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**AUSTRALIAN ASYLUM POLICY ALL AT SEA:
AN ANALYSIS OF PLAINTIFF M70/2011 v
MINISTER FOR IMMIGRATION AND
CITIZENSHIP AND THE AUSTRALIA–
MALAYSIA ARRANGEMENT**

TAMARA WOOD; JANE MCADAM

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UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au

W: <http://www.law.unsw.edu.au/research/faculty-publications>

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III. AUSTRALIAN ASYLUM POLICY ALL AT SEA: AN ANALYSIS OF *PLAINTIFF M70/2011 V MINISTER FOR IMMIGRATION AND CITIZENSHIP* AND THE AUSTRALIA–MALAYSIA ARRANGEMENT

A. Introduction

On 25 July 2011, the governments of Australia and Malaysia announced that they had entered into an ‘Arrangement’ for the transfer of asylum seekers.¹ Its stated aim was to deter asylum seekers from travelling by boat to Australia by providing that the next 800 asylum seekers to arrive unlawfully would be transferred to Malaysia in exchange for the resettlement of 4,000 UNHCR-approved refugees living there.² The joint media release by the Australian Prime Minister and Minister for Immigration lauded it as a ‘groundbreaking arrangement’ that demonstrated ‘the resolve of Australia and Malaysia to break the people smugglers’ business model, stop them profiting from human misery, and stop people risking their lives at sea’.³ The success of the Arrangement relied on Malaysia being perceived as an inhospitable host country for asylum seekers, with the Australian Government emphasising that it provided ‘the best course of action to make sure that we sent the maximum message of deterrence’.⁴ The Government also made clear that those transferred to Malaysia would ‘go to the back of the [asylum] queue’.⁵

While the Australian Government described the deal as a ‘true burden-sharing arrangement in line with the principles of collective responsibility and cooperation’,⁶ refugee and human rights advocates labelled it ‘ill-conceived’⁷ and a ‘human rights disaster’.⁸ Of particular concern was Malaysia’s extensive record of ill-treatment of refugees, including arbitrary detention, deprivation of basic services and their lack of status under Malaysian law.⁹ The Arrangement was widely criticized for failing

¹ Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 July 2011) (Australia–Malaysia Arrangement).

² Prime Minister and Minister for Immigration and Citizenship (Cth), ‘Transcript of Joint Press Conference’ (12 September 2011) <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-15>>.

³ Prime Minister and Minister for Immigration and Citizenship (Cth), ‘Australia and Malaysia Sign Transfer Deal’ (Media Release, 25 July 2011) <<http://www.pm.gov.au/press-office/australia-and-malaysia-sign-transfer-deal>>.

⁴ Prime Minister and Minister for Immigration and Citizenship (n 2).

⁵ ‘Gillard Reaches Asylum Agreement with Malaysia’ (7 May 2011) <<http://www.abc.net.au/news/stories/2011/05/07/3210503.htm?site=qanda>>.

⁶ Prime Minister and Minister for Immigration and Citizenship (n 2).

⁷ Human Rights Watch, ‘Australia: Ruling Upholds Refugees’ Rights’ (2011) <<http://www.hrw.org/news/2011/08/31/australia-ruling-upholds-refugees-rights>>.

⁸ G Lopez, ‘Malaysian Refugee Swap Spells Human Rights Disaster’ (*The Conversation*, 27 July 2011) <<http://theconversation.edu.au/malaysian-refugee-swap-spells-human-rights-disaster-2533>>.

⁹ See, eg, Human Rights Watch, ‘World Report 2011: Malaysia’ (January 2011) <<http://www.hrw.org/world-report-2011/malaysia>>; Amnesty International, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’ (2009) <<http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>>; Amnesty International, ‘Human Rights at Risk in Mass Deportation of Undocumented Migrants’ (2004) <<http://www.amnesty.org/en/library/asset/ASA28/008/2004/en/a4e9ce8d-d57c-11dd-bb24-1fb85fe8fa05/>>.

to respect refugees' rights,¹⁰ promoting the erosion of protection for refugees in the Asia-Pacific region,¹¹ and placing Australia in breach of its obligations under international refugee law and human rights law, in particular the 1951 Convention relating to the Status of Refugees (Refugee Convention).¹²

Following a successful challenge to the High Court of Australia,¹³ which found that the Arrangement was unlawful under the Migration Act 1958 (Cth), the Australian Government introduced brazen legislative changes to enable it to proceed.¹⁴ However, in a minority Parliament, the Bill could not pass without multi-party support. Rather than face defeat on the floor of Parliament, the Government withdrew the Bill from Parliament's agenda on 13 October 2011.¹⁵ Although the Government accepts that it cannot proceed with offshore processing in Malaysia at present, this remains its official policy should legislative change become possible.

This article examines the background to the Arrangement and the implications of the High Court's decision for the future development of Australian refugee law and policy. In particular, it analyses the international law dimensions of the judgment relating to the reception, processing and protection of asylum seekers and refugees.

[asa280082004en.html](#)>; UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention: Mission to Malaysia' (8 February 2011) UN Doc A/HRC/16/47/Add.2.

¹⁰ Amnesty International, 'Australian Government "Waters Down" Refugee Rights' (12 September 2011) <<http://www.amnesty.org.au/news/comments/26727/>>.

¹¹ See B Packham and J Kelly, 'Human Rights Groups Attack Malaysia Refugee Swap Deal', *Australian* (26 July 2011) <<http://www.theaustralian.com.au/national-affairs/labors-blank-cheque-for-malaysian-refugee-deal/story-fn59niix-1226102110131>>; Human Rights Watch, 'Letter to the Prime Ministers of Australia and Malaysia regarding the Australia-Malaysia Transfer and Resettlement Arrangement' (26 July 2011) <<http://www.hrw.org/news/2011/07/26/letter-prime-ministers-australia-and-malaysia-regarding-australia-malaysia-transfer->>>.

¹² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Australian Refugee Law Academics, Submission No 25 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Inquiry into Australia's Agreement with Malaysia in relation to Asylum Seekers, 15 September 2011, 7, states: 'Although the Arrangement has two positive features—it represents an opportunity to engage with Malaysia to improve the circumstances of asylum seekers and refugees there, and it creates an additional 4,000 resettlement places in Australia for refugees—these do not outweigh the lack of legal safeguards and protection outcomes for the 800 asylum seekers sent to Malaysia.' See also 'Refugee Expert says Australia/Malaysia Swap Illegal', *ABC News* (10 June 2011) <<http://www.abc.net.au/worldtoday/content/2011/s3240886.htm>>; J McAdam, 'Explainer: The Facts about the Malaysian Solution and Australia's International Obligations' (*The Conversation*, 16 June 2011) <<http://theconversation.edu.au/explainer-the-facts-about-the-malaysian-solution-and-australias-international-obligations-1861>>; S Taylor, 'Regional Cooperation and the Malaysian Solution' (*Inside Story*, 9 May 2011) <<http://inside.org.au/regional-cooperation-and-the-malaysian-solution/>>.

¹³ *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

¹⁴ Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth).

¹⁵ See A Gartrell, 'Government Concedes Malaysia Deal Off', *Sydney Morning Herald* (Sydney, 13 October 2011) <<http://news.smh.com.au/breaking-news-national/government-concedes-malaysia-deal-off-20111013-1lllov.html>>.

1. Background

The Australia–Malaysia Arrangement is not the first example of Australia engaging other States in the region to assist in its management and processing of asylum seekers. The conservative Howard Government (1996–2007) developed a policy of offshore processing for asylum seekers arriving in certain Australian territories without a valid visa (overwhelmingly ‘boat people’).¹⁶ In 2001, the ‘Pacific Solution’ saw the excision of almost 5,000 islands and coastal ports from Australia’s migration zone¹⁷ and the introduction of section 198A of the Migration Act, which provided that an ‘unlawful non-citizen’ entering an ‘excised’ area was to be detained and taken to a ‘declared country’, at that time Nauru or Papua New Guinea. The domestic legal effect of the Pacific Solution was to render certain Australian islands ‘outside’ Australia for the purposes of lodging visa applications, thus preventing asylum seekers arriving there from applying for protection visas.¹⁸ They were precluded from pursuing legal proceedings against the Australian Government in relation to their status as ‘unlawful non-citizens’, the lawfulness of their detention or their transfer to a declared country.¹⁹ The policy was widely condemned as an abrogation of Australia’s responsibilities to process people

¹⁶ For a detailed analysis, see J McAdam and K Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *Australian YBIntlL* 87. The current Labor government has continued the Howard government’s policy of offshore processing. The policy applies to ‘offshore entry persons’, defined by s 5 of the Migration Act 1958 (Cth) as persons who ‘entered Australia at an excised offshore place after the excision time for that offshore place’. While in theory offshore processing could apply to persons arriving at an excised offshore place by air, such places are largely Australian islands and coastal ports and so in practice the policy applies exclusively to unauthorised asylum seekers arriving by boat.

¹⁷ Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone (Consequential Provisions)) Act 2001 (Cth); Migration Amendment Regulations 2005 (No. 6) (Cth) (which excised territories previously disallowed in the proposed Migration Amendment Regulations 2003 (No. 8) (Cth)). See also response from the Department of Immigration, Multicultural and Indigenous Affairs to a question from the Committee: Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Migration Zone Exclusion: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters (2002) para 2.34. A Bill to excise the whole of the Australian mainland was withdrawn when the government realised it could not get the numbers to pass it: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth); see also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (2006).

¹⁸ A ‘protection visa’ allows a Convention refugee to live in Australia as a permanent resident, with the right to work and access to social security services. See Department of Immigration and Citizenship (DIAC), ‘Visas, Immigration and Refugees: Refugee and Humanitarian’ <<http://www.immi.gov.au/visas/humanitarian/onshore/866/>>.

¹⁹ Migration Act 1958 (Cth), s 494AA. This section does not exclude claims brought under the original jurisdiction of the High Court of Australia (Australian Constitution, s 75). For a detailed discussion of the Pacific Solution, see, eg, P Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 *AJIL* 661; A Francis, ‘Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing?’ (2008) 20 *International Journal of Refugee Law* 253; McAdam and Purcell (n 16) 87; M Crock, ‘In The Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 2 *Pacific Rim Journal of Law and Policy* 49.

onshore and an abuse of human rights.²⁰ It effectively led to refugee warehousing in remote locations, causing significant psychological distress to many of those held there.²¹

Although processing in declared countries was conducted by Australian immigration officials, sometimes in conjunction with UNHCR, the Pacific Solution separated the process for *recognising* Convention refugees from the *granting* of protection visas. Whereas people found to be Convention refugees within Australia received protection visas, those declared to be refugees offshore had no assurance that they would *ever* receive a visa to settle in Australia or anywhere else.²² Furthermore, those who had their refugee claims rejected were denied procedural protections such as independent merits and judicial review.

