

2003

The Shifting Meaning of Persecution in Australian Refugee Law: How Much Must One Suffer to be Deserving of Asylum?

Penny Dimopoulos
Monash University

Mirko Bagaric
Deakin University

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The Shifting Meaning of Persecution in Australian Refugee Law: How Much Must One Suffer to be Deserving of Asylum?

Abstract

This article examines legislative changes to the meaning of persecution in Australia in the context of refugee law. In particular it considers the level of harm that a person must endure to be eligible for refugee status. The reflexive humanitarian response is that even relatively low levels of harassment and discrimination should suffice. However, it is argued that this approach is flawed. Given the limited number of refugees that states are prepared to accept, a narrow definition of persecution should be adopted, such that only asylum seekers whose subsistence is imperiled should qualify as refugees.

Keywords

refugee law, persecution, asylum seekers, Migration Act 1958

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING OF ASYLUM?

Penny Dimopoulos and Mirko Bagaric***

This article examines legislative changes to the meaning of persecution in Australia in the context of refugee law. In particular it considers the level of harm that a person must endure to be eligible for refugee status. The reflexive humanitarian response is that even relatively low levels of harassment and discrimination should suffice. However, it is argued that this approach is flawed. Given the limited number of refugees that states are prepared to accept, a narrow definition of persecution should be adopted, such that only asylum seekers whose subsistence is imperiled should qualify as refugees.

Introduction

The Australian Parliament has recently enacted legislation concerning the meaning of persecution in refugee law. The changes were driven by concerns caused by the courts gradually expanding the meaning of persecution, to the point where it amounted to relatively slight harm. Ostensibly, the reforms confine persecution to serious forms of harm. However, the (non-exhaustive) manner in which the relevant section is drafted allows the courts to continue with a liberal reading of the term. To date the meaning of serious harm as set out in the statute has not been interpreted by the courts.

This paper looks at the background to the changes and then discusses the manner in which this section ought to be interpreted by the courts. The reflexive humanitarian approach to the issue would urge a broad reading of the section. However, doing this will not necessarily provide the kindest or most appropriate means of dealing with the problems of refugees.

The next part of this paper provides an overview of the concept of persecution and spells out the recent legislative changes. In section three, we discuss the manner in which persecution was interpreted by courts prior to the legislative changes. In section four, we discuss the way in which the legislative changes should be interpreted. It is argued that persecution should be interpreted narrowly, so that only people who are subject to a high degree of harm should qualify for refugee

* BA LLB, Assistant Lecturer, Monash University.

** BA LLB (Hons), LLM, PhD, Professor and Head of School, Deakin University.

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING OF ASYLUM?

assistance. Given the competition that exists for refugee spots in Australia and the rest of the world, persecution should be interpreted narrowly, so that only the people most at risk qualify for asylum. A related reason to adopt a narrow interpretation is that refugee law was never intended to assist people leaving their countries for 'reasons of pure convenience'.¹ Quite simply, refugee law is not migration law.

Overview of Persecution and the Statutory Changes

Overview of Persecution

The Convention Meaning of Refugee

The definition of a refugee in international law is contained in Article 1A(2) of the 1951 *Convention Relating to the Status of Refugees* (the Convention). Article 1A(2) provides, inter alia, that:

For the purposes of the present Convention, the term 'refugee' shall apply to a person who...owing to a 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 [emphasis added].

According to Article 1A(2) a person is granted refugee status under the Convention only if his or her well-founded fear of persecution is based on one or more of five specified grounds: race, religion, nationality, membership of a particular social group or political opinion. As well as defining the term 'refugee', the Convention provides for certain standards of treatment to be accorded to a person falling within the definition. A refugee under Article 1A(2) is entitled to claim protection against return to a country in which he or she fears persecution from any of the State parties to the Convention or Protocol.²

Persecution: an overview

In order to qualify for refugee status, the harm feared by a claimant must constitute 'persecution'. This renders the notion of 'persecution' central to the concept of a refugee. It sets the level of harm at which state parties to the Convention believe they should step in to assist a person from another state.

