

**HUMAN RIGHTS WATCH COMMENTARY ON AUSTRALIA'S
TEMPORARY PROTECTION VISAS FOR REFUGEES
May 2003**

I. Temporary Status is Inappropriate for Fully Adjudicated Refugees

A. Australia's Policy Has No International Precedent

Australia is the *only* country to grant temporary status to refugees who have been through a full asylum determination system and who have been recognized as genuinely in need of protection for 1951 Refugee Convention reasons. Temporary Protection, as it is used in Europe and as permitted by various United Nations High Commissioner for Refugees (UNHCR) ExCom¹ Conclusions,² is granted to asylum seekers as a group when they are fleeing an emergency that is self-evidently causing forced displacement or when the number of arriving asylum seekers threatens to overwhelm the administrative capacity of receiving states. In all other instances refugees are able to enjoy full and permanent protection after they have gone through the refugee determination process.

In the United States, temporary protection is a status that exists *in addition to* (and not in lieu of) regular refugee status. Therefore persons already in the United States who are nationals of countries that are designated as unsafe are allowed to enjoy temporary protection while their asylum applications are being considered, and those who cannot make out a traditional asylum claim are allowed to remain in the United States with temporary protected status. In all of these examples, temporary protection is a way of giving asylum seekers something closer to refugee status, with certain social rights afforded, *earlier on*, in exchange for postponing or in addition to their right to lodge individual asylum claims.

B. Temporary Protection Should Have a Finite Duration, Eventually Allowing for a More Secure Status

Member states of the European Union harmonized their use of temporary protection in their *Directive on Minimum Standards for Giving Temporary Protection*.³ A copy of this text, which could be considered a model in terms of attempting to balance refugee rights with legitimate state interests, is available [here](#). The most important articles, setting it apart from Australian practice, are perhaps Articles 4 (which sets a three year maximum duration for temporary protection, after which return or a more secure status must be granted), Article 17 (which guarantees access to procedures for permanent asylum), and Article 15 (family reunion).

In non-EU European countries, domestic legislation contains a similar view of temporary protection. In Norway, for example, temporary protection, which includes a right to family reunion, is given one year at a time, but automatically becomes permanent if it is renewed four times. In Switzerland, temporary protection affording a right to family reunion is granted to specific nationalities after consultations with other governments, non-governmental organizations, and UNHCR. After five years, all temporary protection holders have the right to apply for permanent status. In Denmark, which is not legally bound to follow EU asylum decisions though a member state of the EU, specific short-term legislation akin to the temporary protection described above for nationalities affected by emergency situations is introduced. The exceptional nature of temporary protection is thereby emphasized.

In the United States, temporary protected status is granted to nationals of designated countries who are unable to return home because of an ongoing armed conflict, an environmental disaster or some other extraordinary and temporary situation. Again, it is a means of immediately granting to nationals of

designated countries (even those found to be unlawfully present in the U.S.) a set of rights, including the right to work and a limited right to travel outside of the United States. Individuals who are unable to make out a claim for refugee status can still be granted temporary protected status, and all individuals eligible can be granted temporary protected status *before* they have their asylum claims processed. In other words, temporary protected status in no way excludes a later or simultaneous application for permanent refugee protection. As of February 2003, countries (or parts thereof) designated under temporary protected status included: Angola, Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia and Sudan. Individuals who have been rejected from refugee status and who have held temporary protected status for many years may be able to adjust their status to enjoy permanent residence under other provisions of U.S. law.

Refugee status can cease to apply to an individual if and when he or she is able to enjoy full protection in his or her home country, or in another country. However, given the nature of many refugee movements, resumption of national protection, with full enjoyment of human rights, may never be forthcoming. Therefore, the conversion of long-standing refugees into legal residents, permitted to remain by virtue of their long residence and significant ties to a country, is a policy in line with human rights standards. The alternative, whereby refugees have their status withdrawn and become subject to forced return regardless of their ties to the host country – as is facing the East Timorese in Australia today – is divisive and destructive to the multicultural fabric of society. After several years, long term refugees have built considerable economic and social ties to their host country. However, when long term refugees have only a temporary status, they will be required to return home, whereas other members of their family who might be naturalized citizens or labor migrants would be allowed to remain in Australia. The priority for host countries should be to facilitate a process whereby individual refugees are able to find “durable solutions” to their previously disrupted lives instead of compounding their experience of displacement.

