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Why Boat People Are Not Welcome: Australia's Refugee Policy in the Context of Immigration Management

Akihiro Asakawa



Afrasian Research Centre, Ryukoku University
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Why Boat People Are Not Welcome: Australia's Refugee Policy in the Context of Immigration Management

Akihiro Asakawa*

*We will decide who comes to this country
and the circumstances in which they come.*
—— John Howard, 28 October 2001.

The Reintroduction of the Pacific Solution

This article discusses the recent reintroduction of the “Pacific Solution,” which is to send boat arrivals to other countries to assess refugee claims in order to prevent boat arrivals, and its meaning in the context of Australia's overall immigration policy, especially in relation to quantitative control and quality control.

In September 2001, the Howard Government introduced the Pacific Solution policy, which was to transfer “boat people” to Nauru and Papua New Guinea (PNG), and to assess their refugee claims there, in response to the Tampa Affair and the growing number of boat people arriving in Australia seeking asylum. The Pacific Solution worked quite effectively and brought about the virtual disappearance of boat arrivals. Over the course of financial years 1998/1999 through 2001/2002, 12,280 people arrived by boat. However, as a result of the introduction of the Pacific Solution, the total number from 2002/2003 to 2007/2008 was only 247.¹ This policy virtually “stopped the boat” and the boat people issue was off the table within Australian politics until the Australian Labor Party (ALP) came to power in November 2007. The ALP fulfilled its promise to abolish the Pacific Solution and the then-Minister for Immigration and Citizenship, Senator Chris Evans, announced that the last refugees had left Nauru to resettle in Australia, stating that “The Pacific solution was a cynical, costly and ultimately unsuccessful exercise”² in March 2008.

However, as a direct result of the abolition of the Pacific Solution, the number of boat arrivals sharply increased. From 2008/2009 to 2011/2012, 19,087 people arrived by boat.³ The

* Assistant Professor, Graduate School of International Development, Nagoya University.

¹ The Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p.70.

² “Last refugees leave Nauru,” Media Release, Minister for Immigration and Citizenship, 8 February 2008.

³ The Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, p.70.

government established a new processing facility on Christmas Island, however, due to large numbers they were forced to relocate some asylum seekers to mainland facilities. Again, the boat people problem became one of the most controversial political issues in the Australian politics. Partly because of mishandling of the boat people issue, then-Prime Minister Kevin Rudd was forced to resign in 2010 and his deputy Julia Gillard took office and called an election. The ALP government could not retain a majority of the lower house and was forced to form a minority government with the cooperation of a number of independents. The Gillard Government tried to resolve this issue by sending 800 asylum seekers who had arrived by boat to Malaysia and agreeing to receive 4,000 proven refugees there in return.⁴ However, in August 2011, this policy was invalidated because of a High Court decision that this was illegal under the Migration Act at the time, due to the safety of the asylum seekers not being guaranteed in Malaysia, which is not a signatory of the United Nations Convention Relating to the Status of Refugees (Refugees Convention). The Coalition denied the government's measure to amend the Migration Act to overcome the legislative obstacle to implement the agreement with Malaysia. In August 2012, the Expert Panel on Asylum Seekers, chaired by Air Chief Marshal Angus Houston, submitted its report and recommended "regional processing" of asylum seekers and specified Nauru and PNG as destinations to which boat people should be transferred. The Gillard Government accepted this recommendation and proposed amendments to the Migration Act to enable regional processing. As a result, boat people arriving since 13 August 2012 are to be transferred to Nauru or PNG. This commenced in September 2012.

Nearly four years since the abolition of the Pacific Solution, almost the exact same measure has been reintroduced. Even though the ALP were against the Pacific Solution, they themselves ended up reintroducing this measure. This shows that the Pacific Solution, or sending boat arrivals to a third country, has become the de facto bi-partisan policy measure to combat this issue.

At the same time, the Expert Panel also recommended increasing Australia's humanitarian intake from 13,750 to 20,000 a year. The Gillard Government also accepted this recommendation and put it into actual implementation.⁵ The Minister for Immigration and Citizenship, Chris Bowen, spoke in parliament about this measure saying "We want to give more vulnerable people, more persecuted people, the chance of a new life in Australia... I do not think this House or the other house should take the view that people who arrive by boat should be advantaged over those in camps in difficult situations around the world."⁶ It is interesting that the hard-line measure to discourage arrival in Australia by boat and the

⁴ "Australia and Malaysia sign transfer deal," Media Release, Minister for Immigration and Citizenship, 25 July 2011.

⁵ "Refugee Program increased to 20,000 places," Media Release, Minister for Immigration and Citizenship, 23 August 2012.

⁶ House of Representatives, Hansard, 14 August 2012, p.8500.

measure to increase the overall refugee intake significantly was implemented at the same time and in the same context. The context in question is that the Australian government demonstrates a clear preference for resettling refugees from various parts of the world rather than boat arrivals. In actuality, this measure was introduced in 2001, abolished in 2008, and again reintroduced in 2012 under a different government.

The purpose of this article is to analyze why this very much contradictory situation is occurring within Australian migration policy. Firstly, Australia's Humanitarian Program will be analyzed in the context of overall immigration policy and legislation. Secondly, the two main components of the Humanitarian Program, "offshore" and "onshore," will be analyzed. Thirdly, these two components will be compared and the root cause of this contradictory situation will be discussed.

1. Australia's Humanitarian Program

(1) Australia's Migration Act and the Concept of "Visas"

To understand Australia's Humanitarian Program, it is important to understand the basic structure of the Migration Act. This is because all entrance and residence for non-citizens is administered under this particular legislation. Of course, management of the Humanitarian Program is also under the actual implementation of this law.

