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.[2] Article 1A(2) of the 1951 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.[3]

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.[4] 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."[5]

Development of refugee policy in Australia

In Australia, there has been controversy and debate over asylum seekers and refugees for over a decade. 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* was amended to codify the criteria for the various Australia 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.[6]

Australia's resettlement of refugees and processing of asylum claims is relatively small in comparison to global needs. In 2012 Australia received 17,202 asylum seekers by boat, but this was only 1.47 per cent of the world's asylum seekers[7].

As stated in Eilbritt Karlsen's "Seeking Asylum: Australia's humanitarian program", 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.[8]

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.[9]

Significant events including the 1989 Tiananmen Square incident coincided with an increase of irregular maritime arrivals.[10] 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)."[11]

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.[12]

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.[13] 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.[14] 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. There are five offshore visa subclasses under Australia's Refugee and Humanitarian (Class XB) visa. Although only the following four require the applicant to be subject to persecution:

- refugee (subclass 200);
- in country special humanitarian (subclass 201);
- emergency rescue (subclass 203); and
- women at risk (subclass 204)[15].

A refugee seeking to enter Australia on a Refugee visa (subclass 200), must satisfy additional criteria. The Minister must be satisfied that there are compelling reasons for giving special consideration to granting the visa, having regard to the degree of persecution to which they are subject, the extent of the connections with Australia and the capacity of Australia to provide for permanent settlement.[16] The fifth visa subclass is the Refugee and Humanitarian (Class XB). This visa is for people who are "subject to substantial discrimination amounting to gross violation of human rights" in their home country. The visa applicant must also be supported by a proposer, responsible for the resettlement for the person within Australia.[17]

In 2012-13 more than 21,000 people applied under the Special Humanitarian Program.[18] 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.[19]

The onshore component of the humanitarian program

When an onshore protection visa application is made, the Department of Immigration and Citizenship ("DIAC") decides if the applicant engages Australia's protection obligations under the Refugee Convention. The Migration Act and *Migration Regulations 1994* set out the criteria for a Protection visa (subclass 866). Subsection 36(2) of the Migration Act provides that "a criterion for a Protection visa is that the

applicant for the visa is a non – citizen in Australia to whom the Minister for Immigration and Citizenship ("the Minister") is satisfied Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol…"[20] That basic criterion has been modified by s.91R of the Migration Act which provides guidance as to what amounts to persecution. There have also been many court judgments that have developed migration law, especially when determining protection visa applications.

Eligible asylum seekers, applicants in detention and disadvantaged visa applicants have enjoyed access to free, professional migration advice and application assistance under the Government's Immigration Advice and Application Scheme ("IAAAS").[21] There is, however, no formal or comprehensive system of Legal Aid available to asylum seekers, and the IAAAS scheme is being curtailed.

Independent merits review is available through the Refugee Review Tribunal ("RRT") or for character related issues 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 RRT or AAT with a more favourable decision if it is determined to be in public interest.[22] As at 30 September 2013, there were 467 people (approximately 5% of the total immigration population) who had arrived lawfully and were then taken into immigration detention for either overstaying their visa or breaching their visa conditions, resulting in visa cancellation.[23]

Refugee Review Tribunal

The legislative objective of the RRT is to conduct reviews that "…are fair, just, economical, informal and quick."[24] The RRT 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 RRT 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 are set out in the Migration Act and the Migration Regulations. The RRT has the power to affirm the primary decision, vary it, set it aside and substitute a new decision or remit the matter to DIAC.[25]

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 RRT review process is required to be conducted by a single member and is inquisitorial rather than adversarial in nature. The RRT 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.[26] 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 RRT reviews (namely ss.424, 424A, 424AA - which give the RRT the power to deal with the putting of adverse information to the applicant and the power to seek information).[27] Opinions

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

Typically, persons appointed as members of the RRT, or alternatively the MRT, have worked in a profession or have extensive experience at senior levels in the private or public sector. Upon appointment members do not necessarily have to have detailed knowledge of migration or refugee law or in the conduct of hearings. New members are provided with induction training supported by a program of mentoring and further training over several months.[28]

Judicial review

In 1998 the amount of litigation that was created in the Federal Court from RRT decisions amounted to approximately 68 per cent of that courts work.[29] 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 2002-2004 period.[30]

The FCC (then known as the Federal Magistrates Court) received jurisdiction under the Migration Act in October 2001 to undertake judicial review of RRT and MRT decisions. In one stroke the federal jurisdiction of the Court (in terms of number of cases handled) was increased approximately ten-fold.[31]

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."[32] 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 2012-13 the courts migration applications increased substantially to 1981. This reflects the addition of offshore entry persons' applications.[33] 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.[34]

In the aftermath of the *Tampa* affair, six Acts[35] 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.[36]

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.

