

Protecting Refugees: Cessation under Article 1C

Published in UNHCR's "Year in Review" No. 1/2003 - *Discussion Paper No. 1/2003* - United Nations High Commissioner for Refugees Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific

Introduction

Australia is committed to meeting its international protection obligations under the Refugees Convention as amended by the Refugees Protocol. Under the Convention, signatory states are not required to provide permanent residence to meet this obligation.

The inclusion of Article 1C in the Convention, together with the absence of a right to permanent residence, indicate an intention by the founders to maintain the right of signatory states to decide for how long they admit refugees. Underlying Article 1C is the principle that international protection is a form of surrogate protection, in the absence of national protection, that should continue only so long as it is justified or necessary.

Australia's approach to cessation of refugee status

The UNHCR has provided detailed guidance to states on the application of the change of circumstances cessation provisions in its "Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6)" of the Refugees Convention. The issue of Article 1C cessation is also arising as an increasing area of interest for Australia as we seek to ensure that those most in need of international protection are assisted. Australia recently contributed to the international discussion of these issues through a paper on the Cessation Clauses, which was prepared as a contribution to the UNHCR's Expert Round-table Series.

While Australia's approach to interpreting Articles 1C(5) and (6) is largely consistent with UNHCR's, there are some points of difference in relation to the relevant factors to be taken into account in assessing change of circumstances, the proviso to 1C(5) and (6) and the issuing of cessation notices.

Substantial, effective and durable changes in circumstances

There is general consensus amongst the international community that the circumstances in connection with which the person has been recognised as a refugee have ceased to exist under Articles 1C(5) and (6) must be substantial, effective and durable.

It is unclear what factors go to establishing whether this test has been met. The UNHCR's Guidelines suggest that considerations may include, for example, the existence of basic administrative structures and adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood, in the

country of origin. Australia is of the view that consideration of the change in circumstances does not involve a consideration of the level of provision of social or economic services that may be available in that country. The clear language of Articles 1C(5) and (6) is oriented to protection, which involves the consideration of whether the circumstances that led to their initial identification as a person with claims to protection under the Refugees Convention continue to exist.

Proviso to Articles 1C(5) and (6)

Another point of departure between Australia's approach and the UNHCR interpretation is in relation to the common proviso to Articles 1C(5) and (6). That proviso sets out that in certain circumstances statutory refugees – those determined under pre-1951 Convention arrangements as identified in Article 1A(1) – may be exempted from their application. Circumstances where exemption may occur are where the statutory refugee can show 'compelling reasons arising out of previous persecution for refusing to seek the protection of their country of origin'. UNHCR suggests that this exception reflects a general humanitarian principle that could be extended to other, modern day refugees as well.

In the United Kingdom, the operation of the proviso was recently discussed in the Court of Appeal, where they held that the starting point for interpreting the proviso is the language of the proviso itself, which clearly states that it applies only to refugees under Article 1A(1). The court was of the view that only a minority of countries see the proviso as applying more broadly to all Convention refugees and thus found that this did not amount to widespread international practice. The Court also stated that the relevant passages of the UNHCR Handbook are not indicative of a legal obligation, but merely express a hope that states will apply the proviso to all Convention refugees.

Australian courts have not ruled on the operation of the proviso in Article 1C(5) and (6). However, given the plain language of the proviso, and the lack of evidence of a widespread international practice to establish its broad application to all Convention refugees, Australia sees the better view as being that the proviso applies only to statutory refugees as defined in Article 1A(1).

Cessation Notices Issued by UNHCR

Australia also has a differing approach to the UNHCR regarding the issuing of cessation notices. While the Convention provides states with the discretion to initiate the application of cessation clauses (5) and (6), the UNHCR also occasionally issues a cessation notice in relation to a particular country or group. Australia's approach to the cessation issue is to determine it on an individual basis. Thus, rather than following cessation notices issued by UNHCR, Australia's current processes allow for a very careful assessment as it applies to an individual's circumstances. As there is no obligation on a state to initiate such action, it is open to the Government to contemplate the broader reasons why refugee status should not be re-examined in deciding whether to embark on that process.

Australia sees this as providing a more cautious and fair consideration of whether a person retains refugee status than would be provided by 'group review' or the making of a blanket assumption covering a cohort of people based on general country information about a change of circumstances.

This approach is considered to provide the most appropriate balance between providing consistency for those found to be refugees and the broader obligations of the Convention founders that people who have ceased to be refugees should not retain refugee status. What this means in the Australian context is that formal cessation processes are undertaken only rarely and on a case by case basis. Where a refugee is granted permanent residence, the continuation of their residency status is generally not dependant on the person continuing to be a refugee.

Refugee Status Cessation and Refugee Protection Obligations

One area of common understanding in refugee issues internationally is the important distinction between refugee status and the existence of protection obligations. Refugee status *per se* obliges a host country to protect the refugee from return to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

However this obligation to provide protection does not necessarily require the host country to provide lawful residence status, either permanent or temporary, to refugees within its territory. Provided that the practical consequences of withholding or removing an entitlement to lawfully reside in the host country does not lead to the individual facing Convention related persecution, then this decision is fully consistent with the obligations under the Refugees Convention irrespective of whether the individual affected remains a Convention refugee. On this point, a decision to withhold or remove residency permission from an individual does not necessarily mean that the refugee status of this individual has been or must be reassessed and ceased.

Article 1C in the context of temporary protection visas

The Refugees Convention provides that there are a recognised group of people who require protection by the international community and have claim to refugee status. Whether, in what numbers and on what basis states accept refugees as permanent residents is internationally accepted as a matter for each state to determine.

Australia provides protection to refugees who may be persecuted for a Convention reason on return to their country of origin. Through the temporary protection visa regime, an assessment is made as to whether this core *non-refoulement* obligation is owed to an individual. Where a further protection visa application lodged by a temporary protection visa holder is being assessed, Article 1C is one of a number of relevant considerations that will go to determining whether protection obligations continue to be owed and therefore whether the further protection visa is to be granted.

As discussed above, a decision to refuse a further protection visa application lodged by a TPV holder does not mean that the refugee status of the individual has – or had to be – considered. Provided a decision to refuse or cancel a protection visa does not result in *refoulement*, it may not be necessary to consider views of cessation of refugee status.

Australia's case by case approach where formal cessation is to be contemplated allows for a very careful assessment as it applies to an individual's circumstances, and ensures that refugee status is not ceased where the individuals continue to have a well-founded fear of persecution.

Concluding comments

As set out in Australia's contribution to the UNHCR Global Consultations on International Protection on Article 1C, close attention to the manner in which Article 1C is being implemented and interpreted is needed to ensure that international protection is provided to those most in need. It also assists in addressing the growth in illegal migration and people smuggling. This is especially important in view of the scarcity and high cost of places available internationally for the local integration and resettlement of refugees, relative to the number of refugees and people of concern worldwide. There also needs to be a focus on the distinction between conferring and removing refugee recognition and processes adopted by signatory states to grant or withdraw residency rights.

Close attention to both of these issues should also serve to enliven the intention of the founders of the Convention that international protection should continue only so long as it is justified or necessary.