading treatment, section 17 contains the protection of families and children, and section 24 protects the right to a fair hearing.

While there are relatively few decisions concerning the application of the Charter in the context of foster care, the decision of the England and Wales High Court is nonetheless relevant, particularly in light of the 2010 report of the Victorian Ombudsman on its *Own motion investigation into child protection – out of home care.* The report cited instances of abuse and mistreatment of children in foster care, and concluded that that "in some of these cases, the department's actions in placing children in unsafe situations constitute breaches of the Charter." The full impact of the Charter in such cases remains to be seen.

The decision is available online at: http://www.bailii.org/ew/cases/EWHC/Fam/2012/1689.html

***Thea Chesterfield** is a solicitor at Freehills*

French authorities failed in duty to prevent suicide in prison

Ketreb v France [2012] ECHR 1626 (19 July 2012)

Summary

In this case, *Ketreb v France*, the European Court of Human Rights held that there had been a violation of article 2 (right to life) of the European Convention on Human Rights and a violation of article 3 (prohibition of inhuman or degrading treatment) of the Convention.

The case concerned the suicide in prison of a drug addict convicted of armed assault.

The Court found that the State had failed in its duty to show particular vigilance to prevent a vulnerable prisoner from committing suicide.

Facts

The applicants, Houria Serghine and Noura Khiat are French nationals who live in France. They are the sisters of Kamel Ketreb, the deceased.

On 10 June 1998 Kamel Ketreb was remanded in custody in La Santé prison (Paris) on a charge of armed assault against his partner, resulting in her total unfitness for work for more than eight days. The following day, having been a polydrug addict for several years, he was allowed to see a psychiatrist from the prison's Regional Medical and Psychological Service (RMPS), and subsequently continued to see the psychiatrist once or twice a month.

From July 1998 onwards he saw a psychiatrist between once and three times a week. On 4 October 1998 he was placed in the punishment block following an incident with a prison guard. On 8 January 1999 he was given a 10-day disciplinary sanction for insulting and jostling a member of staff, and on the same date a doctor prescribed him Mogadon and a Valium injection, and scheduled a consultation for him with a psychiatrist. The doctor mentioned in writing in the medical file that, according to the guards, Kamel Ketreb had already made two attempts to commit suicide. On 13 January 1999 a psychiatrist from the RMPS observed that he was not at all well and seemed "capable of putting his suicidal inclinations into effect".

On 16 March 1999 Kamel Ketreb was sentenced to five years' imprisonment.

On 20 May 1999 he was brought before the disciplinary board for having wounded a fellow prisoner with a broken glass and insulted two prison officers. He was also accused of hoarding medicinal drugs. He was given two weeks in a disciplinary cell. On his first day in the disciplinary cell he had to be moved to another cell after breaking a window. In the new cell he partly dislodged the concrete table, broke the sanitary fittings and hurled chunks of concrete at the window.

On 21 May 1999 Kamel Ketreb broke the window in the visiting room door when one of his sisters went to visit him, cutting his forearm and hand in the process. After that incident he was examined by a doctor from the Outpatient Unit. On 23 May 1999 a doctor from the Outpatient Unit found him unwell.

On 24 May 1999 the guard who did his round between 8 and 8.20 p.m. said that he had seen Kamel Ketreb standing in the middle of his cell. At 9.15 p.m. the same guard found him hanging from a bar of the inner door of his cell by a fabric belt fastened with a metal buckle. The prison medical staff and the emergency medical team attempted to revive him, but to no avail. His time of death was recorded as 9.30 pm.

Relying on article 2 (right to life), the applicants complained that the authorities had failed to take proper steps to protect their brother's life when he was placed in the disciplinary cell in the prison.

Relying on article 3 (prohibition of inhuman or degrading treatment), they complained that the disciplinary measure applied to their brother was unsuitable for a person in his state of mind.

Decision

Article 2

The Court had already emphasised in previous cases that persons in custody were in a vulnerable position and that the authorities were under a duty to protect them. There were general measures and precautions available to diminish the opportunities for self-harm without

infringing on personal autonomy. The Court reiterated that in the case of mentally ill persons it was necessary to take their particular vulnerability into consideration.

The Court observed that as early as 11 June 1998, the day after his arrest, Kamel Ketreb had seen a psychiatrist at the prison, as well as a psychologist. The Court further noted that it had been mentioned that some months before he committed suicide, Kamel Ketreb had already tried to commit suicide twice while placed in the punishment block. On 13 January 1999 the psychiatrist had noted that he talked quite openly about his intention to kill himself.

The days leading up to his suicide had been marked by violent incidents that bore witness, if not to a serious psychological crisis, at least to an alarming deterioration in his state of health. According to the experts, it was likely that his transfer to the punishment block had occurred at a time when his mental balance was already fragile.

In their opinion the conditions of detention in the punishment block and the pronouncement of the judgment sentencing him to five years' imprisonment were what spurred him to action and predisposed him to take his own life, in addition to his mental condition, which was one of depression or considerable distress.

The Court had to determine whether the authorities had done all that could reasonably have been expected of them to prevent the risk of a new suicide attempt.

The Court noted that from the time when he was remanded in custody Kamel Ketreb had access to general practitioners and specialists. He had been monitored by the doctor in charge of the drug addiction branch of the RMPS. The consultations were more or less frequent, depending on his changing mood, and he had also seen a psychologist from the prison two or three times a week. It also appeared from the expert opinion and the second opinion commissioned by the investigating judge that the treatments prescribed were justified by his psychiatric condition and his state of agitation.

The Court also noted a number of shortcomings, however. No particular notification had been given to the competent medical service prior to or at the time of the decision to place the prisoner in a disciplinary cell, and no special surveillance instructions had been issued to ensure the compatibility of the disciplinary measure with Kamel Ketreb's mental health. The Court pointed out that Recommendation R(98)7 of the Committee of Ministers of the Council of Europe recommended that the risk of suicide should be constantly assessed by both medical and custodial staff.

