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ACCESS TO PROTECTION FOR 'OFFSHORE ENTRY PERSONS' aka asylum seekers

ANGUS FRANCIS and SONIA CATON

In the first months of 2011, over 12 000 refugees streamed into Italy from Libya (by boat) and 800 000 into other neighbouring countries; 41 000 Ivorians fled into Liberia; and Kenya received over 40 000 refugees from Somalia. Conditions for refugees in the host countries are harsh, but indefinite detention of each and every asylum seeker is not practised. Back in the antipodes, a comparatively modest 10 000 asylum seekers arrived by boat over a two year period, mostly from Afghanistan, Iraq and Iran. In response, Australian politicians are resorting to ever-more legally questionable responses as solutions to the politically dreaded 'irregular maritime arrivals,' accompanied by language of 'threat'. So relentless has this rhetoric been that a survey conducted in July 2010 found that 38 per cent of the Australian population believed that irregular maritime arrivals amounted to a tenth of the annual immigration intake, and 10 per cent of people thought it was at least half. The correct figure was 2.9 per cent of the permanent migration and humanitarian programs for 2009–10.¹

In February 2008, the Rudd Labor government brought the last refugees detained at the Nauru detention centre to Australia, effectively marking the disbandment of the so-called 'Pacific solution' — the Howard government's policy of transferring onshore asylum seekers to third countries for detention and processing.² Announcing its demise, the then Minister for Immigration and Citizenship, Senator Chris Evans, stated 'the Pacific solution was a cynical, costly and ultimately unsuccessful exercise introduced on the eve of a Federal election by the Howard government.'³ However, the Rudd Labor government had no intention of repealing the Howard government's 2001 amendments to the *Migration Act 1958* (Cth) ('the Act') that purportedly provided the basis for the Pacific solution.

Rather than repeal the 2001 amendments, successive Labor governments have sought to make full use of them. First, at the same time as the Rudd government disbanded offshore processing in third countries it embraced a policy of non-statutory processing of offshore entry persons in Australia. This process was referred to as the Refugee Status Assessment ('RSA') process between 2008 and 28 February 2011 and the Protection Obligations Determination ('POD') process from 1 March 2011 (rebadged after the High Court cases of *M61* and *M69*). The result is a discriminatory and bifurcated system for processing claims for refugee status (and Protection Visas) determined solely by the mode and point of arrival of an asylum seeker in Australia.

Second, the Gillard government sought to rely upon the 2001 amendments to re-enliven offshore processing in third countries, issuing a Ministerial declaration on 25 July 2011 that effectively stated that Malaysia was an appropriate country to transfer asylum seekers. The declaration was based principally on a transfer and processing agreement signed with Malaysia on the same day.⁴ On 31 August 2011, in *Plaintiff M70/2011* a 6 to 1 majority of the High Court ruled that the Minister's declaration was invalid.⁵ The decision put a (at least temporary) halt to the transfer of asylum seekers to Malaysia and raised serious questions concerning the lawfulness of processing on Nauru and Manus Island, PNG. This article considers these developments in light of Australia's obligations under the Convention relating to the Status of Refugees ('the Convention')⁶ and cognate rights instruments.

The legislative scheme

Following the 2001 amendments, an unlawful non-citizen (a non-citizen without a valid visa) who arrived at an 'excised offshore place'⁷ became an 'offshore entry person' ('OEP').⁸ An OEP is prohibited from making a valid application for a visa to enter Australia.⁹ As a visa is *the* mechanism for lawful entry into Australia,¹⁰ this prohibition prima facie excludes all OEPs from the country. However, an OEP may be permitted to apply for a visa if the Minister for Immigration exercises his personal, non-compellable, non-reviewable power to lift the legislative bar that prohibits OEPs from applying for a visa.¹¹ In practice, if the Minister chooses to 'lift the bar', a protection visa may be issued under a further non-compellable, non-reviewable discretionary provision that allows the Minister to issue a visa to a person held in detention.¹²

The application of this scheme to OEPs has raised a number of issues with respect to Australia's compliance with its international obligations. First, the Commonwealth argued before the High Court in the cases of *M61* and *M69* that the intent of the Act is to prevent OEPs from having a right under Australian law to make claims under the Convention.¹³ In its submissions it referred to the Second Reading Speech for the Bill, in which the Minister maintained that Australia can honour its obligations under the Convention '*without those obligations being enforceable as a matter of domestic law* [emphasis added]'.¹⁴ It is a truism that international rights are illusory unless enforceable domestically. The Australian government's minimalist attitude undermines its obligation to interpret and apply the Convention in good faith.¹⁵

Second, the government obviously considers that the broad powers of the Minister under the Act authorise the suspension of processing of OEPs, as occurred with Sri Lankan and Afghan nationals in 2010.¹⁶ Arguably, this amounts to a breach of the non-discrimination principle found in the Convention and the International Covenant on Civil and Political Rights.¹⁷ Third, OEPs have been refused permission to apply for a visa in Australia and instead taken to a 'declared country' (as happened with the majority of asylum seekers taken to Nauru and PNG).¹⁸ Removal to a third country was back on the table following an agreement between Australia and Malaysia on a 'swap' of refugees.¹⁹

As the refugees have come under its jurisdiction, Australia is obligated under international law to assess on a case-by-case basis whether transfer to Malaysia or some other third country deprives a refugee of the rights acquired by the transferee under the Convention and cognate rights instruments (including the right to access the courts to remedy a denial of a right).²⁰ The extent of the government's satisfaction of this requirement in relation to asylum seekers to be transferred to Malaysia was the Ministerial

declaration of 25 July 2011 and a pre-removal assessment.

The High Court in *Plaintiff M70/2011* held that the Minister's declaration was invalid on the basis that Malaysia is not a party to the Convention or its Protocol, does not recognise the status of refugees in domestic law and does not undertake activities related to the reception, registration, documentation and status determination of asylum seekers and refugees, and has made no legally binding arrangement with Australia obliging it to accord the protections under the Convention and its Protocol.²¹ The High Court's decision also highlighted that the pre-removal assessment, which should have included a case by case assessment of the risks faced by removal of asylum seekers to Malaysia, as well as a consideration of the best interests of the child, was a truncated and, in the case of children, unlawful process.

At the time of writing, the government is considering legal advice to the effect that *Plaintiff M70/2011* precludes it from reintroducing processing on Nauru or PNG (as the legislation now stands). While the joint judgment did allude to the fact that processing on Nauru was undertaken by Australian officials (as was the case with PNG), it is far from certain whether that processing itself satisfied Australia's obligations under the Convention.²²

The successful challenge in the High Court also illustrates the importance of OEPs having access to independent legal advice. Of concern, OEPs who arrived following the Joint Statement of the Australian and Malaysian Prime Ministers on 7 May 2011 were not given access to independent legal advice for the purpose of lodging protection claims or to contest their proposed removal to Malaysia or some other third country, arguably in contravention of the Convention.²³ Strictly speaking, the Act requires detainees to be provided with access to legal advice only upon the request of the detainee.²⁴ But this raises obvious problems for detainees who are unlikely to know they have this right under the Act,²⁵ or where, despite the making of such requests, detainees are advised they are being held solely for the administrative purpose of removal and no claims will be accepted. The policy led to the indefinite detention of OEPs without any guarantee of removal to a third country or of processing in Australia — a matter that was the subject of proceedings in the High Court.²⁶ After the signing of the transfer agreement with Malaysia on 25 July 2011 an announcement was made that this cohort would be processed in Australia.²⁷ However, recent arrivals faced a similar situation of detention pending removal on a date unknown,²⁸ until a chance referral to legal representation.

A further issue that the High Court did not address was the standard of processing by the United Nations High Commissioner for Refugees ('UNHCR') in Malaysia. UNHCR processing was a key plank of the arrangements between Australia and Malaysia.²⁹ Yet, the UNHCR determination procedures in Malaysia do not adequately allow for legal representation, do not require written reasons for decisions, and do not provide for independent merits or judicial review.³⁰ These factors increase the risk of *refoulement* of refugees from Malaysia, exposing Australia to charges of engaging in the indirect or chain *refoulement* of refugees by sending them to an unsafe third country.³¹

RSA and POD processes

Alternatively, the Act allows for OEPs to be held in detention in Australia and assessed for refugee status under a non-statutory procedure (the RSA, rebadged the POD process after *M61* and *M69*), with recommendations then made to the Minister as to whether it is in the public interest for him to lift the legislative bar and allow them to apply for protection — at which point he exercises his discretion to grant a visa to a person in immigration detention.³² These non-statutory processes have been applied irrespective of whether an OEP is brought to the mainland, as the government considers that OEPs do not lose their status as a result of transfer to mainland detention facilities.³³

The RSA process was set out in policy guidelines issued by the Department of Immigration and Citizenship ('DIAC') called the Refugee Status Assessment Procedures Manual. The Manual was based on a similar non-statutory process that was applied to the determination of refugee claims on Nauru and Manus Island, PNG. The RSA process included an initial determination of refugee status by an officer of DIAC followed by an independent review by an employee of a government contractor (Wizard Pty Ltd). If successful, a submission was made to the Minister that the Minister 'lift the bar' under the Act. The Minister then had the non-compellable and non-reviewable power to decide whether to permit the person to apply for a protection visa.³⁴

The RSA process sought to substitute a clear legislative basis and criteria for the grant of a protection visa, interpreted by a wealth of authoritative case law, with administrative guidelines. Ironically, in 2006 the Senate Legal and Constitutional Legislation Committee rejected the Howard government's attempts to extend the Pacific Solution to unlawful arrivals on the Australian mainland, for the very reason that the non-statutory processing regime on Nauru, undertaken by Australian officials, effectively excluded refugees from statutory protections, tribunals and the courts in Australia.³⁵

While states parties to the Convention have the discretion to determine what procedures apply,³⁶ they are required to adopt a fair and effective status determination process in order to properly identify those needing protection.³⁷ The UNHCR has raised concerns with the RSA process on the basis that there should be 'a legislative basis for decisions, to ensure clarity and to ground the decisions, to the extent possible, in Australian law in a non-discriminatory manner.'³⁸ UNHCR also takes the view that Australia's non-statutory scheme, whether applied onshore or offshore, risks breaching the Convention obligation not to penalize refugees based on the mode of their arrival because of the lower standards of processing applied to OEPs (who arrive by boat without a valid visa).³⁹

The RSA process was intended to operate independently of judicial review of any determination, or non-determination, by the Minister. According to the government, because the Minister was under no duty to consider whether to exercise their discretion to 'lift the bar' it followed that there could also be no judicial review of the non-statutory procedures up to that point. If successfully maintained as a matter of domestic law, this position would amount to a clear denial of the right of refugees under international law to seek judicial review of an adverse refugee status determination.⁴⁰ It would also lead to an increased risk of *refoulement* — the return of a person to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion⁴¹ — by denying access to the courts that scrutinize asylum decision-making.⁴²

M61 and M69 of 2010

The RSA process eventually went to the High Court of Australia in the cases *M61* and *M69*.⁴³ The Plaintiff in each proceeding was

an OEP who, having made an RSA application, was assessed by an officer of DIAC and an independent reviewer to be a person to whom Australia did not have protection obligations under the Convention. The result was that DIAC did not make a submission to the Minister as to whether or not the Minister should consider 'lifting the bar' under the Act. Judicial review was sought in the High Court's original jurisdiction under s 75 of the *Australian Constitution*. Both applicants alleged they had been denied natural justice at the primary and review stages, and both argued that the departmental delegates and reviewers had committed errors of law by failing to consider themselves bound by the provisions of the Act or by domestic case law in arriving at their recommendations to the Minister.

The Court found in *M61/M69* that the non-statutory decision-making process was in fact statutory and as such, the common law rules of procedural fairness applied, as did the Act and domestic case law. The Court was satisfied that: (1) as there were no words expressly excluding the requirement for procedural fairness; and (2) that an exercise of the discretions to 'lift the bar' and to grant a visa to a detainee directly affected rights and interests of the Plaintiffs, and (3) given the refugee status determination scheme being applied to OEP's was implicitly tied to the operation of sections of the Act — the process must be procedurally fair. The Court then upheld the argument that the substance of adverse country information had not been put to the Plaintiffs for response. Further, the Court found that the departmental delegates and reviewers erred in law by regarding provisions of the Act and domestic case law as merely providing 'guidance', rather than being legally binding.

Following the High Court's decision in *M61/M69*, DIAC revised the RSA process and rebadged it the 'POD process', which recognises the jurisdiction of the courts to review OEP refugee status determinations.⁴⁴ However, the government retained the essential features of the RSA process: the use of administrative procedural guidelines to direct decision-makers and the outsourcing of the merits review function to employees of a private company.

Darabi v Minister for Immigration & Anor is one of the first cases to have been determined by the Federal Magistrates Court post *M61/69*.⁴⁵ Federal Magistrate Nicholls ultimately found against the contention that the decision-making process had not been procedurally fair in that instance. Natural justice obligations were satisfied in that case without the necessity for the source of text and text itself (often vital country information that may be selectively quoted from or be from non-credible sources) to be put to the claimant where the 'substance of the issues and the substance of the subject country information was put to the claimant' at the review interview.⁴⁶ But depending on the circumstances of a case, Nicholls FM entertained the possibility that the claimant may 'only have the opportunity to meaningfully respond when he has been given the actual text.'⁴⁷ He noted an opportunity for post-hearing submissions was not taken advantage of and dismissed the application. In contrast, Raphael FM in *SZPAC v Minister for Immigration* found that the independent merits reviewer erroneously believed that he was under no obligation to provide the applicant with details of the adverse country information which he intended to use against the applicant's claim.⁴⁸

Practical barriers facing OEPs

The cases of *Darabi* and *SZPAC* provide a useful counterpoint for a discussion around practical obstacles presently facing OEPs seeking to exercise their rights. A fair and effective status determination process requires, among other things, a right to legal assistance and representation.⁴⁹ The government seeks to meet this obligation with respect to OEPs through the Immigration Advice And Assistance Scheme ('IAAAS'), which pays several contracted migration firms and two community legal centres on a case-by-case basis, to assist OEPs prepare their claims for protection, and if unsuccessful, represent them upon review.

At the primary level, contract conditions do not limit IAAAS providers in how many applications they prepare in a day, or stipulate baseline services, such as whether clients should be interviewed prior to the lodgment of review submissions. The only guides lie in professional duties as a Solicitor (for those migration agents who are also solicitors) and the Code of Conduct within the Act applying to Migration Agents. This means in practice that most providers supply 'task forces' in which each migration agent prepares three OEP applications for protection in one day in detention centres. Given the trying circumstances in which such applications are prepared, it is arguable that in doing so, at least some migration agents are breaching the Code of Conduct which requires them to act in the best interests of their clients.

In particular, many people are deeply traumatised and do not fully state their claims easily. Time is required to build a modicum of trust and explain why it is that they must carefully recount painful events; to examine transcripts of prior interviews conducted by departmental officers (known as entry interviews) addressing any inconsistencies that may have arisen; and to gain access to the internet to check country information. Almost without exception, there is no internet access for migration agents in detention centres and so must be done out of hours elsewhere. Country information can make all the difference to the depth, and thus persuasiveness, of a statement of claims. And finally, time is required to ensure that translation is as accurate as possible as many of the interpreters have little training and are not accredited.

Rushing an application can lead to misunderstandings that can badly damage the credibility of applicants and lead to rejections of applications. The critical importance of contact with a representative at the primary level is amplified by the fact that it is rare for an agent to return to a remote detention centre after an unsuccessful finding by a departmental delegate to conduct another face to face interview. Access by telephone to detention centres is in practice also extremely difficult since personal mobile phones were banned. As a result, it is commonplace for most agents to have minimal contact with asylum seeker clients after a departmental interview until an hour before an independent review hearing. Further, the challenging logistics of running merit review hearings across the country in many remote locations means that it is unusual for an applicant to have the same agent at a review hearing.

The case of *SZPAC* illustrates the importance of ensuring that OEPs have access to the courts to challenge the decisions of independent merits reviewers.⁵⁰ The risk of *refouling* people in breach of Article 33 of the Convention is very real when returns are based on possibly unlawful merit review decisions and access to justice is ad hoc.⁵¹ Ensuring access to the courts requires measures to make this right a reality, eg providing legal representation, adequate translation facilities.⁵² Strict time limits and lack of access to legal representation are undermining access to the courts for OEPs who have had an unsuccessful merits review. An extension of time was granted in the case of *Darabi* partly because it was recognised by the Court that not speaking English, dealing with complex legal issues, and being held in a remote detention centre will make it much harder for an applicant to file within time. The finding however can only have been aided by the Minister's consent for the additional required remedy (injunction) to be added to the pleadings late in the piece.

A fundamental and additional reason why many pleadings are currently being filed out of time is the lack of dedicated funding for judicial review cases of this nature. Anecdotal evidence of the variation in the quality of IAAAS service delivered, dependent upon which service provider is allocated is sobering, and access to judicial review would seem to be all the more important. The variation between IAAAS service providers also has a direct bearing on whether an asylum seeker will take advantage of the legal right to judicial review, despite the many barriers. Further, some service providers facilitate a referral of a matter to a state public interest law clearing house ('PILCH') and/or Legal Aid Commission ('LAC'), while others provide no assistance.

There is now a growing movement of community advocates organising in tandem with pro bono lawyers to gain access to remote detention centres, to obtain the paperwork and authorisations necessary to pursue cases for judicial review. Time limits tick by inexorably, and increasingly community advocates are filing applications based on pro forma pleadings in the Federal Magistrates Court to 'stop the clock', before they then resume the search for pro bono lawyers who have the necessary expertise to assess cases for merits and represent in the FMC.⁵³ LACs in Victoria and NSW in particular are doing their best to fund cases that meet the public interest and merit tests within their own tight budgets. Yet despite this frantic activity, there are arguably over 1000 people in detention who are not going to have their cases considered for judicial review. In short, the practical reach of M61/69 is being undermined by the lack of funding and the sheer remoteness and inaccessibility by phone or otherwise of potential applicants.

Conclusion

Irregular people movement, which applies to most seeking protection, is here to stay. Australia has a tradition of strong governance, functioning non-corrupt legal institutions and extensive civil society involvement in refugee status determination and support. It should be engaging in a far more systematic and positive way to achieve lawful, long term, durable and safe regional solutions for asylum seekers. Legislation and short term policy responses driven by immediate political imperatives have not solved 'the boat' issue. Only about 1500 people were ever held on Nauru and Manus Island, and reduced boat arrivals at that time coincided with a lull in the strength of the Taliban in Afghanistan, and a decline in atrocities in Iraq. Both situations have re-intensified, with the addition of the brutal oppression of dissent in Iran. These country-of-origin conditions have prompted new outflows of asylum seekers who know they may encounter appalling reception conditions, but staying where they are is not an option. Regional bilateral agreements negotiated in a hurried and covert fashion do not do justice to a country that speaks the language of human rights internationally, and that has the resources and human capital to advocate for and help build truly path breaking and enduring solutions that safeguard the legal and psycho-social well being of asylum seekers. In the interim, all asylum seekers arriving in Australia, irrespective of their place or mode of arrival should have their claims assessed equally under domestic law and in accordance with our international obligations.

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3. Ibid.
4. *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* <http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf> at 25 July 2011.
5. *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).
6. Adopted 28 July 1951, entered into force 22 Apr. 1954, 189 UNTS 137 (Refugee Convention), read together with the Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
7. The definition was extended by regulation in 2005 to encompass all islands north of Carnarvon, Mackay and Darwin: *Migration Amendment Regulations 2005* (No. 6) SLI 171.
8. *Migration Act 1958* (Cth), s 46A and s 198A. More recently, unlawful non-citizens arriving in excised offshore places are commonly referred to as 'irregular maritime arrivals' rather than 'offshore entry persons.' However, there is no definition of irregular maritime arrivals in the Act. This article uses offshore entry person as defined in s 5(1) of the Act.
9. *Migration Act* s 46A(1).
10. *Migration Act* ss 13(1), 14(1), 29(1), 45, 46, 47, 65.
11. *Migration Act* s 46A(2), (7).
12. *Migration Act* s 195A. There is also scope for the Minister to grant a visa to a person held in detention under this section independent of the power to 'lift the bar'.
13. Submissions of the First and Second Defendants, M61 of 2010 and M69 of 2010, page 9.
14. Commonwealth, Parliamentary Debates, House of Representatives, 18 September 2001, at 30870–30871.
15. *Applicant A v Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 231 (Brennan CJ).
16. Minister for Immigration and Citizenship/Minister for Foreign Affairs/Minister for Home Affairs 'Changes to Australia's Immigration Processing System' (Joint Media Release, 9 April 2009).
17. The Convention, article 3; ICCPR, article 26; UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Australia*, July 2010 www.unhcr.org/refworld/docid/4c3abad02.html at 22 August 2011.
18. *Migration Act* s 198A.
19. *Arrangement*, above n 4.
20. See generally regarding protection safeguards on transfer to a third country: Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in another State' (2007) 28 *Michigan Journal of International Law* 223; Savitri Taylor, 'Protection Elsewhere/Nowhere' (2006) 18 *International Journal of Refugee Law* 283.
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29. *Arrangement*, above n 4, Clause 10.2(a).

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38. UNHCR, above n 17.

39. UNHCR, Migration Amendment (Designated Unauthorised Arrivals) Bill, Submission of the Office of the UNHCR to the Senate Legal and Constitutional Legislation Committee, 22 May 2006, [25].

40. The Convention, Article 16(1); ICCPR, Article 14; UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, [6] and [8].

41. The Convention, Article 33. *Non-refoulement* obligation also in article 3, 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, entered into force 26 June 1987 and International Covenant on Civil and Political Rights Adopted 16 Dec 1966, entered into force 23 March 1976, 999 UNTS 172 (entered into force 23 March 1976).

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47. *Ibid* [99].

48. *SZPAC v Minister for Immigration & Anor* [2011] FMCA 517 (7 July 2011), [24].

49. UNHCR, Global Consultations on International Protection, 2nd meeting, 'Asylum Processes (Fair and Efficient Asylum Procedures)', EC/GC/01/12, 31 May 2001, [4] – [5]; ExCom Conclusions No. 8 (XXVIII)–1977, [(d)] and [(e)], No. 28 (XXXIII) – 1982, [(c)], and No. 85 (XLIX – 1998), [(r)].

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51. UNHCR, above n 42.

52. The Convention, Article 16(1); ICCPR, Article 14; UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, [6] and [8].

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