

PROTECTION OR PREVENTION? A CLOSE LOOK AT THE TEMPORARY SAFE HAVEN VISA CLASS

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I. INTRODUCTION

The *Migration Act* 1958 (Cth) was amended in 1999 to create a class of visa known as “temporary safe haven visas”.¹ The introduction of the temporary safe haven visa class is to be welcomed as a positive initiative insofar as it affords Australia’s protection to those who need it, but who have no treaty-based entitlement to it. It is also to be welcomed insofar as it is used as a stop-gap measure to provide swift protection to persons who have an immediate need of asylum, pending a full determination of possible treaty-based claims to protection. However, it is the purpose of this article to demonstrate that the application of the safe haven visa mechanism to date has been, and its application in the future is likely to be, far from unproblematic.

The format of the article is as follows: in Part II, the relationship of the new safe haven visa provisions to the pre-existing protection visa provisions is explained. In Part III, the political context in which the safe haven visa provisions were introduced is discussed. In Part IV, Australian application of the safe haven visa mechanism is detailed. Finally, in Part V, Australian practice is evaluated against international law and standards. It is concluded that the use of the temporary safe haven visa mechanism, as presently structured, has already resulted in, and will continue to result in, diminished access to Australia’s protection for those non-citizens entitled to protection under the Convention Relating to the Status of Refugees (“Refugees Convention”), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and/or the International Covenant on Civil and Political Rights (“ICCPR”).

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1 *Migration Act* 1958 (Cth), s 37A.

II. AUSTRALIA'S DOMESTIC PROTECTION PROVISIONS

A. The Protection Visa

At present, Australia purports to give effect to its treaty-based protection obligations primarily through the mechanism of the protection visa. Under s 36(2) of the *Migration Act* 1958 (Cth), it is a criterion for the grant of a protection visa that the applicant is a 'refugee' to whom Australia owes protection obligations under the Refugees Convention.

Assuming that an asylum seeker is actually permitted to make a protection visa application,² he or she receives a first instance decision on that application from an officer of the Department of Immigration and Multicultural Affairs ("DIMA"). Merits review of the first instance decision is available from the Refugee Review Tribunal ("RRT"). Neither DIMA nor the RRT has the power to grant a protection visa to a person who does not meet the s 36(2) criterion. However, a protection visa applicant who does not meet this criterion, is able, upon receiving an unfavourable decision from the RRT, to request exercise of the Minister for Immigration's non-compellable power to substitute for the decision of the RRT another more favourable decision.³ The Minister is able, *inter alia*, to use this power to grant a protection visa to a non-citizen to whom Australia owes a protection obligation under the CAT and/or the ICCPR, though not the Refugees Convention.⁴

If a successful protection visa applicant is immigration cleared (ie not classified as an unauthorised arrival) at the time of making the application, he or she is entitled to the grant of a permanent protection visa and thus permanent residence.⁵ However, a successful protection visa applicant who is not immigration cleared at the time of making the application, can only be granted a temporary protection visa of three years duration in the first instance.

B. The Temporary Safe Haven Visa

The temporary safe haven visa class is divided into two subclasses: the subclass 448 (Kosovar safe haven (temporary)) visa and the subclass 449 (humanitarian stay (temporary)) visa.

In order to qualify for the grant of a subclass 448 (Kosovar safe haven (temporary)) visa the applicant must have been resident in Kosovo on 25 March

2 Unauthorised arrivals are kept in incommunicado detention while screening interviews are conducted by officers of the Department of Immigration and Multicultural Affairs ("DIMA"). Other DIMA officers read summaries of these interviews and determine whether the claims which have been made *prima facie* engage Australia's protection obligations. Those who are determined not to have made such claims are removed from Australia without being given the opportunity to apply for a protection visa. See further, S Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals: The Case for Good Faith Implementation of Australia's Protection Obligations" (1999) 11(1) *Pacifica Review: Peace Security and Global Change* 43 at 46-8.

3 *Migration Act* 1958 (Cth), s 417.

4 *MSI-225: Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s 345, 351, 391, 417, 454 of The Migration Act 1958* (4 May 1999). Available through LBC, *Immigration Service* [CD-ROM].

5 *Migration Regulations* 1994 (Cth), sch 2 pt 866.

1999 and displaced from Kosovo since that date⁶ or be a member of the immediate family of a Kosovar safe haven visa holder.⁷

The main criteria for the grant of a subclass 449 (humanitarian stay (temporary)) visa are that the applicant:

- be displaced, or face a strong likelihood of being displaced, from his or her place of residence;
- if displaced, cannot reasonably return; and
- hold a “grave fear of his or her personal safety” because of the circumstances causing or threatening displacement.⁸

A member of the immediate family of a humanitarian stay visa holder also qualifies for a humanitarian stay visa.

An application for a temporary safe haven visa is valid only if made upon the invitation of the Australian Government.⁹ The period of a temporary safe haven visa is set at the discretion of the Minister for Immigration. The Minister has the power to extend the period initially specified by notice in the Commonwealth of Australia Gazette,¹⁰ but “does not have a duty to consider whether to exercise” the power.¹¹ Beyond this, however, an application for any other class of visa (*including a protection visa*) by a non-citizen in Australia who holds, or has overstayed, a temporary safe haven visa is rendered invalid by *Migration Act* 1958 (Cth), Part 2 Division 3 Subdivision AJ. Section 91L(1) does give the Minister for Immigration the power, exercisable only by the Minister personally,¹² to override the application of these provisions to a particular non-citizen, if the Minister thinks that it is in the public interest to do so. However, the Minister does not have a duty to consider whether to exercise the s 91L(1) power in any particular case (ie use of the power is non-compellable). Moreover, a decision by the Minister not to exercise, or not to consider the exercise of, the s 91L(1) power is not reviewable by the Federal Court of Australia.¹³ The decision, though, is theoretically reviewable by the High Court in circumstances where a writ of mandamus or prohibition or an injunction could properly be sought by way of relief.¹⁴ This ‘reviewability’ is, however, largely illusory. Since the Minister has no duty to consider the exercise of the s 91L(1) power, the High Court would not be able to grant mandamus to compel the Minister to

6 *Ibid*, sch 2 clause 448.22.

7 *Ibid*. It is safe to assume that no new grants of a subclass 448 visa will be made. See Part IIIA below.

8 *Ibid*, sch 2 clause 449.22.

9 *Ibid*, reg 2.07AC.

10 *Migration Act* 1958 (Cth), s 37A(2).

11 *Ibid*, s 37A(6). The Minister also has the power to shorten the period initially specified, but only where he or she is of the opinion that “temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned”: *Migration Act* 1958 (Cth), s 37A(3). Moreover, the Minister has to table in both Houses of Parliament a statement of reasons for holding this opinion: *Migration Act* 1958 (Cth), s 37A(4). These constraints were forced on the Australian Government by the Senate. The Government has responded by specifying visa periods of very short duration.

12 *Migration Act* 1958 (Cth), s 91L(2).

13 *Migration Act* 1958 (Cth), ss 475(2)(e) and 485.

14 Australian Constitution, s 75(v).

consider the exercise of the power where he or she chose not to do so. Moreover, as the recent High Court case of *Minister for Immigration and Multicultural Affairs; Ex Parte Fejzullahu* (“Fejzullahu”)¹⁵ demonstrated only too clearly, even where the Minister purports to consider the exercise of the power, there is little practical use in invoking the High Court’s jurisdiction to challenge a decision by the Minister not to exercise the power.¹⁶

III. AUSTRALIAN PRACTICE TO DATE

A. Kosovars

(i) *The Introduction of the Visa*

On 24 March 1999, the North Atlantic Treaty Organisation (“NATO”) began air strikes intended to force an end to the violence being perpetrated by Serbs against ethnic Albanians living in the Kosovo province of Yugoslavia. The events triggered by these air strikes led to 860 000 ethnic Albanians fleeing to surrounding countries, including the Former Yugoslav Republic of Macedonia (“FYROM”), in the space of nine weeks.¹⁷ Initially, the United Nations High Commissioner for Refugees (“UNHCR”) took the position that the refugees ought to be protected as close as possible to their country of origin so as to facilitate repatriation.¹⁸ This position was consistent with its handling of previous situations. However, in response to pressure from the United States, which was concerned about the effect that the Kosovo refugees would have on the stability of the region, UNHCR quickly moved to a position supporting the evacuation of the refugees out of the region.¹⁹

The Kosovo refugee crisis was a ‘high visibility’ event²⁰ in Australia, as it was in other Western states. Although the Minister for Immigration initially expressed the view that the Kosovo refugees ought to be protected within their own region, Australian public opinion soon forced the Australian Government to accede to an UNHCR request that it participate in the so-called Humanitarian Evacuation Program (“HEP”).²¹ Approximately 3 900 persons, selected by Australian authorities in consultation with UNHCR, were granted the hastily created subclass 448 (Kosovar safe haven (temporary)) visas and flown from camps in FYROM to Australia between 7 May and 23 June 1999.²²

15 (2000) 171 ALR 341.

