



# UNHCR

## The UN Refugee Agency

### DISCUSSION PAPER

## The principle of effective protection elsewhere

*For this discussion paper, UNHCR asked the government, an academic, a legal practitioner and our own protection team to provide comment on the*

*principle of 'effective protection elsewhere'. Together, these papers offer a discussion of the principle in general and its current application in Australia.*



Photo: UNHCR

## Dimensions of Effective Protection: Some Reflections

### **William Maley\***

CONSIDERATIONS of 'effective protection' tend to arise when a state in which a protection claim is made wishes to transfer to another state the burden of protecting the applicant, by claiming that he or she enjoys 'effective protection' in that state. It is also implicit in the idea of a 'safe third country' in which an asylum claim could allegedly have been made before

an applicant reached the country in which the claim was in fact lodged. Since the outcome in either situation could be denial of protection, it is important to address the question of what effective protection might be, and should be.

Effective protection of refugees has attracted serious attention in recent years. In his magisterial work *The Refugee in International*

Law, Guy Goodwin-Gill argued that effective protection 'would appear to entail the right of residence and re-entry, the right to work, guarantees of personal security, and some form of guarantee against return to a country of persecution'.<sup>1</sup> The substance of effective protection has also been canvassed on a number of occasions by the Federal

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Court of Australia, which has emphasised the need to consider whether an individual would have a well founded fear of being persecuted for a Convention-related reason in a country in which effective protection is allegedly available, whether the individual has a right to enter and live there, and whether protection would exist against refoulement as prohibited by Article 33.1 of the 1951 Convention Relating to the Status of Refugees.<sup>2</sup>

The purpose of the following remarks is to highlight some considerations that need to be borne in mind in marginal cases, for while in some situations the argument for effective protection elsewhere may be clear-cut, this is by no means invariably so.

First, there are good reasons why one should require that states be parties to the 1951 Convention and the 1967 Protocol before concluding that they offer effective protection. While one can argue that the norm of non-refoulement has achieved the status of customary international law, a treaty foundation for such an obligation is preferable. This draws states into the wider webs of reciprocity, embodied in the maxim *pacta sunt servanda*, that underpin international obligations more generally. When a state is not a party to the Convention, the danger exists that considerations of 'national interest' may incline it to act in ways that would violate the spirit and the letter of the Convention. This can happen even in states which are parties to the Convention, but is easier when states are not.

Second, one should look to the structure of authority in the state in question. A question of particular importance is whether the state embodies the core elements of constitutionalism, namely the rule of law and the separation of powers.<sup>3</sup> The rule of law as a political principle requires that laws be prospective, general, and enforced by an independent judiciary. It is the last of these, implicit also in the doctrine of the separation of powers, that is of fundamental importance. Law must be more than an instrument used by the executive to maintain its dominance, yet this is what it becomes if adjudication is taken out of independent hands. Even Australia has witnessed the corrosive effects of such a mind-set,

which was embodied in the so-called 'privative clause' inserted in the Migration Act in 2001 which provided *inter alia* that decisions of the Refugee Review Tribunal were not to be 'challenged, appealed against, reviewed, quashed, or called in question in any court'.

This dangerous provision was emasculated by the High Court of Australia in the case of *S157/2002 v. Commonwealth of Australia* (2003) 195 ALR 24, but the fact that it was enacted in the first place highlights how fragile commitment to the rule of law can be even in established polities.

Third, one should look at the character of politics in a given state. In a number of states, political structures are not consolidated, but going through various phases of transitional development, from infancy to adolescence to maturity. The regimes in such states may voice strong commitments to constitutionalism, but it is necessary to be cautious in appraising their capacity to deliver on their promises. Goodwill may significantly outstrip key elements of capacity, not least survivability. Fiji stands as a clear example of the way in which, with the best will in the world, and carefully-crafted institutions designed to balance diverse interests, opportunities may nonetheless arise for extremists to de-rail processes of change, as happened with the Speight coup in May 2000.<sup>4</sup>

Fourth, one should bear in mind that persecution can come from non-state actors as well as agents of the state. Thus, even where

states are parties to the Convention, committed to constitutional rule, and securely on the path to democratic consolidation, their territorial control may be insecure or contested, providing space for other, less appetising forces to operate. Thus, in appraising whether effective protection is available, it is important that the range of potential threats be very carefully assessed. All in all, it pays to err on the side of caution when drawing conclusions about effective protection, for the human costs of a mistake could be very high indeed.