The Court noted that the mention of the two suicide attempts by hanging in January 1999 when Kamel Ketreb was in the punishment block, his self-mutilation and his behaviour at the origin of the disciplinary measure should have alerted the authorities to his psychological vulnerability. It saw no particular reason to justify the failure to consult the psychiatric branch of the prison's RMPS, which was actually responsible for monitoring the prisoner's mental health. In the days preceding the suicide, different duty doctors from the Outpatient Unit had examined Kamel Ketreb during his stay in the punishment block and found him unwell. Yet they had not informed the RMPS, or requested the urgent assistance of an outside psychiatrist, even though, as revealed by the investigation division's judgment, a psychiatrist from the Sainte Anne Hospital Centre had been on duty.

It must have been clear to both the prison authorities and the medical staff that Kamel Ketreb's state was critical, and placing him in a disciplinary cell had only made matters worse. That should have led the authorities to anticipate a suicidal frame of mind, as had already been noted during a previous stay in the punishment block some months earlier, and to alert the psychiatric services,

for example. Nor had the authorities set in place any special measures, such as appropriate surveillance or regular searches, which might have found the belt he used to commit suicide.

The Court considered that the authorities had failed in their positive obligation to protect Kamel Ketreb's right to life. It followed that there had been a violation of article 2.

Article 3

The assessment of whether the treatment or punishment concerned was incompatible with the standards of article 3 had, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they were being affected by any particular treatment.

Although in the opinion of the experts Kamel Ketreb had no chronic mental disorder or acute psychotic symptoms, his history of suicide attempts, his psychological condition which the doctors diagnosed as "borderline", and his extremely violent behaviour called for special vigilance on the part of the authorities, who should at least have consulted his psychiatrist before placing him in the punishment block, and generally kept him under proper supervision during his stay.

The Court considered that the prisoner's placement in a disciplinary cell for two weeks was not compatible with the level of treatment required in respect of such a mentally disturbed person. Accordingly, there had been a violation of Article 3.

The Court held that France was to pay the applicants jointly 40,000 euros in respect of non-pecuniary damage.

The judgment is only available in French.

***Registrar**, European Court of Human Rights.*

The scope of the right to respect for private or family life

Ali & Anor, R (on the application of) v Minister for the Cabinet Office the Statistics Board [2012] EWHC 1943 (Admin) (13 July 2012)

Summary

This decision of the English and Wales High Court considered the right to respect for private and family life and the exceptions to this right.

In particular, the High Court considered whether the Statistics Board's ability to disclose personal information provided to it in the census for the purposes of a criminal investigation or proceedings was incompatible with a person's Convention right to privacy.

Facts

On 27 March 2011, householders in the United Kingdom were required to complete a census form. It is a criminal offence not to do so. The information required included sensitive personal data such as information about individuals' racial or ethnic origins, their religious and other beliefs, and their physical and mental health.

Section 39(4)(f) of the *Statistics and Registration Act 2007* (UK) (the 2007 Act) permits the Board to disclose personal information and sensitive personal information provided to it in the census where the disclosure is made "for the purposes of a criminal investigation or criminal proceedings (whether or not in the United Kingdom)".

The first claimant completed and returned a census form. He was concerned that his personal and sensitive information might be transferred abroad to support a foreign criminal investigation, perhaps for a relatively minor offence.

The second claimant, a refugee from Afghanistan, refused to complete a census form because he was concerned that his personal details might be disclosed to external agencies, including the Afghan authorities.

Both claimants sought a declaration that section 39(4)(f) of the 2007 Act was incompatible with article 8 of the European Convention on Human Rights, which provides that there shall be no interference by a public authority with a person's right to respect for their private or family life except "such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety … for the prevention of disorder or crime … or for the protection of the rights and freedoms of others".

The claimants argued that the absence of criteria for disclosure in the 2007 Act meant that:

- The regime was not a clear, transparent and sufficiently predictable body of law, and therefore a disclosure would not be "in accordance with the law".
- There was no way of assessing whether the disclosure was proportionate.

They also contested the lack of advance notification to a person of a request for disclosure and an opportunity to challenge the disclosure. The second claimant also submitted that there was no safeguard as to how personal data may be used by other authorities once disclosed by the Board.

The defendants, the Minister for the Cabinet's Office and the Board, argued that the *Data Protection Act 1998* (UK) (the DPA Act), the *Human Rights Act 1998* (UK) and the Board's published policy combined with the 2007 Act to provide appropriate protection.

Legislative and Policy Framework

Section 6 of the Human Rights Act (which incorporates the Convention into UK law) states that public authorities must act in a way that is compatible with the Convention.

The DPA Act sets out eight data protection principles. These include that personal data "shall be processed fairly and lawfully", it "shall not be kept for longer than is necessary for that purpose", it "shall be processed in accordance with the right of data subjects" under the DPA Act, and it shall not be transferred to a country or territory outside the European Economic Area "unless that country or territory ensures an adequate level of protection for the right and freedoms of data subjects in relation to the processing of personal data." The Board is required to comply with the obligations under the DPA Act, including the eight data protection principles.

The Board's policy is that the Board will never volunteer to disclose personal information, it will refuse requests for disclosure where it is lawful to do so, and it will contest any legal challenge to its decision to the maximum extent possible under the law. The only qualification to this is if a court order is made requiring disclosure.

Decision

The Court dismissed the claims.

Justice Beatson of the High Court set out three elements to his decision:

- In determining the overall effect of section 39 of the 2007 Act and its compatibility with the Convention, it is legitimate and necessary to consider the DPA Act, the Human Rights Act and the Board's policies.
- The Board, employees and contractors complying with the various rules, principles and policies would not be able to disclose census information in a manner that would constitute a disproportionate interference with article 8.