From 2001 to 2008, the numbers of boat arrivals in Australia dropped from a peak of 5,516 persons (in 2001) to an average of less than 100 per year.²³ This led supporters of the Pacific Solution to conclude that it was an effective strategy to 'stop the boats' and disrupt associated people smuggling networks. While such an analysis is far too simplistic and fails to take into account external factors which led to a decline in asylum numbers worldwide at this time,²⁴ such sentiments continue to have potency in

²⁰ See, eg, LK Newman, M Dudley and Z Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110; S Taylor, 'The Pacific Solution or A Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asia-Pacific Law and Policy Journal* 1; Amnesty International, 'Offending Human Dignity: The "Pacific Solution"' (Report No ASA 12/009/2002 (August 2002)); Human Rights Watch, 'By Invitation Only: Australian Asylum Policy' (December 2001); Human Rights and Equal Opportunity Commission, Submission No. 112 to Senate Legal and Constitutional Affairs Legislation Committee (n 17).

²¹ See, eg, Newman, Dudley and Steel (n 20); D Silove, P Austin and Z Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359; 'Nauru Camps "Psychiatrist's Nightmare": Doctor' (15 May 2003) <<http://www.abc.net.au/7.30/content/2003/s855996.htm>>.

²² Indeed, asylum seekers transferred to Nauru and Papua New Guinea were told that they would never be resettled in Australia, even though the vast majority ultimately were, since other countries regarded them as Australia's responsibility. See Commonwealth, Parliamentary Debates, Senate Legal and Constitutional Affairs Committee, 19 February 2008, 124 (Chris Evans, Minister for Immigration and Citizenship). As the Secretary of the Department of Immigration observed: 'There were of course some people—largely that group from the *Tampa*—who were resettled in New Zealand. But following that 2001 resettlement, there was very limited resettlement elsewhere. A number of people went to Scandinavia but the vast majority came to Australia. It is the department's assessment that resettlement of people in other places is extremely unlikely. That is essentially for the reason that those folks are seen as Australia's responsibility and Australia is a country with sufficient resources to deal with the issue': at 124 (Andrew Metcalfe).

²³ For a breakdown of boat arrivals in Australia by year since 1976, see J Phillips and H Spinks, Parliament Library, 'Background Note: Boat Arrivals in Australia since 1976' (15 July 2011) <http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm#_Toc285178604>.

²⁴ For example, UNHCR figures show a worldwide decrease in the number of persons seeking asylum in industrialised countries from 2001 to 2002, the period immediately following the introduction of the Pacific Solution. In Australia, the number of asylum seekers arriving by air during this same period decreased by some 51 per cent, with 6,353 fewer so-called 'authorised' asylum seekers arriving in 2002 compared to 2001. See UNHCR, 'Asylum Applications Lodged in Industrialized Countries: Levels and Trends 2000–2002' <<http://www.unhcr.org/3e705bb24.html>>.

Australian political debates. Indeed, a revamped Pacific Solution remains the Opposition's policy.²⁵

The Pacific Solution ended in 2008, with the new Labor Government stating that it had been a 'cynical, costly and ultimately unsuccessful exercise'.²⁶ In February 2008, the (then) Immigration Minister, Senator Chris Evans, explained:

Quite frankly, it seems to me that people were just left to rot for long periods because the government could not deliver on its promise to send them somewhere else. My advice is that the options for third country resettlement are extremely limited. We are not likely to get takers.²⁷

Nevertheless, the Labor Government has continued to provide extensive funding to third countries (notably Indonesia and Papua New Guinea) for the interception, detention and management of asylum seekers in an effort to prevent them from seeking protection in Australia.²⁸

Australia has also utilized the Bali Process—an intergovernmental network in the Asia-Pacific for combating people smuggling, trafficking and related transnational crimes—to advocate for the creation of a regional protection framework as 'a more effective way for interested parties to cooperate to reduce irregular movement through the region'.²⁹ The Asia-Pacific region is characterized by very low accession rates to the Refugee Convention, its Protocol and other international human rights treaties, and there is no regional human rights treaty or complaints mechanism.³⁰ While UNHCR and leading refugee NGOs generally support greater regional cooperation, they do so on the basis that any new framework must genuinely foster better protection within the region as a whole and not deflect Australia's responsibilities on to other States.³¹

²⁵ See <<http://www.liberal.org.au/~media/Files/Policies%20and%20Media/National%20Security/Border%20Protection%20A4%20Coalition%20policy%20%20Web%20Version.ashx>>. It is revealing that the Liberal Party's asylum policy comes within its policies on 'National Security'.

²⁶ Minister for Immigration and Citizenship (Cth), 'Last Refugees Leave Nauru' (Media Release, 8 February 2008) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/YUNP6/upload_binary/yunp61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/YUNP6%22>.

²⁷ Commonwealth, Parliamentary Debates, Senate Standing Legal and Constitutional Affairs Committee, 19 February 2008, 124 (Chris Evans, Minister for Immigration and Citizenship).

²⁸ Australia funds Indonesia's interception of asylum seekers en route to Australia, including by boat; asylum seekers' detention in Indonesian facilities; and some provision of material assistance via the International Organization for Migration (IOM). A similar arrangement exists between Australia and Papua New Guinea. For a detailed discussion, see S Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility?' (2010) 33 UNSW Law Journal 337.

²⁹ 'Co-Chairs' Statement of the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime' (Bali, 29–30 March 2011) para 16.

³⁰ See, eg, D Seah, 'The ASEAN Charter' (2009) 58 ICLQ 197.

³¹ Refugee Council of Australia, '2010 High Priorities List: Asylum Policy Issues' (20 October 2010) <http://www.refugeecouncil.org.au/docs/current/2010_Asymum_priorities.pdf>. See also 'A Regional Framework: A Joint Statement by Australian Non-Government Organisations' (1 August 2010) <http://www.refugeecouncil.org.au/docs/releases/2010/100801_Regional_Protection_Framework.pdf>. UNHCR presented the original proposal for a Regional Cooperation Framework to the November 2010 Ad Hoc workshop on regional cooperation in Manila: UNHCR, 'Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement' (Manila, 22–23 November 2010) <<http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>>. More recently, the UNHCR

As part of the Bali Process, the Australian Government announced its plans in early 2011 to establish a regional processing centre for asylum seekers in East Timor. Since the proposal was publicized before the East Timorese Government had agreed to it, details were scant and experts expressed significant concerns about the ability of a poor, developing country such as East Timor to house such a facility. In particular, many regarded it as Australia using the country as a dumping ground for people it had a responsibility to process and protect.³²

When East Timor formally rejected the proposal, the Australian Government desperately sought an alternative. Politically, the Government was embarrassed that its first foray into a new regional processing arrangement had collapsed, especially since 'solving' the asylum issue had been a major electoral promise. The Opposition continued to attack the Government for its lack of a workable asylum policy, exhorting a return to the 'successful Howard model' instigated under the Pacific Solution.³³ The Government, having vowed never to adopt that policy, nevertheless began negotiations with Papua New Guinea about the possibility of re-opening facilities on Manus Island.³⁴ It was in this context that it turned to Malaysia as a potential new partner.

Before examining the Australia–Malaysia Arrangement in detail, it is important to bear in mind that during the first six months of 2011, when these discussions were underway, there were 1,675 boat arrivals in Australia.³⁵ These numbers are minute in global terms and represent an almost 50 per cent decrease from the previous year.³⁶

Assistant High Commissioner for Protection, Erika Feller, published an article in an Australian newspaper stressing that 'the key to the success of regional arrangements is a genuine engagement and sharing of burdens and responsibilities among affected states. Arrangements that deflect burdens and responsibilities rather than properly apportioning them stand a good chance of heightening tensions, creating fertile ground for people smuggling': E Feller, 'Detention Centres and Restrictions on Movement Solve Nothing', *The Age* (Melbourne, 30 August 2010) <<http://www.theage.com.au/opinion/politics/detention-centres-and-restrictions-on-movement-solve-nothing-20100829-13xhf.html#ixzz1c92FOMMj>> .

³² J McAdam, 'Gillard's Missing the Boat on Asylum', *Sydney Morning Herald* (Sydney, 7 July 2010) <<http://www.smh.com.au/opinion/politics/gillards-missing-the-boat-on-asylum-20100706-zyvb.html>>; B Saul, 'Some Ifs, but Timor Could Be a Solution', *Sydney Morning Herald* (Sydney, 9 July 2010) <<http://www.smh.com.au/opinion/politics/some-ifs-but-timor-could-be-a-solution-20100708-10276.html>>; S Taylor, 'Asylum Seeker Processing in East Timor: A Solution for Whom?', *Inside Story* (9 March 2011) <<http://inside.org.au/asylum-seeker-processing-in-east-timor-a-solution-for-whom/>> .

³³ S Morrison, 'Buying a Stairway to Howard: An Assessment of Labor's Approach to Asylum Policy and Boat Arrivals' (Address to the Foreign Correspondents Association, Sydney, 19 May 2011) <<http://www.scottmorrison.com.au/info/speech.aspx?id=195>> .

³⁴ Negotiations between Australia and Papua New Guinea were hampered by significant political upheaval in the latter. Despite a breakthrough on 11 August 2011, when PNG's new Prime Minister, Peter O'Neill finally agreed to open the asylum seeker centre on Manus Island, the plan has remained in abeyance and its legality under Australian law is now doubtful following the High Court's decision in *Plaintiff M70*. See P Coorey, 'Unrest Slowing Talks about Manus, Says PM', *Sydney Morning Herald* (Sydney, 27 July 2011) <<http://www.smh.com.au/national/unrest-slowng-talks-about-manus-says-pm-20110726-1hykq.html>>; K Needham, 'PNG Yes to Asylum Centre', *The Age* (Melbourne, 11 August 2011) <<http://www.theage.com.au/national/png-yes-to-asylum-centre-20110810-1imx1.html>> .

