

# ASSESSING REFUGEE PROTECTION CLAIMS AT AUSTRALIAN AIRPORTS: THE GAP BETWEEN LAW, POLICY, AND PRACTICE

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*Australia's current approach to processing individuals who arrive by air and raise protection claims at or before immigration clearance at Australian airports has not been previously explored. This article reveals a set of policy and procedural instructions, recently released by the Department of Home Affairs (DHA) under the Freedom of Information Act 1982 (Cth), which establishes the administrative process of 'entry screening'. The article examines entry screening within the transnational framework governing Australia's legal obligations towards individuals seeking international protection. While much scholarly and public attention has been directed towards policies such as offshore detention and interdiction at sea, the documents reveal that policies designed to deter 'unauthorised maritime arrivals' have similar manifestations — and consequences — for 'unauthorised air arrivals'. The article then turns to an analysis of domestic law, arguing that the Migration Act 1958 (Cth) does not authorise the entry screening procedures and that the procedures contradict certain statutory guarantees and procedural fairness. The documents further indicate that DHA lacks accurate data on protection claims made in Australian airports. Finally, the article examines why the current practice of entry screening violates Australia's international legal obligations of non-refoulement and non-penalisation.*

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## I INTRODUCTION

Despite playing a key role in the development of the post-World War II international refugee law framework, in recent years Australian practice has openly challenged well-settled international legal norms through the use of policies meant to deter individuals from seeking protection in Australia. While much scholarly and public attention has been directed towards the Australian government's attempts to create zones free of legal protections and judicial review through the use of externalisation policies such as offshore detention and interdiction at sea — essentially leveraging physical spaces away from the Australian mainland to effect policy objectives — information recently released by the Department of Home Affairs ('DHA') in response to requests under the *Freedom of Information Act 1982* (Cth) ('FOI Act')<sup>1</sup> reveals the creation and maintenance of similar zones on the Australian mainland.

A number of recent media reports concerning people seeking asylum at Australian airports demonstrate Australia's approach to people seeking asylum by air. In February 2019, an Australian Broadcasting Corporation ('ABC') investigation found evidence that the Australian Border Force ('ABF') had turned back at least two young Saudi Arabian women at Sydney Airport after the women requested asylum.<sup>2</sup> The ABC reported that one of the women, called

<sup>1</sup> *Freedom of Information Act 1982* (Cth) ('FOI Act').

<sup>2</sup> Sophie McNeill, Sharon O'Neill and Mary Fallon, 'Australian Border Force Accused of Targeting Women Suspected of Fleeing Saudi Arabia', *ABC News* (Web Page, 5 February 2019)

Amal, arrived at Sydney Airport in November 2017 when ABF officials became suspicious that she intended to request asylum.<sup>3</sup> After informing Amal that she would not be allowed to enter Australia, Amal made clear her intention to claim asylum to officials, which the ABF apparently denied.<sup>4</sup> Amal was then transferred to an immigration detention centre, where she was not offered a lawyer, before being removed to South Korea (where she had boarded her flight to Australia).<sup>5</sup>

In November of the same year, the Guardian Australia reported that two gay journalists from Saudi Arabia had been detained after seeking asylum at an Australian airport.<sup>6</sup> The men fled Saudi Arabia, where homosexuality is illegal and punishable by death, after being outed as gay by Saudi state security. According to their Australian lawyer, the men had already cleared passport control on valid tourist visas before ABF officials in customs inspected their bags and phones and asked if they intended to apply for asylum.<sup>7</sup> When the men indicated that they did intend to apply for asylum they were detained. They were released from detention on bridging visas in December 2019.<sup>8</sup> These incidents do not appear to be isolated, though the DHA does not keep accurate data regarding the number of individuals who have raised protection claims at Australian airports.<sup>9</sup>

<<https://www.abc.net.au/news/2019-02-04/border-force-accused-of-targeting-saudi-women-traveling-alone/10768036>>.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Helen Davidson, 'Two Gay Saudi Journalists "Treated like Criminals" in Australia after Seeking Asylum', *The Guardian Australia* (Web Page, 16 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/16/two-gay-saudi-journalists-treated-like-criminals-in-australia-after-seeking-asylum>>.

<sup>7</sup> 'Gay Saudi Journalists in Australian Detention after Seeking Asylum', *The Sydney Morning Herald* (online at 19 November 2019) <<https://www.smh.com.au/world/middle-east/gay-saudi-journalists-in-australian-detention-after-seeking-asylum-20191119-p53bvu.html>>.

<sup>8</sup> 'Gay Saudi Couple Sultan and Nassar Released from Australian Detention', *SBS News* (Web Page, 17 December 2019) <<https://www.sbs.com.au/news/gay-saudi-couple-sultan-and-nassar-released-from-australian-detention>>.

<sup>9</sup> Department of Home Affairs (Cth), *Decision on Internal Review: Freedom of Information Act 1982* (ADF2019/60244, 27 May 2019) 3 (emphasis added) <<https://www.righttoknow.org.au/request/5131/response/14847/attach/3/Decision%20letter%20FA%2018%2011%2001551%20R1.pdf>> ('FOI Decision on Internal Review').

[R]eferrals for persons seeking to engage Australia's protection claims are in fact recorded in the relevant system under one of two separate codes. One of these codes is specific to Refugee Claims, the other is for Manual Referrals/Reason Unknown. A very low number of referrals have been recorded under the code for Refugee Claims and as there is no

The transnational framework governing Australia's legal obligations towards individuals seeking international protection, like Amal and the men discussed above, consists of a complex web of legal sources including international law, domestic legislation, judicial decisions, administrative law, and executive power. International law provides the footing upon which the Australian domestic protection framework rests, however imperfectly.<sup>10</sup> Australia's ability to act is underpinned by the international legal norm of non-refoulement, which prohibits the return or removal of an individual to a place where they risk persecution or other serious harm,<sup>11</sup> as well as by rule of law principles such as procedural fairness.<sup>12</sup> While reflected in international treaties,<sup>13</sup> the principle of

distinct way of determining which of the Manual referrals may have related to protection claims, the *total number of persons raising protection claims at Australia's borders remains undetermined*.

- <sup>10</sup> Even the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 10 (emphasis added) ('Migration and Maritime Powers Bill Explanatory Memorandum') notes the removal of references to certain international obligations in domestic law:

The Bill also removes most references to the Refugees Convention from the *Migration Act* and instead creates a new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention. It is not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention but rather to codify Australia's interpretation of these obligations within certain sections of the *Migration Act*.

- <sup>11</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33 ('1951 Convention'); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 7 ('1967 Protocol'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 ('CAT'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7 ('ICCPR'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37 ('CRC'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 15 ('CRPD').
- <sup>12</sup> See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636: '[T]he interests which the exercise of a power of deportation are apt to affect are such as tend to attract the protection of the principles of natural justice': at 659 [66] (Gummow, Hayne, Crennan and Bell JJ), citing *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J) ('*Kioa*'). See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) Preamble para 3.
- <sup>13</sup> *1951 Convention* (n 11) art 33; *1967 Protocol* (n 11) art 7; *CAT* (n 11) art 3; *ICCPR* (n 11) arts 6, 7. Though not contained explicitly within the *ICCPR* (n 11), the obligation of non-refoulement has been considered part of the instrument: Human Rights Committee, *General Comment No 31* [80]: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/REV.1/ADD.13 (26 May 2004) 5 [12].

non-refoulement also forms part of customary international law,<sup>14</sup> and Australian domestic law.<sup>15</sup> Yet successive federal governments have taken explicit steps to weaken the application of the obligation of non-refoulement, in part by framing full and effective implementation of the obligation as being at odds with state sovereignty.<sup>16</sup>

Whether the Saudi cases represent a small segment of individuals removed from Australia after seeking asylum, or whether their stories form part of a larger pattern of behaviour is not known. The DHA has confirmed that although ‘referrals for persons seeking to engage Australia’s protection claims are in fact recorded’,<sup>17</sup> the DHA’s record keeping procedures render it impossible to determine ‘the total number of persons raising protection claims at Australia’s borders.’<sup>18</sup> Until recently, little conclusive information was publicly available regarding the current<sup>19</sup> entry screening procedures for individuals seeking

<sup>14</sup> See, eg, United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Advisory Opinion, 26 January 2007) 7 [15] <<https://www.refworld.org/docid/45f17a1a4.html>>; Guy S Goodwin-Gill, ‘Non-Refoulement, Temporary Refuge, and the “New” Asylum Seekers’ in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity?: War Refugees and International Humanitarian Law* (Brill Nijhoff, 2014) 433, 458 (‘Non-Refoulement and Temporary Refuge’); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 354; Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 140 [196].

<sup>15</sup> See, eg, Department of Home Affairs (Cth), *The Administration of the Immigration Program* (Background Paper, 2<sup>nd</sup> ed, 3 April 2019) 10 [34]. But see *Migration Act 1958* (Cth) s 197C (‘Migration Act’).

<sup>16</sup> See generally Claire Higgins, *Asylum by Boat: Origins of Australia’s Refugee Policy* (NewSouth Publishing, 2017); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Asher Lazarus Hirsch, ‘The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls’ (2017) 36(3) *Refugee Survey Quarterly* 48; Jennifer Hyndman and Alison Mountz, ‘Another Brick in the Wall?: Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43(2) *Government and Opposition* 249.

<sup>17</sup> *FOI Decision on Internal Review* (n 9) 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> Various iterations of screening protection claimants at Australian airports have been in place since at least 2001, though the focus of those procedures appears to have been on referring people to a protection visa process. For example, according to Department of Immigration and Border Protection (Cth), *Immigration Clearance at Airports and Seaports* (MSI No 327, 10 August 2001), ‘[a]ny person arriving in Australia who claims to be a refugee or who otherwise states that they fear return to their country of citizenship or usual residence should be interviewed to determine the nature of those claims. The interviews should be carried out in accordance with PAM3 guidelines on *Protection Visa — 866* and the *Protection Visa Procedures*

protection at airports on the Australian mainland. This article brings those procedures to light, while analysing their domestic and international legal implications.

Part II of this article examines the entry screening procedures for individuals who seek protection before, or during, immigration clearance at an Australian airport. This Part defines key terms and explores the content and operation of the policy guidance and procedural instructions. This article does not address the procedures for individuals who seek protection *after* passing through immigration clearance, as those claims are subject to a different process. Part II concludes with an examination of the claimed statutory basis for the policy, as well as the legal protection framework within which the entry screening procedures are meant to operate. Part III then turns to an analysis of the various domestic legal and practical issues implicated by the entry screening process, as well as potential bases for challenging the policy and procedures. This Part explores the right to access to counsel and the right to visa application forms where a non-citizen is detained, as well as the lack of review of entry screening decisions, the validity of the entry screening process under the *Migration Act 1958* (Cth) (*'Migration Act'*) and the practical considerations that impede an individual's ability to raise these claims while detained at an airport.

Part IV examines the international law implications of the entry screening procedures, including the interplay between the entry screening procedures and the obligation of non-refoulement as contained in various international refugee law and human rights treaties, as well as the prohibition on state penalisation of refugees and asylum seekers on account of their illegal entry or presence under international law. This Part seeks to initiate a deeper exploration of the international law implications of a policy that has not previously been the subject of scholarly consideration. Part concludes that the entry screening procedures may be inconsistent with both domestic and international law.

As vividly demonstrated in the two Saudi cases, the entry screening procedures go beyond a simple inquiry into whether an individual is seeking protection. Rather, entry screening enables discretionary decision-making as to the

*Manual: Border applicants'*: at 14.11.1–2. The Department of Immigration and Border Protection (Cth), *Protection Visa Procedures Manual* (PAM3, 1 November 2000) states that '[a] person in immigration clearance may apply for a [protection visa]'; and provided further instructions for screening persons arriving with, and without, a valid visa and referring them to the appropriate application process: at 2.5.1, 2.5.5. For an early exploration of Australia's practice of removing travellers who arrive at airports *without* authorisation, see Savitri Taylor, 'Rethinking Australia's Practice of "Turning Around" Unauthorised Arrivals: The Case for Good Faith Implementation of Australia's Protection Obligations' (1999) 11(1) *Pacifica Review: Peace, Security & Global Change* 43.

strength and validity of a protection claim in a procedure lacking transparency and largely shielded from judicial review.

## II ENTRY SCREENING PROCEDURES FOR INDIVIDUALS SEEKING TO ENGAGE AUSTRALIA'S PROTECTION OBLIGATIONS IN IMMIGRATION CLEARANCE

Though individuals may seek protection in Australia after arriving by water, or by air, legal scholarship tends to place greater focus on those seeking to reach Australia by boat.<sup>20</sup> To be sure, policies of interdiction and offshore processing, among other practices, raise important and enduring questions about Australia's regard for human rights principles and the implementation of its international legal obligations.<sup>21</sup> Yet many of these policies have associated analogues in the context of air arrivals. For example, an individual who reaches any part of Australian territory by boat, without a visa, is designated an 'unauthorised maritime arrival' ('UMA')<sup>22</sup> and may not make a 'valid application' for a visa subject to a non-compellable ministerial power permitting them to do so.<sup>23</sup> However, non-citizens who arrive at an Australian airport with a valid visa and seek protection, but who are subsequently refused immigration clearance, are considered 'unauthorised air arrivals' ('UAA')<sup>24</sup> and legally reconstituted as

<sup>20</sup> See, eg, Jane McAdam, 'Australia and Asylum Seekers' (2013) 25(3) *International Journal of Refugee Law* 435; Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism?: Refugee Status Determination in Australia's "Excised" Territory' (2011) 23(4) *International Journal of Refugee Law* 583; Andonea Dickson, 'Distancing Asylum Seekers from the State: Australia's Evolving Political Geography of Immigration and Border Control' (2015) 46(4) *Australian Geographer* 437.

<sup>21</sup> For a detailed examination of these questions, see generally Ghezelbash (n 16); Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011); David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press, 2019).

<sup>22</sup> *Migration Act* (n 15) s 5AA.

<sup>23</sup> *Ibid* s 46A.

<sup>24</sup> Though not defined by the *Migration Act* (n 15), the term 'unauthorised air arrivals' is used to distinguish this class of persons: see, eg, Migration and Maritime Powers Bill Explanatory Memorandum (n 10) 113 [754], which states that

[a]n unauthorised air arrival does not have a valid visa that is in effect when they enter Australia or has had their visa cancelled in immigration clearance. While some of these persons may have arrived in Australia by lawful means, they may have been refused entry at Australian airports or ports for reasons including that they are found not to intend to abide by the visa conditions (for example, where the reason for the grant of the visa no longer exists) or on the basis of document fraud.

