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VISAS FOR VICTIMS OF TRAFFICKING; AUSTRALIA
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Between 1999 and 2005 the Department of Immigration and Citizenship (DIAC, formerly Department for Immigration and Multicultural Affairs (DIMA)) identified 159 suspected victims of human trafficking.¹ Once a victim of trafficking has been identified by the authorities, their ability to remain lawfully in Australia depends on the granting of either a Criminal Justice Visa or a Protection Visa, as outlined below.

1. Criminal Justice Visas

There are a number of visas available to victims of trafficking that are linked to their participation in the criminal justice system. These visas are only granted to victims who are considered to be 'of benefit' to a criminal prosecution in relation to a trafficking or sexual servitude investigation. If a visa is granted it allows the visa holder to remain in Australia and get access to limited social services provided under the Department of Families, Housing, Community Services and Indigenous Affairs' Victims of Trafficking Care Program (VoTCARE).²

The Criminal Justice Visa system is divided into four phases which are discussed in the following Sections.

1.1 Phase 1 — Bridging Visa F (Class WF)

A Bridging Visa F (BVF)³ is granted to a person who is 'of interest' in the investigation or prosecution of an offence involving people trafficking, sexual servitude or deceptive recruiting.⁴ This visa came into effect on January 1, 2004⁵ and allows the visa holder to remain in Australia for 30 days or until a date specified by the Minister.

In deciding to issue a BVF, the Minister must be satisfied that suitable arrangements have been made for the welfare of the applicant in Australia for the proposed period of the visa.⁶ Additionally, the Minister must be certain that, if the bridging visa is granted, the applicant will abide by the conditions imposed on it.⁷

The purpose of the BVF is to give federal or state/territory police agencies time to determine whether or not the trafficked person will be of future benefit to an investigation or prosecution. If this determination is made in the affirmative the police will issue a Criminal Justice Stay Certificate (CJSC), which is the prerequisite for the second phase of the criminal justice visa scheme, the Criminal Justice Stay Visa (CJSV) (see below).⁸ It has also been stated that the BVF is designed to give victims time to 'reflect on their circumstances' in order to provide useful evidence.⁹

¹ Department of Immigration and Citizenship. *People Smuggling and Trafficking*, (2005) <<http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-chapter13.pdf>> at 13 Jan 2009.

² More information about VotCare is available at <www.law.uq.edu.au/humantrafficking>. Subclass 060.

³ *Migration Regulations 1994* (Cth). Schedule 1, 1306 3(d).

⁴ Australian Government, *Guide to Social Security Law: 9.2.1 Visa Subclasses 010-099 Payment Eligibility Visa Subclass 060 Bridging Visa F (BVF)*, (2007) <www.facs.gov.au/guides_acts/ssg/ssguide-9/ssguide-9.2/ssguide-9.2.1/ssguide-060.html> at 9 Dec 2008.

⁵ Suhad Kamand (ed), *The Immigration Kit* (8th ed, 2008) 200.

⁶ Ibid.

⁷ See also Instruction 391: People Trafficking Para 8.2.3

⁸ Australia, *Parliamentary Debates*, House of Representatives, 14 Mar 2005, 11 (Malcolm Turnbull).

BVF holders are entitled to access certain support measures under the Victims of Trafficking Care Program (VoTCARE) including a start-up allowance for toiletries and clothing, an accommodation and food allowance, an emergency allowance, medical treatment and counselling, access to English training, and up to three appointments with legal practitioners.¹⁰ However, while holding this visa, the recipient is not entitled to work or receive social security benefits. He/she must also satisfy the reporting requirements.¹¹ Should the federal or state/territory police determine that the visa holder is no longer of interest to their investigations, notice will be given to the Minister, the BVF will be revoked and the person will be deported.

In the period between January 2004 and December 2007, 81 Bridging Visas were issued to 78 people.¹²

1.2 Phase 2 — Criminal Justice Stay Visa (CJSV)

The Criminal Justice Stay Visa (CJSV)¹³ is issued to recipients of the Bridging Visa F (BVF, see above) who have been determined to be of interest to a prosecution, following the issuing of a Criminal Justice Stay Certificate (CJSC) by the State/Territory or Federal Attorney-General.¹⁴ Pursuant to ss 147, 148 *Migration Act 1958* (Cth) a federal or state/territory CJSC may be issued where the Commonwealth Attorney-General or an authorised official of the state or territory considers that the non-citizen should remain in Australia for the purposes of the administration of justice. However, even if a CJSC is in force, the Minister still retains absolute discretion regarding the grant of a CJSV.¹⁵

CJSVs allow the visa holder to remain in Australia for as long as is necessary to complete judicial proceedings or a criminal investigation. Whilst in Australia, a CJSV holder has access to a case manager and can obtain rent assistance, medical and counselling treatment, access to English language programs, family support benefits, and has limited work rights.¹⁶ The victim's children are also allowed to visit Australia.¹⁷

Upon conclusion of the relevant investigation or prosecution, s 162 *Migration Act 1958* (Cth) requires the Commonwealth Attorney-General or the authorised state or territory official to cancel the CJSC, thus also cancelling the CJSV. The CJSV holder is also prohibited from applying for any other visa (apart from the Protection Visa under s 36 *Migration Act 1958* (Cth)) whilst they remain in Australia.¹⁸ If a protection visa is not applicable, the only option left is to be granted a Temporary Witness Protection (Trafficking) Visa, as outlined below.