16 *Ibid.* See Part IVA below.

17 A Suhrke et al, *The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response*, UNHCR (February 2000) at para 31: available at <<http://www.unhcr.ch:80/evaluate/kosovo/toc.htm>>.

18 *Ibid* at para 452.

19 *Ibid* at para 455.

20 *Ibid* at para 34.

21 See for example, D Shanahan et al, “Safe Haven for 4 000 Souls: Howard Reverses Refugee Stance” *The Australian*, 7 April 1999, p 1.

22 DIMA, Fact Sheet 62: *Operation Safe Haven – Kosovars and East Timorese*, 3 February 2000.

(ii) *The Beginning of the Repatriation Process*

The Kosovars evacuated to Australia were initially granted visas of three months duration. On 12 July 1999, UNHCR announced that the situation in Kosovo had improved sufficiently for it to “co-ordinate organised voluntary repatriation”.²³ Repatriation of the Kosovars in Australia began at that point.²⁴ Kosovars who did not wish to return to Kosovo upon expiry of the initial period of their safe haven visas were granted extensions to 30 October 1999. However, it was made quite clear to them that they would be expected to leave by that date.²⁵ Given the conditions in Kosovo (see below), many Kosovars were understandably reluctant to return. For its part, UNHCR was opposed to involuntary repatriation before the approaching European winter had come and gone.²⁶ Australia responded to this situation by offering a winter relocation allowance of \$3 000 per adult and \$500 per child as an inducement for those Kosovars still in Australia to leave by 30 October 1999.²⁷ The Kosovars were told that those still in Australia as at 30 October 1999 would be granted an extension of their safe haven visas to 30 November 1999, but would not be guaranteed further extensions nor be eligible for the winter relocation allowance when repatriated.²⁸

The Australian Government was, however, under intense political pressure to be seen to do right by the Kosovars, because the Kosovars had managed to retain both media attention and public sympathy. On 28 October 1999, the Minister wrote to the approximately 500 Kosovars still remaining in Australia asking those who wished to stay in Australia to make a written request to that effect, providing reasons.²⁹ The Minister undertook to consider all such requests. All of the remaining Kosovars chose to make such requests.³⁰ While the requests were being considered, the Kosovars were given month-to-month extensions of their safe haven visas. However, medical support and other facilities previously made available to the Kosovars were progressively reduced.³¹

On 15 March 2000, the Minister for Immigration pointed out that the European winter was almost over and indicated that those who were not assessed as having a valid reason to remain longer in Australia would be expected to leave Australia on 8 April 2000.³² On 3 April 2000 it was announced that 130 Kosovars would have their safe haven visas extended beyond 8 April 2000, “mainly for medical reasons”, and, in exercise of the Minister’s s 91L(1) power, 110 Kosovars would be permitted to apply for protection visas and two Kosovars

23 Note 15 *supra* at para 18.

24 *Ibid.*

25 J MacDonald and A Darby, “Kosovars Given Ultimatum to Go” *The Age*, 16 October 1999, p 4.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Note 15 *supra* at para 20.

30 Australia, Senate Legal and Constitutional Legislation Committee, *Consideration of Supplementary Estimates, Proof Committee Hansard*, 2 May 2000, p 103 (testimony of Mr Waters, DIMA).

31 J Molony, “Let These People Stay” *The Age*, 13 May 2000, p 4.

32 Minister for Immigration, P Ruddock, “Kosovars to Leave Australia Next Month”, Media Release, 15 March 2000.

would be permitted to apply for partner visas.³³ The remaining Kosovars were reminded that those who did not leave Australia by 8 April 2000 would become unlawful non-citizens subject to detention and removal under the relevant provisions of the *Migration Act*.³⁴

(iii) *The Process Leading to the Decisions Announced on 3 April*

The Kosovars were not provided with any official information about the criteria against which their requests to remain in Australia would be assessed nor were official arrangements put in place for the provision of legal advice, free or otherwise, to the Kosovars.³⁵ However, 100 of the 144 families that presented written requests to the Minister were, assisted by a Migration Agent³⁶ and all of them appear to have been in receipt of a great deal of well-meaning advice from members of the Albanian community in Australia.³⁷ Notwithstanding this, Amnesty International Australia and the Refugee Council of Australia have, on the basis of the evidence available to those organisations, expressed serious doubts about whether the Kosovars truly understood the process in which they were participating.³⁸

Further, as a result of the communal nature of the letter-writing which took place, some of the Kosovars may have refrained from divulging facts which, while relevant to the making of a treaty-based protection claim, may well have alienated other safe haven residents and/or members of the Albanian community in Australia.³⁹ For example, in radio interviews conducted after the Minister's decisions were announced, Mr Erik Lloga, who was heavily involved with the Kosovar safe haven visa holders in his role as Chair of the Australian-Albanian National Council, indicated that some of the Kosovars had been afraid to state in their letters that they had refused to join the Kosovo Liberation Army ("KLA") or that they had held positions which might be considered to associate them with the Serbian regime.

In several cases, DIMA officers conducted an interview with the 'head of family' as part of the process of assessing the requests put to the Minister.⁴⁰ While this was certainly a positive initiative, the fact that only heads of family were interviewed raises serious concerns about the extent to which facts relevant to the making of treaty-based protection claims by other members of the family emerged through the interview process.⁴¹ For example women subjected to sexual violence might have been too ashamed to reveal the fact to other members of their family.

33 Minister for Immigration, P Ruddock, "Kosovars to Return Home This Week", Media Release, 3 April 2000.

34 *Ibid.*

35 Interview with D Hogan, Refugee Co-ordinator, Amnesty International Australia, 1 May 2000; interview with M Piper, Executive Director, Refugee Council of Australia, 10 May 2000.

36 Note 30 *supra*.

37 M Piper, note 35 *supra*.

38 Note 35 *supra*.

39 M Piper, note 35 *supra*.

40 Note 35 *supra*.

41 *Ibid.*

The Minister for Immigration referred all claims made to the UNHCR for advice on protection issues and to the Department of Health and Aged Care for advice on health issues.⁴² The Minister then:

considered each Kosovar evacuee case individually on its merits, having regard to the individual material lodged by, or on behalf of, each Kosovar family together with relevant medical and trauma counsellor reports, DIMA interview reports, UNHCR reports and assessments and material, and DIMA assessments and recommendations.⁴³

As Gleeson CJ pointed out in the *Fejzullahu* case, “[h]aving regard to the extreme sensitivity of the subject, the national and international attention being paid to his decisions, and the political accountability involved, it would have been surprising had the Minister done otherwise”.⁴⁴

(iv) *The High Court Challenge*

Upon learning that the Minister for Immigration had decided not to exercise his s 91L(1) power in their particular cases, 81 Kosovars attempted to challenge the Minister’s decision in the High Court of Australia under s 75(v) of the Constitution. The relief sought in each case was a mandatory injunction directing the Minister to consider and determine according to the law an application under s 91L of the *Migration Act* 1958 (Cth). The Kosovars also applied for an interim injunction to prevent their removal from Australia pending a court decision in the principal proceedings. On 10 April 2000, Gleeson CJ handed down his decision in the proceedings for the interim injunction. His Honour’s decision was that the applicants had not shown that there was a serious question to be tried in the principal proceedings such as would support the grant of an interim injunction.

Counsel for the 81 Kosovars had been attempting to argue that the fact that most of the Kosovars fell into categories designated by the UNHCR as ‘at risk’ categories (see below), but had not had the s 91L(1) power exercised in their favour, was proof that the Minister had not taken relevant considerations into account or had made a decision which failed the *Wednesbury* test of reasonableness.⁴⁵

In his decision of 10 April, Gleeson CJ responded to that argument with the following observation:

42 Australia, Senate Legal and Constitutional Legislation Committee, *Consideration of Additional Estimates, Proof Committee Hansard*, 10 February 2000, p 175 (testimony of Mr Waters, DIMA).

43 Evidence admitted without objection in the *Fejzullahu* case: note 15 *supra* at para 28.

44 *Ibid* at para 28.

45 See *Fejzullahu & Ors, Ex parte - Re Minister for Immigration* (transcript of proceedings, High Court of Australia, Gleeson CJ, 7 April 2000). The other ground of review relied upon was failure to accord procedural fairness.