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1 Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1998) p.89.

2 Roz Germov and Francesco Motta, *Refugee Law in Australia* (Melbourne: Oxford University Press, 2003) p.466.

3 See Chandran Kukathas, David W. Lovell and William Maley, *The Theory of Politics: An Australian Perspective* (Melbourne: Longman Cheshire, 1990) pp.44-53.

4 Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2001) p.107.



Photo: UNHCR/A. Aarhus

# Australia's protection obligations: only a last resort?

## UNHCR, Regional Office Canberra

AUSTRALIA has traditionally had a well-developed and sophisticated asylum system with safeguards built into the refugee status determination procedure.

From UNHCR's perspective, the Australian system is also important for its export value in the region and beyond — particularly for countries which may not have an equivalent level of safeguards in their systems, the same tradition of respect for human rights, or a comparable level of support for refugees among civil society.

In accordance with Article 35 of the Refugee Convention (regarding the cooperation of national authorities with the United Nations), UNHCR has the duty of supervising the application of Convention provisions with regards to all the State Parties.

Within this framework, the UNHCR Regional Office could observe that most asylum claims in Australia are assessed on their merits and normally benefit from the safeguards built in the system.

Other cases however are decided on the basis of Section 36(3) of the 1958 Migration Act. This section, introduced in 1999 and developed by the Australian jurisprudence, stipulates that “*Australia is not taken 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, whether temporarily or permanently... in any country other than Australia.*” In practice, this means that asylum seekers who are deemed not to have taken steps to avail themselves ‘of a right to enter or reside’ shall not have their claims fully and properly assessed on merits.

In other words, it appears that Australia currently interprets its protection obligations towards refugees under the Refugee Convention, as applying only when it is the last resort.

In some cases the application of this principle of ‘effective protection elsewhere’ may lead to a perfectly acceptable protection outcome, in UNHCR's view. The Full Federal Court in *MIMA v Thiyagarajah* (1998) found that a non citizen who had been recognized as a refugee in a third country (France in this case) had effective protection there and Australia had no protection obligations.

However, this initial interpretation was expanded by subsequent court decisions to the point where it is currently applied to asylum seekers who have not been recognized as refugees by a third country, and who have no link at all with the country assumed to provide

effective protection. As such, it could prevent asylum-seekers from having fair and proper determination of their asylum claims and place them at risk of being returned to places of danger.

Most of the cases who came to UNHCR's attention in recent years (Colombians vis a vis Argentina; Nepalese vis a vis India; Sri Lankans vis a vis the UK; Russian Jews vis a vis Israel; Colombians vis a vis the USA), didn't even transit those countries or have any substantial links beyond a tourist visa (sometimes expired) or anything stronger than their physical presence in Australia when they claim asylum.

In such cases, however, the Australian authorities assume that the asylum seekers may find effective protection in those other countries due to the absence of visa requirements, a tourist visa, a Treaty of Friendship between two nations (country of origin and the third country), or rights under the Law of Return (for Jews vis a vis Israel). UNHCR's view is that effective protection cannot be assumed but should be confirmed for each specific case.

UNHCR's concern is to avoid and prevent the risk of chain refoulement or orbit situations, where people travel endlessly between states without being granted entry or residence in any of them.

In an orbit situation, the third country may return the person to Australia (ironically on the same assumption that Australia can provide effective protection.)

In a potential chain refoulement, the third country may return the asylum seeker to the country of origin on the erroneous assumption that his/her case had been rejected on the merits in Australia.