1 G Melander, 'The Protection of Refugees' (1974) 18 *Scandinavian Studies in Law* 153, 159.

2 The core obligation assumed by parties to the Convention and Protocol is one of *non-refoulement*: not to return the person to the place where persecution is feared: Article 33.

The term 'persecution' derives from the Latin *persequi*, which means 'to follow with hostile intent, or pursue'.³ The Convention drafters deliberately did not define the term 'persecution' with any degree of exactness, to ensure that the concept could be applied to new situations.⁴ To judge if a person has suffered persecution under the Convention, the severity of the treatment inflicted and the importance of the human right violated are measured on quantitative and qualitative levels. Although the level of severity of treatment must generally be high, the severity may vary depending on the importance of the violated right.⁵ As is noted by UNHCR 'there is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success'.⁶ Thus, states in have a wide discretion in interpreting the term persecution. This has resulted in numerous irreconcilable decisions regarding its meaning. As Goodwin Gill puts it, 'practice reveals no coherent or consistent jurisprudence'.⁷

Although 'persecution' is not defined in the Convention, there is a large amount of case law on the meaning of this term in the context of the Convention definition. This is discussed in section three.

Recent legislative Changes

Under Australian law, the term 'persecution' in Article 1A(2) is now qualified by s. 91R of the *Migration Act* 1958 (the Act). Section 91R(1) provides that for the purposes of the Act and regulations, Article 1A(2) does not apply in relation to persecution for one or more of the Convention reasons unless:

- That reason is the **essential and significant reason**, or those reasons are the essential and significant reasons, for the persecution;
- The persecution involves **serious harm** to the person; and
- The persecution involves **systematic and discriminatory** conduct.

The main change to the notion of persecution stems from the serious harm requirement. The essential and significant reason requirement reinforces the fact

3 J-Y Carlier et al (eds), *Who Is a Refugee?* (Kluwer Law International, The Hague, (1997) 702.

4 Dr Susan Kneebone, from the Castan Centre for Human Rights Law: www.law.monash.edu.au/castancentre/submissions/migration6.html.

5 Ibid, 707.

6 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

7 G S Goodwin-Gill, *The Refugee in International Law* (2nd Ed, (1996) 67. For some common themes in interpretation, see R Bacon and K Booth, 'The Intersection of Refugee Law and Gender: Private Harm & Public Responsibility' (2000) 23 *UNSW Law Journal* 135, 143-145. For an examination of the position in the United States and also a discussion of the merits of a clear definition of persecution see S Pirie 'The Need for a Codified Definition of Persecution in US Refugee Law' (1986) 39 *Stanford Law Review* 187.

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

that there is a strong causal connection or nexus between the harm caused to the applicant and one or more of the five Convention grounds. The systematic and discriminatory element requires that the persecution be *directed* against a person as an individual or as a member of a group. The statutory provisions and the Explanatory Memorandum do not seem to suggest that the reference to systematic and discriminatory in s.91R(1)(c) should be understood differently from the Courts' previous interpretation of this term. Thus, the term 'systematic' in s.91R(1)(c) should be understood to mean non-random, but not necessarily organised or methodical persecution.⁸ A single act may suffice, as long as it is part of a course of systematic (in the sense of non-random) conduct. The reference to 'discriminatory conduct' in s.91R(1)(c) reflects existing case law on this topic, which held that persecution involves a discriminatory element.⁹

8 In *Chan v MIEA*, McHugh J stated: 'The notion of persecution involves selective harassment ... [It is not] a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is "being persecuted" for the purposes of the Convention': *Chan v MIEA* (1989) 169 CLR 225, per McHugh J at 429-430. See further, *MIMA v Hamad* (1999) 87 FCR 294, *Mohamed Dahir Mohamed v MIMA* (unreported, Federal Court of Australia, Hill J, 11 May 1998), *Abdalla v MIMA* (1998) 51 ALD 11, *Chopra v MIMA* [1999] FCA 480 (Lee, Whitlam and Weinberg JJ, 23 April 1999). In *MIMA v Haji Ibrahim*, McHugh J stated that his use of 'systematic conduct' in *Chan* did not mean that persecution for the purposes of the Convention requires a systematic course of conduct by the oppressor. Rather the term was used as a synonym for non-random. His Honour held that: 'It is an error of law to suggest that the use of the expression "systematic conduct" in either *Murugasu* or *Chan* was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic' (para 99).

