Confusion and clarity across the Tasman

A comparison of the regimes for refugee status determination in Australia and New Zealand.

ROLF DRIVER [1]

This paper explores the surprising differences that have developed between Australia and New Zealand in the domestic application of their common obligations under the Convention Relating to the Status of Refugees. The author puts the view that the New Zealand system is simple and effective while the system that has developed in Australia is unnecessarily complex and inflexible, 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. Recently, the United Nations High Commission for Refugees ("UNHCR") remarked that "[f]inding asylum can become a matter of chance in some regions, due to inconsistency by States in applying Convention standards."[5] It is a matter of geographical chance that New Zealand is relatively small and remote, compared to Australia. That relative remoteness has allowed New Zealand to avoid many of the stressors that have impacted upon Australian refugee law and policy. It will be argued that Australia has an unnecessarily complicated system in comparison to New Zealand's more streamlined and simple system.

Australia

Development of refugee policy

In Australia, there has been controversy and debate over asylum seekers and refugees for over a decade. That debate on most levels has been largely 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. As noted in Prime Minister Gillard's speech to the Lowy Institute in July 2010 - *Moving Australia Forward* - in 2009 "...Australia received 0.6 % of the world's asylum seekers. Refugees, including those referred for resettlement by the UNHCR, make up less than 8% of migrants accepted in Australia."[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 2009-10 more than 34,000 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 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.

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 Magistrates Court ("FMC"), 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 31 January 2012, there were 344 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 FMC 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]

Seeking asylum in Australian excised territory

The most controversial part of the Humanitarian Program is that relating to asylum seekers arriving in the offshore excised territories. 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.[29]

In the aftermath of the *Tampa* affair, six Acts[30] 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.[31]

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 in an excised offshore territory are unable to lodge visa applications under Australian law they are able to seek asylum and have their claims processed under an ostensibly non – statutory Refugee Status Assessment (RSA). If the person is found to be a refugee the

case will be referred to the Minister who will decide if it is in the public interest to allow them to apply for an onshore protection visa.

Recent developments - Independent Merits Review

The regime of processing an offshore entry person begins with an officer of the Department interviewing the applicant. If the officer determines that the applicant is a person who is 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 is of the opinion that the applicant is not a person to whom protection obligations were owed under the Convention, the applicant may then seek a review by an Independent Merits Reviewer. Under the administrative arrangements, the reviewers' assessment and recommendation are 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 the reviewers assessment or recommendation into account in deciding whether or not to lift the s.46A(1) bar.[32]

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

The Rudd and Gillard Governments have not sought 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.[33] In practice, when a non–citizen is assessed to be a

refugee a submission is made to the Minister recommending that the Minister "lift the bar"[34]to exercise his discretion and to grant a protection visa to an offshore entry person.[35]

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.

The system of operation on Christmas Island has seen asylum seekers taken to the Island and allowed to lodge refugee claims. Procedures have been established ostensibly outside of the Migration Act to allow for Refugee Status Assessment ("RSA") and Independent Merits Review (IMR) of negative rulings. The RSA process allows 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 RSA is carried out by an officer of the DIAC, while the IMR is conducted by reviewers employed by the private company, Wizard People Pty Ltd.[36]

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*[37]. 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.[38]

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.[39]

> *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.*[40]

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.[41]

The recent 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"[42], being Christmas Island[43]. 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 is not a "migration decision" within the meaning of the Migration Act and s.477 which imposed the 35 day time limit on judicial review applications, does not apply to it. This was perhaps the final nail in the coffin for the bifurcated process of dealing with onshore asylum claims. In future, the Government will permit offshore entry persons to apply for protection visas in the same way as those who arrive legally by air. There is a pool of offshore entry persons already in the former system who remain subject to it, but they do not need to be. As I highlighted in a recent case *SZQPA v Minister for Immigration*[44]

> *[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.*[45]

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.[46] 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.[47]

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.[48]

The *Migration Litigation Reform Act 2005* enhanced the role of the Federal Magistrates Court as a response to reduce "unmeritorious litigation". This legislation enforced strict time limits and gave the FMC power to summarily dismiss proceedings where it is satisfied that there are no reasonable prospects of success. The long term trend in migration litigation has most definitely been downward as a consequence of effective case management in the FMC. These days any perceived "migration benefit" from seeking judicial review is very much reduced."[49] Over the years the number of lodgements in the FMC has gone from 1549 (2007-2008) to 1288 (2008-2009) and a mere 880 (2009-2010). There has been a small increase in the filings for the last financial year to 959 in 2010-11. It is projected that filings are likely to increase with the addition of offshore entry persons' applications.[50] Professor John McMillian has advised the Government on options to improve the efficiency of the judicial review process for irregular maritime arrivals, but no substantial change has resulted