The Minister agreed to take the recommendations of UNHCR into account. He did not agree to abide by them. Having regard to his statutory obligations, it may be doubted that he could lawfully have agreed to do so. Nor did he agree not to receive information, or take advice, from other sources as well. In that connection, it is to be noted that, under the legislation, the Minister's concern is the public interest. That is not necessarily the way the primary concern of UNHCR would be characterised.⁴⁶

His Honour held that there was "no basis, demonstrated either by evidence or by argument, for a case that the Minister's assessment of the public interest was not one that was reasonably available".⁴⁷ Likewise, his Honour also held that there was no basis shown for a case that the Minister had failed to take into account relevant considerations.⁴⁸

In addition to these remarks, Gleeson CJ also expressed an *obiter* view, which, from the perspective of those deciding whether to challenge a decision by the Minister not to exercise his s 91L(1) power in some future case, is, perhaps, the most significant part of the decision. Pointing out that s 91L(6) provides that the Minister does not have a duty to consider whether to exercise the power under s 91L(1), his Honour said:

If, contrary to the view of the facts I have formed, the evidence in the present case had supported the grounds relied upon by the applicants, that provision would have constituted a substantial obstacle to relief of the kind they seek in the principal proceedings.⁴⁹

This suggests that his Honour was inclined to accept the argument presented by counsel for the Minister that even if there is a successful challenge to the Minister's exercise of power under s 91L(1), s 91L(6) would entitle the Minister to decline even to consider the exercise of his or her powers under s 91L(1) thereafter. It would be inappropriate, therefore, for a court to grant relief in the form of a writ of mandamus or a mandatory injunction against the Minister requiring the Minister to do exactly that.⁵⁰

(v) *The End Game*

Twenty-two Kosovars were persuaded to board a flight to Kosovo on 9 April 2000.⁵¹ A further few were granted extensions of their safe haven visas for medical reasons and a few more were allowed to apply for protection visas "because new information had come to light".⁵² Those remaining in Australia without permission were by now unlawful non-citizens subject to detention. At midnight on 9 April 2000, the North Bandiana army barracks near Albury-

46 Note 15 *supra* at para 22.

47 *Ibid* at para 35. It is worth noting that Gleeson CJ expressly stated that the reason he was accepting that unreasonableness was a ground of review was that the parties to the case had chosen to proceed on the assumption that it was: *ibid* at para 31.

48 *Ibid* at para 36. His Honour also found that no basis had been shown for a case that the Minister had failed to accord procedural fairness.

49 *Ibid* at para 16.

50 Note 45 *supra*.

51 F Farouque and P Murphy, "Return of Kosovars is Delayed" *The Sunday Age*, 9 April 2000, p 6; Australia, Senate, *Proof Hansard*, 10 April 2000, p 13184 (Senator Stott Despoja).

52 F Farouque and P Murphy, *ibid*.

Wodonga, which had previously been designated 'safe haven' accommodation, which the Kosovars were free to leave as and when they pleased, was redesignated an Immigration Detention Centre ("IDC"). A week of intense negotiations followed, which resulted in further extensions of safe haven visas for a few and exercises of the Minister's s 91L(1) power in favour of a few more. The rest of the Kosovars were subjected to increasing pressure to agree to 'voluntary' repatriation.

On 11 April 2000, the Minister for Immigration promised the Kosovars that he would waive the debt incurred by them for the costs of their detention and the costs of defending the failed High Court challenge.⁵³ The Minister also promised that he would lift the three year ban upon re-entry into Australia which would normally apply, leaving the way clear for the Kosovars to access Australia's Special Humanitarian Resettlement Program after their return to Kosovo.⁵⁴ DIMA later admitted at a Senate Estimates hearing that there was little chance that those Kosovars, who subsequently left Australia clutching humanitarian visa application forms handed to them by the Department, would be able to enter Australia under the Special Humanitarian Resettlement Program.⁵⁵

On 14 April 2000, the Australian Government decided to end the 'kid glove' treatment. Security at Bandiana IDC was tightened and all visitors were refused entry "so detainees could make their decision free of 'external influences'".⁵⁶ Those who had agreed to leave but were refusing to sign statements that they were doing so voluntarily "were confined to their rooms awaiting further interviews with officials", and those who were still refusing to leave were told that they would shortly be relocated to Port Hedland IDC.⁵⁷

On 16 April 2000, 116 Kosovars were flown back to Kosovo and 21 Kosovars, who were still refusing to leave Australia, were relocated from Bandiana IDC to Port Hedland IDC.⁵⁸ Although the 116 persons who were flown back to Kosovo on 16 April had refused to sign documents stating that their return was voluntary, DIMA characterised the returns as 'voluntary' on the basis that no physical coercion was employed.⁵⁹ This characterisation was not accepted by UNHCR which described the returns as 'induced'.⁶⁰

As at 2 May 2000, 338 Kosovars remained in Australia of whom 170 were the holders of safe haven visas, 123 were the holders of bridging visas pending determination of protection and partner visa applications, and 45 were unlawful non-citizens either in immigration detention or 'on the run'.⁶¹

53 M Saunders and A Crosweiler, "32 Kosovars on Run from Manhunt" *The Australian*, 12 April 2000, p 4.

54 *Ibid.* See also "Kosovars Refuse to Budge" *The Australian*, 14 April 2000, p 5.

55 Note 30 *supra*, pp 150-1 (testimony of Ms Bedlington, DIMA).

56 A Hodge, "Push Comes to Shove for 34 Kosovars" *The Weekend Australian*, 15-16 April 2000, p 4.

57 *Ibid.*

58 A Hodge, "Kosovars Fly Out Leaving Defiant 21" *The Australian*, 17 April 2000, p 2.

59 Note 30 *supra*, p 159 (testimony of Mr Metcalfe, DIMA).

60 S Mann, "Rejected Kosovars Caught in Limbo" *The Age*, 22 April 2000, p 11.

61 Note 30 *supra*, 2 May 2000, p 101 (testimony of Mr Waters, DIMA).

(vi) *The Conditions to which the Kosovars Were Returned*

From mid-June 1999, when NATO's Kosovo Force ("KFOR") took control of Kosovo, the situation of most Kosovo Albanians improved in most parts of Kosovo.⁶² However, the situation of ethnic minorities (ie non-Albanians) in Kosovo became grim⁶³ and amongst the Kosovo Albanians certain categories of individuals were identified by UNHCR as being at risk of violence, harassment and discrimination. These 'at risk' categories were:

- persons or families of mixed ethnic origin;
- persons associated with, or perceived to be associated with, the Serbian regime after 1990;
- persons who refused to join or deserted the Kosovo Liberation Army ("KLA" or "UCK" [Ushtria Clirimtare E Kosoves]);
- persons known to be outspokenly critical of the former KLA or the former self-proclaimed "Provisional Government of Kosovo" and members or supporters of political parties not aligned with the former KLA or the former self-proclaimed "Provisional Government of Kosovo"; and
- persons who are known to have refused to follow the laws and decrees of the former KLA or the former self-proclaimed "Provisional Government of Kosovo".⁶⁴

It appears that the majority of the Kosovars, who were reluctant to repatriate even after the European winter was over, fell within these 'at risk' categories.⁶⁵ Even those not falling within an 'at risk' category would probably not have been 'safe' in Kosovo.⁶⁶ The security situation was, to say the least, volatile during the period in which Australia was repatriating the Kosovars.⁶⁷ Moreover, despite the best efforts of KFOR and the United Nations Interim Administration Mission in Kosovo ("UNMIK"), Kosovo did not, and still does not, have an effectively functioning police force, court system or prison system.⁶⁸ In the graphic words of one journalist, "[s]hootings, bomb attacks, knifings, home invasions are daily grist to the mincing machine still grinding away in Kosovo".⁶⁹

The rest of the civil infrastructure in Kosovo is equally decimated. There is little or no access to telephone services, postal services, banking services and

62 UNHCR, *Kosovo Albanians in Asylum Countries: UNHCR Recommendations as regards Return*, Update March 2000 at para 4.

63 *Ibid* at para 3.

64 *Ibid* at para 7.

65 Note 31 *supra*.

66 In this regard, Senator Bartlett made the following observation: "It is worth noting that, on the Foreign Affairs and Trade web site tonight, the travel advice to Australian citizens quite bluntly states that travel to all parts of Kosovo and in the areas of southern Serbia should be avoided. It is obviously the Government's view that it is not safe for Australians to go to this area but they are quite happy to send the Kosovo people straight back there...." (Australia, Senate, Debates, *Proof Hansard*, 12 April 2000, p 12464).

67 Australia, House of Representatives, Debates, *Proof Hansard*, 6 April 2000, p 14886 (Mr Danby); T Laidler (for Jon Faine), interview with senior communication officer, World Vision, (ABC Melbourne, 7 April 2000).

