

## SENDING ASYLUM SEEKERS ELSEWHERE: RECENT DEVELOPMENTS IN AUSTRALIAN 'SAFE THIRD COUNTRY' LAW

**Joanne Kinslor**

*Court decisions, plus changes to Australian legislation on refugee law, have the potential to sharply restrict claims for asylum in Australia. Officers making judgements at the primary and review level will have to take account of whether the applicant could have sought to take up or maintain rights to residence in Third countries. The Minister for Immigration can also designate 'safe third countries' which the applicant may have resided in. In either of these two circumstances the applicant may not be successful in his or her asylum claim.*

### INTRODUCTION

During 1999 the Australian Government expressed concern over Australia's rising number of on-shore asylum claims. Unauthorised arrivals by air and boat increased from 1,707 in 1997-98 to 3,032 in 1998-99.<sup>1</sup> While the number of asylum seekers reaching Australia's border continued to remain small in comparison with numbers in other western countries,<sup>2</sup> the Australian Government was (and continues to be) anxious about the increased costs of detention and of processing claims. Of particular concern to the Government is the increase in people smuggling and forum shopping that has accompanied this rise in numbers.<sup>3</sup> In order to address these issues the Government implemented a number of changes to Australian refugee law in 1999. These were designed to deter asylum seekers from coming to Australia, reduce processing procedures and limit the number of successful asylum seeker claims.

This article examines two aspects of the legislative changes that the Australian Government implemented in December 1999:

- the bar to on-shore asylum seekers making a valid application for a protection visa under S91N(2)-(5) of the *Migration Act 1958*; and
- the obligation upon asylum seekers to retain any residency rights that they

have, as stated in S36(3) of the *Migration Act 1958*.<sup>4</sup>

This discussion traces the development of the 'safe third country' concept in Australia.<sup>5</sup> It looks first at how the use of this concept involved a change in Australia's approach to the Refugee Convention, which was led by the Full Federal Court in *Minister for Immigration and Multicultural Affairs (MIMA) v Thiyagarajah* in 1997.<sup>6</sup> It then reviews the case law subsequent to the *Thiyagarajah* case, in order to observe how the 'safe third country' concept is being used in an increasingly restrictive manner against asylum seekers in Australia. Finally, this article uses the case law on this issue to discuss Australia's new 'safe third country' legislation, and analyse it in terms of Australia's obligations under the Refugee Convention.

### AUSTRALIA'S OBLIGATIONS UNDER THE REFUGEE CONVENTION

As a signatory to the UN Convention Relating to the Status of Refugees and subsequent Protocol<sup>7</sup> (hereafter the Refugee Convention) Australia is obliged to ensure that refugees who come to our borders are protected, either in Australia or another country.<sup>8</sup> Article 1A(2) of the Refugee Convention defines a refugee as a person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

This definition is expressly qualified by clauses 1C, 1D, 1E, 1F and Article 33(2) of the Refugee Convention.

Of particular relevance to this discussion is the exclusionary clause Article 1E. It states that the Convention 'shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of the country'. The effect of Article 1E is that someone who has already been granted the rights that citizens possess in a third country,<sup>9</sup> even if she/he does not have formal citizenship in that third country,<sup>10</sup> is not a refugee.

This exclusionary clause was originally designed to apply to ethnic Germans from central and eastern Europe, residing in Germany after the Second World War, but without German citizenship. Its purpose was to prevent these people claiming refugee protection and

require Germany to accept responsibility for them.<sup>11</sup> However, as a component of the definition of a refugee under the Refugee Convention, this clause may be applied more widely.

#### **ARTICLE 1E OF THE REFUGEE CONVENTION: ITS APPLICATION IN AUSTRALIAN LAW**

The Federal Court first considered Article 1E, in 1992, in *Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs*.<sup>12</sup> This case concerned a Sri Lankan national who had been accepted as a refugee in Norway, where he had lived from 1987 until 1990. In 1990 he left Norway for Australia on a Norwegian alien's passport that was valid until 12 July 1992.<sup>13</sup> In Australia, his application for refugee status was rejected, on the grounds that he was not a refugee, due to the operation of the exclusionary clause Article 1E.

This ruling was appealed. The appeal judge, Justice Olney, made it clear that it was not sufficient for the applicant to have refugee status in Norway for Article 1E to apply.<sup>14</sup> Thus, Justice Olney emphasised that Article 1E has a narrow application, which should be strictly applied and that the Department of Immigration and Multicultural Affairs (DIMA) be restrained from deporting the claimant until the matter was further considered..

In *Barzideh v Minister for Immigration and Ethnic Affairs*<sup>15</sup> Justice Hill further stressed the limited application of Article 1E. He held that Article 1E only excluded an asylum seeker being considered a refugee when she/he holds 'the same rights and is under the same obligations as a national'<sup>16</sup> of the country where she/he was residing.

In 1997, the Full Federal Court decision of *MIMA v Thiyagarajah*<sup>17</sup> also

considered Article 1E. In this case the respondent was a Sri Lankan national of Tamil ethnicity. Before he entered Australia in 1994 on a visitor's visa the respondent had been recognised as a refugee in France and had been granted permanent residency by France. He had also been given a travel document that allowed him re-entry into France. The issue before the court was whether the respondent had sufficient rights and obligations in France to satisfy Article 1E.<sup>18</sup> With regards to this issue, it had been found that he was eligible to apply for French citizenship, although he had not applied. It had also been found that without French citizenship, he was not eligible to vote and was barred from certain occupations, including work in the public service.

Relying on Article 1E, the Refugee Review Tribunal (RRT) had refused the respondent's application for a protection visa. That is, the RRT had decided that he was not a refugee because he held rights and obligations comparable to a French national and, therefore, had prior protection in France.<sup>19</sup>

This decision was appealed before Justice Emmett, who found that the RRT had erred in its interpretation and application of Article 1E. Justice Emmett emphasised that Article 1E was intended to have only a very limited application and did not extend to persons who had merely obtained refugee status in a state other than Australia or the state of their nationality. Justice Emmett found that Article 1E was only to apply to persons who had *all* the rights of a national other than actual citizenship and political rights.

