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## TEMPORARY PROTECTION

### The New Cornerstone of Australia's Refugee and Humanitarian Response

As Michael Wooldridge, the federal Minister for Health, noted in August 1998, when launching a GP's manual on refugee health, 'creating uncertainty and insecurity...is one of the most dangerous ways to add to the harm that torturers do'. At the launch the minister attacked the views of Pauline Hanson's One Nation Party for its 'spurious claim...that, at best, Australia should only be a temporary haven for refugees before they are sent back again when "things are better". Dr Wooldridge warned that the policies of One Nation would 'continue the sufferings of refugees who have been tortured and could well complete the insidious work that torture began'.

One year later, One Nation's 'deeply flawed and dangerous' proposal was approved as official policy for all refugees who arrive in Australia without a valid visa.

*Borderline*, Peter Mares, UNSW Press 2001 at p.26

#### □ Overview

The creation of the Temporary Protection Visa<sup>1</sup> ("TPV") for unauthorised arrivals (read "boat people") towards the end of 1999 was highly controversial, and greeted with outrage and concern by refugee advocates around the country. It was, however, seen as the exception to the rule. The operating norm was that Australia offered permanent protection to refugees, but these particular refugees – for various reasons – would fall outside the norm.

On 27 September 2001, the Government created two new subclasses of TPV and introduced changes to other aspects of the Refugee and Special Humanitarian Program ("RSHP"). The Government has portrayed these moves as being targeted at particular groups of refugees who are, essentially, morally undeserving of permanent protection. Once again, the framework offered to the Australian community is one where Australia

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<sup>1</sup> Subclass 785

has a generous program of permanent protection, but these “special” groups will not be entitled to it. Temporary protection is still presented as the exception to the norm.

In our view, what the Government’s legislation<sup>2</sup> actually does is *change the norm*. It fundamentally alters Australia’s RSHP from being a program which primarily offers permanent protection to one which will be dominated by temporary protection. In other words, the “usual” protection offered to refugees will be temporary – permanent rights will be reserved for special cases deserving of such. We now hear from the Government that Australia’s only obligation under the Convention is not to refole – anything beyond that is, it seems, a luxury.

This change in emphasis in the RSHP is accompanied by a shift in the moral paradigm often used by the Government to justify its policies. We are accustomed to the Minister’s effective classification of refugees as “good” and “bad” – the “good” refugees wait patiently offshore for entry into Australia; the “bad” refugees jump the queue by arriving here unlawfully.

This paradigm no longer applies. Whether people seek asylum offshore or onshore has ceased to be the major determinant of their moral worthiness for protection.

Now, a “good” refugee is one who goes directly to the nearest possible country of first asylum *and stays there*. “Bad” refugees move through these apparently safe countries, finding the one that best suits them and gives them an unfair advantage over others. It doesn’t in fact matter whether the country in which they finally “choose” to lodge their applications for resettlement is Australia or elsewhere – punishment is still applied.

#### ❑ **The legal fiction of the “offshore entry person”**

The journey into this changed regime begins with the creation of a new class of person – the “*offshore entry person*”. The Government’s reasons for creating this legal fiction have been well publicised and won’t be canvassed here.

Offshore entry people are those who:

- (a) entered Australia at an *excised offshore place* after the excision time; and
- (b) became an unlawful non-citizen because of that entry.<sup>3</sup>

The new definition of “*excised offshore place*”<sup>4</sup> includes:

- (a) Christmas Island
- (b) Ashmore and Cartier Islands
- (c) Cocos Islands
- (d) Australian sea and resource installations
- (e) *Any other external territory, or island which forms part of a State or Territory, which is prescribed by regulations.*

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<sup>2</sup> Migration Amendment (Excision from Migration Zone) Act 2001 and Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001

<sup>3</sup> Migration Act s.5(1)

<sup>4</sup> *supra*.

The legislation is specifically drafted so that a person's status as an offshore entry person endures after they leave Australia. If they subsequently lodge an application for protection from offshore, the options available to them are severely circumscribed as a direct consequence of their previous arrival in an excised offshore place. This is discussed in more detail when we look at the new TPVs which have been created.

The legislation gives the Minister a blanket power to excise, in the future, any other non-mainland parts of Australia which he considers necessary (without being facetious, this theoretically means that Stradbroke Island could be excised if any boats managed to make their way there). Furthermore, any future excisions can be done by regulation without prior parliamentary scrutiny.

