

Migration Amendment (Temporary Protection Visas) Regulation 2013

FRLI: F2013L01811

Portfolio: Immigration and Border Protection

Tabled: House of Representatives and Senate, 12 November 2013

PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013

Response dated: 20 January 2014

Information sought by the committee

3.148 The committee sought a range of information to determine whether temporary protection visas (TPVs) were compatible with human rights.

3.149 The Minister's response was provided as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.

Committee's response

3.150 The committee thanks the Minister for his response.¹

3.151 The committee notes the regulation is no longer in effect as it was disallowed in full on 2 December 2013. The committee understands that TPVs were issued to 22 individuals prior to the disallowance of the regulation.

3.152 The committee notes that, subsequent to the disallowance, the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (UMA Regulation) was introduced to reinstate the outcome that was sought to be achieved by the TPV Regulation, namely to prevent unauthorised arrivals from accessing the permanent protection visa regime under the *Migration Act 1958*. A consequence of the UMA Regulation is that unauthorised arrivals who are found to engage Australia's protection obligations will either remain on bridging visas or be granted a Temporary Humanitarian Concern visa.

3.153 The committee notes that the TPV scheme and the new scheme share many of the same human rights concerns, albeit in the context of different visa types.² The committee has decided to reserve its final views on the compatibility of temporary protection visas with human rights, until it receives further information from the Minister with regard to the human rights compatibility of utilising the bridging visa scheme and/or the Temporary Humanitarian Concern visa regime for unauthorised arrivals who have been found to engage Australia's protection obligations.

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 8-12.

2 See the committee's comments on the UMA Regulation in the *Second Report of the 44th Parliament*, 11 February 2014, pp 127-134; and at pp 119-124 of this report.

Migration Amendment (Temporary Protection Visas) Regulation 2013 [F2013L01811]

From 18 October 2013, the *Migration Regulations 1994* ('the Regulations') were amended to reintroduce Temporary Protection (Subclass 785 (Temporary Protection)) visas (TPVs), which were the only protection visa (a visa that may be provided to people within Australia in respect of whom Australia has protection obligations) available to people who:

- are an unauthorised maritime arrival as described in the Act; or
- otherwise arrived in Australia without a visa; or
- were not immigration cleared on their last arrival in Australia; or
- are the member of the same family unit as a person in any of the above-mentioned categories who has been granted a Subclass 785 (Temporary Protection) visa.

At 9:46pm on 2 December 2013 the TPV Regulations were disallowed and as a result are no longer in effect. As such, this response relates only to the 22 persons granted TPVs prior to the disallowance of the *Migration Amendment (Temporary Protection Visas) Regulation 2013*.

The reintroduction of TPVs remains a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

Achieving the objective of combatting people-smuggling and discouraging people from making dangerous voyages to Australia

The purpose of applying the TPV regime to unauthorised air arrivals is to have the same approach to all unauthorised arrivals, that is, non-citizens who enter Australia without a visa that is in effect, as required by the Act. By applying the TPV regime to both air and sea arrivals, a permanent protection outcome for persons who arrive in Australia in an unauthorised manner, regardless of their mode of travel, is removed. This is consistent with the objective of combatting people-smugglers, who also operate, in a smaller number, on air routes to Australia.

Relevance of the Refugee Convention

As a party to the Refugees Convention, Australia is committed to meeting its international protection obligations arising under that Convention. However, the Refugees Convention, does not oblige Contracting States to provide permanent residence to refugees. In addition, TPVs are consistent with the international framework of safeguarding the well-being of refugees including durable solutions through supporting voluntary repatriation where a change in circumstances has made it safe to return.

Non-discrimination and protection of the family/children's rights

Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The United Nations (UN) Human Rights Committee has recognised that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.