See generally Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 21 October 2019, 103 (Michael Outram, Australian Border Force Commissioner) ('Commissioner Outram's Evidence to Senate Standing Committee').

outside of the ‘migration zone’.<sup>25</sup> The consequence is that the individual is detained and precluded from being able to access a permanent protection visa.<sup>26</sup> This reconstitution triggers an entry screening process that can, at best, result in being granted the facilities to apply for a temporary protection visa. At worst, it may lead to the summary removal of the individual from Australia.

This Part examines the entry screening process for non-citizens who seek protection at Australian airports at or before immigration clearance. Though neither the public, nor the DHA has reliable data on the number of individuals who have raised protection claims at Australian airports, currently available statistics shed some light on the numbers of individuals arriving by air who have interacted with various aspects of the onshore protection or deterrence framework. This Part then identifies and defines various legal terms used in two newly-released DHA guidelines while providing an overview of operational policy and procedure for protection claims at airports.<sup>27</sup> Part II concludes with an examination of Australia’s onshore protection framework for air arrivals, which serves to frame the analysis of the various domestic legal and practical issues surrounding the entry screening process addressed in Part III.

### A Overview and Statistics

The *Migration Act* is the primary source of legislative authority for Australia’s immigration system and sets forth the object of ‘regulat[ing], in the national

<sup>25</sup> *Migration Act* (n 15) s 5 (definition of ‘migration zone’).

<sup>26</sup> Immigration clearance, which grants entry into the ‘migration zone’, is required under s 72(1) of the *Migration Act* (n 15) before a person may apply for a bridging visa that may lead to the later protection visa. See below nn 88–9 and accompanying text.

<sup>27</sup> The first newly-released document is the Department of Immigration and Citizenship (Cth), *Entry Screening Guidelines* (August 2013) (‘*Entry Screening Guidelines*’). The second is the Department of Home Affairs (Cth), *Protection Claims at the Border* (Procedural Instruction, 21 November 2018) (‘*Protection Claims at the Border Instruction*’). The *Protection Claims at the Border Instruction* (n 27) indicates that it must be read in conjunction with several other documents, including the Department of Home Affairs (Cth), *Events after Refusal of Immigration Clearance* (BC-2671, 8 August 2018) (‘*Events after Refusal Instruction*’) and the Department of Home Affairs (Cth), *Summary Removal* (BC-2460, 3 June 2018) (‘*Summary Removal Instruction*’). These documents were obtained as part of a series of requests under the *FOI Act* (n 1): Department of Home Affairs (Cth), *Freedom of Information (FOI) Request: Access Decision* (ADF2018/236776, 3 April 2019) <[https://www.righttoknow.org.au/request/policies\\_and\\_procedures\\_regardin#incoming-14558](https://www.righttoknow.org.au/request/policies_and_procedures_regardin#incoming-14558)>; Department of Home Affairs (Cth), *Freedom of Information (FOI) Request: Access Decision* (OBJ2019/30118, 11 December 2019) <[https://www.righttoknow.org.au/request/policies\\_and\\_procedural\\_instruct#incoming-16256](https://www.righttoknow.org.au/request/policies_and_procedural_instruct#incoming-16256)>.



interest, the coming into, and presence in Australia of non-citizens.<sup>28</sup> This framework relies upon the existence and issuance of visas as the sole means by which a non-citizen may lawfully enter or remain in Australia.<sup>29</sup> The visa requirement also underpins the DHA's strategic approach to border management, which constructs the 'border' as 'a complex continuum that encompasses the physical border, [DHA's] offshore operations, and [DHA's] activities in Australian maritime and air domains'.<sup>30</sup> This system of border controls and defences specifically includes 'work ahead of, at and after the border' and 'collaborat[ion] with domestic and international partners in law enforcement and policy', among other efforts.<sup>31</sup>

For an individual seeking to travel to Australia by air, this construction of the border as a continuum invokes a multi-step process of entry which requires a successful visa application, followed by subsequent phases of remote and in-person eligibility reviews. Where a person may seek protection in Australia, or is perceived by the government as a potential asylum seeker, each review phase creates a point of inquiry permitting enforcement actors to identify and take action against 'those who are non-compliant with their visa conditions' among other disqualifications.<sup>32</sup> Though much of this process occurs extraterritorially and aims to prevent the arrival of persons without prior authorisation, Australia has extended these '*non-entrée* policies'<sup>33</sup> to individuals arriving *with* prior authorisation, by air, in its physical territory. As a result, evaluating Australia's compliance with its international protection obligations in the context of air

<sup>28</sup> *Migration Act* (n 15) s 4(1). Section 51 of the *Australian Constitution* sets forth the legislative powers of the Parliament. These include 'naturalization and aliens' as well as 'immigration and emigration': at ss 51(xix), (xxvii).

<sup>29</sup> Section 4(2) of the *Migration Act* (n 15) states that '[t]o advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.'

<sup>30</sup> Department of Immigration and Border Protection (Cth), *Strategy 2020* (Strategy Paper, July 2015) 2 ('*Strategy 2020*'). See also the Australian Border Force's ('ABF') statement: 'We consider the border not to be a purely physical barrier separating nation states, but a complex continuum stretching offshore and onshore, including [its] overseas maritime, physical border and domestic dimensions': Australian Government, 'Australian Border Force', *Directory* (Web Page, 18 April 2019) <<https://www.directory.gov.au/portfolios/home-affairs/department-home-affairs/australian-border-force-0>>.

<sup>31</sup> *Strategy 2020* (n 30) 12.

<sup>32</sup> *Ibid* 17. See also Hirsch (n 16): 'By requiring all non-citizens to hold a valid visa, and by employing a range of extraterritorial visa checking systems, Australia is able to remotely control who can enter and exit its ports': at 55; Commissioner Outram's Evidence to Senate Standing Committee (n 24) 100–4.

<sup>33</sup> James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 291. Hathaway goes on to say that this term describes 'the array of legalized policies adopted by States to stymie access by refugees to their territories': at 291 n 70.

arrivals — as well as the domestic legal effects of its implementation choices — requires a holistic understanding of the border continuum and the interplay between layers of enforcement focused screening and access to the legal migration framework.

In the financial year of 2018–19, the ABF processed 44.7 million air travellers arriving with visas at Australian airports.<sup>34</sup> Yet, for an asylum seeker, the requirement to obtain a valid visa presents the first obstacle to lawful entry.<sup>35</sup> As the Australian government ‘does not issue a visa for the purpose of entering its asylum system’,<sup>36</sup> the individual must qualify for another type of visa.<sup>37</sup> Where a potential asylum seeker successfully obtains a visa, the government uses a range of additional measures such as Airline Liaison Officers (‘ALOs’), carrier sanctions, and a variety of surveillance and control technologies to identify potential protection claimants and prevent access to Australian territory.<sup>38</sup> The ‘ALOs operate ahead of the border’<sup>39</sup> at overseas airports, collaborating with airlines, airport security groups and foreign governments to identify improperly documented travellers and facilitate ‘genuine’ travel.<sup>40</sup> During this time, ALOs prevented 387 ‘improperly documented’ persons from entering

<sup>34</sup> Department of Home Affairs (Cth), *Annual Report 2018–19* (Report, 2019) 22 (‘DHA 2018–19 Annual Report’).

<sup>35</sup> Andrew Brouwer and Judith Kumin, ‘Interception and Asylum: When Migration Control and Human Rights Collide’ (2003) 21(4) *Refuge* 6, 8: ‘In order to obtain a visa, an applicant must present a valid passport, but a person who fears persecution at the hands of his or her government is unlikely to take the risk of approaching the authorities for a travel document ... “[o]ften it is impossible, or too dangerous, for a refugee to obtain the necessary travel documents from authorities.”’

<sup>36</sup> Hirsch (n 16) 57.

<sup>37</sup> A student visa, for example, contains a ‘genuine temporary entrant’ requirement that an individual seeking protection would be unlikely to satisfy — ‘An applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to temporarily enter and remain in Australia’: Minister for Immigration and Border Protection (Cth), *Direction No 69: Assessing the Genuine Temporary Entrant Criterion for Student Visa and Student Guardian Visa Applications* (2016) 3. All applicants for a visitor visa must satisfy the primary criteria found in *Migration Regulations 1994* (Cth) reg 600.211 (‘*Migration Regulations*’), which include that the

applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to ...

(b) whether the applicant intends to comply with the conditions to which the Subclass 600 visa would be subject; and

(c) any other relevant matter.

<sup>38</sup> Hirsch (n 16) 59–60.

<sup>39</sup> Department of Home Affairs (Cth), *Annual Report 2017–18* (Report, 2018) 42 (‘DHA 2017–18 Annual Report’).

<sup>40</sup> *Ibid.* See also *DHA 2018–19 Annual Report* (n 34) 22; Commissioner Outram’s Evidence to Senate Standing Committee (n 24) 100–4.

Australia,<sup>41</sup> while offloading an additional 1,343 travellers with visas from flights.<sup>42</sup> The DHA has not indicated how many of those 1,730 individuals were prevented from travelling to Australia because of potential protection claims.

Once an international traveller has arrived in Australia, they are considered to be outside the 'migration zone' under Australian domestic law until they are 'immigration cleared'.<sup>43</sup> Immigration clearance is a legal term of art describing the zone that every passenger must pass through before being allowed to legally enter Australia.<sup>44</sup> To be 'immigration cleared', the traveller must provide evidence of identity, a valid visa,<sup>45</sup> and leave the airport entirely — not only the immigration and customs zone — with the permission of a 'clearance authority' and not subject to immigration detention.<sup>46</sup> Whether a traveller has been immigration cleared has a significant impact on their eligibility to apply for certain visas, especially a permanent protection visa, though international law makes clear that states may not use these types of international zones to prevent individuals 'from seeking and enjoying asylum from persecution'.<sup>47</sup> In 2018–19, the DHA refused immigration clearance to 4,191 individuals who had arrived in Australia by plane, with a visa.<sup>48</sup>

Also in 2018–19, the DHA reported that only 60 travellers requested protection upon arrival at an international airport in Australia, a decrease from 62 claimants in the prior year.<sup>49</sup> However, this number is likely to be inaccurate

<sup>41</sup> *DHA 2018–19 Annual Report* (n 34) 22.

<sup>42</sup> *Ibid.* This number represents an increase of more than 142% from 2017–18. The 2017–18 number of 555 offloaded travellers represented an increase from 2016–17 of 300%, partly as a result of 'engagement with airlines [which] led to an increase in traveller referrals to ALOs by airline staff': *DHA 2017–18 Annual Report* (n 39) 45.

<sup>43</sup> *Migration Act* (n 15) ss 5 (definition of 'immigration cleared'), 166, 172.

<sup>44</sup> *Ibid* ss 166, 172.

<sup>45</sup> In the case of an Australian citizen, the requirement is to provide evidence of identity and Australian citizenship: *ibid* s 166(1)(a)(i).

<sup>46</sup> *Ibid* s 172(1). See also *Cujba v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 11, 15–16 [16]–[18] (Branson J).

<sup>47</sup> United Nations High Commissioner for Refugees, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports* (Discussion Paper, 17 January 2019) 1 [3] <<https://www.refworld.org/docid/5c4730a44.html>> ('*Legal Considerations regarding Air Arrivals*'); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27 ('VCLT').

<sup>48</sup> *DHA 2018–19 Annual Report* (n 34) 39.

<sup>49</sup> Commissioner Outram's Evidence to Senate Standing Committee (n 24) 103. For prior year information, see Department of Immigration and Border Protection (Cth), Response to Question on Notice No 231 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, *Asylum Claims at Australian Airports*, 23 October 2017 ('DIBP Response to Question on Notice').

because the DHA has expressly conceded it does not track the total number of protection claims raised at airports. In response to requests from the authors under the *FOI Act*, the DHA stated that ‘as there is no distinct way of determining which of the Manual referrals may have related to protection Claims, the total number of persons raising protection claims at Australia’s borders remains undetermined.’<sup>50</sup>

The DHA also did not disclose how many of the 60 protection claimants were removed from Australia, or how many were granted some form of protection.<sup>51</sup> This small number of asylum applicants at airports stands in stark contrast to the 24,566 applicants for protection visas in 2018–19 who arrived in Australia with a visa, by air, and applied after being immigration cleared.<sup>52</sup> The number of individuals who apply for protection visas *after* immigration clearance raise distinct policy and legal questions, which are not the focus of this article. Reference to this statistic simply highlights the apparent disparity in protection claims recorded to occur before or during immigration clearance, as opposed to claims made after immigration clearance. In short, the DHA’s acknowledgment that the agency does not keep accurate, disaggregated data hinders effective evaluation of the entry screening process.

### B Entry Screening Guidelines and the Procedural Instructions

DHA staff who make decisions, or exercise powers or functions under the *Migration Act*, have a duty to make decisions and exercise their powers or functions in accordance with legislation and legal principle.<sup>53</sup> While agencies may develop policies to facilitate decision-making, policy documents do not have

<sup>50</sup> *FOI Decision on Internal Review* (n 9) 3.

<sup>51</sup> DIBP Response to Question on Notice (n 49): ‘The detailed breakdown of this information requested is not available in the Department’s reporting suite and is not disaggregated from other Protection visa assessment outcomes.’

<sup>52</sup> It is important to note that the 24,566 total provided by the DHA does not indicate the year in which the applicant first-entered Australia. The number only reflects the number of individuals applying for protection in the 2018–19 reporting year, which does not mean that the applicant entered Australia in the 2018–19 reporting year: Department of Home Affairs (Cth), *Onshore Humanitarian Program 2018–19: Delivery and Outcomes for Non-Illegal Maritime Arrival (Non-IMA) as at 30 June 2019* (Factsheet, 2019).

