

**THE IMPLICATIONS OF THE FAILED ‘MALAYSIAN  
SOLUTION’:  
THE AUSTRALIAN HIGH COURT AND REFUGEE  
RESPONSIBILITY SHARING AT INTERNATIONAL LAW**

MICHELLE FOSTER\*

*The notion that international cooperation is required in order to adequately respond to the challenge of refugee protection is a well established and accepted concept, yet in recent decades many states’ attempts to engage in responsibility sharing regimes have tended to undermine rather than expand refugee protection. Against this background, the attempt by Australia to implement a regional agreement with Malaysia in 2011 raised serious concerns about its compliance with international and domestic law and was hence challenged in the High Court of Australia. The High Court’s intervention, in which it found that the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement was not capable of complying with legislative protections designed to uphold the Convention relating to the Status of Refugees (‘Refugee Convention’), has not only provided guidance as to the limits of Australian domestic law in this regard, but has made an important contribution to our understanding of the limits of the Refugee Convention in accommodating responsibility sharing regimes. This article examines the High Court’s judgment in Plaintiff M70/2011 v Minister for Immigration and Citizenship, explaining its background and significance in Australian law, and analyses and assesses its importance to our understanding of the constraints which international law places on the ability of states lawfully to engage in responsibility sharing regimes.*

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\* Associate Professor and Director, Research Programme in International Refugee Law, Institute for International Law and the Humanities, Melbourne Law School. The author is grateful for feedback received from colleagues, students and participants at the following conferences and seminars at which the ideas in this paper were presented: ‘Looking to the Future, Learning from the Past: A Conference to Mark 60 Years of the Refugee Convention’, University of New South Wales, 15 June 2011; Staff Research Seminar, Melbourne Law School, 29 August 2011; ‘Beyond the Malaysian Solution? Refugee Responsibility Sharing in the Asia-Pacific Region’, Melbourne Law School, 22 September 2011; *The High Court and the Malaysian Solution*, Australian Institute of Administrative Law Seminar, Melbourne, 26 October 2011; and the ‘Human Rights and Governance Colloquium’, Queensland University of Technology, Brisbane, 24 November 2011. The author acknowledges the support of the Australian Research Council Project DP1096791. Any errors or omissions remain my own.

## I INTRODUCTION

The Preamble to the *Convention relating to the Status of Refugees* ('*Refugee Convention*')<sup>1</sup> recognises that 'a satisfactory solution' to the 'social and humanitarian' challenge of refugee protection cannot be achieved without 'international co-operation',<sup>2</sup> a notion that remains as true today as it was 60 years ago when the key treaty for the protection of refugees at international law was drafted.<sup>3</sup> However, the *Refugee Convention* does not set out the manner by which states may engage in such cooperation, nor does it clearly outline the constraints that operate upon any attempt to engage in responsibility sharing regimes.<sup>4</sup>

This lack of precision and clarity has arguably been exploited by (mainly developed northern) states which increasingly in recent decades have relied on concepts of cooperation to engage in what is more accurately understood as burden-shifting, rather than burden-sharing arrangements.<sup>5</sup> This is perhaps

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<sup>1</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').

<sup>2</sup> Ibid Preamble. The Preamble to the *Refugee Convention* recognises that one of the key objectives of the *Convention* was to 'revise and consolidate previous international agreements relating to the status of refugees' and to 'extend the scope of and the protection accorded by such instruments by means of a new agreement'. It also recognised that the 'social and humanitarian nature of the problem of refugees' requires 'international co-operation' in order to ensure that it does not become 'a cause of tension between States'.

<sup>3</sup> Indeed, subsequent regional refugee treaties have adopted this principle even more clearly: see, eg. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) art 2(4):

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU [Organization of African Unity], and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

<sup>4</sup> For the purposes of this article, a responsibility sharing regime is one set by the *Michigan Guidelines on Protection Elsewhere*, developed by a group of experts in international refugee law — a state or agency 'acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the state where the refugee has sought, or intends to seek, protection': Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 228. The variation in the nature of the schemes and arrangements which have been adopted in practice is outlined and described, explaining the different types of responsibility sharing arrangements adopted by states.

<sup>5</sup> See, eg. in relation to *Regulation (EC) No 343/2003 of the European Parliament and of the Council of 18 February 2003* [2003] OJ L 50/1 ('*Dublin Regulation*'), the acknowledgement by the European Parliament that

a correct implementation of the *Dublin Regulation* may well result in the unequal distribution of responsibility for persons seeking protection, to the detriment of some Member States particularly exposed to migration flows simply on the grounds of their geographical location.

illustrated most vividly in Australia's experience of the so-called 'Pacific Solution'<sup>6</sup> — a policy which ended ignominiously in 2008 with the acknowledgement by the then government that rather than promoting refugee protection, the policy was about 'the cynical politics of punishing refugees for domestic political purposes'.<sup>7</sup> Yet in 2011 the same government that ended the Pacific Solution attempted to institute a new scheme of responsibility sharing in the form of an *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* ('*Malaysian Arrangement*'),<sup>8</sup> which would have resulted in the transfer of 800 asylum seekers from Australia to Malaysia in exchange for up to 4000 recognised refugees from Malaysia to Australia. However, before the first asylum seekers could be transferred from Australia to Malaysia, the Australian High Court intervened, in dramatic fashion, to prevent their removal.<sup>9</sup>

This article analyses the significance of the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*M70*'),<sup>10</sup> both for Australia's future prospects of engaging in regional responsibility sharing schemes and in terms of its contribution to our understanding of the limits of responsibility sharing at international law. Although several multilateral and bilateral responsibility sharing schemes have been operating in other regions for some time — including the Dublin regime in Europe<sup>11</sup> and the *US–Canada Safe Third Country Agreement*<sup>12</sup> — there have been few opportunities for senior appellate courts to examine the legality of such schemes in light of states parties

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*European Parliament Resolution of 2 September 2008 on the Evaluation of the Dublin System* [2008] OJ C 295E/4, 6. This has also been well documented in literature: see, eg, Pieter Boeles, Maarten, Den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia, 2009) 330, where the authors note that 'it has become evident' that the Dublin system does not 'distribute asylum seekers evenly among the Member States', rather it 'imposes a disproportionate burden on Member States at popular points of entry in the EU'.

<sup>6</sup> The 'Pacific Solution' comprised three pieces of legislation: *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

<sup>7</sup> Chris Evans, 'Refugee Policy under the Rudd Government — The First Year' (Speech delivered at Annual General Meeting of the Refugee Council of Australia, Parramatta, 17 November 2008) <<http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm>>.

<sup>8</sup> *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed and entered into force 25 July 2011) ('*Malaysian Arrangement*').

<sup>9</sup> The interim injunction was granted by Hayne J of the High Court on a Sunday — 7 August — a matter of hours before the first asylum seekers were to be transferred to Malaysia.

<sup>10</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18 ('*M70*').

<sup>11</sup> *Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [2003] OJ L 50/1.

<sup>12</sup> *Agreement between the Government of Canada and the Government of the United States of America for Co-Operation in the Examination of Refugee Status Claims from Nationals of Third Countries*, Canada–United States of America, signed 5 December 2002, [2004] CTS 2 (entered into force 29 December 2004) ('*US–Canada Safe Third Country Agreement*').

obligations under the *Refugee Convention*.<sup>13</sup> Hence the Australian High Court's examination of these issues has made a valuable contribution to international refugee law jurisprudence.

This article is divided into five parts. In Part II the legislative background to the High Court's decision is explained, as well as the circumstances surrounding its intervention in *M70*. In Part III the article considers and explains the significance of the decision in terms of the High Court's ability and willingness to undertake a robust examination of a diplomatic arrangement between Australia and another country, and the significance of this from a broader international perspective. Part IV then turns to examine the importance of the decision from the perspective of its contribution to our understanding of the limits and constraints imposed by the *Refugee Convention* on responsibility sharing regimes. It compares and contrasts the decision with leading jurisprudence from domestic and regional courts which have considered responsibility sharing regimes in other regions of the world. In Part V the article concludes by exploring the implications of this landmark decision for future policy making relating to this controversial and enduring issue.

## II BACKGROUND TO THE HIGH COURT'S DECISION IN *M70*

The domestic legislative framework that underpinned the *Malaysian Arrangement* was introduced in 2001 in a highly charged pre-election atmosphere, in which the hard-line response by the then government to the infamous 'Tampa incident' had created a state of near hysteria surrounding the issue of asylum seekers who arrive by boat. Among the six individual pieces of legislation rushed through the Australian Parliament to respond to this so-called crisis, were those that provided the legal architecture for a regime of offshore processing. There were two key components to the scheme: excision and transfer.

First, the *Migration Act 1958* (Cth) ('*Migration Act*') was amended to provide that a number of islands and coastal ports, including the Territory of Christmas Island, were to be specified as 'excised offshore place[s]',<sup>14</sup> the significance of which is that an asylum seeker who first arrives at such a place is deemed to be an 'offshore entry person' ('OEP') and is prohibited from applying for a protection visa — the usual mechanism in Australian law for giving effect to the *Refugee Convention* — unless the Minister for Immigration considers that it is in the public interest to allow the person to so apply.<sup>15</sup> Further, the *Migration Act* provides that regulations can subsequently expand the list of 'excised offshore

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<sup>13</sup> Indeed most courts that have considered the validity of such schemes have done so in relation to regional human rights treaties, such as the *European Convention on Human Rights* in the case of the House of Lords/UK Supreme Court (see, eg, *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920 ('*Yogathas*')), or have been restricted by relevant domestic legislation to assess the relevant scheme only in relation to art 33 of the *Refugee Convention* (as in the case of the Canadian litigation surrounding the *US-Canada Safe Third Country Agreement*): see below nn 49–50.

<sup>14</sup> *Migration Act 1958* (Cth) s 5(1) ('*Migration Act*').