However, on appeal to the Full Federal Court, the scope of Article 1E was not conclusively decided.<sup>20</sup> Guided by international developments (particularly

those occurring in Europe), the court<sup>21</sup> removed the need to apply Article 1E<sup>22</sup> and instead introduced the concept of protection in a 'safe third country' into Australian law.<sup>23</sup> The leading judgement in this case addressed the issue of whether the respondent could be removed from Australia by solely focusing upon whether he had 'effective protection' in France. Or, in other words, the focus was on whether France was a 'safe third country' in relation to the respondent.

The significance of this assessment was that if the respondent had 'effective protection' in France Australia could return him to France without breaching its non-refoulement obligations under the Refugee Convention, regardless of whether the respondent was a refugee or not. Thus, the Full Federal Court articulated the fact that, consistent with its obligations under the Refugee Convention, Australia could send an asylum seeker to a 'safe third country' without determining her/his refugee status.<sup>24</sup>

#### **THE 'SAFE THIRD COUNTRY' CONCEPT UNDER THE REFUGEE CONVENTION**

The non-refoulement obligations of the Refugee Convention are set out in Article 33(1), which states:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The 'safe third country' concept holds that a Contracting State acts in accordance with these obligations when it sends an asylum seeker back to a 'third country', which is considered to be 'safe'.<sup>25</sup> In this context 'third country' refers to a country other than the Con-

tracting State or the country of which the asylum seeker is a national.<sup>26</sup> 'Safe' is defined as a country where the asylum seeker is free from the threat of persecution.<sup>27</sup> Asylum seekers who travel beyond a 'safe' country<sup>28</sup> are considered 'forum shoppers'<sup>29</sup> who are engaging in 'migratory movement rather than movement necessary for the purpose of obtaining protection'.<sup>30</sup> Consequently, Contracting States have considered it reasonable for such asylum seekers to be subject to normal immigration controls.<sup>31</sup> Moreover, with respect to 'forum shoppers' who apply for asylum in two or more countries, concern has been expressed by many Western governments that are concerned that resources are wasted because two or more countries will be assessing the same claim.

In defending the notion that asylum seekers should apply for asylum in the first country available, reference has been made to Article 31(1) of the Refugee Convention, on the grounds that this article requires an asylum seeker to travel directly from the country in which they have suffered persecution.<sup>32</sup> Article 31(1) states:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without admission, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

However, using Article 31 as a justification for not considering an asylum seeker's claim to refugee status entails using this article in a manner that differs significantly from its original purpose. Article 31's original purpose was to recognise that refugees may not be able

to obtain proper immigration documents and may need to flee situations of persecution by extra-legal means.<sup>33</sup>

#### **'EFFECTIVE PROTECTION': THE 'SAFE THIRD COUNTRY' CONCEPT IN AUSTRALIAN CASE LAW**

*MIMA v Thiyagarajah* (1997) focused on Australia's non-refoulement obligations under the Refugee Convention (set out above) in order to examine how asylum seekers (whether they be refugees or not) may be returned to 'safe third countries' where they are not at risk of persecution. Justice Von Doussa stated that an asylum seeker could be removed in accordance with Australia's obligations under the Refugee Convention if it was determined that she/he had 'effective protection' in a third country (other than Australia or the country of her/his nationality). In deciding whether the asylum seeker had 'effective protection', Justice Von Doussa's judgments in *MIMA v Thiyagarajah* held that the following considerations should be addressed:

1. Whether the applicant has the right to reside in, enter and re-enter the third country;
2. Whether there is a risk that the third country will return the applicant to a country where he claims to fear persecution; and
3. Whether the applicant has a well-founded fear of persecution in the third country itself.<sup>34</sup>

Under *MIMA v Thiyagarajah* (1997), if the first of these questions can be answered affirmatively and the last two negatively, the applicant may be returned to the relevant 'safe third country'.

Judgments in subsequent cases have further considered the conditions which must be satisfied in order to effect removal to a 'safe third country' by deciding issues that were not relevant to

the factual situation in *MIMA v Thiyagarajah*.

*Rajendran v MIMA (1998)*<sup>35</sup> raised the issue of whether an asylum seeker who had not been recognised as a refugee in a country of prior protection could be removed without the Refugee Convention being breached. In this case, the appellant was a Sri Lankan national who had been granted permanent residence,<sup>36</sup> but not refugee status, in New Zealand prior to coming to Australia.

The Full Federal Court upheld the Federal Court judge's ruling that removal under *MIMA v Thiyagarajah* should not be restricted to cases where the applicant has been granted refugee status in the relevant third country.<sup>37</sup> It further confirmed that asylum seekers who were entitled to permanent residence (and, in time, citizenship) and had been provided with 'effective protection' in a third country could be safely returned there.<sup>38</sup>

In *MIMA v Gnanapiragasam (1998)*<sup>39</sup> the issue was whether an applicant could be returned to a third country in which she/he did not have permanent residency. The relevant applicants were spouses of Sri Lankan nationality who, before coming to Australia, had been granted permanent residency by Germany but this permanent residency was relinquished upon entry into Australia. It was relevant in this case that Germany was a party to the Refugee Convention, but it was not known whether Germany had earlier recognised the applicants as refugees.

Justice Weinberg of the Federal Court found that it was reasonable to assume the applicants would receive temporary residence in Germany and that they would be able to have their claim for refugee status assessed in Germany. He held that, therefore, the applicants may have 'effective protection' in Germany, despite not having permanent residency

there and that this should have been considered by the Refugee Review Tribunal. However, he did stipulate that a right to temporary residence alone was insufficient. Australia must also be satisfied that the third country would not refuse entry and that the third country would assess the applicants' claim to refugee status under the Refugee Convention.<sup>40</sup> Thus, he held that the minimum conditions discussed above, under the heading 'The 'Safe Third Country' Concept Under the Refugee Convention', must be satisfied, that is, that the relevant asylum seekers will not be persecuted in the relevant third country and that they will not be removed from the third country to a country where they are at risk of persecution.