Firstly, there is the basic and very important concept of "visas." Visas are defined in section 29 of the Migration Act. According to this section, the Minister for Immigration "may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia." This means that non-citizens must obtain a visa before they travel to Australia and also that they must have a visa during their stay in Australia. The government therefore grants visas to those who wish to enter Australia. Secondly, visas are mainly divided into categories of "permanent visas" and "temporary visas" under section 30. Permanent visas enable non-citizens to stay in Australia indefinitely, and temporary visas enable them to stay for a certain specific period. Not only is there a difference in the length of the stay, but also the distinction between permanent visas and temporary visas is important, as this is strongly related to the social security system.

In addition to this division between permanent and temporary, several kinds of visa are also defined. Under the Migration Act, some visas that are specified include the Protection visa, which is granted to those who are recognized as refugees under the Refugees Convention. However, actual kinds of visa defined in the Migration Act are few in number and, in fact, most kinds of visa are defined under the Migration Regulations 1994, which were drawn up under the Act to provide detailed rules. Quite importantly, the Act enables the government to set limits on the number of visas granted each financial year (section 39). In fact the government decides the number of permanent visas in each category at the beginning of each

financial year and permanent visas are only granted within this preset number. However, the Protection visa escapes this quantitative control because of the nature of this particular visa. This point is also directly related to refugee policy itself and will be discussed later.

Because of this basic framework for the visa system under the Migration Act, it can be said that the actual implementation of Australia's immigration policy is conducted through the management of the visa system. In other words, immigration policy is about "How many visas should be granted to whom, and on what conditions." The refugee policy also falls within this context as the existence of the Protection visa clearly shows.

(2) Immigration Policy and Refugee Policy

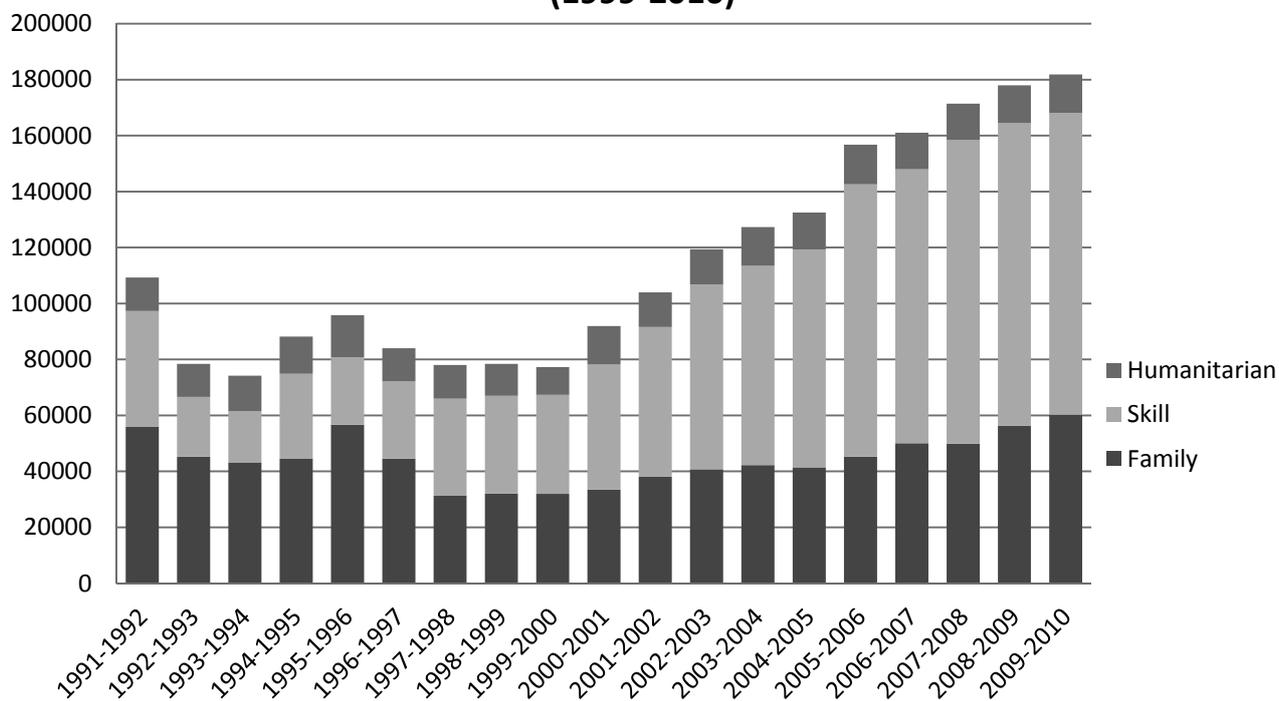
As mentioned above, the number of permanent visas is predetermined for each financial year. Within this presupposition, family migrants and skilled migrants come under the administration of the Migration Program, while and refugees come under the administration of the Humanitarian Program. At the time of the announcement of the budget in May each year, the components of both programs are announced for the next financial year (July–June). For example, for the 2012/2013 financial year, the Migration Program has been set at 190,000 (129,250 for skilled migrants and 60,185 for family migrants)⁷ and the Humanitarian Program has been set at 13,750.⁸ This clear quantitative control is one of the most important features of Australia's immigration policy. Figure 1 shows the number of permanent visas under the three categories in recent years. According to this, family migrants have remained stable, skilled migrants have dramatically increased, and humanitarian migrants are steady at around 13,000 each year. This means that refugee policy is under quantitative control according to the overall immigration policy.

Under this quantitative control, the Humanitarian Program is comprised of two main categories: onshore and offshore refugees. "Onshore refugee" refers to those who are recognised as refugees within Australia and "offshore refugee" refers to those for whom it is recognized as necessary for relocation to Australia for resettlement. Australia has traditionally accepted offshore refugees, who are selected to be resettled while they are overseas. Figure 2 clearly shows this trend. The three categories of "Refugee," "Special Humanitarian," and "Special Assistance" are all offshore categories. Compared to these three categories, the number within the onshore category is very small, except during certain specific periods of time.