<sup>15</sup> *Ibid* s 46A. For a full description of the background to the policy of excision, see Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised Territory"' (2011) 23 *International Journal of Refugee Law* 583, 585–9.

places', which has since resulted in more than 4891 Australian islands being deemed 'excised offshore places' for the purposes of Australia's migration law.<sup>16</sup>

This designation of an asylum seeker as an OEP was designed to provide the Australian Government with considerable discretion in relation to the treatment of such a person. Rather than being required to process an application for a protection visa,<sup>17</sup> the government could choose either to subject the asylum seeker to the parallel system of refugee status determination ('RSD') established on Christmas Island since 2008,<sup>18</sup> or alternatively invoke the second set of relevant legislative provisions, namely, those providing for the transfer of asylum seekers to another country. In this regard, s 198A was inserted into the *Migration Act* in 2001 to provide that '[a]n officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3)'.<sup>19</sup> Section 198A(3) in turn provides that:

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

Section 198A was relied upon by the Howard Government in establishing the Pacific Solution which involved the transfer of more than 1500 asylum seekers from Australia to the small pacific island of Nauru, a country with no prior experience of processing or receiving asylum seekers.<sup>20</sup> While the Pacific

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<sup>16</sup> Ibid 587–8.

<sup>17</sup> The Minister is to consider a valid application: see *Migration Act* s 47(1).

<sup>18</sup> This alternative system of Refugee Status Determination ('RSD') has been controversial, having been found by the High Court in an important decision in December 2010 to be subject to judicial review, contrary to the intention of the government: see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ('M61'). See generally Foster and Pobjoy, above n 15. For a critical recent discussion of the so-called independence of the review process established on Christmas Island, see *Minister for Immigration and Citizenship v MZYLE (No 2)* [2011] FCA 1210 (25 October 2011). Immigration Minister Chris Bowen has since announced that the Independent Protection Assessment Office will be discontinued in 2012 and a new system will be in its place: see Kirsty Needham, 'UN Praises Double Policy Relief for Boat Arrivals', *The Canberra Times* (online), 28 November 2011 <<http://www.canberratimes.com.au/national/un-praises-double-policy-relief-for-boat-arrivals-20111125-1nz80.html>>; Department of Immigration and Citizenship, 'Implementation of a Single Process for Irregular Maritime Arrivals (Questions and Answers)' <[http://www.immi.gov.au/visas/humanitarian/\\_pdf/implementation\\_single\\_process\\_ima.pdf](http://www.immi.gov.au/visas/humanitarian/_pdf/implementation_single_process_ima.pdf)>.

<sup>19</sup> *Migration Act* s 198A(1).

<sup>20</sup> For further information and statistics regarding those detained and processed under the Pacific Solution, see Foster and Pobjoy, above n 15, 588–9.

Solution was subjected to considerable academic scrutiny and criticism,<sup>21</sup> the validity of the declaration made pursuant to s 198A, which underpinned the policy, was never challenged in the High Court of Australia.<sup>22</sup>

On 25 July 2011, the same day as the *Malaysian Arrangement* was concluded,<sup>23</sup> the Minister made a declaration that Malaysia was a specified country in accordance with s 198A(3) and intended thereafter that all OEPs who had arrived after that date would be taken to Malaysia (at least until the allocation of 800 places was exhausted).<sup>24</sup> The plaintiffs, who had arrived in Australia at an 'excised offshore place,' did not intend to travel voluntarily to Malaysia, but where a declaration is in force, s 198A(2) authorises an officer to, inter alia, 'use such force as is necessary and reasonable' in relation to an OEP, whether within or outside Australia.<sup>25</sup> On 7 August, the applicants sought and were granted a temporary injunction, which was extended on 8 August pending the Court's determination of the matter, and on 31 August the High Court effectively made the injunction permanent.<sup>26</sup>

### III THE REVIEWABILITY OF RESPONSIBILITY SHARING REGIMES BY DOMESTIC COURTS

The key contention of the plaintiffs was that the *Malaysian Arrangement*, even supplemented by the accompanying *Operational Guidelines to Support Transfers and Resettlement* ('*Operational Guidelines*'),<sup>27</sup> did not suffice to

<sup>21</sup> See, eg, Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law*, 661; Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53; Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696; Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006); Savitri Taylor, 'Sovereign Power at the Border' (2005) 16 *Public Law Review* 55; Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: the Evolution of Australia's Offshore Processing Regime' (2007) 13(1) *Australian Journal of Human Rights* 33; Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2009) 27 *Australian Year Book of International Law* 87; Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273.

<sup>22</sup> Although it was challenged in the Federal Court: see *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 (26 September 2003) [49], where French J left open the possibility that a declaration could be challenged for jurisdictional error.

<sup>23</sup> See *M70* (2011) 280 ALR 18, 28–9 for a discussion of the *Malaysian Arrangement* and its content.

<sup>24</sup> Minister for Immigration and Citizenship, *Instrument of Declaration of Malaysia as a Declared Country under Subsection 198A(3) of the Migration Act 1958*, 25 July 2011. On the same day as the declaration was made, the Minister issued a direction to the Secretary of the Department in which he ordered that 'no processing of any asylum claims is to occur in relation to offshore entry persons who are intercepted or who arrive directly in Australia after 25 July 2011': Direction Letter from Christopher Bowen, Minister for Immigration and Citizenship, to Andrew Metcalfe, 25 July 2011, quoted in *M70* (2011) 280 ALR 18, 31 (French CJ).

<sup>25</sup> *Migration Act* s 198A(2)(d).

<sup>26</sup> The Court ordered that '[t]he Minister may not lawfully take either plaintiff from Australia to Malaysia and the Minister should be restrained accordingly': *M70* (2011) 280 ALR 18, 63.

<sup>27</sup> Department of Immigration and Citizenship, *Operational Guidelines to Support Transfers and Resettlement*, 25 July 2011 ('*Operational Guidelines*').

support a valid declaration under s 198A(3).<sup>28</sup> The concerns raised in public debate about the *Malaysian Arrangement* included that the arrangement did not require Malaysia to undertake any new international law obligations, particularly significant given that Malaysia has not signed the *Refugee Convention* or many other widely accepted human rights treaties, such as the *International Covenant on Civil and Political Rights*<sup>29</sup> or the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>30</sup> Hence the proviso that the *Malaysian Arrangement* is ‘subject to the respective participant’s relevant international law obligations’ was said to be of questionable efficacy in this case.<sup>31</sup> Secondly, there was concern that while Malaysia had agreed to respect the principle of *non-refoulement*, it did not undertake to implement this obligation into domestic law, and in any event, the commitment only related to obligations under the *Refugee Convention* and not under any of the other treaties to which Australia is a party.<sup>32</sup> Thirdly, the adequacy of the RSD available in Malaysia was questioned, as was the treatment received in practice by both asylum seekers and refugees in Malaysia, particularly given the lack of durable solutions for asylum seekers in Malaysia.<sup>33</sup> Fourthly, these concerns were magnified in the case of vulnerable asylum seekers, such as children, whose particular needs were thought to be inadequately addressed in the *Malaysian Arrangement* or the *Operational Guidelines*.<sup>34</sup> Finally, the lack of an adequate procedure for overseeing the *Malaysian Arrangement* was raised as a serious deficiency in the scheme.<sup>35</sup>

Among these myriad concerns, the plaintiffs in *M70* focused specifically on the lack of either an international or domestic legal obligation in Malaysia in

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<sup>28</sup> It should be noted that the Minister had sought also to rely on a wholly independent provision for his power to remove the applicants, namely, s 198(2), however this was rejected by the Court: see *M70* (2011) 280 ALR 18, 49–52.

<sup>29</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>30</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*‘CAT’*). One exception is that Malaysia acceded on 17 February 1995 to the *Convention on the Rights of the Child*, opened for signature 2 September 1990, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>31</sup> See Michelle Foster, ‘Counting the Human Cost of Refugee Swap’, *The Age* (online), 28 July 2011 <<http://www.theage.com.au/opinion/politics/counting-the-human-cost-of-refugee-swap-20110727-1i078.html>>.

<sup>32</sup> *Ibid.* These have now been embodied in Australian law via the *Migration Amendment (Complementary Protection) Act 2011* (Cth). The *Malaysian Arrangement* had a provision that allowed Australia access to persons not found to be refugees in order to assess their other protection claims. However, this was vague and the system that would be followed was unclear: *Malaysian Arrangement* cl 11(2).

<sup>33</sup> See Foster, ‘Counting the Human Cost of Refugee Swap’, above n 31.

<sup>34</sup> See, eg, Australian Refugee Law Academics, Submission No 25 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Agreement between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia*, 15 September 2011, 4, 15.

<sup>35</sup> See generally *ibid.* The Committees ultimately recommended, based on many of these concerns, that ‘the Australian Government not proceed with the implementation of the *Arrangement*’: Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Arrangement with Malaysia in relation to Asylum Seekers* (2011) 57 [4.27].

respect of either asylum seekers or refugees, arguing that properly construed the four criteria in s 198A(3)

exist when a country has legal obligations (both domestic and international) to secure the protection described in sub-paragraphs (i)–(iii) and to meet the standards set out in sub-paragraph (iv), together with a judicial system which is capable of ensuring those obligations are enforced.<sup>36</sup>

However, a crucial initial issue in this case was whether the High Court could review the facts underpinning the Minister's declaration or whether the Minister's declaration effectively precluded any independent analysis of the degree to which Malaysia in fact satisfied the criteria set out in s 198A(3). This was crucial because if, as the Minister argued, his discretion under s 198A(3) was subject only to 'the minimum constraint applicable to the exercise of any statutory power, namely that it must be exercised in good faith within the scope and for the purpose of the statute',<sup>37</sup> the Court's review would be extremely limited. On the contrary, the plaintiffs argued that the criteria established in s 198A(3) constituted 'jurisdictional facts' in an objective sense such that a court whose jurisdiction is invoked may 'determine, for itself, whether those criteria do or do not exist'.<sup>38</sup> In the alternative, the plaintiffs contended that at a minimum s 198A(3) requires the Minister to be satisfied of the s 198A(3) criteria, and that whether the Minister had properly reached a state of satisfaction was also judicially reviewable by reference to jurisdictional error.<sup>39</sup>

The Minister's submissions were thought to be strengthened by previous Federal Court authority concerning the declaration made in respect of Nauru, in which several judges of the Australian Federal Court had rejected the argument that the criteria in s 198A(3) constitute jurisdictional facts.<sup>40</sup> However, the High Court in *M70* was not troubled by previous authority, determining the matter afresh and by reference to its own analysis of the method for assessing whether

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<sup>36</sup> Sayed-Navab Shah, 'Plaintiffs' Outline of Submissions', Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 17 August 2011 [4.4.2].

<sup>37</sup> Minister for Immigration and Citizenship, 'Submissions of the Defendants', Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 18 August 2011, [57]. See also *M70* (2011) 280 ALR 18, 54.

