

NEW ISSUES IN REFUGEE RESEARCH

Working Paper No. 118

Complementary protection and beyond: How states deal with human rights protection

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August 2005



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ISSN 1020-7473

Abstract

This paper* outlines the grounds on which people may claim complementary protection in the European Union, United States and Canada, and the appeal processes available at each stage of the determination process. It also sets out additional types of claims that may be made, such as humanitarian and compassionate claims, although these do not technically constitute complementary protection since they are not based on States' international legal obligations. The paper is largely descriptive, as its purpose is primarily to show how other States have dealt with expanded protection concepts, in order that Australia—which recognizes only Convention refugees—might develop its own system of complementary protection. By contrast to most western States, Australia does not have a formal mechanism for recognizing protection claims based on fear of torture or inhuman or degrading treatment or punishment, or any other grounds outside article 1A(2) of the Refugee Convention.¹ This is despite its non-refoulement obligations under article 3 of the CAT² and article 7 of the ICCPR.³

* The author wishes to thank Stephen Legomsky and Catherine Dauvergne for their helpful comments on the US and Canadian material respectively.

¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. In Australia, the only means of having a protection claim considered on non-Convention grounds is to request that the Minister for Immigration and Multicultural and Indigenous Affairs exercise her non-compellable, non-delegable and non-reviewable discretion to grant the applicant a visa. This discretion may only be invoked once the applicant has been unsuccessful in an asylum claim, both at first instance and on appeal. The Minister is not compelled to even consider the claim.

² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

³ International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171.

Background

Complementary protection has a long history, both internationally and in the European context. Ever since the international community has sought to regulate the movement of refugees through international law, States have recognized that not all persons seeking protection fit neatly within legal definitions. Accordingly, some countries have allowed persons who are not technically ‘refugees’, but who nonetheless have a valid need for protection, to remain in their territories. However, there are discrepancies between different States’ understandings of who should benefit from such extended protection, and, crucially, the status to which they should be entitled.

A large number of States permit persons to remain in their territory who are not Convention refugees, but for whom return to the country of origin is either not possible or not advisable. The obligation not to return an individual to serious harm may be express, as in article 33 of the Convention and article 3 of the CAT, or implied, as in article 7 ICCPR.

In other cases, permission to remain may be granted for compassionate reasons such as age, health or family connections unrelated to an international protection need;⁴ or for practical reasons, such as the inability to obtain travel documents.⁵ While such protection is humanitarian in nature, it is not based on an international protection obligation and therefore does not come within the legal conception of ‘complementary protection’.

In legal terms, ‘complementary protection’ describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework. It may be based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.⁶ In this pure form, it is not constrained by exclusion clauses but simply operates as a form of human rights or humanitarian protection triggered by States’ expanded non-refoulement obligations. Codified forms of complementary protection, such as ‘subsidiary protection’ in the EU; Temporary Protected Status, ‘withholding of removal’, and CAT-based protection in the US; and ‘persons in need of protection’ in Canada,⁷ may exclude particular persons from protection for reasons similar to the

⁴ Sometimes health or family reasons may also be tied to an international protection need, such as under articles 3 or 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) (ECHR), and there remains some scope to test the extent to which compassionate reasons may in fact have a legal basis. However, generally they describe reasons for stay not linked to any legal ground.

⁵ EXCOM Standing Committee 18th Meeting ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’ UN Doc EC/50/SC/CRP.18 (9 June 2000) [4]–[5]. During the drafting of the 1951 Convention, France had proposed that refugee status should extend to a person ‘unable to obtain from [his or her] country [of origin] permission to return’: Ad Hoc Committee on Statelessness and Related Problems ‘France: Proposal for a Draft Convention Preamble’ UN Doc E/AC.32/L.3 (17 January 1950).

⁶ See D Perluss and JF Hartman ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia J of Intl L 551; GS Goodwin-Gill ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26 Virginia J of Intl L 897; cf K Hailbronner ‘*Non-Refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 Virginia J of Intl L 857.

⁷ Immigration and Refugee Protection Act 2001 s 97(1).

exclusion clauses in the Refugee Convention, but may also specify the rights and status to which beneficiaries are entitled. Typically, such legal status is less comprehensive than that accorded to Convention refugees.

At the outset, it is essential to appreciate that the ‘complementary’ aspect of ‘complementary protection’ is not the form of protection or resultant status accorded to an individual, but rather the source of the additional protection. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status but simply assesses international protection needs on a wider basis than the 1951 Convention.