The UN Human Rights Committee has recognised in the ICCPR context that “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment” (CCPR General Comment 15, 11 April 1986). Unlike permanent visa holders, all temporary visa holders (not just TPV holders) are not able to sponsor family members for residence in Australia. To the extent that the regulations result in differential treatment between permanent protection visa (PPV) holders and TPV holders in being unable to sponsor family members for reunification purposes, this treatment is based on reasonable and objective criteria. The criteria being applied is whether or not the individual entered Australia illegally, or applied to come to Australia via lawful means and is aimed at a legitimate purpose, that is the need to maintain the integrity of Australia’s migration system and encouraging the use of regular migration pathways to enter Australia.

Family reunification and best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

However, other considerations may also be primary considerations. While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in the best interest of an UAM to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The decision to reintroduce the TPV Regulations to ensure that UAMs who are IMAs or unauthorised air arrivals are not eligible for a PPV was made to discourage minors and their families from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal is also a primary consideration, in addition to the need to maintain the integrity of Australia’s migration system and protect the national interest. The Australian Government considers that on balance these and other primary considerations outweigh the best interests of the child to have an ability to sponsor family members for reunification. If Australia were to provide a right of family reunification to some minors it would provide an incentive to people smugglers to target younger and more vulnerable children which would in turn place them in greater danger and separate them from their family.

Concerns relating to the ban on family reunion rights rationally connected to the objective of reducing the incentive for people, including children, from undertaking dangerous voyages

There is no right to family reunification under international law. The protection of the family unit under Articles 17 and 23 of the ICCPR does not amount to a right to enter Australia where there is no other right to do so.

The TPV Regulations were designed as part of a range of measures, which includes the Regional Resettlement Arrangements (RRA), to act as a deterrent for people making the dangerous journey by boat to Australia. TPVs meant that if someone came by boat to Australia they would not be able to sponsor their family, and the RRA means that if someone came by boat to Australia after 19 July 2013 they would not be processed or settled within Australia. These two policies were to work in conjunction to provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means would not result in the reunification of their family should they choose to travel separately. Therefore, the measures would encourage those who are considering dangerous journeys to instead use regular migration pathways that allow families to migrate together, such as the visas available through the offshore humanitarian programme. Please also refer to question four above.

Additional primary considerations alluded to in the Statement of Compatibility

Relevant primary considerations include:

- seeking to prevent anyone, including minors, from taking potentially life threatening measures to achieve resettlement for their families in Australia;
- maintaining the integrity of Australia's borders and national security;
- maintaining the integrity of Australia's migration system;
- protection of the national interest; and
- encouraging regular migration.

Freedom of movement/right to non-discrimination

Articles 2 (1) and 26 of the ICCPR relating to the equality and non-discrimination are outlined in question 3.

Since 3 June 2013, all persons granted a PPV must seek permission before travelling to their home country as otherwise their visa is liable for cancellation. TPVs cease automatically if the holder departs Australia. The reintroduction of TPVs was a key element of the Government's border protection strategy to combat people smuggling, to discourage people from making dangerous voyages to Australia and to encourage the use of regular migration pathways. As such, the Government considers that the differential treatment between PPV holders and TPV holders is a reasonable measure based on objective criteria. To the extent that it may be argued to be inconsistent with the Convention it is considered a necessary and proportionate policy. TPV holders are able to voluntarily depart and return to their country of origin and family at any time, and may particularly wish to do so where circumstances in their country of origin have changed.

Unintended consequences of travel restrictions

TPVs were designed to deter people from boarding a boat to make the dangerous journey to Australia by providing a less attractive package of benefits than to those who arrive in Australia lawfully, while still remaining consistent with relevant international obligations. It is not the Government's intention to encourage family members to come via illegal means to be reunited with TPV holders. TPVs, in conjunction with a range of other measures including RRA (please also see the answer to question five above), are designed to discourage people travelling by illegal means. TPV holders are able to voluntarily depart and return to their family at any time, and enter another country where they have a right to do so or return to their country of origin, and may particularly wish to do the latter where circumstances in their country of origin have changed. However, if they choose to depart Australia, it is in the knowledge that they will not be able to re-enter on that visa.

Alternative options

Consideration has been given to a range of options relating to the conditions placed on TPVs. However, ultimately TPVs were designed to deter people from boarding a boat to make the dangerous journey to Australia and entering Australia illegally. The range of conditions applied to TPVs, including the restriction on travel, was developed to act as the strongest possible deterrent.