- Despite the number of legal sources governing the matter, the position is sufficiently certain to comply with the requirement of article 8(2) that any interference with privacy be "in accordance with the law".

In relation to the second element, Justice Beatson noted that article 8 contains implicit procedural safeguards to ensure that the decision-making process is fair. However, in a case where there is a risk that the investigation or proceedings may be endangered, the fact that an individual is not informed of the disclosure or not informed in advance, will not constitute a breach of article 8. It is necessary to assess the decision-making process as a whole in determining whether there are "adequate and effective safeguards against abuse" and whether the scope of the discretion is sufficiently well-defined. In doing so it is relevant to consider whether there are procedural safeguards such as advance authorisation by a court, judicial control of the exercise of discretion, and the possibility of judicial review.

Justice Beatson found that the conditions in the DPA Act must be seen as guidelines structuring the discretion of the Board. The DPA Act provides for a balancing exercise which takes into account the rights and freedoms or legitimate interests of the data subject.

Justice Beatson also stated that the Board's policy to refuse to disclose personal census data unless compelled by a court was an important additional safeguard which meant that, looking at the decision-making process as a whole, the interests of the data subject would be adequately protected.

Commentary

This case has relevance to the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) in that the Charter contains a right to the protection of privacy and family life under sections 13 and 17. Section 7 of the Charter also states that a human right may be subject "under law" only to "such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom", taking into account all relevant factors. The wording of article 8(2) of the Convention and section 7 of the Charter do have some differences: for example article 8(2) talks about what is “necessary” as opposed to section 7 which looks at what is “reasonable” and can be "demonstrably justified". However, there are similarities between these two sections which both place a limitation on the right to privacy, and in the case of the Charter, the other rights listed therein.

This case could therefore provide some guidance as to what is required to provide sufficient protection to individuals when limiting a right listed in the Charter.

The decision is available online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/1943.html

***Tamsin Webster** is a lawyer at Maddocks.*

UK court holds that extradition of alleged sex offender to US would result in flagrant denial of rights

Sullivan v The Government of the United States of America & Anor [2012] EWHC 1680 (20 June 2012)

Summary

The appellant appealed to the England and Wales High Court against orders for his extradition to the United States to be prosecuted for sexual offences. Lord Justice Moses held that the extradition would expose the appellant to a real risk of detainment under the Minnesota "civil commitment" program, which would amount to a flagrant denial of his rights under article 5.1 (deprivation of liberty) of the European Convention on Human Rights.

Facts

Between July 1993 and January 1994 the appellant allegedly indecently assaulted two girls under the age of 13 and allegedly raped a girl aged 14 in Minnesota, before fleeing the United States. He was eventually arrested in the United Kingdom on 28 June 2010. In 1997 he was convicted of two further indecent assaults on two 12 year old girls in Ireland.

The United States government sought his extradition from the UK to prosecute him for the US offences. Mr Sullivan asserted that, if extradited, there was a real risk that he would be detained under a process called "civil commitment".

In Minnesota, a person may be committed indefinitely if found by a judge to be a "sexually dangerous person" under the following criteria specified in the *Sexually Dangerous Persons Act 1994* (Minn) (the Act): the person has engaged in a course of harmful sexual conduct; has manifested a sexual, personality or other mental disorder or dysfunction; and is likely to engage in future acts of harmful sexual conduct.

An order of committal is made by a court not on sentencing, but when a convicted sex offender is approaching release. An order follows the inmate's referral by the Department of Corrections to the prosecutor's office, the filing of a petition by a prosecutor with a district court, an examination of the respondent by a court-appointed mental health expert, and, finally, the court's finding that the statutory criteria are satisfied.

Decision

Lord Justice Moses found that "[t]here is a real risk that if extradited the appellant might be subject to an order for civil commitment within Minnesota and that that amounts to a risk that he would suffer a flagrant denial of his rights enshrined in Art. 5.1."

Despite this conclusion, there was no order made on the appeal. His Honour stated that it is in the interests of justice that the appellant faces trial in respect of the serious allegations made against him. To otherwise allow the appeal would have deprived the US Government of the opportunity to give an undertaking to not make an order for civil commitment, as the court would need to quash the order for his extradition under section 104(5) of the *Extradition Act 2003* (UK) (the Extradition Act).

Risk of an order of civil commitment if returned

The court adopted the principle established in *R (Ullah) v Special Adjudicator* [2004] UKHL 26 that in order to resist extradition an applicant must show strong grounds for the conclusion that there is "a real risk of infringement" that his Convention rights will be violated if returned.

In his assessment of the Act, the appellant's expert witness Professor Janus provided a number of reasons as to why there was a real risk that the appellant would be categorised as a "sexually dangerous person". One reason was that each of Sullivan's five acts of sexual misconduct – three suspected and two proven – would be taken into account on applying the Act, considering that 45 percent of men currently under the program had two or fewer criminal convictions prior to their commitment.

The evidence submitted at first instance by the US Government from Judith Cole, the Assistant Hennepin County Attorney was to the effect that the applicant does not meet the criteria for civil commitment under the Act. On appeal, however, Ms Cole's evidence was that it is too early to be able to predict whether a petition for civil commitment would be filed against the appellant.

This significant change of position by the US Government, combined with the cogent evidence of Professor Janus, led the court to conclude that there was a real risk that if returned the appellant would be subject to an order of civil commitment.