Most recently, the application of the 'safe third country' concept was significantly broadened in *MIMA v Al-Sallal (1999)*.<sup>41</sup> This case is particularly important because it addressed the issue of whether a 'third country' need be a party to the Refugee Convention in order to provide 'effective protection'. The respondent was a stateless Bedoon who was born in Kuwait and had subsequently moved to Iraq and then to Jordan. The concern raised in this case was that if the respondent was returned to Jordan, which was not a signatory to the Refugee Convention, the respondent was at risk of being refouled to Iraq or Kuwait.

The Full Federal Court held that while it is relevant, it is not determinative whether a third country is a party to the Refugee Convention.<sup>42</sup> Rather, the relevant question is whether there is a 'real chance' that the applicant will be refouled from the relevant third country to their country of origin, where they have a well-founded fear of persecution.<sup>43</sup> The RRT's decision of fact: that the applicant had a right to re-enter and

reside in Jordan where he would not be refouled to Kuwait and where he had effective protection from the harm that he feared in Iraq and Kuwait, was upheld and the respondent's application for a protection visa denied.

**PROTECTION IN THIRD COUNTRIES UNDER SUBDIVISION AK OF THE MIGRATION ACT 1958<sup>44</sup>**

Under legislation S91N(2-5) of Subdivision AK passed in December 1999 asylum seekers who have resided for seven days or more in an 'available country'<sup>45</sup> which they have a right to re-enter and where they may reside cannot apply for a protection visa.<sup>46</sup> The stated purpose of this legislation is to ensure that an asylum seeker who 'can avail himself or herself of protection from a third country' does so. In such cases, an asylum seeker's claim to refugee status in Australia will not be assessed.<sup>47</sup>

Although this legislation does not use the phrase 'safe third country', its justification is comparable to the justification used for returning asylum seekers to 'safe third countries' because removal following the application of S91N is conducted on the assurance that an asylum seeker has protection outside Australia.<sup>48</sup> To the extent that the case law has held that asylum seekers may be returned to 'safe' countries without their refugee status being determined, this legislation codifies the case law. Nevertheless, s91N(2) is also distinct from previous case law in that it relies upon 'country assessments' rather than 'individual assessments' in order to determine whether a country is safe in relation to a particular asylum seeker. Moreover, it is different from previously implemented 'safe third country legislation'<sup>49</sup> because it allows countries to be listed without the existence of an international agreement addressing

their protection.<sup>50</sup>

The legislation states that asylum seekers who have a right to re-enter<sup>51</sup> and reside in an 'available country' about which the Minister has made a 'declaration' are prohibited from applying for protection visas in Australia. S91N states:

(2) This Subdivision applies to a non-citizen at a particular time if at that time:

a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the *available country*) apart from:

- i) Australia; or
- ii) a country of which the non-citizen is a national; or
- iii) if the non-citizen has no country of nationality — the country of which the non-citizen is an habitual resident; and

b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer period, for at least that longer period; and

c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice from the Office of the United Nations High Commissioner for Refugees:

a) declare in writing that a specified country:

provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

- i) provides protection to persons to whom that country has protection obligations; and
- ii) meets relevant human rights standards for persons to whom that country has protection obligations; or

iii) in writing, revoke a declaration

made under paragraph (a).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each house of Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

S91N(2) sets down three essential conditions, which must be satisfied before an asylum seeker can be barred from making a protection visa application. First, the asylum seeker must have a right to re-enter and reside in a third country (other than Australia or the asylum seeker's country of nationality) called an 'available country': s91N(a). Second, the asylum seeker must have resided in the relevant available country for at least seven days continuously. The seven days may have occurred at any time in the past: s91N(b). Third, the country to which the asylum seeker is to be returned must have been declared by the Minister to meet certain minimum standards: s91N(2) (c).

#### **When does a right to re-enter and reside in a third country exist?**

A right to re-enter and reside is one of the conditions of removal to third countries originally set down in *MIMA v Thiyagarajah*. The significance of this condition is that an asylum seeker must be able to re-enter and reside in a third country before she/he can be held to enjoy 'effective protection' in that third country, since 'effective protection' includes freedom from the risk of refoulement from that third country.<sup>52</sup>

Under *Tharmalingam v MIMA*<sup>53</sup> this right must be established in fact in the individual case as more than a possibility, but it does not need to be guaranteed by the third country. In this particular case the applicant had been residing in France and had travelled to Australia on a French visa, which he had not renewed within the

stipulated time limit. On the issue of the applicant's right to re-enter and reside in France, the RRT concluded that, although the applicant's re-entry to France was not guaranteed, it was highly likely that France would renew his visa if he were refused a protection visa in Australia. Relying on this finding, the RRT refused to grant the applicant a protection visa on the grounds that he had effective protection in France. The Federal Court dismissed two appeals against this decision.

#### *The use of international agreements*

Australia may use bilateral or multilateral agreements in order to establish a right for asylum seekers to re-enter and reside in particular countries.<sup>54</sup> However, developing workable agreements that accord with international human rights standards is a difficult process. An example was the protracted, yet failed, attempt of the US and Canada to develop an agreement which the US could use in legislation similar to Australia's new legislation.<sup>55</sup>

Moreover, once readmission agreements are established they can be difficult to operate because states are often reluctant to accept returned asylum seekers. For instance, in Germany, decision-makers now seek to avoid using readmission agreements because receiving states often protract and complicate the readmission process and interpret readmission agreements restrictively in an effort to avoid receiving asylum seekers.<sup>56</sup>

#### *The right to re-enter and reside may be temporary*

It is noteworthy that an asylum seeker's right to temporarily re-enter and reside in a third country is sufficient to satisfy the first condition of S91N(2). This is consistent with Justice Weinberg's judgement in *MIMA v Gnanapiragasam (1998)*. In his judgement, Weinberg states that '(t)here is

no reason in principle why Article 33 should rest upon nothing less than an entitlement to “permanent residence” in the “safe third country”.<sup>57</sup> Nevertheless, a right to temporary residence depends upon the finding that a third country is safe for an asylum seeker to return to and if the right will create an opportunity for the asylum seeker to have their claim for refugee status assessed in accordance with the Refugee Convention.<sup>58</sup> This emphasises the importance of this condition being coupled with the other conditions of s91N(2), since a right to temporary re-enter and reside is not sufficient in itself to guarantee effective protection in a third country. Rather, as Justice Weinberg states, an examination of an asylum seeker’s right to re-enter and reside should constitute part of an individual assessment of an asylum seeker’s situation. Justice Lehane in *Al-Anezi v MIMA* describes the case law’s approach to this issue thus:

What the cases emphasise is that the inquiry is directed to the position of the particular applicant. Has the applicant a right of admission (or readmission) to the third country concerned? Has the applicant a right to reside there? Will the third country give proper consideration to the applicant’s claim for protection as a refugee? Information concerning the attitude of the third country generally to persons in positions analogous to that of the applicant is relevant to the inquiry. But the inquiry is directed to the rights and treatment which the third country will accord to the particular applicant.<sup>59</sup>

The legislation passed in December 1999 is consistent with this approach, in that s91N(2)(a) addresses the first and second questions and s91N(3)(i) addresses the third question. The legislation also employs general third country information in assessing an individual’s situation. However, the inquiry set down in the

legislation is not ‘directed to the rights and treatment that the third country will accord to the particular applicant’. Instead, the rights and treatment that an asylum seeker will receive in a third country are assessed according to general country information, as directed by s91N(3).

#### **Past residence in an available country**

S91N(2)(b) stipulates that an asylum seeker must have a connection with the relevant third country of residence for a minimum of seven continuous days<sup>60</sup> for s91N to operate. The issue of how long an asylum seeker should have resided in a third country is relevant to the operation of the ‘safe third country’ concept in that it provides information as to the opportunity that the asylum seeker had to seek and gain refugee status in that third country.<sup>61</sup> This issue is particularly pertinent to Australia because ‘the geographical situation of Australia is such that it is unlikely any refugee will reach its shores as a result of a direct flight’.<sup>62</sup>

Australia’s minimum requirement of seven days means that asylum seekers who have made short transit stops in third countries are not excluded from applying for protection visas under s91N. However, asylum seekers who stop in countries for seven days or longer will satisfy this clause, unless the Migration Regulations have lengthened this time period in a specific instance. This raises the issue of whether asylum seeker’s who have stayed in a country for a period of seven days or more on their way to Australia should be considered to have broken their journey and to have had sufficient opportunity to seek asylum outside Australia. With respect to this issue, Justice Nicholson accepted, in *Kabail (1999)*, that the asylum seeker could be unaware of her rights to residency after

being in that country (in Kabail's case, Italy) for one month. In subsequently setting this time limit at seven days, the Australian Government has expressed its disagreement with Justice Nicholson's assessment. However, the Government has not provided reasons, nor justification, for the time frame that it has set down. It is of concern that this seven-day requirement does not allow for assessment of an asylum seeker's individual circumstances. This is in direct opposition to opinion expressed in Australian case law, which stresses that for decisions of this nature to be made in accordance with the Refugee Convention, they each 'should be considered on (their) own circumstances'.<sup>63</sup> Whether the Minister's power to intervene and allow an application to be made because of an individual's circumstances is sufficient to remedy this problem is discussed below.

#### **The receiving country declared to be meet minimum standards**

##### *Three basic criteria*

Section 91N(2) can only operate to remove an asylum seeker to a 'safe third country' if the Minister has declared that country to meet certain minimum protection standards. First, a country must provide effective procedures for asylum seekers to have their claims for protection assessed: s91N(3)(a)(i). Second, it must provide protection to persons to whom it has protection obligations: s91N(3)(a)(ii). Third, it must protect the basic human rights of those to whom it owes protection: s91N(3)(a)(iii). A declaration may only be made under s91N(3) after the Minister has considered any advice of the United Nations High Commission (UNHCR).<sup>64</sup>

Under *MIMA v Al-Sallal (1999)* countries such as Jordan, that are not signatories to the Refugee Convention, may

satisfy s91N(3)(a)(i). The reason why a country such as Jordan would satisfy s91N(3)(a)(i) is that it had been found to protect refugees, even though it had not made a formal commitment to do so. That is, Jordan in fact provides protection to asylum seekers to whom it has protection obligations under international law, even though it has not formally accepted that it is under such obligations.<sup>65</sup> The RRT found, in *Al-Sallal*, that Jordan respects the right of refugees to asylum in accordance with the UNHCR's guidelines, and that it does not refole/deport refugees.<sup>66</sup> However, *Al-Sallal* was concerned with the circumstances of an individual asylum seeker and, therefore, it is uncertain whether this ruling can be extended to cover 'country assessments' made under s91N(3). One of the issues pertinent to this question is raised by a finding made by the RRT in *Al-Sallal*. The RRT found that, as an exception to Jordan's practice described above, in March 1995 Jordan had forcibly repatriated an Iraqi national without permitting the UNHCR to mediate in the matter.<sup>67</sup> Since the asylum seeker in *Al Sallal* was not an Iraqi this finding was not relevant to the decision made in that case, which was only concerned with an individual.<sup>68</sup> By contrast, however, such a finding would be relevant to assessing Jordan under s91N(3)(a)(i). This is because a declaration made under s91N(3) applies to all asylum seekers from the declared country. However, such a finding may not be determinative in the making of a declaration because a country does not need to be able to guarantee protection under the Refugee Convention in order to be viewed as a country that provides protection to persons to whom it has protection obligations.<sup>69</sup>

S91N(3)(a)(iii) requires that the third country treat asylum seekers in accor-

dance with basic human rights standards. This refers to the standards set out in international conventions such as the United Nations Declaration of Human Rights, the Convention Against Torture and the International Convention and Civil and Political Rights.