European Union

Definition

On 29 April 2004, the EU adopted the Qualification Directive,⁸ which aims to harmonize EU asylum law by defining who qualifies for international protection—either as a refugee or a beneficiary of subsidiary protection. Member States must bring into force laws, regulations and administrative provisions to comply with the Directive by 10 October 2006.⁹ The Directive in essence establishes a framework with which national laws must comply.

Article 2(e) defines as a ‘person eligible for subsidiary protection’:

a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.¹⁰

‘Serious harm’ is defined in article 15 as:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

⁸ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (Qualification Directive).

⁹ The Directive does not apply to Denmark, in accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5 and the Treaty establishing the European Community [2002] OJ C325/33: Qualification Directive recital 40.

¹⁰ 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally art 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (6 September 2002).

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

When the Directive was first proposed in 2001, the definition of 'serious harm' contained a further paragraph, which provided that serious harm could consist of a 'violation of a human right, sufficiently severe to engage the Member State's international obligations'. The deletion of this broader human rights provision has significantly reduced the scope of the Directive. It was the provision which allowed for the greatest development of the human rights–refugee law nexus, providing flexibility for addressing new situations arising in international law and relevant developments in the jurisprudence of the European Court of Human Rights. As article 15 stands now, there is little room for interpretation and it may be that 'inhuman or degrading treatment or punishment' becomes the focal point for seeking to broaden the Directive's scope, functioning in a similar fashion to the Convention's 'membership of a particular social group' category.

Exclusion clauses

The exclusion clauses relating to subsidiary protection are broader than those contained in the Refugee Convention. In addition to the Convention exclusion clauses, a person is excluded from subsidiary protection if he or she 'constitutes a danger to the community or to the security of the country in which he or she is' (art 17(1)(d)). Such exclusion—on national security grounds—was considered in relation to refugees as well, but since this would effectively constitute a merger of article 33(2) with the refugee exclusion clauses, it was ultimately acknowledged as being inconsistent with the Convention. However, the lack of an international instrument on subsidiary protection meant that no analogous legal argument could be satisfied with respect to subsidiary protection.

Furthermore, article 17(3) allows Member States to exclude an individual from subsidiary protection status

if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

This provision has no parallel in the Refugee Convention.

Finally, persons who instigate or otherwise finance, plan or incite terrorist acts are excluded from protection, since recital 22 regards such acts as encompassed by Convention article 1F(c). This is particularly problematic since 'terrorism' is not defined in international law.

Appeal processes

The EU instruments do not set out a standardized appeal procedure, nor do they require a single asylum procedure (that is, one in which refugee and complementary protection claims are considered in the same process) to be instituted. The proposed Procedures Directive,¹¹ which has been politically approved but not yet formally adopted, states only that:

- Member States must establish a ‘responsible authority’ to decide refugee claims (see articles 7(2) and 8));
- States retain absolute discretion to determine the type of appeal available and whether it has suspensive effect (article 38(3)(a)–(c)), which has been criticized as contrary to States’ non-refoulement obligations;
- the determining authority is not required to give reasons why subsidiary protection is granted instead of Convention status, but they must be noted on the file, to which the person has access;
- appeals may be provided for by national law.

Article 38 of the proposed Directive stipulates only that failed asylum applicants must have ‘the right to an effective remedy before a court or tribunal’ against decisions relating to their asylum application, including decisions:

- to consider an application inadmissible;
- taken at the border or in transit zones;
- not to examine an asylum claim;
- not to re-open a discontinued application;
- not to further examine a subsequent application;
- to refuse entry;
- to withdraw refugee status.

What constitutes an ‘effective remedy’ depends on the administrative and judicial system of each Member State viewed as a whole. The parallel right to an effective remedy under article 13 of the ECHR does not necessarily require judicial review, but simply review by an independent body.

Furthermore, the Procedures Directive applies only to claims for Convention refugee status. Member States retain the discretion as to whether or not the same procedures will apply to beneficiaries of subsidiary protection.

¹¹ Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04 ASILE 33 (30 April 2004).

Compassionate claims

Purely humanitarian and compassionate claims fall outside the scope of the Qualification Directive, since they are not based on an international protection need. These remain subject to the discretion of individual Member States. A comprehensive study of Member States' practices in 2001 found that Belgium, Greece, Italy and the UK were the only European States to provide some form of leave to remain to persons who could not be deported for compassionate reasons.¹²

Upgrading status

In practice, it is only where the rights and entitlements accorded to refugees and beneficiaries of complementary protection differ, that the question of whether complementary protection can be 'upgraded' to refugee status arises.¹³

Since the EU has failed to implement a common status for all beneficiaries of international protection, the question remains whether individuals can seek to challenge a decision to grant complementary protection rather than refugee status. The areas in which the two statuses differ under the Qualification Directive are:

- Family unity;
- Access to and length of residence permits;
- Eligibility for travel documents;
- Access to employment;
- Social welfare entitlements;
- Health care entitlements;
- Access to integration facilities;
- Rights of accompanying family members.