<sup>53</sup> *Protection Claims at the Border Instruction* (n 27) 18, citing the Australian Public Service (‘APS’) Code of Conduct, which provides that ‘[a]n APS employee must comply with any lawful and reasonable direction given by someone in the employee’s Agency who has authority to give the direction’: *Public Service Act 1999* (Cth) s 13(5). See also *Australian Border Force Act 2015* (Cth) ss 55(1), 57.

the force of law.<sup>54</sup> The DHA has issued several policy documents intended to govern the actions of staff in the ‘aviation and maritime environments providing immigration clearance’ for those ‘[t]ravellers who seek to engage Australia’s protection obligations whilst in immigration clearance.’<sup>55</sup> The two key documents focused on here are the *Entry Screening Guidelines* and the *Protection Claims at the Border Instruction*, which together provide an overview of operational policy and procedure.<sup>56</sup>

‘Entry screening’ is the process to which all ‘non-citizens who are refused immigration clearance at an airport and claim that they cannot return to their home country’<sup>57</sup> are subjected. The *Entry Screening Guidelines* set forth the general policy guidance and procedures for entry screening, while the *Protection Claims at the Border Instruction* provides detailed, step-by-step guidance for processing protection claims at the border. According to the *Entry Screening Guidelines*, entry screening is conducted to ascertain a non-citizen’s reasons for travel to Australia and any reason why they cannot return to their home country as part of the ‘department’s consideration of whether a non-citizen should be removed from Australia, or whether they should remain in Australia pending further departmental consideration.’<sup>58</sup> Thus, entry screening will either result in a non-citizen being ‘screened-in’ if their reasons for why they cannot return to their home country relate to Australia’s protection obligations, or ‘screened-out’ if their reasons do not relate to Australia’s protection obligations.<sup>59</sup> A ‘screened-in’ non-citizen will be allowed to remain in Australia pending further consideration of their case, while a ‘screened-out’ non-citizen ‘is [placed] on a removal pathway.’<sup>60</sup>

<sup>54</sup> See, eg, *Sariman and Minister for Immigration and Citizenship* [2012] AATA 387: ‘[P]olicy documents are merely a statement of usual administrative practice and do not have the force of law’: at [11] (Dr McDermott), citing *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31, 37 [24] (Heerey, Mansfield and Hely JJ). See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Drake v Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634 (*‘Drake [No 2]’*). While lacking the force of law, see below Part III(C) discussing the circumstances in which policy may still be legally relevant for the purposes of judicial review.

<sup>55</sup> *Protection Claims at the Border Instruction* (n 27) 4. Protection claims made after immigration clearance are outside the scope of the procedural instruction.

<sup>56</sup> *Entry Screening Guidelines* (n 27); *Protection Claims at the Border Instruction* (n 27).

<sup>57</sup> *Entry Screening Guidelines* (n 27) 3. All UMAs are also subject to entry screening. However, screening will not be conducted where a non-citizen requests removal from Australia prior to being screened: at 4.

<sup>58</sup> *Ibid* 3.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

Figure 1: Entry Screening Process for a Traveller Refused Immigration Clearance and ‘Screened In’

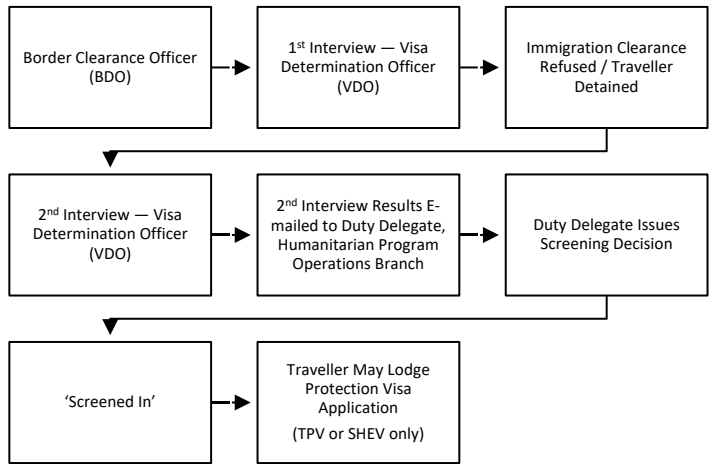
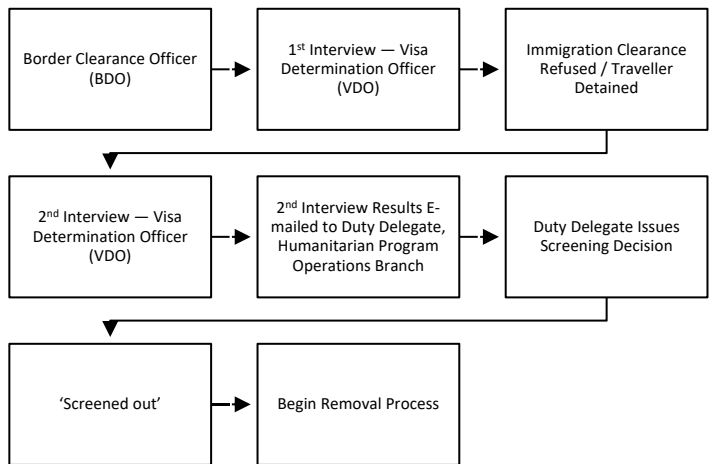


Figure 2: Entry Screening Process for Traveller Refused Immigration Clearance and ‘Screened Out’



According to the *Protection Claims at the Border Instruction*, a non-citizen such as Amal, who arrives at an Australian airport may ‘claim protection at any time while in immigration clearance.’<sup>61</sup> Where a traveller indicates a ‘wish to seek

<sup>61</sup> *Protection Claims at the Border Instruction* (n 27) 4. See also *Summary Removal Instruction* (n 27) which directs ABF officials to ‘immediately refer the traveller to their supervisor for advice

protection<sup>62</sup> to a Border Clearance Officer ('BCO') at the primary line,<sup>63</sup> that officer must refer the traveller to a Visa Determination Officer ('VDO')<sup>64</sup> in the secondary immigration area.<sup>65</sup> Though the non-citizen is referred to the secondary immigration area after raising a protection claim, the first interview with the VDO only determines whether the non-citizen can be immigration cleared and does not explore the protection claim.<sup>66</sup> To that end, the VDO examines whether the non-citizen has complied with s 166 of the *Migration Act* and, if the non-citizen has presented with a visa, whether 'the purpose for the visa grant aligns with the traveller's intention for entry to Australia.'<sup>67</sup> In other words, if the person intends to enter Australia to seek asylum, they may be found not to be entering Australia for the intended purposes of their visa, such as tourism, work or study. The DHA interprets this as allowing them to cancel the traveller's visa as they may have misrepresented their reason for entering Australia.<sup>68</sup>

After the first interview, the *Protection Claims at the Border Instruction* requires the VDO to discuss the case with the Senior Border Force Officer or Border Force Supervisor and decide whether to:

- 1 refuse immigration clearance on the basis of non-compliance with s 166 of the *Migration Act*, where the traveller presents without a travel document and/or visa;
- 2 issue a *Notice of intention to consider cancellation* ... where the traveller holds a visa and ... there are grounds to consider visa cancellation;
- 3 continue with immigration clearance, where the traveller meets s 166 of the *Migration Act* and there is insufficient or no evidence to support consideration of visa cancellation.<sup>69</sup>

on how to proceed' if at any time the individual makes a request for protection 'or states that they are fearful of returning to their country of citizenship or usual residence': at 11.

<sup>62</sup> *Protection Claims at the Border Instruction* (n 27) 4.

<sup>63</sup> A Border Clearance Officer is defined as an 'ABF officer who has delegated authority to undertake *primary* Customs, Immigration and Biosecurity clearance': *ibid* 5 (emphasis added).

<sup>64</sup> A Visa Determination Officer ('VDO') is defined as an 'ABF officer who has a delegated authority to undertake *secondary* Customs, Immigration and clearance': *ibid* 9 (emphasis added).

<sup>65</sup> *Ibid* 4.

<sup>66</sup> *Ibid* 12.

<sup>67</sup> *Ibid*.

<sup>68</sup> For an in-depth examination of issues surrounding visa cancellations in immigration clearance see, eg, Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) 148–55.

<sup>69</sup> *Protection Claims at the Border Instruction* (n 27) 13.

If the non-citizen is refused immigration clearance for either having presented without a visa and/or travel document, or having their visa cancelled at the border, the VDO must detain the non-citizen and provide them with a break before commencing the second interview, also called the 'pre-screening interview'.<sup>70</sup>

A pre-screening interview must be conducted where a non-citizen makes a claim for protection in immigration clearance in order to establish the non-citizen's reason for travel to Australia and record any claims that 'prima facie may assist the delegate to decide whether the traveller may engage Australia's protection obligations'.<sup>71</sup> The VDO must follow a prescribed template to record 'the traveller's claims that may relate to Australia's non-refoulement obligations'<sup>72</sup> arising under the *Migration Act*.<sup>73</sup> During the pre-screening interview, the VDO must also facilitate access to a consular official or the Office of the United Nations High Commissioner for Refugees ('UNHCR') upon the non-citizen's request.<sup>74</sup>

After concluding the pre-screening interview, the VDO must 'email the traveller's details and a copy of the completed pre-screening interview to the Duty Delegate, Humanitarian Program Operations Branch' who will make 'a screen in or screen out decision'.<sup>75</sup> The Duty Delegate, in turn considers the potential refugee and complementary protection claims and decides — based upon the information elicited by the VDO at the pre-screening interview<sup>76</sup> — whether

<sup>70</sup> Ibid.

<sup>71</sup> Ibid 14. The DHA has specific procedures for unaccompanied minors who are refused immigration clearance at an airport, which include that an independent observer must be available for the interview: *Entry Screening Guidelines* (n 27) 10.

<sup>72</sup> *Protection Claims at the Border Instruction* (n 27) 14.

<sup>73</sup> The *Migration Act* (n 15) codifies Australia's interpretation of its international obligations. The VDO first assess whether the person meets the statutory definition of a 'refugee' as defined by s 5H, which is similar to art 1(a) of the 1951 *Convention* (n 11). Where a person does not meet this definition, the VDO will then assess whether the person may receive complementary protection provided by s 36(2)(aa) of the *Migration Act* (n 15). Complementary protection arises from Australia's obligations under ICCPR (n 11); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, GA Res 44/128, A/RES/44/128 (15 December 1989); CAT (n 11).

See also *Protection Claims at the Border Instruction* (n 27) 23.

<sup>74</sup> *Protection Claims at the Border Instruction* (n 27) 14. It is unclear whether this obligation includes informing the passenger of their right to access a consular official or the UNHCR.

<sup>75</sup> Ibid 15. The Duty Delegate, also called the 'screening officer', is 'generally an executive-level officer reporting to the Global Manager, Refugee and Humanitarian Visas': *Entry Screening Guidelines* (n 27) 4.

<sup>76</sup> Dual enforcement and humanitarian protection frameworks compete throughout the entry screening process, creating legal and operational opacity. For example, the *Entry Screening*



the claims meet the entry screening ‘threshold’.<sup>77</sup> The screening ‘threshold’ considers only whether a non-citizen’s reasons for claiming they cannot return to their home country warrant an assessment of Australia’s protection obligations through a departmental process.<sup>78</sup> The *Entry Screening Guidelines* make clear that ‘the screening officer does not need to make a case for the non-citizen’ and ‘if the non-citizen does not present a fear of any serious or significant harm’ they should be ‘screened-out’.<sup>79</sup> However, ‘Australia may be at risk of breaching its non-refoulement obligations’ where ‘information is available indicating’ that the non-citizen may be subject to ‘a serious or significant harm’ in their country of origin, ‘even if this is not explicitly articulated by the non-citizen’.<sup>80</sup>

There is no designated timeframe for the Duty Delegate to issue a screening decision, but the *Protection Claims at the Border Instruction* anticipates situations in which a decision is either not received in a reasonable period of time or it is unlikely that a decision will be made within a reasonable period of time.<sup>81</sup> However, the range of options available to the VDO in these circumstances include only discussing the case with a supervisor and duty manager, telephoning the Duty Delegate, or transferring the non-citizen to an Immigration Detention Facility (‘IDF’) pending the decision.<sup>82</sup> It is unclear where the non-citizen might be held in the event that the Duty Delegate’s decision is not issued in a reasonable period of time and the non-citizen is not transferred to an IDF.

*Guidelines* (n 27) direct screening officers to assess a non-citizen’s claims having regard to Australia’s protection obligations under various international instruments: at 5–6. However, VDOs must gather evidence of those claims, which forms the basis of the Duty Delegate’s decision: see above n 73 and accompanying text. The instructions may be problematic where they could lead to VDO assessments of a non-citizen’s protection claim either not having regard, or having regard to the agent’s own understanding of the relevant legal instruments, resulting in a decision not to action a Duty Delegate referral or pursue a particular line of inquiry in a pre-screening interview.

<sup>77</sup> *Entry Screening Guidelines* (n 27) 6.

<sup>78</sup> Ibid. But see the reaffirmation of ‘the fundamental importance ... of the principle of non-refoulement ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees’: Executive Committee of the High Commissioner’s Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: Conclusions of the Committee — Non-Refoulement*, UN DOC A/32/12 (31 October 1977) 14 [4(c)] (‘Conclusions of the Committee: Non-Refoulement’).

<sup>79</sup> *Entry Screening Guidelines* (n 27) 8.

<sup>80</sup> Ibid.

<sup>81</sup> *Protection Claims at the Border Instruction* (n 27) 15–16.

<sup>82</sup> Ibid.

Where the Duty Delegate issues a 'screened in' decision and the non-citizen is still in immigration clearance,<sup>83</sup> the VDO must communicate the decision to the non-citizen and explain that they will be transferred to an IDF where they may lodge a protection visa application.<sup>84</sup> If the non-citizen is located in an IDF at the time of the 'screened in' decision, the VDO must advise the Status Resolution Officer of the decision and transfer the case to the Compliance Status Resolution service after creating a referral to case management.<sup>85</sup> In this scenario, the VDO is not required to advise the non-citizen of the screening decision, nor is the VDO required to advise the non-citizen that they may lodge a protection visa application.<sup>86</sup> If 'screened in', only two classes of protection visas are available.<sup>87</sup> The Class XD temporary protection ('TPV')<sup>88</sup> or the Class XE safe haven enterprise visas ('SHEV').<sup>89</sup> Applicants generally have access to the standard protection visa application process, rather than the fast-track procedures that apply to UMAs.<sup>90</sup> However, the Minister retains the power to designate additional classes of arrivals as being subject to the fast-track procedures by means of issuing a legislative instrument,<sup>91</sup> and has used this power in the past to expand the fast-track procedures to apply to certain asylum seekers who arrived by plane.<sup>92</sup>

<sup>83</sup> Ibid 16. The language appears to refer to immigration clearance as a place, rather than as the process of being immigration cleared.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> *Migration Regulations* (n 37) sch 1 pt 4 reg 1401(3)(d)(vi) explicitly requires a person to be 'immigration cleared' before a valid application for a Class XA protection visa is received. A person must also not hold or have previously held either a temporary protection visa ('TPV') or safe haven enterprise visa ('SHEV'): at reg 1401(3)(d)(i)–(ia).

<sup>88</sup> A TPV is a three year visa that requires the person 'was not immigration cleared': ibid sch 1 pt 4 reg 1403(3)(d)(vi).

