



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S47/2020
File Title: Applicant S270/2019 v. Minister for Immigration and Border F
Registry: Sydney
Document filed: Form 27D - Respondent's submissions
Filing party: Respondent
Date filed: 14 Aug 2020

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No. S270 of 2019

BETWEEN:

APPLICANT S270/2019

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

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Respondent

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

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1. The respondent (**Minister**) certifies that these submissions are in a form suitable for publication on the internet.
2. These submissions are filed with the leave of the Court to address a question that arose during the hearing of the appeal concerning whether the appellant is prevented from applying for a protection visa by Subdivision AI of Division 3 of Part 2 of the *Migration Act 1958* (Cth) (**the Act**): *Appellant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 103 lines 1873-1878.
3. Section 91E(b) would prevent the appellant from applying for a protection visa if Subdivision AI applied to him at the time such an application was made. However, that subdivision would apply to the appellant only if, at the time of the application, he met the requirements of s 91C(1), which provides:

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- (1) This Subdivision applies to a non-citizen at a particular time if:
 - (a) the non-citizen is in Australia at that time; and
 - (b) at that time, the non-citizen is covered by:
 - (i) the CPA; or
 - (ii) an agreement, relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen (see section 91D); and
 - (c) the non-citizen is not excluded by the regulations from the application of this Subdivision.

Mills Oakley
 Level 7
 151 Clarence Street
 Sydney NSW 2000

Telephone: +61 2 8035 7908
 Fax: +61 2 9247 1315
 Email: njohnson@millsoakley.com.au
 Ref: Nicola Johnson

4. Section 91B defines “CPA” to mean the “Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva Switzerland, from 13 to 14 June 1989” (BFM 102 to 107). Thus, whether Subdivision AI prevents the appellant from applying for a protection visa depends upon whether, at the “particular time” that he seeks to lodge an application for such a visa, he is “covered by the CPA” (s 91C(1)(b)(i)).¹
5. Section 91C(1) is drafted using the present tense. It does not direct attention to whether a person was, at some time in the past, covered by the CPA.
6. The CPA formally came to an end by agreement as of 30 June 1996.² It follows that, since that date, no person has been “covered by the CPA”. The operation of s 91C(1)(b)(i) is therefore spent, although Subdivision AI has ongoing operation (albeit not with respect to the appellant) by reason of s 91C(1)(b)(ii).
7. The conclusion that the appellant cannot now be “covered by” the CPA is supported by *Lu v Minister for Immigration and Multicultural Affairs*,³ where Drummond J considered the meaning of “covered by” in the context of s 91C(1)(b)(ii) with respect to an agreement concerning safe third countries. His Honour stated:⁴

Given the ordinary dictionary meanings of the words, the expression “covered by” the MOU means, I think, something different from “referred to” or “mentioned in” the MOU. It connotes a closer connection than that between the person and the MOU. So far as concerns reg 2.12A(1), a person is a refugee “as covered” by the MOU if the MOU affects that person in some way.

8. By parity of reasoning, the appellant would be covered by the CPA only if, at the present time, it could be said that it “affects [him] in some way”. In circumstances where the CPA formally came to an end decades ago, plainly it does not.
9. The conclusion that s 91C(1)(b)(i) does not apply to the appellant is also supported by the purpose of Subdivision AI. That purpose was explained in the Second Reading Speech to the *Migration Legislation Amendment Bill (No 4)* as follows:⁵

The purpose of the Migration Legislation Amendment Bill (No. 4) is to ensure that Australia’s onshore refugee determination system is not open to abuse of forum

¹ There has been no suggestion that the Subdivision applies to him on any other basis.

² See record of the meeting of the UNHCR Executive Committee of the High Commissioner’s Programme Standing committee of 19 August 1996 (EC/46/SC/CRP.44).

³ (1996) 68 FCR 30.

⁴ (1996) 68 FCR 30 at 36G.

⁵ House of Representatives Hansard, 8 November 1994, p 2830.

shopping by asylum seekers who have been denied refugee status by or who have access to protection in another country. The bill ensure that non-citizens covered by the comprehensive plan of action for Indo Chinese refugees, CPA, or in relation to whom there is a safe third country, should not be able to apply for a protection visa...

These amendments to the Migration Act are being introduced following the arrival in Australia of 17 Vietnamese people on a boat ... from a refugee holding centre in Galang, Indonesia. These people, who had been rejected as refugees in Indonesia by a refugee determination process approved by the United Nations High Commissioner for Refugees, sought to have another assessment of their cases conducted by Australia. ...

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Under current domestic law there is no option but to allow such arrivals access to Australia's refugee determination process... Consequently, this access was granted despite requests from the UNHCR and the Indonesian government not to process the applicants but to return them immediately to Galang.

10. Just before the CPA formally came to an end, the United Nations declared that the CPA had "successfully met" its objectives.⁶ In those circumstances, s 91C(1)(b)(i) has likewise served its purpose, there having long since ceased to be Indo-Chinese refugees who may seek to travel to Australia in order to circumvent the refugee determination process approved by the UNHCR as part of the CPA.

20 11. For the above reasons neither s 91E(b), nor any other part of Subdivision AI, prevents the appellant from applying for a protection visa.

