
A fair refugee status determination (RSD) process for people seeking asylum in Australia

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Background

Two distinct refugee status determination (RSD) processes apply to people seeking asylum in Australia depending on whether they have arrived in Australia with or without a valid visa.

People seeking asylum who arrive with a valid visa (e.g. a tourist visa) and clear immigration check points at an air or seaport may apply for a permanent protection visa (PPV) once they are in the community. [i] They have access to merits review of a primary decision on their protection claims, at the Refugee Division of the Administrative Appeals Tribunal (AAT), and to judicial review of any legal error in protection visa decisions. They are not subject to mandatory detention.

Approximately 30,000 people seeking asylum who arrived without valid visas in Australia between 13 August 2012 and 1 January 2014 are subject to a different RSD process. [ii] Referred to as “The Legacy Caseload”, they were subject to mandatory detention on arrival, and a “statutory bar” on making valid protection visa applications. As such, they could only make a valid protection visa application if the Minister exercised his personal, non-compellable, and discretionary power to “lift the bar.” The bar effectively denies people seeking asylum in the Legacy Caseload the right to seek asylum under Australian law.

In December 2014, the Federal Government introduced the “Legacy Caseload Act,” which made significant changes to Australia’s RSD processing framework, applying specifically to this group of people. These changes included:

- replacing access to full merits review of a primary decision on a person’s protection visa claims with a limited, “fast-track” merits review process at a newly constituted body known as the Immigration Assessment Authority (IAA) [iii]
- removing references to the Refugee Convention from the Migration Act and replacing it with a framework articulating the Federal Government’s narrower interpretation of its protection obligations to people seeking asylum.
- introducing an amendment to the Migration Act denoting non-refoulement obligations ‘irrelevant’ to the removal of a person from Australia to a country of origin.

People in the Legacy Caseload are only eligible for 3-year Temporary Protection Visas (TPV) or 5-year Safe Haven Enterprise Visas (SHEVs) if found to be refugees, requiring them to re-engage with the ‘fast-track’ process upon the expiry of these visas.

Key Statistics

- As of May 2021, 4,120 people who are part of the Legacy Caseload were still waiting for their applications or reviews to be processed and 27,022 had their applications finalised. [iv]
- As of May 2021, 8,704 people who were part of the Legacy Caseload had received negative decisions on their protection visa applications at the primary and IAA stages, and were either seeking judicial review, Ministerial intervention, or making arrangements to depart Australia. [v]
- Between 2016 and 2021, the IAA 'affirmed' an annual average of 87% of DHA primary decisions on protection visa claims, including 93% from Sri Lanka and 80% from Afghanistan. [vi]
- Between 2017 and 2021, the Refugee division of the AAT affirmed 65% of DHA primary decisions on protection visa claims for those arriving in Australia with valid visas, including 57% from Sri Lanka and 18% from Afghanistan. [vii]

Key Issues

In contrast to regular merits reviews at the AAT, “fast-track” merits reviews at the IAA are generally conducted based exclusively on information used by the primary decision-maker (Department of Home Affairs [DHA]), without interviewing the applicant again or accepting new details that may be relevant to the case. [viii] As a result, in effect, applicants have only one opportunity to provide every single piece of information relevant to their case.

This can be profoundly challenging for people for a range of reasons. Applicants may have suffered significant past traumas, which can make it difficult or painful to recall details under the pressure of a high-stakes interview. Applicants may also not fully understand what is required of them in Australia's RSD process, which may be compounded by limited English literacy or fluency, and inadequate interpreting services.

Applicants may not have access to pro-bono legal assistance and may not be able to afford private legal representation. Such a scenario may have become more likely since the Federal Government cut approximately 90% of funding to pro-bono legal services assisting people to navigate the RSD process in 2014. [ix]

In the above context, access to a full merits review process is crucial in order to maintain established standards of procedural fairness and ensure that people with strong protection claims are not at risk of refoulement; being removed from Australia to a country where they may be persecuted.

Those who are twice rejected in the RSD process generally lodge applications for judicial review. According to the 2019- 2020 annual report of the Federal Circuit Court (FCC), the

volume of applications from people seeking asylum contributed to the FCC falling significantly short of its targets for a second year in a row, thereby resulting in “delays, and leaving families and children in limbo and often at risk while waiting for their matter to be heard.” [x]

The setting aside of non-refoulement obligations in determining removals from Australia is concerning because it may result in a person with ongoing fears of persecution or significant harm in their country of origin being removed to this place.

Our Recommendation

That the Australian Government reverse amendments made to RSD under the “Legacy Caseload Act” to ensure that all people seeking asylum in the Australian community have access to a common, regular RSD process with access to full merits review at the AAT.

Further Resources

Andrew & Renata Kaldor Centre for International Refugee Law (2019), Fast-Track Refugee Status Determination.

Australian Human Rights Commission (2019), Lives on hold: Refugees and asylum seekers in the ‘Legacy Caseload’

Emily McDonald and Maria O’Sullivan (2018), Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast-Track Regime.

[i] Andrew & Renata Kaldor Centre for International Refugee Law (2020), Refugee Status Determination in Australia.

[ii] Note: since 19 July 2013, people seeking asylum who attempt to arrive in Australia without a valid visa (generally by boat) are subject to interception and turn-back policies, or offshore processing in Nauru or Papua New Guinea (PNG).

[iii] Andrew & Renata Kaldor Centre for International Refugee Law (2020), Refugee Status Determination in Australia.

[iv] Australian Government: Department of Home Affairs (DHA) (2021), IMA Legacy Caseload Report on Status and Processing Outcomes, May 2021.

[v] Australian Government: Department of Home Affairs (DHA) (2021), IMA Legacy Caseload Report on Status and Processing Outcomes, May 2021.

[vi] Immigration Assessment Authority (2016 to 2021), IAA Caseload Report.

[vii] Refugee Division of the Administrative Appeals Tribunal (2015 to 2020), Refugee Caseload Summary by Country of Reference.

[viii] Andrew & Renata Kaldor Centre for International Refugee Law (2019), Fast-Track Refugee Status Determination.

[ix] Andrew & Renata Kaldor Centre for International Refugee Law (2020), Do People Seeking Asylum Receive Legal Assistance?.

[x] Federal Circuit Court (2019-2020), Annual Report.