³⁵ Phillips and Spinks (n 23).
³⁶ The total number of asylum claims received by Australia during this period (4,930) constituted just 2.5 per cent of asylum claims across 44 industrialized countries: UNHCR, 'Fewer Asylum Claims in Australia' (18 October 2011) <http://www.unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=227&catid=35&Itemid=63> . When arrivals by air are

Nevertheless, the issue of asylum is intensely political in Australia and one which has the potential to determine whether or not the Government retains key marginal seats in the next election. There are widespread misunderstandings in the Australian community about why people seek asylum and little awareness about the difference between asylum seekers, refugees and migrants.³⁷ The near-hysterical fear about border security and the rhetoric by both major political parties that asylum seekers arriving by boat are ‘illegals’ and ‘queue jumpers’ means that many voters believe such people have no right to be in Australia, and they therefore support draconian measures to ‘stop the boats’.³⁸

2. *The Arrangement*

Under the terms of the 2011 Australia–Malaysia Arrangement, 800 asylum seekers unlawfully in Australia were to be transferred to Malaysia without a determination of their protection claims. Once in Malaysia, they were to be referred to UNHCR where they would ‘have to wait alongside more than 90,000 other asylum seekers for their claims to be assessed’.³⁹ The 4,000 resettlement places offered by Australia in return were to be granted over a four year period to refugees who had arrived in Malaysia prior to the signing of the Arrangement, had been granted a UNHCR refugee identification card, and satisfied Australia’s requirements for resettlement.⁴⁰ The Arrangement was to be supported by a set of Operational Guidelines detailing the procedures and respective responsibilities of the parties in arranging for the transfer of asylum seekers.⁴¹ The costs of implementing the Arrangement were to be borne by Australia.⁴²

The Arrangement was not a treaty but a bilateral political agreement—it stipulated it was ‘a record of the Participants’ intentions and political commitments but is not legally binding on the Participants’.⁴³ Its preamble recognized ‘the sovereignty of states in determining their own immigration policy and laws relating to immigrants’,⁴⁴ and many of its provisions were subject to the ‘laws, rules, regulations and national policies from time to time in force in each country’.⁴⁵ Putting the Arrangement into practice therefore

taken into account, Australia experienced a decrease of 19 per cent compared to the previous year: UNHCR, *Asylum Levels and Trends in Industrialized Countries* (2011) 8.

³⁷ J Phillips, Parliamentary Library, ‘Background Note: Asylum Seekers and Refugees: What are the Facts?’ (22 July 2011) <<http://www.aph.gov.au/library/pubs/bn/sp/AsylumFacts.pdf>>.

³⁸ For an interesting analysis of public perceptions of ‘boat people’ in Australia, see FH McKay, SL Thomas and R Warwick Blood, “‘Any One of These Boat People Could be a Terrorist for All We Know!’” Media Representations and Public Perceptions of “Boat People” Arrivals in Australia” (2011) 12 *Journalism* 607.

³⁹ Prime Minister and Minister for Immigration and Citizenship (n 3).

⁴⁰ Australia–Malaysia Arrangement (n 1) cl 5. The Australian government has agreed to honour this commitment, but has stated that these places will no longer be *additional to* Australia’s existing resettlement quota, but will be subsumed within it: Prime Minister and Minister for Immigration and Citizenship (Cth), ‘Transcript of Joint Press Conference’ (13 October 2011) <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-17>>.

⁴¹ Operational Guidelines to Support Transfers and Resettlement, Australia–Malaysia Arrangement (n 1), annex A. The Guidelines included provisions relating to the initial handling of transferees in Australia, handover to Malaysian authorities, referral to UNHCR for refugee status determination and the situation of transferees during their stay in Malaysia.

⁴² Australia–Malaysia Arrangement (n 1) cl 9.

⁴⁴ *ibid.*, preamble.

⁴³ *ibid.*, cl 16.

⁴⁵ *ibid.*, cls 1, 4, 5, 12(1).

would have depended on the parties' implementation of the necessary laws, policies and procedures in their respective domestic jurisdictions.

The relevant legal framework in Australia was provided by the Migration Act 1958 (Cth). In addition to regulating Australia's immigration programmes, this statute governs the reception, processing and removal of people seeking asylum.⁴⁶ The group of asylum seekers who would have been subject to transfer under the Arrangement—those arriving unlawfully by boat⁴⁷—are described in the Migration Act as 'offshore entry persons'.⁴⁸ As discussed above, by virtue of section 46A of the Act, offshore entry persons are prohibited from applying for a protection visa in Australia⁴⁹ and from having their refugee claims assessed in the same manner as onshore arrivals (who typically arrive by plane). Instead, they must rely on an administrative regime in which the discretionary and non-compellable power of the Minister for Immigration may be enlivened to grant a person a protection visa if the Minister considers that it is in the 'public interest' to do so.⁵⁰ In practice, the 'public interest' in this context has been determined by reference to Australia's obligations under international refugee law, and a visa is granted where the Minister (or, in practice, an immigration officer) is satisfied that the person meets the definition of a refugee. However, the effect of these provisions is to make asylum seekers arriving in Australia by boat subject to a largely discretionary regime of protection, with limited procedural safeguards.⁵¹

Immediately following the signing of the Australia–Malaysia Arrangement, the Australian Minister for Immigration, Chris Bowen, issued a declaration authorising the removal to Malaysia of the next 800 offshore entry persons to arrive in Australian territorial waters. In issuing the declaration, the Minister purported to act under powers conferred on him by section 198A(3)(a) of the Migration Act, which provides:

The Minister may declare in writing that a specified country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
- (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- (iv) meets relevant human rights standards in providing that protection.⁵²

⁴⁶ In particular, s 36(2) provides for the grant of a 'protection visa' to persons 'to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol', see n 49.

⁴⁷ Australia–Malaysia Arrangement (n 1) cl 4(1)(a).

⁴⁸ Section 5 of the Migration Act 1958 (Cth) defines an 'offshore entry person' as 'a person who (a) entered Australia at an excised offshore place after the excision time for that offshore place; and (b) became an unlawful non-citizen because of that entry.'

⁴⁹ Section 36(2) of the Migration Act 1958 provides that a 'protection visa' is granted to a person who is (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who: (i) is mentioned in paragraph (a); and (ii) holds a protection visa. ⁵⁰ Migration Act 1958 (Cth), s 46A.

⁵¹ The procedural safeguards were somewhat expanded in 2010, when the High Court held that the common law rules of natural justice continue to apply to applicant's whose claims for protection are assessed under the offshore processing regime. See *Plaintiff M61/2010E and Plaintiff M69/2010 v Commonwealth of Australia* (2010) 272 ALR 14.

⁵² Migration Act 1958 (Cth), s 198A(3)(i)–(iv).

A declaration made by the Minister under this section triggers a corresponding power of removal under section 198A(1) of the Act, which authorises an officer of the Department to take an asylum seeker, by force if necessary, to a country which is the subject of the declaration.⁵³

B. The Case: Plaintiff M70/2011 v Minister for Immigration and Citizenship

On 7 August 2011 an application was made to the High Court of Australia challenging the legality of Australia–Malaysia Arrangement.⁵⁴ *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Plaintiff M70)* concerned an application brought by two asylum seekers who had arrived in Australian territorial waters by boat from Indonesia on 4 August 2011.⁵⁵ Arriving just over a week after the signing of the Arrangement, both plaintiffs were detained pending their removal to Malaysia.⁵⁶ Plaintiff M70 was an adult, and Plaintiff M106 was a 16 year old unaccompanied minor. Both were citizens of Afghanistan and claimed to have a well-founded fear of persecution in Afghanistan for a Convention reason. In addition, they claimed that they feared persecution in Malaysia on account of their religion as Shi'a Muslims.⁵⁷

As a dualist system, Australia's international legal obligations have no direct effect within the domestic sphere unless and until they are implemented by domestic legislation.⁵⁸ The applicants therefore sought an injunction against their removal from Australia on the grounds that the declaration by the Minister under section 198A(3)(a) of the Act was outside the power conferred on the Minister by that Act, and thus invalid.

The basis of their application was that the criteria for the Minister's declaration set out in section 198A(3)(a)(i)–(iv) of the Act—concerning the provision of protection and access to adequate asylum procedures—were 'jurisdictional facts'. In other words, they argued that the exercise of the Minister's power to issue the declaration was

⁵³ Section 198A(1) of the Migration Act 1958 (Cth) provides: 'An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3)'. French CJ explained that 'the power to "take" under s 198A(1) includes the power, within or outside Australia, to place and restrain a person on a vehicle or vessel, to remove a person from a vehicle or vessel and to use such force as is necessary and reasonable': *Plaintiff M70* (n 13) para 10.

⁵⁴ The application, being for an injunction against the Commonwealth preventing the applicants' removal to Malaysia, was brought in the High Court's original jurisdiction under s 75 of the Australian Constitution: under s 75(iii), as a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; and s 75(v), as a matter in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. ⁵⁵ *Plaintiff M70* (n 13).

⁵⁶ Plaintiff M70 had been determined by an officer of the Department of Immigration and Citizenship to be liable for removal under the Arrangement. In relation to M106, an officer of the Department had assessed that, being an unaccompanied minor, the only impediment to his removal was the establishment in Malaysia of relevant support services. See *Plaintiff M70* (n 13) para 8 (French CJ).

⁵⁷ 'Plaintiffs' Outline of Submissions' (17 August 2011) para 125 in *Plaintiff M70* (n 13); *Plaintiff M70* (n 13) para 203 (Kiefel J). The applicants' fear of persecution in Malaysia for reasons of their religion as Shi'a Muslims reflects the broader risk of refoulement of asylum seekers subject to transfer under the Australia–Malaysia Arrangement, given that the majority of asylum seekers arriving in Australia by boat in recent years have been Shi'a Muslims fleeing Taliban held areas of Pakistan and Afghanistan. Plaintiff M106 also expressed concern about his status as a minor and the treatment of refugees in Malaysia: see paras 39–40 (French CJ).

⁵⁸ See generally A Aust, *Handbook of International Law* (CUP, 2005) 79–85.

dependent upon each of the four criteria being satisfied by the country which was the subject of the declaration. The plaintiffs submitted that, in the case of Malaysia, these criteria were not and could not be satisfied, Malaysia being neither a signatory to the Refugee Convention nor having any domestic legal regime for refugee protection.⁵⁹

In response, the Minister submitted that ‘it is the existence of the Minister’s declaration itself, not the truth of the content of that declaration, that engages the operation of [the power to remove the asylum seekers]’.⁶⁰ He further argued that the protections and access described by the criteria did not require the existence of any *legal* obligation to provide such protection; rather, all that was required for the Minister’s declaration to be valid was that he make, in good faith, an evaluative judgment that Malaysia’s treatment of asylum seekers and refugees would *in practice* fulfil the relevant criteria.⁶¹

The central question before the High Court was therefore one of statutory construction: what was the correct interpretation of the criteria set out in section 198A(3)(a)(i)–(iv) of the Act, and what limits did those criteria place on the Minister’s exercise of the declaratory power conferred under that section? Once the correct construction of those criteria had been determined, the court was required to assess whether or not the Minister’s declaration with respect to Malaysia satisfied those criteria.

