Recent developments in the regime for refugee status determination in Australia

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This paper explores the domestic application of Australia's obligations under the Convention Relating to the Status of Refugees. The author puts the view that the system for refugee determination in Australia has been unnecessarily complex and inflexible in recent times, which has been both a consequence of, and a contributor to, public debate in Australia about asylum seekers and refugees.

Introduction

An asylum seeker is someone who is seeking international protection but whose claim for refuge status has not yet been determined. A refugee, however, is someone who has been recognised under the *Convention Relating to the Status of Refugees 1951* (Refugee Convention) to be a refugee. Article 1A(2) of the Refugee Convention defines a refugee as a person:

> *...owing to well – founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it…*

The Refugee Council of Australia emphasises that not everyone in need of international protection will satisfy the definition of a refugee. The Refugee Convention does not expressly provide protection for people that are stateless; are

from a country engaged in civil war; are subjected to gross violations of their human rights for non Convention reasons; are people who would face torture upon their return; or are people who have fled a country where the rule of law and order no longer exists.

The current border protection policies of industrialised countries are made in the context of irregular international migration and security. At times these concerns can lead to policies that discriminate against refugees. Historically, refugee protection has developed in a reactive approach to refugee crises. From this there has developed a tension between the rights of the refugees and political interests. The United Nations High Commission for Refugees ("UNHCR") has remarked that "[f]inding asylum can become a matter of chance in some regions, due to inconsistency by States in applying Convention standards."

Development of refugee policy in Australia

In Australia, there has been controversy and debate over asylum seekers and refugees for around two decades. That debate has been sometimes uninformed. The public perception about asylum seekers and refugees is generally negative. Those perceptions are greatly influenced by a misunderstanding of basic issues and by the spreading of misinformation, sometimes for political or media purposes. Our political leaders like to be seen to be "tough" on asylum seekers who arrive undocumented by sea but, at the same time, they feel the need to take a humane approach to the treatment of refugees. This janus faced approach reflects the bifurcation of policy and administration in migration which has lead to major structural inefficiencies and disconnections.

Immigration law in Australia became a federal responsibility in 1901 but between then and 1989 the power of primary decision makers was generally expressed and largely discretionary. During the 1980s there was a growing concern about the arbitrary and inconsistent nature of migration decisions. In 1989 the *Migration Act 1958* (Migration Act) was amended to codify the criteria for the various Australian visas and entry permits. The legislation also provided for merits review by a tribunal of primary decisions on a semi – independent basis within the structure of the Executive Government.

Australia's resettlement of refugees and processing of asylum claims is relatively small in comparison to global needs. In 2016-2017 Australia received 20,257 asylum seekers from overseas out of 91,177 applications. Over the same period, around 10,000 claims for protection were made onshore by persons who had arrived lawfully but who sought a change of status and of those, 1,711 were granted.

Very few understand the difference between Australia's obligations owed under the Refugee Convention, which are met onshore, as opposed to its voluntary involvement in the resettlement of refugees referred by the UNHCR through the offshore component of the Humanitarian Program.

Prior to the 1970s, Australia's main response to deal with humanitarian crises was to focus on assisting refugees offshore. With the arrivals of the Indochinese "boat people" seeking onshore protection in the aftermath of the Vietnam War, the Government saw the need to revise the existing practices and develop a refugee policy specifically designed to respond to refugee and humanitarian issues. Since the 1970s

Australia has adapted its refugee policy in response to various humanitarian crises. Significant events including the 1989 Tiananmen Square incident coincided with an increase of irregular maritime arrivals. In reaction to the significant increase in such irregular arrivals, the Government began a program of deterrence which introduced the mandatory detention regime. At this time the Migration Act was amended to "…provide a system of entry by visas and a distinction between 'citizens' and 'non-citizens' (and, arising from that, between 'lawful' and 'unlawful' non- citizens)."

Another noteworthy development in Australia's refugee policy was the Howard Government introducing the practice of specifically identifying and linking the onshore and offshore components of the Humanitarian Program "to improve program management". This meant that "offshore refugee and humanitarian" and "onshore protection" were separately identified but included together in the same program (Humanitarian and Refugee Resettlement) for the first time.

