Casenotes, commentaries and recent developments

Non-refoulement and torture: the adequacy of Australia's laws and practices in safeguarding asylum-seekers from torture

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Introduction

On 28 June 2000 the Senate Legal and Constitutional References Committee (Senate Committee) tabled its report on Australia's refugee and humanitarian determination processes.[1] This report discusses, amongst other issues, whether Australia is able to meet its non-refoulement obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[2] given that the fundamental principle of non-return to face torture or death is not present in Australian domestic law nor subject to the rule of law.[3] These obligations are set out in art 3 of the CAT, which states that no contracting party shall 'expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.[4]

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1 Senate Legal and Constitutional References Committee *A sanctuary under review: An examination of Australia's refugee and humanitarian determination processes* (The Parliament of the Commonwealth of Australia, Canberra, June 2000).

2 The Convention Against Torture or CAT.

3 The Senate Committee's term of reference c) is discussed in Ch 2 of the report. Reference c) directs the Senate Committee's inquiry to: 'Whether Australia's treaty commitments to, and obligations under, the 1951 Convention relating to the Status of Refugees, the 1984 United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1966 International Covenant on Civil and Political Rights are capable of being met given that the fundamental principle of non-return to face torture or death is not present in domestic law nor subject to the rule of law.' Moreover, Ch 8 of the report discusses the Minister for Immigration's discretion to grant an asylum-seeker a visa on humanitarian grounds, as directed by term of reference b) which required the Committee to consider: 'The adequacy of a non-compellable, non-reviewable Ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death'.

4 CAT art 3. Torture victims are also protected under the *International Covenant on Civil and Political Rights* (ICCPR), arts 6 and 7, which Australia ratified on 13 August 1980. For a discussion of these provisions

With respect to this issue, the Senate Committee recommended 'that the Attorney General's Department, in conjunction with Department of Immigration and Multicultural Affairs (DIMA), examine the most appropriate means by which Australia's law could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and International Covenant of Civil and Political Rights (ICCPR) into domestic law'.[5] Furthermore, the Committee 'recommends that appropriately trained DIMA staff consider all s 417 requests and referrals against Convention on the Rights of the Child (CROC), ICCPR and CAT'.

This article argues in support of the Senate Committee's recommendations in so far as they recognise that Australia is not well positioned to meet its obligations under the Convention Against Torture. It argues that, contrary to what the Australian Government has suggested, the provision of protection visas and humanitarian visas at the discretion of the Minister for Immigration is not sufficient to ensure that Australia complies with its non-refoulement obligations under the CAT. This discussion involves consideration of the nature of the CAT and the form of its non-refoulement obligations, which forms the background for the author's suggestion as to an 'appropriate means by which Australia's law could be amended'.

The case of SE v Australia

The need to investigate how Australia is fulfilling its non-refoulement obligations under the CAT was emphasised in May 1999 when the United Nations Committee Against Torture handed down its first communication against Australia: *Sadiq Shek Elmi v Australia* (*SE v Australia*).[6] The committee's view in this instance was that

refer to Hearn J and Eastman K 'Human rights issues for Australia at the United Nations — Australia's non-refoulement obligations under the Torture Convention and the ICCPR' (2000) 6(1) AJHR 216. Furthermore, the Convention on the Rights of the Child (CROC) obliges Australia not to refoule a child to a country where she or he will be at risk of being tortured. See arts 37, 6 and 22. Refer to Senate Legal and Constitutional References Committee, above, note 1, at 56.

5 Senate Legal and Constitutional References Committee, above note 1 at 60.

6 Communication No 120/1998, 17 November 1998. The communication is discussed in Hearn Jand Eastman K above note 4 at 234-238. Prior to *SE v Australia* two communications were accepted by the Committee Against Torture (UNCAT): *H v Australia* Communication 102/1998 and *NP v Australia* Communication 106/1998. The first of these was discontinued when the complainant returned to her home country. The second was rejected by the UNCAT on its merits. Subsequent to *SE v Australia* there has been an increase in the number of complaints lodged, including CAT Communication 136/1999 and CAT Communication 138/1999 and CAT Communication 139/1999. See Attorney General's

Australia would be in breach of its obligations under art 3 of the CAT if it continued in its decided course of forcibly returning a Somali national to Somalia, where he would be in danger of being subjected to torture.[7] In coming to its conclusion the committee rejected Australia's argument that it had adequately assessed its art 3 obligations to Sadiq Shek Elmi (SE) by evaluating his application for a protection visa[8] and by allowing SE to request that the Minister for Immigration use his discretion to grant him a humanitarian visa.[9] The author submits that the primary reason this process was inadequate for dealing with SE's claim was that it did not require SE's case to be assessed in accordance with art 3 of the CAT.

In view of the fact that most asylum-seekers do not have the opportunity to have their case heard before the United Nations Committee Against Torture (UNCAT), this case calls for changes within Australia's immigration laws so as to ensure that Australia's treatment of asylum-seekers does not offend our obligations under the CAT. The Senate Committee's recommendations reiterate that call for change.

