how to apply for a permanent visa

Booklets with detailed information and application forms on the family stream, employer sponsored, skilled, business skills and special visa categories are available from the DIMA website (www.immi.gov.au). The booklets are also available from any Australian mission overseas or regional office of DIMA in Australia. Each booklet costs $10 and provides details on application charges, health, character and settlement in Australia.

The booklets do not cover information on temporary or humanitarian visas and separate information forms are also available for each of the Special Assistance Categories under the Humanitarian Program.

To make a valid application, an applicant is usually required to lodge a completed approved form (if there is one) together with payment of the amount of the visa application charge payable at the time of application (if any), and meet any other relevant requirements in Schedule 1 of the Migration Regulations.

An application will not be valid, and therefore cannot be considered, until all of the above requirements have been met.

exceptions

There are numerous people who wish to stay in Australia, who need not complete the migration documentation. These include those who:

- are *already in Australia* and want to stay permanently (Permanent Residence)
- want to visit and work for a *limited time* only (Temporary Residence)
- want to *retire* to Australia (Retirement)
- are already living in Australia but want to *travel* on their foreign passport (Return Travel Documents)

want more information ?

Try the Department of Immigration and Multicultural Affairs website (www.immi.gov.au). Relevant legislation includes:

- *Migration Act* 1958
- Regulations made under the *Migration Act* 1958 -
  - Migration Regulations
  - Migration Agents Regulations
  - Migration (Iraq - United Nations Security Council Resolutions) Regulations
  - Migration (Republic of Sudan - United Nations Security Resolution No 1054) Regulations
- *Migration Reform Act* 1992 and Migration Reform (Transitional Provisions) Regulations
- *Australian Citizenship Act* 1948 and Australian Citizenship Regulations
- *Migration Agents Registration (Application) Levy Act* 1992
- *Migration Agents Registration (Renewal) Levy Act* 1992
- *Immigration (Guardianship of Children) Act* 1946 and Immigration (Guardianship of Children) Regulations
- *Migration (Health Services) Charge Act* 1991 and Migration (Health Services Charge) Regulations
- *Immigration (Education) Act* 1971 and Immigration (Education) Regulations
- *Immigration (Education) Charge Act* 1992 and Immigration (Education) Charge Regulations
- *Aliens Act Repeal Act* 1984
- *Temple Society Trust Fund Act* 1949
- *Migration Legislation Amendment Act* (No. 5) 1995
- *Migration (Visa Application) Charge Act* 1997

Don't forget that online access to legislation and regulations is available from:

- SCALEplus (legal information retrieval system owned by the Australian Attorney General's Department; and
- AustLII (the Australasian Legal Information Institute).

refugee protection:

chen shi hai v minister for immigration and multicultural affairs

by Anthony Oxley, Minter Ellison

introduction

Asylum seekers are protected in Australia provided they meet the United Nations' definition of 'refugee', as defined in the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

The Convention defines 'refugees' as people who:

- are outside their country of nationality or their usual country of residence; and
- are unable or unwilling to return or to seek the protection of that country due to a well-founded fear of being persecuted for reasons of:
  - race;
  - religion;
  - nationality;
  - membership of a particular social group; or
  - political opinion.

Where an application for a protection visa (ie. a visa that confirms the applicant's refugee status and confers protection in Australia) is denied, merits review is available in either the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal, depending on why the application was refused. Where merits review fails, judicial review of the Tribunal's decision is available in the Federal Court.

In 1998-1999, 979 applicants were granted protection visas by the Department of Immigration and Multicultural Affairs (DIMA) at first

instance. 6,160 applications were refused. Of the 5,505 cases that went to the RRT, in 560 cases applicants for protection visas were successful on review.

The High Court faced an unusual application in Chen Shi Hai's case (*unreported at 13 April 2000*).

facts

Chen Shi Hai was conceived and born in 1996 whilst his parents were being held in the Port Hedland Immigration Detention Centre. His parents:

- had previously been refused permission to marry in China;
- had already had a child in contravention of China's 'one child policy' (both of their two other children had been born in China);
- had themselves been refused protection in Australia by the Department of Immigration and Multicultural Affairs.

Chen Shi Hai's application for a protection visa was refused. The decision was affirmed by the RRT. Chen Shi Hai (through his father) then sought judicial review in the Federal Court, from which he ultimately appealed to the High Court. The High Court held that Chen Shi Hai was entitled to refugee protection.

basis for protection - summary

The Court held that Chen Shi Hai was entitled to refugee protection because he was a 'black child' under China's 'one child policy'. The Court found that 'black children' constituted a 'particular social group' for Convention purposes. The Court also found that, as a member of that social group, Chen Shi Hai would likely be subjected to persecution if deported to China. It was not relevant that Chen Shi Hai could not himself have had a 'well founded fear of being persecuted' because of his young age (he was 3fi years old at the time the Court handed down its decision). It was accepted that his parent's fears on his behalf were sufficient.

where the full federal court went wrong

The Full Federal Court had purported to apply the decision in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. In that case, the High Court had held that a shared fear of persecution because of *opposition* to China's one child policy was not enough to amount to a 'particular social group' for Convention purposes. In that case, Dawson J had held that where there is a policy of *general application* in a particular country, it could **not** create a particular social group.

