

Temporary Protection Visas – part 2

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In Part 1 of our TPV Social Issues briefing, we explored some of the history behind Australia's use of Temporary Protection Visas. This week we turn our attention towards those refugees who have been granted a TPV previously and who are now applying for further protection.

TPV Re-assessments

In October 1999 the Australian Government introduced the Temporary Protection Visa (TPV) for people found to be refugees in need of Australia's protection, and who arrived in Australia without valid documentation.

A significant difference between the TPVs that Australia issues and those issued by some other European countries is that as the expiry date of the TPV nears, Australia requires refugees to re-apply for further protection (historically this has been in the form of a permanent protection visa which grants them Australian residency status).

However, since September 2001, immigration law changed to say that 'unauthorised arrivals' assessed as meeting refugee classification, who, since leaving their home country have resided for at least seven days in a country where they could have sought and obtained effective protection (eg Indonesia), will not be able to seek a permanent protection visa. So, many refugees granted TPVs since 2001 will never have the right to permanent protection in Australia.

The majority of the 8912 TPVs issued have been given to asylum seekers from Iraq (4269) and Afghanistan (3661). As at May 2004, 8453 refugees had applied for further protection. Almost all TPVs are due to expire by mid-2005.

Case study: Afghanistan

As at 14 May 2004 DIMIA had made 1192 primary decisions on TPV holders applying for further protection. In 991 cases the application had been refused (with 201 visas granted). Most of these cases involved refugees from Afghanistan. The government's argument was that since the fall of the Taliban the refugees are no longer at risk of persecution in their homeland.

Where DIMIA refuses to grant further protection, refugees have an automatic right of appeal to the Refugee Review Tribunal (RRT), an independent merits review tribunal. The main function of the RRT is to review decisions made by the DIMIA to refuse or cancel protection visas to non-citizens in Australia.

In conducting a review of a decision by DIMIA, the Tribunal looks at the issues and evidence afresh. The RRT was designed to be an independent statutory review body, however the Minister for Immigration retains significant control over the method of appointment, the duration of appointment and remuneration of members as well as the facilities and funding of the review body. The Tribunal has the power to affirm the DIMIA's decision, vary the decision, set the decision aside and substitute a new decision, or remit the matter to DIMIA for reconsideration. The Tribunal has an obligation to provide a mechanism of review that is fair, just, economical,

informal and quick. Unlike a court, the tribunal is not adversarial. It is not bound by technicalities, legal forms or the rules of evidence but must act according to substantial justice and the merits of the case.

While there are various criticisms of the way the RRT works in practise (see Eriksen), it appears that in recent months, it has come to a different conclusion than DIMIA in many of the cases brought before it.

In the past 12 months the tribunal has considered the appeals of 271 Afghans who had been told by DIMIA they were no longer refugees. In 244 of those cases the tribunal 'set aside' the department's decision, arguing that the applicants in question should be allowed to stay in Australia. Basically, the RRT says DIMIA officers got it wrong 90% of the time when they refused to grant further protection to refugees from Afghanistan.

When the question was raised over why the difference in outlook of DIMIA and the RRT regarding these cases, the explanation was given by DIMIA that circumstances in Afghanistan had changed between the time decisions were made by DIMIA officers and the time those cases came before the Tribunal. In other words, the Tribunal was acting on newer, more negative country information than DIMIA decision makers.

There also appears to be a difference in the way that the DIMIA and the RRT decide the outcome of refugee applications for further protection. DIMIA requires applicants to prove their case for refugee status all over again, as if they had just arrived in Australia, whereas the RRT puts the onus on the authorities to show why the applicant is no longer a refugee.

"DIMIA's approach is based on the definition of a refugee contained in Article 1A of the 1951 Refugee Convention – that is, it requires applicants to demonstrate a well-founded fear of persecution on the basis of their race, religion, nationality, political opinion or membership of a particular social group. The tribunal's approach is based on Article 1.C (5), known as the cessation clause, which applies when the circumstances under which a person was granted refugee status 'have ceased to exist'. In applying this test, the tribunal must be convinced that change in the homeland is so fundamental and so durable that the returning refugees are no longer at risk – a difficult case to make in relation to Afghanistan." [Peter Mares, Refugees – It's time to clean up the mess of temporary protection visas, Institute for Social Research, Swinburne University of Technology]

This entire area of law is complex indeed, and it is sometimes easy to forget that there are thousands of people in Australia whose daily lives and futures are impacted by the decisions made in courtrooms and by departments.

There are many concerning issues that arise from Australia's current TPV policy. Some commentators argue that Australia's temporary protection system is creating problems of social exclusion for TPV recipients and placing pressure on community and non-government agencies to fill the gap in support services.

Research funded by the Victorian government, for example, found that the introduction of the TPV policy has:

created two classes of refugees, those who were assessed off-shore and granted full settlement services and protection visas, and those who were assessed on-shore and granted temporary protection and limited access to settlement services. The TPV policy has created uncertainty, insecurity, isolation,

confusion, powerlessness and health problems among the holders of these visas as well as an increased burden on community organisations, state governments and volunteers.

Others argue that TPV holders experience uncertainties and psychological suffering on a similar scale to those held in immigration detention.

The restrictions on family reunion is a source of further stress with refugees on TPVs forced to choose between reuniting with their families and trying to remain in Australia for their own protection.

Postscript

In an unexpected development this week, more than 300 TPV holders, most of whom are Afghans, have been granted permanent protection visas, even though they applied after the law change in September 2001.

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Sources:

- Eriksen, Jane, (2003) *Criticisms of the RRT in light of its crucial role given the recent trend of limitations on judicial review of migration decisions*. University of Adelaide Law School http://www.law.adelaide.edu.au/student/forum/Admin03/pdf/jane_eriksen.pdf
- Mansouri, F.(2002) *Politics of Social Exclusion: Refugees on Temporary Protection Visa in Victoria*.
- Mares, Peter (2004) *Refugees: It's time to clean up the mess of temporary protection visas*, Institute for Social Research, Swinburne University of Technology. Found at: <http://www.apo.org.au/webboard/items/2004/06/00711.shtml>
- Marston, Greg (2003) *Temporary Protection Permanent Uncertainty Report* found at: http://www.refugeecouncil.org.au/docs/current_issues/refugee_report_june03.pdf
- Phillips, Janet, (2004) *Temporary Protection Visas*, Social Policy Section, Department of the Parliamentary Library found at: <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn51.htm>
- Refugee Council of Australia, *Position Paper on Australia's Use of Temporary Protection Visas for Convention Refugees*, September 2003
- Refugee Council of Australia, *Australia's Temporary Protection Visa Regime* found at http://www.refugeecouncil.org.au/html/current_issues/tpv.html
- Refugee Review Tribunal, *History*, found at <http://www.rrt.gov.au/about.htm#history>
- Shaw, Meaghan, *'Queue-jumpers' Win Against Odds*, The Age, July 5, 2004 found at: www.theage.com.au/articles/2004/07/04/1088879372782.html
- Stephen, Sarah. *Afghan Refugees Win The Right to Stay*, Green Left Weekly found at: <http://www.greenleft.org.au/back/2004/583/583p11.htm>

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