<sup>38</sup> Sayed-Navab Shah, 'Plaintiffs' Outline of Submissions', Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 17 August 2011 [22]. See also *M70* (2011) 280 ALR 18, 53.

<sup>39</sup> *M70* (2011) 280 ALR 18, 53.

<sup>40</sup> See Minister for Immigration and Citizenship, 'Submissions of the Defendants', Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 18 August 2011, [66]–[67]. See especially *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 (26 September 2003) [49] (French J). But see *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518, 537.

legislative criteria amounts to a jurisdictional fact, with five of the six majority judges finding in favour of the plaintiffs on this issue.<sup>41</sup>

In the joint judgment by Gummow, Hayne, Crennan and Bell JJ ('joint judgment'), their Honours explained that the Minister's contention of a limited review role for the court should be rejected because to accept it would mean that s 198A(3) was 'validly engaged whenever the Minister bona fide thought or believed that the relevant criteria were met',<sup>42</sup> regardless of the objective reality. Such a reading would 'pay insufficient regard to its text, context and evident purpose'.<sup>43</sup> Central to the context and purpose of s 198A was the previous observation by the Court that

read as a whole, the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the *Refugees Convention* and the *Refugees Protocol*.<sup>44</sup>

Further and more specifically, the changes made to the *Migration Act* in 2001 which resulted in the excision of 'offshore entry places' and the concomitant creation of the status of OEP, together with the insertion of Ministerial discretion to grant a protection visa (s 46A) to an OEP, or to transfer an OEP (s 198A), 'are to be seen as reflecting a legislative intention to adhere to that understanding of Australia's obligations under the *Refugee Convention* and the *Refugees Protocol* that informed other provisions made by the Act'.<sup>45</sup> Since the criteria stated in ss 198A(3)(a)(i)–(iii) 'are to be understood as a reflex of Australia's obligations',<sup>46</sup> and are evidently concerned with ensuring that 'a country specified in the Declaration will provide some of that which Australia would have provided had the asylum-seeker remained in its territory',<sup>47</sup> the criteria must meaningfully constrain the Minister's power to issue declarations and could not be considered as mere window dressing. Presumably this legislative purpose of ensuring consistency with international law could not be maintained were the Minister to be free to issue declarations in good faith, regardless of whether such declarations in fact complied with the criteria in s 198A(3) and hence Australia's international legal obligations.

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<sup>41</sup> *M70* (2011) 280 ALR 18, 77–8. French CJ differed in that his Honour rejected the argument that the criteria were 'jurisdictional facts': at 42. He nonetheless found that the Court can review the Minister's decision to issue a declaration for jurisdictional error and such error would exist if the Minister misconstrued the law: *ibid*. Interestingly, despite subsequent criticism of French CJ's position by the Prime Minister of Australia, his Honour's position in *M70* was not inconsistent with that taken in previous decisions: see *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 (26 September 2003) [49], where he left open the possibility that a declaration could be challenged for jurisdictional error. Kiefel J agreed with the joint judgment: *M70* (2011) 280 ALR 18, 86–7, 89. Her Honour also agreed with French J's conclusion concerning jurisdictional error: at 89. Heydon J was in dissent: at 63–76.

<sup>42</sup> *M70* (2011) 280 ALR 18, 54.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* 50, quoting *M61* (2010) 243 CLR 319, 339, which was a unanimous judgment of the High Court.

<sup>45</sup> *M70* (2011) 280 ALR 18, 51, quoting *M61* (2010) 243 CLR 319, 341. See also Kiefel J: *M70* (2011) 280 ALR 18, 78–9, 82.

<sup>46</sup> *Ibid* 56.

<sup>47</sup> *Ibid* 85 (Kiefel J).

The High Court's approach to the reviewability of the ministerial declaration in *M70* can be contrasted with that taken by the Canadian Federal Court of Appeal in litigation concerned with the validity of the *US–Canada Safe Third Country Agreement* — a bilateral arrangement for responsibility sharing in North America. Phelan J of the Canadian Federal Court held at first instance that compliance with art 33 of the *Refugee Convention* was a condition precedent to the executive's exercise of its delegated authority to designate the US as a safe third country, such that the court could consider objective evidence as to whether the condition precedent was satisfied in the case of the US.<sup>48</sup> Following an extensive and fascinating consideration of a range of objective evidence, including expert affidavits, his Honour concluded that the *US–Canada Safe Third Country Agreement* was ultra vires the enabling legislation on the basis that transfer of asylum seekers to the US from Canada was likely to result in a violation of art 33 of the *Refugee Convention*.<sup>49</sup> However, the Canadian Federal Court of Appeal overturned this decision on the basis that Phelan J had misconstrued the role of the Court in this inquiry. Rather than being able to review for itself whether transfer from Canada to the US in fact complied with Canada's international obligations, the court was permitted only to review whether the executive considered the relevant factors and 'acting in good faith, designated the US as a country that complies with the relevant Articles of the *Conventions*'.<sup>50</sup>

The quite distinct approach of the Australian High Court in *M70*, explicable on the basis of different principles of administrative law as between Canada and Australia,<sup>51</sup> meant that the High Court *was* empowered to examine the facts supporting the ministerial declaration and assess the degree to which the declaration complied with international law, as will be the case for any future attempts to invoke the power to issue a declaration under s 198A. Apart from operating as a significant constraint on executive power, it also provides a domestic court with the opportunity to explore the requirements of international law in this important but largely judicially under-developed context.

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<sup>48</sup> *Canadian Council for Refugees v The Queen* [2008] 3 FC 606, 619–20.

<sup>49</sup> See *ibid* 724. For a more specific analysis of Phelan J's decision, see Michelle Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25 *Refuge* 64, 69–72.

<sup>50</sup> *R v Canadian Council for Refugees* [2009] 3 FC 136, 171 (Noël JA, with whom Richard CJ agreed). Note that an appeal to the Supreme Court was not accepted. However, there was a complaint filed in the Inter-American Commission of Human Rights ('IACHR') which was found admissible: see *John Doe v Canada* (Inter-American Commission of Human Rights, Report No 121/06, Case No 12.586, 27 October 2006). The Commission's decision on the merits was handed down on 21 July 2011 in which it found that, in relying on the *US–Canada Safe Third Country Agreement*, Canada violated the applicants' right to: 'seek asylum, as provided by Article XXVII of the *American Declaration*'; 'protection from possible chain *refoulement* by failing to conduct individualized risk assessments prior to returning them to the United States, in contravention of Article XXVII of the *American Declaration*'; and 'to resort to the courts before being returned to the United States, as provided by Article XVII of the *American Declaration*': *John Doe v Canada* (Inter-American Commission on Human Rights, Report No 78/11, Case 12.586, 21 July 2011) [128].

<sup>51</sup> In particular the fact that there is no such concept as 'jurisdictional fact' in Canadian law.

## IV INTERNATIONAL LAW AND RESPONSIBILITY SHARING: THE HIGH COURT'S CONTRIBUTION

A *Sharing with Whom? Minimum Obligations of States Parties to Responsibility Sharing Arrangements*

A key question in any assessment of burden sharing arrangements compliant with the *Refugee Convention* is whether a state party, such as Australia, may engage in an arrangement with a country that is not party to the *Refugee Convention* — clearly an acute issue in the context of the *Malaysian Arrangement*. Although this is a contentious issue,<sup>52</sup> there are persuasive reasons for concluding that a state party can only share responsibility with a state which shares the same international obligations. First, there is a strong argument that accession matters: it ‘represents a binding commitment by a State to respect the provisions of the *Convention* and to implement those provisions in practice’.<sup>53</sup> Secondly, accession to the *Refugee Convention* also involves a binding commitment to cooperate with the United Nations High Commissioner for Refugees (‘UNHCR’), which ‘gives the UNHCR a degree of leverage it might not otherwise have’.<sup>54</sup> Even though several non-parties, including Malaysia, in practice allow the UNHCR to conduct its supervisory and protective functions, it remains the fact that such states are not legally obligated to do so and thus may refuse to cooperate at any time. Indeed, as the UNHCR office in Malaysia noted in 2005, although

there is a considerable degree of cooperation in the protection of refugees between UNHCR and the Malaysian authorities ... a consistent implementation of oral agreement and political decisions in the form of specific laws, regulations or instructions is still lacking’.<sup>55</sup>

In other words, cooperation in Malaysia is discretionary and piecemeal. Thirdly, accession to the *Refugee Convention* includes the compulsory obligation to submit to the jurisdiction of the International Court of Justice in relation to ‘any

<sup>52</sup> See, eg, Stephen Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *International Journal of Refugee Law* 567; Foster, ‘Protection Elsewhere’, above n 4, 267–75.

<sup>53</sup> Rosemary Byrne and Andrew Shacknove, ‘The Safe Third Country Notion in European Asylum Law’ (1996) 9 *Harvard Human Rights Journal* 185, 200. In *Ruhani v Director of Police (No 2)* (2005) 219 ALR 270, Kirby J noted that ‘Nauru is not a party to the *Refugees Convention* and *Protocol*. This fact itself made the removal of the appellant by Australian officials to Nauru a source of potential disadvantage for him’: at 285.

<sup>54</sup> Legomsky, above n 52, 660.

