

ONSHORE PROTECTION INTERIM PROCEDURES ADVICE

No: 16

TITLE: REFUGEE STATUS ASSESSMENT PROCEDURES FOR UNAUTHORISED ARRIVALS SEEKING ASYLUM ON EXCISED OFFSHORE PLACES AND PERSONS TAKEN TO DECLARED COUNTRIES.

ISSUED: September 2002

AUTHORISING OFFICER: Assistant Secretary, Onshore Protection Branch

* The Onshore Protection Interim Procedures Advice (OPIPA) format has been adopted to formalise and standardise interim procedures advising. OPIPAs will normally be incorporated into PAM (including the PV Procedures Manual) on a regular basis after which time the individual OPIPA will cease to apply.

The following procedures apply to the assessment of claims for refugee protection made by people who are subject to the provisions of new legislation which commenced on 27 September 2001, namely people who:

- have entered or enter Australia at an excised offshore place after the excision time;
- have entered or enter Australia at an excised offshore place after the excision time and who are taken to a declared country; and
- have attempted or attempt to enter Australia and are taken to a declared country.

BACKGROUND

1. Australia's primary obligation under the Refugees Convention is not to *refoule* (return) a refugee, either directly or indirectly, to a country where they have a well-founded fear of persecution for a Convention ground. Australia's protection obligations extend to refugees who have entered Australia's territorial seas. The Pacific strategy in no way detracts from these obligations.
2. Australia's protection obligations under the Refugees Convention are not engaged by intercepting individuals who have not entered Australia's territory. Nor is Australia obliged to allow asylum seekers to enter its territorial boundaries.
3. Any asylum seekers on vessels that enter Australian territorial waters engage Australia's *non-refoulement* obligation under Article 33 of the Refugees Convention. This Article prohibits the return of a "refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

4. Against the background of high numbers of unauthorised non-citizens arriving by boat, Parliament passed a series of new laws in September 2001. The legislation is designed to strengthen Australia's territorial integrity and to reduce incentives for people to journey to Australian territories with the assistance of people smugglers. The clear message of the legislation is that people who abandon or bypass effective protection opportunities and travel to Australia will not be rewarded with a permanent visa for Australia.
5. The legislation makes significant changes to the *Migration Act 1958* (the Act) and includes:
 - *Migration Amendment (Excision From Migration Zone) Act 2001*
 - *Migration Amendment (Excision From Migration Zone) (Consequential Provisions) Act 2001*.

Legislative Framework

6. The new legislation underpinning the Pacific strategy has two mechanisms that reflect Australia's obligations under Article 33 of the Refugees Convention and other Conventions. These mechanisms are:
 - a framework to enable the Minister for Immigration and Multicultural and Indigenous Affairs to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places (offshore entry persons) (while in Australia), following consideration of protection obligations under the relevant United Nations Conventions; and
 - the ability to take unauthorised arrivals who have entered Australia at excised offshore places (such as Ashmore Reef and Christmas Island) to another country provided that the Minister for Immigration and Multicultural and Indigenous Affairs has declared under s198A of the *Migration Act 1958* that the country:
 - provides access, for persons seeking asylum, to effective procedures for assessing their needs for protection; and
 - provides protection for persons seeking asylum, pending determination of their refugee status; and
 - provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
 - meets relevant human rights standards in providing that protection.

Nauru and Papua New Guinea were declared countries under s198A of the Act on 2 October 2001 and 12 October 2001 respectively.

7. The *Migration Amendment (Excision from Migration Zone) Act 2001* amends the Act to prevent any person who enters Australia unlawfully at an "excised offshore place" (s5(1)) after the "excision time" for that place (s5(1)) from making a valid visa application in Australia. Such a person is called an "offshore entry person" (s5(1)).