The offshore component of the humanitarian program

The Offshore Program grants visas to two categories of people, namely, refugees and those people who enter Australia under the Special Humanitarian Program. The majority of persons in the "refugee category" are identified by the UNHCR as refugees and referred by the UNHCR to Australia. The UNHCR has a program for resettlement of refugees from the country in which they have sought refuge to another State that has agreed to admit them. The UNHCR may recommend or refer people for resettlement, but due to the shortage of places the UNHCR will only recommend the neediest of cases.

As noted above, in 2016-2017 more than 91,177 people applied under the Special Humanitarian Program. Many are refused on the basis that they do not adequately demonstrate compelling reasons for this grant of visa. No merits review is available for applicants who are refused this visa. However there has been a significant number of grants successfully sought through Ministerial intervention.

The onshore component of the humanitarian program

When an onshore protection visa application is made, the Department of Home Affairs decides if the applicant engages Australia's protection obligations under international law which are codified in the Migration Act. The Migration Act and *Migration Regulations 1994* set out the criteria for a Protection visa. These draw upon the criteria for protection under the Refugees convention, the International Covenant on Civil and Political Rights ("ICCPR"), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and Convention on the Rights of the Child ("CROC").

The Migration Act provides guidance as to what circumstances call for protection. There have also been many court judgments that have developed migration law, especially when determining protection visa applications.

Independent merits review is available through the Administrative Appeals Tribunal ("AAT"). Judicial review proceedings may be available in the Federal Circuit Court ("FCC"), the Federal Court and/ or the High Court. The Minister may also intervene to replace a decision of the AAT with a more favourable decision if it is determined to be in public interest.

Administrative Appeals Tribunal

In 2015 the jurisdiction of the former Refugee Review Tribunal and the former Migration Review Tribunal was transferred to the AAT. The AAT is a statutory body that provides a final, independent merits review of visa and visa – related decisions made by the Minister or one of his delegates. The review of the decision of the Minister or his delegate usually involves considerations as to whether the applicant is a person to whom Australia has protection obligations. The AAT is not bound by technicalities, legal forms or rules of evidence but must act on the justice and merits of the case. The Tribunal's jurisdiction, powers and procedures in relation to migration cases are set out in the Migration Act and the Migration Regulations. The AAT has the power to affirm the primary decision, vary it, set it aside and substitute a new decision or remit the matter to the Minister's Department.

Applicants or the Minister can seek judicial review of a decision on a point of law only. The two avenues that are available are to the FCC via s.476 of the Migration Act and to the High Court under paragraph 75(v) of the Commonwealth Constitution. The AAT review process is usually conducted by a single member and is inquisitorial rather than adversarial in nature. The AAT is bound by a "code of procedure" which is contained in the Migration Act and relates to obtaining and giving information, the conduct of hearings and other matters. Despite the intention of the Parliament in enacting the code, namely to deliver certainty in how procedural fairness is accorded to applicants, the judicial interpretation of provisions of the code has resulted in considerable complexity in the conduct of AAT reviews (namely ss.424, 424A, 424AA and 425 - which give the AAT the power to deal with the putting of adverse information to the applicant and the power to seek information). Opinions vary about

the utility and wisdom of the code but the general consensus of opinion is that the code is unnecessarily prescriptive.

There were 26,604 migration review applicants to the AAT in 2016-2017 including over 8,000 in relation to protection visa applications.

Certificates

Section 375A and 438 are similar provisions in the Migration Act applying to reviews by the Administrative Appeals Tribunal. Section 438 provides for certificates to be issued by delegates in relation to certain documents and information, prohibiting disclosure of the same, if such disclosure "would be contrary to the public interest for any reason specified in the certificate" or if the documents or information were provided to the Department in confidence.

A substantial problem has arisen because officers of the Minister's Department have, over several years, been issuing certificates in many cases as a matter of course in respect of purely bureaucratic administrative documents. Such certificates have been found to be invalid. Resulting questions have been whether the Tribunal relied upon an invalid certificate and whether the affected documents should have been disclosed to applicants.