Risk of an order of civil commitment leading to a flagrant denial of the right to freedom from deprivation of liberty

The court applied the principle established in *Soering v United Kingdom* [1989] 11 EHRR 439 that in order to resist extradition, the infringement, the occurrence of which there is a real risk, must amount to a flagrant denial of rights under the Convention. The court held that detention under civil commitment would amount to a flagrant denial of article 5.1 deprivation of liberty. Of particular relevance was the fact that not one of the 600 persons committed since 1988 has been released. The court also found that committal is not justified under any of the article 5.1 exceptions. Specifically, the article 5.1(a) exception for lawful detention after conviction by a competent court is not relevant as the decision to commit is not made by the sentencing court. Further, the article 5.1(e) exception for the lawful detention of persons of unsound mind did not apply as the Act does not require the prospective subject of a civil commitment order to be suffering from a serious mental disorder, but rather a "sexual … disorder or dysfunction".

Further arguments

The appellant's arguments concerning his article 6 right to a fair trial and section 95 (speciality) of the Extradition Act were deemed unnecessary to consider in detail because of the finding concerning article 5.1. In *obiter*, his Honour indicated that both would likely fail, the article 6 argument because "[a flagrant denial of justice] only exists where the breach of the principles of fair trial guaranteed by Art. 6 is so fundamental as to amount to a nullification of the very essence of the right."

Commentary

This judgment has general relevance to section 21(3) of the Charter, as it provides guidance on what constitutes a real risk of a flagrant denial of the right to freedom from deprivation of liberty sufficient to challenge an order for extradition. This question is yet to be considered by a Victorian court. Unlike the Convention, the Charter does not specify circumstances in which deprivation of liberty is justified.

The *obiter* concerning article 6 has general relevance to section 24 of the Charter which protects the right to a fair trial, as it provides guidance on the requirements for establishing a flagrant denial of justice.

It is relevant to note that Australia has an International Transfer of Prisoners scheme which allows people imprisoned in a foreign country to apply to transfer to their own country to serve the balance of their sentence, provided certain conditions are met. The question as to how this scheme would intersect with the Charter remains to be judicially considered.

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/1680.html

***Jade Cooper** is a Vacation Clerk at Allens Linklaters.*

Excessive use of force against protesters by police violated prohibition against torture and ill-treatment

Gamarra v Paraguay, UN Doc CCPR/C/104/D/1829/2008 (30 May 2012)

Summary

The UN Human Rights Committee has found that the use of force by the Paraguay police against peaceful demonstrators was disproportionate, constituting a violation of article 7 of the International Covenant on Civil and Political Rights. Paraguay was also found to have

contravened article 2, paragraph 3 of the Covenant by depriving the demonstrators with access to an effective remedy in relation to the human rights violations.

Facts

On 3 June 2003, 1000 demonstrators, including Ernesto Benitez Gamarra, orchestrated a peaceful blockade demonstration in an attempt to pressure the Ministry of Agriculture in Paraguay to grant the producers of lemon verbena a subsidy for losses suffered as a result of private sector marketing.

However, the demonstrators were met by armed policemen and military personnel, who commenced a violent assault before negotiations between the police and the demonstrators had concluded. According to Gamarra, the assault involved firing tear gas, live rounds and water cannons, and was not preceded by any loudspeaker warnings. Many demonstrators were beaten violently, with police and military personnel clearing the demonstrators' camp and singling out between 20 and 25 people for arrest, including Gamarra, forcing them to lie on the ground in order to beat them with batons and kick and stamp on them.

Gamarra and the other detainees were then taken to a police station where personnel continued to beat them. Gamarra was targeted in particular and was taken aside to a room where he was kicked, beaten with batons on his back, feet, stomach and head and sprayed in the face with an irritant gas. This treatment ceased only when journalists covering the demonstrations arrived at the police station. Gamarra and the other detainees were placed in a cell where they were unable to sit, lie down or go to the toilet until 5.30 am the next day. Consequently, Gamarra now suffers from significant physical and psychological ailments.

On 10 June 2003, Gamarra and the other victims filed a complaint for torture and ill-treatment with the Public Prosecution Service. On 3 August 2005, however, the San Pedro del Ykuamandyju interim Criminal Court of Guarantees ruled that the case against the chief of police and prosecutor L.A. should be dismissed on the basis that the prosecutor's office did not have sufficient evidence to justify continuing the case. Gamarra was not formally notified of this decision, and only determined the status of the case through his own initiative. On 24 May 2006, the Caaguazu and San Pedro Appeal Court declared an appeal by the Special Unit on Human Rights Offences inadmissible, on the grounds that it had not been filed by the deadline. Gamarra was informed that no further appeal was possible.

Decision

The Committee determined that Gamarra had exhausted his domestic remedies as required by article 5, paragraph 2(b) of the Optional Protocol to the Covenant. This was held on the basis that the Criminal Court dismissed his case and he was informed by the Appeal Court that no further appeal against this decision was available.

After considering Gamarra's detailed description of the 3 June 2003 events, the medical reports he submitted and the acknowledgment of the events by the Public Prosecution Service, the Committee determined that the use of force by the police was disproportionate to any threat posed by the demonstrations. The treatment to which Gamarra was subjected therefore constituted a violation of article 7 of the Covenant.

Further, there was significant delay in the prosecution attending to Gamarra's case. For example, it was not until a year after Gamarra's complaint that the prosecutor indicted two suspects, and the Criminal Court refused to allow a stay for further evidence to be gathered, dismissing the case altogether. In these circumstances, the Committee found that Gamarra did not have access to an effective remedy and therefore a violation of article 2, paragraph 3 of the Covenant had

occurred in conjunction with article 7. The Committee held that Paraguay was under an obligation to provide Gamarra with an effective remedy, including an impartial and thorough investigation of the facts, the prosecution and punishment of the perpetrators and full reparation, including compensation.

The Committee held that Paraguay was under an obligation to prevent similar violations occurring in the future. By way of enforcement, Paraguay is required to submit to the Committee within 180 days information regarding the measures adopted to give effect to the decision.

