AUSTRALIA'S 1999 "SAFE HAVEN" REFUGEE ACT IS IT HUMANITARIAN?

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BACKGROUND

During 1999 the Australian government reluctantly gave temporary "safe haven" visas to some victims of the fighting in Kosovo and East Timor. In May, after initially opposing the notion of taking any Kosovar Albanian refugees from the NATO bombing of Yugoslavia, the government decided to accept 4,000. Despite their war trauma, the refugees were housed in military barracks, usually in remote locations. In September, confronted with the need to evacuate about 1,800 East Timorese, United Nations staff and refugees from the United Nations compound in Dili, the government offered the same facilities to them.

HISTORY OF THE 1999 TEMPORARY SAFE HAVEN ACT

The Australian government and media presented both of the afore-mentioned decisions as generous and humanitarian gestures. Little was said about the legislation passed in the Senate on 30 April 1999 and the House of Representatives on 11 May 1999. The purpose was to prevent "safe haven" visa holders from applying for refugee status under the 1951 Geneva Convention Relating to the Status of Refugees or from gaining any legal right to remain in Australia.

The 1999 Migration Legislation Amendment (Temporary Safe Haven Visas) Act (Cth)[1] gives the Kosovar and Timorese refugees a new type of temporary entry visa. The Act does not specify how long these visas are to last but says they can be extended, shortened or cancelled by the Minister for Immigration and Multicultural Affairs, without any right of appeal or review by a tribunal, court or other body. The refugees have no right to apply for any other type of visa – such applications are "not valid".[2]

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[1] Hereafter the "Temporary Safe Haven Act".

[2] See below for a detailed examination of these provisions.

The Temporary Safe Haven Act adds a new Subdivision AJ to the 1958 Migration Act (Cth).[3] One key provision, a new section 91H of the Migration Act, sums up the purpose:

> This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than a temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.[4]

In short, the Temporary Safe Haven Act seeks to severely restrict the legal and democratic rights of the asylum-seekers.

How these powers might be used was demonstrated on 29 September 1999 when Immigration and Multicultural Affairs Minister, Mr Philip Ruddock, issued a media release threatening to deprive Kosovar refugees of basic necessities unless they moved to more remote locations, or left the country altogether.[5]

In the second week of October 1999, the Minister visited Kosovar refugees at the Brighton barracks near Hobart and told them: "I don't want it to come to this, but if people become unlawful, they may have to be taken into detention and removed from Australia."[6] Despite these threats, media reports in mid-October suggested that about half the 1,000 refugees still in Australia had indicated a desire to stay permanently.

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[3] Hereafter the "Migration Act".

[4] Division 8 of the Migration Act makes its mandatory for immigration officers to detain and deport all non-citizens without valid visas "as soon as reasonably practicable".

[5] The media release stated in part:

> Mr. Ruddock met with Kosovars at the East Hills safe haven earlier today to reiterate the Government's position on their return to Kosovo. "No living allowances, phone cards, Internet and other facilities will be available at East Hills to Kosovars," Mr. Ruddock said. "The only exceptions to this would be those people who are medically unfit to travel. All other Kosovars can move to the havens I have specified – or better still go home by 30 October with the $3,000 winter reconstruction allowance we have generously offered... I have also made it abundantly clear that it is not a matter of 'if' but 'when' the Kosovars return."

[6] The Sydney Morning Herald, 16 October 1999 at 5.

