



## **Appendix D: The Refugee Determination Process**

### **Overview<sup>1</sup>**

- 1.1 Australia provides protection to people who meet the United Nations definition of a refugee. This definition is contained in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (collectively referred to as the Refugees Convention). Broadly speaking, the Refugees Convention defines refugees as people who are:
- outside their country of nationality or their usual country of residence; and
  - unable or unwilling to return or to seek the protection of that country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- 1.2 Asylum seekers in Australia are assessed against the Refugees Convention. If they arrive lawfully in the Australian migration zone, and are found to require protection, they may be granted a Protection Visa (PV) which enables them to live permanently in Australia. If they arrive in the Australian migration zone unlawfully, that is, without authority, and lodged a protection application on or after

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1 This chapter is based on the Committee's 1999 report on Migration Regulation 4.31B

20 October 1999, and they are found to have protection needs, they will only be eligible for a Temporary Protection Visa (TPV). This provides temporary residence for three years in the first instance.<sup>2</sup>

## Primary Stage

1.3 At the primary stage, the asylum seekers apply for a PV and pay a \$30 fee unless they are not immigration cleared and in immigration detention. The fee applies to each application, whether there is only one applicant or a whole family. With the exception of those detained as unauthorised arrivals or who cleared immigration with fraudulent documents<sup>3</sup>, asylum seekers receive a bridging visa upon lodging a PV application. If those who receive a bridging visa had been in Australia for fewer than 45 days in the 12 months prior to lodging the PV application, they are permitted to work in Australia until their PV application is finalised.

1.4 When the PV application is lodged a Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) case officer (the *primary decision maker*):

acting as a delegate of the Minister for Immigration and Multicultural Affairs, decides if the applicant engages Australia's obligations under the UN Refugees Convention. This is done by assessing the claims against the definition of a refugee set out in that Convention.

All applications are assessed on an individual basis. Where further clarification is required, the officer may interview the applicant using an interpreter if necessary.

The interviews are conducted in a non-adversarial environment, using all available and relevant information concerning the human rights situation in the applicant's home country. Applicants are given opportunities to comment on any adverse personal information, which is taken into account when considering a claim.

Submissions made on behalf of the applicant by migration agents can also form part of the material to be assessed.

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2 DIMIA Fact Sheet 62, *Assistance for Asylum Seekers in Australia*, (at 13 February 2003)

3 DIMIA, Submission No 2, Attachment A, p.38

Applications are treated in confidence. No approach is made to a home government (including that country's embassy in Australia) about an individual asylum seeker.

An officer then makes the decision on the application for a PV.<sup>4</sup>

- 1.5 A PV confers on an asylum seeker:
- the right to remain permanently in Australia;
  - access to Australia's public health system
  - access to welfare benefits;
  - permission to work;
  - permission to travel to and enter Australia for five years after grant; and
  - eligibility to apply for citizenship after two years of permanent residence.
- 1.6 If the case officer finds that an applicant does not meet the criteria for grant of a PV, the officer must provide the person with a written record of the decision. This should specify the visa criterion that the applicant has failed to meet, the provision in the Act or Regulations which prevents the grant of the visa, and the reasons why the criterion has not been met. The applicant must also be advised of the right of review.<sup>5</sup>

## Review Stage

- 1.7 Those who fail to be granted a PV or TPV by DIMIA can appeal to the Refugee Review Tribunal (RRT). It again assesses the application against the Refugees Convention, and can accept any new information not previously available to the primary decision-maker.
- 1.8 The RRT can decide to affirm, vary or set aside the original decision, depending on the merits of the case.

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4 As described in the November 1999 DIMA Fact Sheet 41, *Seeking Asylum in Australia*. See also DIMIA, Submission No 2, Attachment A, p. 39

5 *Migration Act 1958*, s.66

- 1.9 If the RRT cannot make a decision favourable to the applicant on the written evidence available, it must give the applicant the opportunity of a personal hearing. This hearing is non-adversarial.<sup>6</sup> The applicant may be accompanied by an adviser.<sup>7</sup> Appropriate interpreters are provided to assist applicants where required
- 1.10 The RRT hearings are not bound by technicalities or rules of evidence to enable the applicant to present their claims and provide responses to Tribunal questions without formality. Hearings are held in private to protect the applicant's privacy and safety.<sup>8</sup>
- 1.11 The Tribunal must provide the applicant with written notice within 14 days of making a decision. The notice must set out the decision, the reasons for the decision, findings on material questions of fact, and the evidence on which those findings were based.<sup>9</sup>
- 1.12 If the Tribunal rejects the PV visa application, an applicant with a bridging visa typically has 28 days to depart Australia upon being notified of the decision.

## Minister's power of intervention to grant a visa

- 1.13 Where the RRT rejects a review application, s.417 of the *Migration Act 1958* gives the Minister the power to overturn that decision and to substitute a favourable decision if the Minister is satisfied that it is in the public interest to do so. Each case where the RRT affirms the DIMIA decision is assessed against the Minister's guidelines to identify unique or exceptional cases that he or she may wish to consider.
- 1.14 Unique or exceptional cases may involve Australia's obligations under the Convention Against Torture, the International Covenant on

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<sup>6</sup> *Migration Act 1958*, s.429.

<sup>7</sup> A registered migration agent or person assisting the applicant may come to the hearing. A person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person or to cross-examine any other person appearing before the Tribunal to give evidence (s427(6)), however, the applicant is entitled to give evidence and present arguments in support of his or her claims (s425(1)). The Tribunal may invite an adviser to make oral submissions at the conclusion of the hearing and/or in writing following the hearing. The Tribunal will determine the time frame in which any written submissions are to be lodged. RRT *Practice Directions: 8.7 Representation*. <http://www.rrt.gov.au/practice.htm>

<sup>8</sup> DIMIA, Submission No 2, Annex A, p. 41

<sup>9</sup> *Migration Act 1958*, s.430.

Civil and Political Rights, and the Convention on the Rights of the Child. They may also involve strong compassionate circumstances, such as hardship to Australian citizens.

- 1.15 A copy of the guidelines is at Appendix E.

## **Judicial review**

- 1.16 The Act also permits people who are refused a PV by the RRT to seek judicial review of the decision in the Federal Court. Such judicial review is concerned only with the lawfulness of the decision-making and does not involve an inquiry into the merits of the case.

## **Bridging visas**

- 1.17 DIMIA will grant bridging visas to asylum seekers who arrived lawfully which enable them to remain lawfully in Australia until their PV application has been processed. A bridging visa ceases 28 days after DIMIA notifies the person of the decision to refuse the PV. If a person appeals to the RRT within that time, the bridging visa continues to operate. It will then cease either on the grant of the PV by the RRT or 28 days after notification by the Tribunal that the person is not a refugee.<sup>10</sup>

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<sup>10</sup> DIMIA, Submission No 2, Annex A, p. 42