<sup>89</sup> A SHEV is a five year visa that similarly to a TPV requires the person 'was not immigration cleared': ibid sch 1 pt 4 reg 1404(3)(d)(vii). Although a UAA TPV holder is only permitted to apply for another TPV or SHEV, it may be possible for a UAA SHEV holder to apply for certain other visas: ibid pt 2 div 2.1 reg 2.06AAB. However, it appears that the *Migration Act* (n 15) s 46A(1) bar which prevents UMAs from applying for other visas does not apply to UAAs, thereby allowing a UAA SHEV holder to apply for other subsequent visas without needing to meet the regional work or study requirement.

<sup>90</sup> For an overview of the fast-track procedures: see generally Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003.

<sup>91</sup> *Migration Act* (n 15) s 5(1AA)(b).

<sup>92</sup> See, eg, Minister for Immigration and Border Protection (Cth), *Migration (IMMI 17/015: Person Who Is a Fast Track Applicant) Instrument 2017* (IMMI 17/015, 26 July 2017), designating

Where the Duty Delegate issues a ‘screened out’ decision while the non-citizen is still in immigration clearance, the VDO must advise the non-citizen of the decision and begin the removal process.<sup>93</sup> The *Protection Claims at the Border Instruction* notes that a non-citizen may still insist on lodging a protection visa application following a ‘screened out’ decision.<sup>94</sup> However, where a non-citizen is legally barred from lodging a visa application, the VDO ‘is to advise the traveller they may attempt to do this but the application would be considered invalid’ and that attempted lodgment will not delay arrangements for their removal.<sup>95</sup> Where the non-citizen is located in an IDF at the time of the ‘screened out’ decision, the Border Force Officer must ensure the non-citizen is advised of the decision and begin the removal process.<sup>96</sup>

The *Entry Screening Guidelines* and *Protection Claims at the Border Instruction* do not provide any avenues to seek review of either the decision to cancel a visa during the entry screening process because a non-citizen has raised a protection claim, nor the screening decision of the Duty Delegate.<sup>97</sup> Similarly, the decision of either a BCO or VDO to refer a traveller who has raised a potential protection claim for exploration of that claim appears not to engage any internal review or oversight mechanism. It is not known whether the two Saudi women who arrived at Sydney Airport in November 2017 were referred to the Duty Delegate of the Humanitarian Program Operations Branch for consideration of a screening decision. However, by having their claims refused in immigration clearance, the women were able to be removed without any access to lawyers or avenue for appeal. The legal and practical problems raised by the entry screening procedures are explored in Part III, following a review of the

plane arrivals who had previously been refused a protection visa but had raised new claims in relation to the data breach on the departmental website in February 2014. The validity of this instrument and its application to plane arrivals was upheld in *SZTVU v Minister for Home Affairs* (2019) 268 FCR 497. See also Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Migration (Fast Track Applicant Class: Temporary Protection and Safe Haven Enterprise Visa Holders) Instrument 2019* (LIN 19/007, 26 March 2019). This expanded the fast track procedures to apply to all applicants re-applying for a TPV or SHEV.

<sup>93</sup> *Protection Claims at the Border Instruction* (n 27) 16.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.* It should be noted that a legal bar to lodging a visa at this stage refers to Australian domestic law, which — in the context of seeking protection — conflicts with international law and will be discussed below in Part IV. See also *VCLT* (n 47) art 27.

<sup>96</sup> *Protection Claims at the Border Instruction* (n 27) 17.

<sup>97</sup> *The Events after Refusal Instruction* (n 27) directs ABF officers to ensure that travellers understand ‘visa cancellation decisions made in immigration clearance are not subject to merits review’: at 6. Note, however, that it may be possible to seek judicial review of a visa cancellation in immigration clearance: see, eg, *Minister for Immigration and Border Protection v Srouji* (2014) 139 ALD 267 (‘*Srouji*’). The practical impediments to accessing judicial review in immigration clearance are discussed below in Part III(A).

statutory framework relevant to protection claims raised by non-citizens travelling to Australian airports from abroad.

### *C Purported Statutory Basis for Entry Screening Procedures*

This Part examines the statutory framework within which entry screening procedures are carried out. We begin with an examination of the government's purported justification, which frames the procedures as informing the duty to detain and remove certain non-citizens. We explore the tension and potential disconnect between this justification and the related legislative and regulatory rules regarding protection visas, and statutory safeguards for persons in immigration detention. The *Entry Screening Guidelines* construct 'entry screening' as a process that applies to any non-citizen refused immigration clearance at an airport who claims that they cannot return to their home country.<sup>98</sup>

While the *Entry Screening Guidelines* stipulate that there is 'no separate or specific statutory basis for entry screening', the document explains that 'entry screening is undertaken to inform (among other considerations) a decision about whether to remove an unlawful non-citizen under s 198(2) of the *Migration Act*.'<sup>99</sup> The section provides that

[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen:

- (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and
- (b) who has not subsequently been immigration cleared; and
- (c) who either:
  - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
  - (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.<sup>100</sup>

Presumably, the government's position is that the entry screening procedures inform the considerations under ss 198(2)(c)(i)–(ii) as to the existence of a valid

<sup>98</sup> The process also applies to all non-citizens who arrive in Australia as UMAs: see above n 57.

<sup>99</sup> *Entry Screening Guidelines* (n 27) 3.

<sup>100</sup> *Migration Act* (n 15) s 198(2). Relevantly, s 193(1)(a)(i) refers to persons detained under s 189(1) on being refused immigration clearance.

pending or determined visa application. We will further interrogate the validity of this claim in Part III(B). What is important to note for current purposes is that there is a link between the removal powers under s 198(2), which the government cites as the authority for pre-screening, and the provisions of the *Migration Act* relevant to making and determining visa applications.

Under the current legislative and regulatory framework, a non-citizen who is refused immigration clearance at an Australian airport and raises a protection claim triggers a complex interaction between numerous substantive provisions of the *Migration Act* and the *Migration Regulations 1994* (Cth) (*'Migration Regulations'*), the effects of which are not fully captured in either the *Entry Screening Guidelines* or the *Protection Claims at the Border Instruction*. As a result, non-citizens refused immigration clearance cannot make a valid application for a *permanent* protection visa. Nonetheless, the *Migration Act* and regulations define a clear path for a non-citizen to seek a *temporary* protection visa. Yet, the entry screening policy operates in a manner that prioritises detention and removal considerations and hinders the effective operation of the legislative and regulatory protection visa framework.

### III CHALLENGING AN ENTRY SCREENING DECISION

The entry screening procedures appear to have been designed in a way to limit avenues available for reviewing adverse determinations by the Duty Delegate. Once a traveller is screened-out, there are no options available to seek a review of the merits of the decision and the VDO must immediately begin the removal process.<sup>101</sup> The *Entry Screening Guidelines* and the *Protection Claims at the Border Instruction* do not provide any avenues of internal review, nor any access to merits review at the Refugee and Migration Division of the Administrative Appeals Tribunal ('AAT'). Decisions made when a non-citizen is in immigration clearance or where they have been refused immigration clearance and not subsequently been immigration cleared are expressly excluded from the jurisdiction of the AAT.<sup>102</sup> While merits review is unavailable, there may be scope to seek judicial review of adverse decisions in certain circumstances. This Part explores four grounds for such review, including a non-citizen's right to access legal advice and visa application forms, the validity of these policy documents, instances of disregard or misapplication of the entry screening procedures, and considerations of procedural fairness, along with the practical impediments to accessing judicial review.

<sup>101</sup> *Events after Refusal Instruction* (n 27) 6; *Protection Claims at the Border Instruction* (n 27) 16.

<sup>102</sup> *Migration Act* (n 15) ss 338(2)(c)(i)–(ii).

To date, there have not been any cases which directly challenge a decision made under the current entry screening procedures. This is likely due to the practical impediments to seeking judicial review which we discuss further below. It may also be a result of the fact that where an individual does manage to overcome these obstacles, they are permitted to obtain legal assistance and assert their right to apply for a protection visa, regardless of the outcome of the screening process, negating the need to pursue the matter in the courts.<sup>103</sup> There are however, a long line of cases which deal with the cancellation of visas in immigration clearance. These cases generally turn on questions of procedural fairness and the adequacy of the timeframe which applicants are provided to respond to adverse information relied upon to cancel the visa. While there are examples of earlier cases where the courts have intervened on behalf of entrants and overturned visa cancellations,<sup>104</sup> the more recent cases have taken a broad view as to the discretion that should be afforded to immigration officers in this context.<sup>105</sup> Given that these deal with decisions to cancel a visa under s 116 of the *Migration Act*, rather than entry screening for protection claims, they are of limited relevance for our current analysis. However, they demonstrate that, despite the practical impediments, it is possible to seek judicial review of decisions made in immigration clearance if a person can access legal advice. One of the few examples of a reported case which directly addresses the screening process for asylum claims at the airport is *Azmoudeh v Minister for Immigration and Ethnic Affairs*.<sup>106</sup> In that case, Wilcox J took the extraordinary step of ordering the return of an Iranian man from Hong Kong who was removed without being afforded an opportunity to make an application for asylum. The man's lawyer was waiting at the airport to lodge the application but was not granted access to his client. Justice Wilcox was willing to intervene and provide interlocutory relief on the grounds that it was likely that the failure to consider the man's claim for asylum rendered the removal unlawful. It is important to note that

<sup>103</sup> Additional empirical research may be needed to determine why no cases directly challenging a decision made under the entry screening procedures have been the subject of judicial review. Assessing the legal and policy consequences of the practical application of the entry screening procedures presents a potentially promising avenue of future inquiry, though obtaining access to conduct such research may prove difficult: see generally Regina Jefferies, 'Research Access and Adaptation in the Securitised Field of Australian Refugee and Asylum Law' [2019] (1) *Journal of the Oxford Centre for Socio-Legal Studies* 49.

<sup>104</sup> See, eg, *Chiorny v Minister for Immigration and Multicultural Affairs* (1997) 44 ALD 605.

<sup>105</sup> See, eg, *Zhaou v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 748; *Srouji* (n 97); *Chiu v Minister for Immigration* [2014] FCCA 2596; *Russo v Minister for Immigration* [2015] FCCA 2526; *Kaur v Minister for Immigration* [2016] FCCA 3289; *Dhaliwal v Minister for Immigration* [2016] FCCA 1669; *DOZ16 v Minister for Immigration* [2017] FCCA 1157.

<sup>106</sup> (1985) 8 ALD 281.

the case predated the current statutory and policy framework for assessing asylum claims at airports.

Moreover, in the intervening years, the Australian government has introduced a series of reforms aimed at limiting the jurisdiction and the grounds for judicial review of decisions made under the *Migration Act*. These efforts culminated in the introduction of the privative clause in s 474 of the *Migration Act* in 2001, which attempted to prohibit the judiciary from reviewing any decisions made under the *Act* and from issuing specified remedies.<sup>107</sup> The 2003 High Court decision of *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*') rendered the privative clause largely ineffective, finding that the clause only covered non-jurisdictional errors.<sup>108</sup> Parliament could not oust the High Court's original jurisdiction to review jurisdictional errors under s 75(v) of the *Australian Constitution* to decide matters in which one of the constitutional writs of mandamus, prohibition, and injunction were sought against an 'officer of the Commonwealth'. Jurisdictional error occurs where the error is such that the decision made falls outside the powers conferred on the decision-maker.<sup>109</sup> While courts have been reluctant to definitively define the circumstances where this occurs,<sup>110</sup> they have found a wide range of errors fall under the concept.<sup>111</sup> The following Parts address four potential instances of jurisdictional error, which might be brought before the Federal Circuit Court, which has been conferred with the same original jurisdiction as the High Court under s 75(v) of the *Australian Constitution*.<sup>112</sup>

### *A Right to Access Legal Advice and Visa Application Forms*

Before exploring possible avenues for review in relation to the right to access legal advice and visa application forms, it is necessary to return to the exact nature of the power being exercised in the entry screening procedures. The government frames entry screening as a process 'undertaken to inform (among other considerations) a decision about whether to remove an unlawful non-

<sup>107</sup> *Migration Act* (n 15) s 474.

<sup>108</sup> (2003) 211 CLR 476 ('*Plaintiff S157*').

<sup>109</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J) ('*Aala*').

<sup>110</sup> See, eg, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*'), where the High Court observed that '[i]t is neither necessary, nor possible to attempt to mark the metes and bounds of jurisdictional error': at 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>111</sup> See generally Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 256. See *Aala* (n 109).

<sup>112</sup> *Migration Act* (n 15) s 476. The bulk of migration cases begin at the Federal Circuit Court.

citizen under s 198(2) of the *Migration Act*.<sup>113</sup> Since travellers refused immigration clearance are subject to immediate, mandatory detention,<sup>114</sup> the *Entry Screening Guidelines* and the *Protection Claims at the Border Instruction* must be read in conjunction with the duty placed on immigration officials in s 256 of the *Migration Act*. Section 256 applies to persons in immigration detention and requires that

the person responsible for [their] immigration detention shall, at the request of the person in immigration detention, give to [them] application forms for a visa or afford to [them] all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to [their] immigration detention.<sup>115</sup>

The *Protection Claims at the Border Instruction* recognises this requirement, noting that '[f]ollowing a screened out decision, and without any legal bar to prevent them from doing so, a traveller may still insist on lodging a Protection visa ('PV') application.'<sup>116</sup> Therefore, where an express request for a visa application or access to legal advice is denied at any point during a traveller's detention, the individual could seek a writ of mandamus in the Federal Circuit Court compelling the person responsible for their detention to fulfil this request.<sup>117</sup>

The practical difficulties in seeking such a remedy are immediately obvious. Judicial review proceedings would be close to impossible to initiate without the assistance of a lawyer, but a failure to access such assistance is exactly what is being challenged. The importance of this practical impediment cannot be overstated, and it is equally relevant to the other grounds of review discussed below. Individuals subject to entry screening are generally held in immigration detention at the airport and may be unable to use their mobile phones which places their contact with the outside world in the hands of the officers responsible for their detention.<sup>118</sup> Where the individual is 'screened out', ABF officials undertake to remove the non-citizen from the country as soon as possible pursuant to s 198(2).<sup>119</sup> Removal can happen as quickly as within a few hours. The

<sup>113</sup> *Entry Screening Guidelines* (n 27) 3.

<sup>114</sup> See above Part II(B); *Protection Claims at the Border Instruction* (n 27) 13; *Migration Act* (n 15) s 189.

<sup>115</sup> *Migration Act* (n 15) s 256.

<sup>116</sup> *Protection Claims at the Border Instruction* (n 27) 16. The *Events after Refusal Instruction* (n 27) states that '[d]etainees should only be advised that it is not possible to facilitate access to immigration assistance or legal advice if to do so would unreasonably impede the detainees removal from Australia': at 7.