⁷ "Targeted migration increase to fill skills gaps," *Media Release*, Minister for Immigration and Citizenship, 8 May 2012.

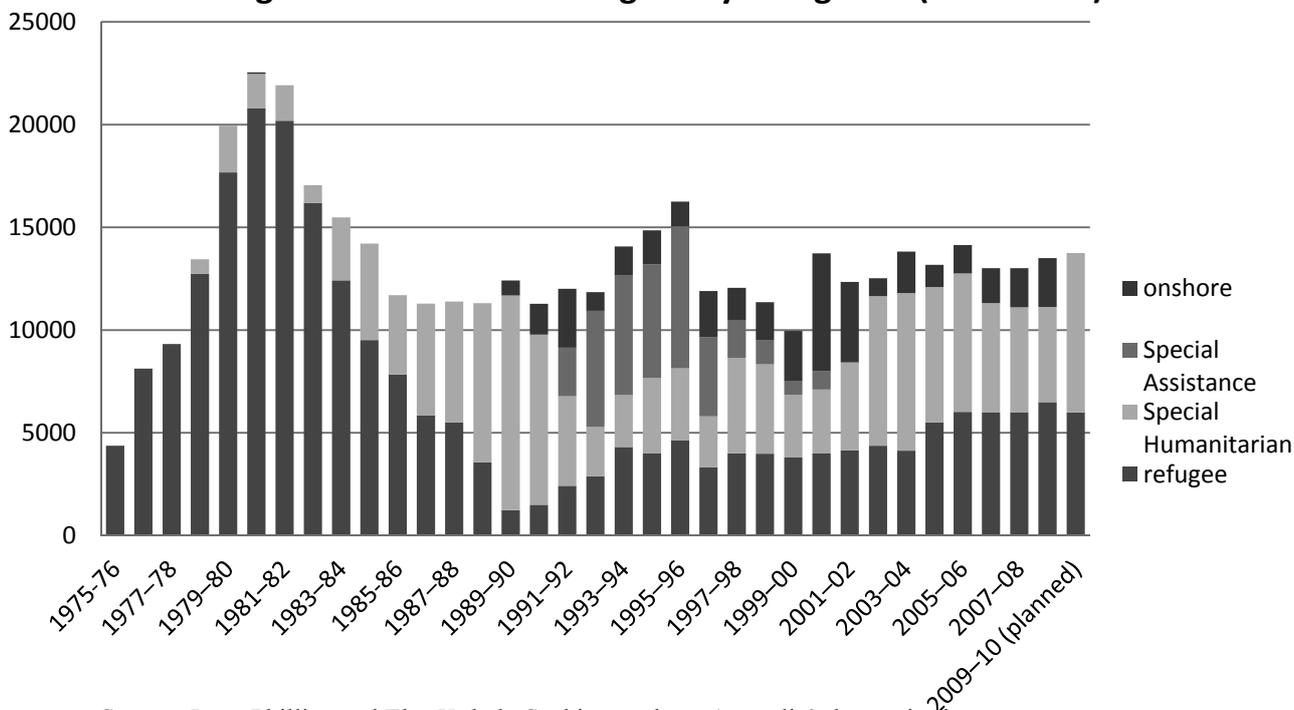
⁸ "Australia committed to refugees most in need," *Media Release*, Minister for Immigration and Citizenship, 8 May 2012.

Figure 1: Number of Permanent Visas Devided by Categories (1999-2010)



Source: Department of Immigration and Citizenship, *Population Flows 2009-10 Edition*, 2011, p.5, p.29, *Population Flows - 2005-06 Edition*, 2007, p.21, p.31, *Population Flows 2000 Edition*, 2000, p.16, p.24.

Figure 2: Number of Refugees by Categories (1975-2009)



Source: Janet Phillips and Elsa Koleth, *Seeking asylum: Australia's humanitarian program*, Parliament of Australia, Parliamentary Library, 21 January 2010, p.28.

The very clear difference between offshore and onshore is whether quantitative control—the basic element of Australia’s immigration policy—is applicable or not. Offshore refugees are under this control and the number of people resettled is fixed beforehand for each financial year, as already mentioned. However, onshore is outside of this quantitative control. As already mentioned, section 39, which enables quantitative control, does not apply to Protection visas, which is the type of visa granted to onshore refugees. This is because Protection visas are granted to those who are recognized as refugees under the Refugees Convention, and the Convention prohibits member countries from deporting refugees to places where they face persecution. This is called the principle of “non-refoulement,” and defined in Article 33 of the Convention. This is why the Australian government cannot set limits on the number of Protection visas each year, because the number of refugees who must not be deported is unpredictable. In reality, the Humanitarian Program itself is comprised of both an onshore and offshore component, and therefore if the onshore number exceeds the prediction, then the number for the offshore component is decreased to adjust the total number to the preset level. The important point here is that onshore refugees who are granted Protection visas are outside of the quantitative control which is applied to all other permanent migrant categories.

In addition to the exemption from quantitative control, the refugee framework also imposes a different situation regarding illegal entry. Illegal entrants to Australia are subject to detention and removal in normal circumstances as they do not possess visas to enter Australia. However, if they claim asylum or apply for a Protection visa, the government cannot remove them because it is prohibited from deporting them to the place of persecution if they are recognized as refugees. The government is therefore forced to allow them to stay at least until the review for their asylum claims are completed. In contrast, this situation never happens under the offshore component because only those who are allowed to resettle to Australia are given visas *before* they travel to enter Australia.

These kinds of fundamental difference exist between the onshore and offshore components even under the one same Humanitarian Program. The onshore component has a significantly different nature compared to other categories of migrants under Australian immigration policy, both in terms of quantitative control and illegal entry. In the next section, this difference between onshore and offshore is more closely examined in terms of quality control.

