Administrative
Review Tribunal

A Guide to Refugee Law in Australia

Introduction

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Administrative Review Tribunal

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Introduction

This Guide provides an analysis of refugee law and complementary protection in Australia, as they relate to the assessment of protection visa applications and other protection-related decisions[1] made under the *Migration Act 1958* (Cth) (the Act).

The Guide is structured around key concepts and issues that arise in considering the definition of 'refugee' in the Act, which applies to visa applications made on or after 16 December 2014. These concepts are largely drawn from art 1A(2) of the 1951 *Convention relating to the Status of Refugees* (read together with the 1967 *Protocol relating to the Status of Refugees*) (the Convention), which applied to visa applications made before this date and has been the subject of several decades of judicial interpretation by Australian courts.

Separate chapters of this Guide examine the four 'key' elements of the definition of refugee identified by the High Court in *MIEA v Guo* in the Convention context, namely:

1. the applicant must be outside his or her country of nationality or, if the applicant is stateless, former habitual residence;
2. the applicant must fear "persecution";
3. the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and
4. the applicant must have a "well-founded" fear of persecution for a Convention reason.[2]

Other chapters deal with related matters such as relocation, state protection, third country protection, exclusion and cessation of refugee status, and the application of the Convention in particular factual situations that commonly arise. There are additional chapters on the legislative framework concerning protection visas, the complementary protection criterion and on merits review of protection related decisions.

Whether looking at the Convention definition or the definition in the Act, the concept of 'refugee' must be construed as a whole and each element must be satisfied before a favourable determination can be made on an applicant's case.[3] If an applicant's case clearly fails to meet one of the elements of the definition, there is no need for the decision-maker to go on to consider the other elements.

Australian migration legislation is subject to frequent amendment and the law that is relevant to any particular case will depend on a number of factors such as the date of the visa application and the terms of relevant amending legislation. Unless otherwise stated, the provisions referred to in this Guide are those in force at the time of writing.

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1 Specifically, decisions made under s 197D(2) of the *Migration Act 1958* (Cth) that an unlawful non-citizen is no longer a person in respect of whom a 'protection finding' would be made. For more details, see Chapter 12 – Merits review of protection related decisions.

2 *MIEA v Guo* (1997) 191 CLR 559 at 570.

3 In the context of the Convention definition it has been observed that: 'It is ... a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole', per McHugh J in *Applicant A v MIEA* (1997) 190 CLR 225 at 256.

While some of the cases presented in this Guide establish general legal principles, others are simply illustrative. Protection visa decisions generally turn on their own facts and the application of the law to the particular circumstances of the individual case, with the courts having observed that rulings on factual issues in individual cases should not be treated as setting down universal propositions of law.[4]

[4] See for example the comments of Windeyer J in *Teubner v Humble* (1963) 108 CLR 491 at 503–4 (referring to the judgment of du Parcq LJ in *Easson v London & North Eastern Railway Co.* [1944] 1 KB 421 at 426): '[o]bservations made by judges in the course of deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application … There is a danger … of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense'. See also *GIO of NSW v King* (1960) 104 CLR 93 at 105.