



Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Secretary

Mr John Lynch
Registrar
Refugee Review Tribunal
Locked Bag A3
Sydney South NSW 1235

Dear Mr Lynch

I am writing to you under s423(2) of the *Migration Act 1958* on matters relating to the review of protection visa refusal decisions made in relation to persons who had previously been granted temporary protection visas.

The Department has previously, by letter dated 1 May 2003, provided the Tribunal with the documents issued to all DIMIA decision makers assessing applications for further protection visas. These documents are *Guidelines on making protection obligation assessments in relation to applications for protection by TPV holders and Interpretation and Application of Migration Regulation 866.215, the 7day rule*.

The following provides further information in support of DIMIA's position on the processing of applications for further protection visas.

The Migration Act and Regulations provide the starting point for the determination of all protection visa applications, including those for further protection. When determining applications for further protection visas the Act requires the decision-maker to form a fresh view as to whether Australia has protection obligations to the applicant. The decision-maker can not treat this matter as foreclosed by the earlier decision and must turn his or her mind to the matter again, as required by the Act and Regulations.

Section 36(2) provides that

- (2) A criterion for a protection visa is that the applicant for the visa is:
- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa.

Regulation 866.221

The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention

The phrase "protection obligations" is not defined in the Act or the Convention. It is used in s36(2) in connection with the grant of a protection visa that allows the grantee to remain in Australia. Protection obligations, thus, does not refer to all the obligations imposed by the Convention, but rather those which are specifically concerned with the right of a refugee to remain in Australia.

The Act defines the circumstances in which Convention obligations are owed to a non-citizen or more particularly the circumstances in which they are not owed as outlined in ss36(3) – (7).

The central criterion for the grant of a protection visa is the existence of protection obligations under the Convention not the question of whether the applicant has the status of a "refugee".

Regulation 866.22 makes it clear that the criteria to be met must be met at the time of decision. A decision as to refugee status made at an earlier date does not meet the requirement. Despite what might be argued at international law, our Act has defined the circumstances in which it is open to find that Australia owes protection obligations to an applicant for a temporary or permanent protection visa.

In determining whether protection obligations exist the decision-maker is not precluded from canvassing issues that were raised when the TPV was granted. An earlier temporary protection visa decision does not dictate what a decision-maker must do, although it may be a relevant consideration. The decision-maker is making a fresh decision as to whether protection obligations exist at the time the application for a protection visa is being considered. In doing so the decision-maker must be satisfied, in accordance with s65 of the Act, that the criteria for the grant of a visa are met.

It follows from this that a DIMIA decision-maker or Tribunal member must be satisfied that an applicant is who they claim to be and that they are not excluded from Convention protection.

Decision-makers, therefore, can actively explore all facets of the applicant's case, including the earlier application, in order to form a view as to credibility and the existence of evidence of fraud or misrepresentation. This investigation can be undertaken irrespective of whether the fraud or misrepresentation relates to identity or the nature and content of claims made. In exploring the applicant's case it may be necessary for the decision-maker to commission further investigations. DIMIA will provide whatever assistance the Tribunal requires to assist in these investigations, be it through document analysis, diplomatic contacts, country research or language analysis.

I would be grateful if the Tribunal would consider and give weight to material contained in this submission.

If you have any enquiries on this matter, please contact Robert Illingworth, Assistant Secretary, Onshore Protection Branch, telephone 02 6264 4677.

Yours sincerely

W J Farmer

July 2004