There is no evidence to suggest that those refugees who were once asylum seekers in Australia require less durable protection than those who were resettled from overseas. To the contrary, an asylum seeker recognized as a refugee by the Australian system is statistically more likely to be someone facing individualized or ethnically-based threats of persecution within the meaning of the Refugee Convention; threats which often remain unaffected by “regime change” or the end of armed conflict.

C. No Justification in International Law for Re-Proving Refugee Claims

Australia is the *only* country to require refugees who have already been recognized as genuine refugees, as a result of rigorous and demanding determination procedures, to *re-prove* their claim in light of new circumstances, several years later. The Minister for Immigration is currently seeking legal advice as to whether this periodic re-assessment of claims by those holding Australian Temporary Protection Visas (TPVs) should be linked to Article 1A (defining a refugee) or 1C (describing when refugee status may cease) of the 1951 Refugee Convention.⁴ This quandary arises only because Australian practice is currently a *misuse and distortion* of temporary protection.

Nothing in the drafting or preparatory notes for Article 1A of the Refugee Convention suggests that States would determine status over and over again in each individual case. Article 1C speaks of conditions under which an individual can no longer “refuse to avail himself” of the protection of his country of nationality or former habitual residence, which does require a legal inquiry once there is a possibility that refugee status can be ceased. However, UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status states that “[a] refugee’s status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.”⁵ This position is also quoted by DIMIA in its own policy literature. Review every three to five years may not be considered “frequent,” but combined with the rights-limited and conditional nature of a TPV, refugees holding these visas are certainly living in Australia without any sense of security. Evidence from trauma

counseling centers such as Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) and other medical practitioners regarding the anxieties of TPV-holders support this assertion.

II. Procedural Failings in Australian TPVs

A. Australian TPVs Unfairly Shift the Burden of Proof

As mentioned above, status under the Refugee Convention can only be withdrawn (except in a revocation because of fraudulent statements, etc.) using the “cessation clauses” in Article 1C of the Refugee Convention. UNHCR advises: “The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively...”⁶ There is a general consensus among refugee law experts and state members of UNHCR that the withdrawal of status is a weighty matter, to be approached with utmost caution.⁷ Prof. Goodwin-Gill, a leading international refugee law expert, has emphasized that the onus should be on the host state authorities, not the refugee, to show that an apparent change of circumstances in the country of origin is significant, effective, durable, substantial and clearly removes a fear of persecution from the individual concerned.⁸ The limited case law relating to cessation has confirmed this view.

If and when the Australian government begins to deliver negative decisions on applications from Afghan or Iraqi TPV-holders to extend their protection, previously recognized refugees will be turned back into rejected asylum seekers and will fear the possibility of forced return. UNHCR has not made a cessation declaration with regard to Afghanistan or Iraq nor in any way advised Australia that it is appropriate to start reassessing Afghan and Iraqi protection needs. In addition, Afghan TPV holders who have been reviewed by Department of Immigration, Multi-Cultural and Indigenous Affairs (DIMIA) have been unfairly put in the position of shouldering the burden of proof, which violates the spirit of the Refugee Convention’s cessation clauses.

Article 1C of the Refugee Convention also includes a proviso, in both cessation clauses 5 and 6, regarding people who experienced such gross human rights violations that they should never be returned to their country of origin, regardless of changed circumstances. This humanitarian exemption, recognizing for example the psychological hardship of going back to a country where one was tortured or had one’s family killed, was originally intended to apply to Jewish Holocaust survivors only. However, UNHCR encourages states to apply this proviso as “a more general humanitarian principle”⁹ to refugees today. People who were raped, tortured or otherwise subjected to gross human rights violations by the Taliban or under Saddam Hussein’s regime, for example, may have a very understandable wish never to return home, regardless of the change of government.

