



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

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ALHR Calls Upon Government to Resist Offshore Processing in Light of Landmark High Court Decision

Stephen Keim SC, President of [Australian Lawyers for Human Rights](http://www.alhr.asn.au), today, called upon the Australian Government to resist offshore processing of asylum seekers in light of last week's decision by the High Court, which ruled the Malaysia Solution to be invalid, and the advice of the Commonwealth Solicitor-General, released on Sunday. "Onshore processing is the legally certain, least expensive and most humane and principled way ahead for determining asylum seeker claims", Mr. Keim said.

Mr Keim welcomed last week's landmark decision, in which the High Court held that the Minister cannot validly declare a country as one to which asylum seekers can be taken for processing unless that country is legally bound to provide effective assessment and protection, by international law or its own domestic law. Mr. Keim said it "clarified and reaffirmed Australia's binding obligations as a party to the UN *Refugee Convention*" and "set out sensible criteria for providing appropriate human rights protections to asylum seekers."

The High Court concluded that these criteria were not met in relation to Malaysia which is not a party to the *Refugee Convention* and does not recognize the rights or status of refugees in its domestic laws. The Court also reinforced the responsibility under Australian law to protect unaccompanied children seeking asylum. This obligation required the Minister to consider the best interests of the child before providing consent to a transfer to a third country. This domestic obligation is in line with Australia's obligations under the *Convention on the Rights of the Child*.

"The significance of the decision", said Mr. Keim, "is that it casts substantial legal uncertainty on a 10-year policy that has been proven to be morally deficient and economically wasteful". Applying the High Court's criteria, it is unlikely that any of Australia's near neighbours – with the exception of New Zealand – would be a suitable country for processing Australia's asylum seekers. "The fact remains that Australia, notwithstanding the shortcomings in its own approach to asylum seekers, is in the best position to meet its freely undertaken obligations under international law to ensure adequate human rights protections to people while they are pursuing their legitimate right to seek asylum from persecution."

Calling upon both sides of politics to resist offshore processing, Mr. Keim also cautioned the Government against reinvigorating the Nauru and Manus Island processing and detention, neither of which has yet been scrutinized by the High Court. Mr. Keim agreed with the advice

of the Solicitor-General, noting that the High Court's decision "throws serious doubt on whether processing on Nauru would withstand a similar challenge". Even though Nauru has recently acceded to the Refugee Convention, there are questions as to whether its domestic protection framework would satisfy the criteria under s.198A of the *Migration Act*, as interpreted by the High Court.

Mr. Keim echoed the concerns of the UNHCR's Regional Representative, Richard Towle, that Australia, as a signatory to the Convention, should not be sending people to countries which do not have "the capacity or the expertise or the experience to deal with refugees".

Mr. Keim affirmed his belief that "efforts to address people-smuggling should be focused upon strategies that are truly regional in character. These strategies should maximise disincentives for people to seek the services of people smugglers, thereby, exposing themselves to the attendant risks. These strategies should, at the same time respect and protect the rights and interests of refugees and asylum seekers. The resettlement component of the Malaysia Agreement and the commitment of Australia and Malaysia to improve the quality of protection for refugees and asylum seekers in Malaysia are the sorts of steps that would need to be part of a well thought out regional approach", he said.

Mr. Keim expressed his hope that the government would not be tempted to undermine the decision through any quick-fix legislative tricks. Any attempts to by-pass the decision, he said, would be likely to be challenged in the courts. They would be likely to further delay the development of a constructive, effective asylum seeker policy in line with Australia's international obligations and human rights standards. The provisions on which the Malaysian Solution foundered were inserted into the legislation by the Parliament, a decade ago, in order to ensure that any attempt at offshore processing would not breach Australia's obligations under international law.

Such attempts would also reflect poorly on Australia as a small but important international contributor to addressing the global refugee protection deficit.

Mr. Keim commended the Government's announcement that it will process onshore the 335 asylum seekers who were due to be transferred to Malaysia under the arrangement, and urged it to move forward with assessing the applications of the over 5,000 people currently in limbo in detention.

Inquiries to:

Stephen Keim SC

President – Australian Lawyers for Human Rights

s.keim@higginschambers.com.au

Mobile: 0433 846 518