Australia's commitment to complementary protection

For a long time now there has been 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.[51]

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 2011. 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.[52] The Act, which amends s.36 of the Migration Act, will see the implementation of significant changes for decision makers including the RRT. The absence of a codified system of complementary protection has meant that Australia has been 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.[53] The purpose of the amendments is to introduce 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").

Applicants that are awaiting a decision on or after 24 March 2012 have the opportunity to provide further details of their protection visa claims. If satisfied that the applicant is not owed protection obligations as a refugee under s.36(2)(a), decision

makers must consider whether the applicant meets the complementary protection criterion in s.36(2)(aa).

The RRT does not have jurisdiction to review a character decision under s.36(2C)(a) or (b) as these are complementary protection "exclusion clauses". These decisions will be reviewable by the AAT maintains 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.[54]

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 of the non-citizen is not a person to whom Australia has protection obligations under the Refugee Convention.[55] 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.*[56]

The Australian legislation separates out the following forms of treatment – "torture"[57], "cruel or inhuman treatment or punishment"[58] and "degrading treatment or punishment"[59] This suggests that they must be considered separately, and that decision makers will need to precisely determine what kind of significant harm will be suffered and why. The international contrast is to view these forms of harm on a sliding scale of ill-treatment with torture the most severe form.[60] Courts and tribunals are generally satisfied to find the violation somewhere within the range of the proscribed harm.[61]

NEW ZEALAND

> *… the right to control borders is fundamental to the sovereignty of a state. Therefore, within the limits of its borders a state is said to have 'exclusive territorial control' and upon crossing a state's borders, all individuals and property fall within the territorial authority of that state. This gives a state the right to exclude or expel non – citizens.*
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> *Ye v Minister of Immigration* [2009] 2 NZLR 596

Similarly to its Pacific neighbour, it has been foreign policy considerations and economic interests that have guided New Zealand's response to refugees. History has shown that the intake of refugees has been greatest where it has meant economic benefits for New Zealand. History has also shown that under Labour Governments, humanitarian motives have also influenced that intake of refugees. Since 1964, New Zealand has enacted two further Immigration Acts, each bringing significant change at the time. The *Immigration Act 1987* ("the 1987 Act") remains in force under s.2 of the *Immigration Act 2009* ("the 2009 Act") to give New Zealand time to prepare

policy to implement the 2009 Act. Currently, New Zealand accepts 750 refugees each year. The quota is set by Cabinet on the advice of the Minister of Immigration.[62]

The 2009 Act has brought considerable change to immigration law and processes in New Zealand. There are three significant changes made by the implementation of the 2009 Act. First, the most significant change is the amalgamation of New Zealand's immigration tribunals. All appeals are now dealt with by one Tribunal, namely the Immigration and Protection Tribunal ("IPT"), with four separate divisions still remaining. Secondly, the 2009 Act saw the dissolution of the visa-permit distinction. The third change was the incorporation of complementary protection under protection claims alongside refugee claims.[63]

The main objective of the 2009 Act is to manage immigration in a way that balances the national interests and the rights of the individuals. Strengthening border control and ensuring compliance with immigration-related international obligations, specifically the Refugee Convention, CAT and ICCPR, are also high priorities for the 2009 Act.[64] In New Zealand it is the Refugee Status Branch that makes initial determinations on applicants' refugee status and protection. Qualifying persons may be able to receive legal aid for legal expenses relating to a refugee claim.[65] Refugee and protection claims that are declined by the Refugee and Protection Officers may appeal the decision through the IPT.