Recent developments

The 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 is not obliged to take an assessment or recommendation into account in deciding whether or not to lift the s.46A(1) bar.[37]

Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth.

The Rudd and Gillard Governments did not seek to alter the legislative framework underpinning the Pacific strategy of the Howard Government. Up to 2010 Labor had adopted a policy of not exercising the power in s.198A of the *Migration Act* to transfer "offshore entry persons" to third countries. Instead, asylum seekers were held at Christmas Island pending a decision by the Minister to exercise the non–delegable, non–compellable discretion under s.46A(2) of the Migration Act to allow an application for a protection visa.[38] In practice, when a non–citizen was assessed to be a refugee a submission was made to the Minister recommending that the Minister "lift the bar"[39]to exercise his discretion and to grant a protection visa to an offshore entry person.[40]

In 2011 the Government sought to implement an agreement with Malaysia for the processing of 800 offshore entry persons in Malaysia. The Government was unable o proceed with that agreement following the decision of the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

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.[41]

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*[42]. 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.[43]

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.[44]

> *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.[45]

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. Crock, in "Due Processes and Rule of Law as Human Rights" argues that the outcome of this decision could see offshore entry people having an easier avenue for a court to declare unlawful the ruling made on their case and that legislative attempts by the Government to undermine various elements of the rule of law has provided a judicial opportunity to affirm the rights of the people to whom the legislation is directed.[46] The extensive litigation which followed M61 proved that assessment to be substantially correct.

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"[47], being Christmas Island[48]. 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 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*[49]

> *[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.*[50]

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.

This new hard line policy reflected the difficulty the former Labor Government experienced with refugee processing. When it was elected in 2007 under Kevin Rudd, the Labor Government promised to end the "cruelty and inhumanity" of the Pacific Solution by closing overseas processing centres down. However as the boats started arriving again, the Labor Government's policy gradually shifted back to the same policies implemented under Howard. The asylum seeker issue was one of the contributing factors to Kevin Rudd being deposed by Julia Gillard in June 2010, where on the night before he was deposed he stated that he would not "lurch to the right on asylum seeker policy"[51]. The Pacific Solution was again reinvigorated under Gillard in 2012 and by 2013 when Rudd returned to the leadership in July he brought in the new policy mentioned above which demonstrated that Labor had now matched the Coalition in hard line policies towards asylum seekers.

Refugee Determination under the Abbott 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 and appointed a three

star General to oversee and implement new hard line policies in relation to irregular maritime arrivals. The new Immigration Minister Scott Morrison has stated:

"The primary purpose of our immigration programme is economic, not social, in our view. Immigration is an economic policy, not a welfare policy".[52]

This sums up the way the Coalition Government perceives the issue of refugees – as a social problem that does not fit with their commitment to grow the Australian economy through skilled migration. Morrison refers to asylum seekers as "illegals" and speaks about people entering Australia the "right" way (through Government granted visas) or the "wrong" way (by boat without a visa). Professor Jane McAdam has commented:

"If people are described as "illegals" this creates an assumption that they have broken the law and deserve to be treated as criminals. Both these assumptions are wrong. Article 31 of the Refugee Convention – the very provision on which the government bases its use of the "illegal" – says that actions that would otherwise be illegal, such as entering without a visa, must not be treated as illegal if a person is seeking asylum. This is because the drafters of the Refugee Convention recognised that the very nature of refugee flight may mean that people arrive without travel documents".[53]

The Abbott 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.[54] TPVs have been widely criticised for leading to more psychological trauma and instability for refugees as they are left in legal limbo, unable to build a life in Australia and know whether they will be sent back to their country of origin after three years.[55] TPVs do not allow refugees to sponsor family members to join them, or to leave the country to visit family without losing their visa. TPVs do allow a refugee to work. The regulations providing for TPVs were disallowed in the Senate on 2 December 2013. On the same day, the Minister responded by capping the number of protection visa that can be granted this financial year at 1650, which has apparently already been reached.

