



Refugee & Immigration Legal Centre Inc

Discussion Paper – Recent developments and future directions

Recent developments

Key developments of a legal and/or policy nature in the last year include:

- New non-refugee, 'mainstream' visa options for TPV/THV holders refused a further Protection Visa (FPV) (27 August 2004)
- New 18-month Return Pending Bridging Visa for refused FPV applicants (27 August 2004)
- Generally, beneficial application of the '7-day rule'; thus, in most cases, grant of permanent, rather than further temporary, Protection Visas
- Generally, increased approval rates for FPV applicants from Afghanistan and Iraq at DIMIA level, and grant of Permanent Residence to most (whether as result of primary or review decision)
- New Removal Pending Bridging Visa for people whose removal is not reasonably practicable, amended in June to remove the 'undertaking to co-operate with removal' and 'abandonment of legal rights' requirements (May and June 2005)
- *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005); the duty of care to immigration detainees required the government to ensure that a level of medical care was made available to them which was reasonably designed to meet their health care needs including psychiatric care and they did not have to settle for a lesser standard of mental health care because they were in immigration detention (May 2005)
- New provisions for release of children and their families into Residential Housing and/or 'community detention arrangements' (June 2005)
- Legislative statement of principle that children will be detained only as a measure of last resort (June 2005)
- New Ministerial discretion provisions containing a broader range of options for grant of bridging or substantive visas to people detained, including provision to grant a substantive visa to a person with another matter 'on foot' (June 2005).
- New three-month time limits for processing of Protection Visa applications at the primary (DIMIA) and administrative review (Refugee Review Tribunal) stages (June 2005)
- Deadline for finalisation of most FPV cases by 31 October 2005 (June 2005)
- Oversight of implementation of June changes by Inter-Departmental Committee, chaired by the Secretary of the Department of Prime Minister and Cabinet (June 2005)
- New legislative powers and role for Commonwealth Ombudsman to review and make recommendations including in relation to the release from detention centres and/or grant of permanent residence to people detained for two or more years (June 2005)
- Palmer Report – "The Inquiry into the circumstances of the immigration detention of Cornelia Rau", which identified systemic failures in the operation of the immigration compliance detention systems by DIMIA and associated serious organisational attitudinal and 'culture' flaws (July 2005)

- Establishment of DIMIA 'Change Management Taskforce' (July 2005)
- Excision of vast expanses of mainly island territory spanning from East to West of Northern Australia (July 2005)
- Re-introduction into the Senate of Migration Litigation Bill 2005, which includes measures to impose further, serious restrictions on a person's rights to judicial review (July 2005)
- *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 136 (27 July 2005); a further Protection Visa application requires consideration under Article 1C(5) of the Refugees Convention as to possible cessation of refugee status where, "if the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognised as a refugee."
- Announcement by Immigration Minister of 'Palmer Plus', being further reforms flowing from the Palmer Report, precise details of which are unclear (August 2005)

Overview of changes

In short:

- The 27 August 2004 changes have had very little practical relevance, given that (a) most FPV applicants have been granted Permanent Residence – an overwhelmingly positive development; and (b) most FPV applicants cannot access the 'mainstream,' visas.
- The June 2005 changes represent a significant– albeit limited and inadequate - development in the process of reform toward a fairer and more humane system. As we commented at the time of the announced changes, much would depend on whether the agreement was implemented quickly and in good faith. If it is, it has the real potential to limit the damage and suffering, and end the agonising uncertainty for many of those people subject to the system, particularly those in immigration detention or TPV/THV holders applying for further protection.
- Thus far, many of the proposed changes appear to have been implemented reasonably quickly, and in general conformity with the announced changes. For example, children and their families were released from detention centres into 'community detention arrangements' as at 28 July 2005. In addition, FPV applications are generally being fast-tracked, and processing of Protection applications at the primary and review levels appears, on initial indications, to have sped up.
- Further, the Minister has been actively exercising her new discretionary powers to intervene or offer visas to many long-term detainees. This includes the grant of RPBVs, as well as some other visas, depending the circumstances. In essence, many long-term detainees have been or are likely to be released from detention into the community shortly. Further, most have access to a range of health and welfare benefits.
- The Commonwealth Ombudsman has commenced review of other long-term detainees.
- Thus, in practice, the changes have resulted in a move toward detention of people within detention centres being used a measure of last resort.

- We understand that the IDC has met regularly with key stakeholders to monitor and review implementation of the changes.
- The changes clearly are inadequate in certain fundamental respects, most particularly in their retention of the mandatory, indefinite and non-reviewable detention system and the TPV regime. Specific problems include:
 - ⇒ the continued lack of transparency and discretionary nature of provisions relating to the release from detention, as well as inconsistency of application of the new measures
 - ⇒ lack of a truly accountable, independent, judicial oversight of a person's detention
 - ⇒ lack of understanding of and provision for psychological effects in delay on processing
 - ⇒ lack of clarity, communication and urgency in relation to the operations of the Ombudsman
 - ⇒ two-year period for Ombudsman review is too long – needs to be shortened to three months
 - ⇒ lack of proper support for detainees post-release
 - ⇒ continued inconsistency and delay with processing of some FPV applications

Future priorities

- Detention – full implementation of detention as a measure of last resort, including detention for strictly limited time and purposes of health and security screening, and independent, periodic judicial oversight of a person's detention.
- Abolition of the TPV regime. In the meantime, exercise of Ministerial discretion to waive 30 and 54 month waiting periods for access to permanent residence, as well as other barriers to permanent residence such as the '7-day rule'.
- Full case management of the health, welfare and legal needs of people who are detained, released and/or on TPVs or THVs.
- Full access to health, welfare and free legal assistance entitlements, to be provided to all those released from detention centres into the community.
- Abolition of the Pacific Solution and urgent resolution and resettlement of those still detained on Nauru.
- Full review and reform of the interdiction, including turnarounds and related excision and removal policies.
- Full review and reform of the refugee determination process, including flawed assessments of country information, 'expert' evidence, the law and credibility. A central feature of this is the striking lack of understanding and/or practical application of procedural fairness.
- Introduction of a formal Complementary Protection system, including introduction of an onshore permanent humanitarian visa class, and decrease in use of Ministerial discretion, particularly in relation to our human rights treaty obligations.

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