Similar conflicts could arise with the East Timorese refugees. It is quite possible that the government will seek to compel them to leave within months, despite the terrible conditions created by many weeks of militia killing, house-burning, torture, rape and ethnic cleansing. Before accepting the occupants of the United Nations compound the government had said it would imprison and deport any East Timorese people fleeing the militia violence and seeking refuge in Australia by boat or any other independent means. "If people arrive here unlawfully there is a legal obligation to detain them," the Minister stated on 9 September 1999.[7]

Moreover, after taking the United Nations compound refugees, the government declined to provide safe haven to an estimated 5,000 Timorese students in danger across Indonesia. After some two weeks of delay, the government argued that it was safe for the students to return to Dili, despite protests from the National Council of Timor Resistance ("CNRT") that basic facilities did not exist for thousands of refugees in Dili.[8]

In addition, the government is still endeavouring to remove about 1,600 East Timorese people who earlier sought asylum in Australia, particularly after the November 1991 Dili massacre. The government is appealing against the Federal Court ruling in *Lay Kon Tji v Minister for Immigration and Ethnic Affairs*[9] where Finkelstein J set aside a Refugee Review Tribunal decision. The Tribunal had found that the Minister's delegate had correctly denied refugee status to the applicant under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

In the Federal Court the government defended its deportation decision on the grounds that the applicant could seek asylum in Portugal, the former colonial ruler that is still regarded by the United Nations as the sovereign power in East Timor.[10] This remained the government's contention despite

[7] The Australian, 10 September 1999 at 3.

[8] Refer Australian Broadcasting Corporation news website at www.abc.net.au/news/etimor/ind-9Oct1999-4.htm (visited 9 October 1999).

[9] [1998] 1380 Federal Court of Australia. See also [1998] 1597 Federal Court of Australia where Finkelstein J declined to afford the applicant refugee status and instead remitted the decision to the Refugee Review Tribunal for hearing and determination according to law.

[10] Indonesia's invasion of East Timor in 1975 resulted in the United Nations General Assembly and Security Council calling for Indonesia to withdraw from East Timor. In 1978, however, the Australian government extended de jure recognition to the Indonesian annexation of East Timor, paving the way for joint Indonesian-Australian exploration of

the fact that Australia is the only western state to recognise the Indonesian annexation of the half-island. Finkelstein J found that, as a matter of law and policy, the Portuguese government did not automatically regard East Timorese as Portuguese nationals and therefore was unlikely to afford them protection if they were deported to Portugal.[11]

The Temporary Safe Haven Act continues efforts by successive Australian governments to restrict the rights of appeal of refugees. Also on the legislative agenda is the 1998 Migration Legislation Amendment (Judicial Review) Bill (Cth), which seeks to use comprehensive privative or ouster clauses to block judicial review of most decisions under the Migration Act.[12] In the Minister's view, the Federal Court and the High Court will be restricted to reviewing cases involving "narrow jurisdictional error and malafides".[13]

In addition, the 1998 Migration Legislation Amendment Bill (No 2) (Cth) provides that neither the Minister nor his department are obliged to give an immigration detainee visa application forms or information on the right to apply for refugee status. Moreover, where a detainee has not made a formal written complaint to the Human Rights and Equal Opportunity Commission or the Commonwealth Ombudsman, a detainee would not have a right to receive communications from them.[14]

In several 1999 decisions, the High Court has upheld previous restrictive legislation. In *Minister for Immigration and Multicultural Affairs v Eshetu,*[15] the High Court rejected Federal Court findings that section 420(2)(b) of the Migration Act gave rise to rights to "substantial justice"

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the oil and gas reserves beneath the Timor Sea, between Timor and Australia. This culminated in the 1989 Timor Gap Treaty between Indonesia and Australia, subsequently challenged by Portugal in the East Timor case (Portugal v Australia) [1995] International Court of Justice Reports 90.

[11] In early October 1999, the Howard government obtained an adjournment of its appeal to the Full Federal Court of Australia. The appeal had been due to open in Melbourne on the same day that Xanana Gusmao, President of CNRT, was to address meetings in the city.

[12] See the Schedule to the Bill, setting out the proposed new section 474 of the Migration Act.

[13] Crock M, Immigration and Refugee Law in Australia (1998, The Federation Press, Sydney) 293.

[14] The Bill adds new sections 193(2) and 193(3) to that effect in the Migration Act.