<sup>117</sup> *Migration Act* (n 15) s 476(1).

<sup>118</sup> *Protection Claims at the Border Instruction* (n 27) 13.

<sup>119</sup> See also *ibid* 16–17.



communication, movement, and time restrictions placed upon individuals in the entry screening process may thus render attempts to challenge some aspect of their treatment during or after the process very difficult.

There may be further practical impediments to an individual exercising their rights under s 256. Where a traveller explicitly requests to apply for a protection visa (or requests forms to facilitate such an application) after being refused immigration clearance, but before the pre-screening interview has commenced, the *Entry Screening Guidelines* and *Protection Claims at the Border Instruction* appear to require the individual to wait for the Duty Delegate's screening decision before being allowed to lodge an application. Moreover, an individual 'screened out' would be required to renew the request after screening is completed in order for it to be considered. Those individuals 'screened out' would have just experienced a process which they had been told was to determine whether Australia owed them protection obligations. It would be reasonable for those individuals to assume that the negative screening decision related to their request to apply for a protection visa, and that the adverse determination would prohibit them from pursuing this further. Without legal advice, a 'screened out' individual might not be aware of their right to apply for a protection visa.

Finally, it is unclear whether ABF officials would be required to provide an individual internet access in order to lodge a protection visa application online. An applicant for a TPV or SHEV may only lodge an application via the internet, or by posting the correct paper form to the DHA Onshore Protection Office in Sydney.<sup>120</sup> Given the limited time frame between the screened out decision and the initiation of the removal process, it is highly unlikely that the applicant would have time to lodge a valid application by post. Therefore, the only realistic method by which an applicant in immigration detention at an airport might have time to lodge a valid application is online. Yet, detention officials would have to facilitate access to the internet — something not explicitly specified in the *Entry Screening Guidelines* or the *Protection Claims at the Border Instruction*.

### B *Validity of the Entry Screening Guidelines and Procedural Instructions*

Policy guidelines are only valid if they are authorised by and compatible with the legislative powers on which they are based.<sup>121</sup> Chief Justice Gleeson noted that policy will be valid only to the extent that it is

<sup>120</sup> Department of Home Affairs (Cth), *Migration (LIN 18/029: Arrangements for Protection, Refugee and Humanitarian Visas) Instrument 2018* (LIN 18/029, 13 February 2019) schs 3–4.

<sup>121</sup> See, eg, *Green v Daniels* (1977) 13 ALR 1.

consistent with the statute under which the relevant power is conferred, and provided also that the policy is not, either in its nature or in its application, such as to preclude the decision-maker from taking into account relevant considerations, or such as to involve the decision-maker in taking into account irrelevant considerations.<sup>122</sup>

If the content or application of the *Entry Screening Guidelines* or *Protection Claims at the Border Instruction* do not meet this requirement, then they are invalid. Therefore, a person subject to a decision made under them would be able to seek a remedy of certiorari, quashing the decision made in excess of power, as well as mandamus, commanding the decision to be remade in accordance with what is required under the legislation.

Construing or applying the entry screening procedures in a manner that frustrates the rights of a detainee under s 256 to access facilities to make a visa application upon request would be unlawful. However, in circumstances where an individual refused immigration clearance does not make an express request, there is no onus on the official carrying out the screening interview to inform the person of their rights under s 256. In fact, s 193 of the *Migration Act* specifically states that the government has no obligation to provide any advice or legal guidance to persons who have been refused immigration clearance (beyond express requests under s 256). As a result, an asylum seeker ‘screened out’ in the entry screening process, yet otherwise entitled to lodge a protection claim, may be prevented from making an application because they did not know to request a form or legal advice.

Even in these very narrow circumstances, it is unclear whether the procedures are valid. Despite the government’s claims to the contrary, there are no provisions in the *Migration Act* that can be construed to explicitly authorise the entry screening procedures. The *Entry Screening Guidelines* state that the procedures inform the decision of whether to remove an unlawful non-citizen under s 198(2) of the *Migration Act*.<sup>123</sup> Presumably, this relates to the considerations under ss 198(2)(c)(i)–(ii), which deal with a simple question of fact: whether the person has made a valid application for a substantive visa that has not been finally determined. However, the entry screening procedures relate to another matter entirely. Entry screening informs a decision as to whether to provide an individual with the facilities to lodge a protection visa application. They do this with reference to a preliminary assessment as to the strength of a person’s protection claim, which serves as a procedural and functional barrier to accessing a visa process prescribed by legislation.

<sup>122</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 289 [24].

<sup>123</sup> *Entry Screening Guidelines* (n 27) 3.

Whether or not to provide an individual with the facilities to lodge a protection visa application is qualitatively different from the question of whether a valid application has already been made. In fact, s 197C of the *Migration Act* makes it clear that, under domestic law, Australia's non-refoulement obligations are irrelevant to the exercise of the removal powers under s 198. It is thus implausible that entry screening, designed to identify protection claims, could be authorised by a power that specifically excludes such claims as being a relevant consideration. There are no provisions elsewhere in the *Migration Act* that would authorise such a line of inquiry undertaken during the entry screening procedures. The *Migration Act* and the *Migration Regulations* include detailed instructions regarding the requirements to make a valid TPV or SHEV application.<sup>124</sup> None of these provisions authorises the consideration of the merits of the asylum claim in relation to the validity of the visa application.<sup>125</sup>

In *Plaintiff M61/2010E v Commonwealth* ('Offshore Processing Case'), the High Court was clear that a statutory power to detain a person could not permit the continuation of that detention at the unconstrained discretion of the executive.<sup>126</sup> That case dealt with the procedures established to assess the asylum claims of 'offshore entry persons' on Christmas Island by the Rudd Labor government.<sup>127</sup> Upon request, an 'offshore entry person' could have their protection claims assessed through the Refugee Status Assessment ('RSA') process, and seek Independent Merits Review ('IMR') of negative rulings. These procedures were established outside the *Migration Act* with the government claiming that they were an exercise of the non-prerogative executive power to enquire.<sup>128</sup> This, the government claimed, meant that there was no obligation to afford procedural fairness. Nor did it matter if those who were making the inquiry misunderstood or misapplied the law. Such a characterisation was rejected by the High Court, which found that the process was linked to the statutory discretion

<sup>124</sup> *Migration Act* (n 15) s 36; *Migration Regulations* (n 15) sch 1 pt 4 regs 1403–4.

<sup>125</sup> Though the government has no statutory power to apply the entry screening procedures, it does have the statutory power to allow an individual to lodge a protection visa application. To the extent that a conflict exists between the statutory protection regime and the statutory visa cancellation and removal regime, the DHA could prioritise protection over visa cancellation and removal. However, with entry screening, the DHA effectively attempts to create a process that allows the Department to choose when to prioritise protection and when to prioritise visa cancellation and removal, without any meaningful oversight or statutory basis.

<sup>126</sup> (2010) 243 CLR 319, 348 [68] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('Offshore Processing Case').

<sup>127</sup> For a detailed examination of this policy and the *Offshore Processing Case* (n 126), see generally Mary Crock and Daniel Ghezelbash, 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18(2) *Australian Journal of Administrative Law* 101.

<sup>128</sup> *Offshore Processing Case* (n 126) 336 [15].

given to the Minister to lift the bar preventing offshore entry persons from submitting a protection visa application.<sup>129</sup> Key to this finding was the fact that the *Migration Act* required the detention of an 'offshore entry person' for the duration of the RSA and IMR processes.<sup>130</sup> Such detention could not be carried out and continue at the 'unconstrained discretion' of the executive.<sup>131</sup> Thus, the assessment and review had to be construed as having a statutory footing.

The High Court's finding as to the need for a statutory basis for procedures which extend the period for which a person is detained has significant ramifications for the current analysis. It precludes the government from claiming, as it did in the *Offshore Processing Case* that entry screening is being carried out pursuant to a non-statutory executive power to enquire. It also explains the attempt in the *Entry Screening Guidelines* to link the entry screening process to the statutory duty to remove a person under s 198(2).<sup>132</sup> As has been demonstrated, this claim does not withstand scrutiny. This results in a significant difference between the procedures examined in the *Offshore Processing Case* when compared to the entry screening procedures in question here. Offshore entry persons (now UMAs) faced an explicit statutory bar to making a valid protection visa application,<sup>133</sup> linked to an explicit discretionary power vested in the Minister to decide to lift that bar.<sup>134</sup> The High Court thus construed the RSA and IMR procedures as informing the decision of whether or not to exercise that statutory discretionary power.

The entry screening procedures rest upon shakier statutory footing. UAAs face no statutory bar preventing them from applying for either a TPV or SHEV. Nor does the Minister, or anyone else, possess any explicit statutory discretion to determine whether an individual can make a valid protection visa application or be provided with the facilities to do so. Yet this is precisely the power which the entry screening procedures appear to inform. Entry screening stems from the omission of a statutory duty to provide an individual with advice and facilities to make a visa application, in the absence of an express and precise request. It is unlikely that an omission can validly authorise screening procedures, particularly given that the procedures extend the duration for which a person is detained. Any assessments undertaken that extend the time that a person is detained must have some sort of statutory footing. This does not appear to be the case with the entry screening procedures, potentially rendering

<sup>129</sup> Ibid 348 [62]. These discretions were found in ss 46A(2) and 195A of the *Migration Act* (n 15).

<sup>130</sup> All unlawful non-citizens are mandatorily detained under s 189 of the *Migration Act* (n 15).

<sup>131</sup> *Offshore Processing Case* (n 126) 348 [63].

<sup>132</sup> *Entry Screening Guidelines* (n 27) 3.

<sup>133</sup> *Migration Act* (n 15) s 46A(1).

<sup>134</sup> Ibid s 46A(2).

the procedures and the period of detention during which they are undertaken as unlawful.

### *C Ignoring or Misapplying the Procedures*

Though questions exist as to the validity of the entry screening procedures, were they found to be lawful, additional limited avenues for judicial review might arise where the procedures were not properly followed in an individual case. While policies do not bind decision-makers in the same way as legislation,<sup>135</sup> they can have legal significance. The courts have indicated a number of circumstances where a breach or misapplication of a non-statutory policy may amount to jurisdictional error.<sup>136</sup> The relevant grounds for challenge include: (1) where the policy constitutes a mandatory relevant consideration, (2) where the policy is misapplied or misconstrued in a manner which renders a decision legally unreasonable, or (3) where a departure from the policy constitutes a breach of procedural fairness.

It may be possible to frame the content of the entry screening procedures as mandatory relevant considerations that the screening officer must take into account. In *Nikac v Minister for Immigration*, Wilcox J explained that even if a non-statutory policy is not binding on a decision-maker, ‘in the sense that [they] may decide in the particular case not to act in accordance with that policy, a policy applicable to the case is always a relevant consideration in the making of a decision.’<sup>137</sup> Courts have been receptive to such an argument in a number of cases related to migration decision-making. In *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (‘Gray’), a majority of the Federal Court found that ministerial policy statements relating to the deportation of criminal non-citizens ‘were relevant factors which the [decision-maker] was bound to consider although not bound to apply so as to prejudice its independent assessment of the merits of the case.’<sup>138</sup> A similar argument was put forward in *Khan v Minister for Immigration and Citizenship*, with respect to the considerations set out in the Department of Immigration and Citizenship’s ‘Procedures Advice Manual’.<sup>139</sup> While the Court sidestepped directly addressing this

<sup>135</sup> Lawful policy ‘guides but does not control the making of decisions’ such that the individual merits of a case cannot be considered: *Drake [No 2]* (n 54) 641 (Brennan J).

<sup>136</sup> The circumstances where this may eventuate are far from settled. For a detailed examination of this issue, see Greg Weeks, ‘The Use and Enforcement of Soft Law by Australian Public Authorities’ (2014) 42(1) *Federal Law Review* 1.

<sup>137</sup> (1988) 20 FCR 65, 81.

<sup>138</sup> (1994) 50 FCR 189, 221 (French and Drummond JJ) (‘Gray’).

<sup>139</sup> (2011) 192 FCR 173, 191 [71]–[72] (Flick J).

question of whether the considerations in the manual were binding, the judges left the door open to such a finding.<sup>140</sup>

A second approach would be to argue that a misapplication of the policy gives rise to an error of law on the grounds of unreasonableness. There is a common law presumption that statutory powers are to be exercised reasonably.<sup>141</sup> A conclusion of unreasonableness can be outcome focused, occurring where there is no 'evident and intelligible justification' for the decision.<sup>142</sup> Alternatively, legal unreasonableness may lie in an error in the decision-making process.<sup>143</sup> In the present context, this may occur where the screening officer purports to apply the entry screening procedures as the 'proper basis for disposing of the case in hand, but misconstrues or misunderstands [the policy] so what is applied is not the policy but something else.'<sup>144</sup> This can be viewed as an example of 'an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so the factual result is perverse, by the decision-maker's own criteria.'<sup>145</sup> Regardless of whether the focus is on the outcome or procedures followed, for a challenge based on legal unreasonableness to succeed, a court would need to be satisfied that the decision was beyond power, having regard to the scope, purpose and objects of the relevant statutory provisions.<sup>146</sup> This would turn on identifying and construing the relevant statutory power being exercised in the screening procedures — a power which we argue does not exist in the *Migration Act*.<sup>147</sup> The exercise of non-statutory powers may also be challenged on the grounds of legal unreasonableness. Thus, if a court was to disagree with our analysis, and find that procedures are validly authorised under a non-statutory power, review on the grounds of unreasonableness may still be available.<sup>148</sup>

<sup>140</sup> Ibid 178 [15] (Buchanan J), 195 [84] (Flick J).

<sup>141</sup> See, eg, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362 [63] (Hayne, Kiefel and Bell JJ) ('Li').

<sup>142</sup> *Li* (n 141) 367 [76], quoted in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 573 [82] (Nettle and Gordon JJ).

<sup>143</sup> *Li* (n 141) 365–6 [72].

<sup>144</sup> *Gray* (n 138) 208, finding that the departure from non-statutory guidelines that the decision-maker purported to rely on was an error of law.

<sup>145</sup> *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435, 453 (Wilcox J), quoted in *Jabbour v Secretary of the Department of Home Affairs* (2019) 369 ALR 620, 638 [89] (Robertson J) ('Jabbour').

<sup>146</sup> *Li* (n 141) 363–4 [67], citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ).

<sup>147</sup> See above Part III(B).