The nature of the Convention Against Torture

The CAT seeks to protect people from one of the most extreme of human rights abuses. The World Conference on Human Rights (June 1993) described torture as 'one of the most atrocious violations against human dignity'.[10] Its status as one of the most basic of human rights is evidenced by its presence in all general human rights treaties, such as the United Nations Declaration of Human Rights (art 5) and the

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Department 'Submission to the Senate Legal and Constitutional Committee: Operation of Australia's Refugee and Humanitarian Program' Submissions No 75, 1999.

7 In response to a request from UNCAT made on 18 November 1998 the Australian Government delayed SE's deportation while UNCAT considered his case. UNCAT made this request in accordance with rule 108, § 9 of its Rules of Procedure: Hearn J and Eastman K above note 4 at 235. After receiving UNCAT's communication, the Minister for Immigration exercised his power under s 48B of the *Migration Act 1958* (Cth) and allowed SE to apply for a protection visa again. To date of the Senate Committee's report, SE remains in immigration detention while this application is being considered.

8 Refer to *Migration Act 1958* (Cth) cl 866.

9 Refer to *Migration Act 1958* (Cth) s 417. SE requested that the Minister for Immigration use his discretion under s 417 to grant him a humanitarian visa on 23 June 1998, 25 September 1998, 22 October 1998 and 28 October 1998. Refer to Senate Legal and Constitutional References Committee above note 1 at 216-19.

10 United Nations Department of Public Information, New York (1993) DPI/1394-393999 at 60 in Burns P and Okafor O 'The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or How it is Still Better to Light a Candle than to Curse the Darkness' (1998) 9(2) *Otago Law Review* 399.

International Covenant on Civil and Political Rights (art 7).[11] Moreover, its universal condemnation has allowed it to secure the rare status of *jus cogens*.[12]

While the universal condemnation of torture has been secured for several decades, the Convention not only prohibits torture, but also aims for its global elimination.[13] This requires States not only to eliminate torture within their borders, but also to recognise that they act as members of a global community and have global responsibilities towards foreign nationals. Accordingly, the Convention's non-refoulement provision (art 3) focuses upon the existence of serious harm which will be suffered if a person is returned to a country, regardless of the character of the person who will suffer the harm, or the connection of the harm with a specific ground. Torture is recognised in art 3 to be such an extreme form of abuse that its existence is the sole determiner of whether an individual should be afforded protection. Understanding the nature and aims of the CAT and the place of art 3 within it is critical for deciding upon an appropriate response to it.

Australia's response to the Convention Against Torture

Australia ratified the CAT on 8 August 1989 and it entered into force on 7 September 1989.[14] Australia gave effect to several of its provisions (excluding art 3) in domestic law through the *Crimes (Torture) Act 1988* (Cth). Furthermore, art 3 shapes the *Extradition Act 1988* (Cth), which only allows a person to be extradited once the Attorney General is content that a person will not be tortured in the country they are extradited to (s 22(3)).[15] However, asylum-seekers are not protected by this provision.[16]

11 Sharvit P 'The Definition of Torture in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' 23 *Israel Yearbook on Human Rights* 147 at 148.

12 *R v Bartle & the Commissioner of Police for the Metropolis & Others Ex Parte Pinochet* (1999) AC per Lord Browne-Wilkinson. '*Jus cogens* is a peremptory norm of international law from which no derogation by States is permissible.' This quote is from Blay S, Piotrowicz R and Tsamenyi B M (eds) *Public International Law: An Australian Perspective* (Oxford University Press, Melbourne, 1999) p 20.

13 Fact Sheet 17, The Committee Against Torture, United Nations High Commissioner for Human Rights, Introduction at <http://www.unhcr.ch/html/menule/2fsl7.htm>.

14 Australian Treaty Series 1989 No 21 in Senate Legal and Constitutional References Committee. Above, note 1, at 52-3.

15 However, Taylor questions the value of this safeguard, since it is not exercised by an independent decision maker. Taylor S 'Australia's implementation of its non-refoulement obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment and the International Covenant on Civil and Political Rights' (1994) 17(2) *University of New South Wales Law Journal* 466 at 459.

16 Extradition is a mechanism designed to return foreign nationals wanted in relation to criminal offences by another country with which Australia has reached an agreement. Non-citizens may also be liable for

In *SE v Australia*[17] one of Australia's principal arguments for attempting to prove that SE's claim for art 3 protection was without merit was that he had failed to gain a visa in Australia, despite exhausting domestic remedies. Thus Australia implied that it had adequately provided for its art 3 obligations through its refugee determination procedure, which allowed SE to apply for a protection visa and to request that the Minister for Immigration exercise his discretion to grant him a protection visa. This is the same position that Australia took in its first, second and third reports to the CAT.[18] In these reports Australia claims that it provides for its art 3 non-refoulement obligations through granting visas to refugees and permitting the Minister for Immigration to grant visas on humanitarian grounds at his or her discretion.[19]

Contrary to Australia's submission, the outcome of *SE v Australia* suggests that it is not the facts of SE's case, but the provisions of Australian immigration law, which do not meet the requirements of art 3. This may be demonstrated by comparing the qualifying criteria of protection visas and humanitarian visas with the terms of art 3.