Commentary

Section 10 of the Victorian Charter provides that a person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way. This reflects article 7 of the ICCPR. The Committee's decision therefore demonstrates that any use of force by the Victorian police must be proportionate to the threat being posed in order to comply with obligations under the Victorian Charter.

The Covenant also obliges State parties to provide effective remedies for non-compliance with the rights it protects. Section 39 of the Victorian Charter provides that there is no free-standing right to a remedy under the Charter. This section therefore does not adequately reflect article 2, paragraph 3 of the Covenant, which is vital to the observance of human rights. The Committee is concerned to ensure that effective remedies are available to victims of human rights violations, therefore this is an aspect that should be explored by the Victorian Charter in the future.

The decision is available online at: http://daccess-ods.un.org/TMP/3904534.87634659.html

Alexandra Jelley *is a Winter Clerk with King & Wood Mallesons Human Rights Law Group.*

HRLC POLICY WORK AND CASE WORK

HRLC Submission to Expert Panel on Asylum Seekers

On 16 July 2012, the HRLC made a submission to the Expert Panel on Asylum Seekers, established by the Government to inquire into "the best way forward for Australia to prevent asylum seekers risking their lives on dangerous boat journeys to Australia".

The HRLC is concerned that several policies proposed by the Government and the Coalition breach Australia's international human rights obligations.

Australia's non-refoulment obligations prohibit the transfer of asylum seekers to third countries where they face human rights violations. In the HRLC's view, both the 'Malaysia Solution' (where asylum seekers are not protected against being returned to the country from which they fled) and the proposal to send asylum seekers to Nauru (where they would face extended detention) breach this prohibition.

The HRLC's submission also highlights that international law prevents Australia from imposing penalties on refugees on account of their 'illegal' entry or discriminating against asylum seekers on the basis of their nationality. Policies which operate punitively against boat arrivals or impact disproportionately on asylum seekers from particular countries may breach the requirement to perform these legal obligations in good faith.

The HRLC's submission also emphasises that any policy involving the detention of children or their transfer to third countries to which they have no ties would fall foul of Australia's human rights obligations under the *Convention on the Rights of the Child*.

The HRLC submission recommends that Australia increase its humanitarian intake and provide additional resources for the UN refugee agency, UNHCR, to process and resettle asylum seekers in the region. Such policies would help relieve more asylum seekers of the need to pursue riskier options for seeking protection.

The HRLC's Rachel Ball urged the Expert Panel to recognise that "asylum seekers do not want to make the dangerous boat journey to Australia. People get on boats as a last resort. Many of these people have fled torture, ill-treatment and persecution in their home countries."

Ms Ball said "As a wealthy, secure country with a bipartisan commitment to good international citizenship, we have an ethical and legal obligation to treat these people humanely and to provide them with refuge and protection."

The Expert Panel has been asked to provide advice to the Prime Minister and the Minister for Immigration and Citizenship prior to the start of the next Parliamentary sitting period in August 2012.

Major Joint Submission: Practical solutions to ensure a humane, effective and lawful approach to asylum seekers

A leading group of non-government organisations and experts in the refugee and asylum seeker sector, including the Human Rights Law Centre, has made a major submission to the Government's Expert Panel on Asylum Seekers.

The group recognises and accepts the need to reduce the number of people risking their lives on precarious sea journeys to Australia. However, we know from experience that the current

policies, based on deterrence, don't work. The terror in which refugees flee cannot be matched by anything we do. Our focus is on humanitarian policy options that are effective, sustainable, responsive and consistent with Australia's international obligations.

Unlike our political leaders we don't pretend that any one approach will "stop the boats". Nor do we support the view that domestic policies alone will impact on irregular movement. We believe instead that we need to shift our policy objective to focus on:

- substantially reducing, at source, the incentive for asylum seekers to engage people smuggling networks and make dangerous boat journeys to Australia;
- improving protections for asylum seekers in our region; and
- ensuring Australia fulfills its international human rights obligations.

Current policy options will not work

We do not support any of the policy options currently before Parliament. This is because we believe they are harsh, unjust and contrary to our international obligations. Furthermore, the current policy approaches, outlined below, will not achieve their stated aim to reduce asylum seekers seeking out people smugglers and travelling to Australia by boat.

Return to the 'Pacific Solution'

Re-opening a Detention Centre on Nauru or Manus Island will not be an effective deterrent to asylum seekers seeking to come to Australia on boats. It is well known that the majority of asylum seekers formerly processed in Nauru and Manus Islandwere resettled in Australia or New Zealand. The United Nations High Commissioner for Refugees (UNHCR) welcomed the closure of the Nauru Offshore Processing Centre in 2008.

Return to Temporary Protection Visas

Temporary Protection Visas (TPVs) did not deter boat arrivals when they were first introduced and will not be an effective deterrent now. It is well known that vast majority of people granted TPVs were subsequently granted a permanent protection visa. Because TPVs did not provide family reunification rights, greater numbers of women and children were encouraged to take boats to Australia.

Turning boats around

Turning boats around is difficult and dangerous, putting both asylum seekers and border security personnel in danger and leading to more deaths at sea. Turning boats around and sending them back to their point of departure or a third party country is not constructive. Indonesia has repeatedly indicated that turning boats back is unacceptable.

Malaysia Arrangement

The Malaysia Arrangement is not a long-term or even medium-term solution. Malaysia has a well documented history of ill-treatment towards asylum seekers and refugees and the Malaysia Arrangement undermines compliance with Australia's international law obligations. Many operational aspects of the Arrangement are insufficient and the proposed management of unaccompanied minors remains unclear.

Alternate Policy Options

Irregular migration is an international issue which cannot be solved by one country acting in isolation. As has successfully occurred in the past, Australia must work with our regional neighbours to encourage the protection and orderly management of irregular migrants in our region.

We recommend focusing on long term and medium solutions within our region, in addition to making immediate changes to Australia's approach to asylum seekers.