By a 6:1 majority, the High Court found in favour of the plaintiffs, holding that the Minister’s declaration was without power and thus invalid, restraining the Commonwealth from taking either plaintiff to Malaysia. The lead judgment of the case was written by a four judge majority;⁶² French CJ and Kiefel J published separate but concurring judgments, largely agreeing with the majority; and Heydon J dissented.

1. The source of the Minister’s power

As a preliminary matter, all six concurring judges held that the Minister’s declaratory power under section 198A(3)(a) was the only source of power that could be relied on to authorise the removal of asylum seekers to Malaysia under the Arrangement.⁶³ Importantly, the court held that the Government could not rely on the more general power of removal under section 198(2) of the Act without first considering (and rejecting) the asylum seekers’ protection claims.⁶⁴ The majority stated that to hold

⁵⁹ ‘Plaintiffs’ Outline of Submissions’ (n 57) para 4.4.

⁶⁰ ‘Submission of the Defendants’ (18 August 2011) para 56 in *Plaintiff M70* (n 13).

⁶¹ *ibid.*, paras 69–70.

⁶² The joint judgment was delivered by Gummow, Hayne, Crennan and Bell JJ.

⁶³ *Plaintiff M70* (n 13) para 99 (Gummow, Hayne, Crennan and Bell JJ), para 55 (French CJ), para 239 (Kiefel J).

⁶⁴ Section 198(2) of the Migration Act 1958 (Cth), provides: ‘(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen: (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and (b) who has not subsequently been immigration cleared; and (c) who either: (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.’

otherwise would render section 198A redundant, and would also ‘undermine the clear legislative intent behind section 198, which was to uphold Australia’s international obligations’.⁶⁵

2. Previous third country transfer arrangements

The High Court also rejected arguments that the relevant provisions of the Migration Act should be interpreted in light of previous arrangements between Australia and third countries for the transfer of asylum seekers. The Minister submitted that the enactment of section 198A in 2001 had been with a view to facilitating a similar arrangement with Nauru, at that time not a party to the Refugee Convention and without any domestic law providing for the determination or recognition of refugee status.⁶⁶ Accordingly, he argued, this augured against a reading of the section which would require the existence of legal protections in the destination country.

All six concurring judges held that the previous arrangement with Nauru did not provide a basis for interpreting the Act. The majority referred to the significant differences between the respective arrangements, noting in particular that the Australia–Nauru Arrangement created binding obligations between the two States and that under its terms, Australia itself was to provide the relevant protections.⁶⁷ In any event, all six concurring judges concluded that the past invocation of section 198A to support a declaration in relation to Nauru ‘cannot determine the construction of the section’.⁶⁸

3. The requirements for the Minister’s exercise of power

The six concurring judges held that the criteria set out in section 198A(3)(a)(i)–(iv) were indeed ‘jurisdictional facts’, the satisfaction of which was a pre-condition to the lawful exercise of the Minister’s power to issue a declaration authorising the asylum seekers’ removal to Malaysia. The joint judgment of the majority (Kiefel J concurring) held that the jurisdictional fact posited by section 198A(3)(a) was the destination State’s satisfaction of the criteria established therein. Failure to establish the existence of the protections described by those criteria would render the Minister’s declaration invalid. French CJ, on the other hand, held that the Minister’s formation in good faith of a *belief* that the criteria were satisfied would be sufficient to enliven the power.⁶⁹ He nevertheless held that a misconstruction by the Minister of those criteria would constitute a jurisdictional error and render the declaration invalid.⁷⁰

⁶⁵ *Plaintiff M70* (n 13) paras 97–98 (Gummow, Hayne, Crennan and Bell JJ), para 55 (French CJ), para 239 (Kiefel J).

⁶⁶ *ibid*, para 128 (Gummow, Hayne, Crennan and Bell JJ).

⁶⁸ *ibid*, para 13 (French CJ), paras 127–128 (Gummow, Hayne, Crennan and Bell JJ), para 225 (Kiefel J). Kiefel J also noted that at the time the legislative changes were proposed the government had said that ‘Australia will continue to honour our international protection obligations’: para 212.

⁶⁹ The Minister is required to form, in good faith, an evaluative judgment based upon the matters set out in s 198A(3)(a), properly construed. That the Minister properly construe them is a necessary condition of the validity of his declaration. Properly construed, they define the content of the declaration which the Parliament has authorised. If the Minister were to proceed to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by the Parliament. The misconstruction of the criterion would be a jurisdictional error: *Plaintiff M70* (n 13) para 59 (French CJ).

⁷⁰ *ibid*, para 29 (French CJ).

All six concurring judges further agreed that the protections afforded to asylum seekers by those criteria were legal, and not just practical, in nature; that is, for the criteria to be satisfied by Malaysia, the relevant protections would have to be provided pursuant to a legal obligation to do so, not only as a matter of State practice or intention.⁷¹ According to the majority,

[c]ontrary to the submissions of the Minister and the Commonwealth, the matters stated in s 198A(3)(a)(i) to (iii) are not established by examination only of what has happened, is happening or may be expected to happen in the relevant country. The access and protections to which those sub-paragraphs refer must be provided as a matter of *legal* obligation.⁷²

In the majority's view, such an obligation could be provided as a matter of either international or domestic law.⁷³

French CJ emphasized that it was the temporal aspect of the power, to authorize not only present but future removal of persons to another country, that signified the need for an enduring legal framework.⁷⁴

The declaration must be a declaration about *continuing circumstances* in the specified country. It cannot therefore be a declaration based upon, and therefore a declaration of, a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent.⁷⁵

Having agreed that the existence of legal protection in the destination country was a necessary requirement for satisfaction of the section 198A(3)(a) criteria, the concurring judges differed in their approach to the relevance of the protections offered by the country in *practice*. French CJ held that an inquiry into State practice was an *additional* requirement of the Minister's power, noting that '[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states'.⁷⁶ Kiefel J also held that a country's practices may be relevant, however stressed that 'a positive assessment of the practical provisions which are made for refugees in a country cannot replace the requirement that the country has obliged itself, through its laws, to provide the necessary recognition and protection'.⁷⁷

The rest of the majority accepted for the purposes of argument that the criteria for removal under section 198A(3)(a) necessitated an inquiry into what actually happens in the destination country,⁷⁸ but found it unnecessary to decide the question. They were also keen to stress that 'because it is not necessary to decide whether any of the criteria stated in s 198A(3)(a) contains any factual element, nothing in these reasons should be understood as expressing any view about whether Malaysia in fact "meets relevant human rights standards", let alone whether asylum seekers in that country are treated "fairly" or "appropriately"'.⁷⁹

⁷¹ Or, according to French CJ's reasoning, the Minister must form a *belief* that such protections will be provided according to legal obligation.

⁷² *Plaintiff M70* (n 13) para 116 (Gummow, Hayne, Crennan and Bell JJ), paras 64–66 (French CJ), para 244 (Kiefel J).

⁷³ *ibid*, paras 124–25 (Gummow, Hayne, Crennan and Bell JJ).

⁷⁴ *ibid*, para 61 (French CJ).

⁷⁵ *ibid*, para 62 (French CJ) (emphasis added).

⁷⁶ *ibid*, para 67 (French CJ).

⁷⁷ *ibid*, para 245 (Kiefel J).

⁷⁸ *ibid*, para 112 (Gummow, Hayne, Crennan and Bell JJ), noting that this is evident in subsection (iv) which provides that the country '*meets* relevant human rights standards' in providing protection.

⁷⁹ *ibid*, para 114 (Gummow, Hayne, Crennan and Bell JJ).

4. Did the Minister's declaration satisfy the relevant criteria?

The six concurring judges held that the Minister did not and could not establish the relevant jurisdictional facts under section 198A(3)(a) and thus the declaration authorising the removal of asylum seekers to Malaysia was invalid.⁸⁰ The decision rested in large part on the Minister's failure to appreciate the necessity of a *legal* framework in the destination country, and the corresponding lack of any such framework in Malaysia.

It was an agreed fact between the parties that Malaysia had undertaken no legal obligation, whether under domestic or international law, to provide the relevant protections and access to asylum procedures described in section 198A(3)(a).⁸¹ Malaysia does not recognize refugee status in its domestic law, nor is it a signatory to the 1951 Refugee Convention or its 1967 Protocol.⁸² The Australia–Malaysia Arrangement itself did not provide a sufficient framework to ensure such protection for two reasons: first, the Arrangement was non-binding and created no obligation under international law;⁸³ and secondly, any relevant protections provided under the Arrangement were directed only at the 800 'transferees', and not at other asylum seekers in Malaysia. It was accepted by the parties that the criteria described by section 198A(3)(a) must be interpreted not merely with respect to the asylum seekers subject to removal under the declaration, but to the country itself.⁸⁴

According to the Minister's own submissions, his declaration that Malaysia satisfied the relevant criteria was based on the belief that the Malaysian government had undergone a 'significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers' and had 'begun the process of improving protections offered to such persons'.⁸⁵ In forming this belief, he had taken into account advice from Australia's Department of Immigration and Citizenship and the Department of Foreign Affairs and Trade, his own discussions with Malaysian officials, and the Malaysian government's willingness to enter into the Arrangement.⁸⁶

According to the majority of the court, the substance of the advice to the Minister about conditions for asylum seekers in Malaysia and the agreed facts among the parties confirmed that the relevant protections described under section 198A(3)(a) did not and could not be found to exist.

Where, as in the present case, it is agreed that Malaysia: first, does not recognize the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments; it was not open to the Minister to conclude that Malaysia provides the access or protections referred to in s 198A(3)(a)(i) to (iii).⁸⁷

⁸⁰ *ibid*, para 135 (Gummow, Hayne, Crennan and Bell JJ).

⁸¹ *ibid*, para 80 (Gummow, Hayne, Crennan and Bell JJ).

⁸² *ibid*, para 30 (French CJ).

⁸³ *ibid*, para 103 (Gummow, Hayne, Crennan and Bell JJ).

⁸⁴ *ibid*, para 29 (French CJ).

⁸⁵ Defendant's submissions (n 60) para 84.3, cited in *Plaintiff M70* (n 138) para 29 (French CJ), para 253 (Kiefel J).

⁸⁶ *Plaintiff M70* (n 138) para 348 (Kiefel J).

⁸⁷ *ibid*, para 135 (Gummow, Hayne, Crennan and Bell JJ).