2. Comparison between Onshore and Offshore Visas

(1) Onshore refugee

“Onshore refugee” refers specifically to a person who has been given residence in Australia by the grant of a Protection visa. The criteria for Protection visas are defined by section 36 of the Migration Act.

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol,” or

(b) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm

According to (a), this means that those who are recognized as refugees under the Refugees Convention are to be granted a Protection visa. As for (b), this part refers to those who are prohibited from being deported under several international humanitarian treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This provision was inserted as the result of an amendment made in October 2011. To qualify for a protection visa, an applicant must fit the definition of either the Refugees Convention or other international human rights treaties.

Much more detailed criteria for Protection visas are defined under the Migration Regulations as a “Subclass 866 visa.”

Firstly, “Criteria to be satisfied at time of application” are that the applicant “claims to be a person to whom Australia has protection obligations under the Refugees Convention,” or “The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.” This is almost the same as section 36 of the Migration Act.

Secondly, “Criteria to be satisfied at time of decision” are as follows:

(1) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

(2) The applicant has undergone a medical examination carried out by any of the following

- (a) a Medical Officer of the Commonwealth;
- (b) a medical practitioner approved by the Minister for the purposes of this paragraph;
- (c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

(3) The applicant has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist.

(4) (a) [If the relevant medical practitioner] is not a Medical Officer of the Commonwealth and considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, has referred any relevant results and reports to a Medical Officer of the Commonwealth.

(b) If a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

(5) The applicant satisfies public interest criteria 4001, 4002 and 4003A. If the applicant had turned 18 at the time of application— satisfies public interest criterion 4019.

(6) The Minister is satisfied that the grant of the visa is in the national interest.⁹

Third, “Circumstances applicable to grant” include that “the applicant must be in Australia.” This shows this visa is only available to those who are currently in Australia.

The “public interest criteria” mentioned in (5) are also defined within the Migration Regulations. These include about twenty sections and each section is numbered 4001, 4002, 4003, etc. The detailed criteria for each visa include the numbers for the sections which applicants are required to meet. In the case of Protection visas, applicants are required to meet 4001, 4002 and 4003A, and also 4019 if they are over 18. The following are the details for each section of the public interest criteria:

4001 The person satisfies the Minister that the person passes the character test.

4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979.

4003A The applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.

4019 The applicant has signed a statement (a values statement).¹⁰

⁹ *Migration Regulations 1994*, Schedule 2, subclass 866 Protection.

¹⁰ *Migration Regulations 1994*, Schedule 4, Public interest criteria and related provisions.

Firstly, the “character test” mentioned in 4001 is related to section 501(6) of the Migration Act. This section defines the situations in which a person would “fail the character test.” One situation is that the person has a “substantial criminal record,” and this includes death sentences, imprisonment for life, imprisonment of 12 months or more, or situations in which “the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.” Next is that “the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.” Then, “in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would engage in criminal conduct in Australia.”¹¹ Non-citizens in Australia who fail one of these conditions can have their visa cancelled by the Minister and be liable for removal.¹²

Secondly, 4002 is designed to prevent persons who would be a threat to security as defined by the Australian Security Intelligence Organisation (ASIO) and this includes espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system, or acts of foreign interference. Third, 4019 requires applicants to sign an “Australian Values Statement” and this statement contains “I understand that Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy” and that “the English language, as the national language, is an important unifying element of Australian society.” It is somewhat unrealistic that failure of 4019 would occur as the result of a refusal to sign this statement.

The above detailed criteria for “Protection visas” reveal that applicants must not only fit the definition of refugee under the Refugees Convention or have fear of persecution under other international human rights treaties, but also that they are required to undergo medical assessments, and they may be placed under the supervision of health authorities in some cases. In addition, because of the public interest criteria, those who are a threat to Australia’s security, or who have substantial criminal records, might not be granted a visa even if they are recognized as refugees. In fact, all Protection visa applicants are required to undergo ASIO assessment and it is reported that actual visa grants are delayed due to the ASIO review.¹³

In summarizing the above conditions, “Protection visas” should be granted to (a) refugees under the definition of the Refugees Convention or equivalent, and when (b) the applicant is not a threat to Australia’s security.

¹¹ *Migration Act 1958*, Section 501(6).

¹² *Migration Act 1958*, Section 501(1)(2)(3)(4).

¹³ “ASIO delays assessment of 900 asylum seekers,” *Lateline*, ABC, 1 March 2011.

As has been repeatedly mentioned, even though Australia's immigration policy contains quantitative control, the Protection visa is outside of this control. This means that however many people apply for Protection visas, they should still be granted the visa if only they satisfy the criteria mentioned above.

In addition, if the application for a Protection visa is refused, the applicant can lodge a review application to the Refugee Review Tribunal (RRT). The RRT might support the original decision, might decide to grant a Protection visa, or alternatively, set aside the decision for reconsideration by the Immigration Department.¹⁴

(2) Offshore refugee

Unlike the onshore category, several visas exist for the "offshore refugee" category. These are "Refugee (Subclass 200)," "In-country Special Humanitarian (Subclass 201)," "Emergency Rescue (Subclass 203)," "Woman at Risk (Subclass 204)," and "Global Special Humanitarian (Subclass 202)." In the 2010/2011 financial year the number of visas granted for each visa type were: Refugee, 5,211; In-country Special Humanitarian, 26; Emergency Rescue, 2; Woman at Risk, 759; and Global Special Humanitarian, 4,818. It can be said that both Refugee and Global Special Humanitarian visas are main components in the offshore category. Details of both visas are analysed below.