A final assessment on the operation of s91N in terms of Australia's non-refoulement obligations under the Refugee Convention will depend upon how this provision is interpreted. The legislation does not specifically define phrases used in the legislation, such as 'effective procedures', 'protection obligations' and 'relevant human rights standards'. Knowing what definitions will be used is necessary for discovering the standards by which Australia will assess countries that are not signatories to the Refugee Convention<sup>70</sup> and signatories that interpret its provisions restrictively.<sup>71</sup> Furthermore, an assessment of whether this clause will operate in accordance with the Refugee Convention must incorporate information about how the status of countries listed under s91N(3) will be reviewed. In this regard, DIMA has advised the author that it constantly monitors the law and practice of countries with respect to asylum seekers and would, therefore, be in a position to promptly advise the Minister of changes that occur in declared countries. Such information may be used by the Minister to revoke a declaration in appropriate circumstances.<sup>72</sup>

*Determination on a collective rather than individual basis*

What is evident about clause s91N(3) is that it allows determinations to be made about a country's conditions that may then apply to a group of people. This is in contrast to determinations on country conditions being made in relation to an individual. For countries such as Ger-

many and the United Kingdom, such 'group determinations' are 'justified' as the only viable means for dealing with mass migration movements. Australia's primary motivation is for implementing this legislation is forum shopping.

The problem with using such 'group determinations' is that, although a country may be generally 'safe', it may not be 'safe' in relation to certain individuals. A further difficulty is that conditions within a country may vary, thus undermining an overarching declaration about a country. Being aware of such issues, Australian courts have stated in the past that 'the individual circumstances of the asylum-seeker are central to any refugee claim'<sup>73</sup> when assessing removal to a 'safe third country'.

**DISCRETION OF THE MINISTER**

Section 91Q of the *Migration Act 1958* sets out the circumstances under which the Minister may determine that, contrary to s91N, an asylum seeker should not be barred from applying for a protection visa under s91P. In such instances, an asylum seeker would have seven days to re-submit a protection visa application: s91Q(1). The Minister may exercise this discretion in circumstances where an asylum seeker 'might not be able to avail himself or herself of protection from the country, or any of the countries' that she/he may be removed to under ss91N-P.<sup>74</sup> However, the discretion may only be exercised if it is in 'the public interest' for the Minister to do so.<sup>75</sup>

This is an important discretion which provides an opportunity for an asylum seeker's individual circumstances to be examined. Unfortunately, the nature of this discretion makes it an inadequate safeguard for ensuring that Australia's non-refoulement obligations are not breached.<sup>76</sup>

First, this discretion that ‘may only be exercised by the Minister personally’: s91Q(3).<sup>77</sup> Considering the many responsibilities that the Minister has and the thousands of requests he currently receives each month under ‘discretion clauses’<sup>78</sup> similar to s91Q, it is unreasonable to expect the Minister to have the time to properly consider each request in accordance with Australia’s non-refoulement obligations. Rather, DIMA officials will deal with the majority of applications. Such officials will be provided with guidelines for forwarding particular cases to the Minister for consideration, but are not to assess thoroughly an application themselves.

Second, this discretion constitutes a political decision which is made by a politician and is tabled in Parliament: s91Q(4). Procedural fairness is compromised in this process because the Minister is not an independent decision-maker free from immigration control and other government interests.<sup>79</sup> Moreover, the public and political nature of decision making using the discretion may be influenced by political concerns, such as an unwillingness to condemn a particular country in Parliament.

Third, this safeguard is compromised by its inadequate review mechanisms. S91Q(7) states that the Minister cannot be forced to make a decision as to whether this discretion should be used or not. This means that if the Minister decides not to consider whether to use the discretion he/she cannot be questioned. Moreover, when the Minister makes an unfavourable decision against an applicant, the applicant does not have effective access to judicial review because the discretion is ‘non-compellable’.<sup>80</sup> That is, a court cannot quash or set aside a decision made under s91Q, nor require the Minister to further consider the decision.

## **AN OBLIGATION TO RETAIN**

### **RESIDENCY RIGHTS: S36(3)**

In the event that an asylum seeker is not barred from making a protection visa application under s91N, s36(3) of the Migration Act 1958, also passed in December 1999, may nevertheless act to exclude her/him from protection in Australia. S36(3) states:

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

This section operates independently of s91N. This means that it may be applied in instances when s91N cannot be applied and that it is operating now, while s91N(2) remains inoperative (due to the fact that, as yet, the Minister has not made a declaration about any country in accordance with s91N(3)).

S36(3) works similarly to s91N(2) in that it states that Australia is not obliged to protect asylum seekers who have a right to enter and reside in a country outside of Australia, on the proviso that the asylum seeker does not have a well founded fear of being persecuted for a Convention reason in that country or a fear of being refouled by that country to another country where she/he fears persecution: s36(4) and (5).

S36(3) differs from s91N(2) in that it is not limited to third countries, but instead applies to an asylum seeker’s country of nationality. Moreover, the ‘nationality’ that is relevant to this provision is nationality that is ‘determined solely by reference to the law of that country’: s36(6). This may change the situation for East Timorese asylum seek-

ers. Previous to this legislation the case law has held that asylum seekers from East Timor must have 'effective nationality' in Portugal to be refused protection: *Jong Kim Koe v MIMA (1997)*.<sup>81</sup> In contrast, under s36(3)-(6) it may be sufficient that East Timoreans have Portuguese nationality according to the laws of Portugal.<sup>82</sup> If this is the case, East Timorese asylum seekers who have not pursued all avenues in an effort to gain residency in Portugal may be denied protection in Australia under s36(3).

S36(3) also differs from s91N(2) in that it does not act as a bar to an asylum seeker making a protection visa application. Rather, decision-makers should take s36(3) into account in the process of considering a protection visa application. Finally, s36(3) is distinct from s91N in that it expressly places an obligation upon asylum seekers to ensure that they maintain any residency rights that they have. This is consistent with the ruling in *MIMA v Prathapan (1998)*<sup>83</sup> which held that an asylum seeker's unwillingness to take up protection in a third country must be based upon a well-founded fear of persecution for a Convention reason.

