

Chapter 3

The Minister's decision and ministerial responses

3.1 This chapter examines the role and response of the Minister for Foreign Affairs to Mr Chen's request for political asylum. Chapter four will consider the actions of DFAT and DIMIA following that decision. This chapter also details the public responses of the Minister for Foreign Affairs and the Minister for Immigration, Multicultural and Indigenous Affairs as reported in the press.

Territorial asylum/subclass 800 Visa

3.2 In his initial request, Mr Chen was seeking political asylum which DFAT treated as a request for territorial asylum.

3.3 The Procedures Advice Manual 3 – Schedule 2 – Territorial Asylum, states that:

...territorial asylum is commonly known as 'political asylum' and is granted by instrument by a Minister (usually the Foreign Minister). It should not be confused with refugee status. Persons who have been recognised as refugees have not been granted territorial asylum. Most requests for asylum have been found to be, more accurately, requests for refugee status. Therefore, if a person enquires about 'asylum', officers should seek to establish whether the enquiry is, in fact, about refugee status and, if so, explain the procedures for applying for a Protection Visa. Anyone who insists on pursuing a request for (territorial) asylum should be advised to contact the nearest office of DFAT.¹

3.4 The Manual further notes:

There is no approved application form for this visa. Rather, Schedule 1 (item 1131(3) (a)) requires application for this visa to 'be made...in a manner approved by the Minister'. Officers may expect further procedures to be notified as need arises ie if a person is granted territorial asylum (by DFAT). Any purported visa 800 application is incapable of being a valid application for the purposes of s46 of the Act unless territorial asylum has been granted. Schedule 1 item 1131 (3) (aa) requires that 'when the application is made, there is lodged...documentation that ...evidences the grant...to the applicant of territorial asylum.'²

3.5 Regarding Subclass 800 – Territorial Asylum, the Migration Regulations notes one of the criteria to be satisfied at the time of application is that 'the applicant must have been granted territorial asylum in Australia by instrument of a Minister'.³

1 DIMIA Procedures Advice Manual 3 – Schedule 2 Visa 800 – Territorial Asylum.

2 DIMIA Procedures Advice Manual 3 – Schedule 2 Visa 800 – Territorial Asylum.

3 Migration Regulations – Subclass 800 – Territorial Asylum.

Mr Hughes from DIMIA clarified that under the *Migration Act 1958* 'you cannot make an application for a territorial asylum visa until you have an instrument of grant of asylum issued by the Minister for Foreign Affairs. So there is a precondition for any application under the Migration Act. If there is no instrument issued then you cannot get to the stage of making an application'. He added that 'it is generally accepted that the Minister for Foreign Affairs would be the minister exercising that power'.⁴

3.6 In Mr Chen's case the Minister decided not to issue the instrument for territorial asylum which would have led to an application being considered.

3.7 Mr David Manne, questioned the response to Mr Chen's request for territorial asylum:

In our view, what ought to have occurred in accordance with the law was consideration of a visa which exists under the migration legislation – that is, territorial asylum visa subclass 800....Our concerns substantially related to whether or not those laws as they exist were applied appropriately and in accordance with the way in which a request for asylum ought to be considered...

My submission on these matters, put simply, is that while there is a very distinct lack of clarity as to exactly what are the criteria for the grant of political asylum, the procedures advice manual makes it clear that it is commonly known as 'political asylum' and is granted by an instrument of the minister and should not be confused with refugee status. It appears on the face of it that we are looking at a situation here where the request for asylum or protection in this situation is similar to, for instance, a politician's or indeed a diplomat's. While there are no particular criteria, it seems clear to me that Mr Chen, as a diplomat, ought to have been seriously considered for a grant of political asylum and then for the visa, given that we have a visa subclass which relates precisely to his situation.⁵

3.8 Mr Green agreed and told the committee that territorial asylum seemed to be the most appropriate visa for Mr Chen to apply for. 'For instance, how many times do diplomats seek protection visas in this country? It is an unusual circumstance and one that has to be handled sensitively and carefully; it is in the national interest that it is done so, so clearly a territorial asylum visa would be a more appropriate way to go'.⁶

3.9 Mr Green further told the committee that the procedures for dealing with territorial asylum applications are not clear.⁷

3.10 Mr Larsen, Legal Adviser, DFAT, advised the committee that 'the decision as to whether or not to grant territorial asylum is at the discretion, in our case of the

4 *Committee Hansard*, 25 July 2005, p. 78.

5 *Committee Hansard*, 26 July 2005, pp. 23-24.