Immediate initiatives:

Immediate initiatives should focus on measures to provide greater incentive for asylum seekers to utilise orderly migration procedures, rather than seek out the services of people smugglers, and to enhance maritime rescue operations to avert loss of life at sea. Immediate recommendations include:

- Doubling Australia's annual humanitarian intake, to offer additional places for vulnerable refugees within the region and to target programs in key source countries.
- Encouraging other governments to increase their commitment to resettlement.
- Increasing resources to UNHCR in our region.
- Increasing regional cooperation to avert loss of life at sea.

Medium term strategies:

Medium term strategies are practical suggestions which the Government should adopt to demonstrate its commitment to a regional approach to asylum seeker and refugee issues. These include:

- Assisting regional neighbours to create conditions of safety for asylum seekers while their protection claims are assessed in a timely manner.
- Reviewing the current composition of Australia's refugee and humanitarian program.
- Promoting accession to the Refugee Convention within our region.

Long term and sustainable regional framework:

Sustained and genuine long term commitment is required to build a regional protection framework. The Bali Process' Regional Cooperation Framework offers a suitable platform for these efforts and the Australian Government should work to enhance the protection elements which underpin it.

To understand how to stop people getting on boats, we need to understand what drives people to risk their lives at sea. People get on boats because they have no other choice. As a group representative of people working directly with asylum seekers, we have been told time and time again by people on the ground who are going through the process in Malaysia and Indonesia, that boats are the only option compared to imprisonment, torture and persecution: "I would rather die seeking freedom, than at the hands of my oppressors".

These policy options are supported by the asylum seeker and refugee sector, ensure we meet our international obligations, are practical to implement on the ground in Australia and our region and, most importantly, will save lives at sea.

We have come together as group to present these solutions for consideration by the Expert Panel to ensure, above else, the protection of asylum seekers by Australia as a proud signatory of the Refugee Convention.

Signed:

Human Rights Law Centre, Amnesty International, Asylum Seeker Resource Centre

GetUp!, Refugee Council of Australia, Welcome to Australia, ChilOut, Brigidine Asylum Seekers Project, The Hon Malcolm Fraser AC CH

HRLC supports ground breaking anti-homophobia campaign

As part of a project to promote substantive equality, the HRLC is supporting a coalition of Gay, Lesbian, Bisexual and Transgender community groups to develop Australia's first television campaign targeting homophobic, biphobic and transphobic harassment. Two commercials will premiere on national telelvision in the coming months aimed at reducing the incidence of homophobic harassment and vilification by raising awareness of its existence and empowering individuals to stand up and respond to homophobic incidents, whether at work, school or social situations. The HRLC has assisted in developing an on-line resource to support the campaign, including comprehensive information about the law and rights of those experiencing homophobic harassment and options for legal and other help. Watch for this space for more details on the upcoming launch of the campaign.

Measuring Australia's human Rights performance: The importance of Human Rights Indicators

As part of developing its National Human Rights Action Plan, the Australian Government has committed to establishing a set of human rights indicators. The purpose of human rights indicators is to measure the realisation of the human rights enshrined in the seven core human rights treaties for affected groups and the broader Australian community. This is a welcome step as it will provide an effective and transparent basis for evaluation and reporting, including future appearances by Australia in the Universal Periodic Review process, and will generate ongoing review and improvement of Government policy in line with human rights standards.

Following on from an expert roundtable on human rights indicators convened by the HRLC in May, the HRLC is now undertaking research into the development of human rights indicators specifically for the Convention on the Elimination of All Forms of Racial Discrimination. It is envisaged that our report will draw on the general approach to human rights indicators recommended by the United Nations Office of the High Commissioner for Human Rights and efforts to implement the OHCHR approach in the United Kingdom and consider the adaption of these approaches to the Australian context. For more information about the National Human Rights Action Plan and human rights indicators please visit www.humanrightsactionplan.org.au

HRLC MEDIA COVERAGE

The HRLC has featured in the following media coverage since the last Bulletin:

- Phil Lynch, 'Hyper-partisanship puts people second', The Australian, 31 July 2012
- Daniel Flitton, 'UN bid for Tamil to stay fails', *The Age*, 27 July 2012
- Michelle Grattan, 'Regional co-operation the way to handle boats, MPs say', *The Age*, 25 July 2012
- Ben Doherty, 'Australia caught in Sri Lanka refugee crossfire', *Sydney Morning Herald*, 25 July 2012
- Greg Dyett, 'Australia 'should re-engage with UNHCR'', *SBS Radio News*, 24 July 2012
- Tim Roxburgh, 'Asylum seekers say they were tortured after Australian rejection', *The Wire*, 24 July 2012
- Julia Medew, 'Within these walls', *The Age*, 21 July 2012

- Julia Medew, 'Prisons a disease 'hotbed'', *The Age*, 21 July 2012
- Sharona Coutts, 'One Punch Can Change Your Life — And Hundreds Of Others', *The Global Mail*, 19 July 2012
- 'Violence Mounts in Papua', *The Diplomat*, 06 July 2012
- Liam Cochrane, 'Calls for SBY to end media ban in Papua', *ABC Radio Australia*, 03 July 2012
- Australia Network News, 'Australian Government urged to step in on Papua', *ABC Online*, 03 July 2012
- Radio NZ, 'Australian leader called on to press Indonesia to open Papua to the media', *Radio International New Zealand*, 02 July 2012

SEMINARS & EVENTS

Human rights and counter-terrorism

Human rights limits and implications of online and offline surveillance and detection technologies

Join the HRLC and global expert on human rights and security, **Professor Martin Scheinin**, for an important and timely discussion on the promotion and protection of human rights and civil liberties in the context of countering terrorism.