Legally, there is no reason why the source of protection should require differentiation in the rights and status accorded to a beneficiary. UNHCR has stated that rights and benefits should be based on need rather than the grounds on which a person has been granted protection, and that there is accordingly no valid reason to treat beneficiaries

¹² D Bouteillet-Paquet 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 238.

¹³ Arguably, it could also arise where a person seeks to challenge that the grounds on which complementary protection was granted in fact fall within the Convention definition, but in practice this scenario is unlikely to result in many appeals. Ideally, such a process should be available even where resultant status is identical, in order to enable challenges to narrow interpretations of the Convention and to enable jurisprudence on the Convention and complementary protection to develop.

of subsidiary protection differently from Convention refugees.¹⁴ Numerous other advocates have stressed the importance of treating refugees and beneficiaries of subsidiary protection equally.¹⁵

Equivalent treatment will minimize the number of appeals against refusal of Convention status by persons seeking to obtain the full set of rights which that encompasses.¹⁶ Furthermore, Member States should recognize that the enjoyment of these rights does not necessarily require permanent settlement, but, conversely, that shorter residence permits for persons with subsidiary protection status cannot be justified by an assertion that subsidiary protection is, by nature, more temporary than refugee protection, since this is plainly not always the case. Given the lack of empirical evidence to support subsidiary protection as a temporary status, it has been strongly criticized as ‘a poor reason for a lesser standard of treatment.’¹⁷

Since the procedure envisaged by the Directive demands full consideration first of an applicant’s claim in accordance with the Refugee Convention, the State may argue that this necessarily waives any right for review on that ground. Presumably, however, if it can be shown that there was an error of law in reaching that finding, a successful judicial review application would enable the matter to be reconsidered. As discussed below, in the UK, beneficiaries of Humanitarian Protection may appeal the asylum decision provided that they have been granted leave to remain for at least one year.¹⁸

The extra litigation that may result from this issue in itself provides an incentive for the State to grant identical rights, or at least to create differences in areas where it will hurt least (thus not in relation to family reunification, for example). Almost inevitably, it seems, States engage in a trade-off between the scope of the definitions and the status granted, such that a wider definition may lead to greater differentiation of statuses, whereas a narrower eligibility threshold (such as Canada’s ‘protected person’) leads to an identical status being accorded.

¹⁴ UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ 14109/01 ASILE 54 (16 November 2001) [46]; UNHCR ‘Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive’ (March 2004) 2.

¹⁵ eg Amnesty International Irish Section ‘The Case for Complementary Protection’ (January 2003) <www.amnesty.ie/act/refug/protection.shtml> (6 September 2003); Refugee Council (UK) ‘Refugee Council’s Response to the Home Office Consultation on Changes to the Policy of Issuing of Certificates of Identity’ (February 2003) <www.refugeecouncil.org.uk/downloads/policy_briefings/cid_traveldocs.pdf> (12 April 2004).

¹⁶ UNHCR ‘Some Additional Observations and Recommendations on the European Commission “Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection” COM (2001) 510 final, 2001/0207 (CNS) of 12 September 2001’ (Geneva July 2002) 8. Some persons may still appeal, for example for formal recognition that they are, in fact, refugees.

¹⁷ GS Goodwin-Gill and A Hurwitz ‘Memorandum’ in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [19], in House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) Oral Evidence 3.

¹⁸ This alters the common law position of cases such as *Saad v Sect’y of State for the Home Dept* [2001] EWCA Civ 2008.

EU case study: United Kingdom

Qualification for protection

In the UK, an applicant can claim asylum (based on the Refugee Convention) or a form of complementary protection (Humanitarian Protection or Discretionary Leave). An asylum claim is deemed to be a claim, in the alternative, for Humanitarian Protection.

The asylum claim must be considered first. In practice, however, since asylum and human rights claims are often based on similar facts the actual assessment of those claims may be a parallel rather than a consecutive process. Nevertheless, a decision to grant Humanitarian Protection should only be made after any asylum claim has been substantively considered and duly refused (with written reasons for the decision).

Stand-alone human rights claims based solely on the ECHR may also be considered. They are assessed using the same process as asylum claims (the claimant must complete a Statement of Evidence Form and the claim is examined at interview). However, the maximum protection that may be granted for a human rights claim is Humanitarian Protection.

Humanitarian protection

Where it is considered that a claimant does not qualify for asylum, or where a stand-alone human rights claim is made, the decision-maker must examine whether the claim gives rise to a need for Humanitarian Protection.