9 In *Applicant A & Anor v MIEA & Anor*, Brennan CJ stated: 'The feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1(A)(2)': (1997) 190 CLR 225 at 233. In the same case, McHugh J said: 'When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group': *ibid.*, at [20]. He further added, 'Whether or not conduct constitutes persecution in the Convention sense does not depend on the

The key aspect of these qualifying provisions is the notion of serious harm. 'Serious harm' is the threshold that must be reached by a person before he or she is deemed entitled to the protection of another state. It is the degree of suffering to which a person must endure before the collective sympathy gland of other nations is sufficiently touched to admit that person into the community as a refugee. It is on this somewhat emotive issue that this paper focuses.

Serious Harm – the Statute

Section 91R(1)(b) of the Act provides that:

For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (b) The persecution involves serious harm to the person ...

Subsection (2) sets out a non-exhaustive list of the type and level of harm that can be classified as serious. The following examples of 'serious harm' are provided:

- (a) A threat to the person's life or liberty;
- (b) Significant physical harassment of the person;
- (c) Significant physical ill treatment of the person;
- (d) Significant economic hardship that threatens the person's capacity to subsist;
- (e) Denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) Denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

Explanatory Memorandum

The Revised Explanatory Memorandum to the legislation which introduced s 91R¹⁰ emphasises that the list is not exhaustive, and also that the serious harm test does not exclude serious mental harm. For example:

nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group': *ibid*, at 258. The discriminatory aspect of persecution involves some motivation on the part of the persecutor. In *Ram v MIEA & Anor*, Burchett J said: 'Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors': (1995) 57 FCR 565 at 568.

¹⁰ Migration Legislation Amendment Bill (No. 6) 2001.

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.¹¹

It further provides that this definition of persecution:

Reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient ... that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.¹²

Case Law Concerning the Meaning of Persecution Before the Statutory Changes

The above approach to serious harm was adopted in response to concerns caused by Federal and High Court judgements that lowered the threshold regarding the meaning of persecution.

In *Chan v MIEA*, Mason CJ held that *serious punishment or penalty*, or the imposition of some *significant detriment or disadvantage*, for a Convention reason will amount to persecution. His honour added that the denial of *fundamental rights or freedoms* can constitute persecution:

The Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage...Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of *fundamental rights or freedoms* otherwise enjoyed by nationals of the country concerned may constitute such harm.¹³

11 EM to Migration Legislation Amendment Bill (No.6) 2000, paragraph 25.

12 Ibid.

13 *Chan v MIEA* (1989) 169 CLR 379 at 388, per Mason CJ.

In the same case, McHugh J suggested that affronts *to human dignity* can constitute persecution, as can the denial of access to employment or to the professions and to education:

To constitute “persecution” the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute “persecution” for the purposes of the Convention and Protocol. Measures “in disregard” of *human dignity* may, in appropriate cases, constitute persecution.¹⁴

The denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.¹⁵

However, it was made clear that not all interferences with human dignity will suffice. In *MIMA v Haji Ibrahim*¹⁶ McHugh J stated:

The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive, or prolonged that it can be described as persecution.¹⁷

His Honour noted it would be impossible to frame an exhaustive definition, however he described persecution for the purpose of the Convention as, ordinarily:

- Unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason
- Which constitutes an interference *with the basic human rights or dignity of* that person or the persons in the group
- Which the country of nationality authorises or does not stop, and
- Which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight

14 *Ibid*, at 430 per McHugh J.