Perhaps the most controversial policy of the Abbott 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. Apart from this policy raising serious sovereignty issues for Indonesia, turning boats back places Australia at risk of breaching its obligation of *non-refoulement* and human rights law.[56] There has also been controversy on a perceived lack of transparency concerning the number of boat arrivals. Alex Reilly, Associate Professor at Adelaide Law School has observed:

"It is to be hoped that the decision not to freely release information on boat arrivals is not an attempt to avoid public scrutiny of the handling of asylum seeker policy, and in particular, the engagement of the navy in turning back boats. The role of the media and concerned voices in parliament will be crucial to keeping the asylum seeker policy in the public eye where it can remain part of democratic deliberation".[57]

Other changes to the processing of refugee claims involve terminating a free legal advice scheme that was previously available to asylum seekers applying for judicial review of their claims in the courts in New South Wales and Western Australia. This is a concerning development, as legal assistance and legal representation benefits the FCC immensely in determining what are the issues of the case, and assisting in better quality decisions by the courts. Prior to the recent election the then opposition and the then Government both also threatened to remove appeal rights to the Refugee Review Tribunal (RRT) which independently reviews decisions made by Government officials determining refugee status. The reason for this is that the RRT has overturned many decisions made against asylum seekers by delegates of the Minister and there is a concern that the RRT is too liberal in its decision making. However there is concern in the legal community that a termination of independent merits review rights would flood the courts with many more asylum claims.

Despite the fact that Australia receives a very moderate number of asylum seekers, the public perception is that there are too many people seeking asylum, and further that they are not seeking asylum a) by the "right" method and b) for the right reasons. These are perceptions in the community, which are spurred on by politicians that people seeking asylum are "economic refugees" rather than people fleeing

persecution. This is a perception that can be held even by people with refugee backgrounds. As Professor McAdam has pointed out, the facts simply do not bear this out, with over 93 per cent of boat arrivals found to be Convention related refugees.[58] Unfortunately, Australian Governments know that in order to survive in office they must be seen to be addressing the issue of deterring asylum seekers from taking risky journeys by boat to Australia. Robert Manne, a politics Professor at La Trobe University has aptly stated:

"Every recent opinion poll makes it clear that hostility to unauthorised asylum seekers represents the opinion not of a small racist minority but of the overwhelming majority of the Australian mainstream. Neither 'education' nor 'leadership' seem likely in the near future to make Australians open their hearts to asylum seekers or to challenge the mood of the conservative populist political culture that crystallised at the time of Tampa. As recent political events have rather painfully revealed, no party that wishes to govern Australia can afford to ignore the meaning of what occurred in the spring of 2001".[59]

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.[60]

Complementary protection has no internationally accepted definition. The *Migration Amendment (Complementary Protection) Act 2011* (Cth) 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.[61] 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.[62] The amendments introduced greater responsibility, transparency and effectiveness into Australia's arrangements for adhering to its non – refoulement obligations under 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 RRT does not have jurisdiction to review a character decision under s.36(2C)(a) or (b). These decisions are reviewable by the AAT under the existing legal framework in which decisions made in dependence on Article 1F,32 or 33 of the Refugee Convention are reviewable by the AAT and not the RRT.[63]

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 Convention.[64] The test for complementary protection has drawn academic criticism; Professor Jane McAdam argues that:

> *[T]he legislation makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalising an extensive international jurisprudence on which Australian decision –makers could (and ought to) draw, and in turn risks isolating Australian decision- making at a time when greater harmonisation is being sought.*[65]

The Australian legislation separates out the following forms of treatment – "torture"[66], "cruel or inhuman treatment or punishment"[67] and "degrading treatment or punishment"[68] This suggests that they must be considered separately, and that decision makers need to precisely determine what kind of significant harm will be suffered and why. Overseas, the approach is to view these forms of harm on a sliding scale of ill-treatment with torture the most severe form.[69] Courts and tribunals are generally satisfied to find the violation somewhere within the range of the proscribed harm.[70]

In December 2013 the Immigration Minister introduced the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill* which seeks to remove the criterion for the grant of a Protection visa on the basis of complementary protection. The Minister explained in his Second Reading Speech that such measures

like complementary protection create another statutory product for people smugglers to sell.[71] The Minister further stated:

"The complementary protection provisions that were introduced in the Migration Act by the previous government are complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes. Moreover, while the intention was to interpret and implement Australia's non-refoulement *obligations under the CAT and the ICCPR without expanding the obligations in a way that goes beyond current international interpretations, the courts have since broadened the scope of the interpretation of these obligations beyond that which is required under international law…The court's interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties."*[72]

The Minister proposed that complementary protection would be re-established within an administrative process similar to that which was undertaken prior to the enactment of the complementary protection legislation. He said:

"This consideration will happen either as part of pre-removal procedures which are undertaken by departmental officials to assess whether the removal of an asylum seeker could engage Australia's non-refoulement *obligations or through the use of the Minister for Immigration and Border Protection's discretionary and non-compellable intervention powers under the Act."*[73]

This is another measure to convince the Australian public that the Coalition is acting proactively and efficiently on curtailing the flow of asylum seekers. The Minister has stated that only 57 applications satisfied the requirements for complementary protection, and used this small number as justification for questioning why all asylum seekers had to be assessed for complementary protection.[74] The Law Council of Australia has countered this argument by stating that despite the small proportion of visas granted, the complementary protection criteria remains an important source of protection for men, women and children who face a real risk of serious harm if returned. The Law Council has further stated that the Minister's powers to intervene and grant a visa are non-compellable and non-reviewable and have been shown to give rise to lengthy and inefficient administrative processes.[75] Professor Jane McAdam has echoed these concerns and commented that the repeal of the complementary protection provisions seems to be another sign that the Government wants to conduct refugee related issues behind closed doors rather than be subjected to transparency.[76]

Comparisons with America

Australia and the United States (US) share similar policies in relation to irregular maritime arrivals. Both seek to deter asylum seekers by removing them from the domestic asylum processing system. The US has had a history of intercepting irregular arrivals from the Caribbean, with asylum seekers coming mostly from Haiti and some from Cuba. Between 1991 and 1992, due to political instability and human rights violations in Haiti, the US intercepted 37,618 Haitian migrants. These Haitians were moved to Guantanamo Naval Base in Cuba to process their claims to refugee status. This procedure was terminated by President George H.W. Bush, who issued an

Executive Order directing the Coast Guard to intercept all Haitians at sea and return them to Haiti. The preamble to the Order stated that Article 33(1) of the Convention relating to *refoulement* did not apply to persons outside the US. This Order was challenged in the US Supreme Court in 1993 in the case of *Sale v Haitian Centres Council* where the court found that the obligations of Article 33(1) of the Convention did not have extraterritorial effect. Effectively, the case of *Sale* turned non-refoulement for those interdicted in international waters into a humanitarian principle, rather than a legal obligation for the US.[77] This decision has been widely condemned by the UNHCR and refugee law scholars, who argue that the text, drafting history and humanitarian object of the Convention support the extraterritorial application of Article 33(1).[78]

Despite the *Sale* decision, the US continued to process Haitian asylum claims, making agreements with Jamaica and the United Kingdom in respect of its Caribbean territory Grand Turk Island so that the US could process asylum seekers outside its own territory in those places. However there was no appeal rights granted to asylum seekers in these cases. In the aftermath of the 9/11 terrorist attacks, the US cited "national security" issues as a means of defending the interdiction, repatriation and detention of Haitian asylum seekers. After the 2010 Haitian earthquake the Obama administration announced that it would continue to intercept and repatriate Haitians fleeing by boat, and would detain those that arrived in the US.[79]

The Australian experience of people arriving by boat mirrors the US, however, as pointed out by Justice North of the Federal Court of Australia, the Australian

Government took the policy one step further by applying it to all irregular maritime arrivals rather than a particular group.[80] Justice North has further commented:

"Refugees are by definition likely to be desperate people. They will not be deterred by being sent elsewhere. Witness the thousands who have perished in dangerous sea journeys. And those who are not refugees can be best and most economically dealt with by efficient and speedy asylum determination claims."[81]

Like Australia, the US also has a system of complementary protection, although this is more narrowly utilised and only applies to people at risk of torture under the CAT.[82] Two forms of protection are available under section 208.16 (c) of Title 8 of the Code of Federal Regulations which is issued under the *Immigration and Nationality Act 1952*. These two forms of protection are withholding of removal and deferral of removal. Under this provision torture is understood to apply only to acts involving state agents and not to third party actions. The UNHCR has stated:

"Beneficiaries of withholding of removal under CAT are eligible for the same standard of treatment as those individuals subject to withholding of removal under the Convention. Deferral of removal is more temporary in nature. Neither form of relief, however, ensures release from detention or protection from deportation to a third country. Protection through withholding or deferral of removal under CAT can be terminated if the government determines that it is safe for the person to return to the country of origin including on the basis of diplomatic assurances from the government of that country".[83]

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 been progressively stripped away, thanks to the intervention of the High Court. More can be done, but I hope that Australia will emerge from the crisis of the past decade with a process that is clearer and simpler. 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 as applied through domestic law.

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