6 *Committee Hansard*, 26 July 2005, p. 58.

7 *Committee Hansard*, 26 July 2005, p. 58.

Minister for Foreign Affairs. It is an executive power and it is an executive discretion' and is non reviewable.⁸ Regarding guidelines, Mr Larsen further advised there are no guidelines for the making of this decision, 'the minister would have various considerations in mind when he makes such a decision. No doubt, the national interest is a critical one of those, but there are no express criteria which limit how the minister exercises that discretion'.⁹

Concerns regarding refusal of territorial asylum visa

3.11 Dr Neumann told the committee that traditionally, government have let their decisions about asylum claims be influenced by a combination of four factors: national interest; legal obligations; humanitarian considerations and public opinion.¹⁰ He explained that when cabinet agreed on Australia's first asylum seeker policy a few months before the Melbourne Olympics, it decided three agencies would be involved in decisions about requests for asylum: ASIO would advise the government whether the person was a security risk; immigration would advise whether the person was a suitable immigrant and external affairs was left to weigh up humanitarian considerations and the national interest. He explained that 'Once Australia's response to asylum seekers became guided in a large part by international refugee law and its interpretation in Australian legislation, the immigration department became the principle agency responsible for decisions about asylum requests. But foreign affairs apparently retained the right to grant territorial asylum in sensitive cases'.¹¹

3.12 He noted that 'a close look at Australia's historical response to asylum seekers suggests that in the past, asylum requests of a sensitive nature – that is, cases where the national interest was potentially affected, such as those involving foreign diplomats or West Papuan nationalists – received close attention, often from the responsible minister and sometimes from cabinet'.¹²

3.13 Dr Neumann told the committee that the important issue is that historically people requesting asylum attend a meeting where issues are discussed. In Mr Chen's case when his request for political asylum was refused, he was not offered anything in return.¹³

3.14 Mr Collaery, legal representative, CC Law, also voiced concerns regarding the process for asylum seekers stating that 'a review of classified archival material embracing the years 1937-1982, revealed that the Australian Government never had a coordinated or humane mechanism for responding to 'sensitive' requests for asylum be

8 *Committee Hansard*, 26 July 2005, p. 87.

9 *Committee Hansard*, 26 July 2005, p. 88.

10 *Committee Hansard*, 26 July 2005, p. 34.

11 *Committee Hansard*, 26 July 2005, p. 35.

12 *Committee Hansard*, 26 July 2005, p. 35.

13 *Committee Hansard*, 26 July 2005, p. 37.

it from fleeing Jews or individual asylum seekers'.¹⁴ Mr Collaery also raised concerns that 'foreign policy in relation to asylum and regime change is muddled by ad hoc assessments and is shrouded by secrecy...' He suggested that 'Ephemeral concerns in bilateral relations overshadow moral imperatives'.¹⁵ This is in contrast to Dr Neumann's criteria of national interest; legal obligations; humanitarian considerations and public opinion.

3.15 The following concerns regarding the response of the Foreign Minister were voiced to the committee:

No reasons provided

3.16 Mr Chen told the committee that at the 31 May meeting, he asked why political asylum had been denied and:

The reason I was given by the senior protocol officer was that the decision had been made and the Australian government could deny my application for political asylum for reasons of foreign affairs.¹⁶

3.17 He told the committee that he attempted again at the meeting to clarify the reason:

At that time I asked why I was rejected for a political asylum visa because I could not understand why. They said the decision had already been made and that they had no choice.¹⁷

3.18 The committee asked DFAT whether the minister received advice from the department or experts to assist him make the decision to refuse territorial asylum. Ms Morton did not answer the question but replied 'I am sorry I am not able to tell you what was in the minister's mind at the time. You would need to ask that question of him'.¹⁸ When asked again whether the minister gained information from experts in the field, she replied 'Mr Chen has either misunderstood what he was told during the meeting on 31 May or his recollection of it is inaccurate. He was told that his request for an instrument to give him the right to apply for territorial asylum would not be given. He was not given reasons for that. He was also told at that meeting, 'Here is the range of visas you can apply for'.¹⁹

3.19 Ms Morton told the committee 'The minister has said that he believed that it would not be appropriate to give a territorial asylum certificate in that case and that it

14 *Submission 6* (Mr Collaery), p. 2.

15 *Submission 6* (Mr Collaery), p. 2.

16 *Committee Hansard*, 26 July 2005, p. 48.

17 *Committee Hansard*, 26 July 2005, p. 49.

18 *Committee Hansard*, 26 July 2005, p. 89.