<sup>55</sup> United Nations High Commissioner for Refugees, ‘UNHCR’s Views on the Concept of Effective Protection as It Relates to Malaysia’ (Report, 31 March 2005) <<http://www.unhcr.org.au/pdfs/Malaysia.pdf>>.

dispute between parties to the *Convention*.<sup>56</sup> By removing a refugee to a state that is not a party to the *Refugee Convention* a state precludes the possibility of any formal supervision, arguably again reducing the scope of refugee protection.<sup>57</sup>

In the context of the *Malaysian Arrangement*, the High Court in *M70* was able to assess the Minister's decision-making process prior to issuing the declaration by virtue of an affidavit produced by the Minister for the purposes of this litigation,<sup>58</sup> in which he explained that rather than basing the declaration on the existence of Malaysia's legal obligations, he had formed a 'clear belief' from various discussions with the Malaysian Government that it had 'made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving the protections offered to such persons'.<sup>59</sup> Further, the Minister went on to explain that the 'Malaysian government was enthusiastic about using the transfer of 800 persons under the proposed arrangement as a kind of "pilot" for their new approach'.<sup>60</sup>

This was notwithstanding that it was an agreed fact between the parties that Malaysia has not ratified the *Refugee Convention* nor does it recognise the status of refugees in domestic law.<sup>61</sup> That is, while the Malaysian Government permits the UNHCR to process refugee claims, even where the UNHCR finds that a

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<sup>56</sup> See *Refugee Convention* art 38, provides that '[a]ny dispute between parties to this *Convention* relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute'. No reservation may be made to this art at the time of signature, ratification or accession: at art 42(1). Thus art 38 is a compulsory provision for any state party to the *Refugee Convention*. Although the *Protocol relating to the Status of Refugees* does permit a reservation to be made to its equivalent provision in art IV, only a small proportion of the 145 states parties to the *Protocol* have entered such a reservation: *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>57</sup> See also Catherine Phuong, 'The Concept of "Effective Protection" in the Context of Irregular Secondary Movements and Protection in the Regions of Origin' (Global Migration Perspectives No 26, Global Commission on International Migration, April 2005) 4, cited in Foster, 'Protection Elsewhere', above n 4, 242 n 76. This issue has been raised by the Committee against Torture in considering whether a state party is in violation of its *non-refoulement* obligation in the *CAT*. In a number of decisions the Committee has taken into account the fact that the state to which transfer is proposed is not a party to the *CAT* in finding the transfer unlawful. For example, in *Mutombo v Switzerland* the Committee said 'in view of the fact that Zaire is not a party to the *Convention*, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection': Committee against Torture, *Views: Communication No 13/1993*, 12<sup>th</sup> sess, UN Doc CAT/C/12/D/13/1993 (27 April 1994) 10 [9.6] ('*Mutombo v Switzerland*'). While there is no possibility of course of an individual taking a case to the International Court of Justice in relation to the *Refugee Convention*, it remains the case that removal to a non-state party reduces the possibility of external supervision.

<sup>58</sup> The Minister is not required to issue reasons for issuing a declaration, but swore an affidavit on 14 August 2011: see *M70* (2011) 280 ALR 18, 32–3 (French CJ). Indeed, as the declaration was not registered under the *Legislative Instruments Act 2003* (Cth) until after proceedings were lodged, there was uncertainty prior to proceedings as to whether a declaration had indeed been issued: see Transcript of Proceedings, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCATrans 195 (7 August 2011).

<sup>59</sup> *M70* (2011) 280 ALR 18, 32 (French CJ), quoting Affidavit of Christopher Bowen, Minister for Immigration and Citizenship, 14 August 2011.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* 33.

person is a refugee pursuant to the *Refugee Convention*, the Malaysian *Immigration Act*<sup>62</sup> in the words of French CJ, ‘does not contain any provisions or protections relating to persons who, under Australian or international law, would be classified as refugees or asylum seekers’.<sup>63</sup> Further, the agreement signed between Australia and Malaysia to facilitate the deal was a political document only and explicitly stated that it was non-binding,<sup>64</sup> and in any event it only related to the treatment of 800 persons, whereas a declaration was potentially of indefinite duration and application.<sup>65</sup>

All six majority judges in *M70* found that the Minister’s reasoning disclosed an insufficient basis on which to make a declaration. Rather, at a minimum, the country must be obliged as a matter of law to provide refugee protection. French CJ based his reasoning in this regard on the ‘temporal element of the Minister’s judgment under s 198A(3)(a)’, which requires that circumstances described by each of the criteria must be a ‘present and continuing circumstance’.<sup>66</sup> This temporal element ‘points to the need for a legal framework to support the continuance of the matters the subject of the Minister’s assessment’.<sup>67</sup> In other words, the ministerial declaration cannot ‘be a declaration based upon ... a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent’.<sup>68</sup>

The joint judgment more clearly linked its reasoning to the fact that the language of s 198A(3)(a) ‘directs attention to the kinds of obligation that Australia and other signatories have undertaken under the *Refugees Convention* and the *Refugees Protocol*’,<sup>69</sup> which again must be anchored in legal obligation rather than merely by reference to ‘what has happened, is happening or may be expected to happen in the relevant country’.<sup>70</sup> Similarly, Kiefel J was of the view that a construction of s 198A(3)(a), which requires that the relevant country to which asylum seekers will be transferred ‘has obliged itself, through its laws, to provide the necessary recognition and protection’,<sup>71</sup> is the construction of s 198A(3)(a) which ‘most closely accords with the fulfilment of Australia’s

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<sup>62</sup> *Immigration Act 1959* (Malaysia) (*‘Immigration Act’*).

<sup>63</sup> *M70* (2011) 280 ALR 18, 33.

<sup>64</sup> See *Malaysian Arrangement* cl 16: ‘This *Arrangement* represents a record of the Participants’ intentions and political commitments but is not legally binding on the Participants’.

<sup>65</sup> A declaration can be revoked, but there is no provision for making a declaration only in respect of a specified group, or for a specified period: see *Migration Act* s 198A.

<sup>66</sup> *M70* (2011) 280 ALR 18, 43.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* 55.

<sup>70</sup> *Ibid* 55. Hence, the joint judgment concluded, at 60, that

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

<sup>71</sup> *Ibid* 87.

*Convention obligations*'.<sup>72</sup> As Kiefel J explained in her concurring judgment, the 'recognition and protection of refugees by a country is effected by its laws. It is a country's laws to which regard is had by other countries in determining the extent to which recognition and protection of refugees might be provided'.<sup>73</sup>

Returning to the question of necessity for ratification of the *Refugee Convention*, although all majority judges were adamant that a form of legal protection for refugees is essential in the receiving state, they did not necessarily require that a country be bound as a matter of *international law* to protect refugees. French CJ explained that it is essential to assess the criteria by reference to 'the domestic laws of the specified country, including its Constitution and statute laws, and the international legal obligations to which it has bound itself'<sup>74</sup> — in other words its 'enduring legal frameworks'<sup>75</sup> — but was not explicit as to whether an international obligation is an essential prerequisite. The joint judgment concluded that a country does not provide protections of the kind described in ss 198A(3)(ii) or (iii) 'unless its domestic law deals expressly with the classes of persons mentioned in those sub-paragraphs or it is internationally obliged to provide the particular protections'.<sup>76</sup> However, as Kiefel J opined, 'it is more likely that a country's domestic laws will provide for [the required] recognition and protection if they are a Contracting State'.<sup>77</sup>

The High Court's position then is consistent with that of a UNHCR Expert Roundtable which concluded in 2002 that 'accession and compliance with the 1951 *Convention* and/or *Protocol* are essential, unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 *Convention* and/or 1967 *Protocol*'.<sup>78</sup> A practice 'akin' would presumably be one whereby the country has implemented into domestic law a system which largely mirrors the obligations which parties undertake pursuant to the *Refugee Convention*. In the case of Malaysia, it has established no such comparable practice. Rather, as explained by the UNHCR office in Malaysia:

As there are currently no legislative or administrative provisions in place for dealing with the situation of asylum seekers or refugees in the country, UNHCR conducts all activities related to the reception, registration, documentation and status determination of asylum seekers and refugees.<sup>79</sup>

In other words, Malaysia has not established a *de facto* refugee protection system, but rather has delegated the entire problem to the UNHCR. But as the

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* 86.

<sup>74</sup> *Ibid.* 44.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* 58. The joint judgment further made clear that it was concerned with a legal obligation (rather than it necessarily be one pursuant to the *Refugee Convention*) in its discussion of Nauru: at 58–9.

<sup>77</sup> *Ibid.* 86.

<sup>78</sup> Lisbon Expert Roundtable, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers' (Report, United Nations High Commissioner for Refugees, 9–10 December 2002) 3 [15] <<http://www.unhcr.org/3e5f323d7.html>>.

<sup>79</sup> See United Nations High Commissioner for Refugees, *UNHCR in Malaysia* <[http://www.unhcr.org.my/About\\_Us-@-UNHCR\\_in\\_Malaysia.aspx](http://www.unhcr.org.my/About_Us-@-UNHCR_in_Malaysia.aspx)>.

UNHCR itself acknowledges, international protection ‘is afforded by States and not by an international organization’.<sup>80</sup>

Of course, acceptance that at international law a valid responsibility sharing arrangement may only be entered into with a state party which has an international or domestic legal obligation to protect refugees in accordance with the *Refugee Convention* does not mean that such a prerequisite is exhaustive, rather the question clearly arises as to whether such legal obligation is sufficient. Although not necessary to decide in this case (given the lack of any relevant domestic or international legal obligations in the case of Malaysia), there are clear indications from the High Court in *M70* that legal obligation is a *necessary but not sufficient condition* for a valid declaration.

The joint judgment did not believe it necessary to decide this issue, but was willing to accept for the purposes of argument, ‘that each of the relevant criteria contains a factual element that requires a judgment to be made about what happens in the relevant country’.<sup>81</sup> However, French CJ was clear that the existence of legal obligation is not the end of the inquiry, rather the existence of a legal framework ‘on paper’ is not a sufficient condition for the making of a declaration.<sup>82</sup> As his Honour noted, ‘[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states’.<sup>83</sup> Hence the words ‘provide’ and ‘meet’ require ‘consideration of the extent to which the specified country adheres to those of its international obligations, constitutional guarantees and domestic statutes which are relevant to the criteria’.<sup>84</sup> Similarly, Kiefel J stated that while a legal obligation is the ‘minimum requirement’ for a country to meet the legislative criteria,<sup>85</sup> its practices may also be relevant, hence the Minister may ‘scrutinise what is done in practice to ensure that the country’s laws are carried into effect and to ensure

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<sup>80</sup> United Nations High Commissioner for Refugees, Submission to Transport and Industrial Relations Committee, *Inquiry into Immigration Bill 2007*, 20 November 2007, [22]. The submission states:

It should be noted in this context that the mere presence of an office of the United Nations High Commissioner for Refugees in another country does not equate to ‘effective protection’. Although mandate refugee status could be conceivably construed as ‘protection’ in which s 125 is framed, protection is afforded by states and not by international organizations.

<sup>81</sup> *M70* (2011) 280 ALR 18, 54. The judgment went on to note that the need for a factual assessment may be (emphasis in original)

most clearly seen in connection with the fourth criterion: that the country in question ‘meets relevant human rights standards in providing that protection’ ... [which] could be understood as directing attention to matters that include what has happened, is happening or may be expected to happen in that country.