While there is an ongoing debate in the international community on what constitutes effective protection,<sup>1</sup> there are also well established principles enshrined in UNHCR Executive Committee (EXCOM) Conclusions.<sup>2</sup>

EXCOM Conclusions 15 (XXX) and 58 (XL) require some conditions and certain safeguards to be in place: “Regard should be had to the concept that **asylum should not be refused solely on the grounds that it could be sought from another State**. Where, however, it appears that a person, before requesting asylum, **already has a connection or close link with another State**, he may, if it appears fair and reasonable, be called upon first to request asylum from that State.”<sup>3</sup>

In most of the cases reviewed<sup>4</sup> that had been rejected on ‘effective protection

elsewhere’ grounds, UNHCR could not identify the required connection or close link and these people had not even transited the potential asylum country.

Furthermore, these EXCOM Conclusions require that in such cases, the authorities of the sending country should ensure that the applicant will be (re)admitted to the third State and to the asylum procedure where a full and fair assessment of the case will be made, will be treated in accordance with accepted international standards, and will receive effective protection from refoulement.

Currently no such safeguards are in place as a precondition for sending the applicant to the third country, as required by EXCOM Conclusions and further recommended by UNHCR Canberra.

When an asylum case in Australia is not assessed on its merits but rejected on the basis of Section 36(3) of the Migration Act without specific checks that safeguards are in place, UNHCR considers that there is a risk of an orbit situation or even of forced return to the country of origin by the third country (ie. effectively, an unintentional instance of chain refoulement).

UNHCR, therefore, recommends taking EXCOM Conclusions into account when interpreting and applying the principle of ‘effective protection elsewhere’.

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*1 Please refer to Summary Conclusions on the Concept of “Effective Protection: in the Context of Secondary Movements of Refugees and Asylum-Seekers, from the Lisbon Expert Roundtable, Dec 2002 at [www.unhcr.ch](http://www.unhcr.ch)*

*2 EXCOM is the Executive Committee of the High Commissioner's Program made up of states, including Australia. EXCOM Conclusions are adopted by consensus.*

*3 EXCOM Conclusion 15 (xxx). Our emphasis.*

*4 In light of its supervisory responsibility relating to the application of the provisions of the 1951 Convention, UNHCR in Australia reviews asylum cases brought to its attention.*



# The Principle of Effective Protection in the Australian Domestic Legal and Policy Context

## **By the Department of Immigration, Multicultural and Indigenous Affairs**

THE REFUGEES Convention is founded on the principle that the protection it offers is protection of last resort. States should generally protect their own citizens. However, where that protection fails and a person with a well-founded fear of Convention persecution flees their home country, then there is an obligation on other States not to return (refouler) that person to the country they have fled. States did not include in the Refugees Convention an obligation to admit all asylum seekers who arrive at their border. Whilst States wanted to ensure that those who are forced to flee were not returned into the arms of their persecutors, they were not prepared to go so far as to agree that asylum seekers should be permitted to enter and reside in a country of their choice. A corollary of this is that the Refugees Convention does not preclude States from sending asylum seekers to countries where they do not have a well-founded fear of persecution.

It is widely accepted among States party to the Refugees Convention and by the UNHCR, that denying a person access to asylum if he or she has found protection in another country is not problematic, provided the protection is both genuinely available and effective.<sup>1</sup> This is the international environment in which Australia's law and policy on effective protection has developed.

Australia's migration policy generally, is underpinned by the principle that permanent and temporary international movement of people should occur, in so far as possible, in an orderly way, in accordance with the national laws of destination and origin countries and consistent with relevant international conventions. In the context of refugee movements, this means our preference is for a managed delivery of resettlement places to those identified in consultation with UNHCR as being in need of resettlement as a durable solution.

As a signatory to the Refugees Convention, Australia takes its protection obligations seriously. It does not return people to countries in which they have a well-founded fear of refugee persecution. In some cases, however, a person in Australia may have effective protection elsewhere because of a right to enter and reside

in a safe third country. In many such cases the individual has by-passed, or abandoned effective protection in a country of first asylum. This is known internationally, as 'secondary movement'. As has been noted above, an asylum seeker who has reached a country where they can access effective protection does not have a "right", under international law, to move on to a third country of choice.

