

**"Effective Protection" in Australian Law**  
**by David Bitel\***

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In the lead-up to the October 2001 election in Australia, Prime Minister Howard loudly proclaimed the slogan "we will control who enters Australia".

Some weeks before, several hundred largely Afghan men, women and children were rescued from a sinking Indonesian vessel by the Norwegian ship, the "Tampa". The captain then sought and was denied by the Australian government permission to bring his human cargo of people who claimed to be refugees to Australia. This set off a chain of incidents with international implications and resulted promptly in significant legislative changes to Australia's already tight and complex immigration laws all designed to give greater effect to the principles underlying the election slogan. In particular, a policy known as the "Pacific Solution" was created whereby asylum seekers arriving in Australia without valid visa documentation were denied entry and removed to nearby Nauru and Manus Island, in Papua New Guinea, to await the outcome of their status determination.

The re-elected Australian government in its next Budget set aside billions of dollars to fund "border protection", controversially employing the Australian navy in coastguard activities along the northern and western waters. In a climax to these policies, following the arrival of a small group of Turkish men of Kurdish background, through the cordon of security which had been created, on Melville Island, a part of the Northern Territory of Australia, an Executive Order with arguably retrospective effects excised Melville Island from Australia's migration zone. The men were then forcibly put back on the small Indonesian fishing vessel on which they had entered Australian waters and escorted by the Royal Australian Navy out of Australia and back to Indonesia, from whence they were deported back to Turkey. Whilst on Melville Island, the Australian government admitted the men sought protection of Australia under its obligations as a signatory of the Refugee Convention. Indonesia, it should be noted, is not a signatory and so is not bound by its obligations, in particular the obligation imposed under Article 33(1) that: "No contracting

State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Many believed Australia had been complicit in a direct breach of the Convention and had misapplied the Effective Protection principles.

The obligation under Article 33 is subject to the important rider that applications for a protection visa (as the refugee application is technically called) may not need to be dealt with by a decision maker where there is effective protection in a third country which does not infringe the right of non-refoulement, or where pursuant to Article 1E the Convention does not apply to a person recognized as having the rights and obligations attached to the possession of nationality of a third country.

Australian courts have grappled for some years with the meaning and significance of these rules and developed jurisprudence in relation to the Effective Protection rule. Justice von Doussa provided the leading judgment of the Full Court of the Federal Court of Australia in *Thiyagarajah v Minister* (1998) 80 FCR 543, a case concerning a Sri Lankan national who prior to his entry to Australia was a resident in France where he had been granted refugee status, and confirmed that Australia does not have protection obligations to a person who has been accorded effective protection in a third country. This is protection which will effectively ensure that there is no breach of Article 33, where the person has a right of residence in that country and is not subject to Convention harms. If the country is a Convention country and can be expected to honour its obligations thereunder, return is permissible whether or not the person has a right of residence there, or even where the country is not a Convention country, but it can be expected that country will afford the person effective protection. (Per French J in *Patto v MIMA* (2000) FCA 1554 para 37.)

The Courts have noted that there is no obligation to find a guarantee of protection will exist in the third country, and that in assessing the likelihood of protection available, the real chance test applies but no other rigid test. Features considered relevant include whether there is an availability of a system for the protection of the citizen and a reasonable willingness by the State to operate it, whether as a matter of practical reality there is a real chance the third country will not accept the refugee and will refoule him or her, and whether the refugee has a right to reside in, enter and reenter the third country. The

decision requires findings of fact by the decision maker on matters objectively relevant to the decision at the date of decision. It is thus a matter of practical reality and fact that is determined.

In a 1999 legislative amendment, Sections 36(3) to (7) were inserted into the Migration Act 1958, which the Government intended as a codification of the doctrine of Effective Protection. In fact, the Courts determined that because of its different terminology, the new law provides for a complementary legal regime for the Effective Protection rule.

Section 36(3) provides:

"Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose and is expressed, any country apart from Australia, including countries of which the non-citizen is a national."

Subsections 4 and 5 ensure that applicant's fears of persecution in the third country must be tested against the Refugee Convention and that an assessment must be made that that country will not refole the refugee. In a neat summary of the contemporary position in Australia, Justice Stone in the Full Court of the Federal Court decision of *MIMA v Applicant C* (2001) 116 FCR 154 noted:

"The combination of the amendments to Section 36 and the doctrine of effective protection leads to this position. Australia does not owe protection obligations under the Convention to:

- (a) a person who can as a practical matter, obtain effective protection in a third country; or
- (b) a person who has not taken all possible steps to avail himself or herself of a legally enforceable right to enter and reside in a third country."

The onus is on the applicant to prove the lack of effective protection or the inability to return to or lack of right to enter the third country, and where an applicant refuses to cooperate one judge expressed the view that there was a constructive waiver of his claim to Convention protection. Nevertheless, if there is a real doubt about what the third country will do, Australia's protection obligations continue. As noted by Justice Hill in *V586/00A v MIMA* (2002) 122 FCR 57, the decision maker must be comfortably satisfied that the applicant with no legal right to enter a safe third country will be granted admission there.

These principles nevertheless contain complexity and still need further clarification in some important respects. Thus, what is precisely meant by the terms "legally enforceable right"? What is the situation where a government has the power which may or not be exercised to revoke this right; and what occurs when for whatever reason the right has expired post determination of application that Australia has no Convention obligation, and prior to actual removal from the jurisdiction of Australia.

Of course, Section 36(3) does not impose on every applicant an obligation to approach every Convention country, as there must be an existing right to enter a third country, which involves some connection, which is usually, though not always, the case where a person has spent some time there.

The laws and jurisprudence have developed as a consequence of and response to different waves of refugee movements. In the late 1980s and early 1990s, an earlier wave of Indochinese refugees who had temporary residence rights in China were excluded by the legislative creation of "Safe Third Country" sections in the Act and bilateral agreements. The ultimate political hypocrisy was applied to the East Timorese refugees who entered Australia in the 1990s with the Australian Government arguing in the Courts that these people could claim effective protection in Portugal, even though Australia no longer recognized Portuguese sovereignty over East Timor.

Most recently, and in what some consider the ultimate irony given the historical circumstances which led to the Refugee Convention, Jewish refugees from Russia with no connection in fact to Israel have been found by the Courts to have no right to claim protection obligations in Australia because under Israel's Law of Return they can safely enter and reside there. The exact extent of Australia's effective protection obligations may in the near future be clarified by the High Court of Australia as a consequence of litigation currently there brought by these aggrieved applicants from Russia.

But the issue remains very significant for other refugees seeking entry to Australia as the complex web of the rules has been used to deny Australian obligations to, amongst others, Nepalese refugees who can obtain protection in India under a 1950 Treaty between the two countries, Iraqis who have been found can live safely in Syria, a Colombian student with a valid student visa to the USA, and recently in the Refugee Review Tribunal, a North

Korean with the right to enter and reside in South Korea, although he had never been there – N03/47934 dated 19 February 2004.

Prime Minister Howard's election slogan contains some truth. A sovereign State has the power to permit and deny entry to non-nationals. This right though is subject to the overriding obligation contained in Article 33 of the Refugee Convention, which itself is subject to the law relating to Effective Protection. From a practical viewpoint, refugees all too infrequently are unaware of this important exception and fail to appreciate that whilst international law will give them protection, they have no right to choose which country will be the protector.

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