<sup>82</sup> *Ibid* 44–5.

<sup>83</sup> *Ibid*. For similar sentiments expressed in a related but distinct context: see *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549, 559:

It is a sad reality of modern times that countries do not always honour human rights, whether enshrined in domestic constitutions or in international treaties to which they are parties. To treat the fact of a country being a party to the *Refugee Convention* as conclusive would be a distortion of the *Convention’s* language and subversive of its underlying purpose.

<sup>84</sup> *M70* (2011) 280 ALR 18, 45.

<sup>85</sup> *Ibid* 86–7.

that the country can be relied upon to recognise refugee status and provide the necessary protections'.<sup>86</sup>

The inadequacy of a reliance on formal legislative and administrative arrangements and the need to inquire into the application of formal standards in practice is perhaps most cogently illustrated in the context of the operation of the *Dublin Regulation* in the European Union, in which the country through which an asylum seeker first enters the EU is deemed responsible for status determination, resulting in the transfer of asylum seekers back to the first country of arrival where they have sought asylum in a second or subsequent state. This scheme is underpinned by a 'Common European Asylum System' whereby all member states are parties to the *Refugee Convention*; are governed by the *Charter of Fundamental Rights of the European Union*, which guarantees the right to asylum;<sup>87</sup> and are bound by a series of Council Directives concerning (inter alia) minimum standards for the reception of asylum seekers,<sup>88</sup> minimum standards on qualification for refugee status,<sup>89</sup> and minimum standards on procedures for granting and withdrawing status,<sup>90</sup> all of which are required to be transposed into the domestic law of member states. Yet notwithstanding this plethora of legal standards, the Grand Chamber of the European Court of Justice has recently affirmed that

the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of [the *Dublin Regulation*] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment ...<sup>91</sup>

Although the governments of Belgium, Italy, and Poland had submitted in that case that they lacked 'the instruments necessary to assess compliance with

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<sup>86</sup> Ibid 86.

<sup>87</sup> *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 18. See *NS v Secretary of State for the Home Department* (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011) [4] ('NS').

<sup>88</sup> See *NS* (Court of Justice of the European Communities, C-411/10 and C-493/10, 21 December 2011) [11], citing *Council Directive 2003/9/EC of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers* [2003] OJ L 31/18.

<sup>89</sup> *NS* (Court of Justice of the European Communities, C-411/10 and C-493/10, 21 December 2011) [11], citing *Council Directive 2004/85/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2005] OJ L 204/24. A revised version of this Directive was approved in December 2011: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9 ('EU Qualification Directive').

<sup>90</sup> *NS* (Court of Justice of the European Communities, C-411/10 and C-493/10, 21 December 2011) [11], citing *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13 and *Corrigendum to Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [2006] OJ L 236/36.

<sup>91</sup> *NS* (Court of Justice of the European Communities, C-411/10 and C-493/10, 21 December 2011) [94].

fundamental rights by the Member State responsible',<sup>92</sup> the Court dismissed this submission noting that in a similar case before the Grand Chamber of the European Court of Human Rights ('ECtHR'), *MSS v Belgium*,<sup>93</sup> the Court took into account (inter alia)

the regular and unanimous reports of international non-governmental organizations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, [and] the correspondence sent by the [UNHCR].

These sources are equally readily available in the context of the treatment of refugees in Australia's neighbours in the region. In other words, a state may be deemed to have constructive knowledge that its obligations will be violated on transfer and cannot in such a case hide behind formal agreements, assurances or the domestic law of the receiving country.<sup>94</sup>

This also implies the need for *ongoing* monitoring as was made clear in the House of Lords decision in *R (Yogathas) v Secretary of State for the Home Department*,<sup>95</sup> concerning the constraints on the UK Government's ability to transfer asylum seekers to other European countries pursuant to the *Dublin Regulation*, in which Lord Bingham noted that a state which wishes to transfer an asylum seeker to another state is 'under a duty to inform itself of the facts and monitor the decisions made by a third country in order to satisfy itself that the third country will not send the applicant to another country otherwise in accordance with the *Convention*'.<sup>96</sup> Further, in a similar context, the UN Human Rights Committee has emphasised that where a state expels a person to another state 'on the basis of assurances as to that person's treatment by the receiving state', the sending state must institute '*credible mechanisms* for ensuring compliance by the receiving state with these assurances from the moment of expulsion'.<sup>97</sup>

In this context, it is questionable whether the monitoring provisions proposed to be established in the *Malaysian Arrangement* would have been sufficient to ensure a credible mechanism for measuring ongoing compliance in Malaysia with Australia's international legal obligations under the *Refugee Convention*. This is because the 'Joint Committee' — the Committee which would have had

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<sup>92</sup> Ibid [91].

<sup>93</sup> See *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011). In that case, the European Court of Human Rights held, at [353], that

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the *Convention*.

<sup>94</sup> Ibid [359]. As the Grand Chamber of the European Court of Human Rights held 'it was in fact up to the Belgian authorities ... not merely to assume that the applicant would be treated in conformity with the *Convention* standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice'.

<sup>95</sup> [2003] 1 AC 920.

<sup>96</sup> Ibid 927 (emphasis added).

<sup>97</sup> Human Rights Committee, *Report of the Human Rights Committee: Volume I*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 109, Supp No 40, UN Doc A/57/40(Vol.1)(Supp) (31 October 2002) 59 (emphasis added).

responsibilities for the day to day management and oversight of the Arrangement, including ‘addressing any concerns of Transferees and refugees and ongoing development of special procedures to deal with vulnerable cases’ — was to be composed of representatives of the respective governments.<sup>98</sup> By contrast, the ‘Advisory Committee’ — which would have comprised representatives from parties independent of the agreement, namely, the UNHCR and International Organization for Migration (‘IOM’)<sup>99</sup> — was confined to providing advice and was designed to operate as ‘a body to which the Governments might refer issues for consideration’.<sup>100</sup>

### B *The Constraint of Non-Refoulement: Substantive and Procedural Aspects*

While there are controversies concerning precisely what constraints operate upon a state that wishes to transfer an asylum seeker to another state,<sup>101</sup> there is no question that, at a minimum, art 33’s prohibition on *refoulement* operates to restrict such a transfer. In other words, at a minimum, the sending state must be satisfied that an asylum seeker will not be subjected to persecution for a *Refugee Convention* reason in the receiving state. Further, it is now well accepted that art 33 extends to a prohibition on indirect or chain *refoulement*, as explained by the House of Lords:

for a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.<sup>102</sup>

In practice, in the context of burden sharing arrangements, the ECtHR has emphasised that when applying the *Dublin Regulation*, therefore, ‘the States must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin’.<sup>103</sup> Although there is no specific guidance in the *Refugee Convention* as to precisely which procedures must be adopted in undertaking RSD, it is now well understood that unless the receiving state will accept all transferees as refugees without any RSD, a sending state needs to be satisfied that: the receiving state has an adjudication procedure in place to assess

<sup>98</sup> See *Malaysian Arrangement* cls 13(1), (2).

<sup>99</sup> *Ibid* cl 13(4).

<sup>100</sup> *Ibid* cl 13(3).

<sup>101</sup> See Part IV(C) regarding the meaning of protection.

<sup>102</sup> *R v Secretary of State for the Home Department, Ex parte Adan* [2001] 2 AC 477, 526, quoting *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] 1 AC 514, 532. See also *John Doe v Canada* (Inter-American Commission on Human Rights, Report No 78/11, Case 12.586, 21 July 2011) [103]–[106], where the IACHR recently noted the overwhelming international authority for this position. Indeed given the incontestable nature of this proposition, Canada in that case ‘concedes that the Article 33 protections extend to indirect *refoulement*’: at [103].

<sup>103</sup> *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) [342]. See also the earlier decision in *TI v United Kingdom* (European Court of Human Rights, Chamber, Application No 43833/98, 7 March 2000) 15, where the European Court of Human Rights noted that, ‘the indirect removal in this case to an intermediary country, which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to [*refoulement*]’.

refugee status;<sup>104</sup> the receiving state guarantees access to that system for the refugees in question;<sup>105</sup> and that the receiving state interprets the *Refugee Convention* in a manner that respects the ‘true and autonomous meaning’ of the definition in art 1 of the *Convention*.<sup>106</sup>

These requirements are arguably embodied in the requirement in s 198A(3)(a)(i) that, ‘the country provides access, for persons seeking asylum, to effective procedures for assessing their need for protection’. However, one of the unique aspects of *M70* was that in most if not all previous decisions from regional and overseas domestic courts which have considered these issues, the relevant transfer has been made or foreshadowed to a state party which *itself* undertakes status determination. Hence the ‘anxious scrutiny’ required of the sending state has related to the adequacy of the RSD procedure established and operated by the receiving state.<sup>107</sup> By contrast, in *M70* there was no question of the Minister’s having assessed the adequacy of any procedure established by the Malaysian Government since, as mentioned above, the task of assessing refugee status is entirely left to the UNHCR — a non-state actor operating independently of the Malaysian Government. While the UNHCR is responsible for status determination in approximately 70 countries,<sup>108</sup> its procedures have been criticised for lack of procedural fairness including failure to issue reasons for decisions, limited or no access to independent legal counsel, and inadequate independent appeal mechanisms.<sup>109</sup> Further, while it has certainly worked to

<sup>104</sup> Foster, ‘Responsibility Sharing or Shifting?’, above n 49, 70. For an in-depth discussion of this issue, see Legomsky, above n 52, 654–8. As noted recently by the IACHR ‘international law has now developed to a level at which there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the *Convention*’: *John Doe v Canada* (Inter-American Commission of Human Rights, Report No 78/11, Case No 12.586, 21 July 2011) [92], quoting *Haitian Interdiction Case* (Inter-American Commission of Human Rights, Report No 51/96, Case No 10.675, 13 March 1996) [153].

<sup>105</sup> See, eg, the extensive discussion of this issue by Phelan J in *Canadian Council for Refugees v The Queen* [2008] 3 FC 606, 672–4, in relation to procedural bars in the US. Although the decision was overturned on a technical matter, the substantive analysis of international law by Phelan J remains valid. This is also supported by considerable judicial authority: as set out by Foster, ‘Protection Elsewhere’, above n 4, concerns relating to access to an effective procedure in Greece have underpinned successful challenges to transfers under the Dublin system in Austria, Finland, France, Italy, the Netherlands, Norway and Sweden: at 250. Further, the European Parliament expressed concern relating to this issue in 2008, stating that ‘there is evidence that some Member States do not guarantee effective access to a procedure for determining refugee status’: *European Parliament Resolution of 2 September 2008 on the Evaluation of the Dublin System* [2008] OJ C 295E/4, 6 [D].