Holders of PPVs are able to travel to their home country in certain circumstances where they have sought permission prior to travelling. TPVs were deliberately designed to be distinguishable from PPVs and to provide a less attractive package of benefits so as to encourage the use of regular migration pathways.

Protection visas are a class of visa granted to persons who have expressly been found to engage Australia's protection obligations. Holders of other visas who do not have re-entry rights may also choose to voluntarily depart Australia even though they may in fact engage those obligations. For example, protection visa applicants who hold Bridging visas or Temporary Safe Haven visas but who choose to depart while their claims are being assessed.

Right to social security/right to an adequate standard of living

TPV holders have permission to work. For those who are unable to work, current legislative arrangements allow TPV holders to be eligible for Special Benefit and Family Tax Benefit. There are also a range of ancillary payments that are available, depending on individual circumstances.

(Note: Individual TPV holders will not qualify for all the benefits and payments listed below.)

- Double Orphan Pension
- Parental Leave Pay (Work test requirements will preclude TPV holders in costing)
- Dad and Partner Pay (Work test requirements)
- Rent Assistance
- Education Entry Payment
- Clean Energy Supplement
- Single Income Family Supplement
- Pharmaceutical Allowance
- Health Care Card
- Pensioner Concession Card
- Low Income Health Care Card
- Pension Supplement
- Remote Area Allowance
- Telephone Allowance
- Family Tax Benefit A & B
- Child Care Benefit

TPV holders also have access under existing arrangements to Medicare.

In addition, TPV holders are entitled to full employment services support. This is commensurate with support provided to permanent residents and citizens in similar circumstances. While not eligible for Settlement Services, TPV holders released from immigration detention are assisted to transition into the community through the Community Assistance Support programme, while those already in the community on BVEs are linked to mainstream services by Asylum Seeker Assistance Scheme providers.

Together, these support services and benefits are intended to ensure that TPV holders in need are able to access a similar level of services and support as permanent visa holders and members of the Australian community more broadly.

Mandatory mutual obligation requirement

Anyone accessing Special Benefit, regardless of whether they are a permanent resident or the holder of a TPV, is required to meet mandatory activity testing requirements (unless exempt) as required under the Social Security legislation. TPV holders are, however exempt from activity testing for the first 13 weeks. This is to allow time to settle into the community and commence supporting themselves.

Right to education

Article 13 of the International Covenant on Economic Social and Cultural Rights (ICESCR) outlines those obligations to which Australia is bound as a State Party to the Covenant (subject to permissible limitations in accordance with article 4).

In Australia, school-age children – usually between 5 and 17 years old – must go to school.

- The children of TPV holders are able to access school education through public schools and through non-government schools.
- The policy on access to public schools for those IMAs granted TPVs is set by state and territory government education departments. This includes any related fees. If granted a TPV, the education and payment arrangements would be an issue for state/territory governments, in consultation with the Commonwealth Department of Education and the Council of Australian Governments on the broader education funding arrangements. In the interim arrangements have been made directly with the Department of Immigration and Border Protection (DIBP) and most of the state and territory education authorities to fund and enrol the children of TPV holders.
- TPV holders accessing non-government schools are funded via existing funding arrangements agreed between Commonwealth and State/Territory education authorities administered by the Commonwealth Department of Education.

DIBP will be assisting those families already living in the community (under community detention arrangements or on bridging visas) to continue to attend their local school. Service providers will also assist to enrol those children who are granted a TPV from detention.

Right to work

There are no conditions or work restrictions placed on TPV holders. TPV holders are able to freely participate in the labour market whilst they remain lawfully in Australia.

Right to health

Article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and requires steps to be taken to achieve the full realisation of this right.

The Government notes that TPVs offer some certainty in that a person will be able to remain in Australia for three years and if they are still owed protection obligations they will be eligible to be granted a further TPV. In addition TPV holders are entitled to access to Medicare and Australia's public health system to the same extent as PPV holders.