[15] [1999] High Court of Australia 21; (1999) 73 Australian Law Journal Reports 746.

and fair procedures. Section 420(2)(b) requires decisions to be made "according to the substantial justice and merits of the case". The case concerned the Labor government's 1994 amendments to sections 476 and 485 of the Migration Act, which abolished appeals from the Refugee Review Tribunal to the Federal Court on the grounds of natural justice, unreasonableness, irrelevant considerations and bad faith.

Earlier, in *Abebe v The Commonwealth*[16] the High Court upheld the constitutional validity of the 1994 amendments, rejecting the argument that reducing the Federal Court's jurisdiction infringed upon the judicial power and hence infringed the separation of powers principle.

Both *Abebe* and *Eshetu* left some scope for High Court challenges. They affirmed the proposition that no law of the parliament can limit or abolish the High Court's own jurisdiction under section 75(v) of the Constitution in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".[17]

Parliament may, however, effectively take the conduct of Commonwealth officers outside the High Court's jurisdiction by authorising conduct that would otherwise have been unlawful under the common law or other legislation. Moreover, the High Court in *Eshetu* gave a traditionally narrow interpretation of the common law doctrine of "unreasonableness," declining to overturn a Tribunal decision to deport an Ethiopian student leader, despite his fear of persecution on return.[18]

The Temporary Safe Haven Act purports to not only remove the jurisdiction of the Federal Court but also shield decisions made under its provisions from High Court review by removing all conceivable grounds of review for abuse of power or denial of procedural fairness. Any decision by the High Court under the Act could therefore have wide implications for immigration and refugee law.

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[16] [1999] High Court of Australia 14; (1999) 73 Australian Law Journal Reports 584.

[17] See also R v Hickman; Ex parte Fox and Clinton (1945) 70 Commonwealth Law Reports 598.

[18] For example per Gaudron and Kirby JJ in Eshetu [1999] High Court of Australia 21 at para 101; (1999) 73 Australian Law Journal Reports 746, 762: "In essence, an unreason able decision is one for which no logical basis can be discerned."

THE TEMPORARY SAFE HAVEN ACT 1999

The Temporary Safe Haven Act contains an array of measures that seek to prevent the Kosovar and Timorese refugees from exercising any rights to apply for asylum or residency in Australia. The Act inserts a new section 91K into the Migration Act, which provides that if the holder of a safe haven visa applies, or purports to apply, for a visa other than a temporary safe haven visa, "then that application is not a valid application".

Section 4 of the Temporary Safe Haven Act says an application made before the commencement of the Act "ceases to be valid" on the Act's commencement, "despite any provision of the Migration Act 1958 or any other law". This rule applies even if the application is the subject of a review or appeal to "a review officer, body, tribunal or court". Moreover, "no visa may be granted to the non-citizen as a direct, or indirect, result of the application".

Section 5 of the Temporary Safe Haven Act also has a retrospective thrust. It states that temporary visas within Class UJ of the migration regulations are taken to be temporary safe haven visas on the commencement of the section.

Under new section 91L of the Migration Act, the Minister has a power, which must be exercised personally, to permit a safe haven visa holder to apply for a different visa "if the Minister thinks it in the public interest".[19] However, each such case must be explained by a statement laid before both Houses of Parliament. Every six months the Minister must table his reasons for such determinations, without revealing the identities of the non-citizens concerned.[20] In a bid to protect this power from judicial review, the Minister "does not have a duty to consider" whether to exercise that power, whether requested to do so by the non-citizen or any other person, "or in any other circumstances".[21]

Under a new section 37A of the Migration Act, the Minister has a wide discretion to, by notice in the Gazette, extend or shorten the period of a safe haven visa. A visa may be shortened "[i]f, in the Minister's opinion,

[19] Section 91L (1)-(2).
[20] Section 91L (3), (4)-(5).
[21] Section 91L (6).

temporary safe haven in Australia is no longer necessary for the holder of a visa because of changes of a fundamental, durable and stable nature in the country concerned". Reasons must be laid before each House of Parliament.[22] Again, the Minister does not have a duty to consider whether to extend the visa of a non-citizen.[23]

Likewise, sections 337 and 338 of the Migration Act are amended to ensure that a decision to refuse to grant, or to cancel, a temporary safe haven visa is not a "reviewable decision" – that is, there is no right of appeal to the Migration Review Tribunal, the Refugee Review Tribunal or the Federal Court. The Minister's powers to shorten and not to extend, or not to consider, extending a visa is further shielded from review by three additions to section 475 of the Migration Act.

