

# victoria legal aid's

## refugee and immigration practice

*by Paul Fisher, Victoria Legal Aid*

### introduction

VLA has had a refugee and immigration practice for many years. It was steadily built up in the 1990s with the focus being on refugee and other humanitarian cases. Prior to July 1998, legal assistance per se was available to refugee applicants who satisfied the merits and means tests, and representation was available at all stages of the refugee determination process. Immigration law, predominantly refugee work, comprises about one third of the work of the practice, with other major components being mental health law and social security law, including both administrative review and summary prosecutions.

In 1997 federal funding of immigration legal services was subjected to a tendering process under the Immigration Application Advice and Assistance Scheme (IAAAS), and private contractors appointed to provided these services by the Department of Immigration and Multicultural Affairs (DIMA). As a result, from July 1998, the legal aid guidelines were amended, the effect of which was to restrict the availability of legal aid for judicial review to:

- unsettled areas of law where there are conflicting authorities which have not been settled by the Full Federal Court or the High Court, or
- some cases involving challenges to the lawfulness of detention.

Concerned that these developments had led to significant erosion of our immigration practice, in 1999, VLA entered into the IAAAS and was awarded part of the work of representing asylum seekers in Victoria. Our work falls into two categories: applicants in the Immigration Detention Centre at Maidstone, and those in the broader community. In the former category,

asylum seekers at Maidstone are referred to us by DIMA at the start of the refugee determination process. We represent them in their initial applications and, if they are unsuccessful and wish to seek review, before the Refugee Review Tribunal (RRT). We also represent eligible asylum seekers in the community, at either or both stages of the process. In this second category, we are limited by a cost ceiling under the IAAAS, and have to be quite selective.

### who are our clients?

Independently of the IAAAS, VLA also provides a telephone advice and referral service, and three weekly clinics. We give legal advice to those with a range of immigration problems, particularly asylum seekers. We cannot assist many of these people, either because they can afford private legal representation, their cases have insufficient merit, or their problem simply falls outside our guidelines (eg, business migration).

Clients in immigration detention are usually those who have not been immigration cleared, such as those with false papers who are detected at the airports, or stowaways who have been discovered. This category of applicant is given the highest processing priority by DIMA and the RRT, and we are obliged to conform to strict timetables for preparation and lodgment of applications and claims.

Clients from the broader community may have come here legally (eg, on a visitor or student visa) or passed through immigration clearance using false or doctored travel documents, or may even have bypassed immigration clearance altogether as stowaways. Some applicants hear about us from friends or relatives, or through their particular ethnic community, while others are referred to us by welfare agencies such as the Red Cross.

They come from a diversity of places, there being no shortage of countries afflicted by civil strife along ethnic or political lines, or where religious or political dissent is brutally suppressed. Among these are Sri Lanka, Iran, Iraq, Turkey, Afghanistan and Burma, but there are many other refugee producing countries, both acute and chronic.

### what our work involves

There are a number of aspects of this sort of work that call for special skills and sensitivity. The clients have often experienced torture or other trauma, including sexual abuse. Many have medical and/or psychological problems as a result, which require treatment or counselling, and which may constitute evidence in support of their claims but also interfere with their ability to present those claims coherently. We maintain close contact with organisations that can provide some of those services, such as the Victorian Foundation for the Survivors of Torture. It is important that factors such as gender and cultural differences be taken into account, and female clients, for example, be given the option of female solicitors and interpreters.

Many asylum seekers are extremely wary of authority figures, as they associate the police or other arms of government with violence and oppression. They often put off even applying for refugee status for this reason. It may have taken a supreme effort just for them to come and get legal advice, and it sometimes takes a number of sessions before a client trusts you enough to tell you the full story.

In most cases is it necessary to use interpreters in order to communicate, and these are provided at no cost to the applicants. The use of interpreters

can be problematic, as some clients are very suspicious of their fellow nationals, particularly if they detect in the interpreter a different political, ethnic or religious persuasion. It also slows considerably the process of taking instructions and preparing documents.