<sup>106</sup> *R (Ex Parte Adan) v Secretary of State for the Home Department* [2001] 2 AC 477 (Lord Steyn). See also Foster, ‘Protection Elsewhere’, above n 4, 245–9. This was an issue in relation to the *US–Canada Safe Third Country Agreement*: see *Canadian Council for Refugees v The Queen* [2008] 3 FC 606, 665, 675–85, 685–91. It has also been an issue in Europe in the context of the *Dublin Regulation* in that the United Nations High Commissioner for Refugees’ (‘UNHCR’) analysis of the implementation of the *2004 Qualification Directive* in 2007 revealed that there is still considerable divergence among Member States on interpreting key aspects of the refugee definition: see Clara Odofin et al, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (United Nations High Commissioner for Refugees, 2007) 42–6.

<sup>107</sup> See *Yogathas* [2003] 1 AC 920, 941 (Lord Hope).

<sup>108</sup> United Nations High Commissioner for Refugees, *Refugee Status Determination Project* (July 2008) <<http://www.unhcr.org/pages/4a16b1d06.html>>.

<sup>109</sup> See, eg, Michael Kagan, ‘The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination’ (2006) 18 *International Journal of Refugee Law* 1.

improve its procedural capabilities in recent years, the fact remains that it cannot replicate the ordinary structures, particularly those relating to judicial review by the courts, which are able to be delivered by a state.<sup>110</sup>

It could be argued that ‘effective procedures for assessing their need for protection’ would require access to judicial review, particularly in light of the fact that the difficulties for asylum seekers in gaining access to judicial review in Greece was an important factor considered by the ECtHR in *MSS v Belgium* in finding Belgium in violation of its *non-refoulement* obligations when it transferred an asylum seeker to Greece.<sup>111</sup> Further, the High Court’s own unanimous decision in *M61/2010E v Commonwealth*<sup>112</sup> in relation to the so-called non-statutory offshore processing regime on Christmas Island, in which the Court found that the RSD procedure there established must comply with the rules of procedural fairness and was reviewable by the federal courts, would tend to support a robust interpretation of ‘effective procedures’.<sup>113</sup>

Ultimately it was not necessary for the High Court to resolve this question in *M70*, but interestingly Kiefel J concluded that s 198A(3)(a)

cannot be taken merely to require that a country ensure that an asylum-seeker has access to an assessment of refugee status undertaken by a non-government agency ... [i]f it is not taken to refer to the determination of refugee status by the government in question, it would leave a matter of great importance to be determined by any means. The requirement that procedures be ‘effective’ would be an insufficient safeguard.<sup>114</sup>

Her Honour also observed that the requirement that it is the declared (receiving) country which itself undertakes the determination of refugee status has an important consequence, ‘namely, that it is bound to that outcome’.<sup>115</sup> In other words, it ‘necessarily implies that the country recognises the status of refugee and gives effect to it’.<sup>116</sup> The corollary is that if the state merely allows access to a procedure operated entirely by another entity, it is far less likely, as is the case in Malaysia, to accord any significance in its own domestic law or practice to the determinations made by that independent body. This is significant because not only does it contribute to our understanding of what procedures are required to be established in the receiving state, but it also represents a particularly lucid explanation of why, as concluded by the *Michigan Guidelines on Protection*

<sup>110</sup> While the UNHCR is working to improve procedural standards, as the UNHCR itself has stated on numerous occasions, the ‘[o]ffice cannot and is not meant to replace whole government structures that would be necessary to protect and assist refugees’: see United Nations High Commissioner for Refugees’ Regional Protection Hub for the Asia-Pacific, *Benefits of Having State Systems to Identify Refugees* (Refugee Newsletter No 1/2008, United Nations High Commissioner for Refugees May 2008) <[http://unhcr.org.au/pdfs/UNHCRNewsletterIssue12008\\_000.pdf](http://unhcr.org.au/pdfs/UNHCRNewsletterIssue12008_000.pdf)>.

<sup>111</sup> *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

<sup>112</sup> *M61* (2010) 243 CLR 319.

<sup>113</sup> Indeed, it is noteworthy that in oral argument before the High Court in *M70*, Gummow J suggested that the decision in *M61* might be relevant for assessing the phrase ‘effective procedures’, although this was not discussed in the judgment in *M70*: see *M70* [2011] HCATrans 223 (22 August 2011).

<sup>114</sup> *M70* (2011) 280 ALR 18, 86.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

*Elsewhere*, ‘any sharing-out of protection responsibility must take place between and among states’.<sup>117</sup>

### C *The Meaning of ‘Protection’ in the Refugee Convention*

One of the most contested aspects of refugee responsibility sharing arrangements is the extent to which obligations in the *Refugee Convention* beyond art 33’s prohibition on *refoulement* operate to constrain the transfer of asylum seekers between states parties. In other words, there is a question as to whether the sending state need only consider compliance with art 33, or whether its ‘rigorous examination’ of the situation in the receiving state must extend to other rights contained in the *Refugee Convention* such as the right to primary education, religious freedom and freedom of movement.

Most domestic and regional courts that have considered the legality of responsibility sharing regimes have been restricted to a consideration of art 33.<sup>118</sup> Where other rights have been considered, these have not been derived from the *Refugee Convention*. For example, in *MSS v Belgium*, the ECtHR found Belgium in violation of the prohibition on degrading and inhuman treatment on the basis that ‘by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment’,<sup>119</sup> however, this turned on Belgium’s obligations under the *European Convention on Human Rights*<sup>120</sup> rather than the *Refugee Convention*.

Against this background, the High Court’s consideration of the meaning of ‘protection’ in s 198A(3)(a)(ii) and (iii) is extremely important. Given that the Court was clearly of the view that s 198A(3)(a) reflects Australia’s international obligations under the *Refugee Convention*, this issue turned directly on the nature of the protection obligations assumed by Australia as a party to the *Convention*.<sup>121</sup>

<sup>117</sup> James C Hathaway, ‘The Michigan Guidelines on Protection Elsewhere’ (2007) 28 *Michigan Journal of International Law* 207, 211.

<sup>118</sup> See Foster, ‘Responsibility Sharing or Shifting?’, above n 49, 66.

<sup>119</sup> *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) [367].

<sup>120</sup> *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) (*‘European Convention on Human Rights’*).

<sup>121</sup> As the joint judgment noted:

The references in s 198A(3)(a)(i) to (iii) to a country that provides access to certain procedures and provides protections of certain kinds must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the *Refugees Convention* and the *Refugees Protocol*.

*M70* (2011) 280 ALR 18, 56. The object and purpose of the *Refugee Convention* is to ‘extend the scope of and the protection accorded by previous instruments by means of a new agreement’, reflected in the fact that the *Refugee Convention* invokes the word ‘protection’ 17 times: see *Refugee Convention* Preamble. Indeed, as Hathaway notes, ‘most of the *Refugee Convention* is in fact devoted to elaborating’ the ‘various rights which follow from recognition of *Convention* refugee status’: James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 2.

In *M70* the Minister argued that ‘protection’ in the *Refugee Convention* and hence the *Migration Act* should be limited to *non-refoulement* — that is, the protection against return to a place of persecution.<sup>122</sup> On the other hand, the plaintiffs argued that while ‘at its heart’ protection means or includes protection from *refoulement*, it also means or includes ‘other rights set out in the *Refugee Convention*, which rights expand as the refugee’s relationship with the asylum state deepens’.<sup>123</sup> This argument invoked James Hathaway’s well known articulation of the nature of the rights regime in the *Refugee Convention* whereby rights are acquired as the relationship between a refugee — which includes those who factually meet the definition of refugee regardless of status determination<sup>124</sup> — is strengthened from mere physical presence through to durable residence.<sup>125</sup>

The joint judgment in *M70* categorically rejected the Minister’s submission in this regard,<sup>126</sup> noting that were it to be accepted, a person subject to transfer may, upon that transfer being effected, ‘have none of the other rights which Australia is bound to accord to persons found to be refugees’.<sup>127</sup> As the joint judgment noted, these rights or obligations extend significantly beyond *non-refoulement* to include application of the provisions of the *Refugee Convention* to refugees without discrimination,<sup>128</sup> to accord refugees religious freedom, including freedom regarding the religious education of their children,<sup>129</sup> to accord to a refugee free access to the courts of law,<sup>130</sup> to accord to refugees lawfully staying the right to engage in wage-earning employment,<sup>131</sup> to accord rights to elementary education,<sup>132</sup> and to accord refugees freedom of movement.<sup>133</sup> The joint judgment did not deem it necessary to decide which of the rights in the *Refugee Convention* apply to persons who claim to be refugees but whose claims have not yet been assessed,<sup>134</sup> but it is well accepted that refugee status is

<sup>122</sup> Minister for Immigration and Citizenship, ‘Submissions of the Defendants’, Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 18 August 2011 [69].

<sup>123</sup> Sayed-Navab Shah, ‘Plaintiffs’ Outline of Submissions’, Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, M70/2011 and M106/2011, 17 August 2011, [28], citing Hathaway, *The Rights of Refugees under International Law*, above n 121, 156–7.

<sup>124</sup> Hathaway, *The Rights of Refugees under International Law*, above n 121, 156–92.

<sup>125</sup> *Ibid.* Hathaway’s analysis is anchored in the fact that the *Refugee Convention* does not distinguish between asylum seeker and refugee; indeed the notion of asylum seeker is not a meaningful concept at international law. Rather, the *Convention* conditions refugee rights on a refugee’s (that is a person who factually meets the definition in art 1A(2)) connection with a state party.

<sup>126</sup> French CJ did not think it necessary to consider the meaning of protection *M70* (2011) 280 ALR 18, 44; Kiefel J referred to the fact that protection includes ‘at the least’ protection against persecution and *refoulement*: at 85.

<sup>127</sup> *Ibid* 56–7.

<sup>128</sup> *Refugee Convention* art 3. See *ibid* 55–6.