Protection visas

An individual qualifies for a protection visa if she or he can satisfy the Immigration Minister that she or he is a refugee.[20] The definition of 'refugee' is taken from art 1 of

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expulsion under ss 201, 202 and 203 of the *Migration Act 1958* (Cth) if they have a criminal history or they are deemed to be a threat to Australia's national security. A decision to deport an individual under these sections is a matter for the exercise of the Minister for Immigration's personal discretion: s 200 of the Act. This discretion is exercised taking into account Australia's international human rights obligations. See Commonwealth of Australia 1999, *Australia's Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* September 1991 – June 1997, Attorney General's Department, 1999.

17 *SE v Australia*, above note 6 at paras 4.10-4.16.

18 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Consideration of Reports Submitted by the State Parties Under Article 19 of the Convention: Australia 27 August 1991 at paras 70 (p 12) and 73 (p 13). Refer also to Commonwealth of Australia *Australia's Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* September 1991 – June 1997, Attorney General's Department, 1999 at 17.

19 Taylor considered whether class 800 territorial asylum visas, not mentioned in the report, are an avenue through which Australia's non-refoulement obligations may be satisfied. She concludes that territorial asylum is not a real option for asylum-seekers. Taylor, above note 15 at 466-7.

20 *Migration Regulations 1994* (Cth), Sch 2 cl 866. See also Crock M *Immigration and Refugee Law in Australia* (Federation Press, Sydney, 1998) p 126.

the 1951 Convention Relating to the Status of Refugees,[21] (the Refugee Convention) which defines a refugee as a person:

> Who owing to a well-founded fear of being persecuted for reasons of 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 the country.[22]

The problem with using this definition as the basis of the main onshore humanitarian visa in Australia is that it does not cover all individuals who are protected under art 3 of the CAT.[23]

The focus of art 3 is the existence of serious harm which will be suffered, rather than its connection with a specific ground or the person making the claim, as with the Refugee Convention.[24] Although both the Refugee Convention and the Convention Against Torture seek to protect people from being returned to a place where they will suffer human rights abuses, the elements that make up the relevant provisions differ. The extent of these differences emerges when we examine the character of the harm suffered, the proof required, and who is protected from refoulement.[25]

The type of harm suffered

Article 3 only applies to acts of torture.[26] Torture is defined in art 1 of the CAT as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, of for any reason

21 See also the UN Protocol Relating to the Status of Refugees.

22 Refugee Convention, art 1A(2). The 1967 Protocol extends this definition to events occurring after 1951. See art 1(A)(2). This definition of refugees is also used in the *Migration Act 1958* (Cth) under s 4(1).

23 The Senate Committee recognised that Australia may have a non-refoulement obligation towards an asylum-seeker even though the asylum-seeker is not a refugee. Refer to Senate Legal and Constitutional References Committee above note 1 at 53.

24 Anker D *Law of Asylum in the United States* (3rd ed, Refugee Law, Boston, 1999) p 18.

25 'Refoulement' is used here as a general term, although art 3 of the CAT is not limited to non-refoulement.

26 Anker, above note 24, pp 480-3.

based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

Torture has been distinguished from other inhuman treatment by the European Court of Human Rights on the basis of its severity and immoral purpose.[27] In *Ireland v United Kingdom*[28] five interrogation techniques were deemed not to constitute torture, but instead inhuman acts which cause extreme suffering.[29] The CAT may be influenced to define torture more broadly than the European Court of Human Rights in this controversial case because, unlike the European Convention Against Torture,[30] only torture activates art 3. Nevertheless, the principle of hierarchical abuse will be maintained, with torture at the top of the hierarchy.

Since other inhuman treatment constitutes 'persecution', the scope of art 3, in regard to the type of harm suffered, is narrower than art 33(1) of the Refugee Convention.

Torture within the CAT must be committed with the 'consent or acquiescence of a public official or other person acting in an official capacity',[31] which makes art 3 narrower than art 33(1) of the Refugee Convention in this respect.[32] Yet, there may be little practical difference between the scope of the two conventions at this point.

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27 Moreover, the UN *Declaration on the Protections of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1975 states that torture 'constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment' above note 24, p 482.

28 The *Case of Ireland v United Kingdom*, judgment of 18 January 1978, Eur Ct HR, Plenary Court Burgers J H and Danelius H *The UN Convention Against Torture: A handbook on the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment* (Nijhoff Sold and Kluwer Academic Publishers, Boston, US 1988) pp 115-17.

29 This hierarchical distinction was also used in *Tyer v United Kingdom* (1978) 26 Eur Ct HR(ser A) 29 in Anker, above note 24, p 484.