A new section 500A of the Migration Act empowers the Minister to refuse or cancel a temporary safe haven visa, and exempts such decisions from the requirements of procedural fairness and other grounds for legal challenge. The wording is similar to the new section 501 of the Migration Act inserted by the Howard government in the 1998 Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act (Cth).

Sections 500A and 501 contain vague and sweeping language, entitling the Minister to refuse or cancel visas on grounds such as lacking "good character"; criminal conduct; having an association with others suspected of criminal conduct; harassment, molestation, intimidation or stalking; vilifying others or inciting discord; and representing "a danger to the Australian community". Both specify that harassment or molestation does not have to involve violence or threatened violence to a person.[24]

In relation to safe haven refugees, section 500A goes further in four respects. First, their visas can be denied or cancelled on grounds of "national security" and "prejudice [to] Australia's international relations".[25] Secondly, the Minister only has to be of the opinion that "there is a significant risk" of detrimental conduct.[26] That is, no actual misconduct has

[22] Section 37A (3)-(4).
[23] Section 37A(6).
[24] Section 500A(1)(a)(c) and (2). See also Section 500A(3)-(5).
[25] Section 500A(1)(d)-(e).
[26] Section 500A(1)(c).

to take place. Thirdly, the rules of natural justice (procedural fairness) and the code of procedure in Subdivision AB of Division 3 of Part 2 of the Act are excluded (that Subdivision has minimal requirements relating to official communication with applicants and having regard to all the information in their applications).[27] Finally, refusals and cancellations automatically apply to applicants' immediate family members, even if the latter are not notified of the decision.[28]

Given the judiciary's past aversion to ouster clauses,[29] there may still be scope for review in the Federal Court, perhaps depending on the individual circumstances of an applicant or his or her treatment by the government. In the light of the decision in *Abebe* that the Federal Court's jurisdiction can be abolished, however, an appeal may have to be sought direct to the High Court, under section 75(v) of the Constitution, with resultant extra cost and delay. Then too, success may depend on whether the facts of the case can assist a claim such as jurisdictional error, error of law on the face of the record, inflexible application of a policy, or denial of procedural fairness.

Refugee and immigration law has become a source of bitter conflict and growing litigation in Australia during the 1990s. Four major factors are at work:

1. We increasingly live in a global society, in which the mobility of people and commerce contradicts the efforts of national governments to prevent the flow of unwanted arrivals.
2. Global economic processes, together with wars, are devastating and uprooting millions of people, setting in motion unprecedented movements of impoverished people.
3. Punitive anti-refugee regimes and adverse immigration decisions often have severe consequences, especially for those fleeing from persecution, poverty or civil war.

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[27] Section 500A(11). Under Section 500A(10) the Minister must notify the applicant of his decision, but failure to do so does not affect the validity of the decision.
[28] Section 500A(12).
[29] See for example Hockey v Yelland (1984) 157 Commonwealth Law Reports 124; Svecova v Industrial Commission of New South Wales (1991) 39 Industrial Reports 328. Note Craig v South Australia (1995) 69 Australian Law Journal Reports 873.

4. The Administrative Appeals Tribunal and the Federal and High Courts have tended to strengthen the legal rights of immigrants and refugees over the past 20 years, to the displeasure of successive Australian governments.

For all these reasons, it is to be hoped that the legal profession and the High Court will find ways to defend the fundamental rights of the Kosovar and Timorese refugees.