Having construed the relevant jurisdictional fact as the Minister's good faith *belief* that Malaysia satisfied the criteria, French CJ held that in forming that belief, the Minister had failed to direct his inquiry to the relevant protections—namely legal protections. Indeed, the Minister himself conceded that if his power to authorize removal to Malaysia depended upon an assessment of the laws in effect in Malaysia, then he had erred in this case.⁸⁸ Thus the Minister fell into jurisdictional error and the declaration was invalid.⁸⁹ Kiefel J concluded both that the Minister had misunderstood the requirements of section 198A(3)(a) and that the facts necessary for making the declaration did not exist and therefore the declaration was invalid.⁹⁰

Heydon J was the sole dissenting judge, holding that the Minister's declaration under section 198A(3) was valid, and therefore denying the relief sought by the plaintiffs. Like French CJ, Heydon J held that the jurisdictional fact required under section 198A(3)(a) pertained to the Minister's formation of a good faith evaluative judgment of the existence of the criteria.⁹¹ However, unlike the six concurring judges, he held that the language of those criteria suggested only the existence of practical protections, not legal obligations.⁹² In his view, the Australia–Malaysia Arrangement and its Operational Guidelines, while not legally binding, were sufficient to support an inference that the transferees would receive sufficient protection in Malaysia.⁹³

5. *Unaccompanied minors and the Minister's role as guardian – Plaintiff M106*

Having struck down the Minister's declaration as invalid, the High Court then briefly considered additional arguments put forward by Plaintiff M106 in relation to his status as an unaccompanied minor. Under section 6 of the Immigration (Guardianship of Children) Act 1946 (Cth) (IGOC Act), the Minister for Immigration is the guardian of any non-citizen child who enters Australia without the care of a parent or other relative, and who has the intention of becoming a permanent resident.⁹⁴ Section 6A(1) of the IGOC Act provides that '[a] non-citizen child shall not leave Australia except with the consent in writing of the Minister'.⁹⁵

The six concurring judges held that the Minister's failure to give consent in writing was a further restriction on the government's ability to remove Plaintiff M106 from Australia.⁹⁶ The requirement that the Minister provide written consent for the removal

⁸⁸ *ibid*, para 65 (French CJ).

⁸⁹ *ibid*.

⁹⁰ *ibid*, paras 255–56 (Kiefel J). Kiefel J also referred to the sources of information relied upon by the Minister in making the declaration and held that '[t]hat information did not confirm the existence of the necessary facts concerning Malaysia': para 249. Kiefel J also noted, 'It remains the case that Malaysia does not have laws which recognise and protect refugees from refoulement and persecution': para 254.

⁹¹ *ibid*, paras 158–59 (Heydon J).

⁹² *ibid*, para 162 (Heydon J).

⁹³ *ibid*, para 180 (Heydon J).

⁹⁴ Section 6 of the IGOC Act provides: 'The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.'

⁹⁵ *ibid*, s 6A(1).

⁹⁶ *Plaintiff M70* (n 13) para 148 (Gummow, Hayne, Crennan and Bell JJ), para 69 (French CJ), para 257 (Kiefel J).

of a child is significant under Australian administrative law, as it brings the decision to give such consent within the scope of the Administrative Decisions (Judicial Review) Act 1977 (Cth), thus requiring the Minister to give reasons for the decision and enabling the decision to be reviewed by a court.⁹⁷

Having determined that the Minister's failure to provide written consent prevented the plaintiff's removal, the court found it unnecessary to examine the content of the Minister's duties as guardian.⁹⁸ It did note, however, that on the facts agreed between the parties, no assessment as to whether removal to Malaysia was in the child's best interests was envisaged, and, in fact, according to departmental records, any such assessment was to be undertaken in Malaysia itself.⁹⁹ Heydon J again dissented on this point, holding that the Minister had clearly demonstrated by his conduct that he consented to the taking of the minor from Australia.¹⁰⁰

C. Analysis: international law issues arising out of the case

While *Plaintiff M70* was primarily a case about domestic statutory construction, the High Court's decision reflects a number of important international law issues regarding the reception, processing and protection of asylum seekers and refugees. The Refugee Council of Australia described the High Court's decision as 'a monumental one which emphasised the critical importance of legal protections for asylum seekers, even in circumstances where Australia is trying to expel them'.¹⁰¹ The court's emphasis on the need for legal protections provides a strong endorsement of the importance of international instruments such as the Refugee Convention and Protocol, in particular in the context of regional cooperation.

The decision also demonstrates that, despite Australia's dualist legal system, it does contain mechanisms for the limited recognition and application of international law, in particular through common law principles of statutory interpretation which provide that a statute is to be interpreted so far as is possible in conformity with Australia's international obligations and other established rules of international law.¹⁰² This is particularly relevant in interpreting the Migration Act, which the High Court has previously said 'contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol'.¹⁰³ In *Plaintiff M70*, Kiefel J explicitly stated that the court's construction of section 198A(3)(a) 'most closely accords with the fulfilment of Australia's Convention obligations and it is to be

⁹⁷ *ibid*, para 146 (Gummow, Hayne, Crennan and Bell JJ).

⁹⁸ *ibid*, para 147 (Gummow, Hayne, Crennan and Bell JJ).

⁹⁹ *ibid*, para 142 (Gummow, Hayne, Crennan and Bell JJ).

¹⁰⁰ *ibid*, para 196 (Heydon J). Heydon J's finding rested on s 6A(4) of the IGOC Act which provides that the section does not affect the operation of any other law 'regulating the departure of persons from Australia'.

¹⁰¹ Refugee Council of Australia, 'Refugee Council Welcomes High Court Ruling' (31 August 2011) <http://www.refugeecouncil.org.au/news/releases/110831_High_Court.pdf>.

¹⁰² *Polites v The Commonwealth* (1932) 47 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Both cited in *Plaintiff M70* (n 13) paras 246–47 (Kiefel J).

¹⁰³ *Plaintiff M61* (n 51) para 27 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

preferred to one which does not'.¹⁰⁴ French CJ also emphasized that 'the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of persons from state to state'.¹⁰⁵

While the protections described by section 198A(3)(a) of the Migration Act do not provide a comprehensive account of Australia's international legal obligations in relation to refugees and asylum seekers, all seven High Court judges accepted that the legislative purpose behind the provision was the implementation, at least in part, of Australia's obligations under the Refugee Convention.¹⁰⁶ The majority stated that the criteria stipulated in section 198A(3)(a)(i)–(iv) 'must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol',¹⁰⁷ and all six concurring judges discussed the nature and scope of those obligations in their decisions. The case is therefore important in illustrating elements that are required for the lawful cooperation between States under international refugee law, as well as the minimum obligations that States owe to asylum seekers within their own territory or jurisdiction.

1. Responsibility sharing under international refugee law

The need for international cooperation and responsibility sharing in protecting refugees has been repeatedly stressed by the UN General Assembly and UNHCR's Executive Committee.¹⁰⁸ It is recognized in the preamble to the 1951 Convention, which recognizes that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'. It accordingly expresses 'the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States', and exhorts them to 'act in concert in a true spirit of international

¹⁰⁴ *Plaintiff M70* (n 13) para 246 (Kiefel J).

¹⁰⁵ *ibid*, para 91 (French CJ).

¹⁰⁶ See *ibid*, paras 212, 218, 237 (Kiefel J), paras 10, 98 (French CJ). These judges drew heavily on the previous case of *Plaintiff M61* (n 51), which held that 'the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.' See *Plaintiff M61* (n 51) para 27 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). The Explanatory Memorandum for the Bill for the Migration Reform Act 1992 (Cth) also stated that the protection visa was 'intended to be the mechanisms by which Australia offers protection to person who fall under [the Convention]': cited in *Plaintiff M70* (n 13) para 217 (Kiefel J).

¹⁰⁷ *Plaintiff M70* (n 13) para 118 (Gummow, Hayne, Crennan and Bell JJ).

¹⁰⁸ See, eg, UNGA Res 45/140 (14 December 1990) UN Doc A/RES/45/140A; UNGA Res 47/106 (16 December 1992) UN Doc A/RES/47/106; UNGA Res 65/264 (28 January 2011) A/RES/65/264; UNHCR, 'A Thematic Compilation of Executive Committee Conclusions' (4th edn, April 2009) 38–55 (for an extensive list of relevant Executive Committee Conclusions). See also Cotonou Agreement (Second Revision 2010) OJ L287, art 60. For a recent overview of the principle in the displacement context, see UNHCR, 'International Cooperation to Share Burden and Responsibilities' (Expert Meeting in Amman, Jordan, 27–28 June 2011).

co-operation in order that these refugees may find asylum and the possibility of resettlement'.¹⁰⁹

Yet despite their obvious desirability, there are serious practical challenges in ensuring that so-called responsibility sharing arrangements do not undermine the important protections provided for by the international refugee regime. As refugee law scholars have pointed out in relation to the Australia–Malaysia Arrangement, 'great care needs to be taken to ensure that "co-operation" does not operate as a facade behind which violations of international law are permitted to take place'.¹¹⁰

The risks inherent in cooperative refugee protection arrangements are particularly salient in a region such as the Asia-Pacific, which has one of the lowest rates in the world of accession to international refugee and human rights instruments.¹¹¹ As refugee law experts have noted, 'accession to the Refugee Convention matters: it represents a binding commitment by a State to respect the provisions of the Convention and to implement those provisions in practice.'¹¹² In *Plaintiff M70*, Kiefel J remarked that while '[i]t may not be necessary that a country be a party to the Convention in order that it recognise and protect refugees ... it is more likely that a country's domestic laws will provide for that recognition and protection if they are a Contracting State'.¹¹³

The importance of accession in the context of responsibility sharing arrangements was emphasized by UNHCR's 2002 Lisbon Expert Roundtable, whose 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers' emphasized that accession to the Refugee Convention and/or its Protocol is essential where a State proposes to transfer of asylum seekers to another State, 'unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol'.¹¹⁴ As accepted in *Plaintiff M70*, these conditions are not met by Malaysia. Indeed, even those who have been recognized as refugees in Malaysia by UNHCR are still regarded as unlawful immigrants under Malaysian law.¹¹⁵

The imperative to consider Australia's international obligations was also recognized by an inquiry into the Australia–Malaysia Arrangement by the Australian Senate Legal and Constitutional Affairs Committee, which examined the consistency of the

¹⁰⁹ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, appended to the Refugee Convention.

¹¹⁰ Australian Refugee Law Academics (n 12) 5.

¹¹¹ For example, among the States of the Asia-Pacific, only the following countries are parties to the Refugee Convention: Australia, Cambodia, China, Fiji, Japan, New Zealand, Papua New Guinea, Philippines, Republic of Korea, Samoa, Solomon Islands and Timor-Leste.