30 In *Ireland v United Kingdom* the court stated that the practice of inhuman and degrading treatment was in breach of art 3 of the European Convention. Refer to Burgers and Danelius, above note 28, p 117.

31 CAT art 1. States are responsible for acts of torture by their public officials, regardless of whether their conduct was approved by the State. See Anker, above note 24, p 504.

32 The Senate Committee recognised that the CAT requires a 'higher degree of State complicity'. Senate Legal and Constitutional References Committee above note 1 at 54.

The definition of torture was limited in this manner because it was expected that criminal acts by private persons would be dealt with through domestic legal systems.[33] Thus, it was implemented in recognition that the CAT dealt in the jurisdiction of international law and should not work in competition with domestic legal systems. It was not intended to leave individuals without redress because the State in which they suffer harm is incapable or disinclined to protect them. Such individuals should be covered under the phrase 'with the consent or acquiescence of a public official' because governments will be taken to have acquiesced in torture if they do not act to prevent it. For example, acts done by paramilitary and other unofficial groups will be covered if public officials ignore their acts.[34] Furthermore, the Special Rapporteur on Torture's 1986 report says that a state which does not intervene against quasi-public groups, such as tribes, that commit human rights abuses may be considered to have 'consented' or 'acquiesced' in their acts.[35] Further still, Copelon and other feminist writers argue that a state may consent even to private acts of domestic violence when it fails to protect citizens from them.[36]

It is also consistent with the purpose of the public official requirement to interpret the phrase 'those acting in an official capacity' as de facto governments, in circumstances where there is no official government. In *SE v Australia* Australia claimed that the applicant did not face torture as defined by art 1 of the CAT because those who threatened to harm him were members of 'armed Somali clans', not officials or persons acting in an official capacity.[37] However, under art 31 and 32 of the Vienna Convention on the Law of Treaties,[38] multilateral treaties such as the CAT should

33 Burgers and Danelius, above note 28, p 120.

34 Rodley N S 'United Nations non-treaty procedures for dealing with human rights violations' in Hurst Hannum (ed) *Guide to International Human Rights Practice* (2nd ed, 1992) p 91 in Anker, above note 24, p 503.

35 *1986 Special Rapporteur on Torture Report* at 38 in Anker, above note 24, p 504.

36 Copelon R 'Recognising the egregious in the everyday: Domestic violence as torture' (1994) 45 *Columbian Human Rights Law Review* 355-6 in Anker, above note 24, pp 506-7. In extending torture to private acts the purpose requirement of the definition should not be forgotten. Sharvit P notes that, while the purposes listed in art 1 are not exhaustive, they all share a connection with the 'interests or policies of the State and its organs': Sharvit, above note 11 at 163-4. Yet torture can still be extended to domestic violence if the patriarchal interests of a state are recognised and their purpose is held to be discrimination according to sex. Such an interpretation is allowable by the fact that the list of purposes is not exhaustive and that 'the "purpose" element should be liberally construed or de-emphasised'. Rodley, above note 34; and Clapman A 'Human rights in the private sphere' 200 (1993) in Anker, above note 24, p 499.

37 *SE v Australia* above note 6 § 4.4.

38 The Vienna Convention.

not be interpreted technically. Rather, the Vienna Convention states that emphasis should be placed upon the ordinary meaning of their text and regard had to the object and purpose of the relevant treaty. Accordingly, the CAT rejected Australia's argument and held that, given Somalia was in a state of civil war and without an official government, the factions in question came within the definition because they had set up quasi-governmental institutions and exercised prerogatives similar to those used by legitimate governments.[39]

Proving the existence of harm

Article 3 requires that *substantial* grounds exist for believing that a person *will* be in danger of being subjected to torture.[40] It uses a probability standard of proof and deals only with future risk, since its aim is to protect from harm rather than bring redress for past abuses. [41]

Balabou Mutombo v Switzerland[42] found that what constitutes 'substantial' grounds will be dependent upon the particular factual situation. This communication indicated that 'substantial' grounds means that the risk of an individual being tortured is a 'foreseeable and necessary consequence' of their return.[43] However, this is not a firm definition because it still requires an opinion as to what is foreseeable in the relevant circumstances and it has not been used as a test in later cases.

As indicated by art 3(2),[44] the general human rights situation in a country will be examined in determining whether an individual is threatened by torture. However, this is not taken as an absolute or an exhaustive proof,[45] but as a means by which a view may be 'strengthened'.[46] Although general human rights abuses exist in a country, art 3 may not operate because the person in question is not at risk.[47]

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39 *SE v Australia* above note 6 § 6.5.

40 Burgers and Danelius, above note 28, p 127.

41 Anker, above note 24, p 509.

42 *Balabou Mutombo v Switzerland* Communication No 13/1993 UNCAT/C/12/13/13/1993 (27 April 1994) published in (1995) 7 (2) IJRL 330.