8. *The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*:
- amends the Act to:
 - define a “declared country” (s.198A(3));
 - permit an officer to take an offshore entry person to a declared country (s.198A(1)); and
 - limit certain legal proceedings in relation to offshore entry persons (s.494AA(1));
 - amends the Migration Regulations to:
 - expand the criteria for the Protection (Class XA) visa; and
 - introduce the new Refugee and Humanitarian (Class XB) visa including new subclasses:
 - 447 Secondary Movement Offshore Entry (Temporary) Visa
 - 451 Secondary Movement Relocation (Temporary) Visa.

Processing an Unauthorised Arrival on Excised Offshore Places or in Declared Countries

9. To ensure fair and effective refugee assessment procedures, Australia has developed a system for processing unauthorised arrivals seeking protection who have entered Australia at an excised offshore place or who have been taken to a declared country. Any such persons subsequently brought to mainland Australia, for example as transitory persons, are to be processed according to this system. Officers dealing with such cases should consult closely with DIMIA Central Office as specific details of each case may give rise to different Migration Act issues.
10. These arrangements are modelled closely on the refugee determination process of the UNHCR. They are supplemented by arrangements which ensure the proper treatment and protection of asylum seekers awaiting a decision on their claims for protection, and while any persons found to be refugees await the provision of refugee protection in some other country.
11. For ease of reference processing arrangements are described in detail in relation to asylum seekers on excised offshore places at the section on refugee status assessment processing on excised offshore places. Variations required to these processes when undertaken in declared countries are set out separately at the section of refugee status assessment in declared countries.

REFUGEE STATUS ASSESSMENT PROCESS ON EXCISED OFFSHORE PLACES

Overview

12. Refugee status processing on excised offshore places involves the deployment of a Refugee Status Assessment (RSA) team comprised of Australian DIMIA officers to process the unauthorised arrivals.

13. The team assesses protection claims and makes a refugee status assessment (RSA) as to whether an unauthorised arrival is a refugee as defined by the terms of the Refugees Convention and Protocol, and commissions other relevant checks. In some cases DIMIA officers may conduct initial registration and bio data collection interviews before the RSA process commences, for example to identify individuals, draw preliminary conclusions as to their origins and to document reasons for their journey.
14. The RSA officer's responsibilities include:
 - establishing the identity of the unauthorised arrival;
 - assessing identity and *bona fides* issues;
 - collecting and documenting claims for refugee protection;
 - exploring these claims; and
 - assessing these claims.
15. RSA officers are responsible for ensuring the collection and documentation of all claims for refugee status. In line with procedures adopted by the UNHCR, publicly funded migration or legal assistance is not necessary. This is not provided to offshore entry persons processed under these arrangements or to persons in a declared country. It should be noted that this does not preclude an offshore entry person from making their own arrangements for assistance with the preparation and lodgment of their claims.
16. The RSA process places emphasis on interviews and oral/personal communication with asylum seekers. Interpreters are to be used wherever needed. RSA officers should take care to satisfy themselves that communication is taking place reliably between the asylum seekers and DIMIA officers during the assessment process. RSA officers are responsible for ensuring that claims and information are elicited from the asylum seeker, reflecting the obligation on Australia, as a Convention signatory, to ensure that a refugee who has entered Australian territory is not refouled.
17. All persons seeking protection are to be given every opportunity to make their claims for protection. A sensitive approach is important in all cases, but particularly when dealing with the young and vulnerable, for example minors (whether accompanied or unaccompanied), torture and trauma victims, and women at risk. It should be noted that departmental procedures provide the flexibility, where considered beneficial, to allow an adult person to attend the RSA interview with the asylum seeker to provide emotional support. The principles set out in the Gender Guidelines used in onshore protection visa decision making are to be applied in the RSA processes.
18. Refugee status assessments on excised offshore places are to utilise the legislated interpretations of the Refugees Convention in the Migration Act.