However, it is not clear whether the 'right to enter and reside' which is the subject of s36(3) must exist at the time when an asylum seeker's application is being considered. This provision may cover situations where the asylum seeker had a 'right to enter and reside', which they failed to take up and consequently lost. In this event it is likely that Australia would not be able to remove such an asylum seeker to a third country (because the asylum seeker would have lost her/his right to re-enter that country) and that, therefore, the asylum seeker would be left

in immigration detention, due to the fact that Australia has excluded him/her from protection.

## CONCLUSION

The most significant distinction between the case law and s91N(2) is that s91N(2) allows an asylum seeker to be barred from making a protection visa application without their individual circumstances being thoroughly considered. The case law bars asylum seekers from having their refugee status assessed if they have 'effective protection' in a third country. Nevertheless, it considers the individual circumstances of an asylum seeker in deciding whether she/he had 'effective protection' in a third country. By contrast, under s91N(2), the Minister for Immigration may declare countries to be 'safe' and, following this, decision-makers can assume that all asylum seekers travelling from the listed countries will be afforded protection in those countries and may be returned there if they have a right to re-enter and reside there.<sup>84</sup>

Looking at the combined effect of developments in Australian case law and the legislative changes discussed above, the situation that asylum claimants face in Australia is changing significantly. Almost all the boat people from the Middle East have been receiving three year protection visas. This is unlikely to continue as decision makers considering protection claims take account of the decision of *Al Sallal* as well as the new legislation regarding 'safe third countries' about which the Minister has made a declaration and the new legislation concerning 'obligations to retain residency rights'.

## References

- <sup>1</sup> Refer to Department of Immigration and Multicultural Affairs (DIMA) Referrals System and Manual Compilation, Table 1.1-2 in DIMA, *Protecting The Border: Immigration Compliance*, Commonwealth of Australia, 1999 at p. 69.
- <sup>2</sup> For example, in 1999, 71,000 claims were made in the United Kingdom, 90,000 in Germany (down from a high of 438, 000 in 1992) and 8,000 in Australia.
- <sup>3</sup> Refer to DIMA, op.cit.
- <sup>4</sup> *Migration Act 1958* Part 2, Division 3, Subdivision AK
- <sup>5</sup> This article does not specifically examine Australia's 'safe third country' legislation as set out in the *Migration Act 1958* (the Act) ss91A-G. Briefly, this legislation, implemented in 1994 and 1995, currently acts to disallow two groups of asylum seekers from applying for protection visas in Australia (thus making them subject to removal under Division 8 of the Act). The first group is made up of asylum seekers covered by the UN brokered Comprehensive Plan of Action (Refer to s91B(1)). The second group consists of Sino-Vietnamese asylum seekers covered by Australia's Memorandum of Understanding with the People's Republic of China (See Migration Regulations Schedule 11). For a discussion of this legislation refer to S. Taylor, 'Australia's "Safe third country" provisions: their impact on Australia's fulfillment of its non-refoulement obligations', *University of Tasmania Law Review*, vol. 15 no. 2 1996, pp. 196-233
- <sup>6</sup> Australian Law Reports (ALR), vol. 151, case beginning p. 685
- <sup>7</sup> The Protocol was signed by Australia on 31 January 1967 and ratified on 13 December 1973.
- <sup>8</sup> Article 33(1) of the Refugee Convention states that Contracting States to the Convention shall not 'expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.
- <sup>9</sup> What these rights are will be discussed below. At the minimum the clause requires that the person be protected against refoulement and possess basic human rights: see *Migration Act 1958* Procedures Advice Manual (PAM) para 3.7
- <sup>10</sup> UNHCR 1992, para. 144 in PAM para. 3.2
- <sup>11</sup> *ibid.* at para. 3.3
- <sup>12</sup> Justice Olney, unreported, September 1992
- <sup>13</sup> He had also been granted a settlement permit in September 1989.
- <sup>14</sup> Justice Olney recognised that under the Refugee Convention refugees are to be accorded the same basic rights as nationals, such as freedom to practice their religion, access to the courts and elementary education. Yet, he stated that 'in other respects the status of refugee confers only the same rights as an alien'. Therefore, refugee status is insufficient to satisfy Article 1E. See *Nagalingum v MILGEA* (1992) Federal Court Reports, p. 191, paragraph 25
- <sup>15</sup> ALR, vol. 139, 1996, case beginning p. 710
- <sup>16</sup> *ibid.*, p. 720
- <sup>17</sup> ALR, vol. 151, 1997, case beginning p. 685
- <sup>18</sup> If Article 1E was satisfied, he could be removed from Australia on the grounds that he was not a refugee.
- <sup>19</sup> The respondent's argument that he feared persecution in France, making him a refugee from France, was rejected. See footnote 17, Justice Von Doussa, pp. 688-89
- <sup>20</sup> See also *MIMA v Thiyagarajah*, ALR, vol. 169, 2000, case beginning p. 515. This is the decision of the High Court of Australia on an appeal by the Minister for Immigration against the Full Federal court's orders in this case. On p. 519 the majority of the High Court states that the Full Federal Court agreed with the decision of Justice Hill (in *Barizideh v Minister for Immigration and Ethnic Affairs*, ALR, vol. 139, 1996, case beginning p.70) on the construction of Article 1E, which Justice Emmett had basically agreed with also. Nevertheless, they go on to explain that the Full Federal Court did not hold that the tribunal had made an error of law, even though Justice Emmett had held that it had. Justice Gaudron in dissent concluded that, by implication, the Full Federal Court held that the RRT had incorrectly interpreted Article 1E, but that the RRT's decision could be sustained on a basis not considered by the tribunal. (Therefore, the error of law made by the RRT was only considering part of the respondent's application.) Refer *MIMA v Thiyagarajah*, per Justice Gaudron at pp. 530-1
- <sup>21</sup> Justice Von Doussa wrote the leading judgement in this case. Justices Moore and Sackville both agreed with his judgment.
- <sup>22</sup> Refer also to *MIMA v Thiyagarajah*, op.cit., p. 518. The majority of the High Court expresses the approach of the Full Federal Court thus: 'The Full Court did not approach the matter as turning upon the application of Art 1E. Rather, it dealt with the matter on the footing that it was unnecessary to determine the scope of Art 1E, if, in any event, Australia did not owe the respondent protection obligations.'