43 Above note 42.

44 Article 3(2) states: 'For the purposes of determining where there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'

45 Burgers and Danelius, above note 28, p 128.

46 See *Balabou Mutomo v Switzerland*, above note 42 at 331.

47 Above note 42 at 330.

Moreover, it may be held that a person is in danger of torture although their country does not have a constant pattern of human rights abuses.[48]

In assessing the significance of inconsistencies and contradictions within an applicant's story, the CAT has repeatedly stated that 'complete accuracy is seldom to be expected by victims of torture'.[49] As well as considering the characteristics of torture victims, the CAT focuses upon the paramount aim of art 3 which is protecting the security of individuals. It has held that, despite doubts regarding the facts of a case, the security of an individual must be ensured.[50]

Taylor observes that art 3 does not consider the subjective fear of an applicant as does art 33(1) of the Refugee Convention.[51] However, the practical significance of this distinction is minimal because, as Taylor notes, the subjective fear of a refugee must have an objective foundation. Under Australian law this objective foundation must allow a decision maker to establish that there is a 'real chance' a refugee will be persecuted.[52] Moreover, the standard of proof required under Australian law seems greater than that required by the CAT. The *Migration Act 1958* (Cth) under s 2AA places the onus of proof upon the applicant to ensure that the Minister 'is satisfied' that she or he has a genuine fear based upon a real risk of persecution.[53] Whereas, with the CAT, the burden of proof, as least with regard to evidence of country conditions critical to an

48 Above note 42.

49 See *Ismail v Switzerland* Committee Against Torture Communication No 21/1995 published in (1996) 8(3) IJRL 448; *Pauline Muzonzo Paku Kioski v Sweden* Committee Against Torture Communication No 41/1996 published in (1996) 8(4) IJRL 657; *Kaveh Yaragh Tala v Sweden* Committee Against Torture Communication No 43/1996 at para 10.3 UN Doc UNCAT/C/17/D/43/1997 at http://www1.imn.edu/humanrts/cat/decisions/CATVWS43.htm.

50 *Balabou Mutomo v Switzerland* above note 42 at 330; *Tahir Hussain Khan v Canada* Committee Against Torture Communication No 15/1994 § 12.3 UN Doc DocA/50/22 at 46 (1995) at http://www.1umn.edu/humanrts/cat/decisions/CATVW43.htm.

51 Taylor, above note 15 at 443. The Senate Committee notes that the CAT is narrower than the Refugee Convention because it uses on objective standard of proof, rather than a subjective/objective test as in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989), Senate Legal and Constitutional References Committee, above note 1, p 54.

52 Above note 15 or *Chan* at 438: In *Chan* Mcl lugh J states that the subjective fear of the applicant 'must be supported by an objective element': *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mcl lugh J.

53 Refer to *Minister for Immigration and Ethnic Affairs* (1996) 70 ALR 568 at 577.

assessment under art 3, is placed upon the State in which relief is sought.[54] In addition, the CAT is concerned that the paramount aim of art 3, that persons be protected from torture, is ensured despite doubts about the facts of a case.[55]

Who is protected from refoulement?

There are significant differences between the identity of persons protected under the Refugee Convention and the Convention Against Torture. A refugee is someone who is part of a persecuted group. A refugee who is protected from refoulement is someone who:

- is not protected or assisted by United Nations agencies other than the United Nations High Commission for Refugees (UNHCR): Refugee Convention, art 1D;
- is not a national of the country where he or she resides: Refugee Convention, art 1E;
- has not committed a crime against peace, a war crime, or a crime against humanity: Refugee Convention, art 1F(a);
- has not committed a serious non-political crime: Refugee Convention, art 1F(b);
- has not committed acts 'contrary to the purposes and principles of the United Nations': Refugee Convention, art 1F(c); and
- is not a danger to the security of the community of the country where he or she seeks refuge: Refugee Convention, art 33(2).

By contrast, a person is protected by art 3 of the CAT regardless of character.[56] '[T]here are no preclusions for those ... considered to be criminals, national security risks, or even torturers.'[57] In *D v United Kingdom*[58] it was held that protection should be given to a drug dealer. In *Chalal v United Kingdom*[59] the successful applicant was

54 Anker, above note 24, p 511.

55 Anker, above note 24, p 511.

56 The Senate Committee recognised that the CAT affords absolute protection to torture victims. Senate Legal and Constitutional References Committee above note 1, p 53.

57 Anker, above note 24, p 469.

58 The European Court of Human Rights Case No 146/1996/767/964.

59 23 Eur HR Rep 82 (1996) (Eur Ct HR) in Anker, above note 24, p 519.

an alleged terrorist involved with planning terrorist attacks in the country where he sought asylum. While these are decisions of the European Court of Human Rights (ECHR) and the jurisprudence of the CAT may develop differently on this issue, it is important to look at the reasoning of the ECHR in deciding an appropriate response. In *Chalal v United Kingdom* the ECHR explained that the claim should be decided without regard to the applicant's conduct or national security because it is fundamental to democratic society that individuals be protected from torture and the irreversible harm caused by it.[60] This stance is consistent with the philosophy behind the CAT: that all persons, regardless of their status, have a right to be protected from torture and that States have an interest in making the elimination of torture their highest priority within the decision making process.