B. The 7 Day Rule – Inappropriate Use of Temporary Protection as a Penalty Against Secondary Movers

Australia is the *only* country to have legislation permitting refugees under the 1951 Refugee Convention to remain in the limbo of temporary protection forever. The complex provisions relating to deterrence of secondary movement by means of the “seven day rule,” mean that persons more recently granted Australian TPVs can be banned from ever applying for a permanent protection visa. The consequences of this unprecedented situation are laid out in the Human Rights Watch report, *By Invitation Only*, along with the ways in which the TPVs violate refugees’ human rights.¹⁰ Most egregious is the flagrant disregard for the well-established human rights principle of family unity in the TPV system. UNHCR has urged states to respect this principle even in the context of temporary refuge.¹¹ While European governments limit the family reunification rights of persons with temporary protection, they do allow some reunification from day one and promise that fuller rights are afforded alongside permanent status if the person remains unable to return home. In the United States, individuals with Temporarily Protected

Status gain full family reunification rights when their asylum claims are adjudicated and they gain recognition as refugees.

Australia is also the *only* country that resettles refugees from overseas but grants some of them temporary protection, lasting for five years. Those who get this kind of TPV have no less need for durable, permanent protection than other resettled refugees; they are simply those who have spent more than seven days in one country of asylum before moving onto another from which they request resettlement. Since this factor has no direct logical relation to the duration of required protection, it should be seen for what it is – a penalty unfairly imposed upon people who may have had good reason to move between various host countries.

C. Unfair Limits on Judicial Review

The issue of Australia's attempts to strip asylum seekers of their judicial appeal rights via the "privative clause" is beyond the scope of this memo; however, it must be understood that the issue impacts upon refugees having their TPVs re-assessed as well as first-time asylum seekers. In the case of the former, limits on judicial appeals mean, in effect, limited judicial oversight of what should properly be regarded as cessation procedures. As explained above, such procedures should be particularly fastidious as to their fairness, thoroughness and independence, so this limitation is a matter of serious concern. The fact that refugees facing such procedures are not guaranteed legal representation when they make their only appeal to the Refugee Review Tribunal already suggests that they may not be getting a fair hearing, with full due process guarantees.

The February 4, 2003 High Court ruling on the scope of the "privative clause" gives some cause for optimism that at least some refugees holding TPVs will be able to appeal beyond the Refugee Review Tribunal to an independent court, rather than just the Minister for Immigration's discretion, if they want to fight the decision that conditions in their home country now permit their safe return.

Finally, while any decision concerning withdrawal of refugee status should be based firmly on protection need, there should also be ways by which an individual refugee long settled in Australia, even if the cessation clauses were formally invoked in their case, could appeal against an expulsion decision once his status is removed. Such a refugee will have acquired rights by virtue of his long residence and level of local integration. Similarly, UNHCR's Excom has noted that there will be refugees who, regardless of any changed circumstances meriting cessation, cannot be expected to leave their country of refuge "due to their long stay in that country resulting in strong family, social and economic links there."¹² Theoretically, the Minister for Immigration retains discretion to avoid such hardship cases, yet he has not yet chosen to exercise this discretion in the cases of East Timorese refugees, threatened with losing their protection, who have been in Australia for many years and have a very strong claim to permanent legal residence.

III. TPVs Can Create a Misallocation of Resources

The government of Australia has argued that when someone's refugee status – in this case a TPV – is withdrawn, and that individual is subsequently returned to their country of nationality or former habitual residence, this somehow "frees up space" for other, new and more needy refugees. There is no direct way in which this statement is true, as extra refugee quota places are not added as a consequence of each departure. If an individual TPV holder were dependent on long-term welfare, his or her return might conceivably free up some welfare resources, but it is questionable whether the administrative costs of re-assessment, detention and deportation would outweigh any such savings. Nor is there any budgetary mechanism for such welfare savings to be reinvested in future refugee resettlement or international aid benefiting refugees. It is therefore an illusory trade-off.