19 *Committee Hansard*, 26 July 2005, p. 90.

was appropriate that, if Mr Chen wished to stay in Australia, he apply for a visa and that it be considered under the Migration Act in the normal way'.²⁰

3.20 Mr Manne told the committee that there are detailed written reasons provided if a protection visa is refused and submitted to the committee that 'as a matter of natural justice and fairness...it would be appropriate to set out reasons, particularly if there is a refusal, so the applicant could understand why they had been refused and to at least assist them in pursuing further options'.²¹

Time taken for the decision

3.21 The committee heard that the Minister for Foreign Affairs became aware of Mr Chen's request around 7pm on 26 May 2005 and by 10:30am on 27 May 2005, when an Interdepartmental Committee meeting began, the attendees were advised of the Minister's decision. DFAT was not aware whether the Minister sought any advice or briefings to make this decision.

3.22 It should be noted that in subsequent correspondence with DFAT regarding another inquiry being undertaken by the committee, they were advised:

Also, Mr Downer has decided that he will not confirm to the Senate Enquiry when he became aware of the letter from Chen Yonglin delivered to DIMIA on 26 May 2005.²²

3.23 Mr Green told the committee of his concerns regarding the timeline:

I would also have to submit that I find it extraordinary that a visa application of that nature from a senior diplomat in a consulate would be decided, if you like, without even an interview or a reference to the applicant. One of the things that in this case renders that extraordinary to me is that somewhere in his letter...Mr Chen indicates that he has confidential information about the way the system operates. Even that remark alone, I would have thought, prompted some kind of investigation.²³

3.24 This view was supported by the Federation for a Democratic China which stated that the timeframe shows that there was a lack of consideration of the details of the case and a decision was made in haste.²⁴

20 *Committee Hansard*, 26 July 2005, p. 88.

21 *Committee Hansard*, 26 July 2005, p. 30.

22 Letter from Ms Morton, DFAT, to committee secretary regarding the committee's inquiry into Australia's relationship with China dated 18 July 2005.

23 *Committee Hansard*, 26 July 2005, p. 58.

24 *Submission 1*(Federation for a Democratic China), p. 4.

Mr Chen not interviewed

3.25 Mr Green also voiced concerns that DFAT officers or the minister had not spoken with Mr Chen before the decision was made:

...in the process of deciding whether or not Mr Chen should be granted territorial asylum, there was no interview conducted with him about what his claims might be and no testing of the validity of those claims, and the Procedures Advice Manual suggested that it was a matter for DFAT. At that stage, as I understand on instructions, DFAT did not approach Mr Chen.²⁵

3.26 Mr Manne told the committee that Mr Chen's letter should have triggered 'a proper investigation and consideration of whether or not these circumstances attracted the grant of political asylum or territorial asylum under law'.²⁶ He further stated:

What we are looking at here, if I could put it as simply as this, is that either we have laws which contain a visa class or subclass or we do not. If we do have a visa, proper consideration would be given to granting it and to taking all necessary steps before the grant to properly consider, in this case at least, whether an instrument ought to be granted. In the circumstances we have concerns that there may not have been a full or proper investigation and/or consideration which would have led to at least a decision by the minister in relation to the matter.²⁷

3.27 Mr Manne suggested to the committee that the following process should have been followed as a bare minimum:

...there ought to have been a proper preliminary interview at which the substance of his fears was heard. There ought to have been a reasonable degree of clarity as to what DFAT needed to know in relation to his claims and a proper process set out whereby he was able to put those claims in writing in detail and for those claims to have been considered. Following from that there ought to have been at least one confidential and lengthy interview to discuss and test the claims, and then both the written and oral testimonies should have been taken back for consideration by the Minister for Foreign Affairs....It would appear to provide a reasonable framework in order to afford the applicant both the proper safeguards and the procedural fairness which are critical in this process.²⁸

3.28 When asked about recourse for an applicant Mr Manne told the committee that there would seem not to be a clear answer but if someone was not provided a proper opportunity to have their case heard, 'the normal legal principles would appear to open up the question of whether or not natural justice has been afforded'. He added that a possible action would be to obtain counsel's advice on 'whether or not a court

25 *Committee Hansard*, 26 July 2005, p. 64.

26 *Committee Hansard*, 26 July 2005, p. 26.

27 *Committee Hansard*, 26 July 2005, p. 26.

