



Submission to the Legal and Constitutional Affairs

Legislation Committee

**Inquiry into the Migration Amendment (Protection and
Other Measures) Bill 2014**

Prepared by Professor Sarah Joseph

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Migration Amendment (Protection and Other Measures) Bill 2014

The Castan Centre for Human Rights Law (Monash University) thanks the Committee for the opportunity to comment on the Migration Amendment (Protection and Other Measures) Bill 2014. We express the following concerns with the Bill's compatibility with international human rights law. Please note that, due to time constraints, we have chosen to concentrate on one aspect of the Bill. Our silence on the other provisions cannot therefore be presumed to constitute a determination on our part that those provisions accord with international human rights law.

Threshold of Complementary Protection

Proposed s 6A provides that complementary protection obligations arise when "the Minister considers that it is more likely than not that the non-citizen will suffer significant harm if ... removed from Australia to a receiving country". This test implies that the Minister must assess the risk of such "significant harm" to be more than 50%.

The effect of s 6A is softened by the fact that it does not apply to obligations which arise independently under the Refugee Convention.

What is complementary protection?

In international law, complementary protection obligations are non-refoulement obligations which arise under the International Covenant on Civil and Political Rights ("ICCPR") and Article 3 of the Convention against Torture ("CAT"). Article 3 reads:

1. 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.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Those treaties prohibit the removal of a person to a receiving State where he or she faces real risks of torture (under the CAT) or "irreparable harm" (under the ICCPR). With regard to the ICCPR, "irreparable harm" has thus far been interpreted to refer to violations of the right to life (Article 6) and the right to be free from torture and other treatment (Article 7). Therefore, the non-refoulement obligation in the ICCPR is broader than that in the CAT.¹ While arguments have been put forward (in cases regarding alleged violations of the ICCPR) that "irreparable harm" arises with regard to other ICCPR provisions, such as the right to a fair trial in Article 14,² the existence of non-refoulement obligations beyond Articles 6 and 7 have never been confirmed or denied by the UN human rights bodies.

¹ See also *T.M. v Sweden*, UN Doc CAT/C/31/D/228/2003 (18 November 2003).

² See, e.g., *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998 (5 August 2003).

Article 6(1) of the ICCPR reads:

Every human being has the inherent right to life. This right shall be protected by law.
No one shall be arbitrarily deprived of his life.

Article 7(1) of the ICCPR reads:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

It may be noted that the parallel non-refoulement obligations under the European Court of Human Rights were extended to an apprehension of a violation of fair trial rights in *Othman (Abu Qatada) v UK*.³

Assuming that complementary protection in international human rights law extends only to foreseeable violations of the rights to life, and to be free from torture and other prohibited ill treatment, it is narrower in some senses than protection under the Refugee Convention. The latter protection applies to persons facing “persecution”, which extends beyond violations of Articles 6 and 7 of the ICCPR, or the CAT. However, it is also broader in some senses. A person claiming a right to complementary protection does not have to establish that his/her persecution is based on a particular “reason” (ie race, religion, nationality, membership of a particular social group or political opinion) as is required under Article 1(A)(2) of the Refugee Convention. Furthermore, the exclusions in the Refugee Convention in Article 1F do not apply under the ICCPR and the CAT.⁴ Therefore, it is clearly possible for a person to be entitled in international law to complementary protection in circumstances where he or she falls outside Refugee Convention protection.

What is the threshold in international law for complementary protection?

Any non-refoulement obligation involves an assessment of the future risk to a person of sending them to a particular State. What is the threshold of risk that must be reached before a complementary protection obligation crystallises?

In its General Comment 1, the CAT Committee extrapolated on the “threshold” to be applied to Article 3 at paragraphs 5-7 (emphasis added):

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party.

6. Bearing in mind that the State party and the Committee are **obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture** were he/she to be expelled, returned or

³ *Othman (Abu Qatada) v the United Kingdom* (European Court of Human Rights, Chamber Application No 8139/09, 17 January 2012).

⁴ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1F. See, in this regard, e.g., *Hamida v Canada*, UN Doc CCPR/C/98/D/1544/2007 (18 March 2010); *Tapia Paez v Sweden* UN Doc CAT/C/18/D/39/1996 (28 April 1997), and *Tebourski v France* UN Doc CAT/C/38/D/300/2006 (1 May 2007).

extradited, the risk of torture must be assessed on grounds that **go beyond mere theory or suspicion**. However, **the risk does not have to meet the test of being highly probable**.

7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such **danger is personal and present**. All pertinent information may be introduced by either party to bear on this matter.

In a recent CAT case, *Gbadjavi v Switzerland*,⁵ the test explicitly applied at para 7.2 was whether the complainant had “substantial grounds for believing that he would be in danger of being subjected to torture” if, on the facts of that case, he was returned to Togo. The risk must also be “foreseeable, real and personal” (para 7.4). In finding that deportation would in fact breach Article 3, the CAT Committee stated that the complainant’s return to Togo “would put him at a real, present and personal risk of being subjected to torture” (para 7.9).

The proposed test in the new legislation does not accord with the CAT standard, as it is too strict. The CAT standard of “substantial grounds” does not require the chances of torture to be more than 50%. The CAT test is arguably vague, and it is difficult to establish a precise percentage of risk which is needed in order to enliven Article 3. However, it would be very easy for the CAT Committee to specify a “more likely than not” standard if that was in fact the standard, which it has never done. The risk required is less than 50%.

Under the ICCPR, General Comment 31 specifies in paragraph 12 that there must be “substantial grounds for believing that there is a real risk of irreparable harm”. The standard of “real risk” has been reiterated in numerous cases, such as *Pillai v Canada*.⁶ The standard of “real risk” is not as high as the proposed Australian standard of “more likely than not”. As with the CAT Committee, the HRC has never endorsed the proposition that the chances of breach in the receiving State be over 50%.

The adoption of proposed s 6A would breach both the CAT and the ICCPR.

Conclusion

The Castan Centre urges that the proposed change to existing law, highlighted above, be rejected.

⁵ *Gbadjavi v Switzerland* UN Doc CAT/C/48/D/396/2009 (1 June 2012).

⁶ *Pillai v Canada*, UN Doc CCPR/C/101/D/1763/2008 (25 March 2011).