The Full Federal Court had held in relation to Chen Shi Hai that "the principles explained in *Applicant A* preclude the identification of a relevant social group for Convention purposes, by recourse to the very laws and policies, being laws and policies being directed to the whole population, which create the category of persons concerned".

The High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) disagreed. The Court said:

> "To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. The question whether 'black children' can constitute the social group for the purposes of the Convention arises in a context quite different from that involved in Applicant A. That case was concerned with persons who feared the imposition of sanctions upon them in the event that they contravened China's one child policy. In this case, the question is whether the children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind".

Kirby J gave a separate concurring judgment. He discerned that the following three issues arose:

- whether it was necessary for the Tribunal to consider the **subjective motivations** of the Chinese authorities;
- whether the Tribunal and the Full Federal Court erroneously made their decisions on the basis of the application of Chinese law to Chen Shi Hai's parents rather than on the basis of the applicant's membership of a particular social group, "black children" (the **causation** point); and
- whether the Full Federal Court was in error in concluding that the **status of the child**, being a child of parents who had been refused a Protection Visa, meant that the child could not claim refugee status because the child was dependent upon the *parent's* fears of persecution.

Kirby J held that "causation" was not an apt descriptor of the principles required under the Convention. He said:

> "Once discrimination and persecution against the appellant, a child, were found, the classification of the persecution in this case as being for reasons of membership of a particular social group followed quite readily. It is true that the object of the population control policy of China was addressed solely to the parents. But it was equally true that one way of reinforcing that policy, as found by the Tribunal, was by actions and deprivations addressed to the children of such parents".

Kirby J also rejected the 'status of the child' point favoured by the Full Federal Court. He noted that the Convention applies to a 'person'. Under Australian law, he held, Chen Shi Hai was entitled to have his own rights determined:

> "At least theoretically, the parents being adults could alter their behaviour. They could practice contraception. They could conform to the law of China. But the child, as such, could do nothing to prevent or terminate its existence. What may possibly

> be viewed as acceptable enforcement of laws and programs of general application in the case of the parents may nonetheless be persecution in the case of the child. Persecution occasioning such a fear attracts the Convention definitions and rights under Australian law".

Kirby J anticipated potential criticisms of the Court's decision on the basis that, by simply procuring a pregnancy, the parents of Chen Shi Hai had circumvented Australian migration laws and delayed their own deportation, thereby securing a right for themselves to stay in Australia. As he logically pointed out, however, the application to the High Court was that of the *child*, and the Minister for Immigration and Multicultural Affairs would still be in a position to make orders deporting the parents and their other children. However, Chen Shi Hai himself could not be deprived of his rights under Australian and international law.

conclusion

In a political climate where refugee status is being restricted by tightening the rules for protection visas, the decision in *Chen Shi Hai's* case is one that broadens the scope for protection. Whether or not the decision is one that will be overturned by amending the guidelines for protection visa applicants remains to be seen. In any event the High Court has made it clear that laws of general application in a country can still be the basis for refugee status under the Convention provided the application of the general law is one that has the particular effect of leading to a well-founded fear of persecution.

skilled migrants

a new form of racism?

by Alex Mathey, General Counsel, Crown Ltd

Although the White Australia policy has long disappeared, Australia's immigration policy continues to be controversial.

The current immigration policy has received criticism from a variety of sources with different, and often competing, interests.

Some detractors have argued, for example, that the policy:

- is unfairly discriminatory and oppressive[1];
- limits accountability and denies justice[2];
- emphasises capitalism and nationalism over compassion and human welfare[3]; and
- is otherwise deficient and defective, exacerbating problems that it is intended to address[4].

Taken as a whole, these concerns highlight that the policy may disadvantage and potentially harm not only those people to whom the policy applies, but Australian society as a whole.

The purpose of this article is to outline briefly some of these concerns.

focus of australia's current immigration policy

The Howard Government's immigration policy has been adjusted to favour skilled immigrants and (compared with previous policies) limit the opportunities to applicants under family and humanitarian categories.

Business groups generally support high levels of skilled immigration on the basis that it generates a number of positive economic outcomes. Indeed, it has been argued that accepting highly skilled people leads to greater productivity and, in effect, "pulls the low-skilled up"[5].

David Stratton, migration specialist and partner of Melbourne commercial law firm Nevett Ford, believes that "now, more than ever, the Government's immigration policy favours people who are seen as contributors - young, highly skilled applicants with vocational English and who are prepared to leave their families."[6]

Whilst immigration policy is not decided on the grounds of race, the current policy is perceived by some to have a "greater impact on groups from poor, non-Western, Asian and Middle Eastern countries".[7]

Some commentators have decried the adjustment in migrant "mix" as discriminatory. Others have gone much further, condemning it as reactionary and institutionalised racism:

> "[T]his "targeting" of skilled immigration is less about reducing the inflow of migrant labour than it is about more tightly controlling the type of immigrant.
> Facilitated by the current resurgence of overt racism in Australia, the Howard government's immigration policy is increasingly looking like a new version of the old bipartisan white Australia policy."[8]

The policy is seen to both restrict applicants under family and humanitarian categories in the first place and to fail adequately to assist those migrants whose applications have been successful. For example:

- Two-year waiting limits have been imposed for the availability