The issue of how to address the irregular, secondary movement of refugees and asylum seekers, particularly in an environment of people smuggling and trafficking, has been on the international agenda for a number of years. It is of concern to States that vast amounts of money and resources are expended on processing claims of asylum seekers who already had protection elsewhere. This has, in the past, led to a reduction in the resources expended on orderly resettlement programs and on resources made available to assist countries of first asylum in their refugee hosting responsibilities.<sup>2</sup>

Against this background, Australia has developed the principle of effective protection as one way of addressing secondary movements, while at the same time ensuring that Australia meets its international obligations, principally the key obligation of non-refoulement in Article 33 of the Convention. This approach has also allowed Australia to focus resources on those refugees in greatest need.

## **Effective Protection in Australian statutory and common law**

UNDER Australian statutory and common law, Australia does not owe protection obligations to an asylum seeker who can access protection in a safe third country. A safe third country is one, other than Australia, in which the applicant would not be persecuted and from which the applicant would not be returned to the country of threatened persecution (ie not refouled). In some circumstances, therefore, a protection visa in Australia may be refused on the basis that the applicant has effective protection in a safe third country.

## **Common law effective protection**

COMMON law effective protection has been developed through the Courts' interpretation of the Refugees Convention in conjunction with Australia's domestic legislation. Common law effective protection was first discussed in the 1997 decision of the Full Federal Court, *MIMA v Thiyagarajah*, in which it was held that a person who can be removed from Australia to another country, without putting Australia in breach of the non-refoulement obligation contained in the Refugees Convention, is not owed "protection obligations" for the purpose of the Migration Act (1958) and would, therefore, not be granted a protection visa.

The 'test' for common law effective protection is whether "as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be at any risk of being refouled to his original country..."<sup>3</sup> This test requires the decision-maker to consider the circumstances of each applicant and the practical result of sending them to a third country. The right of entry, re-entry or residence does not have to be formal or legally enforceable, but rather there must be evidence that the person is able to access effective protection in the third country in a practical and factual sense.

The Courts' interpretation of effective protection is still evolving. An example of this is a recent Full Federal Court case, where the Court considered whether Jewish applicants from Russia had effective protection in Israel because of the 'right of aliya'.<sup>4</sup> The Court held that effective protection could apply even though the applicants had never been to Israel and did not wish to go there. The Full Federal Court decision was appealed to the High Court which will not only consider effective protection in relation to aliya, but the broader issue of the effective protection doctrine, as developed by the Courts so far.

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## Statutory effective protection

STATUTORY effective protection is embodied in sections 36(3)-(7)<sup>5</sup> of the Migration Act, and was inserted in 1999.

Subsection 36(3) of the Act requires a decision-maker to be satisfied that the applicant has taken all possible steps to avail him or herself of a right to enter and reside in a safe third country, whether permanently or temporarily. The reference in section 36(3) to a “right to enter and reside...” has been interpreted as requiring a legally enforceable right.<sup>6</sup> Accordingly, this provision requires satisfaction that the applicant has a legally enforceable right to enter and reside in the third country and has taken all possible steps to access this right.

Only where the applicant would be safe from persecution and refoulement, can an application be refused by reference to section 36(3). This qualification of approach is required by sections 36(4) & 36(5) of the Act. These sections provide that if a non-citizen has a well-founded fear of being persecuted in a country for a Convention reason, or, if the non-citizen has a well-founded fear that a country will return the non-citizen to another country; where they will be persecuted for a Convention reason, subsection (3) does not apply in relation to that country.

The effect of section 36(4) is to ensure that, for the purposes of section 36(3), ‘any country’ cannot include a country in relation to which the applicant would have a well-founded fear of persecution for a Convention reason. Such a country could not be a safe third country for the purposes of sections 36(3) -(7).

Similarly, as a consequence of section 36(5), a country which would refole a refugee to a place of persecution cannot be a safe third country for the purposes of sections 36(3)-(7). The combined effect of the principle of effective protection, as defined by common law and sections 36(3) – (5) of the Act, is that Australia does not owe protection obligations under the Convention to:

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

As noted above, Australia is not alone in applying the principle of effective protection. It is a widely accepted concept that States may send a person to a country where they do not have a well-founded fear of persecution.