Humanitarian protection applies to persons who would face in the country of return a serious risk to life or person arising from:

- death penalty;
- unlawful killing; or
- torture or inhuman or degrading treatment or punishment.

Humanitarian Protection is a form of limited leave to remain. It is granted where removal would breach the UK's obligations under articles 2 (right to life) or 3 (torture, inhuman or degrading treatment or punishment, excluding medical and humanitarian cases) of the ECHR, or Protocols 6 or 13 to the ECHR (prohibition of the death penalty).

The types of situations it covers, which differ from Convention protection, include:

- where the treatment feared amounts to persecution but is not for one of the five Convention reasons; or
- where the treatment or punishment is in the narrow category of actions that are of a severity and nature to amount to torture or inhuman or degrading treatment or punishment, but not to persecution.

The following individuals are not eligible for Humanitarian Protection:

- persons falling within the Convention exclusion clauses;
- persons who have committed a serious crime in the UK or overseas;
- persons who are considered to be a threat to national security.

These are in line with the exclusions from subsidiary protection under the Qualification Directive.

Humanitarian Protection is normally granted for three years. Provided that leave to remain has been granted for at least one year, then beneficiaries of Humanitarian Protection may appeal against rejection of the asylum claim¹⁹—in essence, they may seek to upgrade their status.

In principle, judicial review is available to anyone irrespective of their immigration status, provided that they have a prima facie case and no avenues for statutory appeal remain.²⁰

Discretionary leave

If both an asylum claim and a claim for Humanitarian Protection have been rejected, then the decision-maker must consider whether the person is eligible for Discretionary Leave.

Discretionary Leave may be granted to individuals who are expressly excluded from refugee protection or Humanitarian Protection. Where an individual would have qualified for such protection but for the exclusion clauses, then Discretionary Leave should be granted.

Discretionary Leave may also be granted to persons who do not fulfil the criteria for asylum or Humanitarian Protection, but where other compelling grounds for protection exist. These include:

- (a) Removal that would directly breach the individual's right to a private and family life article 8 of the ECHR. This is a qualified right and may be balanced against other 'legitimate aims' of the State (such as measures taken to protect national security, public safety, public health or morals, rights and freedoms of others, the country's economic well-being, and to prevent disorder or crime). It applies only to breaches of the right within the UK, not in the country to which return is proposed.
- (b) Removal that would breach article 3 of the ECHR relating to torture and inhuman or degrading treatment or punishment, where the individual concerned has not qualified for refugee protection or Humanitarian Protection. Certain types of article 3 treatment are excluded from Humanitarian Protection but may give rise to

¹⁹ Nationality, Immigration and Asylum Act 2002 s 83.

²⁰ See UK Civil Procedure Rules.

Discretionary Leave: medical cases and other severe humanitarian conditions.

(i) Medical cases

There is a very high threshold for establishing that removal of a person with a serious medical condition will breach article 3 of the ECHR. This will only be shown where the UK has assumed responsibility for an individual's care, there is credible evidence that the individual's life expectancy would be significantly reduced if returned due to the complete absence of medical treatment in the country of origin, and return would 'subject them to acute physical and mental suffering'.²¹

(ii) Severe humanitarian conditions

In rare and extreme cases, a person may be granted Discretionary Leave if he or she would face such poor conditions on return (such as absence of water, food or basic shelter) that article 3 of the ECHR would be breached.

(c) Unaccompanied children who do not qualify as refugees or for Humanitarian Protection may be granted Discretionary Leave if there are inadequate reception arrangements available in their own country.

(d) In other very compelling circumstances, Discretionary Leave may be granted.²²

The Humanitarian Protection exclusion criteria are relevant to Discretionary Leave claims, but apply in a different manner. Where the UK's obligations prevent refoulement of an excluded person, then the relevance of the exclusion criteria may go to the length of stay granted. For example, Discretionary Leave is normally granted for three years, but it is not uncommon for it to be reduced to six months for an excluded person.

Accordingly, a person who would be eligible for Humanitarian Protection but for the exclusion clauses should always be granted Discretionary Leave, since the principle of non-refoulement under article 3 of the ECHR is absolute and to return someone in spite of that would be in breach of the UK's obligations under that treaty.

With respect to article 8 ECHR claims, exclusion criteria will be relevant to the balancing test (that is, with respect to national security interests, etc). With respect to other compelling cases, being in an excluded category may affect whether Discretionary Leave is appropriate at all.

²¹ Asylum Policy Instruction (API) on Discretionary Leave [2.3] <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis/discretionary_leave.html> (13 May 2005).

²² For further explanation of these grounds, see API on Discretionary Leave <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis/discretionary_leave.html> (13 May 2005).