15 *Ibid*, at 431, per McHugh J.

16 (2000) 175 ALR 585.

17 *Ibid*, at [55].

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

from, or refusal to return to, that country is the understandable choice of the individual concerned.¹⁸

The concept of an affront to dignity or one's rights was again employed in *Win v MIMA* where Madgwick J stated:

A denial of ... civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights ... The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes... But, of course, the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on earth, however important civil and political rights may, as a matter of mere intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potentially real suffering.¹⁹

In *Kord v MIMA* Hely J adopted a very expansive test of persecution. His Honour held that harm which is directed at an applicant can constitute persecution 'unless the impact of that conduct on the applicant is trivial or insignificant'.²⁰ The fact that persecution has traditionally taken a variety of forms of social, political and economic discrimination was recognised in *Chan v MIEA*²¹

The breadth of the meaning of persecution was noted in *Applicant A & Anor v MIEA & Anor*, by McHugh J who observed that:

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.²²

18 *Ibid*, at [65]. See also [61]-[62].

19 [2001] FCA 132 (Madgwick J, 23 February 2001) at [15].

20 [2001] FCA 1163 (Hely J, 24 August 2001),

21 (1989) 169 CLR 379 at 430ff per McHugh J.

22 (1997) 190 CLR 225 at 258, per McHugh J.

Although the courts did not exhaustively define persecution, an analysis of the decided cases draws attention to two themes. The first is that the concept of persecution is connected with notions human rights and dignity. Secondly, persecution can include the deprivation of interests that do not come close to threatening subsistence. For example, it was held that discrimination in the form of restrictions to employment and educational opportunities constituted persecution.²³ To meet the persecution requirement, it was not necessary for the applicant to be denied the opportunity of *any* employment; merely being denied the opportunity to work in his or her chosen field was sufficient.²⁴ Thus on any measure the courts adopted a relatively broad view of persecution - it was certainly not the case that it applied only to persons enduring unbearable levels of suffering.

The Manner in Which the Legislation Should be Interpreted – Cruel to be Kind

Ample Scope for Judicial Interpretation and Creativity

As noted above the section 91R(2) was created in response to concerns created by court judgments that significantly lowered the threshold concerning the types of harm that would enable a person to qualify for refugee status.²⁵ As indicated by the Explanatory Memorandum, in order to be entitled to Convention protection it is not enough for a person to show that he or she would suffer discrimination or disadvantage in their home country, or in comparison with the opportunities or treatment they could expect in Australia.

Nevertheless, under the new legislation there remains ample scope for judicial interpretation, creativity and ultimately expansion of the types of harm that constitute serious harm. In fact, the legislature has left it open to the judiciary to tenably interpret serious harm in effectively the same manner as prior to the changes. The argument that would lead to such an approach is not difficult to make out. The courts could simply invoke the oft used maxims of statutory interpretation that (i) the definition employed by the legislature is inclusive, not

23 See *Chan v MIEA* (1989) 169 CLR 379, 4321. See further, *Syan v Refugee Review Tribunal* (1995) 61 FCR 284 (extortion); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Thalary v Minister for Immigration and Ethnic Affairs* (1997) 73 FCR 437; 50 ALD 349; *Gunaseelan v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 594 (discrimination in employment and education); *Minister for Immigration and Multicultural Affairs v Gutierrez* (1999) 92 FCR 296; 59 ALD 89 (exposure to civil litigation).

24 See for example, *Ahmadi v MIMA* [2201] FCA 1070 (Wilcox J, 8 August). See also K Walker, 'Sexuality and Refugee Status in Australia' (2000) 12 *International Journal of Refugee Law* 175, 193-194.

