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Background

Overview of the refugee determination process

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 (these are 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
- are 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 who apply in Australia are assessed against the Refugees Convention. If they also meet Australia's health and character requirements, or if the requirements to meet health and character checks are waived by the minister, they are granted protection visas that allow them to remain permanently in Australia.

Primary Stage

1.3 At the primary stage, the asylum seekers apply for a protection visa and pay a $30 fee (the fee applies to each application, whether there is only one applicant or a whole family). A case officer of the Department of

Immigration and Multicultural Affairs (DIMA)[1] then assesses each application against the UN definition and against Australia's health and character requirements. DIMA has described the process in these terms:

> Assessment of claims for a protection visa are made on an individual basis 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 information personal to them, 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. 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 of the department then makes the decision on the application for a protection visa. Applicants who are found to meet the UN Convention definition, and meet Australia's health and character requirements, are granted a PV.[2]

1.4 A protection visa confers on an asylum seeker:

- the right to remain permanently in Australia;
- 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.

1.5 If the case officer finds that an applicant does not meet the criteria for grant of a protection visa, 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.[3]

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1 Hereafter referred to as the department.

2 DIMA, Fact Sheet 41, *Seeking Asylum in Australia.*

3 *Migration Act 1958*, s.66.

Review Stage

1.6 Those who fail to be granted a protection visa by the department can appeal to the Refugee Review Tribunal (RRT). [4] It also assesses the application against the Refugees Convention, and can accept any new information not previously available to the primary decision-maker. The Tribunal can decide to affirm, vary or set aside the original decision depending on the merits of the case.

1.7 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 and is held in private for the applicant's benefit.[5] Although the applicant can be accompanied in a hearing, it is only the applicant who has the right to address the Tribunal.[6]

1.8 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.[7]

1.9 If the Tribunal rejects the protection visa application, an applicant with a bridging visa typically has 28 days to depart Australia upon being notified of the decision.

Ministerial power of intervention

1.10 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 departmental decision is assessed against the Minister's guidelines to identify unique or exceptional cases that he or she may wish to consider.

1.11 Unique or exceptional cases may involve Australia's obligations under the Convention Against Torture, the International Covenant on Civil and

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4 Not every refusal to grant a protection visa in Australia is reviewable by the RRT. Under s.500(1)(c) of the Act, a refusal to grant a protection visa because of Articles 1F, 32 or 33 of the Refugees Convention can only be reviewed by the Administrative Appeals Tribunal (AAT). Articles 1F and 33 make exceptions to the protection obligations owed to refugees. No obligations are owed to a person who has committed a serious non-political crime before being admitted to a country. Likewise, a country can refuse to admit a refugee who can reasonably be regarded as a danger to national security, or who has been convicted of a particularly serious offence and who constitutes a danger to the community.

5 *Migration Act 1958,* s.429.

6 *Migration Act 1958,* s.425.

7 *Migration Act 1958*, s.430.

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

1.12 A copy of the guidelines is contained in Appendix D.

Judicial review

1.13 The Act also permits people who are refused a protection visa 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

1.14 The department will grant asylum seekers bridging visas enabling them to remain lawfully in Australia until their protection visa application has been processed. A bridging visa typically ceases 28 days after DIMA notifies the person of the decision to refuse the protection visa. 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 protection visa by the RRT or 28 days after notification by the Tribunal that the person is not a refugee.

1.15 Applicants, with some exceptions granted by ministerial discretion, must apply for a protection visa within 45 days of their arrival in Australia if they are to be granted a bridging visa with work rights. This rule applies to all applications lodged on or after 1 July 1997.