In considering the implementation of art 3 into our domestic law, thought should be given to the fact that the CAT does not require Australia to do anything more than ensure that it does not return individuals to countries where they are at risk of torture. Australia is not obliged to grant a torture victim permanent residence or refugee status and may send her or him to any country where she or he is not under threat of torture.[61] This has been recognised in US law, which offers relief under the CAT in two forms. Asylum-seekers who do not meet the definition of a refugee but do meet the requirements of art 3 are granted similar rights to refugees, which includes the rights not to be deported and to work. Asylum-seekers who meet the requirements of art 3 and are prevented from gaining refugee status under art 1(F) of the Refugee Convention because of crimes that they have committed are granted 'deferral from deportation'. Through this, the US recognises that it is obliged not to refoule asylum-seekers at risk of torture, but it reserves the right to send them to a safe third country, to detain them and to refuse them permanent residence.[62] Furthermore, art 3 does not prevent a state from subjecting a person to domestic jurisdiction. Neither does it prevent a state from extraditing a torture victim to a country where they may be tried for their crimes.[63]

Finally, it is important to recognise that art 3 applies to a small number of people. Of the limited number of asylum-seekers affected by the extreme abuse that constitutes

60 Above note 59.

61 Refer to Benedict D L *A survey of State implementation of the obligations of non-refoulement embodied in Article 3 of the Convention Against Torture in the context of refugee protection* (University of Michigan Law School, Michigan, 1999) p 6.

62 Refer to Immigration and Naturalisation Service 8 CFR section 208.17(a) *Regulations Concerning the Convention Against Torture*; Interim Rule effective 22 March 1999.

63 Benedict, above note 61, p 6.

torture, only a minority of these individuals will have a criminal history. It is submitted that the principles of the CAT should not be compromised because of this small minority. To do so would involve making a severe moral judgement upon individuals whose past actions have been inevitably influenced by situations where gross human rights abuses threatened them and/or were perpetuated against them. This judgement would be coupled with an abrogation of moral responsibility on Australia's part if we were to place individuals at risk of torture. The question focused upon should not be: 'Why should we implement laws which allow criminals to enter Australia?' Rather, the question should be: 'How can we retain laws which do not protect people from being tortured?'

Nevertheless, it is important not to allow this issue to block substantial reform. In the event of there being significant opposition to the implementation of art 3 on this issue its application may be limited in a manner similar to that achieved through Arts 1 and 33 of the Refugee Convention.

A further difference between those who are protected by the Convention Against Torture and the Refugee Convention is that torture victims do not need to be part of a group towards which harm is directed. The 'nexus' requirement of the refugee asylum is not present because of the exceptional nature and often individually focused nature of torture.[64] In this respect, the scope of the Refugee Convention is narrower than that of the Convention Against Torture. It does not cover individuals, such as nationals of countries where there is civil war[65] who cannot show that they are at risk of suffering persecution on one of the five Convention grounds, including race, nationality, religion, membership of a particular social group and political opinion.

The Minister's discretion

The above discussion indicates that an individual under threat of torture may not be a refugee because the harm they suffer is not harm suffered by a group or because they do not meet character requirements. Australia has allowed for such torture victims by giving the Immigration Minister discretionary power to grant them a humanitarian visa under s 417 of the *Migration Act 1958* (Cth) when it is in the 'public interest' to do so. In fact, in its submission to the Senate Committee, DIMA indicated that the operation of this Ministerial discretion is *the* method by which the Australian

64 This requirement stipulates that a claimant must be able to connect their suffering to the discrimination of a group.

65 Thornton M in Senate Legal and Constitutional References Committee, above note 1, p 49.

Government meets its non-refoulement obligations under the CAT.[66] However, the nature of this discretion renders it inadequate for ensuring that Australia complies with its art 3 obligations. One consequence of this was that applicant SE[67] was not granted asylum as a torture victim, despite his making four requests to the Minister to exercise his discretion.

A personal discretion

The Minister's s 417 discretion must be exercised by him or her personally. *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* found that a decision not to consider whether to use the discretion can only be delegated to DIMA officials.[68] Due to the large number of requests that are made for s 417 intervention,[69] many are not considered by the Minister. Rather, Refugee Review Tribunal (RRT) members and DIMA officials use Ministerial Guidelines to identify cases that should be considered by the Minister.[70]

The Minister issued new guidelines in March 1999 to identify unique or exceptional circumstances where the discretion may be exercised.[71] These guidelines specifically mention Australia's obligations under the CAT as a factor to be taken into account when assessing whether a case should be referred to the Minister for consideration. As such, these new guidelines (which were not operating when applicant SE submitted his requests to the Minister) significantly improve the chances of a torture victim being recognised and granted protection. Nevertheless, substantial demands are placed upon this process as the means of applying complex international law to

66 Senate Legal and Constitutional References Committee, above note 1, p 58.

67 Communication No 120/1998.

68 (1996) 141 ALR 322. Merkel J explained, at first instance, that there are three separate decisions which can be made under s 417. A decision to exercise the discretion, a decision not to exercise the discretion and a decision not to consider whether to consider exercising the discretion.