68 Note 64 *supra* at para 13; see also Australia, House of Representatives, *ibid*, p 14886 (Mr Danby).

69 J Walker, "Kosovars Return to a Blighted Country" *The Australian*, 10 April 2000, p 2.

other basic services.⁷⁰ There is such a serious deficiency of housing that as many as 40 to 60 people are crammed into houses not intended to accommodate anywhere near that many.⁷¹ Reconstruction is occurring, but occurring very slowly.⁷² Finally, few people have access to legitimate sources of income and are thus struggling to feed themselves and their dependants.⁷³

With the exception of those Kosovars who received the winter relocation allowance for leaving before 30 October 1999, the returned Kosovars appear to have been left stranded in these miserable conditions without any material assistance from Australia. They were not even put in touch with aid agencies able and willing to help.⁷⁴

B. East Timorese

(i) *The Introduction of the Visa*

In June 1999, the Migration Regulations were amended to bring into existence the non-country-specific subclass 449 (humanitarian stay (temporary)) visa. Since it was not many weeks earlier that Indonesia had agreed to the holding of a United Nations sponsored independence ballot in East Timor, it was speculated at the time that the move was “driven by the need to prepare for a possible upheaval” in East Timor.⁷⁵ As is well-known, on 30 August 1999, the East Timorese people voted overwhelmingly for independence and in doing so triggered a militia rampage. In mid-September 1999, at UNHCR's request,⁷⁶ subclass 449 visas were granted to approximately 300 locally engaged United Nations Mission in East Timor (“UNAMET”) staff and approximately 1 500 other East Timorese who sought refuge in the United Nation's Dili compound.⁷⁷ Given the intense focus of the Australian media on events in East Timor and the obvious sentiments of the Australian public, the Australian Government could hardly have done otherwise.

(ii) *The Repatriation Process*

The East Timorese evacuated to Australia (most of whom were women and children)⁷⁸ were granted safe haven visas of three months duration in the first

70 UNHCR, note 64 *supra* at para 13; see also J Walker, *ibid*; Australia, House of Representatives, *Proof Hansard*, 13 April 2000 p 15251 (Mr Adams).

71 UNHCR, *ibid*; Australia, House of Representatives, *Proof Hansard*, 13 April 2000 p 15251 (Mr Adams); S Waldon, “Last Week This Family Was in Australia. Today They Live with 30 Others in Kosovo” *The Age*, 15 April 2000, p 1.

72 UNHCR, *ibid*; J Walker, note 69 *supra*.

73 *Ibid*; J Walker, *ibid*; S Waldon, note 73 *supra*.

74 Australia, House of Representatives, Debates, *Proof Hansard*, 6 April 2000, p 14886 (Mr Danby); UNHCR, *Refugees Daily*, 19 April 2000 (summary of AAP report of interview with Erik Lloga in Pristina), <<http://www.unhcr.ch/news/media/daily.htm>>.

75 R McGregor, “Kosovar Rule Widened: Timorese Eligible for Refuge” *The Australian*, 11 June 1999, p 4.

76 Australia, Senate Legal and Constitutional Legislation Committee, *Consideration of Budget Estimates: Supplementary Hearings, Official Hansard*, 1 December 1999, p 142 (testimony of Mr Metcalfe, DIMA).

77 Note 22 *supra*.

78 Interview with C Graydon, refugee lawyer, 8 May 2000.

instance.⁷⁹ As the expiry date of 8 December 1999 approached, Australia started encouraging the safe haven visa holders to return to East Timor, pointing out that UNHCR advised that it was 'safe' to do so and that thousands of their compatriots were in fact returning home.⁸⁰ It was drawn to the attention of the safe haven visa holders that the UNHCR was providing emergency shelter and assistance packages to returnees to 'tide them over' until they could make contact with aid agencies.⁸¹ The packages consisted of "50 kilograms of rice for each family, a blanket and a plastic sheet".⁸² However, no additional support was offered by the Australian Government to East Timorese safe haven visa holders choosing to return.⁸³

According to the Australian Government, all returns were voluntary as evidenced by returnees signing a form to this effect.⁸⁴ However, it is questionable whether the East Timorese felt that return was a matter of choice. It appears that it was DIMA's deliberate strategy to make the East Timorese feel that they had overstayed their welcome.⁸⁵ DIMA appears also to have made a concerted attempt to convince the East Timorese that they would be betraying free East Timor, unless they returned immediately to participate in the reconstruction process.⁸⁶

Persons who had contact with the East Timorese safe haven visa holders report that most were reluctant to return within DIMA's preferred time frame, because they had fears for their safety and serious concerns about how they would be able to survive in a devastated East Timor, especially if returned before the end of the rainy season (ie before April 2000).⁸⁷ These fears and concerns were all well-founded (see below), and known to the Department and to the Minister.

Unlike the Kosovars, however, the East Timorese safe haven visa holders were not issued with personal invitations to state in writing, for the Minister's consideration, their reasons for wishing to remain in Australia.⁸⁸ In any event, the East Timorese (most of whom only spoke Tetum and many of whom were illiterate) would have needed assistance to make such requests, and assistance

79 P Green, "Kosovar Formula Opens Southern Havens to Evacuees" *The Australian*, 15 September 1999, p 9.

80 Note 76 *supra*, p 142 (testimony of Mr Metcalfe, DIMA).

81 Australia, Senate, Debates, *Official Hansard*, 29 November 1999, p 10904 (Senator Vanstone); Minister for Immigration, "East Timorese Return Home from Temporary Safe Haven", Media Release, 27 February 2000.

82 A West, "Kit Offer to Refugees" *The Sunday Age*, 28 November 1999, p 2.

83 Australia is, however, contributing financially to the work of aid agencies operating in East Timor: Australia, Senate, Debates, 6 December 1999, p 11183 (Senator Vanstone).

84 *Ibid.*

85 Interview with health professional A, who worked in one of the safe havens, 17 May 2000. A mortifying possibility by East Timorese cultural standards.

86 *Ibid.*; interview with E Rodan and K Anderson, Erskine Rodan and Associates, 3 May 2000; see also note 82 *supra*.

87 M Saunders, "Time to Go Home, Timorese Told" *The Australian*, 23 November 1999, p 4; G Safe, "Refugees Refuse to Pack Their Bags" *The Australian*, 23 February 2000, p 4; interview with health professional A, 17 May 2000; interview with C Graydon, 8 May 2000; interview with M Clutterbuck, Co-ordinator, Refugee and Immigration Legal Centre Inc, 27 April 2000; interview with E Rodan and K Anderson, 3 May 2000.

88 Interview with health professional A, note 85 *supra*.

was far from readily available.⁸⁹ From about the same time that DIMA started pressuring the East Timorese to leave Australia, visitor access to the safe haven accommodation was also made considerably more difficult.⁹⁰ Although the East Timorese were theoretically free to venture out of the safe haven accommodation in search of assistance, lack of community contact, lack of English and transport difficulties meant that only a few were able to translate theory into practice.⁹¹

Health professionals and others, who happened through their work in the safe havens to be aware of individuals they believed ought to be allowed to remain longer in Australia, brought these individuals to the attention of DIMA.⁹² However, no systematic attempt appears to have been made by DIMA to assess individual cases for the purposes of determining whether their individual circumstances warranted either a safe haven visa extension or an exercise of the Minister's s 91L(1) power.⁹³

Upon the expiry of the initial safe haven visa period, extensions were granted to those East Timorese who happened to have been identified by DIMA as having 'substantial reasons'⁹⁴ for remaining longer in Australia. The definition of 'substantial reasons' appears to have been restricted to being the immediate family member of a person having a medical condition preventing travel, or an acute medical condition requiring treatment unavailable in East Timor.⁹⁵

Several of the East Timorese had chronic, or potentially chronic, medical conditions such as diabetes, tuberculosis, malaria and hepatitis.⁹⁶ However, no chronic medical condition, regardless of seriousness, appears to have been regarded as constituting a 'substantial reason' for remaining longer in Australia.⁹⁷ On the contrary, it appears that DIMA was disinclined to fund the diagnosis and treatment of chronic medical conditions suffered by East Timorese safe haven visa holders on the basis that continuation of treatment begun in Australia would probably not be possible in East Timor.⁹⁸

As at the time of writing, there was no available evidence of the Minister for Immigration having exercised the s 91L(1) power in favour of any of the East Timorese. It may well be the case that none of the East Timorese requested an exercise of the power.⁹⁹ In the circumstances described above, however, this could not be regarded as indicative that none had good grounds for invoking Australia's international protection obligations.

89 G Safe, note 87 *supra*; interview with health professional A, *ibid*.

90 Interview with E Rodan and K Anderson, note 86 *supra*; interview with health professional A, note 85 *supra*.

91 Interview with M Clutterbuck, 27 April 2000; interview with E Rodan and K Anderson, *ibid*; interview with health professional A, *ibid*.

92 Interview with health professional A, note 85 *supra*.

93 *Ibid*.

94 Note 76 *supra*, 1 December 1999, p 142 (testimony of Mr Waters, DIMA).

95 Australia, Senate, Debates, 29 November 1999, p 10904 (Senator Vanstone).

96 G Safe, note 87 *supra*.

97 For example, some individuals were told they had to return to East Timor though they had malaria, tuberculosis or hepatitis: *ibid*.