25 S Haddad, 'Qualifying the Convention Definition of Refugee' in *Immigration Review*, (2002).

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

exhaustive;²⁶ and (ii) important rights should not be removed unless there is a clear statutory intention to do so.²⁷ Moreover, the Explanatory Memorandum indicates that even mental harm can constitute serious harm. Judges could also justify an expansive interpretation by invoking the notion that the section should be interpreted consistent with the humanitarian objectives of the Convention.²⁸

However, as is generally the case with statutory interpretation there are contrary maxims that can be invoked, which will lead to a more restrictive interpretation of serious harm. In this case, there is the *ejusdem generis* rule.²⁹ It is evident from the list of examples of harm expressly detailed in the new section that the types of harms referred to are those which affect the most fundamental of human interests that are a *pre-condition to any degree of flourishing*. The rights to life, liberty, and the protection of one's physical integrity are the most basic rights. Other interests (such as economic hardship) are also recognised but only to the extent that they threaten the subsistence of the person. Accordingly, all the other nominated harms are derivative from the right to life. Arguably, the courts should not find that other forms of mistreatment constitute serious harm unless they interfere with one's subsistence. Further, statutory provisions are assumed to have some effect.³⁰ Hence, it would be inappropriate to simply apply pre-existing case law.

It may also be argued that Article 31(1) of *Vienna Convention on the Law of Treaties* is relevant to the interpretation of serious harm. It provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.

Article 31(4) provides that 'a special meaning shall be given to a term if it is established that the parties so intended'.

In terms of the significance of Article 31 in domestic law, the High Court has held that it forms the basis for treaty interpretation unless the legislature has expressed an intention to the contrary. In *Applicant A & Anor v MIEA & Anor*, Dawson J said:

Deciding that question [the interpretation of the Refugees Convention] involves the construction of a domestic statute which incorporates a definition

26 See for example, *Sheritt Gordon Mines Ltd v FCT* (1976) 10 ALR 441, 455.

27 *FCT v Citibank Ltd* (1989) 85 ALR 589; *R v Cane* [1985] 1AC 46

28 For an argument in favour of an expansive interpretation of 'persecution' see P Matthew, 'Conformity or Persecution: China's One Child Policy and Refugee Status' (2000) 23 *UNSW Law Journal* 103.

29 For example see *Canwan Coals Pty Ltd v FCT* (1974) 4ALR 223.

30 *Commonwealth v Baume* (1905) 2CLR 405, 414, *Maddalozzo v Maddick* (1992) 84 NTR 27.

found in an international treaty. Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the *prima facie intention that it have the same meaning in the statute as it does in the treaty*. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty. ...The general rule of interpretation of treaty provisions appears in article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention)... Under that rule, the starting point must be the text of the treaty. Of course, the text of the treaty is often couched in fairly general terms due to differences in language and legal conceptions among those to whom it is to be addressed and as part of an attempt to reach agreement among diverse nations. Accordingly, technical principles of common law construction are to be disregarded in construing the text. Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of the treaty and would be inconsistent with the context in which the words being construed appear. To say as much is, perhaps, to state no more than the accepted canon of construction that an instrument is to be construed as a whole and that words are not to be divorced from their context or construed in a manner which would defeat the character of the instrument.³¹

In the same case, McHugh J stated that a holistic approach should be taken to treaty interpretation.³² This means that 'primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered.'³³

31 (1997) 190 CLR 225, 239-40. Murphy J in *Commonwealth v Tasmania* stated that the relevant international convention (in that case the UNESCO Convention for the Protection of the World Cultural and National Heritage) should be interpreted in a manner that gives 'primacy to the ordinary meaning of its terms in their context and in light of its objects and purpose' (1983) 158 CLR 1, 177.

32 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 253-254, see also at 231 per Brennan CJ applying Zeika J in the European Court of Human Rights in *Golder v United Kingdom* (1975) 1 EHRR 524 and Murphy J in the *Cth v Tasmania* (1983) 158 CLR 1 at 177.