<sup>148</sup> *Jabbour* (n 145) 640 [101];

A third approach might frame a departure from the entry screening procedures as a breach of procedural fairness. In *Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs*, Gray J considered the 'gender guidelines' issued by the Minister which set out procedures for dealing with gender-related claims by asylum seekers.<sup>149</sup> His Honour found that the failure of the Refugee Review Tribunal ('RRT') to apply the guidelines in that case amounted to a breach of procedural fairness.<sup>150</sup> The guidelines indicated what procedurally fair steps were required to be taken. Justice Gray found they must be followed for the RRT to afford a 'proper opportunity' to an applicant to present information regarding their claim.<sup>151</sup> Therefore, even if a court is unwilling to construe the entry screening procedures as creating hard legal requirements, a departure from them may give rise to grounds for judicial review.

#### D Procedural Fairness

The question of whether procedural fairness considerations beyond those expressly identified in the entry screening procedures apply in the entry screening context, as well as the content of that requirement, turns on the construction of the source of power being exercised. If the government's contention is correct, and the procedures are construed as informing a decision under s 198(2) of the *Migration Act*,<sup>152</sup> the rules of procedural fairness will likely apply. Where a statute confers power to 'destroy, defeat or prejudice a person's rights [or] interests' the principles of natural justice generally apply.<sup>153</sup> A failure to adhere to those requirements may amount to a jurisdictional error amenable to judicial review. In the *Offshore Processing Case*, the High Court made clear that screening procedures which prolonged the detention of persons subject to them affected their rights and interests in way which entitled them to be afforded procedural fairness.<sup>154</sup> In that case, inquiries undertaken in an RSA, and any subsequent IMR, prolonged the detention of the applicants for as long as the assessment took to

It would seem to me to be incongruous to have in the common law a principle of statutory interpretation implying reasonableness as a condition of the exercise of a discretionary power conferred by statute, but not to have in the common law any such principle existing outside statutory interpretation.

<sup>149</sup> (2005) 148 FCR 46, 56–60 [37]–[53].

<sup>150</sup> Ibid 59 [49]–[50].

<sup>151</sup> Ibid 59 [50].

<sup>152</sup> *Entry Screening Guidelines* (n 27) 3.

<sup>153</sup> *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

<sup>154</sup> *Offshore Processing Case* (n 126) 352–3 [75]–[76] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

complete.<sup>155</sup> The airport entry screening procedures similarly have the consequence of depriving individuals 'of their liberty for longer than would otherwise have been the case'.<sup>156</sup> The rules of procedural fairness thus apply, a denial of which will result in a decision made in excess of jurisdiction, unless the duty to observe procedural fairness is excluded by words of necessary intendment.<sup>157</sup>

In order to exclude considerations of natural justice (or procedural fairness) the legislative intention must appear 'from express words of plain intendment'.<sup>158</sup> The *Migration Act* contains a number of provisions expressly limiting the scope of natural justice to certain decisions made under the Act. These provisions cover decisions to grant or refuse visas,<sup>159</sup> cancel visas,<sup>160</sup> and the conduct of merits review.<sup>161</sup> However, no such provisions exist in relation to decisions to allow a person to lodge a visa application. Nor do any provisions cover a decision about whether to remove an unlawful non-citizen under s 198(2), which the government claims the entry screening process informs. Given that there are no express words of plain intendment excluding natural justice, common law rules of procedural fairness would apply and 'consideration must proceed by reference to correct legal principles, correctly applied'.<sup>162</sup> Though the concept of procedural fairness does not have a fixed meaning, '[f]airness is not an abstract concept' and the 'concern of the law is to avoid practical injustice'.<sup>163</sup> In *Plaintiff S157*, Gleeson CJ identified the 'essential elements' as 'fairness and detachment'.<sup>164</sup> One rule of procedural fairness, the hearing rule, has particular resonance in the context of the entry screening process and generally requires that an individual be afforded prior notice,<sup>165</sup> that the government disclose

<sup>155</sup> Ibid 353 [76].

<sup>156</sup> Ibid.

<sup>157</sup> See, eg, *Kioa* (n 12) 585 (Mason J), 615–16 (Brennan J), 632 (Deane J); *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395–6 (Dixon CJ and Webb J) ('*Tanos*').

<sup>158</sup> *Tanos* (n 157). Such an intention 'is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations': at 396.

<sup>159</sup> *Migration Act* (n 15) s 51A.

<sup>160</sup> Ibid ss 97A, 118A, 127A.

<sup>161</sup> Ibid ss 422B (review of protection visa decisions), 357A (review of other visa decisions), 473DA (review of fast-track decisions).

<sup>162</sup> *Offshore Processing Case* (n 126) 354 [78].

<sup>163</sup> *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ). This 'derives from the recognition of the importance of the process of the exercise of state power and not just the correctness of the outcome': *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142, [8] (Allsop CJ) (emphasis in original).

<sup>164</sup> *Plaintiff S157* (n 108) 490 [25].

<sup>165</sup> *R v Small Claims Tribunal; Ex parte Cameron* [1976] VR 427, 432 (Anderson J); *Trail v McRae* (2002) 122 FCR 349, 380 [134] (Sackville, Kenny and Allsop JJ).



certain information and allow the individual to respond,<sup>166</sup> and that the individual has a reasonable opportunity to present their case.<sup>167</sup> Each requirement is addressed as to the entry screening process, in turn.

First, persons subject to entry screening procedures must be given notice that a decision will be made and provided with sufficient time to prepare their case. The amount of notice required will vary depending on the circumstances. However, the lack of notice or time to prepare provided for in either the *Entry Screening Guidelines* or the *Protection Claims at the Border Instruction* would likely be unacceptable. This is particularly given the fact that there is a strong presumption that appropriate notice will be provided to an individual where liberty is at stake.<sup>168</sup> Second, there must be disclosure of the substance of the information on which the decision is being made and an opportunity to respond to this information.<sup>169</sup> In particular, ‘an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.’<sup>170</sup> This would extend, as it did in the *Offshore Processing Case* to a requirement to give claimants an opportunity to respond to adverse country information.<sup>171</sup> Finally, the individual must be given a reasonable opportunity to place relevant information before a decision-maker.<sup>172</sup> The *Entry Screening Guidelines* and the *Protection Claims at the Border Instruction* do not appear to meet any of these requirements and likely do not provide the necessary degree of fairness and detachment required by natural justice to individuals subject to the entry screening process.

<sup>166</sup> *Kirk* (n 110) 557–8 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Kioa* (n 12) 629 (Brennan J).

<sup>167</sup> *Jamal v DPP (NSW)* [2013] NSWCA 355, [54] (Gleeson JA).

<sup>168</sup> See, eg, *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807, [33] (Allsop J), where it was held that 14 days was inadequate to enable a person to respond to a notice to cancel a permanent visa. See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 207 [83] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>169</sup> See, eg, *Offshore Processing Case* (n 126) 356 [91] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>170</sup> *Kioa* (n 12) 629 (Brennan J), discussed in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95–7 [15]–[18] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

<sup>171</sup> *Offshore Processing Case* (n 126) 356–7 [91].

<sup>172</sup> *Sullivan v Department of Transport* (1978) 20 ALR 323, 343 (Deane J).

## IV INTERNATIONAL LAW IMPLICATIONS

Having considered the shortcomings of the entry screening process under the domestic legal framework, Part IV considers the practices and policies under international law. Though the focus of this Part fixes primarily upon obligations contained in the *Convention Relating to the Status of Refugees* ('1951 Convention') and the *Protocol Relating to the Status of Refugees* ('1967 Protocol'), which form the basis of the international legal framework governing refugees and to which Australia is a party, other human rights instruments and customary international law bear upon the issues discussed. While Australia has attracted condemnation for violations of international law in relation to offshore processing and interdiction,<sup>173</sup> less attention has been paid to its interception policies within Australian airports. However, Australia is not alone in its use of airport transit zones to prevent refugees from seeking asylum and the UNHCR has expressed concern about the growing use of such zones.<sup>174</sup>

Claims from states that people intercepted within transit areas are outside of their jurisdiction, and thus responsibility,<sup>175</sup> has no basis in international law which recognises a state's competence and responsibility over the entirety of its territory.<sup>176</sup> States are responsible for ensuring protection from refoulement 'to all individuals within its territory and subject to its jurisdiction'<sup>177</sup> The UNHCR has held that

[t]he term 'territory' includes a state's land territory and territorial waters as well as its de jure border entry points, including transit areas or 'international' zones at airports. A state's responsibility to protect persons from refoulement is

<sup>173</sup> See, eg, Michelle Bachelet, 'Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet' (Speech, 39<sup>th</sup> Session of the Human Rights Council, 10 September 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23518&LangID=E>>; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018) 16–17 [53].

<sup>174</sup> *Legal Considerations regarding Air Arrivals* (n 47) 1:

UNHCR is aware of instances of persons seeking international protection not being able to make asylum claims upon their arrival at airports. They are stopped in the transit area or 'international' zone before being removed and returned to territories where their lives or freedom are threatened, irrespective of whether they have had the opportunity to express a fear of returning to face a risk of persecution or other forms of serious harm to immigration or other officials at the airport.

<sup>175</sup> Hathaway (n 33) 298.

<sup>176</sup> ICCPR (n 11) art 2.

<sup>177</sup> *Ibid*. This point touches upon a deeper-rooted argument regarding state responsibility to protect the human rights of all persons within their territory and subject to their jurisdiction, which falls beyond the scope of this article.

regardless of whether the person has entered the country in a [domestic] legal sense and has passed immigration control, was authorized to enter, or is located in the transit areas or ‘international’ zone of an airport.<sup>178</sup>

As such, Australia’s international legal obligations apply within immigration clearance, just as they do anywhere else within its territory or under its jurisdiction.

Part IV begins with an examination of the fundamental obligation of non-refoulement, which requires fair and effective assessment of refugee claims and access to legal representation. The Part then turns to an analysis of whether three aspects of the entry screening process — visa cancellation, visa class restriction, and detention — violate the prohibition on penalisation of refugees. Australia’s attempt to implement its international legal obligations through the construction of a transnational system consisting of domestic legislation, regulation, and policy guidance must be evaluated having particular regard to the obligations of non-refoulement and non-penalisation, which play a central role in the design and function of the international system of refugee protection.<sup>179</sup>

### *A Non-Refoulement*

Australia has non-refoulement obligations by virtue of its accession to the *1951 Convention* and *1967 Protocol*, its ratification of various human rights

<sup>178</sup> *Legal Considerations regarding Air Arrivals* (n 47) 2–3 (citations omitted). See *Amuur v France* [1996] III Eur Court HR 1, 15 [26], in which the French Government attempted to claim that asylum seekers detained ‘in a so-called international zone at the airport’ were ‘not yet on French territory and the French authorities are therefore not under a legal obligation to examine the request’ for asylum. The European Court of Human Rights rejected this argument, finding that ‘even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone ... made them subject to French law. Despite its name, the international zone does not have extraterritorial status’: at 25 [52]. As provided in *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UN Doc A/RES/428(V) (14 December 1950), and strengthened by subsequent General Assembly Resolutions and the *1967 Protocol* (n 11), UNHCR’s core mandate includes ‘providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees.’ (emphasis added). This core mandate requires UNHCR to supervise the application of the *1951 Convention* (n 11) and *1967 Protocol* (n 11), which includes providing legal analysis and commentaries on national law, among other things, to assist policy and decision makers in ensuring that domestic law comports with obligations under international law.

<sup>179</sup> Questions regarding the consequences of a state’s breach of international law obligations are beyond the scope of this article.

treaties,<sup>180</sup> as well as under customary international law.<sup>181</sup> These obligations prohibit the return or removal of asylum seekers to places where they risk persecution or harm. The term ‘non-refoulement’ has expanded beyond its use as a term of art in the *1951 Convention* to ‘encapsulate the protection obligations that arise in similar, if related contexts’ and possesses a normative grounding in humanitarian, refugee, and human rights law.<sup>182</sup> However, art 33(1) of the *1951 Convention* provides the typical starting place for understanding the prohibition on returning a refugee

to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.<sup>183</sup>

Article 33 also ‘prohibits, without discrimination, any state conduct leading to the “return in any manner whatsoever” to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory.’<sup>184</sup> The prohibition on return found in the *1951 Convention*, the *1967 Protocol*, various other human rights instruments, and customary international law includes an obligation that states provide admission ‘at least on a temporary basis’ to those fleeing serious harm.<sup>185</sup> The UNHCR has observed that where states ‘intensify and coordinate their efforts to curb irregular immigration, there is a danger that the legal and administrative measures adopted’ may lead to refoulement.<sup>186</sup> Finally, under both the *1951 Convention* and international human rights law, states are not only prohibited from returning a refugee to any territory where they may face persecution, but also to a territory where there is a real risk they would face

<sup>180</sup> See above n 11 and accompanying text.

<sup>181</sup> See above n 14 and accompanying text.

<sup>182</sup> Goodwin-Gill, ‘Non-Refoulement and Temporary Refuge’ (n 14) 440.

<sup>183</sup> *1951 Convention* (n 11) art 33(1).

<sup>184</sup> *Legal Considerations regarding Air Arrivals* (n 47) 2 (citations omitted), quoting Executive Committee of the High Commissioner’s Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: Conclusion on Safeguarding Asylum*, UN DOC A/52/12/ADD.1 (3 November 1977) 8 (‘Conclusion on Safeguarding Asylum’).

<sup>185</sup> Executive Committee of the High Commissioner’s Programme, *Report of the Executive Committee for the Programme of the United Nations High Commissioner for Refugees on the Work of Its Thirty-Second Session: Conclusions of the Committee — Protection of Asylum-Seekers in Situations of Large-Scale Influx*, UN DOC A/36/12/ADD.1 (21 October 1981) 18. Goodwin-Gill, ‘Non-Refoulement, Temporary Refuge, and the “New” Asylum Seekers’ (n 14) 457–8.

<sup>186</sup> United Nations High Commissioner for Refugees, *Note on International Protection*, UN GAOR, UN Doc A/AC.96/815 (31 August 1993) 6 [14].

other forms of serious harm.<sup>187</sup> This Part examines whether Australia's policy of entry screening allows for the fair and effective assessment of protection claims and access to legal representation, thus reducing the risk of breach of the obligation of non-refoulement.

### 1 *Fair and Effective Assessment*

As already highlighted, states have a duty to persons on their territory. This duty requires the state in question 'to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of re-foulement'.<sup>188</sup> The UNHCR has concluded that at a minimum, these status determinations must be both fair and effective.<sup>189</sup> This requirement stems both from the principle of non-refoulement and the obligation to implement and interpret the provisions of the *1951 Convention* in a manner consistent with its object and purpose.<sup>190</sup> The object and purpose of the *1951 Convention* is the protection of refugees.<sup>191</sup> Without access to fair and effective procedures for

<sup>187</sup> Lauterpacht and Bethlehem (n 14) 122 (emphasis in original): 'The evident import of this is that refoulement is prohibited to the frontiers of *any* territory ... regardless of whether those territories are the country of origin of the person concerned.' See also Goodwin-Gill and McAdam (n 14); Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens?: Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens* (Asser Press, 2015) vol 46, 273, 284–6; Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33(4) *Sydney Law Review* 687, 693–4.