(a) Refugee visa

There is no provision about this visa in the Migration Act itself, however, details are defined in the Migration Regulations. The "criteria to be satisfied at time of application" for this visa are that:

- (1) Applicant is subject to persecution in the applicant's home country and is living in a country other than the applicant's home country; or
- (2) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called the proposer) who is, or has been, the holder of a Subclass 200 visa; and
 - (a) the application is made within 5 years of the grant of that visa; and
 - (b) on the date of grant of that visa, the applicant was a member of the immediate family of the proposer; and
 - (c) the applicant continues to be a member of the immediate family of the proposer; and
 - (d) before the grant of that visa, that relationship was declared to Immigration; and
 - (e) the proposer is not an irregular maritime arrival.

¹⁴ *Migration Act 1958*, sections 410-473.

Firstly, the condition that the “Applicant is subject to persecution in the applicant’s home country and is living in a country other than the applicant’s home country” is close to the definition of “refugee” under the Refugees Convention. Even though the Refugees Convention itself is not applied to this visa, the definition of refugee under the Convention seems to have been applied for this visa.

Secondly, this visa has the function of reuniting family for those who have previously been granted this same visa. A person can be a “proposer” for this visa if he or she has been granted a refugee visa within the last five years and wishes to propose the application for his or her immediate family. In this case, the applicant is not required to be “subject to persecution in the applicant’s home country,” they could be invited by those who are already resettled in Australia within the limited period. This shows one of the characteristics of offshore visas, which are not necessarily bound to the Refugees Convention or other international human rights treaties.

Next, “Criteria to be satisfied at time of decision” are as follows:

- (1) The applicant continues to satisfy “criteria to be satisfied at time of application.”
- (2) The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:
 - (a) (when application is proposed) the extent of the applicant’s connection with Australia; or
 - (b) in any other case—the following:
 - (i) the degree of persecution to which the applicant is subject in the applicant’s home country; and
 - (ii) the extent of the applicant’s connection with Australia; and
 - (iii) whether or not there is any suitable country available, other than Australia, that can provide for the applicant’s settlement and protection from persecution; and
 - (iv) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.
- (3) The permanent settlement of the applicant in Australia would be consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds.
- (4) The Minister is satisfied that permanent settlement in Australia:
 - (a) is the appropriate course for the applicant; and
 - (b) would not be contrary to the interests of Australia.

Table 1: Offshore Refugees by Origins (2003-2010)

Country	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	Total
Sudan	6,147	5,220	3,726	2,276	1,158	631	298	243	19,699
Iraq	1,400	1,589	2,150	1,444	2,215	2,874	1,688	2,151	15,511
Burma	N/A	313	1,118	2,030	2,961	2,412	1,959	1,443	12,236
Afghanistan	933	1,291	1,799	1,410	1,185	847	951	1,027	9,443
Liberia	368	868	888	608	410	387	258	N/A	3,787
Congo (DRC)	226	300	363	670	348	463	584	565	3,519
Sierra Leone	287	751	460	460	267	363	237	N/A	2,825
Burundi	N/A	660	740	703	303	N/A	N/A	N/A	2,406
Others	2,441	1,104	1,514	1,585	1,952	3,033	3,261	3,542	14,890
Total	11,802	12,096	12,758	11,186	10,799	11,010	9,236	8,971	84,316

Source: Department of Immigration and Citizenship, *Population Flows*, various years.

(5) Grant of the visa would not result in either:

(a) the number of Subclass 200 visas granted in a financial year exceeding the maximum number of Subclass 200 visas, as determined by Gazette Notice, that may be granted in that financial year; or

(b) the number of visas of particular classes (including Subclass 200) granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.

(6) The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010; and

(b) if the applicant had turned 18 at the time of application—satisfies public interest criterion 4019.

In addition, it is required that “the applicant must be outside Australia when the visa is granted,” showing that this visa is only available to those who are not currently in Australia.

Firstly, one of the major and fundamental differences in comparison to the Protection visa is that this visa is under quantitative control as shown in (5), while the onshore Protection visa is outside of this control. As shown in (2) and (4), persecution against applicant is taken into consideration, but, degree of persecution itself does not mean the automatic grant of this visa, as this visa is under quantitative control.

Secondly, as it is shown in (3), in addition to the quantitative control, this visa is also regulated under the regional priorities of the government. For example, in the 2009/2010 financial year, the Department of Immigration “demonstrated a commitment to three priority regions —Africa, Asia and Middle East/South West Asia region.”¹⁵ In summary, this visa is designed to provide resettlement for those who are under persecution, within the pre-determined numerical quotas, and from the regions of the government’s priorities. Table 1 shows statistics from recent years for offshore refugees, and the top countries are Sudan, Iraq, Burma, and Afghanistan, coinciding with the stated government priorities. This clearly shows that quantitative control by the government is imposed both on total number and on regional breakdowns.

In addition, regarding offshore visas, much stricter conditions are imposed by the public interest criteria. 4001, 4002, and 4019 are the same as for the Protection visa, however, 4003, 4004, 4007, 4009, and 4010 are additionally imposed under the Refugee visa. Details of these conditions are explained as follows:

4003 The applicant is not determined by the Foreign Minister, or a person authorised by the

¹⁵ Department of Immigration and Citizenship, *Annual Report 2010-2011*, Canberra, DIAC, 2011, p.111.

Foreign Minister, to be a person whose presence in Australia

- (a) is, or would be, contrary to Australia's foreign policy interests; and
- (b) may be directly or indirectly associated with the proliferation of weapons of mass destruction; and

4004 The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

4007 (1) The applicant:

- (a) is free from tuberculosis; and
- (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- (c) subject to subclause (2) — is free from a disease or condition in relation to which:
 - (i) a person who has it would be likely to:
 - (A) require health care or community services; or
 - (B) meet the medical criteria for the provision of a community service; during the period described in subclause (1A); and
 - (ii) the provision of the health care or community services would be likely to:
 - (A) result in a significant cost to the Australian community in the areas of health care and community services; or
 - (B) prejudice the access of an Australian citizen or permanent resident to health care or community services;regardless of whether the health care or community services will actually be used in connection with the applicant; and
- (d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment — has provided the undertaking.

