

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN HUMAN RIGHTS COMMISSION

Question No. AE16/010

Senator McKim asked the following question at the hearing on 9 February 2016:

Senator McKIM: I am happy to argue this on a point of order if it will make it easier. I am quoting from a cabinet document that was obtained and made public last week by at least one media outlet. The department of immigration yesterday confirmed that this document had veracity—that is, that it did exist. So I will rephrase again the question, which, I believe, would put it within your comfort zone around whether or not it is hypothetical. Will removing direct access to permanent residence for humanitarian visa holders contravene any of Australia's international human rights obligations?

CHAIR: First of all, the evidence yesterday—I am not sure if you were here—was that it was not a cabinet document, that it had not gone to cabinet but that it was a draft by someone in the department. I think that is an accurate reporting of it. So it is not a cabinet document. It was a draft of, I gather, a middle-order official. It is a bit difficult to ask witnesses what might happen if this, that and the other will happen because we do not know full proposal.

Senator McKIM: In fact I have removed that element of it. In none of my substantive questions have I referenced a cabinet document. I have simply said: will doing this contravene Australia's international human rights obligations? The Human Rights Commission has an advocacy role here around—

CHAIR: Perhaps if the question were: what are the human rights obligations in relation to whatever the substance is—

Senator HANSON-YOUNG: The current law is that they get permanent residency. If we take that away, does that contravene any international human rights?

Senator McKIM: And there have been hypothetical questions asked this morning already without a ruling from you.

CHAIR: That shows that I am not as good chairman as I thought I was. Anyhow, I think it is inappropriate but it is almost lunchtime. Prof. Triggs, if you can give some sort of an answer.

Prof. Triggs: Thank you for the question. I, if I may, would like to take it on notice because you raise an important legal question and I would like to really examine what the implications of this purported proposal are. I think it is something that we would need to look at in a little bit more detail. But perhaps I can make a general statement—that is, Australia is a sovereign body and has the right to decide those who would have permanent residence and that is a very important underpinning principle of international law. With that in mind, we would be very pleased to get back to you with a view of what we think the law is.

The answer to the honourable senator's question is as follows:

The Refugee Convention and long-term residence

The Convention Relating to the Status of Refugees,ⁱ does not include a clear obligation to grant refugees a specific type of residency. However, its provisions do imply that States should grant refugees a secure legal status which permits long-term residence (including right of return), provides a safeguard against expulsion or return to situations of danger and has the potential to lead to naturalisation.

For example, the Convention obliges States Parties to provide refugees with administrative assistance (article 25), identity papers (article 27) and travel documents (article 28) and prohibits States from expelling refugees lawfully in their territory (article 32) or returning refugees to situations of persecution (article 33, *non-refoulement*). It also obliges States to “as far as possible facilitate the assimilation and naturalization of refugees” and “make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings” (article 34).

In addition, the United Nations High Commissioner for Refugees (UNHCR) recommends that temporary protection arrangements are best suited to situations where “individual status determination is either not applicable or feasible”, such as large-scale influxes, rescue at sea scenarios and fluid or transitional contexts (e.g. the beginning of a crisis where the cause of movement may be uncertain). UNHCR emphasises that temporary protection is complementary to but does not replace existing obligations under the Convention and is not suitable if stay becomes prolonged.ⁱⁱ

Cessation clauses

Under the Convention, the circumstances in which refugee status can cease – that is, in which a person is deemed to no longer be a refugee and therefore no longer entitled to protection under the Convention – are very limited. Article 1(C) sets out a series of “cessation clauses” which stipulate that refugee status can cease if a person:

- Voluntary re-avails themselves of the (diplomatic) protection of their country of origin;
- Voluntarily reacquires a nationality that they have previously lost;
- Acquires a new nationality and enjoys the protection of the country of their new nationality;
- Voluntarily returns to their country of origin; or
- No longer has protection claims against their country of origin because the circumstances which forced them to flee have “ceased to exist” (unless they can demonstrate that there are “compelling reasons” arising out of previous persecution for refusing to return to their country of origin).

According to UNHCR:

The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained unless he/she falls within the terms of one of the cessation

*clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee status.*ⁱⁱⁱ

One of the implications of the cessation clauses is that refugees should be permitted to reside in their country of asylum until such time as they fall within one of the cessation clauses. As such, the granting of temporary protection – where protection is provided for a set period of time, and may cease irrespective of whether a cessation clause has been triggered – may not fulfil Australia’s obligations under the Refugee Convention.