Contrary to public information issued by the Minister and DIMA, the locations listed above have not been excised from the migration zone, and offshore entry persons are not treated legislatively as if they never set foot in the migration zone. In fact, their status as unlawful non-citizens continues to be governed by s.14<sup>5</sup>, and the definition of "migration zone" continues to include external territories and islands. In summary, an offshore entry person is still treated by the Migration Act as someone who has:

- entered Australia; and
- is in the migration zone.

The real limitations placed on offshore entry persons begin with the new s.46A.

S.46A now makes any application for a visa invalid (and therefore DIMA is not required to even accept it for lodgement) if the application is made by an offshore entry person who:

- (a) is in Australia; and
- (b) is an unlawful non-citizen.

On first reading, the drafting of s.46A seems tautologous – why include the requirement in (b) to be an unlawful non-citizen when the definition of "offshore entry person" already prescribes unlawfulness? This is, in fact, intentional, and sets up the following structure:

- The ban on lodging applications (which includes protection visas) only applies to offshore entry persons whilst they *remain* in Australia as a consequence of their unlawful arrival;
- If they leave Australia, their status as an offshore entry person endures because nothing ever changes the fact that, at a prior time, they *became* unlawful non-citizens when they entered Australia at an excised place. Their continued status as an offshore entry person ensures that:
  - The only visa they can apply for in order to return to Australia lawfully is the new Subclass 447 TPV; and
  - Having entered Australia lawfully on a TPV, they are no longer subject to the s.46A ban and can apply for a protection visa in Australia. However, their ability to obtain a permanent protection visa is severely constrained.

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<sup>5</sup> MA s.14 defines unlawful non-citizens as "persons in the migration zone who are not lawful"

Similarly to s.48A, the Minister has power to personally waive the s.46A ban and allow an application to be lodged if it is in the public interest. This is a non-compellable ministerial discretion and there are not, at present, any policy directions or guidelines which indicate what the Minister will consider to be in the public interest.

Another legal fiction is created in relation to detention. The existing clauses of s.189 (which provide that an unlawful non-citizen in the migration zone *must* be detained) are amended to exclude anyone in an excised offshore place. New clauses have been added which state that any unlawful non-citizen in an excised offshore place *may* be detained. The result? *There is no mandatory detention of unlawful non-citizens in excised offshore places.*

The illusory effect of these provisions is soon revealed when one examines the de facto powers that can be exercised over an offshore entry person who is, de jure, not in immigration detention. For completeness, however, we note that even if an offshore entry person is overtly detained, s.195 (which contains the right to apply for a visa within 2 working days etc.) does not apply to them. It is hard to see why this exclusion was needed given the outright ban contained in s.46A.

The key provision in this new offshore entry person regime is s.198A, which allows DIMA and ADF officers to “*take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3)*”.

These declarations by the Minister will state *inter alia* that the third country provides:

- access to effective asylum procedures;
- protection during processing; and
- if assessed as refugees, protection (which meets relevant human rights standards) until voluntarily repatriated or resettled.

These declarations are entirely at the discretion of the Minister without, for example, the safeguard which exists in s.91N(3) (where the Minister has to actually receive advice from UNHCR). It is impossible not to be skeptical about the integrity of such declarations given the domestic political imperatives which have driven their creation. Furthermore, one has to query what human rights standards will be applied by a Government which has itself been the subject of intense criticism from many sectors for its own breaches of human rights in relation to asylum seekers.

Officers who are “taking” these offshore entry people to other countries are entitled to:

- (a) place the person on a vehicle or vessel;
- (b) restrain the person on the vehicle or vessel (*query whether this will include chemical restraints*);
- (c) remove them from the vehicle or vessel; and
- (d) use such force as is necessary and reasonable.<sup>6</sup>

The farcical provision is s.198A(4), which states that people who are being “taken” elsewhere under this section are not in immigration detention!!!

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<sup>6</sup> MA s.198A(2)

To complete the punishment, s.494AA contains a bar on the bringing of legal proceedings in relation to just about everything involving offshore entry persons.

□ **What has changed in the offshore program?**<sup>7</sup>

A lot.

The existing Refugee and Humanitarian (Migrant)(Class BA) has been abolished and replaced with the new Refugee and Humanitarian (Class XB)<sup>8</sup>. While this might appear semantic, it actually reflects a fundamental change in the direction of the program. The RSHP is no longer a migrant program – permanent residence is not guaranteed and may in fact prove to be the exception. *For the first time, the RSHP offshore visa class includes temporary as well as permanent visas.* They are:

- 200 (Refugee)
- 201 (In-country Special Humanitarian)
- 202 (Global Special Humanitarian)
- 203 (Emergency Rescue)
- 204 (Woman at Risk)
- 447 (Secondary Movement offshore Entry (Temporary)) **(new)**
- 451 (Secondary Movement Relocation (Temporary)) **(new)**

The two new TPVs are only available offshore and form part of the RSHP quota. It will be critical to examine projections by DIMA in relation to composition by visa subclass of future RSHP intakes, to see what percentage allocations are made for temporary entry.