In the seminal decision of *MZAFZ v Minister for Immigration* [2018] FCA 1081, Beach J explained that such certificates are, on their face, invalid. Merely asserting that disclosure is prevented because the documents are "internal working documents" is insufficient because this "has never been either a necessary or sufficient basis for

public interest immunity, either at common law or under statute" (at [27]). Such certificates only disclose at best *part* of the basis for a claim. Beach J described the certificate as "manifest[ing] imprecision and overreach", a description that is apt for many such certificates in Departmental files. As the certificate upon which the Tribunal relied did not comply with the s.438 statutory prescription, the Tribunal fell into jurisdictional error.

This has been another rapidly changing area of migration law, and questions of the consequences of validity or invalidity of certificates and the procedural fairness ramifications of them have been further explored in a number of authorities including *Minister for Immigration v Singh* (2016) 244 FCR 305, *SZMTA v Minister for Immigration* [2017] FCA 1055, *BEG15 v Minister for Immigration* [2017] FCAFC 198 and *Minister for Immigration v CQZ15* [2017] FCAFC 194. The latter two decisions are currently set down for hearing before the High Court this month. Beach J declined to examine the documents in *MZAFZ*. Where the certificate is on its face invalid, I typically examine the documents in question to determine whether any obligations of disclosure to the applicant arose under s.424A or s.424AA of the *Migration Act*.

Judicial review

In 1998 the amount of litigation that was created in the Federal Court from migration decisions amounted to approximately 68 per cent of that courts work. In the following years the number of refugee matters being heard in the Federal Court did not decline, which is reflected in data for the periods from 2002 onwards, although it changed from first instance work to mainly appeals.

The FCC (then known as the Federal Magistrates Court) received jurisdiction under the Migration Act in October 2001 to undertake judicial review of migration decisions. In one stroke the federal jurisdiction of the Court (in terms of number of cases handled) was increased approximately ten-fold.

The *Migration Litigation Reform Act 2005* enhanced the role of the FCC as a response to reduce "unmeritorious litigation". This legislation enforced strict time limits and gave the FCC power to summarily dismiss proceedings where it is satisfied that there are no reasonable prospects of success. The long term trend in migration litigation was for some years thereafter consistently downward as a consequence of effective case management in the FCC. Over that period any perceived "migration benefit" from seeking judicial review was very much reduced." The number of lodgements in the FCC went from 1549 (2007-2008) to 1288 (2008-2009) and a mere 880 (2009-2010). There was a small increase in the filings in 2010-11 with 959 applications filed. In more recent years, the court's migration applications increased substantially. In 2016-2017 almost 5,000 migration appeals were filed in the FCC. This reflects the addition of offshore entry persons' applications. Professor John McMillian advised the former Government on options to improve the efficiency of the judicial review process for irregular maritime arrivals, but no substantial change has resulted.

Seeking asylum in Australian excised territory

The most controversial part of the Humanitarian Program is that relating to asylum seekers arriving irregularly by boat. The controversy has centred upon the steps taken by Parliament and the Executive Government to contain and deter irregular maritime arrivals and to attempt to exclude judicial scrutiny.

In the aftermath of the *Tampa* affair in 2001, six Acts were enacted to limit the access of future unauthorised boat arrivals to mainland refugee status determination procedures.

Four strategies were adopted to achieve the Government's objective of deterring irregular maritime arrivals:

- the Minister was empowered to declare certain territories to be excised offshore places, and as such not part of Australia's "migration zone";
- a new category of offshore entry person was created to catch all asylum seekers landing on an excised territory without a valid visa or other authority;
- the Migration Act was amended to enable the transfer of "offshore entry persons" to a declared country; and
- section 46A(1) was introduced to explicitly bar "offshore entry persons" from making an application for a visa to enter Australia, unless the Minister exercises the public interest discretion under s.46A(2) to lift the bar.

Under the legislative changes made, asylum seekers who entered Australia at an excised offshore place were deemed not to have entered the Australian migration zone for the purpose of applying for a visa. They were barred from applying for any visa by s.46A of the Migration Act. Although asylum seekers arriving irregularly by boat

are unable to lodge visa applications under Australian law they were, under the Howard, Rudd and Gillard Governments, able to seek asylum and have their claims processed under an ostensibly non – statutory Refugee Status Assessment (RSA). If the person was found to be a refugee the case would be referred to the Minister who would decide if it was in the public interest to allow them to apply for an onshore protection visa.