<sup>188</sup> *Legal Considerations regarding Air Arrivals* (n 47) 3 [6].

<sup>189</sup> See, eg, Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: General Conclusion on International Protection*, UN Doc A/52/12/ADD.1 (3 November 1997) 5–6; 'Conclusion on Safeguarding Asylum' (n 184) 8; Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: Conclusion on International Protection*, UN Doc A/53/12/ADD.1 (30 October 1998) 8; Executive Committee of the High Commissioner's Programme, *Report of the Fifty-Third Session of the Executive Committee of the High Commissioner's Programme: Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems*, UN Doc A/AC.96/973 (8 October 2002) 9; Executive Committee of the High Commissioner's Programme, *Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme: General Conclusion on International Protection*, UN Doc A/AC.96/1003 (12 October 2004) 9; Executive Committee of the High Commissioner's Programme, *Report of the Fifty-Sixth Session of the Executive Committee of the High Commissioner's Programme: Conclusion on the Provision on International Protection Including through Complementary Forms of Protection*, UN Doc A/AC.96/1021 (7 October 2005) 14; Executive Committee of the High Commissioner's Programme, *Report of the Sixty-First Session of the Executive Committee of the High Commissioner's Programme: Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR*, UN Doc A/AC.96/1095 (12 October 2010) 7.

<sup>190</sup> VCLT (n 47) arts 26, 31.

<sup>191</sup> *1951 Convention* (n 11) Preamble para 3.

deciding protection claims, Australia cannot know whether an individual is a refugee requiring protection as mandated by the *1951 Convention* or the human rights instruments discussed above.<sup>192</sup> This determination is critical to ensuring compliance with the obligation of non-refoulement.

Though states have a degree of discretion in how they design their asylum procedures, minimum procedural requirements should be guided by obligations derived from international treaties, international human rights law and humanitarian law, and Conclusions adopted by UNHCR's Executive Committee, of which Australia has long been a member.<sup>193</sup> This requires that:

- (i) The competent official (eg an immigration officer or border police officer) should have clear instructions for dealing with international protection issues, be required to act in accordance with the principle of non-refoulement and refer such cases to a central authority responsible for asylum.
- (ii) The applicant should receive necessary guidance as to the procedure to be followed in order to raise or lodge a protection claim.
- (iii) There should be a clearly identified central authority with responsibility for examining requests for refugee status and taking a decision in the first instance. Enforcement officials at airports should not be responsible for assessing the substance of the claim.
- (iv) The applicant should be given the necessary facilities, including prompt access to legal assistance on request and the services of a competent interpreter, for submitting their case to the authorities. Applicants should also be given the

<sup>192</sup> United Nations High Commissioner for Refugees, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc EC/GC/01/02 (31 May 2001) 2 [5] ('*Global Consultations on Fair and Efficient Asylum Procedures*'): 'Fair and efficient procedures are an essential element in the full and inclusive application of the [*1951 Convention*]. They enable a State to identify those who would benefit from international protection ... and those who should not.' See also Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: General Conclusion on International Protection*, UN Doc A/46/12/ADD.1 (29 January 1992) 7–8; Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: General Conclusion on International Protection*, UN Doc A/48/12/ADD.1 (19 October 1993) 9; Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: General Conclusion on International Protection*, UN Doc A/49/12/ADD.1 (20 October 1994) 9–10.

<sup>193</sup> Regina Jefferies, Daniel Ghezelbash and Asher Hirsch, *Assessing Protection Claims at Airports: Developing Procedures to Meet International and Domestic Obligations* (Policy Brief No 9, September 2020) 10–11.

opportunity, of which they should be informed, to contact a representative of the UNHCR.

- (v) If the applicant is recognised as a refugee, they should be informed accordingly and issued with documentation certifying their refugee status.
- (vi) If the applicant is not recognised, they should be given a reasonable time to appeal to an authority different from and independent of that making the initial decision, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on their initial request and review, as well as any judicial or administrative appeal.<sup>194</sup>

Originally formulated by the UNHCR Executive Committee (in 1975, this list has been updated to reflect an evolving understanding of minimum procedural requirements, particularly in reference to developments international human rights law.<sup>195</sup>

These elements are absent from the screening procedures at Australian airports. First, as discussed above in Part III, asylum seekers intercepted at an Australian airport are often given limited time to make a protection application and may be removed from Australia before an application can be made. Second, while a preliminary interview within the airport does take place, there is no evidence such an interview is comprehensive, nor if a person has a proper understanding of the questions being asked of them or the legal significance of such questions. Third, an asylum seeker has no chance to address any adverse information and provide evidence of their claim, especially within the short timeframes before removal. Fourth, no written reasons are provided to the asylum seeker before removal as to why they have not met Australia's protection obligations. Fifth, there is no chance available for asylum seekers within

<sup>194</sup> See *ibid*; United Nations High Commissioner for Refugees, *Conclusions on International Protection: Adopted by the Executive Committee of the UNHCR*, UN DOC HCR/IP/3/Eng/REV.2017 (October 2017); Executive Committee of the High Commissioner's Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: Conclusions of the Committee — Determination of Refugee Status*, UN Doc A/32/12/Add.1 (31 October 1977) 14–16 [6(e)]; *Global Consultations on Fair and Efficient Asylum Procedures*, UN Doc EC/GC/01/02 (n 192) 10 [43]; *Hirsi Jamaa v Italy* [2012] I Eur Court HR 97, 172, 179–80 (Judge Albuquerque) ('*Hirsi Jamaa*'); *Kaldor Centre Principles for Australian Refugee Policy* (Andrew and Renata Kaldor Centre for International Refugee Law, June 2019) 9–10. See also Madeline Gleeson, *Where to from Here?: Report from the Expert Roundtable on Regional Cooperation and Refugee Protection in the Asia-Pacific* (Report, Andrew and Renata Kaldor Centre for International Refugee Law, December 2016) 18–19.

<sup>195</sup> *Global Consultations on Fair and Efficient Asylum Procedures*, UN Doc EC/GC/01/02 (n 192) 10 [43]; *Hirsi Jamaa* (n 194) 172, 179–80; Gleeson (n 194) 18–19.

Australian airports to challenge the merits of their negative decision, as discussed above. Sixth, judicial review may be impractical due to limited access to lawyers and the practicalities of being detained. Finally, there is no free legal advice provided, and no onus on the DHA to provide access to a lawyer unless formally requested by the asylum seeker. The deficiencies in the process means that Australia may fail to identify protection claims, and as a result risks breaching its non-refoulement obligations by returning or removing individuals to locations where there is a real risk they would face persecution or other forms of serious harm.

## 2 Access to Legal Representation

Access to legal assistance is a key feature of a fair and effective status determination procedure and stems from the non-refoulement obligation whereby Australia accurately identifies those in need of protection. As the UNHCR has concluded:

Asylum-seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of states, as it can help to ensure that international protection needs are properly identified.<sup>196</sup>

Likewise, in terms of the non-refoulement obligation under the *ICCPR*, the United Nations Human Rights Committee has held, in the context of France, that ‘asylum-seekers must be properly informed and assured of their rights, including the right to apply for asylum, with access to free legal aid.’<sup>197</sup> Access to legal advice is not unfamiliar elsewhere in international law. The ECtHR has held that access is required by art 13 of the European Convention on Human Rights.<sup>198</sup> In *ND v Spain*, the Court found that the collective expulsion of asylum seekers to Morocco by Spanish officials violated art 13 as

the applicants were turned back immediately by the border authorities and had no access to an interpreter or to any official who could provide them with the

<sup>196</sup> United Nations High Commissioner for Refugees, ‘Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards’ (Position Paper, 2 September 2005) 3 <<https://www.refworld.org/docid/432ae9204.html>>.

<sup>197</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: France*, UN Doc CCPR/C/FRA/CO/4 (22 July 2008) 6 [20].

<sup>198</sup> See, eg, *Abdolkhani v Turkey* [2009] II Eur Court HR 1, 34 [115].



minimum amount of information required with regard to the right of asylum and/or the relevant procedure for appealing against their expulsion.<sup>199</sup>

As discussed above, if asylum seekers at Australian airports are not given access to a lawyer, the policy may run afoul of both domestic law and Australia's international legal obligations. Without legal assistance, individuals at risk of persecution may be unaware of their rights or unable to articulate their claims. As such, they may be removed from Australia to locations where they face harm contrary to the non-refoulement obligation under international law.

### B *Non-Penalisation*

Article 31 of the *1951 Convention* prevents states from imposing penalties on refugees on account of their illegal entry or presence.<sup>200</sup> The language of art 31 delineates state obligations, while specifying conditions incumbent upon a refugee which qualify the obligations:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary ... The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>201</sup>

Therefore, an analysis of Australian policy in light of art 31 requires consideration not only of whether state action constitutes a 'penalty' under art 31(1) but whether restrictions on movement (such as detention) are 'necessary' and applied for the limited time specified in art 31(2). The inquiry further requires a look at the conditions of entitlement to protection, including who benefits and whether they have met the conditions of 'coming directly', entry or presence in the territory 'without authorization', presenting themselves 'without delay', and showing 'good cause for their illegal entry or presence'.<sup>202</sup> This Part begins with an examination of the scope of protection under art 31 and whether the phrase 'on refugees' encompasses individuals who arrive in Australia by air and raise

<sup>199</sup> *ND v Spain* (European Court of Human Rights, Third Section, Application Nos 8675/15 and 8697/15, 3 October 2017) [120].

<sup>200</sup> *1951 Convention* (n 11) art 31.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

protection claims.<sup>203</sup> We then turn to an analysis of the limiting conditions of art 31, before examining whether Australia's policies of visa cancellation, visa class restriction, and detention constitute penalties prohibited by art 31, particularly as the exercise of state jurisdiction in the entry screening process occurs before an examination of the claim to refugee status.

As the UNHCR has noted, the prohibition on penalties for illegal entry extends to 'refugees' and has been recognised in international law to include asylum seekers, in accordance with the principle of good faith and full and effective implementation of international legal obligations.<sup>204</sup> The principle of non-refoulement in the 1951 *Convention* applies to any person who meets the refugee definition and does not fall within the scope of the exclusion provisions.<sup>205</sup> Refugee status is thus declaratory in nature, whereby '[a] person is a refugee within the meaning of the 1951 *Convention* as soon as [they fulfil] the criteria contained in the definition.'<sup>206</sup> An individual therefore becomes a refugee prior to the moment when their refugee status is formally recognised.<sup>207</sup> As Goodwin-Gill observes, 'this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or ... to "presumptive refugees"'.<sup>208</sup> Many of the States Parties to the 1951 *Convention* and/or 1967 *Protocol* have agreed and incorporated this understanding in their national

<sup>203</sup> Ibid.

<sup>204</sup> United Nations High Commissioner for Refugees, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Position Paper, 26 January 2007) 2–3 [6] <<https://www.refworld.org/docid/45f17a1a4.html>>.

<sup>205</sup> Ibid.

<sup>206</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.4 (February 2019) 17 [28] ('*UNHCR Handbook*'). See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 25.

<sup>207</sup> *UNHCR Handbook*, UN Doc HCR/1P/4/ENG/REV.4 (n 206) 17 [28].

<sup>208</sup> Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection' (Discussion Paper, United Nations High Commissioner for Refugees Global Consultations, October 2001) 8 [27] ('Article 31 of the 1951 *Convention* Discussion Paper'), quoting *R v Uxbridge Magistrates' Court; Ex parte Adimi* [2001] QB 667, 677 (Simon Brown LJ) ('*Ex parte Adimi*'). Without a fair and efficient determination as to whether a person meets the refugee criteria, a state cannot know whether an asylum seeker is, in fact, a refugee. As a result, where a state penalises asylum seekers (who may also be refugees), the art 31 prohibition on penalisation of refugees would be undermined: see above n 192 and accompanying text. See also *Global Consultations on Fair and Efficient Asylum Procedures*, UN Doc EC/GC/01/02 (n 192) 2 [5].

legislation, case law, and practice.<sup>209</sup> Though Australia voluntarily accepted the international legal obligation of non-penalisation by becoming a party to the *1951 Convention* and the *1967 Protocol*, the government has not taken steps to make that obligation effective under domestic law.<sup>210</sup> Regardless of the degree of incorporation into domestic law, Australia owes a duty of non-penalisation under international law to refugees and asylum seekers falling within the ambit of art 31 until a final decision has been made in a fair procedure, finding them not to be refugees.<sup>211</sup>

The next question relates to whether individuals who make protection claims at or before immigration clearance in Australian airports can be said to fall within the definition of refugee or asylum seeker. The answer to this inquiry is straightforward. As travellers raising protection claims at or before immigration clearance cannot be said to have received a decision on the merits of their claim to refugee status, these individuals would be considered asylum seekers. As outlined above, the declaratory nature of refugee status dictates that an asylum seeker may be a refugee regardless of whether Australia has formally recognised that status. Travellers seeking protection at Australian airports clearly fall within the personal scope of art 31. Yet art 31 still requires an analysis of whether air arrivals who make protection claims meet the conditions of ‘coming directly’, entry or presence in ‘territory without authorization’, presenting ‘without delay’, and showing ‘good cause for their illegal entry or presence’.<sup>212</sup>

An inquiry into these conditions requires an individual analysis of each case; something missing from — and precluded in practice by — the entry screening process.<sup>213</sup> Regardless, few travellers would likely be left outside

<sup>209</sup> For a discussion of more recent state practice, see United Nations High Commissioner for Refugees, *Roundtable on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention* (Roundtable, 15 March 2017) <<https://www.refworld.org/docid/5b18f6740.html>> (‘Roundtable on Non-Penalization’).

<sup>210</sup> *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287. Cf *VCLT* (n 47) art 26; Hathaway and Foster (n 206) 28–30.

<sup>211</sup> See also ‘Roundtable on Non-Penalization’ (n 209) 4 [7]:

For [art 31(1)] to be effective, it must apply to any person who is or claims to be in need of international protection, and it must only cease to apply once a decision-maker issues a final decision, after following a fair procedure, holding otherwise.

<sup>212</sup> *1951 Convention* (n 11) art 31.