Background to Regulation 4.31B

1.16 On 20 March 1997, the Minister for Immigration and Multicultural Affairs, Hon Philip Ruddock MP, announced extensive changes in the refugee determination process.[8] The changes affected the framework for work rights, the review application periods, and the review application fee for refugees. They also included a more strategic approach to protection visa applications, with DIMA to give greater priority to straightforward applications and to use more streamlined methods, such as reduced documentation. The Minister explained that these measures were necessary to curb abuse in the refugee determination process:

8 DIMA, Media Release 28/97, *Sweeping changes to refugee and immigration decision making.*

> This year we expect to receive some 10,000 applications for refugee status in Australia, and possibly more. That is 20 times more than we saw only seven years ago. The cost of assessing all of those claims through the various stages with the judicial intervention, asylum seeker support and the like is over $60 million a year.
>
> A large number of the applications are not coming from residents of countries that are generally associated with human rights abuses. Numbers have come from the Philippines, Tonga, Fiji and Thailand. This financial year, the department has finalised more than 3,000 applications from those countries that I have mentioned and has been able to identify only four bona fide refugees.
>
> People are turning up at my department and asking for a $30 work visa, the name by which we understand the protection visa is now becoming known. By lodging an application such individuals can obtain work rights in Australia and they know that they cannot be sent home until after their refugee application has been properly assessed and considered by the department, possibly the Refugee Review Tribunal, accessing my discretion and applications to the Courts. We also know that in many cases, what they are seeking is access to Medicare, benefits for which they have in no way paid or contributed…What we are seeking to do is to remove the incentives that are now current in the system that make it wide open to this form of abuse.[9]

1.17 Statutory Rules 109 of 1997 (SR 109 of 1997) contained many of the changes. These included measures:

- imposing a new 14 day period for RRT applications;
- restricting access to work rights to refugee applicants who applied within 14 days of entering Australia; and
- imposing a $1,000 fee on unsuccessful applicants to the RRT.

1.18 DIMA has explained the objective of the $1,000 fee as follows:

> [T]he fee was intended to operate as a means of containing the number of review applications made by people without genuine claims, rather than as a means of cost recovery, per se. The fee was imposed 'post decision' to ensure that it did not present a barrier to people who had a subjective fear (albeit perhaps not a well founded fear) of persecution making an RRT application.[10]

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9 *Hansard*, House of Representatives, 19 June 1997, pp. 5857-5858.

10 DIMA, *Submissions*, p. S72.

1.19 As with the other changes in SR 109, the fee was scheduled to take effect on 1 July 1997.

1.20 Before any changes could come into effect Senator Margetts (Greens, WA) gave notice of a motion in the Senate to disallow parts of the Statutory Rules. After negotiations with the Opposition, the government decided to alter some parts of SR 109 of 1997. The alterations were made in Statutory Rules 185 of 1997. They included:

- extending the 14 day application period for the RRT to 28 days;
- ensuring that refugee applicants could have access to work rights if they applied within 45 days of entering Australia, as opposed to the original 14 days;
- enabling the Minister to remove groups of people from the restriction on work rights where circumstances in their home country had changed since their arrival; and
- imposing a two year sunset clause on the $1,000 post-decision fee for unsuccessful RRT applicants.

1.21 The sunset clause for the $1,000 post-decision fee commenced on 1 July 1997 and was accompanied by the government's undertaking to ask the Joint Standing Committee on Migration to review the issue in 1998. Regulation 4.31B of the Migration Regulations, which introduced the fee, is due to cease operating for review applications lodged on or after 1 July 1999.

Operation of Regulation 4.31B

1.22 Regulation 4.31B provides that unsuccessful applicants to the RRT must pay the $1,000 fee within seven days of receiving notice of the decision. Where RRT applications have been combined, however, only one fee per family is imposed irrespective of the number of applicants.

1.23 There are two exceptions where the fee is to be refunded or waived. Regulation 4.31C provides that the fee must be refunded or waived if:

- the applicant seeks judicial review, the case is subsequently remitted to the RRT, and the Tribunal finds in the applicant's favour; or
- the Minister substitutes a favourable decision for that of the RRT by using the power under s.417 of the Migration Act.

1.24 Where an applicant cannot pay the fee within seven days, the fee becomes a debt payable to the Commonwealth, and an entry is placed in the Movement Alert List (MAL). If the person leaves Australia and later seeks to return, officers processing visas would be alerted to the existence of a debt through the MAL record. This may prevent the person from returning, for it is a prerequisite for the grant of offshore visas that applicants meet public interest criterion 4004 of the Migration Regulations. That provision states:

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

1.25 Applicants who later seek to return to Australia but who have not paid or made arrangements to pay the $1,000 fee would therefore have their applications refused.