Date: **12.45pm to 2pm on Thursday 6 September 2012**
Venue: The Wheeler Centre, 176 Little Lonsdale St, Melbourne
Cost: $20 / $10 (concession)
RSVP: by downloading **this booking form** and returning it by 30 August 2012

Lecture: The Universal Declaration of Human Rights of 1948 in the History of Cosmopolitanism

14 August, Melbourne

This Public Lecture by Professor of History at Columbia University, **Samuel Moyn**, at Melbourne Law School will offer a revisionist account of the relationship of the famous human rights document with various political universalisms of the 20th century. See the Melbourne Law School website for more information and to register.

UNAA Media Peace Awards 2012

August 2012

Established in 1979, the Media Peace Awards recognise those journalists, producers and editors, who seek to promote understanding and awareness about humanitarian and social justice issues in our society and stimulate public debate. Australian journalists whose work has been published/broadcast in the Australian public media between 3 September 2011 and 31 August 2012 are encouraged to nominate now.

Australian National University, "Law and Democracy" Public Law Weekend Conference

20–22 September 2012

This year's Public Law Weekend theme is Law and Democracy, which seeks to examine the complements and tensions between the two ideals. As part of the Weekend, **Judge Christopher Weeramantry** will deliver this year's **Annual Kirby Lecture in International Law** and **Professor Adrienne Stone**, of Melbourne University Law School, will deliver the**15th Geoffrey Sawer Lecture**. The conference also includes various panels of speakers on themes such as comparative constitutional law and democracy, law and the Australian people, and Indigenous Australians and current developments. Visit the ANU College of Law website for more details.

HUMAN RIGHTS JOBS & RESOURCES

National Children's Commissioner

As National Children's Commissioner, a newly created statutory position, you will be responsible for advocating for children's human rights at the national level. You will promote public discussion and awareness of issues affecting children; conduct research and education programs; consult directly with children and representative organisations; and examine Commonwealth legislation, policies and programs that relate to children's human rights. You will have a clear focus on vulnerable or at-risk groups of children, such as children with disability, Aboriginal and Torres Strait Islander children, homeless children or those who are witnessing or subjected to violence.

Applications close 6 August 2012. For further information click here.

Reprieve Australia Blackstrikes Fellowship

Reprieve Australia is now in its 10th year of working against the death penalty. In commemoration of this achievement, Reprieve has established the Blackstrikes Fellowship. The Blackstrikes Fellowship will involve research and analysis of the under representation of minorities on juries in the United States, particularly on the juries for cases involving capital punishment in Louisiana. Applications close 31 August 2012. See www.reprieve.org.au for more info.

inTouch Multicultural Centre Against Family Violence

inTouch Inc. Multicultural Centre Against Family Violence (formerly known as The Immigrant Women's Domestic Violence Service (IWDVS)) is a statewide service responding to family violence across culturally and linguistically diverse communities and is seeking a temporary part-time Principal Lawyer.

FOREIGN CORRESPONDENT

Positive developments at 20th session of UN Human Rights Council

The 20th session of the Human Rights Council saw a number of significant developments in the Council's response to country situations, with the creation of special rapporteurs on Belarus and Eritrea, as well as several thematic developments of interest to human rights defenders.

Amongst the latter was the presentation of the first report of the Special Rapporteur on freedom of peaceful assembly and association, Mr Maina Kiai. Mr Kiai focused on best practice and referred to a number of countries in this regard. Despite this effort to produce a balanced assessment of the situation by drawing on cases from all regions, Cuba criticised the Special Rapporteur for the narrow range of negative cases referred to in the report, specifically the emphasis on non-western countries. There was a similarly unconstructive engagement from Canada during the High Commissioner, Ms Pillay's, update to the Council, when she remarked on 'alarming' moves to restrict freedom of assembly in the context of student protests in Quebec. Canada reacted strongly to this statement, expressing disappointment in Ms Pillay for 'misguidedly' commenting on Canada when she could have been talking about 'serious human rights violations' such as in Bahrain, Iran, and Sri Lanka.

Nonetheless, consensus was found on a resolution on the promotion, protection, and enjoyment of human rights on the Internet despite continuing objections by China and Cuba. A resolution was also adopted by consensus on national human rights institutions (NHRIs), an Australian-led initiative. One of the key action points in this resolution is a recommendation to the General Assembly (GA) to explore how it could enable the effective participation of NHRIs in its work. While this recommendation is a remarkable achievement, it remains to be seen how far if at all the GA will take it on board.

In terms of country situations, the Council continued to follow-up on the situation in Syria. However its latest resolution on Syria does not build substantially on previous action taken by the Council, most notably in the continued failure to recommend the Security Council to refer the situation to the International Criminal Court (ICC). Despite a joint call from 23 States for the Council to include this reference in the resolution, the final text only 'notes' the High Commissioner's call to the Security Council to do so. This softer language follows the US's lead on the resolution, as it has not itself ratified the Rome Statute under which the ICC is founded. China, Cuba, and the Russian Federation again voted against the resolution.

The Council also failed once again to take action on the issue of Bahrain, despite an unprecedented joint statement by Switzerland on behalf of 27 countries expressing particular concern over actions taken against peaceful protestors in Bahrain. This statement was however not supported by the US and the UK, who preferred to present their own statements under Items 8 and 10 of the agenda (on follow-up to the Vienna Declaration and Programme of Action, and on technical cooperation respectively), seen as less confrontational than Item 4 (on country situations of concern) under which Switzerland presented its statement. While it is welcome to see a less than usual State taking the lead on such an initiative, the decision of two States that usually position themselves as positive players in the Council not to join the statement, a decision tied to their political interests, is unfortunate.

The creation of two special rapporteurs was, however, a positive development. The Special Rapporteur on Eritrea was created by consensus with the Council strongly condemning the "widespread and systematic violations of human rights" in the country. While the Russian Federation and China dissociated themselves from consensus, and Cuba strongly objected, none of these States forced a vote. This is perhaps because the resolution was led by the African Group, and also because of Eritrea's relative political isolation.