Initial Registration

19. For registration purposes, each unauthorised arrival (including offshore entry persons) is to be identified as far as possible and named on a Nominal Roll. The Nominal Roll will also include identification details regarding language spoken, claimed nationality, family composition, relationship to other arrival group members and possible claims for refugee status. An initial registration team of DIMIA officers may be deployed to obtain this preliminary information, including bio-data details and details of any family links with Australia or other countries. If an initial registration team has not been deployed, the RSA officer is responsible for collecting and documenting this information. Bio-data is recorded on a Client Registration Form and any interview that is conducted is taped wherever possible. It is particularly important to identify any family links of the asylum seeker either with Australia or with other countries of potential effective protection or resettlement.

The RSA Process

20. In deciding whether a person who is on an excised offshore place engages Australia's protection, the RSA officer is to consider and take into account:

- the Refugees Convention;
- the United Nations High Commissioner for Refugees (UNHCR) guidelines (Handbook);
- the *Migration Act 1958* and Migration Regulations 1994 (including any relevant guidance on Convention interpretation introduced by MLAA6); and
- all other relevant information, including information and source material held by DIMIA.

RSA officers are not bound by Australian case law relating to Protection Visa decisions on the interpretations of section 36 "protection obligations" as the RSA is not a protection visa process.

21. An asylum seeker entering Australia at an excised offshore place is prevented from making a visa application unless the Minister decides that it is in the public interest to exercise his discretionary non-compellable power and allow an application to be made. This power is exercisable by the Minister personally. As these places remain within Australia's jurisdiction, the Migration Act and Regulations, and Australian case law relating to this legislation, continues to apply.

Family Unity

22. On excised offshore places the principle of family unity should be applied in the same way as on the Australian mainland. That is, according to principles outlined in the Convention Handbook as they are applied to refugees under domestic legislation specifically:

Where family members arrive together

- Where family unit members arrive together and are found to be refugees in their own right, they should receive protection in the way that maintains the unity of their family. Under domestic law, membership of family unit of refugees is an alternative ground for obtaining a protection visa where the individual does not in themselves satisfy the definition of a refugee.
- In refugee processing described in this OPIPA, family members (who are not in themselves refugees but who are accompanying family members who are refugees) should be identified as such at the appropriate part of the decision record so that they can receive appropriate care.

Where family members arrive separately

- Where persons arrive and are processed separately, family members are to be assessed against the Convention definition in their own right, as is the case for persons arriving on the Australian mainland.

Documentation of RSA

23. Claims for refugee status are to be recorded on a client registration form. Any interviews conducted are to be taped and the unauthorised arrival is to be asked to sign a declaration form which covers information such as whether the information provided is complete, correct and up-to-date in every detail and consent to release of information. Assessing officers should confirm with both the asylum seeker and interpreter that communication is proceeding reliably at the interview. Wherever feasible, specific requests by asylum seekers for interpreters in specific languages and dialects should be accommodated.
24. It is prudent that the RSA officer make contemporaneous notes of the interview, as these will be of assistance in the review process. All interview tapes are to be carefully labelled, retained by the Department and stored in accordance with current Departmental procedures onshore. It is of particular importance that thorough record keeping is maintained as the tape and any documentation may be used in any later review of the RSA. All claims for protection should be fully explored by the RSA officer at an interview with the claimant.
25. There may be instances where an interview may not be necessary, for example in the case of dependents or spouses accompanying persons found to be owed protection or where no individual protection claims are raised. If any case arises where an asylum seeker with individual claims is not to be interviewed, handling arrangements should be discussed with Protection Program Management Section.
26. Where relevant character/exclusion checks are not commissioned as part of the initial registration process, RSA officers may need to commission such checks where they relate to possible exclusion issues.

