



# *Universal Periodic Review (UPR)*

*37th Session*

9 -12 November 2020

## **THE RIGHT TO SEEK ASYLUM**

**Unaccompanied Minors in Australia**

**who are**

**‘Legacy Caseload’ Asylum Seekers**

**LCAS**

Submitted by

**Foundation for Marist Solidarity, International**

La Fondazione Marista per la Solidarietà Internazionale

**FMSI**

1. FMSI (La Fondazione Marista per la Solidarietà Internazionale) is an organization in special consultative status with UN Economic and Social Council (ECOSOC) since 2011. By sharing the expertise of an international Marist network, present in eighty countries, FMSI is able to engage in discussions and decisions on standards and international agreements dealing with the human rights of children and young people and to present this information to the various human rights charter, treaty and special rapporteur mechanisms of the United Nations.

### **Previous Cycle Recommendations**

2. After Australia's previous UPR cycle in 2015, the Report of the Working Group communicated 54 recommendations from states parties to thirty-first session of the Human Rights Council in March 2016 concerning refugees and asylum seekers to Australia<sup>1</sup>
3. 22 of the 54 recommendations addressed the promotion and protection of the rights of asylum seekers who have arrived to Australian shores and specifically referred to increasing efforts to treat refugees and asylum seekers in accordance with international obligations, ensuring transparency and accountability in procedures relating to refugees and asylum seekers and assurance of respect of non-refoulement obligations. The recommendations came from the following States Parties: *Recs. 136.239 – 136.255* India, Greece, Republic of Korea, Peru, Uzbekistan, China, Fiji, Italy, Pakistan, Maldives, Djibouti, Mexico, Holy See, Indonesia, Rwanda, Japan and Luxemburg. *Rec. 136.273* Italy. *Recs. 136.281 – 136.284* Germany, Slovenia, Switzerland and Argentina. The other thirty recommendations were more concerned with detention and offshore processes.
4. These States Party recommendations were in alignment with recommendations made in the Joint Submission (JS1<sup>2</sup>) in which FMSI participated

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<sup>1</sup> See [UPR recommendations 2016: 136.239 to 136.290](#).

<sup>2</sup> See [Joint Submission \(JS1\) from FI; ERI; FMSI etc](#)

## Legal and Institutional Framework

5. The **legacy caseload** is a group of around 30,000 asylum seekers who arrived in Australia by boat between 12 August 2012 and 1 January 2014<sup>3</sup>. They were placed under exceptional legislative restrictions regarding their ability to apply for protection visas. To understand these restrictions, one needs to refer to the ‘fast-track’ process.
6. In 2014, a **‘fast-track’ process** was introduced for this specific group, under which a legacy caseload asylum seeker (LCAS) needed to be invited individually by the then Minister for Immigration and Border Protection, to apply for asylum, before making a written application to the minister and attending an interview. Until this application was assessed, LCAS cannot apply for permanent visas. They must apply for three-year Temporary protection visas or 5-year safe haven enterprise visas, which must be renewed periodically.
7. If the Department of Immigration and Border Protection rejects the LCAS claim, they may be referred to the Immigration Assessment Authority (IAA) for a review on the facts, called a **‘Merits Review’**<sup>4</sup>. The IAA can generally only assess facts available at the time of original application, meaning that new and relevant evidence may be unjustly ineligible for inclusion in the review. The fast-track process does not afford the procedural fairness safeguards afforded to non-fast track applicants available in a review at the Administrative Appeals Tribunal, the judicial body responsible for regular legal and merits-based administrative review in Australia.
8. In 2014, the government abolished publicly-funded legal assistance to the majority of Australian asylum seekers without a valid visa – thus cancelling the eligibility of most LCAS to access legal assistance in the face of Australia’s extremely complex immigration law. This, coupled with the language and social support network difficulties that most asylum seekers face, has caused a significant barrier to LCAS in their attempts to claim asylum in Australia.
9. Measures undertaken by the federal government since 2014 can be described as punitive based on migration status<sup>5</sup>. For example, in May 2017, the government announced all asylum seekers in the Legacy Caseload had until 1 October 2017 to apply for protection or be deported from Australia immediately. The application form was very lengthy and complex, had to be completed in English and required the detailing of the LCAS experiences of trauma and harm. This occurred with no access to publicly funded legal assistance and limited access to publicly funded English translation

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<sup>3</sup> UNSW, [‘The Legacy Caseload’](#) (Factsheet, April 2019) Kaldor Centre for International Refugee Law

<sup>4</sup> Administrative Appeals Tribunal [Immigration Assessment Authority \(IAA\) Merits Review](#)

<sup>5</sup> Refugee Council of Australia – [Fast-Track Processing](#)

services. All income support was removed from people who did not meet a new and significant threshold of vulnerability – bringing the original \$35AUD per day to \$0 for LCAS who were determined not to be in a state of extreme vulnerability<sup>6</sup>.

