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Research Brief REFUGEE STATUS DETERMINATION ON MANUS ISLAND

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Introduction

Papua New Guinea (PNG) is an independent Pacific nation, north of Australia across the Torres St



Refugee status determination (RSD) in PNG

Legislation

History of PNG refugee law

Despite acceding to the 1951 Convention Relating to the Status of Refugees (Refugee

as to other classes of asylum seekers.¹⁵ However, as at July 2018 PNG law still did not contain any express protections against *refoulement*.

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The first cohort: November 2012 – July 2013

After visiting Manus in January 2013, UNHCR returned with concerns about the state of PNG's RSD system, as well as the 'very significant inadequacies in the legal and operational framework governing the transfer, treatment and processing of transferees from Australia to PNG'.¹⁶ The relevant authorities were drafting regulations that would establish a legal framework and procedures for RSD, but there was no timeframe for when they were expected to be completed and implemented. In the meantime, there was:

- no adequate domestic legal framework to implement PNG's responsibilities under the Refugee Convention;
- no specific legal provisions for the processing and treatment of child asylum seekers;
- no experienced officials in the PNG government able to undertake RSD on the scale and complexity of cases envisaged under the transfer arrangements; and
- no preliminary data collection of asylum seekers other than biodata collected in Australia prior to transfer, which represented another obstacle to commencing the substantive assessments of refugee claims.¹⁷

UNHCR concluded that 'the delays and uncertainty surrounding the commencement of the refugee status determination process are inconsistent with the primary and, arguably, sole purpose of transfer from Australia'.¹⁸ Asylum seekers detained in the Manus RPC at this time expressed confusion and frustration over the lack of clarity about RSD procedures, which country was responsible for them, and their timeframes.¹⁹

After visiting Manus Island again in June 2013, UNHCR acknowledged a number of positive developments since its January visit and welcomed the fact that RSD had commenced in the interim. However, UNHCR also noted significant ongoing shortcomings in the legal framework, including the regulations passed in April 2013. In terms of PNG's capacity to perform RSD, UNHCR welcomed capacity-building initiatives for PNG officials but noted that it would take a period of at least six months before they would be able to undertake RSD with any degree of self-sufficiency.²⁰ Even then, UNHCR believed some 'quality oversight' would be useful, including ongoing mentoring support from the Australian government.

The second cohort: July 2013 onwards

According to the Australian government, the RSD process did not commence in PNG until 8 July 2013.²¹ When asked about the reasons for this delay, Martin Bowles, then Secretary of the Department of Immigration and Border Protection (DIBP), explained in 2014 that:

PNG was new to this, right down to the point where they had to change legislation to actually get this process in place. What has happened through this process is that they now have a functioning refugee status determination and review mechanism.²²

asylum seeker should be excluded from refugee status for any reason; and an assessment of whether the asylum seeker should be determined to be a refugee.³⁹

At this stage of the process, information about how RSD is and has been carried out on Manus Island becomes increasingly unclear. It appears that asylum seekers would receive an 'interim' or 'initial' notification of the outcome of their claim from PNG ICOSA. These initial notifications were sometimes called 'recommendations' and were required to be in writing.⁴⁰

If the initial notification was positive the asylum seeker's case was referred to the Minister 'for final decision', with a recommendation that he or she be found to be a refugee. According to reg 15 of the Migration Regulation, once an initial notification was referred to the Minister for a final decision he or she should make and communicate this decision 'as soon as practicable'. There is no legislative guidance on how the Minister should make such decisions. Reg 14 provides only that the Minister 'may' determine a person to be a refugee if they meet the definition contained in the Refugee Convention.

If the initial notification was negative, PNG ICOSA was required to advise in writing why the asylum seeker failed to meet the eligibility criteria for refugee status, including whether evidence submitted by the asylum seeker was insufficient or not accepted.⁴¹ The draft procedures manual of the Refugee Determination Guidelines provides that notifications of negative decisions should 'contain information about the automatic referral to the Review Officer',⁴² however there is no provision for 'Review Officers' under PNG law.

In late 2013 UNHCR was advised by the PNG government that it intended to establish 'an independent panel comprised of an officer from the Department of Justice and an officer from the Attorney-General's Department, who will review negative RSD decisions'.⁴³ The Australian DIBP subsequently stated that there was a Refugee Assessment Review Panel in PNG, independent from the PNG ICOSA, with authority to 'review the merits of an initial refugee assessment, and provide [a] recommendation for refugee determination to the PNG Minister for Foreign Affairs and Citizenship prior to his making of a refugee determination under PNG law'.⁴⁴ The PNG government has also stated that asylum seekers initially assessed not to be refugees may have their claims reviewed by 'an independent panel of eminent Papua New Guinean and international lawyers'.⁴⁵ Despite these statements, such a panel is not established under the *Migration Act*, nor does it appear to be established under any other PNG law. Limited information is available about its powers and composition.

It is not clear what opportunity

refugees refused to leave it and move into the transit facility at Lorengau, citing fears for their safety.⁵³

Following a ruling of the Supreme Court of PNG on April 2016 that the detention of asylum seekers at the Manus RPC was unconstitutional and illegal under PNG law,⁵⁴ PNG Prime Minister Peter O'Neill announced that it would close and that Australia would need to make 'alternative arrangements' for the men still there.⁵⁵ He invited any men found to be refugees to live in PNG 'only if they want to be a part of our society and make a contribution to our community'.⁵⁶ For everyone else, including those refugees who were not permitted or did not wish to settle in PNG, durable solutions needed to be found elsewhere. When Australia subsequently withdrew all services from the Manus RPC on 31 October 2017 and the facility 'closed', the 600 men still there demonstrated their unwillingness to move into the PNG community, even on a temporary basis, by refusing to move to the transit accommodation that had supposedly been made available for them in Lorengau.⁵⁷

UNHCR has repeatedly emphasised that 'solutions must be found for all, outside of Papua New Guinea, as a matter of urgency', and maintained that 'Australia remains ultimately responsible, as the state from which these refugees and asylum-seekers have sought international protection, for their welfare and long-term settlement outside of Papua New Guinea'.⁵⁸ However, since July 2013, successive Australian governments have firmly and consistently stated that no person transferred to and determined to be a refugee in PNG will ever have the opportunity of settling in Australia. The most viable resettlement opportunity for refugees in PNG is to the United States, under a resettlement agreement between that country and Australia. However it remains unclear how many refugees the United States will accept, and there do not appear to be arrangements in place for those who remain in PNG. New Zealand offered to resettle a small number of people but as at July 2018 Australia had refused this offer Australia would PNG. sidest10900000887 0 595.25 842 reW*nBT/F1 11 Tf1 0 0 1 124.05 5

³⁸ Ibid, 53.

³⁹ Ibid.

⁴⁰ Ibid, 67.

⁴¹ Ibid.

⁴² Ibid.

⁴³ UNHCR, above n 13, 10.

⁴⁴ Mark Cormack, Answer to Question Taken on Notice by Senator Hanson Young, Senate Legal and Constitutional Affairs Committee, Budget Estimates, 26-

⁶⁰ Ben Doherty, 'Manus refugee who reached Canada last week says deaths are "very likely"', *Guardian* (online), 6 November 2017, <https://www.theguardian.com/australia-news/2017/nov/06/manus-refugee-who-reached-canada-last-week-says-deaths-are-very-likely>.