(2) The Minister may waive the requirements of paragraph (1) (c) if:

- (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
- (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
 - (i) undue cost to the Australian community; or
 - (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

4009 The applicant:

- (a) intends to live permanently in Australia; and
- (b) if the applicant seeks entry to Australia as a member of a family unit, also satisfies the Minister that the applicant could obtain support in Australia from other members of the family unit.

4010 If the applicant seeks to remain in Australia permanently, or temporarily for longer than 12 months, the applicant is likely to become established in Australia without undue personal difficulty and without imposing undue difficulties or costs on the Australian community.¹⁶

Firstly, 4003 is almost the same as 4003A, however, applicants are required to not be someone “whose presence in Australia is contrary to Australia’s foreign policy interests,” in addition to not being associated with “the proliferation of weapons of mass destruction.” 4004 is related to debt to a government. For example, if a person is removed and did not pay the cost of the removal, that would constitute a debt to the Australian government.¹⁷ In such a case, this person would be prevented from being granted this visa because of 4004.

Secondly, 4009 and 4010 are intended to assure the applicants will not be a burden to the Australian community, in the sense that these conditions require assistance from family members for their settlement. In fact, if the application for this visa is “proposed,” proposers are required to submit “Form 681.” In this form, a proposer is expected to answer the question of “Are you able to assist the entrant to access...income support, permanent housing, health services, employment services, education and training services, banking services, and transport.”¹⁸ This question is considered to be related to 4009 and 4010, which are two of the conditions for the grant of this visa, and proposers are strongly expected to assist initial settlement.

Thirdly, there is a major difference of requirements in order to fulfil 4007. For Protection visas, 4007 is not required. 4007 is referred to as the “health requirement,” which is designed to prevent migrants with certain health conditions which will be of disadvantage to the Australian community in terms of public health and cost. Under 4007, applicants need to be free from tuberculosis, and not to have health conditions that would “result in a significant cost to the Australian community in the areas of health care and community services,” or “prejudice the access of an Australian citizen or permanent resident to health care or community services.” This health requirement is imposed on many visas, but, the Minister can waive this condition under 4007. (There is no waiver under 4006 which is imposed on other Family and Skilled visas.)

More specifically, “significant cost” is set at more than 35,000 Australian dollars of expected health expenditure on behalf of an intended migrant. However, the government decided to

¹⁶ Migration Regulations 1994, Schedule 4, Public interest criteria and related provisions, underline added.

¹⁷ Suhad Kamand ed., *The Immigration Kit: Practical Guide to Australia's Immigration Law* (8th edition), Annandale, The Federation Press, 2008, p.169.

¹⁸ Form 681, Refugee and special humanitarian proposal, Department of Immigration and Citizenship, p.8. (<http://www.immi.gov.au/allforms/pdf/681.pdf>, last accessed on 19 November 2012.)

give waiver on this “significant cost” condition to humanitarian entrants in 2012.¹⁹ As for the “prejudice the access” criteria, health conditions which require organ transplants, blood/plasma products, fresh blood, and radiotherapy for malignancy are considered to be conditions to which this criterion is applicable.²⁰

Unlike this type of offshore visa, the Protection visa is designed to give permanent residence to those who are refugees under the Refugees Convention and who are already in Australia, therefore, it is impossible to deny a visa due to the health requirement because of the non-refoulement principle. However, under the Refugee visa, even though applicants would be “subject to persecution”, there is a possibility that the visa is denied due to the health requirement, which is designed to protect Australian communities’ interests. On this point, there is a fundamental difference with the Protection visa, in terms that the government can control the “quality” of migrants for the benefit of the country, even under the Humanitarian Program.

(b) Global Special Humanitarian Visa

Global Special Humanitarian visa is another main type of offshore visa under the Humanitarian Program. The detailed conditions are also defined under the Migration Regulations as same with the Refugee visa.

Firstly, “criteria to be satisfied at time of application” for this visa are that:

(1) The applicant:

(a) is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant’s home country and is living in a country other than the applicant’s home country; or

(2)(a) the applicant’s entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called the proposer); and

(b) either:

(i) the proposer is, or has been, the holder of a Subclass 202 visa, and the applicant was a member of the immediate family of the proposer on the date of grant of that visa; or

(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(ia) the proposer is, or has been, the holder of a Resolution of Status (Class CD) visa, and the applicant was a member of the immediate family of the proposer on the date of

¹⁹ Australian government response to the Joint Standing Committee on Migration Report: Enabling Australia, Inquiry into the migration treatment of disability, November 2012, p.8.

²⁰ PAM3: Sch4/4005-4007, The health requirement, 60.3 Prejudice to access, 1 July 2012.

application for that visa; or

(iii) the proposer is, or has been, the holder of a special assistance visa, and the applicant was a member of the immediate family of the proposer on the date of the application for that visa; and

(ba) the application is made within 5 years of the grant of that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to Immigration;

In addition, there is a condition that “the applicant is proposed for entry to Australia, in accordance with approved form 681” by an Australian citizen, an Australian permanent resident, or a body operating in Australia. Under the Refugee visa, application is accepted without a proposer, however, a proposer is mandatory for the Global Special Humanitarian visa. This visa is therefore designed to provide resettlement to Australia for those who have strong family connections to Australia. Proposers for this visa seem to be expected to assist the settlement of entrants. For example, on the application form of this visa, there is a statement that “as the government does not fund travel costs for this visa subclass, your proposer is expected to assist you and any dependants in meeting costs associated with travel to Australia and initial settlement after arrival.”²¹ In actuality, the Australian government funds a loan scheme operated by the International Organization for Migration (IOM) to give no-interest travel loans for Special Humanitarian visa holders and their proposers. In the 2011/2012 financial year, 455 people were assisted by this fund.²²

Moving on, “Criteria to be satisfied at time of decision” are the same as with the Refugee visa and both provisions on quantitative control and quality control exist. The same conditions regarding public interest criteria, and in particular the health requirement, are applied. The main difference compared to the Refugee visa is that the Special Humanitarian visa works as a *de facto* method of family reunion for those who have been accepted under the Humanitarian Program.