10. Further, even upon recognition of refugee status, LCAS are required to reapply every few years for ongoing protection<sup>7</sup>. They are further denied the right to being reunited with their families, travelling outside of Australia and are subject to numerous restrictions in their daily lives. This punitive style of treatment is active discrimination against LCAS by virtue of their migration status and method of arrival into Australia.
11. As of December 2019, there were still 6,632 people waiting for the Department of Home Affairs to determine their asylum application. 82% of LCAS applicants had been granted either a temporary protection visa or a safe haven enterprise visa, which means that they are temporarily allowed to remain within Australia.<sup>8</sup>

### ***Promotion and Protection of Human Rights***

12. We are concerned by the inherent lack of procedural fairness afforded to LCAS individuals, particularly to LCAS who arrived as minors and have since ‘aged-out’ (reached adult majority since their arrival to Australia and therefore are no longer considered to have the vulnerability of a minor) due to delays in processing and numerous changes to the requirements implied by their migration status. The Australian Human Rights Commission report of 2019, *‘Lives on Hold’ Refugees and Asylum Seekers in the ‘Legacy Caseload’* supports this concern with their Recommendation 31<sup>9</sup>:

*In cases where a young person receiving services under Band 2 of the Status Resolution Support Services program turns 18, the Department of Home Affairs should:*

- a) automatically transition the young person onto Band 4 of the program, with an opportunity to transition onto Band 5 where ongoing intensive support is required*
- b) extend the timeframes for transition of young people between the various bands of the SRSS program, to allow adequate time for provision of transition support.*

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<sup>6</sup> UNHCR: [Monitoring Asylum in Australia](#)

<sup>7</sup> Asylum Seeker Resource Centre [Limitations of temporary protection](#)

<sup>8</sup> UNSW, Kaldor Centre for International Refugee Law [Legacy Caseload Fact sheet](#).

<sup>9</sup> The Australian Human Rights Commission report of 2019, [Lives on Hold: Refugees and Asylum Seekers in the Legacy caseload](#)

13. The Fast Track system of visa determinations for the legacy caseload indicates significant barriers to natural justice in the process of claiming asylum in Australia and exacerbates the pre-existent vulnerability that these applicants experience due to factors surrounding their migration status.
14. Significant barriers have been put in place to hinder asylum seekers from completing applications which put enormous strain on their mental health. Given the inability of the fast-track review by the Immigration Assessment Authority to assess fresh and compelling evidence that has arisen since the time of the original application, some LCAS are placed in extreme vulnerability of refoulement to a country which may put their life at significant risk.

### 15. Case Study

*'Ahmed' is a Hazara Afghan who arrived in Australia as a minor in December 2012 prior to the change in legislation which barred the resettling of asylum seekers who arrive by boat in Australia. As such, he forms part of the legacy case load.*

*Since arriving in Australia, unable to speak English, has completed high school education and is now a third-year engineering undergraduate student at university. He has received assistance and championing from several NGOs for his education and social support including housing and financial backing from a ministry of the Marist Brothers, an agency which cares for unaccompanied minors. He has since 'aged-out' of his vulnerability as a minor, and his application for asylum is only now being reviewed for possible final ministerial intervention.*

*In February 2018, the Merits Review processes of the Immigration Assessment Authority judged the Jaghori District of Afghanistan as 'safe.' Jaghori is Ahmed's place of origin. Following this assessment, brutal sectarian violence, perpetrated by the Taliban, escalated in later 2018<sup>10</sup>. Ahmed is not permitted to present this new evidence for his application for asylum because the Merits Review is considered finally determined and the Judicial Review only adjudicates on matters of law. The Taliban were the original threats to Ahmed and his family leading to their displacement.*

*The Department of Home Affairs has claimed that Ahmed now has a Western education, speaks English and he will be able to survive in Afghanistan if he remains unobtrusive in Kabul. Ahmed asserts that a Hazara is readily identifiable and his Western education and social development are exactly the reasons for the Taliban targeting him.*

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<sup>10</sup> Reuters: [Reuter's article on Taliban offensives of 2018](#)

Al Jazeera: [Afghan Hazaras slaughtered and Australian families want action](#)

New York Times: [Taliban Slaughter Elite Afghan Troops, and a 'Safe' District Is Falling](#)

16. Ahmed, who has exhausted all Merits Review and Judicial Review avenues, awaits the results of a request for ministerial intervention made to the Australian Minister for Home Affairs<sup>11</sup>.
17. Further, the conflict of interest is inherent in the vesting of power in the Minister for Home Affairs as final *arbitrator of asylum determinations* and concurrent *guardian of unaccompanied minors*<sup>12</sup> needs to be resolved. Preferably through division of the powers to a person of equal administrative positioning so as to be in compliance with article 3(1) of the Convention on the Rights of the Child - that all decisions must be made in the best interests of the child.
18. Moreover, the current 'legacy caseload,' as it is so named, must have legal mechanisms in place to protect asylum seekers who arrived as unaccompanied minors from the effects of the ageing-out process. This is where they start as minors but because of caseload delays, do not have their case processed until they reach adulthood. That is, there should be specific legal protection for those of special status from losing said special status simply because of turning 18. If they are a persecuted minority in their country of origin, putting these legacy caseload minors into a position of adult responsibility and administrative determination when in a clear state of relative vulnerability, is dangerous to their wellbeing and a potential threat to their right to life under the Universal Declaration of Human Rights.

**Recommendations:**

1. **Amend the Fast Track Review** system to reinstate a degree of procedural fairness to asylum seekers by providing the opportunity for a merits review which accepts fresh and compelling evidence for the assessment of the individual's claim.
2. Reinstating the ability of asylum seekers to access **legal support and translation services** to afford them a fair attempt at asserting their claim for asylum in Australia.
3. Introduce specific legal protection to safeguard vulnerable persons who have arrived by boat to Australia as unaccompanied minors from the effects of the '**ageing-out**' process.
4. Resolve the **conflict of interest** arising through the vesting of both guardianship and arbitration of claim powers in the Minister for Home Affairs through the division of these two powers to a separate authority so as to protect the interests of the child whilst having an appropriate solution to their claim decided.

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<sup>11</sup> Department of Home Affairs: [s48B, Migration Act, 1958](#)

<sup>12</sup> Victoria State Government: [Health and Human Services 'Legal Guardianship of unaccompanied humanitarian minors'](#)