69 4072 requests were made in 1997/98 and 4236 in 1998/99. Refer to DIMA Table 8.1: Statistics relating to s 417 intervention power in Senate Legal and Constitutional References Committee, above note 1 at 255.

70 Cases are brought to the Minister's attention in three ways. Automatic, internal consideration of a case against the Ministerial guidelines is conducted by a DIMA case officer after the RRT hands down a negative decision. A Refugee Review Tribunal (RRT) member may informally refer cases for consideration. An asylum-seeker or his or her representative may make a request after he or she receives a negative RRT decision. Senate Legal and Constitutional References Committee, above note 1, p 249.

71 Guidelines entitled *The identifiCATion of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under Section 345/351/391/417/454 of the Migration Act 1958.*

numerous factual situations. With respect to the Refugee Convention, such a process had required the regular guidance of the High Court.[72] It is arguable that it may be even more difficult to implement the CAT, which is a more recent Convention where little jurisprudence has been established so far. Moreover, DIMA officers will often be working with factual situations that are presented without regard to the terms of art 3.[73] Mindful of such concerns, the Senate Committee has recommended that DIMA staff be trained in considering requests and referrals against the CAT and instructed to do so in each instance.[74]

Discretion exercised by a politician

The procedural fairness of the discretion is compromised by the fact that the Minister is not an independent decision-maker, in that he or she is not independent of immigration control and other government interests.[75] As a politician the Minister may be reluctant to exercise this discretion because of possible political ramifications, especially since s 417(4) requires that the decision be made public.[76]

Inadequate review

This discretion is non-compellable and the Minister's decision (or that of DIMA staff) not to use it cannot be questioned: s 475(1)(e).[77] This means that applicants do not receive a hearing at all if a decision is made not to exercise the discretion. Moreover,

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72 Refer to Law Council of Australia, Submission to Senate Legal and Constitutional References Committee: Operation of Australia's Refugee and Humanitarian Program (1999) at 14. It poses as an example the case of *Applicants A and B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 in which the High Court looked at the definition of a 'particular social group' under the Refugee Convention and stated that such a group could not be defined as those who shared an experience of persecution.

73 Cases assessed automatically after a negative RRT decision will have been presented and investigated as a claim for refugee status. Refer to Senate Legal and Constitutional References Committee above note 1 at 248. Moreover, asylum-seekers who make an application are unlikely to be aware of the guidelines, especially if they do not have representation at that stage. The likelihood of asylum-seekers being represented at this stage is influenced by the fact that they do not receive funding after they have received a RRT decision. Refer to Senate Legal and Constitutional References Committee above note 1, pp 254, 257 and 258.

74 Senate Legal and Constitutional References Committee above note 1, p 262.

75 Taylor, above note 15 at 464.

76 Law Council of Australia above note 72 at 15.

77 *Migration Act 1958* (Cth) s 475(1)(e). The Law Council of Australia has submitted that this is contrary to 'the general principles of our legal and constitutional system that executive action should be subject to the law' in Senate Legal and Constitutional References Committee above note 1, p 264.

the Minister's guidelines do not create enforceable rights and obligations for asylum-seekers.[78] Thus, the nature of this discretion, which the Minister *may* choose to exercise, is inconsistent with the absolute obligations set down in the CAT.[79] Considering the significance of the absolute obligation to the operation and aims of the CAT (discussed above), this aspect of the discretion is of particular concern, especially while the discretion is the only means by which an asylum-seeker may have her or his claim assessed in accordance with the CAT.

When the Minister does exercise this discretion, an applicant does not receive procedural fairness because hearings are by written submissions only, which makes it particularly difficult for non-English speakers and those who have traumatic stories to relate. Neither do applicants have effective access to judicial review because the discretion is non-compellable.[80] Moreover, unfavourable decisions cannot be publicly reviewed because there is no legislative requirement that they be tabled in Parliament or otherwise made public.

As mentioned above, only a favourable decision by the Minister receives a form of review. Under s 417(4) the Minister must table a favourable decision, with the reasons he or she made it, in Parliament. However, the quality of such a review is affected by the fact that Parliament 'may lack the time, expertise and political will to properly review specific cases'.[81]

Costs involved with the process

The Senate Committee documented concerns regarding the fact that a request for ministerial intervention may only be made after an asylum-seeker has received a negative RRT decision.[82] For this reason, a protection visa application may be submitted before DIMA and the RRT for the sole purpose of reaching the stage at which a request may be made, thus contributing to the number of 'unsuccessful'

78 Amnesty International in The Senate Legal and Constitutional References Committee above note 1, p 60.

79 Above note 1, pp 64 and 243.

80 For a discussion of judicial review of s 417 refer to *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) ALR 322.