Permanent residency and the enjoyment of human rights

The denial of permanent residency may in some circumstances have implications for the enjoyment of a range of human rights. For example:

- Access to social security, Medicare and higher education loan schemes is largely limited to permanent residents (with some important exceptions – for example, Temporary Protection Visa holders are eligible for Medicare and limited social security payments). As such, a person’s residency status may have implications for the enjoyment of the rights to social security,^{iv} health^v and education.^{vi}
- A person wishing to apply for citizenship must be a permanent resident for at least one year, thus permanent residency can facilitate the enjoyment of rights related to participation in political life.^{vii}
- Only Australian citizens, Australian permanent residents and some New Zealand citizens are eligible to sponsor people (including family members) to migrate to Australia. This may have implications for the right to family life^{viii} and the obligation to protect the family.^{ix}

In many cases, limiting access to these entitlements on the basis of a person’s residency status would not lead to a violation of their rights. For example, restrictions which prevent tourists from accessing social security, applying for citizenship or sponsoring relatives to migrate to Australia would not generally contravene human rights law, particularly if the individual concerned is able to enjoy these rights in their country of origin.

However, where a person is residing in Australia on a long-term basis, does not enjoy the protection of their country of origin and has no prospect of returning to their country in the near future – as is typically the case for people from a refugee backgrounds – it is possible that denial of permanent residency could result in breaches of Australia’s human rights obligations.

Research examining the mental health and settlement outcomes of Temporary Protection Visa (TPV) holders suggests that temporary status can indeed limit the enjoyment of human rights by refugees. A 2006 study,^x comparing the mental health of TPV holders and permanent Protection Visa (PPV) holders, for example, found that “TPV holders exceeded PPV holders on all measures of psychiatric disturbance and mental disability.” While pre-arrival experiences of trauma also had an impact on mental health regardless of current visa status, temporary status was “by far the greatest predictor of PTSD [Post-Traumatic Stress Disorder] symptoms, accounting for 68% of the variance”.^{xi}

Adverse experiences in immigration detention and “current living difficulties” also made a contribution to PTSD symptoms in TPV holders, and “current living difficulties” were associated

with general distress, anxiety and depressive symptoms.^{xii} Many of these “current living difficulties” were related to the limited entitlements of TPV holders due to their temporary status. For example:

- 78% of TPV holders were worried about not getting medical treatment, compared to 1% of PPV holders.
- 96% of TPV holders were concerned about difficulties obtaining government welfare, compared to 6% of PPV holders; and
- 96% of TPV holders indicated that separation from family was a significant difficulty, compared to just 7% of PPV holders.^{xiii}

These findings, which are consistent with those of other studies conducted at the time,^{xiv} suggests that granting temporary protection to refugees may place Australia at risk of contravening its international human rights obligations.

ⁱ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

ⁱⁱ United Nations High Commissioner for Refugees, *Guidelines on temporary protection or stay arrangements* (2014). At <http://www.unhcr.org/5304b71c9.html> (viewed 4 March 2016), 3, 8

ⁱⁱⁱ United Nations High Commissioner for Refugees, *The Cessation Clauses: Guidelines on their Application* (1999). At www.refworld.org/pdfid/3c06138c4.pdf (viewed 3 March 2016), 1

^{iv} *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 9; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 26.

^v *International Covenant on Economic, Social and Cultural Rights*, art 12; *Convention on the Rights of the Child*, art 24.

^{vi} *International Covenant on Economic, Social and Cultural Rights*, art 13; *Convention on the Rights of the Child*, art 28.

^{vii} *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 25.

^{viii} *International Covenant on Civil and Political Rights*, art 17; *Convention on the Rights of the Child*, art 16.

^{ix} *International Covenant on Civil and Political Rights*, art 23; *International Covenant on Economic, Social and Cultural Rights*, art 10. See also *Convention on the Rights of the Child*, art 10.

^x Shakeh Momartin et al, ‘A comparison of the mental health of refugees with temporary versus permanent protection visas’ (2006) 185 (7) *Medical Journal of Australia* 357.

^{xi} Shakeh Momartin et al, ‘A comparison of the mental health of refugees with temporary versus permanent protection visas’ (2006) 185 (7) *Medical Journal of Australia* 357, 360

^{xii} Shakeh Momartin et al, ‘A comparison of the mental health of refugees with temporary versus permanent protection visas’ (2006) 185 (7) *Medical Journal of Australia* 357, 360

^{xiii} Shakeh Momartin et al, ‘A comparison of the mental health of refugees with temporary versus permanent protection visas’ (2006) 185 (7) *Medical Journal of Australia* 357, 360

^{xiv} See, for example, Fethi Mansouri and Stephanie Cauch, ‘The psychological impact of extended temporary protection’ (2006) 23 (2) *Refuge: Canada’s Journal on Refugees* 81