Dated: 13 August 2020



Stephen Donaghue
Solicitor-General of the Commonwealth

Rachel Francois
02 9151 2211
rfrancois@level22.com.au

⁶ United Nations Press Release REF/1135: *Comprehensive Plan of Action for Indo-Chinese Refugees to end in June* (6 March 1996). A copy of that document is annexed to these submissions.



United Nations

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PRESS RELEASE

REF/1135
6 MARCH 1996

COMPREHENSIVE PLAN OF ACTION FOR INDO-CHINESE REFUGEES TO END IN JUNE

6 March 1996



Press Release REF/1135

COMPREHENSIVE PLAN OF ACTION FOR INDO-CHINESE REFUGEES TO END IN JUNE

19960306 GENEVA, 6 March (UNHCR) -- The Steering Committee of the International Conference on Indo-Chinese Refugees, which seven years ago adopted a Comprehensive Plan of Action to resolve the exodus of people from Viet Nam and the Lao People's Democratic Republic, declared Tuesday, 5 March, in Geneva that the Plan would formally end on 30 June

The Plan of Action had "successfully met" its objectives, the Steering Committee declared. "Clandestine departures from the countries of origin [have] essentially come to a halt. First asylum [has] been restored and preserved. An equitable and efficient screening procedure ... permitted the resettlement in third countries of 74,287 recognized refugees... More than 500,000 persons departed Viet Nam legally."

The decision to end the Plan of Action meant that the United Nations High Commissioner for Refugees (UNHCR) will phase out care and maintenance activities in South-East Asians camps for rejected asylum seekers as of 1 July. In Hong Kong, which shelters a larger number of rejected asylum seekers, the UNHCR will maintain alternative arrangements. The Agency extensive programme to monitor people who have returned to Viet Nam and the Lao People's Democratic Republic, and its financial assistance and micro- development project to facilitate reintegration of returnees, will continue well beyond the closure of the Plan.

The Steering Committee, which met under the chairmanship of the UNHCR, noted in its final statement that "the only viable option" for Vietnamese non- refugees was to return to Viet Nam "either under voluntary repatriation or under orderly repatriation". It further noted that all non-refugees would "be treated humanely and consistent with the principles contained in the Universal Declaration of Human Rights." Such persons "can return to their country of origin in safety and dignity", the Steering Committee declared.

The Steering Committee also noted a statement by the Government of Viet Nam indicating that it would create favourable conditions permitting non-refugees who return to Viet Nam to then depart the country, provided that they are eligible for exit permits from Viet Nam. The United States Government indicated at the meeting that it would offer expanded opportunities for the departure of returnees from Viet Nam. The Steering Committee expressed "the hope that this would encourage the remaining population in camps to return home voluntarily as soon as possible".

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- 2 - Press Release REF/1135 6 March 1996

When the Steering Committee first met, in 1989, hundreds of thousands of people were pouring out of Viet Nam and the Lao People's Democratic Republic by land and boat. Faced with the continuing exodus, and increasing reluctance by third countries to maintain resettlement opportunities for every Vietnamese or Laotian exile, countries of first asylum in South-East Asia threatened push-backs of the asylum seekers.

The International Conference on Indo-Chinese Refugees brought Viet Nam and the Lao People's Democratic Republic to the table for the first time, along with first-asylum and resettlement countries, to share responsibility for the asylum seekers and guarantee asylum to all refugees. The Plan, which the Conference adopted, set up alternative, legal departure programmes. It also guaranteed that every asylum seeker would receive refuge in first-asylum countries, pending determination of his or her refugee claim. Screening procedures were adopted to examine every individual's claim to refugee status. Recognized refugees were to receive resettlement opportunities. Rejected asylum seekers were to return to their home countries, whose governments agreed to refrain from any discrimination, harassment, persecution or unfair treatment.

Under the Plan, the UNHCR provided humanitarian assistance to the asylum seekers and advised countries of first asylum on the implementation of status determination procedures to identify genuine refugees. It also set up extensive monitoring mechanisms in the countries of origin, and gave significant financial assistance to the returnees and to the communities which absorbed them.

"The Plan, as a framework for international cooperation to provide humanitarian solutions to Indo-Chinese asylum seekers, has accomplished its goals", UNHCR Assistant High Commissioner Sergio Vieira de Mello told the Steering Committee in his opening statement. "Asylum has been upheld, genuine refugees have been recognized and resettlement has been generously provided. Returnees have been fairly and humanely received under the watchful eye of UNHCR."

Mr. Vieira de Mello noted that UNHCR assistance to returnees in Viet Nam and the Lao People's Democratic Republic would continue. However, he said, "UNHCR cannot continue indefinitely to spend for one Vietnamese non-refugee nearly eight times as much as we spend for

a Rwandan refugee. UNHCR cannot justify continuing its care and maintenance expenditure... for a caseload not in need of international protection."

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On 1 February, there were 1,721 Vietnamese recognized refugees in South- East Asia and Hong Kong, and 36,390 non-refugees. Of those Vietnamese non- refugees, 19,801 were in Hong Kong. There were also 6,130 Laotian refugees in Thailand, and 160 screened-out Laotian non-refugees. Over 74,000 Vietnamese and Laotian refugees had resettled to third countries. More than 77,000 non- refugees had already returned, voluntarily, to Viet Nam, and some 27,000 had returned voluntarily to the Democratic Republic.

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