¹¹² Australian Refugee Law Academics (n 12) 8. See also Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) *Michigan Journal of International Law* 223, 238–42.

¹¹³ *Plaintiff M70* (n 13) para 244 (Kiefel J).

¹¹⁴ Lisbon Expert Roundtable, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers (December 2002) ('Lisbon Expert Roundtable') para 15(e).

¹¹⁵ Asylum seekers transferred under the Arrangement were to be exempt from punishment for unlawful entry into Malaysia from Australia, however French CJ noted the fragility of the exemption, stating that there was 'nothing on the face of the exemption order to protect the plaintiffs from being charged and prosecuted in a Malaysian court for an offence against s 6 of the Malaysian Immigration Act associated with their entry into Malaysia on their way to Indonesia': *Plaintiff M70* (n 13) para 33 (French CJ).

Arrangement with Australia's international obligations.¹¹⁶ The Senate Committee found that in concluding the Arrangement, the Australian Government 'completely ignored that Malaysia is not a party to the Refugee Convention'¹¹⁷ and recommended that 'at a minimum, the Australian Government should meet the Prime Minister's previous commitment to "rule out" sending asylum seekers who travel to Australia by boat to countries which are not a signatory to the Refugee Convention'.¹¹⁸

Accession to international instruments alone, however, is insufficient to guarantee the legality of responsibility sharing arrangements. As French CJ noted in *Plaintiff M70*, 'protective domestic laws and international obligations are not always reflected in the practice of states'.¹¹⁹ Even within the European Union, which is, in comparison to the Asia-Pacific region, relatively homogenous in terms of the international legal obligations which States have undertaken, the attempt to create a Common European Asylum System has been fraught with problems. A recent decision by the European Court of Human Rights that Greece is not a safe country for asylum seekers, despite its being a signatory to the Refugee Convention and other key international and regional human rights treaties, indicates that even where common legal and procedural standards under both regional and international law have been adopted, practices on the ground can vary considerably.¹²⁰

2. Third country guarantees

Australia alone bears responsibility for the fulfilment of its international obligations, notwithstanding any bilateral arrangement with Malaysia.¹²¹ Australia's capacity to ensure Malaysia's adherence to its undertakings under the Arrangement, or to monitor the treatment of the 800 asylum seekers whose transfer was proposed, would have been extremely limited. The Arrangement itself contained no provision for such monitoring, and the absence of any such obligations on Malaysia under international law would have meant that affected individuals could not have made complaints to the human treaty monitoring bodies, such as the Human Rights Committee, since Malaysia is not a party to the relevant treaties. Thus, although Malaysia expressed its intention under the Arrangement to adhere to certain standards of treatment, including to 'respect the principle of non-refoulement',¹²² this could not absolve Australia of its obligations with respect to the asylum seekers it proposed to transfer there.

¹¹⁶ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) para 1.1. This inquiry was established prior to the High Court challenge. Following the outcome of that challenge, the Committee decided that there was no need to continue with the inquiry. However, when the Australian Government announced that it would seek legislative changes to the Migration Act 1958 (Cth), to make decisions pursuant to section 198A wholly within the Minister's discretion, the inquiry was reinstated.

¹¹⁷ *ibid*, para 4.6.

¹¹⁸ *Plaintiff M70* (n 13) para 67 (French CJ).

¹¹⁹ *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).

¹²⁰ Clause 16 stipulates that the Arrangement 'represents a record of the Participants' intentions and political commitments but is no legally binding on the Participants': Australia-Malaysia Arrangement (n 1) cl 16. See also clause 19.2, which provides that the parties may 'jointly decide in writing to vary or extend this Arrangement'; Operational Guidelines (n 41) para 6.2.

¹²¹ Australia-Malaysia Arrangement (n 1) cl 10(2)(a).

Political assurances are an insufficient guarantee that international obligations will be respected.¹²³ According to the Michigan Guidelines on Protection Elsewhere, such assurances ‘do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.’¹²⁴ In *Plaintiff M70*, the High Court agreed that neither the terms of the Australia–Malaysia Arrangement, nor the Minister’s belief that the Malaysian Government was ‘committed to a new approach’ and ‘keen to improve its treatment of refugees and asylum seekers’,¹²⁵ were sufficient guarantees of the protection asylum seekers would receive in Malaysia.

The Senate Committee similarly recognized the insufficiency of political guarantees by third countries that they would comply with human rights standards. The Committee referred to numerous submissions received during the inquiry which expressed concern at the ‘almost aspirational’ nature of the Arrangement, which relied on political commitments rather than binding legal obligations.¹²⁶ These submissions agreed that it was not enough for the Australian Government to simply ‘be satisfied a country will act in a certain manner’.¹²⁷ The Committee concluded that:

At its most basic level, the arrangement is inadequate and unacceptable because it is extraordinarily imprecise in nature, and includes the use of vague language and terms which are not defined and which appear only to reflect the “political commitments” of the parties. Since the Malaysian Arrangement is non-legally binding, there is absolutely no means to enforce the obligations of the parties under the arrangement.¹²⁸

In particular, the Committee noted that the Australian Government would be ‘powerless’ if it found that Malaysia had not complied with the Arrangement: ‘there are

¹²³ The UN High Commissioner for Human Rights for example has stated that: ‘diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement. To begin, it is understood that diplomatic assurances would be sought only after an assessment has been made that there is a risk of torture in the receiving State. If there is no risk of torture in a particular case, they are unnecessary and redundant. It should be clear that diplomatic assurances cannot replace a State’s obligation of non-refoulement in these circumstances, either in fact or in law. Second, while some have suggested the establishment of post-return monitoring mechanisms as a means for removing the risk of torture and ill-treatment, we know through the experience of international monitoring bodies and experts that this is unlikely to be an effective means for prevention’: UN High Commissioner for Human Rights, ‘Statement by the High Commissioner’ (Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism, 29–31 March 2006). See also *MSS v Belgium and Greece* (n 120): ‘the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention’: at 353. For a defence of political assurances in national security deportation cases see K Jones, ‘Deportations with Assurances: Addressing Key Criticisms (2008) 57 ICLQ 183.

¹²⁴ ‘The Michigan Guidelines on Protection Elsewhere’ (2007) 28 Michigan Journal of International Law 207, para 3.

¹²⁵ See *Plaintiff M70* (n 13) para 29 (French CJ).

¹²⁶ See, eg, Human Rights Watch, Submission 2 to Senate Legal and Constitutional Affairs References Committee, cited in Senate Legal and Constitutional Affairs References Committee (n 116) para 3.4.

¹²⁷ A Bartlett and M van Galen-Dickie, Australian National University, Submission 19 to Senate Legal and Constitutional Affairs References Committee, cited in Senate Legal and Constitutional Affairs References Committee (n 116) para 3.6.

¹²⁸ Senate Legal and Constitutional Affairs References Committee (n 116) para 4.2.

no steps which can be taken by the Joint Committee or the Advisory Committee—the only bodies likely to be providing any form of oversight or monitoring of the arrangement—in the event that there is any breach of the arrangement.¹²⁹ It was ‘simply not adequate’ for the Australian Government to assert that the Arrangement was entered into in good faith, or to rely on the clause providing for ‘the resolution of differences’, which provided only that the parties consult with one another.¹³⁰

3. Scope of obligations

a) Non-refoulement

The principle of *non-refoulement* is the cornerstone of international refugee protection. It requires States to ensure that people are not sent to any place where there is a real risk that they would face—or be sent elsewhere to face—persecution, arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. The principle is enshrined in article 33 of the Refugee Convention as well as numerous other international human rights instruments,¹³¹ and it is generally considered to be a principle of customary international law.¹³²

The prohibition on *refoulement* requires States not only to refrain from sending asylum seekers to the country in which persecution is feared, but also to ensure that they are not sent to any other country which might return them to such harm. As the House of Lords explained,

[f]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.¹³³

It is also important to consider whether the standards of treatment within Malaysia could themselves breach the principle. If, for example, the conditions in which asylum seekers were forced to live in Malaysia were inhuman or degrading, then Australia would have violated the principle of *non-refoulement* by exposing them to such treatment. This was noted by Kiefel J, who stated that the principle of *non-refoulement* prohibits governments from returning asylum seekers ‘to the country from which they have fled

¹²⁹ *ibid*, para 4.3.

¹³⁰ *ibid*, para 4.4.

¹³¹ This principle is reflected in article 33 of the Refugee Convention; article 3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; articles 6 and 7 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); articles 6 and 37 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UNGA res 61/177 (12 January 2007).

¹³² See G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, OUP, 2007); E Lauterpacht and D Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement’ in E Feller, V Türk, and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 78–177; Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol (adopted at the Ministerial Meeting of States Parties, (12–13 December 2001) UN Doc HCR/MMSP/2001/09.

¹³³ *R (ex parte Adan) v Secretary of State for the Home Department* (2001) 2 WLR 143, 165.

and to any other country where would be exposed to the same harm'.¹³⁴ Indeed, the applicants in *Plaintiff M70* claimed to fear persecution in Malaysia on account of their religious beliefs.¹³⁵

b) Individual assessment of protection needs

Blanket designations of particular countries as 'safe' are necessarily inconsistent with the principle of *non-refoulement*, which requires a case-by-case assessment that a particular country is safe for a particular individual.¹³⁶ This points to one of the fundamental problems of the Arrangement—the lack of assessment by Australia of individuals' protection needs prior to transfer.

Although neither the Refugee Convention nor its Protocol formally stipulates procedures for refugee status determination, it is well accepted that 'their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination, argue strongly for the adoption of such effective internal measures'.¹³⁷ The Australian High Court has previously recognized the obligation on States to assess an individual's claim for asylum under the Refugee Convention,¹³⁸ and this point was reinforced in *Plaintiff M70*.¹³⁹

The mere existence of a refugee status determination system is insufficient evidence to conclude that the principle of *non-refoulement* will be respected. At a minimum, any refugee status determination system must contain sufficient procedural safeguards to prevent the risk of error and subsequent *refoulement*. While Kiefel J noted that the establishment of particular procedures is left to the governments of State parties to the Refugee Convention,¹⁴⁰ UNHCR's Executive Committee has recommended that refugee status determination procedures should satisfy a number of basic requirements in order to be effective. These include respect for the principle of *non-refoulement*, clear allocation of authority for considering and determining claims, the provision of necessary guidance and facilities to applicants to make their claims, the opportunity for either administrative or judicial review in cases of rejection, and permission for applicants to remain in the country pending the final outcome of their application.¹⁴¹

¹³⁴ *Plaintiff M70* (n 13) para 214 (Kiefel J) (emphasis added). See also Australian Refugee Law Academics (n 12) 11.