98 Interview with health professional A, note 85 *supra*.

99 Certainly, no requests had been made as at 10 February 2000: Note 42 *supra*, p 176 (testimony of Mr Waters, DIMA).

As at 6 May 2000, 51 East Timorese remained in Australian on safe haven visas extensions “mostly for health reasons” but were to be returned home when fit to travel.¹⁰⁰

(iii) *Conditions to Which the East Timorese were Returned*

Once the International Force for East Timor (“INTERFET”) had secured East Timor, the risk of persecution faced by East Timorese people diminished markedly. Further, Xanana Gusmao made it known that free Timor would be a racially tolerant Timor. However, this did not necessarily mean that returnees would be safe in East Timor. As in Kosovo, the basic prerequisites for enforcing the rule of law, such as an effective civilian police force, and a functioning court system and prison system, were not, and still are not, in place.¹⁰¹

As for basic food, shelter and services, there are many bilateral, international and non-government agencies on the ground in East Timor attempting to provide these necessities to the East Timorese people.¹⁰² However, these attempts have not yet come close to meeting the enormous need. Much of the housing stock in East Timor has been destroyed, leaving many East Timorese with inadequate shelter.¹⁰³ While food production has not been disrupted to the degree first feared, many East Timorese have inadequate access to food.¹⁰⁴ Many East Timorese have also been left without a source of income due the devastation of the East Timorese economy.¹⁰⁵ When a season of tropical rain is added to this mix,¹⁰⁶ the potential for outbreaks of illness such as typhoid, cholera, malaria, diarrhoea, dysentery and respiratory tract infections is high.¹⁰⁷ There have, in fact, been large numbers of reported cases of these sorts of illnesses.¹⁰⁸ It should be kept in mind that even diarrhoea can be a killer, especially of young children¹⁰⁹ in countries, such as East Timor, which have grossly inadequate health services.¹¹⁰

As with the Kosovars, it was to miserable conditions that the East Timorese were returned and left to fend for themselves as best they could.¹¹¹

100 Minister for Immigration, P Ruddock, “East Hills Safe Haven to Close”, Media Release, 6 May 2000.

101 L Murdoch, “High Price of Freedom” *The Age*, 15 April 2000, p 3.

102 Note 76 *supra*, 1 December 1999, p 144 (testimony of Mr Farmer, DIMA); Australia Senate, Debates, 6 December 1999, p 11183 (Senator Vanstone).

103 L Murdoch, note 101 *supra*; interview with health professional A, who maintained contact with some of the East Timorese returnees, note 85 *supra*.

104 L Murdoch, *ibid*; Food and Agriculture Organisation of the United Nations, *Special Report: FAO/WFP Crop and Food Supply Assessment Mission to East Timor*, 19 April 2000.

105 *Ibid*; interview with health professional A, note 85 *supra*.

106 This year the heavy rains have continued up to the time of writing, with three districts cut off from the rest of East Timor by flood waters: M Dodd, “125 Feared Dead in Timor Floods” *The Age*, 20 May 2000, p 29.

107 M Saunders, note 87 *supra*; M Dodd, *ibid*.

108 WHO, *East Timor: Weekly Epidemiological Bulletin*, Week 15/2000, 27 April 2000.

109 M Dodd, note 108 *supra*.

110 Interview with health professional A, note 85 *supra*.

111 *Ibid*.

C. Ambonese¹¹²

On 22 January 2000, 54 Christians from Ambon arrived in Australia without authorisation and were placed in detention at Port Hedland IDC.¹¹³ Ambon is the island capital of the Maluku province of Indonesia.¹¹⁴ Since about January 1999, there have been a series of violent clashes between Muslims and Christians in Ambon.¹¹⁵ According to the Jesuit Refugee Service:

[t]housands have been killed, and there are over 100 000 internally displaced people in Ambon seeking shelter in churches, mosques, government buildings and schools. Many live in the forests, while relatively few reside in three large camps around the islands.¹¹⁶

The Ambonese who arrived in Australia were, at least, fleeing the generalised violence. They may have been fleeing worse. After two months in immigration detention, fifteen of the Ambonese were granted temporary safe haven visas for an initial period of 28 days.¹¹⁷ They were then given monthly renewals of the visas until June 2000 followed by a three month renewal to September 2000.¹¹⁸ The first opportunity that the Ambonese had to obtain independent legal advice came *after* they had been released from detention on the safe haven visas.¹¹⁹

In June 2000, the journalist Peter Mares asked the Minister for Immigration about the grant of the safe haven visas to the refugees. The Minister's response was that:

[I]t was reasonable to issue a safe haven visa in cases 'where we don't think it is appropriate immediately to admit people to a protection regime where claims have to be tested, but where you don't immediately wish to send people back'.¹²⁰

Peter Mares then suggested a person making the choice about whether or not to accept a temporary safe haven visa needed to be "well-informed and well advised".¹²¹ According to Peter Mares:

[T]he Minister protests that he is not prepared to have 'advocacy groups and advisers' determine such issues: 'I think they are matters that are between the parties and my officials when they work out what is the most appropriate outcome' he told me.¹²²

112 The facts about the Ambonese arrivals were obtained from several reliable sources. However, several sources have not been attributed because public identification would not be in the best interests of those concerned.

113 P Mares, *Borderline: Australia's Treatment of Asylum Seekers and Refugees*, (book manuscript) chapter 7.

114 The province is composed of thousands of islands.

115 Jesuit Refugee Service, *Dispatches: Refugee News Briefings No 69*, 17 April 2000. These clashes were worsening at the time of writing. See for example, T Lingsma, "Sea of Refugees Flee a Society Torn Asunder" *The Australian*, 24 May 2000, p 10.

116 Jesuit Refugee Service, *ibid*.

117 The 39 other Ambonese who arrived on the same boat were 'screened out' and removed to Bali: P Mares, note 113 *supra*. See note 2 *supra* for an explanation of the screening process for unauthorised arrivals.

118 P Mares, *ibid*, chapter 7.

119 *Ibid*.

120 *Ibid*.

121 *Ibid*.

122 *Ibid*.

Even if it is assumed that the Ambonese were informed by DIMA that they had the option of applying for protection visas, it is easy to see why they would not have been able to resist the temptation of accepting safe haven visas. Unauthorised arrivals, who make protection visa applications, are kept in detention pending final determination of those applications. It may well have been emphasised by DIMA that the process could take a considerable period of time and that a positive outcome was by no means assured. By contrast, accepting safe haven visas would mean immediate release from detention and, theoretically, permission to remain in Australia until it was safe to return. Most asylum seekers faced with such a choice would probably choose to accept the offer of safe haven visas, unless, of course, they were aware of how the Kosovars and East Timorese had fared before them.

IV. EVALUATION OF AUSTRALIAN PRACTICE AGAINST INTERNATIONAL LAW AND STANDARDS

A. The Scope of Australia's International Protection Obligations

(i) *Refugees Convention*

Subject to an exception contained in Article 33(2),¹²³ Article 33(1) of the Refugees Convention provides that no state party:

shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 1A(2) of the Refugees Convention, as modified by Article I(2) of the Refugees Protocol, provides that for the purposes of the Refugees Convention, the term 'refugee' applies to any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.¹²⁴

In participating in the Humanitarian Evacuation Program, Australia's signalled intent was that of identifying and selecting those persons who could "best be assisted through temporary asylum".¹²⁵ This criterion appears not to have had much to do with the degree of vulnerability, but rather with factors such as

123 Article 33(2) provides that the benefit of Article 33(1) may not be claimed "by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country".

124 Article 1A(1) of the Refugees Convention defines an additional category of refugee, but it is a category that has very little relevance now. Articles 1D, 1E and 1F of the Refugees Convention provide for the exclusion from the application of the Convention of persons who would otherwise fall within the definition in article 1A.

125 Interview with M Piper, quoting letter received from DIMA, note 35 *supra*.

fitness to travel and English language skills. UNHCR, for its part, did make some attempt to prioritise the most vulnerable refugees for evacuation to third countries, but evacuation seems to have proceeded largely on a 'first-come first-serve' basis.¹²⁶ Therefore, the fact of their selection cannot be treated as evidence that Australia or UNHCR had identified the Kosovars evacuated to Australia as being 'refugees' within the meaning of the Refugees Convention and Protocol. Likewise, the East Timorese evacuated to Australia were those who happened to be in the right place at the right time. It is not correct to assume, therefore, that all were 'refugees' within the meaning of the Refugees Convention and Protocol. On the other hand, it is also not correct to assume that none of the Kosovar or East Timorese evacuees were, or later became, 'refugees'.¹²⁷

The circumstances in which cessation of refugee status occurs are set out exhaustively in Article 1C of the Refugees Convention. Most are triggered by voluntary actions of the person in question. Although Australia contends that the Kosovars and the East Timorese repatriated voluntarily, the contention quite clearly does not stand up to objective scrutiny in relation to many, if not most, of them (see Part IVB below). The only cessation clause upon which Australia can rely with any degree of credibility is article 1C(5) which provides:

This Convention shall cease to apply to any person falling under the terms of Section 1A if:

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;¹²⁸

Clearly, where the Refugees Convention protection obligation is the only protection obligation in issue, a person falling within the terms of article 1C(5) can be repatriated against his or her will. The interpretation of this cessation clause, therefore, becomes a matter of some significance. In the absence of much state practice interpreting this clause,¹²⁹ it is reasonable to have recourse to the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook").¹³⁰ According to the *UNHCR Handbook* (para 135):

126 A Suhrke et al, note 17 *supra* at para 464.

127 It should be noted, in this context, that the making of a refugee status determination by a state party to the Refugees Convention is declaratory and not constitutive.

