TEMPORARY PROTECTION OF REFUGEES: AUSTRALIAN POLICY AND INTERNATIONAL COMPARISONS

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> "*The humanitarian program will be replaced by a program of temporary refuge for those who meet the UNHCR definition of a refugee, with repatriation when the situation resolves. The number of places for genuine refugees will remain 12,000…"* (Pauline Hanson's One Nation, 1998:14)

> "*What One Nation would be saying is that they have no place in Australia. They are only to be here temporarily … Can you imagine what temporary entry would mean for them? It would mean that people would never know whether they were able to remain here. There would be uncertainty, particularly in terms of the attention given to learning English, and in addressing the torture and trauma so they are healed from some of the tremendous physical and psychological wounds they have suffered. So, I regard One Nation's approach as being highly unconscionable in a way that most thinking people would clearly reject*." (Phillip Ruddock, Australian Minister for Immigration, Multiculturalism and Indigenous Affairs, 1998).

Introduction

At best, recent reforms to refugee policy in Australia may be described as an *ad hoc* series of harsh poll-driven measures, and at worst, as a counterproductive and inhumane regime that seeks to punish those found to be in need of protection. In 1999, one year after the right-wing populist One Nation party called for a regime of 'temporary' refuge to deal with the 'influx' of asylum seekers, the Federal Government produced Visa subclass

785, the 'Temporary Protection Visa' (TPV). In so doing, it overturned an erstwhile principle of refugee protection; that genuine refugees should not be penalised for their method of entry (UN 1951: s31). Previously described by immigration minister Phillip Ruddock as "totally unacceptable and quite extreme", the concept of temporary protection has subsequently been expanded as a punitive form of deterrent to asylum seekers. In practice, the TPV has created exactly the type of uncertainty Ruddock predicted in 1998 when criticising One Nation's 'highly unconscionable' immigration agenda (see Mansouri and Bagdas, 2002). Indeed, in one critical respect, the Federal Government has gone one step further than the anti-immigration hardliners of One Nation. By denying recognised refugees the right to family reunion, Ruddock's position is now markedly more punitive than that of One Nation, which still appears to recognise that the obvious corollary of accepting 'a person… in need of protection' is that 'we must grant their wife or husband and dependent children residency also' (One Nation, 2002).

The introduction of the TPV in October 1999 created a situation of open discrimination against TPV holders who were specifically excluded from a range of key settlement services, as illustrated in Table 1. These exclusions have resulted in considerable levels of anguish and hardship for already traumatised asylum seekers, and placed considerable strain on state-funded agencies and community-run services. Separate studies by Mann (2001), and Mansouri & Bagdas (2002) found that the TPV policy has effectively created two classes of refugees; those who were assessed off-shore and granted full settlement services and permanent protection visas (PPV), and those assessed on-shore and granted temporary protection visa with no family reunion and a punitively reduced access to settlement services. As a result, the TPV policy created uncertainty, insecurity, isolation, confusion, a sense of powerlessness and health problems among this class of asylum seekers. In 2001, the Federal Government proceeded to further erode the rights of refugees in Australia by introducing a host of new legislative amendments aimed at making Australia 'less attractive' to potential asylum seekers.

Recent Legislative Changes

Throughout the 2001 election year, the Federal Government exploited the Opposition's poll-driven bipartisanship by hastily adopting a number of measures aimed at sending a 'warning to potential asylum seekers' that Australia is 'no longer a soft touch'. These measures included the further erosion of settlement rights for TPV holders and the adoption of the so-called 'Pacific Solution'. A response to the 'Tampa crisis', the ominously titled 'Pacific Solution' amendments excised certain territories from the migration zone, and deemed arrivals at these designated places to be ineligible for a visa of any kind. Pacific solution asylum seekers are transported and processed 'offshore' in the neighbouring Pacific states of Nauru and Papua New Guinea. The Refugee Bills (September 2001) passed in the Australian parliament prior to the November Federal election resulted in a more complex visa regime intended to discourage potential refugees from seeking protection in Australia. They provide for two new Humanitarian and Refugee visa subclasses:

- secondary movement offshore entry (temporary) subclass XB447, and
- secondary movement relocation (temporary) subclass XB451.

Effectively, these new visa subclasses ensure that most 'onshore' asylum seekers - namely, those who have spent more than 7 days in a country of first asylum en route to Australia - will never be eligible for a permanent protection visa, and consequently for family reunion and a range of settlement services. The Minister for Immigration argues that this new regime aims to 'protect settlement places for those who need resettlement as distinct from those who want resettlement and are able to travel to Australia' (DIMIA, 2001). The introduction of these two further levels of temporary visas via the 'border control' legislation will have far-reaching consequences for many of the people who were granted refugee status and temporary protection before and after 26 September 2001.

