

Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007, ISBN 0521870178, AUD\$180, ix–xlv, 387 pages)

REVIEWED BY PENELOPE MATHEW*

It is perhaps inevitable in a field such as international refugee law, especially in the close-knit world of Australians writing in this field, that an academic will review a book by someone she knows. In this case, the reviewer read some draft chapters of the doctoral thesis that eventually became *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*. On reading the final, published product, I was thoroughly impressed by Dr Foster's ability to negotiate some of the most difficult issues facing refugee decision-makers. This book is a must-read for all such decision-makers and policy-makers, and makes a valuable contribution to the international literature on refugee law.

The book challenges 'the simple dichotomy between political persecution, which is traditionally thought to involve positive action by an entity targeted at a particular individual or group, and economic degradation, which has traditionally been thought to be uncontrollable, inevitable, and just a sad fact of life'.¹ The book explores four key issues. First, Dr Foster challenges the artificial divide between 'economic migrant' and 'political refugee' (see, particularly, Chapters 1 and 5). Second, she revisits the role of economic, social and cultural rights in defining the term 'persecution' in the definition of a refugee contained in the *1951 Convention Relating to the Status of Refugees* ('*1951 Refugee Convention*') in Chapters 2-4.² Third, she examines the difficult questions posed by claims based upon economic deprivation in light of the need to show that the asylum-seeker's fear of persecution is 'for reasons of' one of the five 'Convention grounds' (race, religion, nationality, membership of a particular social group, and political opinion; see Chapter 5). Finally, she analyses the ground of 'membership of particular social group' and its relevance to claims involving socio-economic deprivation (Chapter 6).

In Chapter 2, Foster provides a firm articulation of the human rights approach to the definition of persecution (ie, a serious violation of human rights amounts to persecution) that squares its use with the traditional tools of treaty interpretation.³ This analysis is

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1 Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) at 19.

2 See *Convention Relating to the Status of Refugees*, opened for signature on July 28 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954). The definition was effectively amended by the *Protocol Relating to the Status of Refugees*, opened for signature January 31 1967, 606 UNTS 267 (entered into force 4 October 1967).

3 The rules of treaty interpretation are contained in the *Vienna Convention on the Law of Treaties*, opened for signature May 23 1969, 115 UNTS 331 (entered into force 27 January 1980). These rules are accepted codifications of customary international law and therefore applicable to the *1951 Convention Relating to the Status of Refugees* ('*1951 Refugee Convention*').

valuable not just for her thesis but more generally for the field of refugee law. In Chapters 3 and 4, she goes on to challenge the notion of a hierarchy of human rights that is commonly used by decision-makers when assessing whether or not a violation of rights is serious enough to constitute persecution. The idea of a hierarchy of rights originated in the ground-breaking work of Foster's doctoral supervisor,⁴ and has subsequently taken on a life of its own, operating to diminish the importance of socio-economic rights in refugee status decisions.

As Foster points out, the broader UN human rights system operates on the basis that all rights are universal, interdependent, interrelated and indivisible. There is no hierarchy. Foster acknowledges that Article 2 of the *International Covenant on Economic, Social and Cultural Rights* contains a somewhat fungible obligation for states parties.⁵ However, she draws extensively on the work of the Committee on Economic, Social and Cultural Rights to demonstrate the ways in which the immediate rights and obligations imposed by the Covenant (for example, the fact that discrimination with respect to economic, social and cultural rights is prohibited and minimum core obligations are imposed) may ground a claim to refugee status. She goes on to develop a notion of 'core' and 'peripheral' violations of these rights in an effort to assist in determining when a violation of a single right (rather than a cumulative violation of many rights) may be defined as serious enough to constitute 'persecution' for the purposes of the *1951 Refugee Convention*. I think this idea will need to be handled with care, given some decision-makers' tendency to use glib phrases (e.g., 'non-Convention related') to deny claims for refugee status. However, Foster's analysis is certainly an interesting way to approach the issues and may assist those charged with the difficult task of deciding whether something is serious enough to constitute persecution or, conversely, sufficiently lacking in seriousness (there are many good reasons to avoid the word 'trivial' when dealing with people who themselves have seen something serious enough to leave their country) to take the disruptive, and possibly dangerous step of sending a failed asylum-seeker back to their country of origin.