28 *Committee Hansard*, 26 July 2005, pp. 29-30.

could consider compelling a proper consideration by the relevant decision maker in accordance with law'.²⁹

The refusal not provided to Mr Chen in writing

3.29 Mr Chen told the committee that he was never given anything in writing as to the reasons for the rejection of his request for political asylum.³⁰ On 4 June 2005, he made known publicly that he was seeking political asylum.

3.30 Mr Green also noted the following concerns regarding the formal lack of advice in writing:

When we took instruction from Mr Chen on 6 June, one of the first things we had to establish was which visa application was on foot, and it became very apparent on 6 June that it was not clear that the application for territorial asylum had been definitively dealt with: there was nothing in writing. Our instructions were that an oral message was communicated on the evening of 27 May to say that the territorial asylum application had been refused. An oral message given through a DIMIA bureaucrat is a little unusual; given that the procedural advice manual suggests that it is the department of foreign affairs that handles territorial asylum applications, at least in the first instance. As one would do in the course of these things, we immediately wrote and sent a fax to Mr Downer's and Senator Vanstone's office, and copied it to the Prime Minister's office, seeking clarification as to exactly what the status of that application for territorial asylum was.³¹

3.31 Mr Manne commented that the lack of a formal response could provide 'further evidence of a failure to properly and fully consider the request for territorial asylum'.³² He stressed that in doing so there was 'a failure to indicate it to someone – and this is the fundamental point – who was in fear of facing fundamental human rights abuses in the form of persecution in his home country and was no doubt in an extremely precarious and terrified situation. Also on the facts that I have been told today, he may well have felt that he had not been heard – that he was coming up against a brick wall – on matters which, at least as far as he was concerned, were of the utmost importance for his basic needs and protection'.³³

3.32 Mr Collaery noted that the 'lack of accountability and review is the achilles heel of the process in Australia'.³⁴

29 *Committee Hansard*, 26 July 2005, p. 27.

30 *Committee Hansard*, 26 July 2005, p. 49.

31 *Committee Hansard*, 26 July 2005, p. 57.

32 *Committee Hansard*, 26 July 2005, p. 28.

33 *Committee Hansard*, 26 July 2005, p. 28.

34 *Submission 6 (Mr Collaery)*, p. 17.

Conclusion

3.33 The committee has no concerns about the Foreign Minister having the discretion to grant instruments for territorial asylum. The committee notes, however, that while there is a Procedural Advice Manual for DIMIA, it contains no details on who is responsible for the proper investigation of the request for territorial asylum, how this should be conducted or how the matter should be resolved. The committee was told that there are no guidelines for the Foreign Minister to follow when making this decision save for the national interest as discussed by witnesses.

3.34 The committee is concerned at the apparent lack of investigation, including the lack of opportunity for Mr Chen to present and explain his claims. This, coupled with the short timeframe for making the decision suggests a lack of due consideration and seriousness afforded to Mr Chen's request by the relevant authorities.

3.35 The committee accepts that for reasons of natural justice and fairness, Mr Chen should have been provided with a reason for the rejection of his request for political asylum. This information could have assisted him to decide between the other visa options open to him. The lack of any justification for denying his request clearly concerned him as he stated he sought a reason at least twice during the meeting on 31 May 2005.

3.36 Furthermore, Mr Chen received no formal written advice regarding the refusal of territorial asylum. This meant that Mr Chen's lawyer had to seek clarification of the status of Mr Chen's request from Mr Downer. Mr Downer seems to have left the communication of this vital piece of information to oral advice, conveyed through his department to an officer of another department.

3.37 Some members of the committee found that important procedures were not adopted when considering Mr Chen's application for territorial asylum. The committee believes that at the very least he should have been interviewed about the circumstances surrounding his request and should have received written formal advice of the decision to reject his request. The committee considers that where such a decision has the ability to affect the rights of an individual that the decision should be as transparent as possible.

Ministerial responses to Mr Chen's initial approaches for asylum/protection

Conflicting reports from Ministers

3.38 The press reported that on 30 May 2005, Senator Vanstone, the Minister for Immigration, Multicultural and Indigenous Affairs said Mr Chen made a request for

territorial (political) asylum and has been refused, apparently by the Foreign Minister.³⁵

3.39 On 6 June 2005, Senator Vanstone said that 'Mr Chen's request for territorial asylum had not been granted but that was a matter for the Minister for Foreign Affairs. She noted further that Mr Chen has applied for a normal protection visa. She explained that that visa is different from territorial asylum and that the claim may come to her.'³⁶