<sup>129</sup> *Refugee Convention* art 4; *M70* (2011) 280 ALR 18, 55–6.

<sup>130</sup> *Refugee Convention* art 16(1).

<sup>131</sup> *Ibid* art 17(1).

<sup>132</sup> *Ibid* art 22(1).

<sup>133</sup> *Ibid* art 26; *M70* (2011) 280 ALR 18, 55–6.

<sup>134</sup> *M70* (2011) 280 ALR 18, 55–6. This was because the *Migration Act* refers both to those seeking asylum and to recognised refugees, and Malaysia provides rights for neither of these groups.

declaratory only, meaning that a state cannot deprive a person of his or her rights pursuant to the *Convention* on the mere basis that status has not been determined.<sup>135</sup> Hence where a putative refugee is to be transferred, the better analysis is that the transferring state must at least consider those rights acquired by the refugee (whether or not status has yet been determined) by virtue of mere physical presence which includes non-discrimination, religious freedom, rights relating to property, access to the courts, rights regarding rationing, the right to elementary education, non-penalisation for illegal entry,<sup>136</sup> freedom from

<sup>135</sup> See *M70* (2011) 280 ALR 18, 79–80 (Kiefel J). This is the position of the UNHCR (see United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Referring to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.2 (1992) [28]) — the body which has supervisory responsibility under the art 35(1) of the *Refugee Convention*. This has also been recently affirmed in the revised *EU Qualification Directive* [2011] OJ L 337/9, Preamble para 21. It is also the position of leading scholars. In addition to Hathaway, Goodwin-Gill and McAdam similarly state that ‘a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive’: Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 240. See also Atle Grahl-Madsen, *The Status of Refugees in International Law* (A W Sijthoff, 1966) vol I, 240 and other sources cited by Goodwin-Gill and McAdam: at 51, n 3. Indeed, given that the text of the *Refugee Convention* does not anywhere mention the word ‘asylum seeker’, provide for any particular form of status determination, or condition any of the *Convention* rights on completion of status determination, it is difficult to comprehend an alternative reading that would be justified by the *Vienna Convention on the Law of Treaties*, which provides that the primary rule of treaty interpretation is that ‘1. 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 object and purpose’: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980) art 31(1) (‘*VCLT*’). Of course in practice, most developed states (albeit constituting a small proportion of all states parties to the *Refugee Convention*) have set up status determination procedures to determine whether a person indeed meets the definition, and in many cases defer the grant of permanent refugee status until that process is complete, but practice is mixed as to whether *Convention* rights are delivered or suspended pending completion of status determination (the lack of consistency being a highly relevant fact given that while the *VCLT* recognises in art 31(3)(b) that ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ is to be taken into account, such practice must be ‘concordant, common and consistent’: Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2<sup>nd</sup> ed, 1984) 137, quoted in Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 227–8. In terms of state practice, most (if not all) states recognise that art 33 applies immediately and prior to completion of an RSD procedure, and others also recognise various other *Convention* rights pending final determination: see, eg, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers* [2003] OJ L 31/18, art 10(1), laying down minimum standards for the reception of asylum seekers, which applies to the 27 member states of the EU and provides in relation to the right to education that

[m]ember States shall grant to minor children of asylum seekers and to asylum seekers [defined to mean a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken: at art 2(c)] who are minors access to the education system under similar conditions as nationals

This implements art 22 of the *Refugee Convention* prior to the recognition of refugee status. But even this state practice pertains to a minority of states parties in that most states parties do not condition refugee status on status determination. As Hathaway notes, in practice, developing states, ‘which host the overwhelming majority of the world’s refugees — have rarely contested the eligibility for refugee status of those arriving at their borders’: Hathaway, *The Rights of Refugees under International Law*, above n 121, 3.

<sup>136</sup> *Refugee Convention* art 31(1).

constraints on movement unless shown to be necessary and justifiable,<sup>137</sup> as well as *non-refoulement*.<sup>138</sup>

While not providing a definitive list of the rights which apply at the point of transfer, given that it was not necessary to resolve in *M70*, the joint judgment nonetheless provides clear authority that a state may not transfer an asylum seeker or refugee by reference merely to whether art 33 will be respected in the receiving state. In this regard, it provides a valuable addition to our understanding of the constraints on refugee responsibility sharing schemes at international law, and is certain to have significance beyond the Australian context alone.

Once it was accepted that ‘protection’ includes more than mere *non-refoulement*, and that such protection must be embodied in legal obligation in the receiving state, it was clear that Malaysia could not possibly have met the criteria in s 198A(3)(a)(ii) and (iii). As noted above, it was an agreed fact that ‘Malaysia does not recognise the status of refugees in domestic law’.<sup>139</sup> On the contrary, s 6 of the Malaysian *Immigration Act* provides that ‘no person other than a citizen shall enter Malaysia unless in possession of a valid entry permit or valid pass, or exempted from the operation of the section by an order made under s 55’.<sup>140</sup> Contravention of s 6 is an offence and a person ‘is liable, on conviction, to a fine, imprisonment for a term not exceeding five years or both, and liable to whipping of not more than six strokes’.<sup>141</sup> Since there is no basis for an asylum seeker or refugee to apply for a ‘valid entry permit or valid pass’, both asylum seekers and refugees are liable to and have been subjected in the past to such punishment as well as deportation.<sup>142</sup>

For the purposes of giving effect to the *Malaysian Arrangement*, on 5 August 2011 an order was made by the relevant Malaysian Minister under s 55(1) of the Act exempting from the requirements of s 6 of the Malaysian *Immigration Act* ‘persons entering Malaysia through the Arrangement and allocated with serial numbers issued by the Department of Immigration of Malaysia to each such person’.<sup>143</sup> However, there was no exemption for such persons in relation to their prior unlawful entry into Malaysia (relevant since some of the proposed transferees had previously been in Malaysia illegally),<sup>144</sup> and in any event, the exemption order stated that it was to become void if any of the listed persons, inter alia, ‘had been registered as a “refugee” by the UNHCR’<sup>145</sup> or ‘had been listed as a prohibited immigrant under s 8(1) of the Malaysian *Immigration Act*’

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<sup>137</sup> Ibid art 31(2).

<sup>138</sup> See Foster, ‘Protection Elsewhere’, above n 4, 267–8. The Michigan Guidelines also suggest that consideration be given to those rights that may be further acquired. The *Migration Act* is consistent with this analysis since it provides that the right of recognised refugees are relevant also in making a declaration.

<sup>139</sup> *M70* (2011) 280 ALR 18 33 (French CJ).

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> This is well documented by various human rights organisations: see, eg, Amnesty International, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’ (Report No ASA 28/010/2010, June 2010) <[http://www.amnesty.org.au/images/uploads/ref/abused\\_and\\_abandoned-refugees\\_denied\\_rights\\_in\\_malaysia.pdf](http://www.amnesty.org.au/images/uploads/ref/abused_and_abandoned-refugees_denied_rights_in_malaysia.pdf)>.

<sup>143</sup> *M70* (2011) 280 ALR 18, 34.

<sup>144</sup> Ibid.

<sup>145</sup> See *Exemption Order*, 5 August 2011, cl 4.1, quoted in *ibid*.

which could be the case if the person was ‘unable to show that he has the means to support himself and his dependants’.<sup>146</sup> In such a case, there was clearly no basis for the Minister to conclude that the protection required by the *Refugee Convention*, including non-penalisation for unlawful entry, and *non-refoulement*, would be respected in Malaysia.<sup>147</sup>

In addition, even had the *Malaysian Arrangement* been legally binding, there were serious deficiencies in terms of Australia’s protection obligations under the *Refugee Convention*. For example, art 22 of the *Refugee Convention* requires states party to ‘accord to refugees the same treatment as is accorded to nationals with respect to elementary education’.<sup>148</sup> However, the *Operational Guidelines* annexed to the *Malaysian Arrangement* provided only that ‘[t]ransferees of school age will be permitted access to private education arrangements in the community, including those supported by UNHCR’, and that where ‘such arrangements are not available or affordable’ they will have ‘access to informal education arrangements organized by IOM’.<sup>149</sup> This clearly does not meet the requirements of art 22 of the *Refugee Convention*, which would have required transferees to enjoy the same rights to education as Malaysian nationals.

#### D *The Decision to Transfer Individual Asylum Seekers: Procedural and Substantive Concerns*

The final issue in the context of refugee responsibility sharing schemes is whether it is legitimate for a state to rely on a blanket agreement or determination that asylum seekers may be transferred to another state in accordance with the *Refugee Convention*, or whether individual assessment is still required.

It is clear from previous consideration both by senior appellate and regional courts that a state cannot rely on blanket determinations that a third state is safe and will deliver *Convention* rights for all refugees, nor can it rely on assurances or agreements given by the other state.<sup>150</sup> For example, one of the factors taken into account by the ECtHR in *MSS v Belgium*, was that the agreement between Greece and Belgium ‘was worded in stereotyped terms and contains no guarantee concerning the applicant in person’.<sup>151</sup> This is also well established in English jurisprudence since the House of Lords has held that although an ‘accelerated procedure’ to determine legality of transfer is acceptable, the need for efficiency cannot obviate the need for a court to subject the decision to transfer an individual asylum seeker to a ‘rigorous examination’.<sup>152</sup> As explained

<sup>146</sup> *Immigration Act* s 8(3)(a), quoted in *M70* (2011) 280 ALR 18, 33.

<sup>147</sup> As French CJ explained, it ‘is sufficient to observe that there was not, in the material before the Minister, evidence of any legal protection against such eventualities in relation to the plaintiffs or other “offshore entry persons”’: *M70* (2011) 280 ALR 18, 34.

<sup>148</sup> *Refugee Convention* art 22(1).

<sup>149</sup> *Operational Guidelines* 11 [3.3].

<sup>150</sup> See, eg, the extensive authority for this proposition cited by the IACHR: *John Doe v Canada* (Inter-American Commission on Human Rights, Report No 78/11, Case 12.586, 21 July 2011) [107]–[112].

<sup>151</sup> *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) [354].