Furthermore, applicants for offshore visas, such as Refugee and Special Humanitarian visas, are not eligible to apply to the RRT for a review, unlike with the Protection visa.

3. Differences between Onshore and Offshore Visas

As discussed above, fundamental differences exist between the onshore and offshore visas even under the same Humanitarian Program. Table 2 summarises these differences. Under

²¹ Form 842, Application for an Offshore Humanitarian visa Refugee and Humanitarian (Class XB) visa, Department of Immigration and Citizenship, p.1. (<http://www.immi.gov.au/allforms/pdf/842.pdf>, last accessed on 9 January 2013.)

²² Department of Immigration and Citizenship, *Annual Report 2011-12*, Canberra, DIAC, 2012, p.128.

Table 2: Comparison between “Onshore” and “Offshore” Visas

Type	Onshore	Offshore	
Name of visa	protection	refugee	special humanitarian
Sub-class	866	200	202
Location of Applicants	inside	outside	outside
Proposers	not necessary	not necessary, can be proposed	necessary
Quantitative Control	No	Yes	Yes
Application of “health requirement”	No	Yes	Yes
Review Application	Yes	No	No
Travel Cost Paid by		Australian government	Applicants or family members

Source: Migration Act 1958, Migration Regulations 1994.

Table 3: Visa Grant Rate for Offshore Humanitarian Visas (2006-2011)

		2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	Total
Refugee	Finalization	13,822	18,706	11,877	14,522	24,242	83,169
	Granted	5,924	5,951	6,446	5,988	5,998	30,307
	Grant rate	42.9%	31.8%	54.3%	41.2%	24.7%	36.4%
Special Humanitarian	Finalization	72,003	39,542	21,868	29,021	28,315	190,749
	Granted	5,157	4,721	4,471	3,234	2,973	20,556
	Grant rate	7.2%	11.9%	20.4%	11.1%	10.5%	10.8%
Total	Finalization	85,825	58,248	33,745	43,543	52,557	273,918
	Granted	11,081	10,672	10,917	9,222	8,971	50,863
	Grant rate	12.9%	18.3%	32.4%	21.2%	17.1%	18.6%

Source: Department of Immigration and Citizenship, Australia's Offshore Humanitarian Program: 2010-11, p.16.

offshore visas, quantitative and quality control, such as the health requirement, are strictly applied. Under onshore visas, quantitative control is not applied and a very much limited form of quality control is applied only to those who would be a security risk. In addition, under the Special Humanitarian visa, travel costs and assistance for initial settlement of entrants are required by their family members.

The reason why this major difference in quantitative and quality control exists can be found in the nature of the Refugees Convention. Under the Convention, those who are recognized as refugees cannot be returned to their countries of origin because of the principle of non-refoulement, and therefore quantitative and quality control (other than the determination of whether the person is a refugee or not) cannot be applied. However, for offshore visas, this restriction imposed by the Refugees Convention is not applicable because, applicants are residing overseas and this means the principle of non-refoulement is not invoked. Both quantitative and quality control can therefore be applied and the Australian government is able to set a quota each year, as well as prevent entrants who have serious health conditions under the same conditions as with other visas, even though criteria are somewhat relaxed.

In fact, the grant rate for offshore visas shows how this quantitative control is working. Table 3 shows the grant number and grant rate for offshore visas in recent years. According to this, offshore visas were granted to about 18.6 percent of applicants from 2006/2007 to 2010/2011. This means that only about one in five people are allowed to resettle to Australia. In other words, the Australian government is actively selecting who should be allowed to resettle in Australia based on the criteria cited in this article. In terms of quality control, the health requirement seems to be working for this category and 103 people were denied offshore humanitarian visas due to this requirement in the 2008/2009 financial year.²³

However, this rigid quantitative and quality control does not seem to be working for the onshore Protection visa. In terms of quality control, it has been explained in this article how the criteria for the Protection visa are relaxed compared with offshore visas, including exercise of the health requirement. In terms of quantitative control, as can be seen in Table 4, the grant rate for Protection visas is about fifty percent to sixty percent and very much higher compared to that for offshore visas. Protection visa grants to “non-IMAs (irregular maritime arrivals)” are around fifty percent. In these circumstances, those who were already in Australia via other types of visa applied for a Protection visa. It is impossible for the Australian government to prevent these people from applying for the Protection visa because of their obligation under the Refugees Convention. At the same time, from the 2008/2009 financial year, visa grants to “IMAs,” or boat people, appear in Table 4. This refers to circumstances in which a person has arrived in Australia illegally by boat, applied for a