The shift of offshore applicants from permanent to temporary protection is achieved by adding certain criteria to the majority of permanent offshore RSHP visas. These additional criteria must be met at the time the application is lodged and are as follows:

- (1) The applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:
  - (a) of the country; or
  - (b) through the officers of the United Nations High Commissioner for Refugees located in that country.
- (2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.<sup>9</sup>

That is, the Minister will only grant permanent visas to people who, in his view, have fled from their country of origin directly to a “safe third country” and remained there.

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<sup>7</sup> All changes discussed in relation to both offshore and onshore only apply to applications lodged after commencement.

<sup>8</sup> Migration Regulation Schedule 1, item 1402

<sup>9</sup> Schedule 2, subclauses 200.212, 202.212, 204.213 – visa subclasses 201 and 203 are not affected since, by their nature, they only apply to applicants who are within unsafe countries

Note that the current drafting of these criteria does not exclude from examination the country in which the applicant is residing at time of lodgement of the application. Technically, therefore, these amendments effectively wipe out the offshore program. In a public briefing held by DIMA in Brisbane on 22 October 2001, the department acknowledged the drafting error but assured those present that “no-one would be adversely affected”, and “once a government is formed, it will be fixed up”!

There are complex legal questions involved in the application of these criteria, such as the legal definitions of “*resided*” and “*effective protection*”. There are also enormous resource implications for overseas posts as courts have made it clear that notions of effective protection require individual assessments of each and every applicant’s circumstances:

Information concerning the attitude of the third country generally to persons in positions analogous to that of the applicant is relevant to the inquiry. But the inquiry is directed to the rights and treatment which the third country will accord to the particular applicant.<sup>10</sup>

What happens to applicants who do not satisfy these new criteria? To answer that, it is necessary to examine the detail of the new TPVs which now form part of the RSHP.

- **Subclass 447 Secondary Movement Offshore Entry (Temporary)**

The operation of the new subclass 447 visa is very limited – it can only be granted to “offshore entry persons” ie. this is the mechanism (the only one) by which persons who are “taken” to declaration countries can be considered for re-entry into Australia.

The essential criteria for grant of the visa to offshore entry persons effectively mirror those for subclasses 200, 202 and 204. The applicant must be:

- (1) subject to persecution in the applicant’s home country; or
- (2) subject to substantial discrimination, amounting to gross violation of human rights, in the applicant’s home country; or
- (3) a female person who is subject to persecution or is registered as being of concern to the United Nations High Commissioner for Refugees.<sup>11</sup>

It is a single entry visa – the holder cannot travel outside Australia without losing its protection. The temporary resident status of the visa holder ensures that there is no family reunion during the life of the visa, and limitations are placed on Centrelink benefits, access to English classes, Medicare and so on.

*The 447 visa provides for a lawful stay in Australia of 36 months, and the holder cannot be granted a further substantive visa other than a protection visa.*

Just in case anyone thought there may be light at the end of the tunnel.....

Amendments have been made to the permanent onshore protection visa (subclass 866). To be eligible now for the grant of that visa, the applicant must not have held a subclass

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<sup>10</sup> per Lehane J. in *Al-Anezi v MIMA* [1999] FCA 355 at paragraph 15

<sup>11</sup> MA Sch.2, paragraph 447.211

447 visa since last entering Australia. The Minister, however, may waive this requirement if he is satisfied that it is in the public interest to do so.<sup>12</sup> The power to waive is not personal to the Minister – it can (and will be) delegated and a refusal to exercise the waiver will, *prima facie*, be reviewable by the RRT.

It is important to realise that there is no ban on a subclass 447 visa holder *making* the application for the 866 – the application will be valid and must be assessed by DIMA. However, success depends entirely upon gaining the waiver.

Applicants who are assessed as *not* meeting the 866 criteria will then be assessed against the subclass 785 – the onshore TPV which resides in the same visa class. Thus the three-year merry-go-round begins.....