This regime of processing an offshore entry person began with an officer of the Department interviewing the applicant. If the officer determined that the applicant was a person who was owed protection obligations under the Refugee Convention, a submission would be made to the Minister for his consideration whether to exercise his power under s.46A(2) by lifting the s.46A(1) bar to allow an application for a visa to be made. If an officer was of the opinion that the applicant was not a person to whom protection obligations were owed under the Convention, the applicant might then seek a review by an Independent Merits Reviewer, later known as and Independent Protection Assessor. Under the administrative arrangements, the reviewers' assessment and recommendation were made available to the Minister for his consideration. By virtue of s.46A(7) of the Migration Act, the Minister was not obliged to take an assessment or recommendation into account in deciding whether or not to lift the s.46A(1) bar.

Between 2007 and 2012 the system of operation on Christmas Island saw asylum seekers taken to the Island and allowed to lodge refugee claims. Procedures were established ostensibly outside of the Migration Act to allow for refugee status assessment review of negative rulings. The process allowed an offshore entry person,

on request, to be assessed to determine whether he or she is a person with respect to whom Australia has protection obligations under the Refugees Convention. In the first instance, the assessment was carried out by an officer of the Department of Immigration, while the review was conducted by reviewers employed by the private company, Wizard People Pty Ltd.

The peculiarities of this process were subjected to judicial scrutiny by the High Court in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* (2010) HCA 41. Each applicant alleged that they were not afforded procedural fairness during either the original RSA assessment or the subsequent Independent Merits Review (IMR). Each claimed further that errors of law were made by the assessors by not applying relevant provisions of the Migration Act in determining their claims.

The plaintiffs argued that the primary decision makers and the independent reviewers were officers of the Commonwealth for the purpose of s.75(v) of the Constitution.

> *The Court accepted that the power being exercised was statutory, through the Minister's consideration of whether to exercise his power under s.46A(2) or s.195A(2) of the Migration Act. The Court found that the Minister's practice and the published policies governing the RSA and IMR processes indicate that the Minister had made a decision to tie the non-reviewable, non–compellable discretions conferred by ss.46A and 195A to the assessment and review outcomes.*

The High Court did not just declare the processes in the two cases to have been flawed by reason of a failure to observe the rules of procedural fairness. The Court also made it clear that the decision makers were bound by other aspects of Australian law.

The case *SZQDZ v Minister for Immigration* [2012] FCAFC 26 involved five applicants, each being an unlawful non-citizen who arrived in an "excised offshore place", being Christmas Island. Following adverse assessments of their requests to be considered a person to whom Australia owes protection obligations under the Refugee Convention each of the five applicants sought judicial review more than 35 days after the date of the relevant assessment and recommendation by the reviewer. The Full Federal Court held that a reviewer's recommendation was not a "migration decision" within the meaning of the Migration Act and s.477 which imposed a 35 day time limit on judicial review applications, did not apply to it. This was perhaps the final nail in the coffin for the former bifurcated process of dealing with onshore asylum claims.

In March 2012, the former Government decided to permit offshore entry persons to apply for protection visas in the same way as those who arrive legally by air. There was a pool of offshore entry persons already in the former system who remained subject to it, but they did not need to be. As I highlighted in the case of *SZQPA v Minister for Immigration & Anor* [2012] FMCA 123:

> *[T]he Minister is entitled to exercise his powers under s.46A of the Migration Act without regard to anything in a Reviewer's report and recommendation. The orders made by the [Federal Magistrates] Court prevent the Minister from relying upon the present report and recommendation in considering whether to*

exercise his power… the [Federal Magistrates] Court's orders do not prevent the Minister from exercising his powers without regard to that report or recommendation.