Discretionary Leave is not granted simply due to practical inability to remove a person (eg absence of travel route or document).

States' broadened exclusion clauses do not obviate their non-refoulement obligations under international law. Accordingly, even though States might exclude certain persons from a protected status under national law, international law may nonetheless prevent their removal. Most States have not adequately dealt with the question of how to treat excludable but non-removable persons. They are not addressed in the EU Qualification Directive. In Canada, they may be identified during Pre-Removal Risk Assessment and granted temporary permission to remain until there is a change in circumstances in the country to which they fear return, and in the US they may obtain deferral of removal. None of these gives rise to a comprehensive legal status or rights entitlements.

*Appeal rights for humanitarian protection and discretionary leave*²³

Part 5 of the Nationality, Immigration and Asylum Act 2002 provides that, unless a specific limitation applies, applicants have a right of appeal against an immigration decision. Section 83 provides that persons refused asylum but granted leave to remain (Humanitarian Protection or Discretionary Leave) may only appeal against a rejected asylum claim if they have been granted leave of more than 12 months (or periods of more than 12 months in aggregate). This means that where leave is granted for less than a year, there can be no appeal to upgrade status.²⁴

There is no right of appeal against a refusal to grant Humanitarian Protection or Discretionary Leave per se, since neither type of protection is currently a category under the Immigration Rules (and only decisions relating to purposes for entering or remaining in the UK under those rules can be appealed).²⁵ However, there is a residual right of appeal on asylum or human rights grounds. There is also a right of appeal against any removal decision that may follow the refusal (unless that decision could be certified under section 96).

Where Humanitarian Protection or Discretionary Leave is revoked, there is no right of appeal. However, a right of appeal may arise where revocation is accompanied by a decision to remove the person.

Upgrading status

Upgrading status from Humanitarian Protection to Convention status has been considered above. Additionally, situations may arise where persons refused Humanitarian Protection but granted Discretionary Leave seek to upgrade their status to Humanitarian Protection. Such requests should be considered, but if refused there will be no right of appeal where the applicant still has some Discretionary Leave

²³ Drawn from API on Humanitarian Protection and the API on Discretionary Leave <http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis/discretionary_leave.html> (13 May 2005).

²⁴ This legislation altered the common law position in *Saad v Sect'y of State for the Home Dept* [2001] EWCA Civ 2008.

²⁵ See Nationality, Immigration and Asylum Act 2002 s 88(2)(d).

remaining, because no ‘immigration decision’ (in terms of section 82 of the Nationality, Immigration and Asylum Act 2002) has been made.

Appeals generally

The two-tier review system (Immigration Appellate Authority) which previously operated in the UK was replaced on 4 April 2005 by a single-tier system (Asylum and Immigration Tribunal).

All types of protection are subject to judicial review. The Asylum (Treatment of Claimants) Act 2004, which amended the Nationality, Immigration and Asylum Act 2002, originally contained an ‘ouster clause’, which effectively removed the right to judicial review in asylum and human rights decisions, including decisions to deport. Instead, it would have allowed persons seeking asylum or entry to the UK a single appeal to a new tribunal, known as the Asylum and Immigration Tribunal. Although this single tribunal was created, the ouster clause was removed before the bill was passed, as a result of substantial protest about its unlawfulness (contrary to the rule of law and fundamental democratic principles).

Canada

Protected persons

Canada has a single determination procedure for Convention refugees and other persons in need of protection, together called ‘protected persons’. For a ‘person in need of protection’, the first ground for protection encompasses persons outside the scope of the Convention who face a personal danger of being tortured, as defined in article 1 CAT. The second encompasses persons falling outside the Convention who face a personal risk to life or a risk of cruel and unusual treatment or punishment where:

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country;
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country;
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards; and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.²⁶

Section 97(2) of the Immigration and Refugee Protection Act provides that the regulations may prescribe further classes of such persons.

²⁶ Immigration and Refugee Protection Act 2001 s 97(1).

‘Protected persons’ may apply for permanent residence. Accordingly, no separate statuses for refugees or persons protected under CAT are set out in the legislation.

Like subsidiary protection under the Qualification Directive, the Convention’s exclusion clauses apply to protection based on these consolidated Convention and CAT grounds.²⁷

Humanitarian and compassionate claims

Any person seeking permanent residence may make a humanitarian and compassionate claim (H&C), not just failed asylum seekers. H&C is usually used as a last resort. Furthermore, unlike the other Canadian mechanisms described, it does not have suspensive effect (ie the applicant may be removed before the claim is heard).

