

## COMPARATIVE RSD SYSTEMS – NAURU

PAPER PRESENTED AT THE 2014 WORLD CONFERENCE IN TUNIS

### **Nauru**

The Republic of Nauru is a coral atoll in the Pacific Ocean, 42 kilometres south of the equator and 4,500 kilometres north east of Australia. It is 21 square kilometres in size and has a population of about 10,000. It is the world's smallest independent republic and newest refugee jurisdiction having acceded to the Refugees Convention on 28 June 2011.

### **Processing environment**

In August 2012, Nauru signed a memorandum of understanding with Australia allowing for the transfer of asylum seekers from Australia to Nauru for RSD processing. Under the MOU, and a subsequent MOU signed in 2013, Nauru is responsible for the RSD process whilst Australia bears all the costs incurred under the MOU.

The asylum seekers transferred to Nauru are accommodated in a processing centre in the centre of the island. Whilst the MOU refers to shared responsibilities, the centre is funded and managed by the Australian government. The asylum seekers on Nauru are from a range of countries including Iran, Sri Lanka, Pakistan, Iraq, Afghanistan, Somalia, Bangladesh, Sudan, Indian and Myanmar and a number are stateless.

Australia has indicated that asylum seekers transferred to Nauru will not be resettled in Australia and Nauru, a small mostly mono-cultural island state, has made clear that it cannot permanently resettle all of the transferred asylum seekers given its size and economy. Currently, persons found to be in need of protection are granted short term work visas and are temporarily settled on Nauru in purpose built accommodation. Australia recently signed an agreement with Cambodia for the voluntary resettlement of people from Nauru.

### **RSD framework**

In 2012, Nauru enacted the *Refugees Convention Act 2012* (the Act) which establishes the legal framework for RSD processing. The Act establishes a refugee jurisdiction, with direct reference to the refugee definition and the principle of non-refoulement in the Refugees Convention, and a complementary protection jurisdiction; and provides that dependents of persons found to be refugees must be granted derivative status. The Act applies to any asylum seeker on Nauru, not just those transferred from Australia.

Nauru applies the UNHCR model to RSD assessments and has produced its own comprehensive guidelines which reflect the UNHCR guidelines. There is not yet any Nauruan refugee jurisprudence.

Nauru has ratified the Convention against Torture and signed the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination and has acceded to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. Nauru cannot return or expel any person to the frontiers of territories where this this would place Nauru in breach of its international obligations. Nauru applies the UNHCR guidelines in relation to dependency and takes a beneficial view of dependency.

Under the Act, primary RSD determinations are made by the Secretary of the Department of Justice. Assessments are prepared for the Secretary by RSD officers. A number of Nauruan officers have been trained and are undertaking RSD assessments.

### **Primary determinations**

Since 19 July 2013, the Secretary has made 332 RSD determinations of which 250 were positive and 82 were negative. There are currently about 1,150 asylum seekers waiting for their RSD claims to be processed.

Asylum seekers who receive a negative determination can seek review by the Refugee Status Review Tribunal (the Tribunal).

### **Tribunal**

The Tribunal is established under the Act as an independent, merits review tribunal.

The Tribunal is inquisitorial and not bound by the rules of evidence. It has the power to obtain any information it considers relevant, to summons people to appear or provide documents and to require the Secretary to conduct an investigation or medical examination.

It is explicitly bound by the rules of natural justice and must put clear particulars of any adverse information without exception. There is no protected information under the Act.

It can make positive decisions on the papers but must otherwise hold a hearing and can take evidence by telephone, video or any other means. To date, all hearings have been in person on Nauru although one was completed by telephone from Australia. There are currently no video link facilities on Nauru.

The Secretary does not have a right to appear before the Tribunal but may provide written arguments relating to the issues arising in the review. The Tribunal must complete its review in 90 days.

The Tribunal comprises a principal member, two deputy principal members and 6 members, appointed in September 2013. The members are all current or past members of the Australian Refugee Review Tribunal and some have also worked for the UNHCR so bring a significant level of RSD experience to the Nauru tribunal.

The Tribunal members fly to Nauru and conduct hearings over a two week period. The first sitting was in July, the second in September, the third will be in November. The Tribunal has

heard 33 cases and finalised 15 and has 28 applications pending. It has set aside the Secretary's determination in relation to 4 applicants and their dependants.

The Tribunal sits as a three member panel with the principal member or one of the deputies presiding. Lead responsibility for each case is allocated to one member but the hearings are conducted - and the decisions are made - collectively. The Tribunal's policy in relation to outcomes is that the majority view will prevail however, to date, members have been able to reach consensus in every case.

Persons found not to be owed protection can appeal to the Supreme Court of Nauru on a point of law and, (under the *Appeals Act 1972*), may appeal from the Supreme Court to the High Court of Australia, with the leave of the High Court. No appeals have been lodged or heard to date.

### **Legal Assistance**

Asylum seekers on Nauru are assisted throughout the RSD process by lawyers from a contracted Australian firm with experience in refugee law who have established a shopfront in the processing centre. The lawyers prepare all the documentation and legal submissions and attend RSD interviews and Tribunal hearings.

The government of Nauru has recently negotiated additional funding to enable the lawyers to advise asylum seekers on the merits of an appeal to the Supreme Court and to prepare an appeal application if they consider that an appeal may succeed.

### **Nauru Issues**

The significant issues impacting on the RSD system in Nauru are the remote location and the regional processing context.

It has been a terrific challenge establishing the Tribunal and getting it operational on Nauru and with limited resources. There is a small Tribunal registry on Nauru which provides a level of administrative support but much of the case management and development of policy and procedures is done remotely. Power failures and unreliable internet add a further layer of complexity.

The Tribunal has no country research or legal support. The members conduct their own research relying on UNHCR country guidelines, COI and NGO reports and other publically available material. The Tribunal currently has no budget to pay any costs associated with its powers to obtain information.

The Tribunal hearing room is a small demountable building located in the processing centre as there was no suitable space available outside the centre. The location in the centre is actually more convenient for applicants, lawyers and interpreters and a Nauru flag hangs in the hearing room to distinguish the Tribunal as a Nauruan government agency.

The asylum seekers on Nauru reside in difficult physical conditions and some have been there for a considerable time. In hearings they are tired and stressed, some have difficulty recalling

details of past events and some are distressed and anxious about their futures and that of their families. The evidence has to be taken carefully and the hearings can be quite long.

These circumstances can make the Tribunal's work in Nauru challenging. The three member panel is advantageous in these circumstances not only because it assists decision making but members also have the support of colleagues.

### **Conclusion**

In conclusion, at a time when other countries are seeking to diminish their RSD systems, Nauru has established a new RSD system based on the UNHCR model which provides asylum seekers with a legal framework in which their claims can be assessed, legal assistance to make their claims, merits review and judicial review.

It has been exciting to be involved in building a new RSD system and the Government of Nauru and those of us working on Nauru are committed to ensuring that asylum seekers on Nauru have access to a high quality RSD process and that they feel that their claims are being fairly and thoroughly assessed.

Rea Hearn Mackinnon  
Principal Member  
Refugee Status Review Tribunal  
Nauru