- **Subclass 451 Secondary Movement Relocation (Temporary)**

The new subclass 451 TPV is, in substance, identical to the 447. But there are important differences:

- An “offshore entry person” cannot apply for it. This ensures that the only option for these people is the 3 year, 447 visa;
- The 451 TPV is valid for 5 years, but, like the 447 and 785, is single entry only; and
- The holder of a subclass 451 visa can apply for a permanent subclass 866 visa without restriction or having to meet additional criteria. However, the permanent visa cannot be granted until at least 54 months have passed since time of entry into Australia unless the Minister specifies a shorter period.

In summary, the subclass 451 TPV has been created to “pick up” all the offshore RSHP applicants who have been screened out of eligibility for permanent visas. These are the “bad” refugees who did not stay put in the first safe country available to them. Their punishment is a life in limbo for a further 5 years and grossly delayed family reunion. At least, however, the end of that period should see the granting of permanent protection (assuming the law hasn’t changed again).

It is critical for potential Australian sponsors of RSHP applicants to understand that there is no possibility of family and friends “electing” to apply *only* for permanent residence from offshore. As all offshore visas are in the same class, an applicant will be considered against the criteria for each visa subclass within it. In other words, the offshore post will decide who gets a permanent visa and who gets a temporary one.

#### ❑ **What has changed for onshore protection applicants?**

We have already canvassed most of the changes to the criteria for the grant of permanent protection within Australia.

For holders of subclass 451 visas, the position is clear – after a 5 year wait, they will be eligible for a permanent subclass 866 visa.

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<sup>12</sup> MR Sch.2, paragraph 866.214

The position is far more complex for holders of:

- Subclass 447 visas (offshore entry persons);
- Existing subclass 785 visa holders who did not lodge an application for permanent protection before 27 September 2001; and
- Future holders of subclass 785 visas.

We have explained that the holder of a subclass 447 visa can only be granted permanent protection if the criterion prohibiting this is waived.

The holders of subclass 785 visas have also been placed in a difficult position. Amendments to the regulations now specify that – just as with applicants for offshore permanent visas - they cannot be granted permanent protection if they travelled through a safe third country on their way to Australia.<sup>13</sup> Although the Minister has power to waive these requirements if it is in the public interest, there are no policy directions or guidelines at present indicating what will meet this test.

The irony of it all is that, from now on, the people in Australia who will gain immediate access to permanent protection are those whom the Minister used to regularly demonise as not being “real” refugees – people who travel directly to Australia by plane as the holders of valid tourist or student visas.

#### ❑ **Can holders of subclass 447 and 785 visas ever get permanent residence?**

We cannot stress enough that there are no bans on 447 and 785 visa holders applying for a permanent subclass 866 protection visa. Valid applications can be lodged and must be assessed by the department.

They will, however, face the additional hurdles described above. Applicants who are unsuccessful in obtaining a permanent visa will be assessed against criteria for a 785 visa and, in all probability, will be granted that visa. *A failure to gain permanent protection will not result in people being deported back to countries where they may face persecution.*

Obviously, however, this is far from satisfactory. The goal of all refugees is to reestablish a life, be reunited with family members, recover from trauma and plan for the future. This is extremely difficult – if not impossible – when life must be lived on a succession of temporary visas.

The real hope for 447 and 785 visa holders may well lie with either the RRT or the courts. As we have indicated in both this section and the section on judicial review, there is clearly scope for the courts to intervene in such cases.

However, *getting* these cases before the RRT and the courts may be a complex exercise. As a discussion of those barriers and possible solutions requires a consideration of legal strategies which may be utilised by this service, we have, regrettably, decided not to make that section of our analysis available to the public.

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<sup>13</sup> MA Sch.2, paragraph 866.215

□ **What are the broader effects of a Temporary Protection policy?**

The impact of temporary protection on individuals has been canvassed throughout this paper. At SBICLS, we also have a broader concern for the long term integrity of the RSHP and the community's acceptance of refugee resettlement in this country.

A Temporary Protection regime which dominates the RSHP means that a large proportion of refugees in Australia will, in the future, be unsupported. They will have restricted income support; limited (if any) access to English language tuition, which in turn impacts severely upon their employability; complete denial of family reunion – they can't even travel to another safe country to visit their family without relinquishing Australia's protection.

If they arrived by boat, they face endless three year cycles of anxiety and uncertainty. Every three years they will reapply for protection. Every three years they will retell their stories and relive their experiences. Every three years they will wonder if they are to be sent back. The capacity for healing, recovery and to move on is severely compromised.

What level of community support will be left for a program which, in the eyes of ordinary Australians, will be seen to "let in" refugees who never learn to speak English, never get jobs, and are never freed of anger, frustration and despair?

*c. South Brisbane Immigration and Community Legal Service Inc.  
Brisbane, 23 October 2001*