## Australia’s Humanitarian Priorities

AUSTRALIA operates a well-targeted resettlement program that supports the global operation of the international protection framework in its response to those refugees most in need. Due to Australia’s success in dramatically reducing the number of illegal arrivals over recent years, Australia is increasing the size of the Humanitarian Program to 13,000 places and within it, the size of the Refugee category from 4000 to 6000 places in 2004-05.<sup>7</sup>

As well as focussing on providing resettlement opportunities for those refugees most in need, Australia also funds various projects both in the region and in refugee hosting countries further afield to strengthen migration management capacity and improve refugee hosting capacity. Australia has an extensive aid program centred on the Asia-Pacific.<sup>8</sup> This includes Australia’s funding of capacity building initiatives in source and transit countries such as Thailand, Cambodia, Vietnam and Indonesia, as well as Pacific countries such as Papua New Guinea and Fiji.

Australia is also playing a leading role in funding international efforts to assist Iraqi refugees and internally displaced people in Iraq to return home, by providing funding to the International Organisation for Migration (IOM) and the United Nations Development Group’s Trust Fund for the Reconstruction of Iraq. In 2003-04 Australia also provided funding to assist returning Afghan refugees and internally displaced people in Afghanistan.

The principle of effective protection, as it has evolved through common law and as it is currently articulated through statutory law, is consistent with Australia’s obligations under the Refugees Convention and ensures that Australia’s capacity to participate in international responsibility sharing arrangements remains undiminished and focussed on assisting those refugees most in need.

*1 UNHCR, EC/GC/01/12 31 May 2001, ‘Asylum processes – fair and efficient asylum procedures’, para 49. See also ExCom, Conclusion No 58 (XL) of 1989 which states (e) Refugees and asylum-seekers, who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action taken by governments and UNHCR ...*

*(f) Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have*

*already found protection, they may be returned to that country if*

*(i) they are protected there against refoulement and*

*(ii) they are permitted to remain there and be treated in accordance with recognised basic human standards until a durable solution is found for them.*

*2 Australia is one of only ten countries in the world that has an annual dedicated program under which thousands of refugees most in need are resettled from overseas.*

*3 Al-Zafiry v MIMA [1999] FCA 1472*

*4 Israel’s law of return which confers on every Jew a right to enter and remain in Israel, NAEN v MIMIA [2004] FCAFC 6*

*5 s36. (3) 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 or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*

*(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.*

*(5) Also, if the non-citizen has a well-founded fear that:*

*(a) a country will return the non-citizen to another country; and*

*(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;*

*subsection (3) does not apply in relation to the first-mentioned country.*

*Determining nationality*

*(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.*

*(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.*

*6 MIMIA v Applicant C[2001] FCA 1332 note, this is a different test to the common law one ‘entry as a matter of practical reality and fact’.*

*7 The 2000 extra refugee places include a 1000 place increase in the total Humanitarian Program (a shift from 12 000 to 13 000) and a re-balancing of the Special Humanitarian Program (SHIP) of 1000 places towards the refugee program. The total program for 2004-05 will comprise 6000 Refugee and 7000 Special Humanitarian places.]*

*8 Totalling \$2.133 billion as Official Development Assistance in 2004-05*

# “Effective Protection” in Australian Law

**David Bitel\***

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



Photo: UNHCR/P. Coat

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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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### UNHCR DISCUSSION PAPER

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## “Year in Review Newsletter” No. 1/2003

### **CORRIGENDUM to Department of Immigration and Multicultural and Indigenous Affairs contribution to UNHCR’s Discussion Paper: When is a refugee no longer a refugee?**

Protecting Refugees: Cessation under Article 1C.

The above version of DIMIA’s paper omitted two words from the two

sentences preceding the heading “Concluding comments”. The text should read:

*“Provided a decision to refuse or cancel a protection visa does not result in refolement, it may not be necessary to consider views of cessation of refugee status.*

*Australia’s case by case approach where formal cessation is to be contemplated allows for a very careful assessment as it applies to an individual’s circumstances, and ensures that refugee status is not ceased where the individuals continue to have a well-founded fear of persecution.”*