33 *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 254, see also Gummow J at 277, Kirby J at 292-6. For further discussion of principles of interpretation of the Refugees Convention see also, *MIMA v Haji Ibrahim* (2000) 204 CLR 1 per Gummow J and *MIMA v Khawar* (2002) 187 ALR 574 per McHugh & Gummow JJ. In *MIMA v Savvin* (2000) 98 FCR 168 at [90]- [91] per Katz J and [14]-[15] per Drummond J it was held that the Vienna Convention did not apply to the interpretation of the Refugees Convention because the Refugee Convention (and Protocol) was concluded by Australia after the entry into force of the Vienna Convention. However, it was held that even though the Vienna Convention is not applicable in the construction of the Refugee Convention, still the Vienna Convention 'constitutes an authoritative

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

In a similar vein, Brennan CJ stated:

In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.³⁴

In essence, the principal guide to the interpretation of international treaties, including the Refugees Convention, is the text of the document. However, this is to be complimented by considerations pertaining to the objects and purposes of the treaty.

Railing against the importance of the text and purpose of the treaty is the fact that domestic law (including principles of statutory interpretation) prevails over international law documents. This means that the legislature is free to depart from general principles of treaty interpretation and to change the meaning of a treaty when it interprets it into domestic law.

The principal domestic law governing statutory interpretation is *Acts Interpretation Act* 1901. Pursuant to ss 15AA and 15AB, the text of a statute is paramount and the objects and purpose of a statute are only to be considered where the text is ambiguous. Thus, the meaning of serious harm should principally be derived from the terms of the statute. However, as is noted by Dawson J above, unless a contrary intention appears in the statute, it should be given the same meaning as in the treaty.³⁵ This effectively takes the interpretive issue full circle: whether or not the phrase serious harm is meant to change the meaning of persecution in the Convention depends on the weight given to the statutory maxims discussed above.

statement of customary international law' (at para 90). See also *Hellman v MIMA* (2000) 175 ALR 149 at [16] where it was held that the Refugee Convention is to be interpreted in accordance with the requirements of the *Vienna Convention*.

³⁴ (1997) 190 CLR 225, 231.

³⁵ *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 230-231 per Brennan CJ, at 239 Dawson J, and at 254 McHugh J, applying *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 per Brennan J.

The main point to emerge from this discussion of the 'principles' of statutory interpretation is that in light of this expansive range of interpretive tools (neither being more logically persuasive or legally imperative than the other) there is obviously ample scope for the courts to interpret serious harm in the manner they deem most appropriate.³⁶

Human rights lawyers and advocates will no doubt urge the courts to adopt a liberal interpretation of serious harm. Hathaway and other commentators assert that in order for the Convention to remain relevant today, persecution must be interpreted broadly.³⁷ According to the Committee on Population and Refugees in the Council of Europe:

The concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted...[A]ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.³⁸

Such an approach would give the courts greater armoury to grant asylum from states where people flourish to a lesser degree than Australia. This reflexive approach, while understandable, is wrong. It is short-sighted, failing to recognise the realities of refugees and the dichotomy between refugee and migration law. We now spell out these reasons in greater detail.

Refugee Realities - no appetite for needy foreigners

Those who would argue in favour an expanded definition of refugee law fail to appreciate a paradox that emerges as a result of judicial expansion of the concept of serious harm. On first glance, courts and other legal bodies (no doubt well-intentioned) appear to be assisting the refugee cause by expanding the type of harm that qualifies for assistance - the people or persons who come within the expanded definition are granted access to the relevant nation State.

Unfortunately, this is not what happens on a practical level. Nations have limited sympathy for those in need. As is noted by Sarah Collinson, 'two linked assumptions appear to underlie almost all current debates on the issue of migration and refugee flows in Western Europe. First, there is the assumption

36 For a general discussion regarding the open-textured principles of statutory interpretation, see DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (1996).

37 J C Hathaway, *The Law of Refugee Status* (Butterworths, Vancouver, 1991) 104.

38 Cited in remarks by J. Thomas in A. Woods, ed, 'Refugees: A New Dimension in International Human Rights', (1976) 70 ASILP 58, at 69.