¹³⁵ *ibid*, para 39 (French CJ).
¹³⁶ UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)' (31 May 2001) UN Doc EC/GC/01/12 paras 12–18 (for a discussion of best practice); Select Committee on the European Union, Handling EU Asylum Claims: New Approaches Examined (HL 2003–04, 74), para 66; UN Human Rights Committee, 'Concluding Observations on Estonia' (15 April 2003) UN Doc CCPR/CO/77/EST, para 13; Lisbon Expert Roundtable (n 117) para 9; *MSS v Belgium and Greece* (n 120). See also Senate Legal and Constitutional Affairs References Committee (n 116) paras 3.34, 3.36, 4.9. The Committee stated that the Arrangement did 'not appear to guarantee that an appropriately rigorous approach will be taken in making case-by-case determinations as to whether Malaysia is a safe country for individual Transferees': para 3.34.

¹³⁷ Goodwin-Gill and McAdam (n 132) 530. The existence of 'fair and efficient procedures' has also been recognised as important by the Lisbon Expert Roundtable (n 114) para 15(f).

¹³⁸ *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, cited in *Plaintiff M70* (n 13) para 215 (Kiefel J).

¹³⁹ *Plaintiff M70* (n 13) para 125 (Gummow, Hayne, Crennan and Bell JJ), para 216 (Kiefel J).

¹⁴⁰ *ibid*, para 217 (Kiefel J).

¹⁴¹ UNHCR Executive Committee, 'Conclusion No 8 (XXVIII): Determination of Refugee Status' (12 October 1977) para e.

Under the Arrangement with Malaysia, Australia was to establish an ‘appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected’.¹⁴² However, while the pre-screening mechanism purported to ‘ensure both fitness to travel and compliance with Australia’s international obligations’,¹⁴³ officers were expressly directed ‘not to assess whether the person was a refugee under Art 1A of the Refugee Convention’.¹⁴⁴ Australia’s failure to assess individuals’ protection needs prior to transfer would have meant that protection against serious harm in Malaysia could not have been guaranteed, and Australia would have been at risk of violating the principle of *non-refoulement*.

Asylum seekers transferred to Malaysia were to be referred to UNHCR.¹⁴⁵ The Malaysian government permits UNHCR to conduct refugee status determination on its behalf. The limited resources and capacity of UNHCR mean it ‘cannot be expected to replicate the complex decision-making models—including review processes—which States can construct’,¹⁴⁶ and given the well-known paucity of procedural safeguards in UNHCR’s refugee status determination processes,¹⁴⁷ it is unlikely that UNHCR’s procedures in Malaysia would fulfil the conditions set out by its own Executive Committee. The resulting risk of error means that it cannot be said with certainty that asylum seekers processed in this way are protected from *refoulement*.

Even if these procedural shortcomings could be overcome, UNHCR is not a State. It does not have jurisdiction over Malaysian territory and thus cannot ensure against the *refoulement* of asylum seekers from there; indeed, even UNHCR-recognized refugees are considered illegal immigrants under Malaysian law.¹⁴⁸ Thus, while the principle of *non-refoulement* is now accepted as part of customary international law, applying to all States irrespective of their treaty ratifications, Malaysia’s lack of a domestic refugee status determination procedure means it offers little guarantee against *refoulement* in practice.¹⁴⁹

Kiefel J stressed in *Plaintiff M70* that the duty to undertake refugee status determination rests with the State itself and cannot be deflected to a non-government agency, such as UNHCR. She held that the language of the Migration Act ‘clearly contemplates the determination of refugee status by the country the subject of the declaration’,¹⁵⁰ further stating that ‘[t]he requirement that the declared country itself undertake the determination of refugee status has an important consequence, namely,

¹⁴² Australia–Malaysia Arrangement (n 1) cl 9(3). The Operational Guidelines stipulate only the gathering of biodata, basic security checks and fitness to travel assessments.

¹⁴³ Pre-Removal Assessment Guidelines, cited in *Plaintiff M70* (n 13) para 36 (French CJ).

¹⁴⁴ *Plaintiff M70* (n 13) para 38 (French CJ). Kiefel J also noted that the pre-transfer assessments of the plaintiffs ‘were not directed to the question whether Australia owed protection obligations to them as refugees’: para 239.

¹⁴⁵ Australia–Malaysia Arrangement (n 1) cls 1(2), 10(2)(a).

¹⁴⁶ Australian Refugee Law Academics (n 12) 12.

¹⁴⁷ See, eg, Michael Kagan, ‘The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination’ (2006) 18 International Journal of Refugee Law 1.

¹⁴⁸ See *Plaintiff M70* (n 13) paras 32–33 (French CJ).

¹⁴⁹ The Senate Committee noted that despite the prohibition on *refoulement* being part of customary international law, Malaysia has a history of non-compliance: Senate Legal and Constitutional Affairs References Committee (n 116) para 3.38.

¹⁵⁰ *Plaintiff M70* (n 13) para 242 (Kiefel J). Cf the majority who held that this requirement might be met either where the country provides such procedures itself under its domestic law, or is bound as a matter of international obligation to allow a third party, such as the UNHCR, to do so: para 125 (Gummow, Hayne, Crennan and Bell JJ).

that it is bound to the outcome'.¹⁵¹ The majority, while not requiring the State to conduct refugee status determination itself, nevertheless held that access to status determination procedures must be provided either under the State's domestic law, or pursuant to its international obligation allow a third party, such as UNHCR, to undertake such procedures. Importantly, they held that '[a] country does *not* provide access to effective procedures if, having no obligation to provide the procedures, all that is seen is that it has permitted a body such as UNHCR to undertake that body's own procedures for assessing the needs for protection of persons seeking asylum'.¹⁵²

c) Protection of other rights

In addition to protecting refugees from *refoulement*, another purpose of the Refugee Convention is to set out minimum standards of treatment for refugees. States parties to the Convention must therefore ensure that those standards are met in any country to which a transfer is proposed. While the Minister argued that the criteria set out in section 198A(3)(a) of the Migration Act 'reflect an understanding that Australia's obligations under the Convention may be limited to non-refoulement',¹⁵³ the applicants in *Plaintiff M70* submitted that the term 'protection' used throughout section 198A(3)(a) is a 'legal term of art',¹⁵⁴ including not only protection from *refoulement* but all of the rights afforded to refugees in the Refugee Convention, as well as the ability to enforce those rights through national courts.¹⁵⁵

The majority of the High Court largely agreed:

[W]hen s 198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations.¹⁵⁶

The majority went on to list some of those rights, including access to courts of law,¹⁵⁷ freedom from discrimination,¹⁵⁸ and treatment as least as favourable as that accorded to its nationals with respect to employment,¹⁵⁹ education¹⁶⁰ and religious freedoms.¹⁶¹ They continued:

The extent to which obligations beyond the obligation of non-refoulement (and the obligations under Art 31 of the Refugees Convention concerning refugees unlawfully in the country of refuge) apply to persons who claim to be refugees but whose claims have not been assessed is a question about which opinions may differ. It is not necessary to decide that question. What is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.¹⁶²

The rights provided for by the Refugee Convention are now supplemented by international human rights law. In discussing the guarantees that must be provided by third States to asylum seekers, the 2002 Lisbon Expert Roundtable stated that respect for

¹⁵¹ *ibid*, para 243 (Kiefel J).

¹⁵² *Plaintiff M70* (n 13) para 125 (Gummow, Hayne, Crennan and Bell JJ) (emphasis added).

¹⁵³ Cited in *ibid*, para 220 (Kiefel J). ¹⁵⁴ *ibid*, para 63 (French CJ).

¹⁵⁵ Cited in *ibid*.

¹⁵⁶ *ibid*, para 117 (Gummow, Hayne, Crennan and Bell JJ).

¹⁵⁷ Refugee Convention, art 16(1).

¹⁵⁸ *ibid*, art 3.

¹⁵⁹ *ibid*, art 17(1).

¹⁶⁰ *ibid*, art 22(1).

¹⁶¹ *ibid*, art 4.

¹⁶² *Plaintiff M70* (n 13) para 117 (Gummow, Hayne, Crennan and Bell JJ).

fundamental rights by the third State, including freedom from torture or cruel, inhuman or degrading treatment, and the rights to life and liberty, is a requirement of any lawful transfer of asylum seekers.¹⁶³ Thus, as Australian refugee law experts recently emphasized, a destination State's 'human rights record is relevant. This includes assessment of substantive and procedural standards, including questions of remedies, non-discriminatory or equivalent treatment to local nationals, and protection of fundamental human rights'.¹⁶⁴

The need to ensure that asylum seekers' rights are protected in the destination State is reflected in section 198A(3)(a)(iv) of the Migration Act, which requires that the State 'meets relevant human rights standards' in providing the relevant protections to asylum seekers.¹⁶⁵ The majority judgment in *Plaintiff M70* gave little attention to this requirement, although it noted that its inclusion supported the conclusion that the term 'protection' in sub-sections (i)–(iii) meant more than just protection from *refoulement*.¹⁶⁶ While Kiefel J's judgment emphasized the connection between section 198A(3)(a) and 'Australia's Convention obligations of non-refoulement and determination of refugee status',¹⁶⁷ she held that the inclusion of 'relevant human rights standards' in this section referred to 'standards required by international law'.¹⁶⁸

Malaysia is not a signatory to the key human rights treaties, including the ICCPR and ICESCR,¹⁶⁹ and has limited domestic rights protection mechanisms.¹⁷⁰ The Australia–Malaysia Arrangement provided that transferees would be 'treated with dignity and respect and in accordance with human rights standards'¹⁷¹ and would enjoy 'standards of treatment consistent with those set out in the Operational Guidelines at Annex A',¹⁷² although the Operational Guidelines themselves made no mention of human rights.

While the Operational Guidelines provided for some assistance to asylum seekers transferred under the Arrangement, including accommodation and financial support for one month after arrival¹⁷³ and access to education and health services provided privately or by UNHCR,¹⁷⁴ these were vaguely worded undertakings which suggested a bare minimum of rights protection. Furthermore, much of the assistance provided for by the Operational Guidelines was to be delivered by UNHCR or the International

¹⁶³ Lisbon Expert Roundtable (n 114) para 15(b).

¹⁶⁴ Australian Refugee Law Academics (n 12) 14.

¹⁶⁵ Migration Act 1958 (Cth), s 198A(3)(a)(iv).