3.40 On 7 June 2005, the Foreign Minister insisted that because Chen has already applied for a protection visa, his case is now being handled by DIMIA and not DFAT.³⁷ However he would not explain why Mr Chen's application for political asylum was rejected. In an interview Mr Downer said 'political asylum has only been granted in extremely rare cases...in the case of the Petrov Affairs and one other over the last 40 years or so...You can't have six different ministers considering his application. Chen has made his application through the Immigration Department and he has to follow due process'.³⁸

3.41 On 8 June 2005, Mr Downer said Mr Chen did not lodge a formal application at all. He said Mr Chen applied for a protection visa and did not seek political asylum.³⁹ On 9 June 2005, Mr Downer confirmed that Mr Chen did make an application for political asylum, contradicting his earlier statements. He said he believed it would be better for Mr Chen to apply for a protection visa.⁴⁰ He said 'I still stick pretty solidly with my view that it's much more appropriate for the Department of Immigration, with all its experience, to make the appropriate determination on the basis of the acts presented to it'.⁴¹

3.42 At a press conference in India on 8 June 2005, the Foreign Minister stated:

First of all I don't think we should get bogged down in semantics here. I mean it's clear that Mr Chen applied on the, I think the 27th of May to stay in Australia. He didn't make a formal application to me for political asylum. He made and that letter illustrates an application to the Department of Immigration. And if you read the whole of the letter you would see that in that letter he asks the Department of Immigration if it would be prepared to vary his visa. Look this is quite a semantic point because he certainly applied to stay in Australia and the only semantic and minor point that I would make is that he didn't make a direct application to me as the Foreign

35 *The Age*, 10 June 2005, p. 4.

36 Transcript PM, 6 June 2005.

37 Transcript PM, 7 June 2005.

38 *The Australian*, 8 June 2005, p. 3.

39 *The Age*, 10 June 2005, p. 4.

40 *West Australian*, 10 June 2005, p. 4.

41 *Canberra Times*, 10 June 2005, p. 4.

Minister for political asylum, that's the only point I am making. But he certainly made an application to stay in Australia. As time went on it became clear to us that the best way for him to apply would be through an application for a protection visa, so that the case that he wanted to put could be objectively considered. It doesn't make sense – and I've made this point before – it doesn't make sense for people to just apply for political asylum and expect the Foreign Minister to just make the decision with a stroke of a pen. It's much wiser to have a considered process which can be worked through by the Immigration Department, they're the experts in considering these cases.⁴²

3.43 These statements made by the Foreign Minister on 8 June 2005 that Mr Chen did not lodge a formal application at all caused Mr Chen further unnecessary concern.

3.44 His lawyer, Mr Green, had already written to the Minister on 6 June 2005 to clarify the situation regarding the territorial asylum visa. In his response dated 14 June 2005, Mr Downer advised that Mr Chen's letter to DIMIA dated 25 May 2005:

...was taken as constituting a request for an instrument granting him territorial asylum (there is no official form or prescribed way of seeking such an instrument) as this is the necessary precursor to making a valid application for a Territorial Asylum (Subclass 800) visa...he had decided on 27 May not to grant an instrument. Mr Chen was therefore not able to make a valid application to DIMIA for a Territorial Asylum Visa. That letter was referred to me.

Having considered Mr Chen's request, I decided on 27 May not to grant an instrument to Mr Chen. In the absence of an instrument granting him territorial asylum in Australia, Mr Chen was not able to make a valid application to DIMIA for a Territorial Asylum Visa. Mr Chen was advised by the Department of Immigration and Multicultural and Indigenous Affairs on my portfolio's behalf later on 27 May that political asylum would not be granted.

Mr Chen was also advised at the same time that if he wished to stay in Australia there was a range of visa options he could pursue including a protection visa. It is now public knowledge that Mr Chen lodged an application for a protection visa on 3 June. That application will be considered on its merits by DIMIA, in accordance with normal processes. I do not intend to give further consideration to any request by Mr Chen for territorial asylum.⁴³

3.45 The committee understands that the Minister for Foreign Affairs is the minister responsible for determining whether to grant an instrument granting territorial asylum. Once this request was rejected, the matter for granting a protection visa came under the responsibility of DIMIA. The confusion created about the status of Mr

42 Minister for Foreign Affairs, Press Conference transcript, 8 June 2005, accessed at http://fff.foreignminister.gov.au/transcripts/2005/050608_press_conf.html on 2.8.05.

43 Letter from the Minister for Foreign Affairs to Mr Mark Green dated 14 June 2005.

Chen's application for a protection visa, highlights the importance of conveying decisions in writing to the applicant and for the applicant to be kept fully informed about the progress of their application.