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

that immigration poses a threat... Second, it is assumed that Western Europe lacks the capacity to cope with any further immigration, whether it be in demographic, economic, social or political terms'.³⁹ She further adds that, 'the international community ... is not infinitely generous. An obligation.... to protect refugees, and the needs of refugees themselves, will in practice always be balanced against the political and economic interests and concerns of potential asylum States'.⁴⁰ Amnesty International has recently described refugee protection as the 'black spot' in the European Union's rights ambitions,⁴¹ and is deeply concerned that the focus of the EU's asylum policy is overwhelmingly on how to keep [refugees] out, rather than how to protect effectively people fleeing from war, civil upheaval and grave human rights abuses'.⁴² In a similar vein, Niraj Nathwani states that 'refugee law is in crisis precisely because altruism has reached its limits. ... We need to face the fact of donor fatigue'.⁴³ There is no question that similar sentiments are shared in Australia. The callous treatment of the refugees on board the Tampa and the ensuing community support of this readily evince this. The international community's finite level of preparedness to absorb refugees is supported by refugee numbers, which show a remarkable level of consistency over the past decade or so. Figures from the United States Committee for Refugees show that the number of refugees and asylum seekers from 1992 to 2001 is as follows: 1992: 17,600,000; 1993: 16,300,000; 1994: 16,300,00; 1995: 15,300,000; 1996: 14,500,000; 1997: 13,600,000; 1998: 13,500,00; 1999: 14,100,000; 2000: 14,500,000; 2001: 14,900,000.⁴⁴

Given that the world's collective sympathy is unlikely to grow in the years to come, the decision of who qualifies for asylum is critical - in effect each person who is accorded refugee status potentially deprives another more needy person of asylum. Any proposed change to the definition of a refugee should be approached in a manner that is consistent not only with the Convention's founders' goal to safeguard important human rights, but also with their concern to respect state sovereignty.⁴⁵

39 S Collision, *Beyond Borders: Western European Migration Policy Towards the 21st Century* (1993).

40 Ibid, 60.

41 Amnesty International EU Office, Press Release, *Asylum Seekers in Europe: The Real Story Amnesty International Launches Europe-Wide Campaign*, 25 September 2001: <http://www.amnesty.org>.

42 Ibid. See also G S Goodwin-Gill, 'The International Protection of Refugees: What Future?' (2000) 12 *International Journal of Refugee Law* 1.

43 N Nathwani, 'The Purpose of Asylum' (2000) 12 *International Journal of Refugee Law* 354, 356.

44 US Committee for Refugees, *World Refugee Survey 2002* (Immigration and Refugee Services of America, Washington, 2002) 4.

45 See further the comments by the Australian Minister for Immigration, Philip Ruddock, in the forward to *Interpreting the Refugees Convention - an Australian Contribution* (Canberra, 2002). See also this report at 80.

Given the preparedness of the courts to expand the notion of persecution, it is not surprising that refugees and economic migrants are often confused in the eyes of the community. This can lead to unfortunate results, as noted by Rudd Lubbers, the UN High Commissioner for refugees. In March 2001 he stated to the UN Commission on Human Rights that:

Today, refugees and economic migrants - along with the criminal element - have become seriously confused - even assimilated - in the public mind. Extremist politicians have been quick to exploit public fears - stereotyping refugees as economically motivated, a burden to public health and a social threat.⁴⁶

It follows that, given the scarcity, value and preciousness of refugee places, the kind thing to do is not to expand the range of human interests that are recognised under the refugee definition - in fact the opposite. The interests should be narrowed to ensure, as far as possible, that refugee places are occupied by those in greatest need. While an expansive definition of persecution appears to be consistent with the humanitarian aims of the Convention, it is ultimately misguided because it makes it harder, to provide protection to the people who need it most. People who 'struggle' to find the right job should not be competing on an equal footing for refugee places on the same basis as people who are at risk of being severely physically beaten, tortured, arbitrarily imprisoned for indefinite periods or whose lives are otherwise in jeopardy.