¹⁶⁶ The joint judgment stated: 'To confine "that protection" to the obligation of non-refoulement would give little or no practical operation to s 198A(3)(a)(iv)': *Plaintiff M70* (n 13) para 119 (Gummow, Hayne, Crennan and Bell JJ). French CJ held '[i]t is not necessary to delineate all of the matters comprehended by the term "protection" in s 198A(3) or the particulars of "relevant human rights standards" mentioned in s 198A(3)(a)(iv)': para 66.

¹⁶⁷ *ibid*, para 234 (Kiefel J).

¹⁶⁸ *ibid*, para 240 (Kiefel J).

¹⁶⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. Malaysia is a party to the CRC; the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; and the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

¹⁷⁰ The assessment by the Australian Department of Foreign Affairs and Trade reported that the Malaysian Federal Constitution contains a number of 'fundamental liberties': cited in *Plaintiff M70* (n 13) para 28 (French CJ).

¹⁷¹ Australia–Malaysia Arrangement (n 1) cl 8(1).

¹⁷² *ibid*, cl 10(4)(a).

¹⁷³ Operational Guidelines (n 41) paras 3.1(c), 3.2(c).

¹⁷⁴ *ibid*, paras 3.3(a), 3.4.

Organization for Migration. The Arrangement was concluded ‘on the basis that UNHCR and International Organization for Migration (IOM) can fulfill the roles and functions envisaged in the Operational Guidelines at Annex A’.¹⁷⁵ The resources of these organizations, particularly UNHCR, are extremely limited and no provision was made for what would happen in the event that UNHCR or IOM could not fulfil the relevant roles and functions.

Even to the extent that provisions for assistance under the Operational Guidelines *did* fulfil particular human rights obligations, they remained non-binding and unenforceable under either Malaysian or international law. It is also significant that the Arrangement was envisaged as a four-year agreement,¹⁷⁶ and once it ceased, it was unclear what treatment asylum seekers transferred pursuant to it would receive.

The lack of human rights guarantees in Malaysia was particularly pertinent given Malaysia’s substantial record of ill-treatment asylum seekers. Malaysian law treats refugees and asylum seekers as ‘illegal immigrants’, an offence carrying a penalty of up to six lashes.¹⁷⁷ They face the possibility of arrest, abuse by immigration officers, detention in squalid conditions, whipping (which qualifies as torture) and other forms of ill-treatment.¹⁷⁸ Their lack of legal status renders them particularly vulnerable to human trafficking and return to persecution.¹⁷⁹ Even the country advice of the Australian Department of Foreign Affairs and Trade, on which the Minister for Immigration purported to rely in declaring Malaysia a safe country for asylum seekers, noted that healthcare was generally beyond refugees’ means, that their lack of status impeded access to sustainable livelihoods and that ‘[c]redible allegations have been made regarding inadequate standards in immigration detention centres’.¹⁸⁰

The inadequate protection of asylum seekers’ human rights within Malaysia formed a substantial part of the Senate Committee’s rationale for recommending that the Australian Government abandon the Arrangement. The Committee found that conditions for refugees and asylum seekers in Malaysia were ‘nothing short of appalling with harassment and violence part of the refugee community’s daily experience, and the threat of arrest a constant’.¹⁸¹ It observed that refugees and asylum seekers were ‘vulnerable to abuse and violence in their homes, in public and at their places of work because they have no rights’.¹⁸² It paid particular attention to the risk of asylum seekers and refugees being caned in Malaysia, either because they had breached immigration laws or because they had committed other crimes. The Committee also pointed to the regular raids carried out by both stage agents and the People’s Volunteer Corps (Ikatan Relawan Rakyat, or RELA) which often involve extortion, intimidation, harassment and abuse of asylum seekers and refugees.¹⁸³ The conditions under which

¹⁷⁵ Australia–Malaysia Arrangement (n 41) cl 3.

¹⁷⁶ *ibid.*, cl 19.

¹⁷⁷ *Immigration Act* 1959 (Malaysia), s 6(3). See *Plaintiff M70* (n 13) para 30 (French CJ).

¹⁷⁸ See Amnesty International, ‘Abused and Abandoned’ (n 9).

¹⁷⁹ Department of State, United States, ‘Trafficking in Persons Report 2010’, (14 June 2010) <<http://www.state.gov/documents/organization/142979.pdf>>.

¹⁸⁰ Cited in *Plaintiff M70* (n 13) para 28 (French CJ).

¹⁸¹ Senate Legal and Constitutional Affairs References Committee (n 16) para 4.13.

¹⁸² *ibid.*, para 3.42, referring to Amnesty International, Submission 13 to Senate Legal and Constitutional Affairs References Committee (n 116) 4–5.

¹⁸³ Senate Legal and Constitutional Affairs References Committee (n 116) paras 3.42, 4.13. See also the reports of various human rights organisations, documenting the ill-treatment of asylum seekers and refugees in Malaysia: Human Rights Watch (n 9); Amnesty International, ‘Abused and

refugees in Malaysia are forced to live has led to the country's ranking as one of the world's worst violators of refugee rights.¹⁸⁴

d) Asylum / Durable solutions

While the Refugee Convention does not provide an explicit right of enduring asylum, UNHCR has indicated that any transfer of refugees between States must give rise to a genuinely accessible durable solution. The Lisbon Expert Roundtable criteria for effective protection in transfer arrangements include that '[i]f the person is recognised as a refugee, effective protection will remain available until a durable solution can be found'.¹⁸⁵ This is reflected in section 198A(3)(a)(iii) of the Migration Act, which requires that a country to which an asylum seeker may be removed provides 'protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country'.¹⁸⁶

Under the Arrangement, transferees determined to be refugees by UNHCR would not have been eligible for any form of durable solution in Malaysia itself, but would have been 'referred to resettlement countries pursuant to UNHCR's normal processes and criteria'.¹⁸⁷ While Malaysia permits UNHCR to determine refugee status, UNHCR does not have the ability to grant durable solutions, instead referring refugees to third countries for resettlement. Malaysia hosts some 90,000 refugees and asylum seekers¹⁸⁸ and in 2010, only around 12,600 of these were referred for resettlement.¹⁸⁹ The Australia–Malaysia Arrangement expressly stated that the 800 asylum seekers Australia would send to Malaysia would have received 'no processing advantage';¹⁹⁰ indeed, this was part of the deterrence 'value' of Malaysia. The very lack of durable solutions was intended to make the Malaysia 'solution' a deterrent for those travelling to Australia in search of protection.

e) Children

The Australia–Malaysia Arrangement contained no exceptions for children, other than to stipulate that special procedures for vulnerable cases, including unaccompanied minors, 'will be developed'.¹⁹¹ The international obligations discussed above, relating to the principle of *non-refoulement* and adherence to international human rights standards, of course apply equally to children as to adult asylum seekers. Additionally, a

Abandoned' (n 9); Amnesty International, 'Human Rights at Risk' (n 9); UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention: Mission to Malaysia' (8 February 2011) UN Doc A/HRC/16/47/Ad.2.

¹⁸⁴ 'Five Asian Nations among Worst Violators of Refugee Rights, US NGO Says' (20 June 2008) <<http://reliefweb.int/node/270878>>.

¹⁸⁵ Lisbon Expert Roundtable (n 114) para 15(i).

¹⁸⁶ Migration Act 1958 (Cth), s 198A(3)(a)(iii).

¹⁸⁷ Australia–Malaysia Arrangement (n 1) cl 6.

¹⁸⁸ UNHCR, '2011 UNHCR Country Operations Profile: Malaysia' (2011) <<http://www.unhcr.org/pages/49e4884c6.html>>.

¹⁸⁹ UNHCR, 'UNHCR Global Report 2010: Malaysia' <<http://www.unhcr.org/4dfdbf516.html>>.

¹⁹⁰ Australia–Malaysia Arrangement (n 1) cl 12(2).

¹⁹¹ *ibid*, cl 8(2).

number of international instruments, including the Convention on the Rights of the Child (CRC), provide particular obligations on States with respect to minors such as Plaintiff M106. Most importantly, articles 3 and 18 of the CRC stipulate that the best interests of the child must be a ‘primary consideration’ in ‘all actions’ concerning children,¹⁹² and the basic concern of the child’s legal guardian.¹⁹³

Arguments about whether transfer to Malaysia would be in Plaintiff M106’s best interests were raised in *Plaintiff M70* by both the plaintiffs and by the Australian Human Rights Commission, which intervened in the case on the grounds that questions about the Minister’s role as guardian of unaccompanied minors involved ‘issues of broad public interest and concern’.¹⁹⁴ These arguments were grounded in both Australia’s international legal obligations, as well as the Minister’s role as M106’s guardian under the IGO Act.

As noted above, the High Court found it unnecessary to decide these matters, having already determined the Arrangement to be unlawful. However, it is notable that the Senate Committee’s Report described the provisions made for children under the Arrangement as ‘completely unacceptable’,¹⁹⁵ stating that ‘[t]o send unaccompanied minors to Malaysia without making detailed provision for their guardianship on arrival is a dereliction in the Minister’s duty as legal guardian of these children’.¹⁹⁶ Questions about the legality of transferring minors to third countries for processing of their refugee claims might therefore be expected to arise again in the future should the government seek to resume its search for further offshore processing alternatives.

D. Conclusion

The High Court’s decision in *Plaintiff M70* reinforced the need for governments to exercise care when entering into responsibility sharing arrangements concerning refugees and asylum seekers, and to ensure that proposed destination countries adhere to international human rights standards and can afford sufficient protections. In light of the decision, it remains to be seen whether Australia will continue to advocate for a regional protection framework—especially since very few countries in the region would satisfy the requisite criteria for a lawful transfer of asylum seekers. Ironically, the legislative stipulations in the Migration Act require more of third countries than Australia demands of itself when it comes to the protection of asylum seekers.

Were it ever minded to do so, Parliament could yet overturn the effect of the decision. Nevertheless, the case affirms important international legal principles about the movement of asylum seekers from one country to another and the meaning of effective protection.

TAMARA WOOD* AND JANE McADAM**

¹⁹² CRC, art 3.

¹⁹³ CRC, art 18.

¹⁹⁴ Australian Human Rights Commission, ‘Submissions on Behalf of the Australian Human Rights Commission (Intervening)’ (17 August 2011) in *Plaintiff M70* (n 13) para 7.

¹⁹⁵ Senate Legal and Constitutional Affairs References Committee (n 116) para 4.24.

¹⁹⁶ *ibid*, para 4.26.

* Faculty of Law, University of New South Wales, Australia.

** Faculty of Law, University of New South Wales, Australia; Australian Research Council Future Fellow.