<sup>152</sup> *Yogathas* [2003] 1 AC 920, 947.

by Lord Hope, the courts are required to subject a decision to transfer to ‘anxious scrutiny’.<sup>153</sup>

Indeed the considerable volume of litigation emerging from EU member states in recent years, particularly concerning transfers to Greece, attests to the importance of an individual assessment. For example, the highest level courts in Austria, France, Hungary, Italy and Romania have ruled against proposed Dublin transfers to Greece in individual cases.<sup>154</sup>

Against this background, it is interesting to note that the Commonwealth conceded in oral argument in *M70* that the power to transfer an OEP pursuant to s 198A(1) of the *Migration Act* is a power to be exercised by reference to the circumstances of an individual, and that it is a mandatory relevant consideration to consider whether the applicant would face persecution in the country to which he or she would be transferred.<sup>155</sup> This was significant for some of the plaintiffs in *M70* who argued that they were of particular risk of being persecuted in Malaysia on the basis of their religion.<sup>156</sup> Ultimately, it was not necessary for the Court to consider this issue, given that the declaration was invalid and therefore there was no basis to invoke the power to transfer at all. However, this is important for future attempts to invoke s 198A and suggests the need for a meaningful pre-removal assessment to be undertaken, particularly given that the decision to transfer an individual will be subject to judicial review. It is questionable that the aim of the parties to the *Malaysian Arrangement* ‘to achieve transfer of each group of transferees within 72 hours of their arrival in Australia’<sup>157</sup> would be conducive to or consistent with an adequate pre-removal assessment.

In other regional responsibility sharing contexts, a particular concern has frequently been raised in relation to the transfer of vulnerable groups such as unaccompanied or separated children, the sick and the disabled.<sup>158</sup> One of the concerns in relation to the *Malaysian Arrangement* similarly related to the lack of detail concerning the nature or extent of any pre-removal assessment in relation to such vulnerable groups. While the Arrangement stated that Australia

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<sup>153</sup> Ibid 941.

<sup>154</sup> ‘UNHCR Information Note on National Practice in the Application of Article 3(2) of the *Dublin II Regulation* in Particular in the context of Intended Transfers to Greece’ (Information Note, United Nations High Commissioner for Refugees, 16 June 2010) 4 <<http://www.unhcr.org/refworld/docid/4c18e6f92.html>>.

<sup>155</sup> See Transcript of Proceedings, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCATrans 224 (23 August 2011).

<sup>156</sup> See *M70* (2011) 280 ALR 18, 36 (French CJ). This was because evidence suggested that at least some of the applicants had a well-founded fear of being persecuted in that country information suggested that Shi’a Muslims could be at risk unless they were ‘discreet’, which had been rejected by the High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. This led Gummow J to state in the oral hearing that, ‘[i]t really would be a good idea if people who had prepared these pages ... read some of the decisions of the Court on these subjects’: Transcript of Proceedings, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCATrans 224 (23 August 2011). So it seems again that the Minister may have asked the wrong question at least in respect of some of the individuals to be transferred.

<sup>157</sup> See *Operational Guidelines* 5 [1.3].

<sup>158</sup> In relation to the *Dublin Regulation*, see, eg, Laura Kok, ‘The *Dublin II Regulation*: A UNHCR Discussion Paper’ (Discussion Paper, United Nations High Commissioner for Refugees, April 2006) 21–5.

‘will put in place an appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected’,<sup>159</sup> the only reference to vulnerable transferees was in the operating guidelines which provided that the initial health assessment undertaken in Malaysia ‘will identify vulnerable cases at the outset’<sup>160</sup> (but clearly after transfer has taken place), and that such transferees ‘will have access to the existing arrangements which UNHCR has in place for identifying and supporting vulnerable cases’.<sup>161</sup> Further, the joint judgment in *M70* noted that the departmental records revealed ‘that it is intended that a “best interests of the child assessment” should be undertaken by UNHCR, in Malaysia’.<sup>162</sup>

In addition to being relevant to the decision to invoke the reviewable power to transfer pursuant to s 198A(1) in relation to an unaccompanied child, the *Malaysian Arrangement* also starkly highlighted the paradoxical position that the Minister of Immigration is both the guardian of unaccompanied children by virtue of the *Immigration (Guardianship of Children) Act 1946* (Cth) (*IGOC Act*), as well as the person ultimately responsible for the deportation or transfer which may have a detrimental impact on an unaccompanied child.<sup>163</sup> Although not strictly necessary to decide in this case,<sup>164</sup> the High Court held in *M70* that the terms of the *IGOC Act* require that the removal of a ‘non-citizen child’ in relation to whom the Minister is guardian, ‘cannot lawfully be effected without the consent in writing of the Minister’.<sup>165</sup> The terms of the *IGOC Act* provide that the Minister ‘shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child’,<sup>166</sup> meaning that the interests of the non-citizen child are an essential consideration in any decision to transfer. Further, the Court made clear that the decision to grant the relevant consent would be judicially reviewable.<sup>167</sup> Hence the *IGOC Act* presently provides important and robust protection from transfer for unaccompanied children, given that it is highly unlikely that any future regional responsibility arrangements could be said adequately to meet the best interests of the child test.

<sup>159</sup> *Malaysian Arrangement* cl 9(3).

<sup>160</sup> *Operational Guidelines* 11 [3.5(a)].

<sup>161</sup> *Ibid* 11[3.5(b)]. It also provided that a ‘backup “safety net” will be provided by IOM’ and transferees would have ‘access to an existing UNHCR “hotline”’: at 11 [3.5(b)], [3.5(c)].

<sup>162</sup> *M70* (2011) 280 ALR 18, 62.

<sup>163</sup> This is well explained in the joint judgment: *ibid* 61.

<sup>164</sup> *Ibid*. The joint judgment considered that it was important nonetheless to consider the issue as it had been well argued and did affect the nature of the orders made. Hence it cannot be dismissed as obiter.

<sup>165</sup> See *ibid* 62, discussing s 6A of the *Immigration (Guardianship of Children) Act 1946* (Cth) (*IGOC Act*).

<sup>166</sup> *IGOC Act* s 6A(2).

<sup>167</sup> See *M70* (2011) 280 ALR 18, 62–3, explaining that such a decision would be a decision under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

## V CONCLUSION AND IMPLICATIONS

According to the Australian *Migration Act* as it presently stands,<sup>168</sup> any future offshore processing arrangement undertaken by Australia must accord with Australia's international legal obligations pursuant to the *Refugee Convention*. In particular, this means that any agreement can only be undertaken with a country that has legal obligations in respect of refugees. This may be as a matter of *international* or *domestic* law, but such obligations must extend to include the rights set by the *Refugee Convention*. In addition, there is strong indication that the existence of any such legal obligation would not be sufficient, rather the degree of implementation of any legal standards in practice would likely be important. Further, the decision to transfer each individual asylum seeker would need to be made carefully, and is unlikely ever to be possible in the case of unaccompanied children.

It is recognised by policy makers that in light of the extremely large numbers of 'people of concern to the UNHCR' moving into the Asia-Pacific, 'no one country can be reasonably expected to manage such population movements',<sup>169</sup> and that countries other than Australia 'disproportionately shoulder the burden of hosting new asylum populations'.<sup>170</sup> Yet policy responses designed to represent a 'solution' to Australia's disproportionately small number of unauthorised arrivals by boat are unlikely to represent the kind of 'international cooperation' which would constructively contribute to 'a satisfactory solution' to the 'social and humanitarian' challenge of refugee protection, as envisaged in the Preamble to the *Refugee Convention*.<sup>171</sup> In particular an arrangement which undermines, rather than embodies, the important protections guaranteed in the *Refugee Convention* cannot be justified on any basis.

In light of the fact that Australia is located in a region with a very low rate of accession to the *Refugee Convention*, no regional human rights instrument or corresponding regional court, and where very few countries have implemented domestic legislation for the recognition and protection of refugees,<sup>172</sup> any

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<sup>168</sup> Following the decision in *M70*, the government attempted to pass amendments to the *Migration Act* which would have effectively removed the constraints imposed by s 198A(3) of the *Migration Act*: see Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth) sch 1. However, it failed to pass the House of Representatives. The Bill would have replaced the s 198A(3) criteria with the sole criterion of 'national interest' as the requirement for a Minister to make a declaration: at s 198AB(2). It also sought to override the protection in the *IGOC Act*: at sch 2.

<sup>169</sup> See John Menadue, Arja Keski-Nummi and Kate Gauthier, *A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers* (Occasional Paper No 13, Centre for Policy Development, August 2011) 21.

<sup>170</sup> *Ibid.*

<sup>171</sup> The UNHCR makes clear that any regional burden sharing arrangements must comply with international law: see United Nations High Commissioner for Refugees, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with respect to Extraterritorial Processing* (Protection Policy Paper, November 2010) read in conjunction with United Nations High Commissioner for Refugees, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* (Paper, January 2007).

<sup>172</sup> See Foster and Pobjoy, above n 15, 624 for a brief discussion of the exceptional case of Timor-Leste which does have relevant legislation. Of course, New Zealand is the most obvious exception to this, but there would seem little point in engaging in an arrangement with New Zealand, since the government has made clear it intends for any such arrangement to operate as a deterrent to people smugglers.

regional arrangement in the future is unlikely to be devised in a short timeframe.<sup>173</sup> Rather, the challenge for Australia is to continue to provide leadership in working towards strategies for regional cooperation in a way that will raise and not lower standards in the region, resulting in wider ratification of the *Refugee Convention* and leading to an implementation of domestic law and practices in the legal systems of our neighbours such that the laudable goals of the *Convention*'s drafters may ultimately be realised.

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<sup>173</sup> The Commonwealth Solicitor-General was of the view that no regional arrangement could be made without legislative change given the lack of legal commitments to refugee protection by potential partners in our region: see conclusions on Nauru and Papua New Guinea in Stephen Gageler, Stephen Lloyd and Geoffrey Kennett, 'In the Matter of the Implications of *Plaintiff M70/2011 v Minister for Immigration and Citizenship for Offshore Processing of Asylum Seekers* under the *Migration Act 1958* (Cth)' (Opinion, SG No 21 of 2011, Solicitor-General of Australia, 2 September 2011) [37], [48]. In terms of Nauru as an option, the joint judgment in *M70* mentioned in passing that the previous Pacific Solution may have been different on the basis that the agreement may have been binding and also that Australia had carried out the processing, but in my view the government is correct to be conservative as to its prospects of reinstating a Nauru option on the basis of the current *Migration Act* s 198A(3). Although Nauru has recently signed the *Refugee Convention*, it is not clear that any system of RSD established there would meet the criteria in s 198A(3)(a).