During the period between January 2004 and December 31, 2007, 62 Criminal Justice Stay Visas were issued.¹⁹

¹⁰ Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (2004) 36, <www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2002-04/sexual_servitude/report/index.htm> at 21 Jan 2009.

¹¹ *Migration Regulations 1994* (Cth) Schedule 2, 060.6.

¹² Fiona David, *Trafficking of women for sexual purposes* (2008) 14.

¹³ Pt 2, Division 4 *Migration Act 1958* (Cth).

¹⁴ Section 157(a) *Migration Act 1958* (Cth).

¹⁵ Section 158 *Migration Act 1958* (Cth).

¹⁶ Section 35(4A) *Migration Act 1958* (Cth).

¹⁷ Section 35(4A) *Migration Act 1958* (Cth).

¹⁸ Sections 46, 161 *Migration Act 1958* (Cth).

¹⁹ Good Shepherd Social Justice Network, *Australian NGO Shadow Report on Trafficked Women in Australia*, (2006) [14],

1.3 Phase 3 — Temporary Witness Protection (Trafficking) Visa (Class UM)

Following the conclusion of a trafficking prosecution or investigation, a CJSV holder may only remain in Australia if they are granted a Temporary Witness Protection (Trafficking) Visa.²⁰ CJSV holders are not allowed to apply for this visa as of right. They can only apply following an invitation from the Minister. The Minister has discretion to issue this invitation; a decision not to invite the CJSV holder to apply for a Temporary Witness Protection (Trafficking) Visa is not reviewable by the Migration Review Tribunal.

The key requirement of this temporary visa is that the federal Attorney-General certifies that the CJSV holder has made a significant contribution to and cooperated closely with the authorities in relation to prosecution or investigation for trafficking, whether or not a conviction resulted and regardless of whether the Department of Public Prosecutions decided not to proceed with a prosecution.²¹ The visa applicant must not be the subject of any other criminal investigations.²² The Minister must also be satisfied that the recipient would be at risk if they returned to their country of origin.²³ Additionally, the applicant must satisfy health, values and character requirements at the time of the decision, although there is discretion for these conditions to be waived.²⁴ The applicant must be in Australia when the visa is granted.²⁵ Members of the applicant's immediate family can also be granted this visa.²⁶

The visa holder is entitled to income support, Medicare and work rights for the three years of the visa's validity.²⁷ By December 31, 2007, 14 Temporary Witness Protection (Trafficking) Visas had been granted since their introduction.²⁸ There is no additional information that further visas have been issued since then.

1.4 Phase 4 — Permanent Witness Protection (Trafficking) Visa (Class DH)

Two years after a victim of trafficking has been granted a Temporary Witness Protection (Trafficking) Visa,²⁹ the person is able apply for a Permanent Witness Protection (Trafficking) Visa.³⁰ Similar to the Temporary Witness Protection (Trafficking) Visa, a certificate is required from the federal Attorney-General certifying that the applicant has made a significant contribution to and cooperated closely with authorities in relation to an investigation or prosecution involving sexual servitude or trafficking offences and that the Minister believes that the person remains at risk if he/she is returned home.³¹ The applicant must also not be subject to any prosecutions in relation to trafficking offences. This visa subclass is also available to victims of migrant smuggling.

<www.goodshepherd.com.au/justice/documents/CEDAWEndorsements1March2006_003.pdf> at 13 Jan 2009.

²⁰ Subclass 787, under *Migration Regulations 1994* (Cth) 2.07AJ; Kamand, above n5, 848.

²¹ *Migration Regulations 1994* (Cth) 2.07 AJ (3) (c)(i) and (ii).

²² Kamand, above n6, 849.

²³ *Migration Regulations 1994* (Cth) 2.07 AJ (3)(f).

²⁴ Australian Government, Guide to Social Security Law, 9.1.2.130 *Criminal Justice Stay Visas (CJSV)*, (2007) <www.facs.gov.au/guides_acts/ssg/ssguide-9/ssguide-9.1/ssguide-9.1.2.130.html> at 9 Dec 2008.