- <sup>23</sup> As Justice Von Doussa explains in his leading judgement, this change in approach was facilitated by changes to the *Migration Act 1958*. Previously, the Act directed a decision-maker to decide whether an asylum seeker was a refugee or not. However, at the time of this decision, the Act did not confine the decision-maker to the question of whether an asylum seeker has refugee status, but broadened the question to that of whether Australia owes protection obligations to the relevant asylum seeker under the Refugee Convention. Refer also to *MIMA v Thiyagarajah* (2000) HCA 9, p. 519
- <sup>24</sup> Under *Thiyagarajah* asylum seekers may also be returned to their country of nationality. However, this discussion will focus upon its application to third countries.
- <sup>25</sup> Another term for the concept described here is the ‘first country of asylum’ principle. In fact, Justice Weinberg suggests that the phrase ‘safe third country’ has been incorrectly used. Refer *MIMA v Gnanapiragasam* (1998) 88 FCR 1 at 13. Nevertheless, the author has chosen to employ this term because of its wide usage.
- <sup>26</sup> For asylum seekers without a nationality Article 1A(2) of the Refugee Convention indicates that the relevant country is that where the asylum seeker was ‘habitually resident’.
- <sup>27</sup> There is dissension amongst nations as to what constitutes a ‘safe’ country and how this should be determined. However, there is a general consensus that the ‘safe third country’ must not be a place where the asylum seeker has a well-founded fear of persecution on one of the grounds set out in the Refugee Convention and that the ‘safe third country’ must not be one that will send the asylum seeker to a country where he/she will be at risk of persecution as defined by the Refugee Convention. Refer to S. Taylor, op.cit at pp. 201-209, especially p. 204.  
Moreover, in 1993, the United Nations High Commission for Refugees (UNHCR) set down three conditions for removal to a ‘safe third country’ under the Refugee Convention. Namely that:
1. the transit country will admit the asylum seeker to its territory;
  2. observe the principles of *non-refoulement* and generally treat the asylum seeker with accepted international standards; and
  3. will consider his or her claim and, if appropriate, will allow the asylum-seeker to remain as a refugee.
- UNHCR (London), ‘The safe third country’ policy in light of international obligations of countries vis-à-vis refugees and asylum seekers’ 2809 (1993) in R. Bryne and A. Shacknove, ‘the safe third country notion in European asylum law’, *Harvard Human Rights Journal*, Vol. 9, 1996 at 191
- <sup>28</sup> In the sense that a ‘safe country’ may be a ‘Safe Country of Origin’ or a ‘Safe Country of Asylum’, the concept discussed here is the ‘Safe Country of Asylum’ concept. The concept of ‘Safe Country of Asylum’ holds that an asylum seeker can correctly be returned to a country where they have gained asylum or had an opportunity to gain asylum, on the proviso that the relevant country is safe and will not *refoules* them to a country in which their safety will be jeopardized. Refer to *UNHCR Executive Committee Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991 in R. Plender (ed.), *Basic Documents on International Migration Law*, Second Edition, Martinus Nijhoff Publishers, The Hague, 1997 at p. 201.
- <sup>29</sup> Forum shoppers are asylum seekers who seek out a particular country in which to claim protection, rather than claiming protection in the first country that they arrive at. This practice is generally condemned on the grounds that the movement of forum shoppers is migratory movement used to gain residency in developed countries, rather than that necessary for gaining protection. However, there is also an argument that asylum seekers should be given some freedom to choose a country because they are likely to seek protection in a country where they have relatives or a country whose residents share their language or culture. This is viewed as positive because it is thought that such factors will facilitate successful resettlement.
- <sup>30</sup> Taylor, op.cit., p. 201
- <sup>31</sup> *ibid.*
- <sup>32</sup> Refer to G Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 1983
- <sup>33</sup> Refer to R. Byrne and A. Shacknove, ‘The safe third country notion in European asylum law’, *Harvard Human Rights Journal* vol. 9, 1996, pp. 189-90. The contrast between the original design of this article and its contemporary use as described here highlights the fact that a preoccupation with the textual content of a clause such as this can lead government away from focusing upon the primary purpose of Article 31: to protect refugees, regardless of their legal status.
- <sup>34</sup> The Full Federal Court has agreed that this is a correct summary of the law set down in *MIMA v Thiyagarajah*. See *Saleh Safaq Sayah Al-Zafiry v Minister for Immigration and Multicultural Affairs* Full Federal Court at Sydney, 29 October 1999, [1999] Federal Court of Australia, no. 1472, paragraphs 10-11.
- <sup>35</sup> FCR vol 86, 1998, case beginning p.526
- <sup>36</sup> He still had this at the time of the Full Federal Court’s decision.
- <sup>37</sup> *Rajendran v Minister for Immigration*, FCR vol. 86, 1998, p. 529
- <sup>38</sup> *ibid.*
- <sup>39</sup> Weinberg, Federal Court of Australia, 25 September 1998.
- <sup>40</sup> *ibid.* p. 21-3
- <sup>41</sup> FCA, 1332 N 369 of 1999, Justices Heerey, Carr and Tamberlin