27. Where it is suspected that a person may be misrepresenting their identity or nationality, checks of identity and nationality details should be carried out. Language analysis can be used to help verify a person's claimed place of origin. RSA officers are to give thorough consideration to cases where asylum seekers, who could reasonably be expected to have had documents, are unable to present them on request. In particular, such cases where a language analysis result does not substantiate the veracity of the claims about nationality should receive close consideration in relation to application of the principles at s91W of the Act.
28. Note that at this stage the person is not an applicant for an Australian visa and, therefore, their details are not recorded on an Australian visa application form. If an unauthorised arrival requests an Australian visa application form, one should be made available to them. However, if the person is an offshore entry person unlawfully in Australia they should be made aware that they are unable to make a valid visa application.
29. Following the RSA interview, the RSA officer is required to make an assessment as to whether the person is a refugee deserving of protection within the terms of the Refugees Convention and Protocol. Where asylum seekers identify close family members or colleagues as visa holders in Australia, RSA officers should undertake any appropriate comparison of accounts provided by such people as part of assessing the reliability of the information provided by the asylum seeker.

What the RSA is to cover

30. The RSA should document reasons why the person is assessed/not assessed as being a refugee entitled to protection under the Refugees Convention and Protocol. The assessment should reference all the information sources considered. An RSA form is to be used for this purpose.
31. Due to lead times in completion of some particular security checking, assessments may need to be made before the issue of exclusion from Convention coverage is able to be considered. Where the inclusion elements of the Convention are met, the approval letter and decision record provide for this part of the assessment to be recorded and advised to the asylum seeker.

Notification of Assessment

32. The person is to be provided with a standard form notification letter. This is provided in English and also where possible in the client's preferred language. Where a person is refused refugee status this letter contains a check box style indication of the reasons for refusal. A copy of the completed RSA form, which sets out the detailed assessment as to whether or not that person satisfies refugee criteria, and the reasons for the assessment, is to be held on file. Persons refused refugee status will be provided with an opportunity to seek face-to-face counselling using interpreters on the detailed reasons for the refusal. The decision record and file will be used by the counselling officer for that purpose.

33. When an RSA can be made (although it may be a partial assessment awaiting outstanding character checks) case details including name, date of birth, nominal roll ID and outcome of RSA are to be notified to the Protection Program Management Section which is then responsible for coordinating the timing of the making of the assessment and notification of the individuals concerned.

Review of Initial Assessment

34. If the result of the RSA (whether in relation to an offshore entry person or a person in a declared country who is not an offshore entry person) is that the person is not a refugee, the person will be provided with access to an internal review by a different DIMIA officer who is more senior than the officer who made the initial assessment.

35. For persons found not to be refugees the decision notification letter will include advice that the person may request a review of the assessment if they believe they have further relevant information to provide in support of their claims. The person should make the request within seven days of receipt of the letter notifying the outcome of the assessment. The review will be requested by completion of a 'tick box' form pre-printed with the person's name and issued with the decision letter. The decision correspondence and review request form uses both English and the applicant's preferred language. Interpreter assistance will be provided to assist illiterate individuals to understand the notification letters, the avenue for review and to complete the review form. Individuals will not be required to state any new information at the time of requesting the review. This will be explored orally by the review officer.

36. It is important for review officers (whether in relation to an offshore entry person or a person in a declared country who is not an offshore entry person) to ensure that all material and documentation relating to the assessment is given full and detailed consideration. The review officer should actively explore any new information provided by the asylum seeker and should make a fresh RSA following guidance provided for the initial RSA process set out in this instruction.

37. If following the review of the RSA the person is found to be a refugee, the person is provided with a standard form notification letter informing them that they will be considered for resettlement.

38. If following the review of the RSA the person is found not to be a refugee, the assessing officer is then to identify whether other international obligations may be relevant for example under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), the International Convention on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC). These matters are to be recorded on the review RSA form.

39. In addition, other issues of possible humanitarian concern, such as family links with Australia and other countries, should be identified for possible Ministerial consideration. These matters should be recorded on the review RSA form.