128 The clause continues as follows: "Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." As previously noted, Article 1A(1) of the Refugees Convention defines a category of refugee that is of very little relevance now. Article 1C(6) makes equivalent provision to article 1C(5) in relation to persons without a country of nationality.

129 J Fitzpatrick, "The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection" (1999) 13 *Georgetown Immigration Law Journal* 343 at 346-7.

130 Article 35(1) of the Refugees Convention provides that: The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees...in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of [the Refugees Convention].

“Circumstances” refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory - change in the facts surrounding the individual refugee’s fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable.

Any Kosovars, who were, in fact, Convention refugees at the time of evacuation to Australia, could not have ceased to be refugees by reason of Article 1C(5) at the time of repatriation because it is impossible to determine at present whether the United Nations peace mission in Kosovo will succeed and, hence, there can be no confidence that the progress achieved to date will prove durable.¹³¹

By contrast, there does appear to have been a fundamental change of circumstances in East Timor sufficient to remove the basis on which most East Timorese would previously have feared persecution. Indonesia, which had been resorting to persecutory behaviour in order to resist East Timorese claims to independence, decided to accede to those claims; the initial militia reaction to that decision is now under control, and it seems improbable that matters will regress.

What must be kept in mind, however, is that a particular Kosovar or East Timorese evacuee, who met the Convention definition of ‘refugee’ for one set of reasons at the time of evacuation, might later have met the refugee definition for a different set of reasons arising after evacuation and still existing. Similarly, a particular Kosovar or East Timorese, who did not meet the Convention refugee definition at the time of evacuation, might, by reason of circumstances arising after evacuation and still existing, subsequently have become a Convention refugee. In the case of the Kosovars, an example would be persons who had refused to align themselves with the KLA. In the case of the East Timorese, an example would be persons perceived as having collaborated with the Indonesian Government.

(ii) *International Covenant on Civil and Political Rights*¹³²

According to the United Nations Human Rights Committee, reading other provisions of the ICCPR in conjunction with Article 2(1) of the ICCPR¹³³ leads

Article II(1) of the Refugees Protocol makes similar provision in relation to the Protocol. The publication of the *UNHCR Handbook*, can be regarded as an act of the UNHCR in discharge of its duty of supervision and, therefore, states are bound by the Refugee Convention and Protocol to regard the guidelines to interpretation and implementation of those treaties contained in the *Handbook* as, at the least, highly persuasive.

131 See, for example, United Nations, “Security Council Debates Report of its Mission to Kosovo”, 11 May 2000, <<http://www.un.org/peace/kosovo/pages/kosovo1.htm>>.

132 Article 3 of the CAT provides that no state party “shall expel, return (*‘refouler’*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”. Since this obligation is narrower than the ICCPR protection obligation, it will not be further discussed.

133 Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

to the conclusion that removal of a person to another state, in circumstances which expose the person to “a real risk (that is, a necessary and foreseeable consequence)” of a violation of an ICCPR right in that other state, constitutes a violation of the ICCPR *by the removing state*.¹³⁴

Even more significant in the present context is the decision of the European Court of Human Rights in *D v the United Kingdom*.¹³⁵ The question in that case was whether the United Kingdom would be in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹³⁶ (a provision which is almost identical to Article 7 of the ICCPR), if it removed an AIDS sufferer in the advanced stages of that illness to his country of nationality, St Kitts and Nevis. In order “not to undermine the absolute character of [Article 3’s] protection”, the Court was prepared to accept that a removing state might be in breach of Article 3 of the European Convention even where:

the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article.

It added, however, that, in such contexts, “the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant’s personal situation in the expelling state”.¹³⁷

Upon examination of all the circumstances surrounding the case before it, the Court found that there was a serious danger that removal of the applicant from the United Kingdom, where he was receiving “sophisticated treatment and medication” as well as substantial moral and social support, to St Kitts and Nevis, where he was not guaranteed any of these things, would “further reduce his already limited life expectancy and subject him to acute mental and physical suffering”. It then made the following determination:

In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant’s fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent state in violation of Article 3.

134 While Australia appears to take the view that the scope of the obligation extends only to protection from exposure to violations of the most basic of rights, such as the right to life (Article 6) and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Article 7), the nature of the Human Rights Committee’s reasoning suggests that the ICCPR protection obligation extends to protection from violation of any ICCPR right. See further, J Hearn & K Eastman, “Human Rights Issues for Australia at the United Nations - Australia’s Non-refoulement Obligations under the Torture Convention and the ICCPR” (2000) 6(1) *AJHR* 216.

135 Judgment of 2 May 1997, <<http://www.echr.coe.int/Judgments.htm>>.

136 213 UNTS 221, 4 November 1950.

137 Note 135 *supra* at para 49.

The Court also notes in this respect that the respondent state has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.¹³⁸

The United Kingdom accepted the judgment of the European Court of Human Rights and granted the applicant indefinite leave to remain in the United Kingdom.

It is suggested that in order not to undermine the absolute character of *its* protection, Article 7 of the ICCPR needs to be interpreted in a manner consistent with the interpretation of Article 3 of the European Convention. The fact that the Australian Government tried to avoid a situation in which there was diagnosis and commencement of treatment of chronic medical conditions suffered by the East Timorese certainly gives rise to the inference that its advice was that Article 7 of the ICCPR *is* to be so interpreted.

In relation to the Kosovars, the Minister did put in place a procedure for assessing the situation of each safe haven visa holder. The matters considered by the Minister suggest that the procedure was probably intended to identify and protect persons to whom ICCPR obligations were owed. However, as will be explained below, the procedure was clearly inadequate for the task.

In the case of the East Timorese, it is extremely likely that there were individuals to whom Australia owed ICCPR protection obligations. For example, an East Timorese evacuee under the age of five (ie an evacuee in the mortality danger zone age-wise) returned from Australia to a situation in which there was a real risk that he or she might not have access to the basic food, shelter and health care necessary to ensure his or her survival could be said (on the basis of *D v the United Kingdom*) to have been subjected by Australia to 'cruel, inhuman or degrading treatment'. Since no procedure was established for carefully considering the circumstances of each person prior to return, it is almost certain that some returns were made in breach of Australia's ICCPR protection obligations.

(iii) *Temporary Protection Beyond the Treaty Obligations*

The UNHCR uses the term 'refugees' to refer to all those outside their country of origin for reasons of "feared persecution, conflict, generalised violence or gross violations of human rights".¹³⁹ The UNHCR's protection mandate extends, *inter alia*, to all such persons.¹⁴⁰ In other words, the term 'refugees' for UNHCR purposes ("mandate refugees") embraces a much wider group than 'refugees'

138 *Ibid* at para 53.

139 UNHCR, *Handbook Voluntary Repatriation: International Protection* (1996) p v.

140 The UNHCR's mandate is set out in the UNHCR Statute and a series of General Assembly and ECOSOC directives and in specific situations even extends to internally displaced persons: V Türk, "The Role of UNHCR in the Development of International Refugee Law" in F Nicholson and P Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 153 at 154.

within the meaning of the Refugees Convention and Protocol. The question is whether individual states have any responsibility to ensure the protection of mandate refugees simply because they are mandate refugees. Jerzy Sztucki points out that “since UNHCR cannot offer protection on its own premises, ‘the ultimate responsibility for refugees within the mandate of the High Commissioner falls in fact upon countries of residence [or presence]’”.¹⁴¹ Volker Türk suggests that “some legal basis” for this may be found in Article 35 of the Refugees Convention.¹⁴² However, Western states, including Australia, reject the proposition that a non-citizen physically present in the territory of a state is owed an international protection *obligation* by that state, by reason only that the person falls within the mandate of the UNHCR.¹⁴³ In my view, mandate refugees would, in very many cases, be able to invoke a state's protection obligations under the ICCPR, if not the Refugees Convention. However, I accept that where treaty obligations (or their customary international law parallels) are not applicable, the terms on which, and duration for which, mandate refugees are allowed to remain in a receiving state appear not to be governed by firmly established international law. This is so even where the individuals in question have been evacuated to ‘temporary safe havens’ at the request of UNHCR.¹⁴⁴

On the other hand, there exist international documents of a non-binding character which ought to guide the conduct of any state interested in ensuring that its conduct is politically acceptable to the international community.¹⁴⁵ The most significant document, from Australia's point of view, is the EXCOM¹⁴⁶ document entitled *Progress Report on Informal Consultations on the Provision of International Protection to All who Need It*.¹⁴⁷ The key standards set out in the EXCOM document are the following:

4(d) Temporary protection should be conceptualized in a manner consistent with the framework of international refugee and human rights law....

(e) Temporary protection is appropriate in situations of mass influx for persons seeking refuge abroad from situations of general danger, such as war, civil war and generalized violence....