The Immigration and Protection Tribunal

Previously, New Zealand's 1987 Act, through various amendments, established four independent review and appeal authorities.[66] Under s.35A and s.130(1) of the 1987

Act the Minister was given discretionary ability to still intervene following an unsuccessful appeal. The four appeal bodies were the Residence Review Board (RRB), the Removal Review Authority (RRA), the Deportation Review Tribunal (DRT), and the Refugee Status Appeals Authority (RSAA). It is noted that the RSAA was New Zealand's specialist body in dealing with matters concerning the Refugee Convention. As such the RSAA's jurisprudence, although not binding, remains highly persuasive. Under New Zealand's previous migration system, non-citizens were able to access multiple appeal authorities in succession, ultimately delaying their departure from New Zealand.[67]

The membership of the IPT is headed by a chairperson who is a District Court Judge.[68] The other members of the Tribunal are required to have been lawyers for at least five years or equivalent experience which deems them appropriate to hold such a position.[69] Contrasting this criterion to that of the RRT members highlights the niche experience and expertise the IPT members have to conduct hearings efficiently and fairly. While there is a place for non legal expertise on migration review tribunals the reality is that they must deal with complex legal issues and the professional leaders of the tribunals need to be experienced lawyers.

It has been suggested that the IPT is a more generic than specialist body acknowledging the extent of its jurisdiction in comparison to the more focused jurisdiction of the previous tribunals. The IPT brings greater efficiency to the immigration appeal process in New Zealand, without reducing the appeal rights of applicants. It is contended that the objective of a single body is not to dilute the experience or expertise of the former appeal authorities, but rather, to enhance the

whole appeals process by gaining from that expertise. The 2009 Act allows the IPT to consider all of a non-citizen's appeals regardless of the grounds, and for appeals to be heard together where those grounds arise at the same time.[70] The IPT is presently administered by the Department of Justice.

In accordance with the 2009 Act, the IPT considers the matter *de novo* when hearing an appeal against a decision of the Refugee Status Brach ("RSB"). This office is New Zealand's initial stage in the method of processing refugee and protection claims.[71] The IPT's Practice Note 17.1[72] provides that "all refugees or protection appeals before the Tribunal proceed by way of hearing *de novo*, and all issues of law, credibility and fact are at large, except that the Tribunal may rely on any findings of credibility or fact by it or any of its predecessor appeal bodies in any previous appeal or matter the appellant or affected person…"[73] The IPT's Practice Note 17.2[74] States that the IPT "will make a decision on the facts as found at the date of determination of the appeal." This signifies that a member can take into account new information as long as it is filed before the date of decision. It is noted that the members of the IPT at their discretion may make post hearing requests for further information. The practice takes place in spite of s.226(1) of the 2009 Act which states that it is the applicants responsibility to have all evidence and submissions before the IPT prior to its decision.[75] This illustrates that the IPT is able to carry out its role

> *...as the Tribunal thinks fit,—*
>
> *(a) of an inquisitorial nature; or*
>
> *(b) of an adversarial nature; or*
>
> *(c) of both an inquisitorial and an adversarial nature.* [76]

Former member Allan Mackey argues that the IPT is not constricted by legislation when it comes to seeking new information following the examination of facts which enables the decision maker to make their decision based on the most recent information, which, in turn reflects the nature of refugee law.[77] Conditions in the country of origin can change rapidly for the better or the worse. The IPT's willingness to obtain new information recognises the flexibility of the decision making process which assists New Zealand in keeping its international obligations intact.

New Zealand's commitment to complementary protection.

The 2009 Act[78] extended protection to "people who are not refugees under the Convention relating to the Status of Refugees but who have an international protection need arising from a human rights treaty."[79] Although the New Zealand legislation suggests that both the refugee and the complementary protection claim must be considered, the IPT has determined that the latter is unnecessary if the refugee claim succeeds.[80]

In a recent presentation, Martin Treadwell, Deputy Chair of the IPT, highlighted that since the implementation of the complementary protection regime there have been two cases[81] which have "set much of the framework for protection in New Zealand."[82] The premise of both cases is the place of serious-economic deprivation as the basis for a claim of cruel, inhuman or degrading treatment. Treadwell argues that if the anticipated harm constitutes torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment it would be difficult to see how this question would not have already constituted serious harm for the purposes of "being persecuted", before any

question of protection arises.[83] For harm constituting cruel, inhuman and degrading treatment to have any standing, the claim must inevitably fall outside the scope of refugee protection for some other reason such as lack of nexus to a Convention ground or exclusion. Acknowledging this highlights the primacy of the Refugee Convention and the need for the harm in a valid protection claim to be serious. Treadwell questions socio-economic deprivation as a source of serious harm as tested in *BG (Fiji)* and argues that if serious enough, socio-economic deprivation can satisfy the harm element of treatment.[84] It is not, however, enough to say that harm in the form of abject poverty exists; it has to be the creation or the result of treatment. The argument then turns to whether the act of refoulment can provide the necessary treatment to constitute harm.

> *The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.*[85]

One approach taken by the European Court of Human Rights is that removal can qualify as 'treatment' in the context of Article 7 would, Treadwell argues, amount to an impermissible interpretation of s.131 of the 2009 Act.[86] There are many schools of thought on this topic; and as *BG (Fiji)* contends the act of returning a person does not constitute the treatment element of cruel, inhuman or degrading treatment. "[T]he 'treatment' element must occur in the home country", before the protected person jurisdiction is engaged.[87]

Comparative Analysis

Australia and New Zealand are two comparable countries as they share a history of European settlement, have similar institutional infrastructures and immigration policies. Australia and New Zealand respond in a similar way to immigration and humanitarian policies. It is argued that despite the parallel there are marked differences which have seen Australia's post 1999 asylum policies become amongst the most restrictive in the developed world.[88] Further, the legal framework within which decision makers have been required to operate has become very complex, especially in relation to offshore entry persons.

Refugee selection in both Australia and New Zealand has been historically linked to economic needs and foreign policy considerations. Until the 1970s the refugee policies of each country reflected responses to humanitarian crises. It is suggested that the larger intake of refugees on behalf of Australia is reflective of the higher demand for immigrants and that New Zealand at that time generally followed a more cautious immigration policy.[89]

Economic decline in the 1970s and 1980s saw a change in immigration policies. In Australia the policies were changed to attract highly skilled or business migrants. In New Zealand a review of immigration saw a major overhaul which saw immigration levels more linked to the availability of employment. Both Australia and New Zealand subsequently set quotas for the controlled intake of refugees.

The immigration policies adopted by each country during the 1990s established their overall policy directions for the post-2000 period. In New Zealand the emphasis on economic growth resulted in the application of an economic rationalist philosophy to

refugee selection with New Zealand failing to fully utilise the maximum quota of 750.[90] It is argued that "… apart from foreign policy considerations, [even] the Kosovar refugees were selected and admitted into New Zealand on economic considerations. Similarly Australia's linking of its Offshore and Onshore Humanitarian Programs to each other and to broader immigration policy considerations highlights the importance and application of economic considerations to refugee policies at the expense of refugee protection."[91]

It is contended nevertheless that New Zealand's stricter compliance with international law shows its refugee determination system has demonstrated a more compassionate approach to refugees and asylum seekers than Australia. Unlike New Zealand, Australia does not have an entrenched bill/ charter of rights that constitutionally guarantees rights to individuals.

Conclusion

The pressures on New Zealand refugee law and policy have been less than those on Australia, due to the accident of geography. New Zealand has remained in the mainstream of international law, and has developed a simple and effective system of refugee status determination and complementary protection. Australia, in contrast, has reacted to the greater pressure upon it with many twists and turns of law and policy, which had added layer upon layer of structure and complexity. Those layers of structure and complexity are now being progressively stripped away, thanks to the intervention of the High Court. More can be done, but Australia will emerge from the crisis of the past decade with a process that is clearer, simpler and closer to that of New Zealand than has applied for many years.

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[2] Karlsen, E. "Seeking Asylum: Australia's Humanitarian Program", Parliamentary Library Research Paper, 21 January 2010. p. 5.
[3] Karlsen, E., "Complementary protection for asylum seekers – overview of the International and Australian legal frameworks", *Parliamentary Library – Laws and Bills Digest Section*, 2009, p.2.
[4] Kneebone, S. "Refugees, Asylum Seekers and the Rule of Law – Comparative Perspectives", 2009, p. 3.
[5] Feller, E., UNHCR, Statement , 58th Session of the ExCom of the High Commissioner's Programme, agenda item 5(a) in introducing the 2007 Note on International Protection, Doc AC.96/1038, 3 October 2007.
[6] Driver, R., "The extent of the judicial review in asylum cases an International Perspective", (Speech delivered at Haarlem), 14 September 2009.
[7] Prime Minister, "Moving Australia Forward", Speech delivered at the Lowy Institute, Sydney, 6 July 2010, viewed 24 May 2011.
[8] Karlsen, "Seeking Asylum: Australia's Humanitarian Program", above n 2, p. 1.
[9] Ibid, p. 2.
[10] Kneebone, S. "Refugees, Asylum Seekers and the Rule of Law – Comparative Perspectives", above n 4, p. 176.
[11] Ibid.
[12] Karlsen, "Seeking Asylum: Australia's Humanitarian Program", above n 2, p. 4.
[13] Simon, K., "Asylum Seekers", NSW Parliamentary Library Research Service, Briefing Paper No 13/08, November 2008, p. 17.
[14] Karlsen, "Seeking Asylum: Australia's Humanitarian Program", above n 2, p. 2.
[15] Ibid, p. 9.
[16] Ibid, p.10.
[17] Ibid, p. 12.
[18] Refugee Council of Australia, "Australia's Refugee and Humanitarian Program 2011-12", March 2011, p. 16.
[19] Ibid, p. 13.
[20] s. 36(2)(a) *Migration Act 1958* (Cth).
[21] Karlsen, "Seeking Asylum: Australia's Humanitarian Program", above n 2, p. 14.
[22] s. 417 *Migration Act 1958* (Cth).
[23] DIAC, "Immigration Detention Statistics Summary", *Community and Detention Services Division, DIAC – As at 31 January 2012*, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> viewed 13 March 2012.
[24] O'Brien D., "Merits Review Update – the challenges in bringing the Tribunals within mainstream administrative law", Law Council of Australia – CPD Immigration Law Conference, 11-12 March 2011, p. 1; s. 353 and s.420 *Migration Act 1958* (Cth)*;*
[25] Ibid, p. 1.
[26] Ibid, p. 3-5.
[27] Ibid, p. 4-5.
[28]Australian Government, "Migration Review Tribunal, Refugee Review Tribunal, Annual Report 2009-2010", 2010, p. 69.
[29] Crock and Ghazelbash, 'Due Process and rule of law as human right: The High Court and the 'offshore' processing of asylum seekers', 2011, 18 Australian Journal of Administrative Law, 101.
[30] Ibid, p 104. These acts were *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment(Excision from Migration Zone) Act 2001*(Cth); *Migration Amendment (Excision from Migration Zone(Consequential Provisions)) Act* (Cth); *Migration Legislation*

Amendment Act (No. 1) 2001(Cth); *Migration Legislation Amendment Act (No. 5) 2001* (Cth); *Migration Amendment Act (No. 6) 2001* (Cth).
[31] Ibid, p. 104.
[32] *SZQDZ v Minister for Immigration* [2012] FCAFC 26
[33] Crock, 'Due Process and rule of law as human right: The High Court and the 'offshore' processing of asylum seekers', above n 24, p. 105.
[34] s. 46A(2) *Migration Act 1958* (Cth).
[35] *Migration Act 1958* (Cth) s. 195A and Crock, 'Due Process and rule of law as human right: The High Court and the 'offshore' processing of asylum seekers', above n 24 p. 105.
[36] Ibid, p. 105.
[37] *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) HCA 41.
[38] Ibid.
[39] *Australian Constitution* s 75(v).
[40] Crock, 'Due Process and rule of law as human right: The High Court and the 'offshore' processing of asylum seekers', above n 24, p. 107.
[41] Ibid, p. 112.
[42] s. 5(1) *Migration Act 1958* (Cth).
[43] s. 5(1) *Migration Act 1958* (Cth).
[44] [2012] FMCA 123
[45] *SZQPA v Minister for Immigration & Anor* [2012] FMCA 123
[46] Kneebone, S., "Refugees, Asylum Seekers and the Rule of Law – Comparative Perspectives", above n 4, p. 180-184.
[47] Ibid, p. 184.
[48] Raphael, K., "Presentation Paper, Law Society of South Australia", *Continuing Legal Education* 5 July 2006.
[49] Gibson, J., "Trends in Judicial Review- Case Law Update*", Law Council of Australia, Immigration Lawyers Association of Australasia Focus Group*, 12 March 2011, p.7-8.
[50] Federal Magistrates Court of Australia, Annual Report 2010-2011, p. 40; see also *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) HCA 41.
[51] Karlsen, "Migration Amendment (Complementary Protection) Bill 2011" Bills Digest No. 79, 2010-11, 11 March 2011, p. 5.
[52] Ibid, p. 3.
[53] McAdam, J., "Australian Complementary Protection: A Step – By – Step Approach" *Sydney Law Review*, vol 33:687, p, 689.
[54] O'Brien "Complementary Protection Changes – A New Paradigm" *Law Council of Australia CPD Immigration Law Conference 2012*,9-10 March 2012, p. 4.
[55]Ibid, p. 2.
[56] McAdam, J., "Australian Complementary Protection: A Step – By – Step Approach" , above n 53, p. 690.
[57] *Migration Amendment (Complementary Protection) Act 2011* (Cth), s. 36(2A)(c).
[58] *Migration Amendment (Complementary Protection) Act 2011* (Cth), s. 36(2A)(d).
[59] *Migration Amendment (Complementary Protection) Act 2011* (Cth), s. 36(2A)(e).
[60] McAdam, J., and Albert, M., "Complementary Protection Training Manual" *Migration Review Tribunal/ Refugee Review Tribunal*, January 2012, p. 45.
[61] Ibid.
[62] Refugee Services; Aotearoa New Zealand, <http://www.refugeeservices.org.nz/faqs/refugees_in_nz>, viewed 10.11.2011.
[63] Ryken D., "Recent Trends in NZ Immigration Policy: Lessons for Australia?" *Immigration Association of Australasia*, 2011,p. 2-3.
[64] NZ Human Rights Commission – "the right to asylum', <http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/17-Jun-2010_10-45-28_Right_to_Asylum_chapter.pdf> ,viewed 19.12.2011.
[65]Immigration New Zealand, Refugee Status Branch <http://www.immigration.govt.nz/branch/RSBHome/default.htm> viewed 14 March 2012.
[66] Tennet, D., "Immigration and Refugee Law", *LexisNexis NZ Limited*, 2009,p. 281.
[67] Coleman, J. "Establishment of the Immigration and Protection Tribunal", 8 December 2010, http://www.national.org.nz/Article.aspx?articleId=34775, viewed 1 March 2012, p. 3.
[68] s. 219(1)(a) *Immigration Act* 2009.

[69] s. 219(1)(2) *Immigration Act* 2009.
[70] Coleman, J. above n 67, p. 3.
[71] Immigration New Zealand, "Refugee Status Branch" ,above n 65, viewed 23 March 2012.
[72] Paragraph 17.1 of the Tribunal's Practice Note 2/2010; Mackey, A., "Power of the judge *vis-à-vis* new facts that happened after examination of the claim by the administrative authority", Asylum Procedures Working Party, Bled IARLJ World Conference, 2011, p.2.
[73] Ibid.
[74] Paragraph 17.2 of the Tribunal's Practice Note 2/2010; Mackey, A., "Power of the judge *vis-à-vis* new facts that happened after examination of the claim by the administrative authority", above n 72, p.3.
[75] Ibid, p.3.
[76] s. 218(2) *Immigration Act* 2009
[77] Mackey, A., "Power of the judge *vis-à-vis* new facts that happened after examination of the claim by the administrative authority", above n 72, p. 4.
[78] McAdam "Status Anxiety: Complementary Protection and the Rights of Non- Convention Refugees" p. 1-2.
[79] Ibid..
[80] McAdam, J., and Albert, M., "Complementary Protection Training Manual", above n 60, p.8-9.
[81] *AC (Syria)* [2011] NZIPT 8000.5 and *BG (Fiji)* [2012] NZIPT 8000091
[82] Treadwell, M. "Complementary Protection in New Zealand and Australia- A Comparative Perspective" p. 1.
[83] Ibid, p. 1.
[84] Ibid, p. 3.
[85] *N v United Kingdom*[2008] INLR 335
[86] Recognition as protected person under Covenant on Civil and Political Rights
(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
(2) Despite subsection (1), a person must not be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.
(3) For the purposes of determining whether there are substantial grounds for belief under subsection (1), the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.
(4) A person who has been recognised as a protected person under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(4).
(5) For the purposes of this section,—
(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
(b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.
(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment
[87] Treadwell, M. "Complementary Protection in New Zealand and Australia- A Comparative Perspective", above n 82, p.4.
[88] Babacan, A., "Seeking Asylum in a Global World – A Comparative Analysis of Refugee and Asylum Seeker Citizenship Rights, Laws and Policies in Australia, Canada and New Zealand," 2009; 168.
[89] Ibid, p. 168.
[90] Ibid, p. 171.
[91] Ibid, p. 171.