²⁵ S787.4, Vol 4, *Migration Regulations 1994* (Cth).

²⁶ Kamand, above n6, 849.

²⁷ Kamand, above n6, 850.

²⁸ David, above n12, 15.

²⁹ Subclass 787.

³⁰ Subclass 852, under *Migration Regulations 1994* (Cth) 2.07AK; Kamand, above n5, 597.

³¹ *Migration Regulations 1994* (Cth) 2.07AK.

The applicant must also satisfy a number of character, values and health requirements, but these conditions may be waived by the Minister.³² The applicant must be present in Australia for the visa to be issued.³³ The Permanent Visa entitles the holder to income support, Medicare, and full work rights.³⁴ The visa recipient can also travel to and enter Australia for five years after the visa is issued, after which they must apply for a resident return visa or gain citizenship if they wish to travel and re-enter Australia.³⁵

No Permanent Witness Protection (Trafficking) Visas had been issued by December 31, 2007.

2. Protection (Class XA) Visa

Some victims of trafficking are unable to receive any of the criminal justice visas mentioned above. This may be the case, for instance, if they are too traumatised or otherwise unable to cooperate with law enforcement authorities or because they cannot offer any information that law enforcement agencies consider useful. In these circumstances the only option which would allow for these non-citizens to remain in Australia is to apply for a protection visa. To be granted a protection visa, the trafficking victim must prove that he or she satisfies Australia's protection obligations under the *Convention and Protocol relating to the Status of Refugees*.³⁶

Accordingly, an applicant must prove that he/she

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁷

Protection visas have previously been granted to a small number of victims of trafficking.³⁸ However, the difficulty of proving that these victims are a member of a particular social group to which Australia owes protection obligations is illustrated by the following examples from decisions of the Refugee Review Tribunal (RRT) involving trafficked persons.

V03/16442 [2004] RRTA 474 (25 June 2004)

While the applicant in this decision was not trafficked to Australia, this case nonetheless illustrates the RRT's methods of evaluating the legitimacy of a claim for membership of a particular social group. A female Albanian national alleged to have been tricked into being trafficked from Albania to Italy to work as a prostitute. She then escaped and came to Australia on a false passport. The RRT rejected the woman's evidence and held that she was not a member of a particular social group to which Australia owed protection obligations.

N03/47757 [2004] RRTA 355 (11 May 2004)

In this decision, a female Thai national alleged that she was forced to work in a brothel in Thailand. She claimed to have escaped with the help of a friend who arranged for her to

³² Ibid.

³³ S852.411, Vol 5, *Migration Regulations 1994* (Cth); Kamand, above n5, 598.

³⁴ Kamand, above n6, 598.

³⁵ S852.511, Vol 5, *Migration Regulations 1994*, (Cth).

³⁶ Section 36(2) *Migration Act 1958* (Cth).

³⁷ Article 1A(2) *Convention Relating to the Status of Refugees* as amended.

³⁸ See, for example, Refugee Review Tribunal Reference N04/40551.

travel to Australia if she did a limited amount of prostitution. Once in Australia, she found that she had been contracted for a longer period. A male associate paid off her debt and she was allowed to leave. The applicant feared that if she returned to Thailand she would again be forced into sexual servitude. The RRT held that

[the] applicant was subjected to treatment in Thailand that amounts to persecution because she was a member of a particular social group, namely Thai sex workers ... [and] also ... that a real chance exists that the applicant will suffer persecution in Thailand if she returns now or, in the foreseeable future.

VXAJ v MIMIA [2006] FMCA 234³⁹

This case demonstrates how the RRT's evaluations of a trafficked person's membership of a social group are capable of review by superior courts. The female Thai national VXAJ had applied for a protection visa on August 25, 2003 after being trafficked into Australia. Her fears of returning to her country of origin were based on concerns that her involvement in the prosecution of a trafficker while in Australia (in the case of *Wei Tang*⁴⁰) would result in retaliation against herself or her family.

VXAJ's protection visa was refused on May 13, 2004. This decision was upheld by the Refugee Review Tribunal on March 21, 2005. These findings were then subject to judicial review in the Federal Court, following an application by VXAJ on May 13, 2005. It was held by Chief Magistrate Pascoe that the RRT's decision was in jurisdictional error as it had failed to correctly apply the principles of *Applicant S*.⁴¹ It was also decided that Thai sex workers were a social group and thus potentially owed protection obligations by Australia. In order to further consider this issue, the case was then remitted to the RRT.

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³⁹ See also the separate case report on VXAJ at <www.law.uq.edu.edu/humantrafficking>.

⁴⁰ *R v Tang* [2008] HCA 39. See also the separate case report on *Wei Tang* at <www.law.uq.edu.edu/humantrafficking>.

⁴¹ *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387.