The resolution establishing the Special Rapporteur on Belarus divided the Council, with the final vote being 22 votes in favour, 5 against and 20 abstentions. This divide did not, as the Belarusian

delegation claimed, reflect disagreement about whether or not action was required in response to the situation in the country, but rather indicated differences of opinion about which course of action would be most appropriate. Latin American countries were of the opinion that options other than a special rapporteur should have been explored first, implying that the situation had not reached the level at which appointment of a special rapporteur would be warranted.

This debate reveals an uncertainty in the Council as to what is the best way to respond to situations that are not seen by all as serious enough to trigger the Council's 'fifth gear' in terms of creating a special rapporteur or Commission of Inquiry, as in the case of Syria for example, but where an international response is felt necessary.

One positive step in this respect was the pledge made by 18 States, in a cross-regional joint statement delivered by the Maldives, to voluntarily commit to be guided by independent voices, such as the UN Secretary-General, the High Commissioner, and special procedures, when assessing whether a situation merits the attention of the Council. A call for a formal 'trigger mechanism' on these lines had been made by NGOs and some States during the review of the Council, but this proposal had failed to achieve consensus.

As the Council continues to move forwards in a generally positive direction in terms of the action it does take, its major weakness now lies in its lack of response to some serious situations. It is a positive sign that a number of States have chosen to take it upon themselves to use independent voices as a guide for initiating country action, and it will be interesting to watch how far this impacts upon the Council's work in the future.

***Florence Foster** is an Intern and **Heather Collister** is Human Rights Officer with the International Human Rights Defenders Programme (www.ishr.ch)*

IF I WERE ATTORNEY-GENERAL…

Balancing the greatest grab for power by security agencies since 9/11

If I were Attorney-General I would put an end to the relentless expansion of resources and power that security agencies in this country have accumulated over the past decade. I would certainly be highly sceptical of the proposals served up earlier this month which provide for less judicial oversight and greater incursions into privacy.

The Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and the Australian Federal Police have been on clover since 11 September 2001. To paranoid politicians who pander to fears that such an event could happen in Australia they have found a receptive audience. Taxpayer handouts are no problem, new headquarters a must, and budgets for operations and routine surveillance have been escalating. Not content with the increase in legislative power that has come in the aftermath of September 11 and Australia's sycophantic commitment to the American's never ending and convenient War on Terror, the spooks are it again.

On 9 July 2012 the Joint Committee on Intelligence and Security announced it would look at Attorney-General Nicola Roxon's quest to increase the powers of security agencies. A discussion paper from Ms Roxon's Department was released setting out what the spies want. It's a frightening list if you care about liberty and the right of individuals to assume that privacy means something more than lip service.

As is the usual case the proposals are dressed up in the language of there being a whole range of new cyber and transnational electronic threats out there and that Australia needs to be kept safe from evil. Ms Roxon, according to the discussion paper, wishes to progress or discuss initiatives such as enabling warrants to be varied by the Attorney-General and extending the duration of search warrants from 90 days to six months. There is also a proposal to "clarify" that reasonable force can be used by ASIO not just on entry to premises but during a raid.

The discussion paper also describes how it is proposed that a single super warrant against a target can be obtained, rather than multiple warrants. And there are going to be onerous obligations on ISPs and telecommunications companies to store customer data for two years and to allow government to see business plans and proposed network expansion plans and designs. ASIS would get the power to give weapons to its operatives overseas, presumably so they can kill people.

Make no mistake; this is the most significant grab for legislative power by security agencies in Australia since they took advantage of the hysterical political climate create by September 11 and the Bali bombings. If these proposals become law, the capacity of security agencies to spy on citizens, to bully telecommunications providers and to inflict violence on persons subjected to raids, will be significantly enhanced.

The sense one gets from the A-G Department's discussion paper is that security agencies want to be allowed to slip under the radar of judicial and broader community scrutiny even further than they are able to do today.

What makes these proposals even more problematic is that Australia does not have adequate human rights protections so that aggrieved individuals can seek remedies in our courts. Ms Roxon is part of a government that promised much on human rights when it came to office in 2007 but has delivered absolutely nothing other than a tokenistic parliamentary committee.

There is no doubt that we live in a global environment where there are threats to national security and to the security of individuals. But vague rhetoric about such matters does not justify the preparedness of government to allow security agencies to be released from fundamental obligations such as respect for liberty and privacy. And that is the difficulty with Ms Roxon and her Department's proposals. They are not justified by any evidence. The community is expected to sit back and be assured that threats of such magnitude exist, and that the existing powers contained in security agency and criminal legislation are not sufficient to adequately deal with them. It's an example of the "trust us, we know what we are doing" approach and it is misplaced and dangerous when so much is at stake in terms of human rights and protections.

But if the Australian Parliament is to be asked to vote on at least some of the amendments to laws such as the *Intelligence Services Act 2001* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth), should they not demand that the government consider strengthening human rights protections at the same time? If not a human rights act, then how about strengthening privacy laws so that if there are breaches of privacy which are not reasonable or justified by ASIO, for example, an individual has an enforceable right to compensation?

Ms Roxon and Prime Minister Gillard are justifying these proposals on the basis that they follow the UK and the US. In those countries, however, there are human rights protections which provide some check on a rampant security agency. Australians are not so protected, as noted above. So until that happens we should not allow security agencies to expand their powers.

***Greg Barns** is a barrister and was until recently National President of the Australian Lawyers Alliance.*

The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible and gratefully received.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne, Vic, 3000, Australia
www.hrlc.org.au
www.twitter.com/rightsagenda
ABN: 31 117 719 267

Follow us at http://twitter.com/rightsagenda for updates as they occur.

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre.