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REFUGEE LAW: THE SHIFTING BALANCE

by

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A New Discipline

Not so long ago, the notion that refugee law could be regarded as a discrete legal subject would have seemed very strange to an Australian lawyer. It is true that Australia has been a party to the 1951 *Convention relating to the Status of Refugees* since it came into force on 22 April 1954.[1] But as Mary Crock has pointed out, until 1989, when Commonwealth legislation for the first time set out detailed criteria governing the grant of entry permits:

> *"the admission or expulsion of non-citizens [including those claiming to be refugees] was regarded as a matter of ministerial prerogative and an inappropriate subject for judicial review".*[2]

Indeed it was not until 1980 that any Commonwealth statute made any reference to the *Refugees Convention* and, even then, it was for the purpose of limiting the circumstances in which the Minister could exercise a discretion to grant an entry permit to a non-citizen after his or her entry into Australia.[3]

A little over two decades after the first statutory acknowledgement of the *Refugees Convention* in Australia, a foreign devotee of the High Court's website might gain the impression that migration law in general, and refugee law in particular, has become the Court's most important single source of work. Since 1999, the full High Court has heard and determined at least 23 cases concerned with migration law, most of which have involved persons claiming to satisfy the *Convention* definition of "refugee" and therefore to be entitled to protection visas.[4] During the same period, migration cases, the bulk of which have involved claimants for protection visas seeking judicial review of adverse decisions, have constituted over one third of the

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1 In 1973, Australia also adopted the 1967 *Protocol relating to the Status of Refugees:* see R Germov and F Motta, *Refugee Law in Australia* (Oxford University Press, 2003), 16-19, 839. The definition of "refugee" in Art 1A(2) of the *Refugees Convention,* as modified by the *1967 Protocol,* is a person who

> *"owing to a 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 is unable or, owing to such fear, is unwilling to return to it."*

2 M Crock, "Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?" (1996) 18 *Syd LR* 267, 275.

3 *Migration Act 1958* (Cth), s 6A, discussed in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

4 The incidence of such cases has not diminished. In the first five months of 2003 the Court decided five migration cases, of which four were refugee matters.

judicial caseload of the Federal Court.[5] It is not surprising that this plethora of litigation has given birth to a new legal discipline.[6]

One reason why refugee law has developed so rapidly is that it represents the intersection of several areas of fundamental importance to the legal system, notably international law, constitutional law and administrative law. Since 1989, the *Refugees Convention,* a foundation stone of the post-war international legal order, has in substance been incorporated into Australian domestic law, although the precise extent to which it has been incorporated has varied according to the constantly changing structure of the *Migration Act.*[7] In consequence, the Australian courts, like their counterparts in other countries which are parties to the *Refugees Convention,* have had to construe its imprecise language.[8] Not surprisingly, given the infinitely varied circumstances in which the *Refugees Convention* falls to be considered, it has been applied to what many critics see as an ever widening range of cases. For example, the *Convention* concept of a "particular social group" has recently been held by the High Court to include so-called "black children" in China (that is, children born outside the constraints of China's one-child policy)[9] and women in Pakistan.[10] Both of these decisions have the potential to increase substantially the classes of persons eligible for protection visas.

Challenges in the Australian courts by unsuccessful applicants for protection visas have provided the occasion for the elaboration and development of familiar administrative law doctrines. Thus the High Court has interpreted the requirement to comply with the principles of procedural fairness to impose what some would regard as onerous requirements on the Refugee Review Tribunal and similar bodies.[11] While the High Court has been less tolerant of claims by disappointed applicants that the

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5 The Federal Magistrates Court now also has jurisdiction in migration matters.

6 See, for example, R Germov and F Motta, note 1 above; M Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998).

7 See now *Migration Act 1958* (Cth), ss 36, 65; cf Part 2, Div 3, Subdiv AL; cf text at notes 31-33, below.

8 For the approach to construction of the *Convention,* see generally *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

9 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293.

10 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574.

11 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs, Ex parte Miah* 2001) 206 CLR 57; *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.

conduct of a decision-maker justifies a reasonable apprehension of bias,[12] it is not always easy for tribunals with a heavy caseload to comply with the rigorous procedural standards prescribed by the courts in the less hectic atmosphere of an application for judicial review. To critics of judicial review of administrative action, these requirements open the way to excessive intervention by the courts into the administrative decision-making process.

Parliament has responded to the perceived generosity of the courts by enacting legislation designed to curtail the opportunities for and the scope of judicial review of migration decisions, thereby raising important constitutional questions. For example, Part 8 of the *Migration Act 1958* (Cth), enacted in 1994,[13] deprived the Federal Court of jurisdiction to grant relief on certain grounds that otherwise would constitute jurisdictional error on the part of the decision-maker. The legislative scheme was upheld by a narrow majority of the High Court on the ground that Parliament has power, pursuant to s 77(i) of the *Constitution,*[14] to vest jurisdiction in a federal court over part only of a controversy. More recently, Parliament's attempt to confine judicial review of migration decisions by a means of a privative clause survived a constitutional challenge, but at the price of a very narrow reading of the provision.[15]

Political Sensitivity of Refugee Law

These developments would be reason enough for refugee law to be of interest to public lawyers and to those with a particular interest in utilising the legal system to protect the interests of a vulnerable group seeking refuge in this country. But in recent years, Australian refugee law has attained greater public prominence and indeed notoriety than virtually any other area of law, except perhaps outside the criminal law. In part, this has been the product of high profile challenges to

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12 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128.

13 Part 8 was introduced by the *Migration Reform Act 1992* (Cth) which took effect on 1 September 1994.

14 *Abebe v Commonwealth* (1999) 197 CLR 510. The result, until the repeal of Part 8 in 2001 (by the *Migration Legislation Amendment (Judicial) Review Act 2001* (Cth)), was a "bifurcated" jurisdiction in migration matters, divided between the High Court and Federal Court.

15 *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24. See text at notes 24-27, below.

government policy, notably the *Tampa* litigation,[16] decided in the lead up to the 2001 federal election.

In that case, the trial judge, North J, made orders directing the Commonwealth to bring ashore and release 433 asylum seekers travelling from Indonesia to Australia who had been rescued from a sinking fishing boat by the Norwegian vessel *MV Tampa*. The rescue had taken place about 140 kilometres north of Australia's Christmas Island territory. The Full Court, in proceedings which attracted the attention usually reserved for sensational criminal trials, in effect upheld what became known as the "Pacific solution" to unauthorised arrivals by boat. The Court concluded that the Commonwealth, in refusing the rescuees permission to land in Australia, had acted within the executive power conferred by s 61 of the *Constitution*.[17]

The *Tampa* litigation is, however, only one illustration, albeit a dramatic one, of the peculiar political sensitivity of refugee law.[18] Judicial review of administration action always has the potential to create conflict between the courts and the executive, regardless of the political complexion of the government of the day. As Justice McHugh has pointed out, tensions inevitably are created by the exercise of the power of judicial review since the courts often appear to undermine executive power.[19] The potential for tension has increased in recent times because of the expanded scope of judicial review, exemplified by the apparently ever-increasing requirements of procedural fairness and the extension of judicial review to exercises of prerogative power previously thought to be exempt from judicial scrutiny.[20]

Although administrative law always carries with it the risk of conflict between the courts and the government of the day, there is no area that has generated more conflict

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16 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

17 *Ruddock v Vadarlis* (2001) 110 FCR 491. Special leave to appeal was refused by the High Court.

18 For varying perspectives on the *Tampa* affair see D R Rothwell, "The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty" (2002) 13 *Pub LR* 118; G Thom, "Human Rights, Refugees and the MV Tampa Crisis" (2002) 13 *Pub LR* 110; H Pringle and E Thomson, "The Tampa Affair and the Role of the Australian Parliament" (2002) 13 *Pub LR* 128.

19 M H McHugh, "Tensions Between the Executive and the Judiciary" (2002) 76 ALJ 567, 570.

20 *Id,* 571.

than judicial review of migration decisions, especially refugee cases. In a recent paper, I identified a number of factors that have contributed to the tension between the judicial and executive arms of government.[21] These include

- the relative novelty of the concept of judicial review of refugee decisions which, within a short time, has converted a largely unreviewable administrative discretion into a decision-making process subjected to close scrutiny by the courts;
- the historical fact that immigration has been an especially sensitive area of public policy in Australia since and even well before federation;[22]
- the operation of the *Refugees Convention* itself which, despite much talk of illegal arrivals and queue jumpers, imposes protection obligations on contracting States towards people arriving in their territory by whatever means, provided that they can satisfy the definition of "refugee" in Article 1A(2); and
- the reliance by Parliament on repeated legislative amendments to overturn unwelcome judicial decisions or to curtail the scope of judicial review, without proponents of the legislation appreciating the profound difference between their subjective intentions and the intention to be attributed to Parliament by the courts when applying well established techniques of statutory interpretation.[23]

The Constitutionalisation of Refugee Law

In the same paper, with s 75(v) of the *Constitution*[24] in mind, I suggested that the fate of the institution of judicial review of migration decisions was likely to rest with the High Court, rather than with Parliament. That prediction has come to pass. In *Plaintiff S157/2002 v Commonwealth,* a challenge was made to s 474(1) of the *Migration Act,* a privative clause which on its face attempts to shield decisions of the Refugee Review Tribunal (and other decision-makers) from judicial review except on

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21 R Sackville, "Judicial Review of Migration Decisions: An Institution in Peril?" (2001) 23 *UNSWLJ* 190, 203-207.

22 One of the first enactments of the Commonwealth Parliament was the *Immigration Restriction Act 1901* (Cth) which subjected potential immigrants to the notorious dictation test.

23 A point brought home starkly by *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24, 43, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

24 Section 75(v) provides that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition, or an injunction, is sought against an officer of the Commonwealth.

very narrow grounds.[25] The High Court rejected the challenge to the validity of s 474(1), holding that the provision, on its proper construction, does not oust the entrenched jurisdiction of the Court, conferred by s 75(v) of the *Constitution,* to grant writs of mandamus and prohibition and injunctive relief. However, in order to avoid possible infringement of Chapter III of the *Constitution,* the Court gave s 474(1) a very narrow construction, such that it provides no protection against review for jurisdictional error by the Tribunal.[26] Parliament's attempt to curtail the scope of judicial review of migration decisions therefore failed.

The major significance of the decision in *Plaintiff S157/2002 v Commonwealth* flows from the Court's invocation of the *Constitution* as a reason for giving s 474(1) of the *Migration Act* a narrow construction. The joint judgment implies that if the privative clause had purported to immunise decisions of the Refugee Review Tribunal against judicial review for jurisdictional error, it would fall foul of s 75(v) of the *Constitution*.[27] Their Honours also suggest that had a broader construction of the privative clause been adopted the provision

> *"would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71."*

Plaintiff S157/2002 v Commonwealth reaffirms, or perhaps establishes, the central role played by s 75(v) of the *Constitution* in maintaining the rule of law in Australia. In that sense, the importance of the case far transcends the High Court's construction of the particular privative clause. But the case also marks the constitutionalisation of refugee law in Australia. Instead of the tension between governments and the courts manifesting itself in differing interpretations of legislation or of the scope of executive power, which Parliament is always free to amend or clarify, the High Court has

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25 The privative clause was drafted on the assumption that it would be subject to the so-called *Hickman* proviso, whereby an administrative decision can be quashed notwithstanding a privative clause, if that decision is not a *bona fide* attempt to exercise the power in question, does not relate to the subject matter of the legislation or is not reasonably capable of reference to the power: *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616, per Dixon J.

26 *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24, 45-46.

27 *Id,* 47.

marked out a protected field of judicial review into which it appears that Parliament may not intrude.

The constitutionalisation of refugee law is not confined to the operation of s 75(v) of the *Constitution.* In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri,*[28] the respondent to the appeal was an "unlawful non-citizen" whose application for a protection visa had been rejected. He had asked to be returned to the Gaza Strip, his place of origin, but the necessary permits from transit countries could not be obtained. He therefore faced continuing detention during a period when there was no real likelihood of him being removed from Australia. The issue was whether s 196(1) of the *Migration Act* required or authorised his continuing detention in those circumstances. Section 196(1) provides that an unlawful non-citizen detained under the "arrest" provisions of s 189 (as the respondent was) be kept in immigration detention until (relevantly) he or she is removed from Australia.

The Full Federal Court accepted that Parliament has the power to legislate for the detention of aliens for the purpose of their expulsion from Australia. It also accepted that legislation can empower the executive to detain an alien in custody for that purpose without infringing Chapter III of the *Constitution,* since such detention is neither punitive in nature nor part of the judicial power of the Commonwealth. But the Court considered that unless s 196 were subject to an "implied temporal limitation", a serious question of invalidity would arise. This was so because the section would then purport to authorise indefinite detention of an alien in circumstances where there is no real likelihood of his or her removal from Australia. The Court ultimately decided that the legislation permitted the respondent to be released by applying a "well-established principle of statutory construction concerning fundamental rights and freedoms".[29] But the reference to possible invalidity indicates that there may be significant limits to Parliament's legislative authority on issues that governments are likely to regard as of high policy significance.

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28 (2003) 197 ALR 271 (Black CJ, Sundberg and Weinberg JJ).

29 *Id,* [81].

One consequence of the constitutionalisation of refugee law, particularly the central role accorded to s 75(v) of the *Constitution,* is that the arena of conflict between governments and the courts is likely to shift. Hitherto that conflict has tended to embroil the Federal Court, as the Minister and others have argued that the Court has strayed into merits review and failed to give effect to the will of Parliament.[30] Whether these criticisms have any validity is not presently important. The point is that it is the High Court, not the Federal Court, that has now substantially altered the balance between judicial power, on the one hand, and legislative and executive power, on the other, so far as decision-making in migration matters is concerned. To the extent that opprobrium is directed at courts by governments or political figures dissatisfied with what they see as judicial interference with migration policy, the High Court is more likely to be seen as the source of the "problem".

International Norms and Domestic Policy

The constitutionalisation of refugee law does not ensure, however, that the *Refugees Convention* will continue to be applied as part of Australian domestic law. Nor does it ensure that the courts will continue to be the authoritative interpreters of its provisions. The fact that Australia is a party to a treaty does not of itself incorporate the treaty into Australian law. Legislative implementation is required.

It follows that Parliament can legislate in a manner inconsistent with Australia's obligations under the *Convention* and, in the view of some commentators, it has already done so.[31] The measures that fall into this category include:

- the excision of Christmas Island, Ashmore Reef and other offshore places from Australia's "migration zone", thereby preventing persons arriving at these places from applying for visas and rendering them liable to be removed to a "declared country";[32]
- a statutory direction that Article 1A(2) of the *Refugees Convention* does not apply in relation to persecution for one or more of the four *Convention* reasons

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30 P Ruddock, "Refugee Claims and Australian Migration Law: A Ministerial Perspective" (2000) 23 *UNSWLJ* 1; J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1.

31 See, for example, a letter to the Prime Minister dated 31 October 2001, from Human Rights Watch and the US Committee for Refugees, available at http//www.hrw.org/press/2001/10 /australia1031-htr.htm..

32 *Migration Act 1958* (Cth), ss 5, 46A, 198A.

unless the reason is "the essential and significant reason" for the persecution and the persecution involves both serious harm to the person and systematic and discriminatory conduct;[33] and

- a further direction that in determining whether a person has a well-founded fear of persecution by reason of membership of a particular social group, the decision-maker is to disregard any fear of persecution that any other member of the family has experienced for a non-*Convention* reason.[34]

These measures point to a more fundamental issue that is likely to play an increasingly prominent part in debates on refugee policy. That issue is whether the *Refugees Convention* is properly to be regarded as a product of its time, ill-suited to a world in which the mass movement of peoples fleeing persecution or simply seeking a better life is commonplace. If so, the question arises as to whether the *Convention* can survive in its present form as either as an integral part of the international order or as a part of Australian domestic law.

The point has been raised in a recent research paper prepared for Parliamentarians.[35] The author argues that the *Refugees Convention* is the product of the European experience of Nazi war-time persecutions and of the Cold War environment. She points out that most asylum seekers are now from the poorer countries of the Middle East, Asia, Africa and Eastern Europe. They are less welcome in western countries than asylum seekers from Western Europe once were. Moreover, the world refugee and internally displaced population has increased dramatically. Yet the core "non-refoulement" obligation under the *Convention*[36] takes no account of the impact of refugee movements in receiving countries and no provision is made for burden

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33 *Migration Act 1958* (Cth), s 91R. Germov and Motta argue that s 91R, insofar as it redefines the "causation" requirement, "is not in accordance with the proper construction or objective of the *Refugees Convention": Refugee Law in Australia,* 190.

34 *Migration Act 1958* (Cth), s 91S. The objective is to overturn Federal Court decisions holding that a member of a family decisions holding that a member of a family who is at risk of persecution by reason of his or her association with another family member may have a well-founded fear of persecution by reason of membership of a particular social group (that is, the family): see, for example, *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184.

35 A Millbank, *The Problem with the 1951 Convention* (Information and Research Services, Research Paper No 5, 2000).

36 Article 33.1 of the *Refugees Convention* provides that no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where the refugees' life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

sharing among contracting states. Likewise, the *Convention* gives priority to asylum seekers on the basis of their mobility and capacity to pay so-called people smugglers, while those with perhaps the greatest need remain in refugee camps. Further, so the author argues, the vague language of the *Convention* has been interpreted differently in different countries, with the consequence that the rates of acceptance of asylum seekers vary considerably among contracting States.

Raw numbers give some insight into why these views have gained currency in Australia and elsewhere. According to the United Nations High Commission for Refugees ("UNHCR"), there were 19,783,100 "persons of concern" to it as at 31 December 2001. Of these, 12,051,100 were classified as "refugees" and 940,800 as asylum seekers. The main countries of origin for refugee populations were Afghanistan, Burundi, Iraq and Sudan. Contrary to popular belief in Western countries, overwhelmingly refugee populations have found asylum in other developing countries such as Pakistan, Iran, Tanzania and Kenya. Nonetheless, some industrialised countries, receive large numbers of asylum applications. These include the United Kingdom (88,300), Germany (88,290) and the United States (86,180). (Australia, by contrast, received a relatively modest 12,370 applications in 2001.) Moreover, the cost of processing claims and caring for asylum seekers is very considerable. It has been suggested, for example, that in 2000 the United Kingdom spent more on asylum seekers ($US2.2 billion) than the entire UNHCR budget ($US1.7 billion).[37]

A New International Order?

Critics of the *Refugee Convention* are not confined to the ranks of politicians or administrators. Professor James Hathaway, an eminent scholar of international refugee law,[38] argues that

> *"the present breakdown in the authority of international refugee law is attributable to its failure explicitly to accommodate the reasonable preoccupations of governments in the countries to which refugees flee. ... Apart from the right to exclude serious criminals and persons who pose a security risk, duty to avoid the return of any and all refugees who arrive at a*

[37] A Millbank, note 35 above, ii-iii.
[38] See J C Hathaway, *The Law of Refugee Status* (1991).

state's frontier takes account of the potential impact of refugee flows on the receiving state".[39]

Professor Hathaway points out that much of the debate during the drafting of the 1951 *Refugees Convention* was devoted to considering how to protect the national self-interest of receiving states. States were not required to grant permanent residence to refugees, but merely to avoid returning them to an ongoing risk of persecution. In that sense, Professor Hathaway suggests, "refugee law is clearly based on a theory of temporary protection".