H&C may be granted where a person faces particular hardship if returned to his or her country of origin. It includes unusual, excessive or undeserved hardship as well as hardship resulting from circumstances beyond the individual’s control. A successful H&C claim results in permanent residence.

In addition to excluded persons, serious criminals, persons who pose a security risk, persons involved in organized crime or persons involved in violations of human rights are ineligible for H&C.

Pre-removal risk assessment

People with a removal order against them may apply for Pre-Removal Risk Assessment (PRRA). Successful PRRA claims normally result in eligibility for permanent residence. The same types of grounds for protection are assessed as in the ‘protected person’ claim (risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment), but where a person has already made an asylum claim in Canada and has been unsuccessful, the PRRA application must be based on new information (ie change of circumstances since the Immigration and Refugee Board decision). To show risk, applicants must demonstrate that the country of origin will not protect them; that the risk is a personal one, not faced generally (eg not the result of famine or civil war); the risk exists in all parts of the country of origin; the risk does not result from lawful sanctions, unless those standards violate international standards; and the risk is not caused by the country of origin’s inability to provide adequate medical care. Consideration is done on the papers only, unless an oral hearing is deemed necessary for issues of credibility.

Applicants who are excluded from protected persons status will not be considered against the Convention’s refugee criteria. In determining their claims, the decision-maker balances the risk of harm feared on return against the risk the applicant poses to Canada. If the former outweighs the latter, then removal will simply be stayed (until circumstances in the country of origin change). PRRA cannot lead to permanent residence for excluded persons but only to a temporary stay of removal.

²⁷ Immigration and Refugee Board ‘Consolidated Grounds in the *Immigration and Refugee Protection Act*: Persons in Need of Protection: *Danger of Torture*’ (Canada 15 May 2002) 53–55.

Furthermore, certain persons are ineligible for PRAA, such as persons recognized as a Convention refugee in a country to which they can return, and persons who have made an unsuccessful protection claim in Canada less than six months ago.

The current success rate of PRRA stands at around 2 percent. It is the last opportunity prior to removal to have the merits of a claim reconsidered.

Protection without risk in compelling circumstances

If the reasons for which a person sought refugee protection have ceased to exist, then that person is not a protected person. However, section 108(4) of the Immigration and Refugee Protection Act provides an exception to this where the person can establish ‘that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.’ Accordingly, protection may be afforded to ‘those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution.’²⁸

Appeals process

The Immigration and Refugee Protection Act provided for the establishment of a Refugee Appeals Division to hear appeals on the merits. However, the Canadian government’s failure to implement the Refugee Appeals Division means that there is still no merits review in Canada for failed asylum and protected persons claims. All decisions relating to the forms of protection mentioned above are, however, subject to judicial review. The Federal Court must first grant leave to appeal for a judicial review claim to proceed. Current figures indicate that it grants leave in around 10% of cases.

United States

Qualification for protection

In the US, overseas ‘refugee status’ is only available to persons applying from outside the country. By contrast, ‘asylum status’ is available to asylum seekers within the US or at its borders. Persons granted asylum status are called ‘asylees’.

The onshore US asylum process consists of ‘affirmative’ and ‘defensive’ tracks. The former relates to asylum claims lodged within the US where the individual concerned is not in removal proceedings. It is based on the Convention definition, but is formally discretionary.²⁹

²⁸ See also *Canada (Minister of Employment and Immigration) v Obsoj* [1992] 2 FC 739 (CA) 748.

²⁹ INA § 208(a), 8 USC § 1158(a).

The defensive track describes persons already in removal proceedings who then seek to invoke asylum. There is a formal administrative process to determine whether or not the individual must leave the US, and by contrast to interviews in the affirmative track, it is formally adversarial.

Merits and judicial review

All asylum decisions may be appealed to the Board of Immigration Appeals for merits review, and to the Federal Court for judicial review. Although the passage of the REAL ID Act on 11 May 2005 has significantly limited the scope for judicial review generally, to the extent that courts are now barred from reviewing any discretionary judgments, decisions or actions, regardless of whether they are made in the context of removal proceedings,³⁰ asylum decisions are exempt.

Judicial review of asylum decisions is, however, prohibited where:

- the individual is barred from asylum due to suspected terrorist activities³¹ (this is a substantive bar on asylum eligibility);
- the individual wants to appeal bars to accessing asylum, such as the existence of a safe third country,³² the one year filing limit, or previous denial of an asylum claim;³³
- the individual wants to appeal final orders of removal, where that individual has committed certain criminal offences.³⁴

Furthermore, in expedited removal proceedings,³⁵ the courts cannot review whether or not an individual was actually inadmissible or entitled to any relief from removal,³⁶ and a determination that a person has not established a credible fear of persecution is barred from both administrative and judicial review.³⁷

If a person leaves the US prior to appealing an asylum decision, then he or she loses the right to appeal. If a person leaves while the appeal underway, then he or she is taken to have withdrawn the appeal.