In fact, there is a shameful lack of economy in Australia's TPV system, because it requires judging every individual claim *at least* twice. There were 881 such cases due for reassessment in February and 592 in March, most of whom are Iraqis and Afghans. This is a huge number of cases for DIMIA, let alone the Refugee Review Tribunal, to reconsider if they are going to do it properly, requiring re-investigation of conditions in each person's home area of Afghanistan and threats posed by non-state agents of persecution, for example. Therefore, while EU temporary protection systems are relieving European taxpayers of millions of dollars of asylum processing costs, Australia's temporary protection system may be virtually doubling those costs.

Finally, it should be noted that migration research suggests that granting refugees a secure legal status implying permanent residence does not necessarily mean all refugees will stay permanently in the host country. The majority of Chilean refugees, for example, chose to return from Europe and the U.S. to Chile, despite many years in exile. Refugees, as persons who have suffered the trauma of persecution followed by that of forced displacement, should be trusted to make rational choices that are in their own best interests, knowing better than any central decision-maker where is truly "home" for them.

¹ The Executive Committee of the High Commissioner's Program ("ExCom") is UNHCR's governing body. Since 1975, ExCom has passed a series of Conclusions at its annual meetings. The Conclusions are intended to guide states in their treatment of refugees and asylum seekers and in their interpretation of existing international refugee law. While the Conclusions are not legally binding, they do constitute a body of soft international refugee law. They are adopted by consensus by the ExCom member states, are broadly representative of the views of the international community, and carry persuasive authority. Since the members of ExCom – including Australia – have negotiated and agreed to their provisions, they are under a good faith obligation to abide by the Conclusions.

² See, e.g. Excom Conclusion No.19 (XXXI) – 1980 para (e) (stressing "the exceptional character of temporary refuge...", and linked it closely to "situations of large-scale influx."); Excom Conclusion No.22 (XXXII) – 1981 (laying out detailed guidance regarding the treatment of refugees temporarily admitted in situations of large-scale influx, including para (h) "family unity should be respected;" and para (i) "all possible assistance should be given for the tracing of relatives;" and para (n) "they should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution;"); Excom Conclusion No.74 (XLV) – 1994 para (r) (stating that temporary protection can be "a pragmatic and flexible method of affording international protection of a temporary nature in situations of conflict or persecution involving large scale outflows;" and in para (t) noting "that in providing temporary protection States and UNHCR should not diminish the protection afforded to refugees under those instruments [the Refugee Convention and Protocol]").

³ E.C. Council Directive 2001/55/EC

⁴ Article 1A of the 1951 Convention Relating to the Status of Refugees states in relevant part

that "the term "refugee" shall apply to any person who: (2) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Article 1C of the 1951 Convention Relating to the Status of Refugees states in relevant part that "[t]his Convention shall cease to apply to any person falling under the terms of Section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re- acquired it, or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this

paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992, para.135.

⁶ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 116.

⁷ UNHCR Excom Conclusion No.69 (XLIII) – 1992 requires states to take a very careful approach to any consideration of cessation, apply clear procedures and arrange for the appropriate involvement of UNHCR in an advisory role. Para (a) “...States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.” Para (b) refers to “the fundamental, stable and durable character of the changes” in the country of origin. Para (d) requires that individuals must have a fair chance to rebut the presumption of changed circumstances “on grounds relevant to their individual case.” In discussing this Excom Conclusion, UNHCR’s experts recommended that states wait for a minimum period of 12 to 18 months to be sure that any change of circumstances was durable.

⁸ Goodwin-Gill, *The Refugee in International Law* 2nd ed, Oxford, 1998, page 87.

⁹ UNHCR Handbook, para 136.

¹⁰ Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, Vol.14, No.10(C), December 2002, Section VII, pages 81-90. This report can be found at <http://hrw.org/reports/2002/australia/>.

¹¹ Excom Conclusion No.15 (XXX) – 1979 para (e) states: “In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;” [Emphasis added]. See also Excom Conclusion No.22, cited above.

¹² UNHCR Excom Conclusion No. 69 (XLIII) – 1992, para (e).