40. The issues identified in paragraphs 38 and 39 above are considered in DIMIA Central Office, and raised with the Minister where appropriate, so that they can be given proper weight in decisions about the future handling of the cases concerned. This includes, considerations relating to resettlement or the provision of a visa for Australia.
41. Where family members are accompanying a person found to be a refugee owed protection, the review assessment should apply the approach set out in relation to the initial RSA process.

Notification of review decisions

42. Once the review RSA work has been completed (although a decision on refugee status may still be awaiting character checks), case details including name, date of birth, nominal roll ID and outcome of the review of the RSA with the above additional issues are to be notified to the Protection Program Management Section which is then responsible for coordinating the timing of the finalisation of the assessments, consultation with the Minister as appropriate on sensitive cases and notification of the individuals concerned.

Offshore Entry Persons - ban on making visa applications

43. Section 46A(1) of the Act prevents an offshore entry person who is in Australia and is an unlawful non-citizen from making a valid visa application. Under s46A(2) of the Act, the Minister acting personally has the power to allow such an offshore entry person to make a valid visa application, if the Minister considers that this is in the public interest. If the Minister chooses to exercise this power, the offshore entry person may make a valid visa application for a specified visa class. DIMIA Central Office will arrange consultation with the Minister over appropriate action, drawing on the material provided in the review RSA form.
44. Flowing from this process, DIMIA Central Office will make appropriate arrangements for any visa applications to be invited from offshore entry persons and for subsequent visa processing. Where an offshore entry person is able to apply for a visa in Australia (including on excised offshore places) they will be able to apply for a Protection (Class XA) visa. The normal onshore merits review avenues are available should such an application be refused.

REFUGEE STATUS ASSESSMENT PROCESS IN DECLARED COUNTRIES

Refugee assessments in Declared Countries

45. With the exceptions set out below, the processing procedures for an excised offshore place apply also to the assessment of protection claims made by persons in a declared country.
46. Persons in declared countries, including offshore entry persons, are not subject to the s46A bar which prevents offshore entry persons on excised offshore places or the mainland from applying for visas. However RSA officers should not invite

visa applications from persons in declared countries unless such an invitation is specifically approved by Humanitarian Branch DIMIA.

47. A person taken to a declared country, irrespective of whether they are an offshore entry person or not, may make a valid application for a visa for Australia without the need to request the Minister's consideration under s46A(2) of the Act. If a visa application is made, it should be drawn to the attention of the team leader or Protection Program Management Section for advice on appropriate handling. Such applications should not disrupt normal RSA work in accordance with these instructions. If the individuals concerned are found to be refugees, this may be relevant to the class of visa for which they have applied. Humanitarian Branch will advise the relevant DIMIA officers if or when, they are to invite visa applications. Persons in declared countries are able to apply for offshore visas, not onshore visas such as the Protection (Class XA) visa.

MONITORING AND REPORTING

48. It is essential that details on the processing of offshore entry persons be scrupulously monitored and recorded in ICSE.
49. The state and territory offices (STOs) Onshore Protection sections should liaise with Onshore Protection Branch in Central Office on operational policy and procedural issues. Onshore Protection Branch, Central Office, is responsible for monitoring and reporting on the refugee processing of offshore entry persons in excised offshore places and of persons taken to declared countries.

CHANGED CIRCUMSTANCES AND NEW INFORMATION

50. If there are significant changes to individual or country information, the RSA process can be revisited as necessary. Similarly, an assessment of other international obligations or humanitarian issues may be conducted as circumstances require.
51. Where such circumstances may have arisen, the case is to be raised with the Protection Program Management Section. Protection Program Management Section will consult with other areas of DIMIA as appropriate to ensure that appropriate reassessment work is undertaken where necessary, drawing on the relevant parts of the above guidelines. For example, it may be that new information is such that DIMIA will conduct a further RSA review.

FURTHER ENQUIRIES

52. Officers undertaking RSA and relevant review work can obtain further guidance on issues relating to the OPIPA by contacting their team leader in the first instance or sending an email to the Program Management Unit mailbox.