Recent studies (Mann 2001, Mansouri 2001) suggest that the TPV policy, and subsequent cost shifting, has placed an enormous strain on community organisations and state agencies. Equally, the TPV policy has a negative impact on refugee's mental and physical well-being which adds to their prior experiences of trauma in their countries of origin and in the detention centres.

In addition, the TPV policy has placed a heavy burden of settlement services provision on ill-prepared community organisations struggling to meet the special needs of an increasing number of refugees left outside the mainstream humanitarian settlement services. State and municipal governments across Australia are left with no option but to assume the fiscal responsibility associated with service provision in housing, English language programs, psychological and physical health services. The post-release settlement services needed when the individual asylum seeker is most vulnerable should not be compromised, as they are vital for the long-term welfare of the refugees in question and the wider community in general.

Critical Perspectives on Temporary Protection

The harsh and unusual character of the TPV regime is best evident in the light of international comparisons. Internationally, the concept of temporary protection has been seen as valid in cases of mass refugee movements, where individual status determinations are impractical in the short term. In Europe, temporary protection has been exclusively employed in relation to meeting immediate needs in situations of "refugee catastrophes", such as the rapid flights of Bosnian and Kosovar refugees in the late 1990s. Under EU agreed norms, temporary protection is regarded as an 'exceptional mechanism' which allows for immediate protection in cases of sudden and massive flows. Moreover, it is not regarded as a substitute for protection under the Geneva Convention. EU regulations emphasise that Temporary Protection "does not prejudge recognition of refugee status under the Geneva Convention and the directive establishes access to the normal asylum procedure if persons concerned wish to apply" (European Commission 2001).

In her overview of the status of temporary protection under international law, Fitzpatrick (2000) argues that TP has a legitimate role in cases of short-term group-based protection, particularly for those who cannot satisfy the Geneva conventions standards but who may fairly be considered at risk. As she warns, however, where TP is offered as a "diluted substitute protection for Convention refugees" it must be seen as a threat to the 1951 refugee regime (Fitzpatrick 2000:1). Australia remains the only country to apply TP to individually assessed asylum seekers with approved refugee status. Indeed, the Australian TPV is punitive, with a fairly explicit intent of deterrence, rather than protection. The extent to which it is prepared to further undermine prevailing standards elsewhere will need to be judged in light of the 3 year

review processes taking place throughout 2002 and 2003. For Fitzpatrick, an important principle of TP remains one of time limitation. Where danger persists in the country of origin, more long-term forms of protection should be offered, as beneficiaries of TP should not be maintained in conditions of ongoing uncertainty (Fitzpatrick 2000:12). The recent EU Council directive on temporary protection reinforces this position, supporting a 3-year maximum on TP (EIS 2001:2).

Standards of Treatment: Rights and Services

Internationally, there are a wide variety of treatment standards for those under TP, reflecting tensions between humanitarian obligations under international law, and nationalist agendas of exclusionism. Most notably, persons under TP often enjoy fewer rights than refugees as a means of discouraging "assimilative tendencies" (Fitzpatrick 2000:14). As this paper demonstrates, one of the most concerning significances of the Australian TPV is the way it has introduced differential standards of treatment *within* the refugee category itself. In cases of TP, the UNHCR strongly urges states to gradually improve treatment as the length of stay is prolonged. Specifically, the UNHCR advocates that rights to education, employment and freedom of movement should be granted without discrimination. Of particular importance is the UNHCR's long opposition to undue restrictions on family reunion, especially with regard to vulnerable beneficiaries of TP, such as those who have already suffered physical or psychological injury (Fitzpatrick 2000:15). For the UNHCR, any restrictions imposed on these basic rights "must be justified on grounds of legitimate national interest and must be proportional to the interest of the state" (UNHCR 1994). It would be difficult to argue that the pain and trauma caused by the denial of family reunion rights, or right of return can realistically be seen as a proportional to any legitimate objective of the Australian state, *particularly* given the fact that these rights are being denied to recognised refugees. Indeed, many would unreservedly describe the emotional and psychological impact of the denial of family reunion rights to TPV holders as a form of 'cruel and unusual punishment' inflicted upon genuine refugees, simply to deter others.