81 Law Council of Australia above note 72 at 16.

82 The discretion may not be exercised where a decision has been quashed or set aside by a court and the matter remitted for reconsideration because in such circumstances there is no review decision which the Minister can substitute for a Ministerial decision. See Senate Legal and Constitutional References Committee above note 1, p 62.

applicants and engendering professional disrepute. Moreover, resources are wasted through the preparation and assessment of unsuccessful claims and through keeping applicants in detention centres for unnecessarily lengthy periods. Furthermore, emotionally vulnerable asylum-seekers can be significantly affected by lengthy delays.[83] Such concerns further emphasise the fact that the Minister's discretion is ill suited to being the sole avenue by which an asylum-seeker may have her or his claim assessed under the CAT.

Recommendations for change

Although the CAT is relatively recent and yet to be widely implemented, Australia may look to the example of the US in assessing how it may provide for its art 3 obligations.

The US was the first country to develop asylum law based directly on art 3 of the CAT, which recognises that the obligations of this article are obligatory rather than discretionary. In March 1999, an interim rule[84] developed by the United States' Immigration and Naturalisation Service came into effect.[85] This rule integrates determinations under the CAT into the asylum process so that asylum-seekers can apply for relief under the Convention at any stage of their proceedings. Under the rule, an asylum-seeker has the burden of proof to show that it is more likely than not that she or he would be tortured if removed to the relevant country.[86] Moreover, Immigration and Naturalisation Service officials and immigration judges are trained to uphold art 3 claims when they deem it appropriate.[87]

Australia's reluctance to give full effect to its art 3 obligations creates an obstacle to the aim of eliminating torture, since this aim requires worldwide, unreserved commitment. Accordingly, Australia should undertake legislative reform in order to ensure that it upholds the CAT, which aims to protect some of the world's most vulnerable members from the extreme human rights violation that constitutes torture.

The Senate Committee's report is an important initial step along the path to legislative reform because it documents the inadequacies of Australia's current

83 Above note 1, p 63.

84 The interim rule is to be followed by a final rule.

85 Immigration and Naturalisation Service 8 CFR Pts 3, 103, 208, 235, 238, 240, 341, 253, and 507, Regulations Concerning the Convention Against Torture, Interim Rule. Federal Register: 19 February 1999 Vol 64(33) at 8477-96.

86 This is a greater burden than that required for refugee status in the US.

87 Benedict, above note 61, pp 12-14.

position and recommends that Australia 'explicitly incorporate' its non-refoulement obligations under the CAT into domestic law. The report recognises that the Minister's s 417 discretion has a significant role to play in dealing with exceptional cases and enabling Australia to meet its obligations under the CAT. Consequently, the Senate Committee has recommended that the s 417 ministerial discretion be retained.[88] Nevertheless, by recommending that Australia also 'explicitly incorporate' its art 3 obligations, the Senate Committee has recognised that the s 417 discretion should be a supplementary means, rather than the primary means by which Australia upholds its non-refoulement obligations under the CAT.

The author submits that creating a separate ground of relief for asylum-seekers based upon the features on the features of art 3, discussed above, is an appropriate means by which Australia can ensure that it upholds its art 3 obligations. The author also notes the Senate Committee's concern with Australia creating a humanitarian visa class because of the extra administrative costs involved at primary and review levels.[89] In response, the author submits that extending the criteria by which an asylum-seeker may qualify for a protection visa is an appropriate compromise. Such a reform would mean that an asylum-seeker could qualify for a protection visa either by satisfying the non-refoulement criteria of the Refugee Convention or that of the Convention Against Torture. Although this would extend the assessment process, it would mean that only one primary decision-maker was required to assess the factual circumstances of an asylum-seeker, rather than such an assessment being undertaken twice for two separate visa applications.

Conclusion

A close examination of protection visas and the Minister's s 417 discretion demonstrates that these do not adequately protect asylum-seekers covered by art 3 of the CAT. Accordingly, the Senate Committee has recommended that Australia 'explicitly incorporate' its art 3 obligations into its onshore determination process. The author is concerned that the Senate Committee has advised that the Attorney General's Department and DIMA should determine how these obligations are explicitly incorporated into Australian law, rather than recommending that bodies with varying perspectives direct this process.[90] Nevertheless, the author

88 Above note 61, p 267.

89 Above note 61, p 257.

90 Above note 61, p 61.

acknowledges that the Senate Committee's report documents a range of views on this issue and as such provides a strong basis for this process of legislative reform.

In the spirit of continuing public debate along the pathway of legislative reform the author submits that the grounds upon which a protection visa may be granted should be extended to include satisfaction of the criteria of art 3 of the CAT. Such a reform would demonstrate that Australia is committed to the protection of torture victims and the worldwide elimination of torture as well as limiting the administrative resources required for Australia to uphold its non-refoulement obligations under the CAT. ●