<sup>213</sup> See also Cathryn Costello, Yulia Ioffe, and Teresa Büchsel, *Legal and Protection Policy Research Series, Article 31 of the 1951 Convention Relating to the Status of Refugees*, UN Doc PPLA/2017/01 (Policy Paper, July 2017) 20 (‘*Legal and Protection Policy Paper*’):

The provision is inherently concerned with the refugee’s individual predicament, and the trio of interrelated conditions, ‘good cause’, ‘without delay’ and ‘coming directly’ related to bona fides, and so ought to be interpreted consistently to take into account the reality of refugees’ flight conditions and the types of barriers they encounter.

art 31's protective scope, due to the meanings attached to each of the phrases under international law. First, 'coming directly' does not require direct flight from the country of origin (or residence) and instead refers to any territory where their 'life or freedom was threatened in the sense of art 1'.<sup>214</sup> The phrase has been interpreted narrowly to include only those refugees 'who found asylum, or who were settled, temporarily or permanently, in another country'.<sup>215</sup> The major transit countries for asylum seekers attempting to reach Australia are not signatories to the *1951 Convention* or the *1967 Protocol* and may independently pose an actual or potential threat to the asylum seeker's life or freedom. It is therefore highly unlikely that the 'coming directly' requirement would preclude UAAs who raise protection claims at Australian airports from the scope of art 31.<sup>216</sup> Second, UAAs who raise protection claims 'are present in [Australian] territory without authorization',<sup>217</sup> as an airport on the Australian mainland undoubtedly constitutes the state's territory.<sup>218</sup> Where a protection claim triggers a rejection of immigration clearance the Australian government has not authorised the entry. Therefore, UAAs who raise protection claims uniformly meet the 'geographic and material scope'<sup>219</sup> of art 31. Third, where an individual raises a protection claim at or before immigration clearance at an Australian airport, they undoubtedly can be said to raise the claim 'without delay'.<sup>220</sup>

Fourth, art 31 requires a person to show 'good cause for [the asylum seeker's] illegal entry or presence'.<sup>221</sup> In general, 'good cause' may mean having a well-founded fear of persecution, or coming directly from a country in which the asylum seeker is at risk or where they do not have access to protection, among other circumstances.<sup>222</sup> The reality that states have engaged in extensive measures to restrict the travel options available to refugees and asylum seekers also supports an understanding that 'it should generally be accepted that they

<sup>214</sup> Ibid, quoting *1951 Convention* (n 11) art 31(1).

<sup>215</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 19, quoting Expert Roundtable, 'Summary Conclusions: Article 31 of the 1951 Convention' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 253, 255.

<sup>216</sup> *1951 Convention* (n 11) art 31(1).

<sup>217</sup> Ibid.

<sup>218</sup> See above nn 175–6 and accompanying text.

<sup>219</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 23.

<sup>220</sup> *1951 Convention* (n 11) art 31(1). See also 'Roundtable on Non-Penalization' (n 211) 6 [16].

<sup>221</sup> *1951 Convention* (n 11) art 31(1).

<sup>222</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 30–2, discussing 'Summary Conclusions: Article 31 of the 1951 Convention' (n 215) 255–6.

have “good cause” for illegal entry or presence.<sup>223</sup> In the Australian context, the restriction on an asylum seeker’s travel options holds especially true, due to the multiple levels of screening and legal analysis imposed along the border continuum.<sup>224</sup> Moreover, the entry screening process and visa cancellation operate to render asylum seekers arriving with a valid travel document and visa unlawful, thus creating the ‘illegal entry or presence’.<sup>225</sup> Understanding that UAAs fall within the scope of art 31, this Part now considers whether three different policies involving the exercise of Australia’s jurisdiction — namely visa cancellation, visa class restrictions, and detention — constitute penalties prohibited by the *1951 Convention* and the *1967 Protocol*.

### 1 *Visa Cancellation*

As discussed above in Part II(B), a traveller who arrives at an Australian airport with a visa and makes a protection claim at or before immigration clearance may not be immigration cleared and subject to visa cancellation. This process legally reconstitutes the traveller as a UAA and renders them ineligible to apply for a permanent protection visa. The term ‘penalties’ is interpreted broadly to include any kind of civil, criminal, or other ‘measure that has the effect of being disadvantageous’<sup>226</sup> to refugees who fall within the scope of art 31, in light of the object and purpose of the *1951 Convention*. In addition to the views of the UNHCR, the legislation and case law of many states also support this interpretation of ‘penalty’.<sup>227</sup> For example, in 2015, the Supreme Court of Canada in *B010 v Minister for Immigration and Citizenship* (‘B010’) held that ‘denying a person access to the refugee claim process on account of’ their illegal entry constituted a ‘penalty’ under art 31(1).<sup>228</sup> By analogy, the administrative act of cancelling the visa of an individual seeking protection in Australia on account of a mismatch between the protection claim and the ‘purpose for the visa

<sup>223</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 31.

<sup>224</sup> See above Part II(A).

<sup>225</sup> *1951 Convention* (n 11) art 31(1).

<sup>226</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 32. Though the French and English texts of the *1951 Convention* (n 11) use terms with dissimilar meanings, it is well-settled that the ‘meaning which best reconciles the texts, having regard to the object and purpose of the treaty shall be adopted’: *VCLT* (n 47) art 33(4). Guy Goodwin-Gill, ‘Article 31: Non-Penalization, Detention, and Protection’, in E Feller, V Turk, and F Nicholson (eds), *Refugee Protection in International Law* (2003) 185, 194. The object and purpose of the Convention call for the broader meaning inherent in the English-version of the term ‘penalty.’ Ibid.

<sup>227</sup> *Legal and Protection Policy Paper*, UN Doc PPLA/2017/01 (n 213) 33.

<sup>228</sup> [2015] 3 SCR 704, 731 [63] (McLachlin CJ). The impugned legislation had rendered the appellants ‘inadmissible’ due to engaging in ‘transnational crime’ including ‘people smuggling [and] trafficking in persons’: at 719 [27], citing *Immigration and Refugee Protection Act* SC 2001, c 27 s 37(1)(b).

grant<sup>229</sup> constitutes a penalty within the meaning of art 31(1). Visa cancellation results in the traveller's reclassification as an unlawful non-citizen, triggering the government's duty to remove the non-citizen 'as soon as reasonably practicable'<sup>230</sup> and without having regard to Australia's non-refoulement obligations.<sup>231</sup> A circumstance in which the cancellation of an asylum seeker's underlying visa results in a legal classification that mandates removal without regard to non-refoulement and without an examination of the refugee claim on the merits, is the type of situation that art 31 was meant to prevent.<sup>232</sup>

## 2 Visa Class Restriction

As with visa cancellation, restricting the class of protection visas available to travellers refused immigration clearance in the entry screening process likely constitutes a prohibited penalty. The government places this restriction on the asylum seeker as a form of procedural disadvantage, based solely upon the individual's immigration status at entry.<sup>233</sup> Once an asylum seeker has been refused immigration clearance and deemed to be a UAA, they are precluded from accessing the permanent protection visa framework and allowed only to request a TPV or SHEV.<sup>234</sup> This penalty of visa class restriction goes beyond the 'procedural detriment' found to violate art 31 in *B010* and in effect renders the asylum seeker ineligible to seek permanent protection from harm. This places the individual in a precarious position where they may be subjected to re-foulement when the temporary status expires. Indeed, the Australian government introduced the TPV and SHEV with the intent to deter and punish asylum seekers attempting to enter the country without a visa.<sup>235</sup> The punitive

<sup>229</sup> *Protection Claims at the Border Instruction* (n 27) 12. See also *Ex parte Adimi* (n 208) where Simon Brown LJ observed that 'the combined effect of visa requirements and carriers' liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents': at 674.

<sup>230</sup> *Migration Act* (n 15) s 198.

<sup>231</sup> *Ibid* s 197C.

<sup>232</sup> '[O]nly if an individual's claim to refugee status is examined *before* [they are] affected by an exercise of State jurisdiction (for example, in regard to penalization for "illegal" entry), can the State be sure that its international obligations are met': Goodwin-Gill, 'Article 31 of the 1951 Convention Discussion Paper' (n 208) 2 [4] (emphasis in original).

<sup>233</sup> See above nn 87–9 and accompanying text.

<sup>234</sup> *Ibid*.

<sup>235</sup> See, eg, Migration and Maritime Powers Bill Explanatory Memorandum (n 10) 2:

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally.

restriction of visa class, based solely upon the asylum seeker's manner of entry constitutes an impermissible penalty prohibited by art 31.

### 3 Detention

Article 31(2) prevents states from restricting the movements of refugees other than where such restrictions 'are necessary'.<sup>236</sup> Furthermore, any restrictions on movement 'shall only be applied until [the refugee's] status in the country is regularised or they obtain admission into another country'.<sup>237</sup> An inquiry into whether detention violates the non-penalisation provision must therefore address the purpose, conditions, and duration of detention. In principle, detention for administrative or investigative purposes does not constitute an unnecessary restriction under art 31(2) or a penalty under art 31(1). However, the question here is not whether administrative detention is generally allowed under international law, but rather whether the purpose and conditions of detention in the Australian context of entry screening render detention impermissible under one or both sections of art 31. If the purpose of detention is punitive, or an arbitrary or discriminatory restriction of rights under international refugee or human rights law, that detention may violate the provisions of art 31.<sup>238</sup>

A state may only resort to detention for a legitimate purpose, based upon 'a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose'.<sup>239</sup> Where the detention lacks protections against arbitrariness (including access to an effective remedy to contest detention) or lacks individualised review, it violates substantive international legal safeguards against unlawful and arbitrary detention.<sup>240</sup> Therefore, even where a state has a legitimate, administrative purpose for detaining an asylum seeker — such as '[i]n connection with accelerated procedures for manifestly unfounded or clearly

<sup>236</sup> 1951 *Convention* (n 11) art 31(2).

<sup>237</sup> *Ibid.*

<sup>238</sup> Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 185, 195:

[T]he object and purpose of the protection envisaged by [a]rt 31(1) of the 1951 *Convention* is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate, for otherwise the fundamental protection intended may be circumvented and the refugee's rights withdrawn at discretion.

<sup>239</sup> United Nations High Commissioner for Refugees, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (Policy Paper, 2012) 15 [19] <<https://www.refworld.org/docid/503489533b8.html>> ('Detention Guidelines').

<sup>240</sup> *Ibid* [18]. See also ICCPR (n 11) art 9.

abusive claims,<sup>241</sup> or ‘to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks,’<sup>242</sup> or even to record ‘within the context of a preliminary interview, the elements of their claim to international protection’<sup>243</sup> — the decision to detain must be based upon an individualised assessment of the asylum seeker’s circumstances, subject to time limits.

Detention as mandated in the entry screening protocols does not conform to these international legal standards. As outlined above in Part II, once an asylum seeker has been refused immigration clearance they must be detained.<sup>244</sup> The decision to detain is automatic and mandated in all cases, without an examination of the need for detention in the individual case, rendering the detention arbitrary.<sup>245</sup> Moreover, the decision to detain and conditions of detention cannot be meaningfully challenged in court, due to both legal and practical impediments.<sup>246</sup> Though the Australian government clearly has an interest in conducting initial identity and security checks, or recording elements of a claim to international protection, the lack of individualised assessment, combined with the lack of effective remedy for contesting detention, renders detention in the context of entry screening an arbitrary restriction of rights under international law.<sup>247</sup> This, in turn, constitutes an impermissible penalty under art 31.

<sup>241</sup> ‘Detention Guidelines’ (n 239) 17 [23].

<sup>242</sup> Ibid 17 [24].

<sup>243</sup> Ibid 18 [28].

<sup>244</sup> *Protection Claims at the Border Instruction* (n 27) 12–13.

<sup>245</sup> ‘Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case’: ‘Detention Guidelines’ (n 239) 16 [20]. See also Human Rights Committee, *Views: Communication No 560/1993*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) 23–4 [9.4]:

[T]he fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual ... which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

<sup>246</sup> See above Part III. See also Human Rights Committee, *Views: Communication No 900/1999*, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) 20 [8.3]:

[T]he court review available to the author was confined purely to a formal assessment of the question whether the person in question was a “non-citizen” without an entry permit ... The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to art 9, para 1, constitutes a violation of art 9, para 4.

<sup>247</sup> There are other international legal considerations which arise under the *CRC* (n 11) to which Australia is a signatory. The *CRC* (n 11) directs that child detainment should only ‘be used as a measure of last resort and for the shortest appropriate period of time’: at art 37.



## V CONCLUSION

Though the redacted release of several policy documents including the *Entry Screening Guidelines* and the *Protection Claims at the Border Instruction* sheds light on the intricacies of a process that has been relatively opaque, several key questions remain. Perhaps foremost among them is the question of whether the ABF follows the procedures outlined in the policy documents on a day-to-day, operational basis. The number of individuals reported to have requested protection at Australian airports is remarkably low relative to the number of visa cancellations in immigration clearance and at airports abroad. The policy documents mandate data collection, yet the DHA does not have procedures in place to accurately capture and record that information. Data previously provided by the DHA on airport protection claims is likely inaccurate. If the agency does not know how many individuals have requested protection at Australia's airports, there is no way to know whether Australia complies with its domestic and international legal obligations.

In asking these questions, a larger picture emerges of a state that has located migration decision-making in an enforcement-focused administrative legal process, eschewing traditional rule of law principles such as transparency and procedural fairness. Non-citizens who arrive at an Australian airport with a visa and seek protection, but who are subsequently refused immigration clearance, are labelled UAAs and legally reconstituted as outside of the migration zone. This designation triggers an administrative entry screening process for the review of protection claims, which appears to find no legislative basis — or analogue — in the onshore protection framework. The entry screening process further appears to implicate a number of potential bases for legal challenge, including the right to access counsel and the right to visa application forms where a non-citizen is detained, as well as the lack of review of entry screening decisions, the validity of the entry screening process under the *Migration Act*, and the practical considerations that impede an individual's ability to raise these claims while detained at an airport.

Initiatives like offshore processing, interdiction, and visa cancellations abroad have persisted due, in part, to their occurrence far from Australian territory. However, the entry screening process locates these problematic practices closer to home. Without an appropriate statutory basis for the operational exercise of the practice of entry screening, the policy is unlawful. If entry screening were to survive despite this fundamental defect, a variety of other domestic legal considerations — including the lack of appropriate provisions to ensure procedural fairness — would render the policy inoperable. The international law implications are also significant and reveal a policy that likely violates Australia's obligations of non-refoulement and non-penalisation, both in form and

operation. Rather than a case of border externalisation, entry screening represents an internalisation of fundamentally unfair and opaque procedures originally adopted to deter the protection claims of individuals far from the Australian mainland.