Meanwhile, the European Union has finalised long-discussed moves to a joint approach to the issue of temporary protection (EIS 2001:1). While harmonisation over the wider issues of asylum seeker and refugee policy remains more rhetoric than reality (Levy 2002), and the EU has signalled

tougher joint approaches to policing EU borders (Wilson 2002), agreement has finally been reached on standards of TP in cases of mass influx (EU 2001). Where a large number of displaced people arrive in the EU, member states may provide TP for a maximum of three years. In this time, those under TP may make an application for more permanent protection as Convention refugees, and gain a hearing within the three-year TP period (EIS 2001:2). Minimal rights and standards attaching to TP status, to be applied by member states cover the right to work, housing, emergency health care, maintenance support and education. In addition, the EU council directive has determined that "close family members" at least shall have the right to reunite in the host country. The directive (EU 2001:16) requires member states to ensure that persons under TP shall have access to employment, vocational or workplace training (article 12); access to suitable accommodation; necessary social welfare and medical assistance (including those with special needs relating to torture and trauma - article 13); and comparable education rights for those under 18 as nationals (article 14). Article 15 of the directive outlines a shared policy on family reunion, allowing spouses and children to reunite, and, subject to certain conditions, other dependent family members. When making decisions on family reunions, EU member states must take into consideration "the best interests of the child" and any "extreme hardship" a person under TP would face if reunification did not take place. Any decision rejecting an application for reunification must be accompanied by a statement of reasons, and is subject to judicial review. By agreement, these measures were to be in place by 31 December 2002.

The United Kingdom's *Exceptional Leave to Remain*

At a policy level, therefore, direct comparisons with Australia's TPV regime are not easy to make. No other nation provides 'temporary' sanctuary to those who have been recognised as genuine refugees, whether their mode of arrival was 'authorised' or not. The United Kingdom's *Exceptional Leave to Remain* (ELR) visa is a temporary form of protection, but one which deals with those whose application for refugee status has been *rejected*, but are nevertheless found to be at risk of human rights abuse; or in need of temporary safe haven due to generalised violence rather than individualised persecution (as in the case of conflicts in Bosnia and Kosovo). As such, the ELR has more in common with the *Temporary Safe Haven* visas given to Kosovars in 1999, than with the TPV.

The ELR visa is periodically reviewed, and therefore, like the TPV, persons under the ELR lack security of settlement. After four years, ELR holders may be eligible for permanent residency. While ELR have access to free compulsory schooling, health care and housing assistance, they lack immediate rights to family reunion and tertiary student grants to which convention refugees are entitled (Bloch 2000:76). As Bloch argues, citizenship rights are an important measure of settlement outcomes, where these are limited, social and economic integration outcomes are limited, as "without security of status as the associated citizenship rights, it is very difficult both structurally and emotionally to participate" (86). Immigration status was found to be the primary self-identified barrier to settlements outcomes in Bloch's study, ahead of language difficulties (85). While the rights of persons on the ELR are limited, and comparable to those of TPV holders, it is again important to emphasise that TPVs have been recognised as refugees by the Australian government, where ELR humanitarian entrants in the UK have not. All refugees in the UK are granted permanent residence, family reunion rights, and travel documents (ILPA: 54). Elsewhere in Europe, as we have seen, state-sponsored forms of temporary sanctuary apply as *pre-determination* category of protection (Fitzpatrick 2000:15). As Brubaker notes (1992:181), the rights conferred under different categories of citizenship or residence "decisively shape life chances".

Conclusion

Over the last few years, asylum seekers in Australia, including those found to be genuine refugees have been harshly punished for the mode of their entry. Their harsh treatment starts with mandatory detention in isolated detention centres run by the private sector (Philpott, 2002) and is made worse by a regime of temporary protection which excludes genuine refugees from basic settlement services and human rights, most notably family reunion. The peculiarity of the temporary protection regime is further illustrated by international comparisons, which reveal that Australia remains the only country to apply TP to individually assessed asylum seekers with approved refugee status. Indeed, temporary protection is employed elsewhere as a means for dealing with those who do not meet the UNHCR criteria for protection, but are nevertheless deemed worthy of immediate humanitarian assistance; or as a predetermination category of protection in cases of mass influx. Despite the seemingly bleak national environment in Australia, there are encouraging signs that refugee advocacy campaigns are starting to have

an impact. While effectively maintaining the so-called 'pacific solution' in a reduced form on the Australian territory of Christmas Island, the Australian Labor Party's recent pledge to review the 1999 and 2001 legislation so that "Temporary Protection Visas will not continue indefinitely" (ALP 2002) is a step in the right direction.

Nonetheless, popular support for recent refugee policy developments in Australia makes it likely that both government and opposition will continue to denigrate asylum seekers, and further undermine prevailing standards of protection. Retrospective legislation attempting to restrict judicial review of refugee review tribunal outcomes is further evidence of this worrying trend. Policies of mandatory detention and temporary protection - framed and sold to the public as aspects of 'border protection' - are likely to remain the cornerstones of refugee policy in Australia for the foreseeable future. Given the humanitarian and legal shortcomings of current Australian refugee policy, one would hope that other countries in Europe and North America steer away from mandatory detention and temporary protection regimes which undermine the Refugee Convention, and substitute punishment for protection.

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Endnotes

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