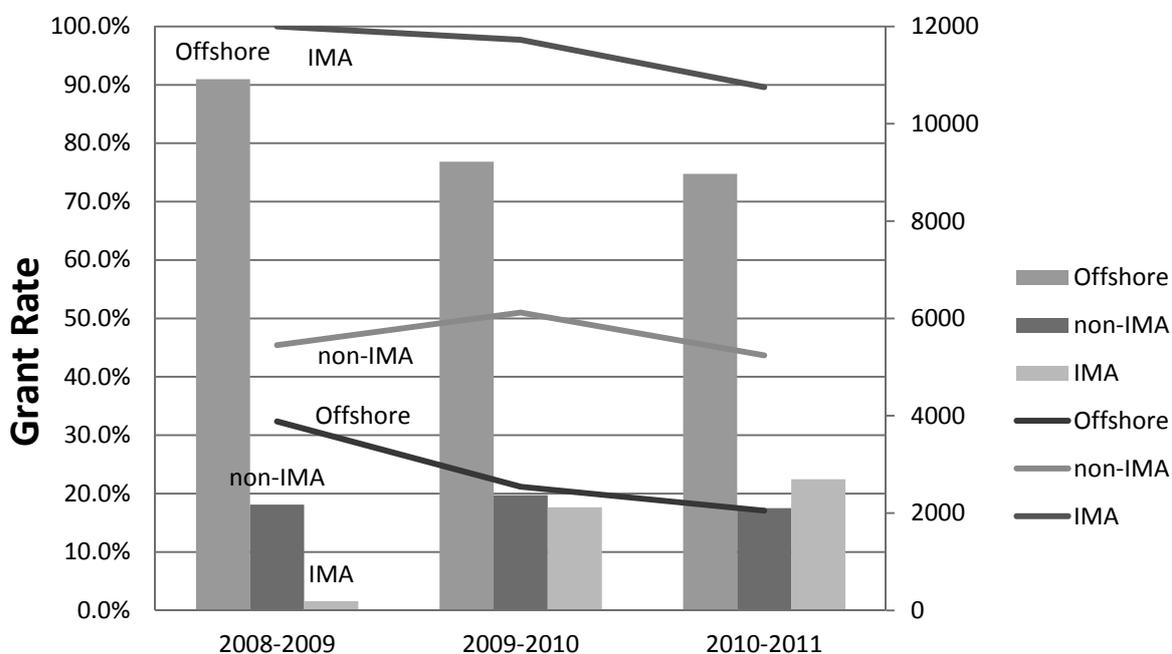
²³ Department of Immigration and Multicultural and Indigenous Affairs, Submission to Inquiry to Immigration Treatment of Disability, the Joint Standing Committee on Migration, November 2009, p.41.

Table 4: Visa Grant Rate for Protection Visa (2006-2011)

		2006-2007	2007-2008	2008-2009	2009-2010	2010-2011
Non-IMA	Total	4,343	4,002	4,784	4,642	4,810
	Grants	1,692	1,898	2,173	2,367	2,101
	Grant rate	39.0%	47.4%	45.4%	51.0%	43.7%
IMA	Total	N/A		189	2,169	3,009
	Grants	N/A		189	2,119	2,696
	Grant rate	N/A		100.0%	97.7%	89.6%
Total	Total	N/A		4,973	6,811	7,819
	Grants	N/A		2,362	4,486	4,797
	Grant rate	N/A		47.5%	65.9%	61.4%

Source: Department of Immigration and Citizenship, Asylum Trends – Australia: 2010-11 Annual Publication, p.20 and p.34. [note] grant rate includes grants determined by review process.

Figure 3: Humanitarian Visa Grant Rate and Numbers



Source: Department of Immigration and Citizenship, Asylum Trends – Australia: 2010-11 Annual Publication, Australia's Offshore Humanitarian Program: 2010-11.

Protection visa and been granted it. The grant rate is extremely high compared to that for non-IMAs. In addition, there was a dramatic increase of numbers in 2009/2010 and 2010/2011, the period when the boat people issue became a major political controversy.

This situation is also reflected in Figure 3. Although the grant rate and number for onshore Protection visas for non-IMAs is stable, there is a decrease in these figures for offshore visas. At the same time, there is a sharp increase in the number of Protection visa grants to IMAs and the grant rate reaches nearly one hundred percent. It can be confirmed that the more IMAs obtain a visa, the less people currently resident abroad will be able to obtain visas and resettle in Australia. As the grant rate for IMAs is nearly one hundred percent, the increase of people who arrive by boat will mean almost automatic admission and permanent settlement in the country. As a result, this leads to a situation where the overall rise in the settlement of migrants will proceed in an increasingly uncontrolled manner. This leads directly to the reduced control of Australian immigration policy itself.

Conclusion: Why Boat People Are Not Welcome

This clear difference of statistics between offshore and onshore visas can be summarized in that reduced quantitative control is imposed on onshore visa applications and that there is virtually no control in terms of numbers for boat people. Almost all boat people are being granted Protection visas and allowed to stay in Australia permanently. Boat people themselves arrive in Australia illegally, and they are not subject to quantitative and quality control by the Australian government, as long as they apply for a Protection visa. In other words, the existence of boat people has become an enormous challenge to an Australian immigration policy which imposes strict quantitative and quality control that is incorporated in the Migration Act and the Migration Regulations as explained in this article. If the Australian government wishes to continue to impose quantitative and quality control as part of their immigration policy, the logical choice would be to *decrease* the number of boat arrivals. At the same time, it is also quite logical that they can *increase* the number of offshore visas, because these types of visa are under their control both in terms of quantity and quality.

It is therefore within this context that the Expert Panel on Asylum Seekers recommended to the government that the quota for the Humanitarian Program be increased from 13,500 to 20,000 and at the same time that the “regional processing” of boat arrivals, which is equivalent to the Pacific Solution of sending arrivals forcefully to Nauru or PNG for processing, be recommenced. This means that Australia is willing to accept refugees and to increase their number, provided they pass through the government’s control and selection processes. This consistent logic in Australia’s immigration policy has resulted in the policy implementation of both hard and soft measures, which may seem ambivalent on the surface.

In 2001, in relation to the Pacific Solution, then-Prime Minister John Howard stated that “We will decide who comes to this country and the circumstances in which they come.” The fundamental principle behind the effective reintroduction of the Pacific Solution in 2012 can be said to be a reimplementation of this statement.

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