(n) Temporary protection may be withdrawn when it is considered that the beneficiaries would be able to return to their country of origin in safety and with dignity. Return in safety and with dignity presupposes the existence of the following elements:

(i) Respect for and compliance with the right to return by the country of origin;

141 J Sztucki, “Who is a Refugee? The Convention Definition: Universal Or Obsolete” in F Nicholson and P Twomey, *ibid* at 71 quoting para 4 of the preamble to GA Res 832, 9 UN GAOR (Supp 21) (21 October), p 19.

142 V Türk, note 140 *supra* at 156.

143 J Sztucki, note 141 *supra* at 71.

144 See further, Amnesty International, *Former Yugoslav Republic of Macedonia: The Protection of Kosovo Albanian Refugees* (May 1999), <<http://www.amnesty.org/ailib/aipub/1999/EUR/46500399.htm>>.

145 These documents are discussed in J Fitzpatrick, note 129 *supra*.

146 EXCOM is the acronym used to designate the Executive Committee of the High Commissioner's Programme. It has a wide membership of states, including Australia.

147 Executive Committee of the High Commissioner's Programme, 8th Meeting, UN Doc EC/47/SC/CRP.27, 30 May 1997; available at <<http://www.unhcr.ch/unhcr/refworld/unhcr/excom/standcom/1997/27.htm>>.

- (ii) Existence of conditions which ensure the physical and legal safety of returnees;
- (iii) Existence of an adequate infrastructure to allow the return to be sustainable, or availability of the basic necessities of life, including food, shelter, and basic sanitary and health facilities;
- (iv) Non-discrimination and respect for other fundamental human rights of returnees; and
- (v) Return forms part of an international process or mechanism...

(o) If return to the former place of habitual residence is not possible, a person can only reasonably be expected to return to a part of the country where he or she would enjoy safety and dignity. Such conditions would not exist where the repatriated individual would become an internally displaced person struggling for survival...

(p) At the end of the crisis and upon the withdrawal of temporary protection, return preferably should take place on a voluntary basis. Those who have valid claims not to be returned should be allowed to have their claims assessed within the framework of established national mechanisms.

On 5 July 1999, DIMA informed the Senate Legal and Constitutional References Committee, “[a]ny return of the Kosovars will either be at their own request or under a planned repatriation program under the auspices of UNHCR”.¹⁴⁸ As already discussed, this is not quite how events transpired. Many Kosovars did not repatriate voluntarily. Several of the Kosovar safe haven visa holders were, in fact, from places such as eastern Kosovo (a Serb-dominated area actually located in Serbia proper). Australia did not return these individuals to their homes in the Serb-dominated areas, but did ‘return’ them to Kosovo proper. Since UNHCR was recommending, in line with 4(o) above, that ethnic Albanians, with homes located in Serb-dominated areas, ought not to be forced into a situation of internal displacement in Kosovo proper,¹⁴⁹ it could not be said that these individuals were being returned ‘under the auspices of the UNHCR’. The Australian Government’s explanation of its actions was as follows:

The Minister does not deny that it will be difficult for them especially those without family or friends in Kosovo. He has paid careful attention to the UNHCR’s advice on the need for on-going international protection but on balance, has decided that there is not a strong case for them remaining in Australia.¹⁵⁰

Although UNHCR and the International Organisation for Migration appear to have assisted Australia with the logistics of repatriation, Australia’s repatriations certainly did not form part of an international process or mechanism in the sense of 4(n)(v) above. During the ‘end game’ period (see above), the head of UNMIK, Mr Bernard Kouchner and the representatives of many other agencies operating in Kosovo were decrying uncontrolled involuntary repatriations then taking place, on the basis that the returns were exacerbating the already serious problem of ensuring that those in Kosovo had access to the basic necessities of

148 Australia, Senate Legal And Constitutional References Committee, *Reference: Operation of Australia’s Refugee and Humanitarian Program, Official Committee Hansard*, 5 July 1999, p 50 (testimony of Ms Bedlington, DIMA).

149 S Mann, note 60 *supra*.

150 Australia, Senate, *Proof Hansard*, 13 April 2000, p 13540 (Senator Ellison on behalf of Senator Vanstone).

life. In other words, these agencies were arguing that the prerequisite for withdrawal of temporary protection and return specified in 4(n)(iii) above did not exist. Despite the evidence to the contrary, the Australian Government simply chose to take the view that those making the comments could not possibly be referring to the trifling hundreds being returned by Australia.¹⁵¹

At the time of the evacuation of the East Timorese, a senior DIMA official said that Australia would be “working closely with the UNHCR and returning the East Timorese only when UNHCR determines it is possible for people to return to East Timor in conditions of safety and dignity”.¹⁵² It is difficult to deny that, technically speaking, this is what Australia did. At the time that Australia started repatriating its East Timorese evacuees, the UNHCR and international aid agencies *were* promoting repatriation to East Timor. However, the focus of all these agencies was on the thousands of East Timorese living in very dangerous, difficult conditions in West Timor.¹⁵³ In other words, these agencies were really promoting the lesser of two evils. It must be questioned whether the pre-conditions for withdrawal of temporary protection and return set out in 4(n) above were met, except relative to West Timor. Aid agencies on the ground in East Timor, already overburdened by the task of making provision for those returning from West Timor, were certainly less than enthusiastic about the early repatriation of East Timorese from Australia.¹⁵⁴

Finally, UNHCR places emphasis on the notion that induced or forced repatriations ought to be conducted in a humane manner. Australia’s failure to ensure that those repatriated to Kosovo and East Timor did not suffer unnecessarily in making the transition to a life back in their own countries can only be described as ‘inhumane’.

B. Procedural Standards for Ensuring that Withdrawal of Temporary Protection does not Jeopardise Fulfilment of Treaty-based Protection Obligations

(i) Voluntary Repatriation

A state cannot breach its international protection obligations by facilitating the voluntary repatriation of individuals to their countries of origin. This is because it is an individual’s right to return to his or her country of origin at any time, no matter how dangerous such return may be. However, where a state chooses to rely on the voluntary character of a particular individual’s repatriation at the expiry of a grant of temporary protection to refute the allegation that it has breached one or more of its international protection obligations, it must be able to show that the repatriation meets the UNHCR’s criteria for verifying true ‘voluntariness’.

151 Australia, House of Representatives, Debates, *Proof Hansard*, 13 April 2000 p 15275 (Mr Albanese); see also note 30 *supra*, p 110 (testimony of Mr Waters, DIMA); and J Molony, note 31 *supra*.

152 J Bedlington, DIMA quoted in AAP, “Australia: East Timorese Tell of Terror” 16 September 1999 as summarised in UNHCR, *Refugees Daily*, 16 September 1999.

153 Interview with C Graydon, 8 May 2000.

154 *Ibid.*

The UNHCR starts from the proposition that ‘voluntariness’ implies “an absence of any physical, psychological, or material pressure”.¹⁵⁵ However, acknowledging political realities, it is prepared to characterise a repatriation as ‘voluntary’ if convinced that “the positive pull-factors in the country of origin are an overriding element in the refugees’ decision to return rather than possible push-factors in the host country or negative pull-factors, such as threats to property, in the home country”.¹⁵⁶ According to the UNHCR:

If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If however, their rights are not recognised, if they are subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will.¹⁵⁷

In the case of both the Kosovars and the East Timorese, the Australian push factors, already discussed, were so great that it would be implausible to assert that they were not the overriding element in most decisions to return. Most repatriations from Australia were, therefore, involuntary.

(ii) *Induced or Forced Repatriation*

As Michael Barutciski rightly points out:

a person’s refusal to repatriate voluntarily would not [necessarily] indicate that he or she is actually a refugee, since the refusal may be motivated by reasons that are not related to international protection.¹⁵⁸

It is difficult to deny that a state does not, per se, act unlawfully by engaging in the induced or forced repatriation of persons to whom it does not owe international protection *obligations*. However, it is argued that, unless that state observes certain procedural standards in dealing with persons who refuse to repatriate voluntarily upon expiry of a grant of temporary protection, there can be no confidence that it is repatriating *only* those to whom it owes no international protection obligations.

It is true that Australia’s repatriations took place at a time when UNHCR was promoting voluntary repatriation of mandate refugees to Kosovo and East Timor. The important point to note, however, is that UNHCR considers it appropriate to promote the voluntary repatriation of mandate refugees where there has been “an overall, general improvement in the situation in the country of origin so that return in safety and with dignity becomes possible for the majority of refugees.”¹⁵⁹ The requirement of “an overall, general improvement in the situation in the country of origin” is acknowledged to be a lower threshold of change than is required for cessation of Convention refugee status under Article 1C(5) of the Refugees Convention.¹⁶⁰ Moreover, the fact that return in safety and

155 UNHCR, note 139 *supra*, p 11.

156 *Ibid.*

157 *Ibid.*

158 M Barutciski, “Involuntary Repatriation when Refugee Protection is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee” (1998) 10 (1/2) *International Journal of Refugee Law* 236 at 249.