In deciding who qualifies for refugee protection, it is important to keep in mind the importance and distinctive nature of refugee law. Refugee law is the only area of international law where the needs of the individual trump the needs of sovereign States. It is essentially based upon what a country can do for an individual, unlike migration law, which is based on the opposite - what the individual can do for a receiving country. Thus, recognition that a person is a member of a class of people such that the person is a 'refugee' allows the rights of that person to override the capacity of a nation to exclude people from its borders'. This is no minor victory. Nations zealously guard their borders and all sovereign nations steadfastly believe that they have an inherent right to determine who can enter them. The capacity to control entry of people across national borders is perhaps the key manifestation of nation sovereignty - it is an unquestioned aspect of sovereignty - both at the international and domestic law level. Although the refugee exception to this aspect of national sovereignty is not absolute⁴⁷,

46 As cited by J Fitzpatrick, in 'The Refugee Convention at 50' in US Committee for Refugees, *World Refugee Survey 2001* (Immigration and Refugee Services of America, Washington, 2002) 22, 23

47 Countries, of course, voluntarily assume protection obligations towards refugees. Further, refugees are not guaranteed rights of full asylum. The obligation assumed by

THE SHIFTING MEANING OF PERSECUTION IN AUSTRALIAN
REFUGEE LAW: HOW MUCH MUST ONE SUFFER TO BE DESERVING
OF ASYLUM?

pragmatically, once countries do ratify the Convention they do not repudiate it and most nations do in fact provide long-term asylum to refugees.⁴⁸

Thus, the Convention is important because it is the one universal, humanitarian international treaty that offers some guarantee that the fundamental rights of desperate people will be safeguarded. By and large most nations observe their obligations pursuant to the Convention. 'The Refugee Convention stands out as a measure that offers substance and "teeth" to the concept of internationally recognised human rights.'⁴⁹ As is noted by James Hathaway, the fact that a State party which has jurisdiction over a refugee automatically owes that person core rights (especially protection against non-refoulement) is the strength of refugee law: 'it ensures that few refugees fall through the cracks of the protection regime'.⁵⁰ However, as noted above, there is no room for complacency in this regard. Many states are already re-evaluating their commitment to the Convention. The United Nations recently noted that the costs associated with hosting large numbers of asylum seekers in addition to security concerns have resulted in 'the Convention's provisions [being] more respected in their breach than their adherence'.⁵¹ Extending asylum assistance to people beyond those

parties to the Convention and Protocol is one of non-refoulement: not to return the person to the place where persecution is feared: Article 33 of the Convention.

48 Some countries even have a right of asylum written into their constitutions, see Collision above n 39, 65.

49 M Crock, *Immigration and Refugee Law in Australia* (1998) 163

50 J C Hathaway, 'Refugee Law is Not Immigration Law', *World Refugee Survey* (2002), 43.

51 United Nations, Executive Committee of the High Commissioner's Programme, *Note on International Protection*, 13 September 2001, 5. The breaches range from situations where individuals are refouled or where borders are closed to refugees, to violence against refugees. For comments regarding future challenges to the problem confronted by refugees, see W Maley, 'A Global Refugee Crisis?' in *Refugees and the Myth of the Borderless World* (Department of International Relations, Canberra, 2002) 1.

whose subsistence is threatened risks further undermining the commitment of states to the Convention.

Conclusion

Refugee law is a concession to the desperateness of personhood and an acceptance that the plight of the individual should in some cases override the economic and material interests of a state. Expanding the concept of a refugee to a point where eligibility for refugee status is extended to people who are simply failing to flourish, as opposed to those whose existence is imperilled, loses sight of the finite level of sympathy that nations have for 'foreigners' and makes the lot of those whose survival is already threatened even more precarious. This matter should not be lost on those interpreting what it means to be persecuted.