Finally, under section 106 of the REAL ID Act, petitions before the Court of Appeals are now the only means of judicially reviewing CAT claims.

³⁰ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief 2005 s 106, which amends INA § 242, 8 USC 1252.

³¹ INA § 208(b)(2)(D), 8 USC § 1158(b)(2)(D).

³² A country determined by the Secretary for Homeland Security to be one where an individual's 'life or freedom would not be threatened' for a Convention reason, and which provides 'access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection': INA § 208(a)(2)(A), 8 USC § 1158(a)(2)(A).

³³ INA § 208(a)(3), 8 USC § 1158(a)(3).

³⁴ INA § 242(a)(2)(C), 8 USC § 1252(a)(2)(C).

³⁵ For criteria: INA § 235(b)(1), 8 USC § 1225(b)(1).

³⁶ INA § 242(e)(5), 8 USC § 1252(e)(5).

³⁷ INA §§ 235(b)(1)(B)(iii)(III), (C), 8 USC §§ 1225(b)(1)(B)(iii)(III), (C).

Withholding of removal under the INA

Withholding of removal is considered as companion relief in an asylum claim and can be provided under section 241(b)(3) of the INA or under the CAT. Asylum applicants are assessed for both asylum and withholding of removal.

The withholding provision in section 241(b)(3) of the INA codifies the non-refoulement obligation under article 33 of the Refugee Convention, providing that:

the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.³⁸

Unlike asylum status, it is a mandatory rather than a discretionary status. It requires a higher burden of proof than asylum status, and simply protects an individual from return to a specific State. It does not result in the grant of a legal status.

Like the asylum provision, exclusions apply that are broader than the Convention's exclusion clauses, including persons who have been convicted of a 'particularly serious crime' and who present 'a danger to the community of the United States',³⁹ as well as where there are 'reasonable grounds to believe that the alien is a danger to the security of the United States.'⁴⁰ A 'particularly serious crime' encompasses aggravated felonies, which are very broadly defined in US law and include such things as theft and drug offences.⁴¹ The US's terrorism-related exclusion clauses have been broadened by the REAL ID Act and apply retrospectively.⁴² This may lead to the reopening of old cases and the subsequent removal of the individual concerned.

Torture relief⁴³

An asylum application is also considered as an alternative application for withholding of removal under CAT, provided that the applicant indicates that he or she wishes to be considered for it, or if the evidence indicates that the applicant may be tortured if removed.

Claims are first assessed against the asylum criteria, then against withholding of removal under section 241(b)(3) of the INA, and finally against withholding of removal under CAT.

(a) Withholding of removal under CAT

³⁸ INA § 241(b)(3)(A), 8 USC § 1231(b)(3)(A).

³⁹ INA § 241(b)(3)(B)(ii), 8 USC § 1231(b)(3)(B)(ii).

⁴⁰ INA § 241(b)(3)(B)(iv), 8 USC § 1231(b)(3)(B)(iv).

⁴¹ For definition: INA § 101(a)(43), 8 USC § 1101(a)(43).

⁴² Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief 2005 s 103.

⁴³ See US Dept of Homeland Security 'Instructions for Form I-589 Application for Asylum and Withholding of Removal' (version 3 July 2003).

CAT protection is the US response to its obligations under article 3 CAT not to ‘expel, return or extradite’ a person to a country where he or she would be tortured. There are two types of protection within the CAT protection framework: ‘withholding of removal’ and ‘deferral of removal’. If an applicant can show that he or she is ‘more likely than not’ to be tortured in the country of removal, then CAT-based protection will be granted. The burden of proof is higher than the ‘reasonable possibility’ standard in asylum claims.⁴⁴ Although persons cannot be removed to a place where they face torture, they may be removed to a third country where they will not be tortured.⁴⁵ Like withholding of removal under section 241(b)(3) of the INA, a successful withholding claim under CAT prevents the individual’s removal to a specific country. Once granted, the onus is on the Department of Homeland Security to show that return is safe.

‘Withholding of removal’ is the more generous form of CAT protection, as it accords beneficiaries some of the same benefits as asylum seekers, but not family reunification or access to a special process to adjust to permanent residence.⁴⁶ Significantly, however, section 241(b)(3)(B) of the INA excludes certain persons from such protection and renders them eligible only for ‘deferral of removal’.