159 Note 155 *supra*, p 16.

160 *Ibid.*, p 10.

dignity has become possible for *most* individuals does not necessarily mean that return in safety and dignity has become possible for a *particular* individual. It is, therefore, quite possible for the induced or forced repatriation of a person to his or her country of origin to amount to a breach of the removing state's Refugees Convention and/or ICCPR protection obligations, even when it takes place at the same time that UNHCR is promoting voluntary repatriation to that country of mandate refugees.

In light of the above considerations, it is generally accepted that the beneficiaries of a state's temporary protection regime must not be prejudiced in their ability to invoke the international protection obligations of that state at the time of withdrawal of temporary protection. It is also generally accepted that, in order for a state to be assured of meeting its international protection obligations, persons invoking those obligations must be given access to an individual status determination procedure meeting certain procedural standards, which *include* the following:

- (ii) The applicant should receive the necessary guidance as to the procedure to be followed....
- (iv) The applicant should be given the necessary facilities...for submitting his case to the authorities concerned....
- (vi) If the applicant is not recognised he should be given a reasonable time to appeal for a formal reconsideration of the decision....¹⁶¹

The fact that the Minister cannot be held legally accountable for a decision not to consider whether to allow a protection visa application to be made means that it is far from satisfactory, even in theory, that the Minister's s 91L(1) power should be the only safeguard against breach of treaty-based protection obligations owed to persons whose safe haven visas have expired. It is to be noted that not even "internal, private, non-public guidelines" relating to the exercise of the Minister's s 91L(1) power are in place.¹⁶² This suggests that the Minister for Immigration is unlikely even to consider the exercise of the power in most cases, let alone to exercise the power in a way that ensures that Australia avoids breach of its international protection obligations. The different treatment of the Kosovars and East Timorese provides support for the view that only intense political pressure is likely to cause the Minister to consider the exercise of the s 91L(1) power. The conditions necessary to generate such political pressure are unlikely to exist in what can be expected to be the usual run of cases; that is, cases, such as the Ambonese case, involving unpublicised grants of safe haven visas to small numbers of individuals from relatively unknown places.

Further grounds for pessimism can be found in the fact that in the Kosovar case, where political pressure forced the Minister to go as far as agreeing to consider the exercise of his s 91L(1) power, the procedure put in place was not adequate to the task of identifying at the very beginning all those to whom Australia might have owed protection obligations. Had political pressure not continued following the 3 April decisions, the several who were belatedly

161 *UNHCR Handbook*, para 192.

162 Australia, Senate, *Proof Hansard*, 10 April 2000, p 13182 (Senator Bartlett).

allowed to make protection visa applications would clearly not have received that opportunity. It should also be recollected that the Minister chose not to exercise the s 91L(1) power in favour of some persons falling within categories of persons who, according to the UNHCR, "should have continued access to Safe Haven status or have their claims to ongoing refugee status examined and enjoy full refugee status upon recognition".¹⁶³ UNHCR was only prepared to countenance 'accelerated procedures' not giving access to a state's full refugee status determination process, in relation to persons not falling within the 'at risk' categories identified by it.¹⁶⁴ The Minister, however, was obviously more concerned with implementing the Australian Government's policy objectives.

V. WHERE IS AUSTRALIA HEADING?

For several years now, the international community has been making concerted efforts to promote repatriation, rather than local integration or third country resettlement, as 'the preferred durable solution' for refugees. The question immediately arises: preferred by whom? One presumes that, where repatriation is the preferred durable solution of the individual refugee, he or she will return home voluntarily as soon as it is safe to do so. But in fact, the preference that is always deferred to in this issue, is the preference of receiving states and receiving states in general prefer repatriation above all other alternatives.

The reasons for this preference are simple. Refugees can cause genuine economic problems for receiving countries in the developing world, through overtaxing limited resources.¹⁶⁵ While refugees are unlikely to cause serious economic problems for receiving countries in the developed world, there may easily develop a community perception that they are doing so. In Australia's case, there is no question that Australia is, *in fact*, sufficiently affluent to allocate adequate resources to the process of determining the protection needs of its on-shore asylum seekers, and also to the permanent resettlement of all of these persons if need be, without noticeably depriving its own population.¹⁶⁶ Nevertheless, there is a community *perception* that the numbers arriving in Australia and seeking its protection are so great as to constitute, or potentially

163 UNHCR Regional Office for Australia, New Zealand, PNG and the South Pacific, "Returns of Kosovo Albanians in Australia", Media Release, 21 March 2000.

164 UNHCR, *Kosovo Albanians in Asylum Countries: UNHCR Recommendations as Regards Return*, Update March 2000 at para 8.

165 A Adepoju, "The Consequences of Influx of Refugees for Countries of Asylum in Africa" pp 219-30 and R Lohrmann, "Irregular Migration: An Emerging Issue in Developing Countries" pp 135-6 both in R Appleyard (ed), *The Impact of International Migration on Developing Countries*, OECD (1989).

166 See for example, D Pratt, "Refugee Alert Sounds Like a Wake-up Call" *The Australian*, 25 November 1999, p 13; M Kirby, "Refugees - Their Need Has Never Been Greater", presented at the National Launch of the Refugee Week Committee, Canberra, 14 June 1995 : <http://www.fl.asn.au/resources/kirby/papers/19950614_refugee.html>.

constitute, a serious economic burden.¹⁶⁷ The Australian Government, for its part, is well aware that the safest path to re-election is simply to accept community perceptions as reality and to respond accordingly.

It is sometimes argued that, given political realities, a temporary protection regime can serve the interests of refugees themselves. This is because citizens of receiving countries may be more willing to shoulder the perceived burden of extending protection to those in need of it, if assured that the individuals concerned will have to return to their homelands when the need for protection no longer exists.¹⁶⁸ The fear is that, in a context of eroded political support for local integration as a durable solution, insufficient care may be taken to ensure that those with continuing protection needs are not repatriated. This fear appears to be substantiated by Australian practice to date.

According to a senior DIMA official:

Everyone agrees that an HEP [Humanitarian Evacuation Program] is a relatively much more expensive way of dealing with an outflow. I think the general reaction is that they were a unique set of circumstances; that it certainly would not be seen as being the obvious response to future outflows. There would have to be that same unprecedented size of outflow and difficulty in relation to countries of first asylum before any of the taking countries would consider such a response again.¹⁶⁹

It is clear, however, that the temporary safe haven mechanism can, and will, be put to other uses in the future. One foreshadowed future use is the offer of humanitarian stay (temporary) visas to some overseas applicants for visitor or other visas whose temporary entry is considered to be justifiable on humanitarian grounds – for example, “someone from the Middle East who thought they might face a risk and they had relatives in Australia”.¹⁷⁰ Recent policy statements suggest, however, that the intended uses of the temporary safe haven visa mechanism do not end there. These policy statements suggest that Australia may well wish to grant temporary safe haven visas to most or all on-shore asylum seekers who come to Australia directly from a place where their safety is under threat.¹⁷¹ The issue of temporary safe haven visas to the Ambonese can certainly be interpreted as a first step in that direction.

167 See, for example, M Saunders, “Illegals Bill Faces Blow-out to \$200m” *The Australian*, 18 January 2000, p 2; M Saunders, “Taxpayers Foot \$55m Bill for Wave of Illegals” *The Australian*, 13 June 2000, p 7.

168 See, for example, M Barutciski, note 158 *supra* at 246.

169 Note 30 *supra*, p 138 (testimony of Ms Bedlington, DIMA). Australia’s response to the East Timor situation was, of course, in every way a special case.

170 Philip Ruddock, Minister for Immigration, quoted in note 75 *supra*.

171 For example,

“Australia’s protection framework will consist of: resettlement as a durable option for UNHCR-identified refugees in countries of unsustainable first asylum who can neither repatriate nor integrate into their country of first asylum...; first asylum for asylum seekers for whom Australia is the country of first asylum through temporary safe haven until repatriation can occur;... local integration if repatriation is not a durable solution for a Safe Haven visa holder or other temporary protection visa holder and as an immediate durable solution for authorised arrivals found to be refugees who should, conceptually, include only *sur place* refugees”. (DIMA, *The International Protection Framework and Australia’s Refugee and Humanitarian Program*, November 1999, p 12). ‘*Sur place* refugees’ is the term used to describe persons who have become refugees due to circumstances arising after their departure from their country of origin.

VI. CONCLUSION

Australia's practice to date relating to the withdrawal of temporary protection from, and repatriation of, persons who can claim no more than mandate refugee status is not a breach of international law, but certainly does not appear to comply with international standards. Moreover, considered in its political context, Australia's practice to date suggests that, as long as the ability of persons, who are, or have been, safe haven visa holders, to make protection visa applications is controlled by a Minister, who is politically, but not legally, accountable for decisions made, the likelihood is that Australia will induce or force the repatriation of some individuals in breach of its treaty-based protection obligations.