Professor Hathaway makes other important observations. The 1951 *Refugees Convention* was formulated at a time when refugees were predominantly of European stock whose cultural assimilation was seen to be relatively straightforward. It must be remembered that the *Refugee Convention* in its original form was limited to persons who satisfied the definition of refugees "as a result of events occurring before 1 January 1951" and contained an optional geographic limitation restricting its operation to events in Europe. It was not until the *1967 Protocol* that these restrictions were lifted.[40] The late 1960s and the early 1970s, however, was a time of labour shortages in the developed world, particularly Europe. At that time there was, as Professor Hathaway says, a "pervasive interest-convergence between refugees and the governments of industrialised states".

There has been a radical change in global social and economic conditions since the *1967 Protocol* came into force. There is no longer a convergence of interest between asylum seekers and governments of advanced economies. The mass movement of people seeking a better life has aroused antagonism rather than sympathy, an attitude doubtless encouraged by the increased threat posed by international terrorism. These changes have prompted developed countries, Australia included, to adopt "*non entrée* mechanisms" such as border controls, visa requirements for nationals of refugee-

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39 J C Hathaway, "Can International Refugee Law Be Made Relevant Again?", available at http://www.refugees.org world/articles/intl_law_wrs96.htm.

40 The *1967 Protocol* is not strictly an amendment to the *1951 Refugees Convention,* but a separate instrument: see *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168, 195, per Katz J. The *1967 Protocol* preserved the geographical restriction for State parties to the *1951 Convention,* but provided for removal of the restriction if the party so determined.

producing states, burden-shifting arrangements and forcible intervention of asylum seekers in international waters.

Professor Hathaway argues for mechanisms to ameliorate the plight of receiving states. These, he says, should revolve around the principle that the protection obligation continues only until the refugee can return to his or her country of nationality in safety and dignity. Such an approach implies that state responsibilities may vary according to the circumstances of the receiving countries, with a greater emphasis being placed on the international community's collective responsibility for affording protection to genuine refugees.

Australia has already proceeded along the path suggested by Professor Hathaway. Prior to 1999, all successful applicants for a protection visa became entitled to permanent residence and to the settlement support arrangements provided to refugees taken under off-shore arrangements. By regulations introduced in October 1999, provision was made for temporary protection visas for unauthorised arrivals found to be refugees.[41] The holders of such visas receive more limited benefits than those accorded permanent protection, but are eligible to apply for a permanent protection visa after 30 months provided that they are assessed at that time as still in need of protection. Substantial numbers of temporary protection visas have been granted to refugees who have arrived in Australia without authority.[42]

Conclusion

Refugee law in Australia, as in most industrialised countries, has developed extremely rapidly, over a short period. In part, this reflects world-wide trends from which Australia is not immune, despite the apparent success of the "Pacific solution" and other measures in discouraging the flow of boat people from south east Asia to Australia's northern offshore territories. It also reflects the fact that the courts, including the High Court, have to grapple with a range of difficult issues, many of which are of considerable political moment. The resolution of those issues has

41 *Migration Act 1958* (Cth), ss 29(2), 30(2); *Migration Regulations, Sched 2, sub-class 785.*

42 In 2000-2001, 4,456 temporary protection visas were granted, while a further 3,082 were granted in the program year to 31 May 2002: Department of Immigration and Multicultural and Indigenous Affairs, *Fact Sheet 64* (July 2002).

exacerbated the underlying tensions between governments and the courts associated with judicial review of administrative action.

The constitutionalisation of refugee law, exemplified principally by *S157 v Commonwealth,* marks a shift in the balance between judicial and legislative powers. The High Court has identified significant limits in the extent to which Parliament can curtail the process of judicial review entrenched by s 75(v) of the *Constitution.* Nevertheless, the ultimate authority over refugee law rests with Parliament. This is shown by domestic legislation that, on one view, departs from Australia's obligations under the *Refugees Convention.* Australia could choose to reject those obligations altogether, either by denouncing the *Convention* and *Protocol,* or by enacting legislation inconsistent with the non-refoulement obligations imposed by them. Unilateralism to this extent is perhaps unlikely. Reconsideration of the *Refugees Convention* by the international community may well be the outcome of a more hostile environment to asylum seekers.