- <sup>42</sup> The fact of a country being a party to the Refugee Convention is not determinative either. That is, a party to the Refugee Convention may not offer effective protection to asylum seekers. Refer *MIMA v Al-Sallal* *ibid.* at paragraph 47.
- Savitri Taylor highlights situations where a country should not be considered 'safe', despite its formal commitments. These include the situation where the country is not 'safe' in relation to a particular group of people towards which it has previously violated its non-refoulement obligations. Alternatively, it may be that the country has an overly restrictive definition of what constitutes a 'refugee', or that its determination system does not meet minimum procedural requirements and will, therefore, be unable to identify some asylum seekers who are refugees. See S. Taylor, *op. cit.* at p. 207
- <sup>43</sup> *MIMA v Al-Sallal* *op. cit.* at paragraphs 43-47
- <sup>44</sup> Part 2, Division 3 *Migration Act 1958*
- <sup>45</sup> The characteristics that an available country must have are set out below.
- <sup>46</sup> Refer to the *Migration Act 1958* s91N. Asylum seekers in this category who have not been through immigration clearance are not able to apply for any visa in Australia, while those in this category who have entered Australia on a valid visa are barred from applying for a protection visa in Australia: s91P *Migration Act 1958*.
- <sup>47</sup> *Migration Act 1958* s91M
- <sup>48</sup> Asylum seekers who have not been through immigration clearance will almost certainly be removed following application of s91N(2), unless the Minister intervenes under s91Q. This is because they will be ineligible to apply for any visa in Australia: S91P. Without a substantive visa or a bridging visa (pending the outcome of a visa application) such persons are liable for immediate deportation under Division 8 of the *Migration Act 1958*. Asylum seekers who come under s91N(2) and have been immigration cleared are in the same situation unless they are eligible to apply for a visa other than a protection visa: refer to s91P.
- <sup>49</sup> *Migration Act 1958* ss91B, 91C, 91D
- <sup>50</sup> This is not to imply that bilateral and multilateral agreements will not be used to implement this legislation, but only to state that as the legislation presently stands, there is no requirement that such agreements be used in its operation.
- <sup>51</sup> The relevant asylum seekers must have previously been in the available country for at least seven days: s91N(2)(b).
- <sup>52</sup> Refer to *Tharmalingam v Minister for Immigration & Multicultural Affairs* [1999] FCA 1180
- <sup>53</sup> [1999] FCA 559 NG 1192 of 1998, Justice Beaumont and [1999] FCA 1180 N 411 of 1999, Justices Ryan, Tamberlin and Madgwick
- <sup>54</sup> The Australian government has indicated that it is currently negotiating agreements that may be applied in this manner. Refer to DIMA, *op.cit.*, p. 20
- <sup>55</sup> Refer to D. Anker, *Law of Asylum in the United States*, pp. 453-4
- <sup>56</sup> K Hailbronner, 'New Techniques for Rendering Asylum Manageable' in K Hailbronner, D. Martin and H Motomura (eds) *Immigration Controls: The Search for Workable Policies in Germany and the United States*, 1998 p. 162
- <sup>57</sup> FCR 1, vol. 88, 1998, p. 13
- <sup>58</sup> Refer to *ibid.*, p. 18
- <sup>59</sup> *Al-Anezi v Minister for Immigration & Multicultural Affairs* [1999] FCA 355 per Justice Lehane at paragraph 15.
- <sup>60</sup> This period may be extended under the Migration Regulations: s91N(b)
- <sup>61</sup> Refer to *Minister for Immigration & Multicultural Affairs v Kabail* [1999] FCA 344 N15 of 1999 R D per Justice Nicholson paragraph 11
- <sup>62</sup> *ibid.*, paragraph 10
- <sup>63</sup> *ibid.*, paragraph 11
- <sup>64</sup> The author has been advised by DIMA that as of June 2000 no countries have yet been listed by the Minister.
- <sup>65</sup> Alternatively, it may be held that s91N(3)(a)(ii) may only be satisfied when a country has accepted that it has protection obligations under the Refugee Convention.
- <sup>66</sup> *Al-Sallal v MIMA* [1999] FCA 369 NG 1306 of 1998, per Justice Katz, paragraph 24
- <sup>67</sup> *ibid.*
- <sup>68</sup> *ibid.*
- <sup>69</sup> Refer to *MIMA v Prathapan*, ALR, vol. 156, 1998, case beginning p. 681
- <sup>70</sup> The legislation makes no indication that an 'available' country must be a signatory to the Refugee Convention.

- <sup>71</sup> Although not coming to a conclusion, Justice Von Doussa broaches the issue of ‘judging’ other signatories in *Sameh v MIMA*. He examines the approach of the United Kingdom where it has been held to be ‘unrealistic’ to expect that signatories will interpret the Refugee Convention similarly and that, following this, another state’s interpretation should be accepted unless the interpretation is so different that it is ‘outside the range of possible interpretations’: *Kerrouche v Home Secretary* [1997] Imm AR 610 per Lord Woolf MR pp. 614-15.
- <sup>72</sup> A declaration may be revoked under s91N(3)(b).
- <sup>73</sup> *Al-Zafiry v Minister for Immigration & Multicultural Affairs* [1999] FCA 1472 No 308 of 1999 per Justices Heerey, Carr and Tamberlin, paragraph 24. Refer also to *Al Alnezi v Minister for Immigration & Multicultural Affairs* [1999] FCA 355 NG 1225 of 1998 per Justice Lehane, p. 15
- <sup>74</sup> S91Q(2)
- <sup>75</sup> S91Q(1),(4)
- <sup>76</sup> While the focus of this article has been Australia’s obligations under the Refugee Convention, it is important to remember that Australia also has non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture). Article 7 of the ICCPR places an obligation on Australia not to remove a person to a State where they will be at risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment, refer Taylor, op.cit., p. 199-200. Article 3 of the Convention Against Torture obliges Australia not to ‘expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.
- <sup>77</sup> It has been held that in circumstances in which the Minister holds a personal discretion only a decision not to consider whether to use the discretion can be delegated to officials from the Department of Immigration and Ethnic Affairs. Refer to *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*, ALR, vol. 141, 1996, case beginning p. 322.
- <sup>78</sup> Refer ss345, 351, 391, 417, 454
- <sup>79</sup> S. Taylor, ‘Australia’s implementation of its non-refoulement obligations under the convention against torture and other cruel, inhuman or degrading treatment or punishment and the international covenant on civic and political rights’ University of New South Wales Law Journal, vol. 17, no. 2, 1994, p 464
- <sup>80</sup> Refer to *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*, op. cit., for discussion of this type of discretion.
- <sup>81</sup> ALR, vol. 143, 1997, case beginning p. 675
- <sup>82</sup> As was found to be the case in *Jong*. Refer to K Anderson, “East Timorese Refugees not Portuguese”, *Law Institute Journal* , p. 50
- <sup>83</sup> ALR, vol. 156,1998, case beginning p. 672
- <sup>84</sup> Subject to the Minister’s discretion, as discussed above.