Unfortunately, between March 2012 and August 2013 many thousands of asylum seekers arrived irregularly by boat, which created a political and policy (but not a practical) crisis. The former Howard Government's "Pacific Solution" of processing offshore was reinstated and the legislative provisions supporting it were reinforced. The Migration Act was further amended in order to attempt to exclude administrative steps taken in support of that policy from judicial scrutiny, except in the High Court. The former Government imposed an entirely new policy in July 2013 which denied protection in Australia to any new irregular maritime arrivals, who would henceforth be sent to Nauru and Manus Island in Papua New Guinea to be processed (and if necessary resettled) according to Nauru and PNG law. Meanwhile, in August 2012 all on shore processing of refugee claims by irregular maritime arrivals ceased, and by September 2013 there were estimated to be about 30 000 unprocessed asylum seekers in a state of legal limbo in Australia.

Refugee Determination under the present Government

In September 2013, Australia had a change of government. The new Coalition Government led by Tony Abbott was elected on a platform of change to asylum seeker and refugee policy. Prior to the election, Abbott vowed to "stop the boats" and viewed people arriving in boats seeking asylum as a direct threat to Australia's sovereignty. There was already little separating the two policies between the previous Labor Government and the Coalition (both favour mandatory detention and offshore

processing), however now Abbott wanted to go a few steps further. Within a week of gaining power Mr Abbott set up Operation Sovereign Borders which was intended to, and has, deterred irregular maritime arrivals.

The present Government has sought to introduce new measures designed to deter people from seeking asylum in Australia. These include a return to Temporary Protection Visas (TPVs) which work on the basis that those who are successful in their claims for protection will only be eligible for temporary protection and will never be allowed to settle permanently in Australia or bring out their families. These visas last for three years, and then must be reassessed on the basis that the refugee continues to fear persecution in their country of origin.

Perhaps the most controversial policy of the Government is its determination to take direct action to stop the boats by turning back boats towards Indonesia when it is safe to do so. Further, the present Government has maintained the former Government’s policy that those who succeed in reaching Australia irregularly will be transferred to Nauru or Manus Island for processing of their refugee claims and resettlement.

Recent developments regarding Australian visa processing

The Migration Act was amended with effect from April 2015 to create a new system for dealing with the protection claims of persons who arrived by boat (ie the 30,000 people left in legal limbo in 2013). Over 15,000 applications for protection were made in 2016-2017 by people who had arrived by boat in preceding years.

The Fast Track Review Process (FTRP) was introduced by the Migration and *Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The aim of the FTRP is to provide a limited, efficient and quick form of review of certain decisions refusing protection visas some applicants, including those who arrived in Australia as unauthorised maritime arrivals on or after 13 August 2012 and before 1 January 2014. Such a reviewable decision is known as "fast track reviewable decision". A protection visa applicant whose visa refusal decision is subject to the FTRP is known as a "fast track review applicant".

Pursuant to s.5(1) of the Migration Act, a person is a "fast track review applicant" if he or she is a fast track applicant who is not an "excluded fast track review applicant".

Subject to certain exceptions which are not relevant for present purposes, a "fast track decision" is defined in s.5(1) as a decision to refuse to grant a protection visa to a fast track applicant.

Part 7AA of the Migration Act establishes a comprehensive scheme of review of fast track reviewable decisions.

Division 8 of Part 7AA establishes the Immigration Assessment Authority (Authority), the body conducting reviews of fast track reviewable decisions.

Division 2 of Part 7AA sets out the procedure for referring fast track reviewable decisions to the Authority. Under s.473CA, the Minister must refer a "fast track

reviewable decision" to the Authority as soon as reasonably practicable after the decision is made.

Once the Minister has referred a fast track reviewable decision to the Authority, s.473CB requires the Secretary of the Department to give to the Authority certain material in respect of that decision at the same time as, or as soon as reasonably practicable after, such referral, namely:

a) a statement that sets out the findings of fact made by the decision-maker, refers to the evidence on which those findings were based, and gives the reasons for the decision;

b) material provided by the "referred applicant" (defined in s.473BB as an applicant for a protection visa in respect of whom a fast track reviewable decision is referred under s.473CA) to the decision-maker before the decision was made;

c) any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review; and

d) the applicant's contact details.

Subsection 473CC(1) requires the Authority to review a fast track reviewable decision referred to it. Subsection 473CC(2) provides that the Authority may either affirm the decision, or remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by regulation.