(b) Deferral of removal under CAT⁴⁷

Deferral of removal is a more transient form of relief. It is accorded to persons who are more likely than not to be tortured if removed, but who are ineligible for withholding of removal. A grant of deferral of removal does not confer a lawful or permanent immigration status⁴⁸ or necessarily require that an applicant be released from detention or prison if held in such a facility.⁴⁹ Furthermore, the grant is subject to review and can be withdrawn quickly and easily once the risk of torture has diminished.⁵⁰ Although beneficiaries are entitled to a work permit, they are denied access to many other rights, including rights to public benefits and family reunion. Deferral of removal effectively amounts to nothing more than a ‘tolerated’ status. Accordingly, deferral of removal in practice tends only to be invoked by persons with criminal convictions who are either barred from the Refugee Convention through its exclusion clauses or because they have been convicted of an ‘aggravated felony’.

The main differences between CAT protection and asylum status are as follows:⁵¹

- CAT protection does not grant permanent residence status or the right to bring family members to the US;

⁴⁴ 8 CFR §§ 208.16(c)(2), 208.13(b)(2).

⁴⁵ See US Dept of Justice ‘Asylum Protection in the United States’ (28 April 2004) <<http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm>> (19 May 2005).

⁴⁶ J Fitzpatrick ‘Harmonized Subsidiary Protection in the European Union—A View from the United States’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 120.

⁴⁷ 8 CFR § 208.17(a).

⁴⁸ 8 CFR § 208.17(b)(i).

⁴⁹ 8 CFR § 208.17(b)(ii).

⁵⁰ 8 CFR § 208.17(b)(iii).

⁵¹ US Dept of Justice ‘Asylum Protection in the United States’ (28 April 2004) <<http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm>> (19 May 2005).

- Although applicants for CAT protection do not need to show that torture is feared for a Refugee Convention ground, they must establish that torture is ‘more likely than not’ if removed to a particular country;
- Not all forms of harm that are ‘persecution’ are necessarily ‘torture’;
- Whereas the grant of asylum is discretionary for person meeting the relevant criteria, CAT protection is mandatory where a person qualifies;
- Exclusion clauses do apply to CAT protection, but where a person is excluded but cannot be removed to torture, they may receive deferral of removal but be detained.

Decisions on CAT claims in removal proceedings may be appealed on the merits to the Board of Immigration Appeals and also judicially reviewed by the courts, but only where petitions are brought before the Court of Appeals.

Temporary Protected Status (TPS)

The US also has TPS, a temporary status granted to eligible nationals of designated countries. The Secretary of Homeland Security may ‘designate’ a country where:

- (a) the Secretary of Homeland Security finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;
- (b) the Secretary of Homeland Security finds that—
 - (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
 - (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
 - (iii) the foreign state officially has requested designation under this subparagraph; or
- (b) the Secretary of Homeland Security finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Secretary of Homeland Security finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.⁵²

⁵² INA § 244, 8 USC § 1254.

To date, TPS has only been granted to persons already in the US on the date of designation. It has not been used to facilitate the admission of persons outside the US.

TPS does not lead to permanent residence. Once it expires, beneficiaries resume their prior immigration status (or any other status granted while a beneficiary of TPS). TPS holders may obtain work authorization. TPS is valid for a minimum of 6 months and a maximum of 18 months, but this may be extended for up to 18 months if the Secretary determines that the conditions triggering TPS no longer exist.

Conclusion

This paper has provided an overview of asylum and complementary protection practices in the European Union, Canada and the US. By comparison to Australia, these protection regimes appear generous and expansive. Nevertheless, there remain significant protection ‘gaps’ in national versions of complementary protection—in particular, the question of status for persons excluded from protection but who cannot be removed due to prohibitions on refoulement under international law. Furthermore, the quality of the domestic status granted to beneficiaries of complementary protection varies considerably. For example, Canada grants an identical status to Convention refugees and other persons in need of protection, whereas the EU accords beneficiaries of subsidiary protection a secondary status—a decision reflecting political motivations but which is not justified by international law. Similarly, beneficiaries of subsidiary protection are given shorter residence permits than Convention refugees, despite the lack of empirical evidence to support subsidiary protection as a temporary status. Nevertheless, though the EU Directive is hallmarked by political compromise, it importantly recognizes States’ broader non-refoulement obligations under international law and allows individuals to claim protection on those bases. In spite of its drawbacks, it is still preferable to Australia’s narrow protection regime.

In any case, the shortcomings of national complementary protection systems, relative to the widened categories of persons protected by them, are an inadequate excuse to delay the implementation of complementary protection in Australia. Ultimately, it is the standards and obligations contained in international law, both in relation to eligibility for protection and substantive rights, that provide the crucial legal foundations for any domestic complementary protection regime.