In Chapter 5, Foster examines the 'nexus' clause: the part of the definition of a refugee which requires that well-founded fear of being persecuted is 'for reasons of' one of the five Convention grounds. She demonstrates that many more claims based on socio-economic status may be included within the definition of a refugee when decision-makers acknowledge that while intention or motivation on the part of the persecutor is sufficient to ground a claim to refugee status, it is not necessary. It is relevant simply to ask why the claimant is in the 'predicament' he or she now finds him or herself. The predicament may be because of a particular characteristic – race, for example – even where the persecutor is not motivated by that characteristic. The analysis here is not new, as many authors, including Hathaway and Foster who refer to the analysis as the

4 See James C Hathaway, *The Law of Refugee Status* (1991).

5 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Article 2 obliges states parties to 'take steps ... to the maximum of [their] available resources with a view to achieving progressively the full realization' of the rights set out in the *Covenant*.

‘predicament approach’, have made similar points before. But the points are particularly well made, and their application to socio-economic based claims to refugee status is persuasive. For example, Foster points with approval to case law that has accepted that street children or children separated from their parents are more vulnerable than others to various forms of violence.⁶

In Chapter 6, the Convention ground of ‘membership of particular social group’ is explored. Foster makes a strong case for the application of the *ejusdem generis* or ‘protected characteristics’ approach to defining the content of this ground, as opposed to the ‘social perception’ test.

The ‘protected characteristics’ test is as follows. Given the difficulty of ascertaining the ordinary meaning of ‘particular social group’, and the fact that the *travaux préparatoires* shed little light on the issue, it is permissible to use the maxim of *ejusdem generis*: general words preceded by particular words are to be interpreted in light of the class of specific words. What, then, is common amongst the Convention grounds of persecution? Two of the grounds, race and nationality refer to immutable characteristics. (It should be noted that nationality generally, though not exclusively, refers to ethnicity.) The person is persecuted because of something that they cannot change. This could include a past history. Meanwhile, religion and political opinion, are characteristics that are changeable, but so fundamental that a person should not be forced to change them. Sex, sexuality and many other characteristics have been found to fall within the category of ‘particular social group’, being either immutable or so fundamental to personality that one should not be required to change.

In contrast to the ‘protected characteristics’ or *ejusdem generis* test, the High Court has, according to some commentators, adopted a ‘social perception’ test to define the terms ‘particular social group’.⁷ When deciding a case concerning a couple fleeing the Chinese One Child Policy, the High Court of Australia decided that there had to be a pre-existing group identifiable within the society concerned that was singled out for persecution.⁸ Since then the High Court has struggled with its own test in *Applicant S v Minister for Immigration and Multicultural Affairs*,⁹ and I would have liked Foster to further her attack on the social perception test through a detailed analysis of this decision.

As Foster notes, the United Nations High Commissioner has effectively endorsed both tests. Having participated in the global consultations on the question of membership of particular social group, my recollection of how the United Nations High Commissioner on Refugees came to this position is different and perhaps more benign than Foster’s.¹⁰ I think that the decision was taken in recognition of the fact that jurisdictions were headed in different directions and that it would be desirable for

6 Foster, above n1 at 284.

7 T Alexander Aleinikoff, ‘Protected Characteristics and Social Perceptions: an Analysis of the Meaning of “Membership in a Particular Social Group”’, in Erika Feller, Völker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) at 271.

8 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225.

9 (2004) 217 CLR 387. (This case is noted by Foster, above n1 at 298, n30).

10 Foster, above n1 at 300, n42.

decision-makers to focus on any common ground between the tests in order to bring consistency across jurisdictions. In view of the fact that there was not time in the two days allocated for the expert panel involved in this part of the 'global consultations' to undertake the disciplined and rigorous analysis which Foster has been able to undertake in three years of doctoral study, this seemed a sensible decision at the time. Be that as it may, Foster's work demonstrates that fears that certain groups would be neglected if the protected characteristics approach alone were adopted are ungrounded.

Foster makes a particularly valuable contribution by exploring groups based on 'occupation'. She exposes the flaws in analysis by decision-makers who misapply the protected characteristics approach and focus on an individual's ability to avoid persecution by changing jobs. The focus should be the impact on individuals, particularly those of low socio-economic status, who have been deprived of a job by virtue of persecution.

In her final chapter (Chapter 7), Foster rehearses well-worn arguments against the idea that her thesis will open the 'floodgates'. Unfortunately, this chapter is necessary, because many people will react to refugees fleeing forms of socio-economic persecution with a combination of fear – that foreigners will come and take their jobs, for example – and complacency – that this forced migration requires no response from them, and especially not a compassionate response. I believe that Australia's 'Pacific Solution' was driven by this mix of fear and complacency. I hope that the new Australian Minister for Immigration, Chris Evans, reads Dr Foster's book and that, in addition to closing down the detention centres on Nauru, there will be a general liberalisation of Australia's policy towards asylum-seekers. The legislative provisions that underpin the 'Pacific Solution' should be repealed, so that the detention centres remain closed, as should the legislative provisions that seek to limit the ambit of the definition of a refugee.