Division 3 of Part 7AA deals with the manner in which reviews are to be conducted by the Authority.

Subsection 473DA(1) provides that Division 3 of Part 7AA, together with ss.473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule "in relation to reviews conducted by the Authority". This provision is couched in broader terms than ss.357A(1) and 422B(1) (which bind the AAT) and has been found to operate to exclude the common law natural justice hearing rule from conditioning the conduct of reviews before the Authority.

Subsection 473DB(1) compels the Authority, subject to Part 7AA, to review a fast track reviewable decision referred to it on the papers, that is, by considering the review material provided to the Authority under s.473CB "without accepting or requesting new information" and "without interviewing the referred applicant". However, s.473DC(1) permits the Authority, subject to Part 7AA, to "get any documents or information (new information)" that "were not before the Minister when the Minister made the decision under section 65" and "the Authority considers may be relevant". Subsection (2) confirms the discretionary nature of the power in s.473DC(1) by providing that the Authority "does not have a duty to get, request or accept any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances."

Further, new information can only be considered by the Authority if the requirements of s.473DD are satisfied. Section 473DD provides that, for the purposes of making a

decision in relation to a fast track reviewable decision, the Authority must not consider any new information unless:

a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:

   (i) was not, and could not have been, provided to the Minister before the Minister made the decision under s 65; or

   (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

Subsection 473DE(1) imposes certain disclosure obligations on the Authority not dissimilar to those imposed on the AAT by ss.359A and 424A of the Migration Act.

Division 5 of Part 7AA contains provisions relating to the exercise of powers and functions by the Authority. Subsection 473FA(1) provides that the Authority, in carrying out its functions under the Migration Act, is to pursue the objective of "providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)." This reinforces the legislature's aim of establishing a form of review that is limited in scope and efficient. Subsection 473FA(2) provides that, in reviewing a decision, the Authority "is not bound by technicalities, legal forms or rules of evidence."

In 2016-2017, 2,664 referrals were made to the Authority and 1,604 cases were finalised, mostly by confirming the decision being reviewed. The vast majority of those decisions have been challenged in the FCC.

Numerous issues have arisen on judicial review concerning Authority decisions, largely because the legislation under which it operates is new and untested, and because the procedural code under which it operates is more restrictive than that binding the AAT. Critical differences are that the Authority is generally not able to conduct oral hearings and that it is generally not able to receive new information from applicants.

Court decisions to date have established that the Authority does not have to observe the common law fair hearing rule but that it must act reasonably. Further, the legislative scheme under which the Authority considers the possible receipt of new information is fraught with difficulty.

Section 473DA excludes common law procedural fairness in relation to reviews by the Authority under Part 7AA. Unlike other provisions in the Migration Act, this has been held to be effective. However, the powers of the Authority, including the powers to get and accept "new information" under s.473DC and s.473DD, are subject to the implied condition that they be exercised reasonably, as was recently affirmed by the High Court in *Plaintiff M174/2016 v Minister for Immigration* [2018] HCA 16 at [21]. The High Court explained that s.437DC and s.473DD are to be understood in the context of Part 7AA as a whole, and in particular s.473FA, which provides that the Authority is to "pursue the objective of providing a mechanism of limited review that

is efficient, quick [and] free of bias…" at [36]. The extent to which any of these objectives are being met is an open question and beyond the scope of this paper.

The requirements of s.473DD are cumulative and thus as a matter of ordinary statutory interpretation the Authority is prohibited from considering new information unless *both* limbs are satisfied. This provision has become the source of an ever-expanding wave of caselaw, rolling through the Federal Court and Federal Circuit Court like the Viking longships, the original unlawful maritime arrivals, and ravaging the existing Migration Act jurisprudence as though it were a 10th century coastal village.