DIMA, however, expects applications to be made promptly upon arrival in Australia, and penalises applicants who do not comply in a number of ways. Firstly, those asylum seekers who do not lodge an application within 45 days of arrival are generally refused permission to work during the processing of their applications. While this policy is designed to deter unmeritorious applications, its impact upon genuine applicants can be very harsh. Delay in lodging also gives rise to a presumption that the applicant does not hold a genuine fear of returning to his or her homeland, a presumption which becomes less rebuttable as time elapses. And woe betide the applicant who lodges their application without detailing every aspect of their claims; any subsequent amendment or elaboration will almost

certainly be looked upon as suspect, and often as not rejected out of hand as fabrication. There is intense pressure to get the application absolutely right at the outset, and achieving this requires a lot of effort from both practitioner and client.

At the DIMA stage, we:

- prepare and the application together with any relevant supporting documentation;
- make written submissions about the applicant's own case and also the relevant country situation; and
- attend the interview with the case officer.

However, there is no automatic right to an interview and many meritorious applications are summarily rejected. If that happens, we will generally continue to represent clients who wish to appeal to the RRT, where we go through the process of *de novo* merits review.

## observations

This work can be intensely rewarding, bearing in mind what is often at stake,

and there is no happier client than a successful refugee applicant. It can also be extremely frustrating when a client you have worked with and come to know well, and whose case you strongly believe in, is rejected on the basis of a spurious credibility assessment which is immune from judicial review.

RRT decisions are reviewable in the Federal Court, subject to restricted administrative review grounds. Under the Migration Act 1958, breaches of procedural fairness, errors of unreasonableness and decisions omitting relevant or admitting irrelevant considerations are not reviewable.

Despite the limited availability of legal aid for judicial review applications, we still have a sizeable Federal Court practice, and even make occasional forays into the High Court. As well as giving our clients another chance, the process of judicial review helps to remind and reassure us that there are still some fetters on the exercise of administrative decision making power.

# the refugee and immigration

## legal centre (RILC)

*by Aurora Kostezky, Ebsworth & Ebsworth\**

RILC was established in July 1998. It provides assistance to people in all areas of immigration and refugee law, at all stages of their battles with the Bureaucracy of Immigration, and in appeals to the Migration or Refugee Review Tribunals (MRT/RRT) or the Federal Court.

Like most community-focused organisations, RILC is constantly battling the pressures of poor funding and a lack of resources. During the week, staff attend to clients referred by community organisations and humanitarian associations such as Red Cross. In addition, RILC offers telephone advice from Wednesday to Fridays, often fielding up to 60 calls a week. With at least 15 people coming through the night service each week, staff are faced with the unenviable task of selecting those cases

the Centre will take on. Martin Clutterbuck, the Centre's coordinator, says RILC can only afford to assist one person per week. Those who are turned away are either referred to private solicitors because they can afford it, or they are referred to Legal Aid because their case involves "an arguable point of law".

So what sort of cases does RILC deal with? Aside from the myriad MRT, RRT and immigration applications, a common problem is people not "declaring" children or other relatives when they initially come to Australia. For example, refugees from warring countries sometimes presume some of their children are dead, only to be informed years later they are alive and living with relatives. Since these children are often not declared on their parents' entry

applications, the Department can be reluctant to believe the refugees' applications to bring out their children.

One case involved an Iranian woman who had had an illegitimate son, a source of great shame in Iranian society. The boy had been looked after by his grandparents and his existence was not declared when the mother came to Australia. She applied to bring him out but without any proof of parent-child relationship, she faced the brick wall of the Department.

RILC is always looking for people to help out, but you do need to be a registered migration agent to volunteer for the night service.

*\* Thanks to Mary Jane Ierodiconou and the staff at RILC.*