The saga of s.473DD perhaps began with the decision of Justice White in *BVZ16 v Minister for Immigration* [2017] FCA 958, which found that the Authority erred in its finding under s.473DD(a) that there were no "exceptional circumstances" to accept new information from the applicant, in the form of a statement and a GP's letter. The Authority's reasons for doing so focused upon a rejection of the applicant's explanation for the late provision of the information. The decision-maker unduly confined its consideration of "exceptional circumstances", rather than considering all the relevant circumstances, and thus constructively failed to exercise jurisdiction. Subsequent decisions of the Full Federal Court, including *Minister for Immigration v CQW17* [2018] FCAFC 110 and *AQU17 v Minister for Immigration* [2018] FCAFC 111 have confirmed the "overlapping" nature of s.473DD(a) and (b): a decision-maker will under most circumstances need to turn his or her mind to the s.473DD(b) factors (and particularly whether the information is credible and its relation to the

applicant's claims) in order to properly consider whether the "exceptional circumstances" limb is satisfied.

As there were many different Norse kingdoms during the Viking Age, so too there are different species of jurisdictional error arising from decisions under s.473DD. For instance, just as a failure to consider (b)(i) or (b)(ii) factors can sound in error, an explicit consideration of these factors can reveal error of a different nature, as was evident in *CSR16 v Minister for Immigration*.[1] The Authority rejected new information because it stated, in relation to a new claim to fear harm, "I am not satisfied that the applicant does have a genuine fear of this kind and I am therefore not satisfied that it is credible personal information."[2] Bromberg J held that it was only later, at the "deliberative stage" of the review, that such a finding should have been made. The word "credible" in s.473DD(b)(ii) refers to information *capable* of being believed, rather than information actually believed by the Authority. Thus the Authority misconstrued the provision and "misconceived what the exercise of its statutory power entailed."[3]

Like Erik the Red, the intrepid Icelandic explorer of Greenland who was exiled for homicide, I have delved at first instance into the swirling and turbulent waters of s.473DC and s.473DD. For instance, in *ABJ v Minister for Immigration & Anor*,[4] the applicant provided to the Authority a translation of a document which had previously been before the primary decision-maker in Farsi. The Authority considered that it was not new information and thus accepted it without applying the statutory test in

[1] [2018] FCA 474
[2] At [35]
[3] At [43]
[4] [2017] FCCA 1240

s.473DD. This decision was attacked by the applicant on judicial review. I held that the Authority was correct, and I posited my view that "a faithful English translation of a document that was before the delegate in a foreign language is not new information for the purposes of s.473DC(1)."[5]

Australia's commitment to complementary protection

Prior to 2012 there was an absence of a codified system of complementary protection in Australia. We have an obligation under international law to provide protection to people that do not satisfy the Convention definition of "refugee" but are nonetheless in need of protection on the basis that they face serious violations of their human rights if returned to their country or origin.

Complementary protection has no internationally accepted definition. The *Migration Amendment (Complementary Protection) Act 2011* received Royal Assent on 14 October 2011 and commenced on 24 March 2012. The purpose of the amendments is to introduce a statutory regime for assessing claims that may engage Australia's non-refoulement obligations under a range of international human rights treaties. The absence of a codified system of complementary protection had meant that Australia was unable to guarantee that people who do not meet the "refugee" definition in the Refugee Convention, but who nonetheless face serious human rights abuses if returned to the country of origin, are granted protection. The amendments introduced greater responsibility, transparency and effectiveness into Australia's arrangements for adhering to its non – refoulement obligations under the ICCPR, CAT and CROC.

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[5] At [36]

Section 36(2)(aa) of the Migration Act sets out the threshold which applicants for complementary protection must meet:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa

(2A) A non-citizen will suffer ***significant harm*** *if:*

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

The new criterion can only be satisfied if the non-citizen is not a person to whom Australia has protection obligations under the Refugee criteria.

Conclusion

Australia has reacted to the pressure upon it in relation to asylum seekers with many twists and turns of law and policy, which add layer upon layer of structure and complexity. Those layers of structure and complexity have generated many legal challenges which have bedevilled the administration of the Migration Act in relation to asylum seekers. In 2013 I hoped that Australia would emerge from the crisis of the

past decade with a process that was clearer and simpler. My hopes have not been realised. Despite new challenges currently arising, the Australian legal system will remain intent on processing the legal claims of asylum seekers through the courts and to hold decision makers to their obligations under the Refugee Convention and other international instruments as applied through domestic law.