



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Draft Complementary Protection Visa Model: Australia
UNHCR Comments
January 2009

UNHCR's Standing

1. UNHCR's standing with regard to refugee protection is based on paragraph 6 of its Statute,¹ Article 35 of 1951 Convention relating to the Status of Refugees and Article II of 1967 Protocol relating to the Status of Refugees.²
2. The UN General Assembly, ECOSOC and UNHCR's Executive Committee (ExCom) have extended UNHCR's competence by empowering UNHCR under its mandate to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute, but who faced serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.³
3. UNHCR has a mandate with regard to stateless persons under Article 11 of the 1961 Convention on the Reduction of Statelessness, extended by UNGA Resolution 3274 of 1974 and UNGA Resolution 31/36 of 1976.
4. UNHCR's Executive Committee has also noted that "States may choose to consult with UNHCR, if appropriate, in view of its particular expertise and mandate, when they are considering granting or ending a form of complementary protection to persons falling within the competence of the Office".⁴

UNHCR's definition of complementary protection

5. UNHCR defines "complementary" forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition of the 1951 Refugee Convention.

¹ Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950.

² 1951 Convention relating to the Status of Refugees; 1967 Protocol relating to the Status of Refugees, General Assembly Resolution 2198 (XXI) of 16 December 1966.

³ For full references to the resolutions, please see the article by Volker Turk "The role of UNHCR in the development of international refugee law" in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, 1999, ed. Frances Nicholson and Patrick Twomey.

⁴ 2005 ExCom Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection (No. 103 (LVI)), para. (p).

6. UNHCR considers such mechanisms to be a positive and pragmatic response to certain international protection needs not covered by the 1951 Convention, but wishes to ensure that complementary protection complements and does not undermine refugee status under the 1951 Refugee Convention.
7. The 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection⁵ affirms that complementary forms of protection should only be resorted to after full use has been made of the 1951 Refugee Convention. It also distinguishes complementary protection clearly from temporary protection – a specific, provisional response to situations of mass influx. Finally, the Conclusion underlines the importance of developing the international protection system in a way which avoids protection gaps, and enables all those in need of international protection to find and enjoy it.⁶

Introduction of a legislative framework for complementary protection

8. UNHCR welcomes the proposed introduction, in Australia, of a legislative basis to protect persons who may not qualify as refugees but who are nonetheless in need of international protection, based on international human rights instruments. UNHCR particularly welcomes the intention to enable claims for complementary protection under international human rights treaties to be considered “in a transparent process that is subject to merits review and scrutiny by the courts”.⁷
9. UNHCR welcomes assurances that the complementary protection regime will apply in ‘excised’ territories of Australia, including notably Christmas Island
10. UNHCR also welcomes assurances that the provision of complementary protection to individuals will not impact on the number of refugees granted resettlement to Australia under Australia’s Humanitarian Program.

Grounds for providing complementary protection

11. UNHCR notes that the Australian draft complementary protection visa model will extend to persons who cannot be *refouled* pursuant to Australia’s *non-refoulement* obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). Australia currently gives effect to its obligations under those treaties under a system of ministerial intervention.

⁵ No. 103 (LVI) – 2005.

⁶ Ibid.

⁷ DIAC Draft Complementary Protection visa model circulated prior to the 13 November consultation on complementary protection and work rights.

Other potential grounds – indiscriminate violence

12. UNHCR notes that the Australian draft model currently does not extend to persons risking indiscriminate but serious threats as a result of armed conflict or generalized violence, although United Nations Member States have repeatedly reaffirmed their support for UNHCR's mandate activities to secure international protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts or serious disorder.
13. While UNHCR understands that persons facing indiscriminate but serious threats could in many cases be protected through a broad interpretation of the provisions of the 1951 Refugee Convention, international human rights instruments or under ministerial discretion, UNHCR would, in principle, welcome the explicit inclusion of such persons in Australia's codified complementary protection regime.
14. Nevertheless, should this be contemplated, UNHCR is of the view that care must be taken not to grant complementary protection to applicants from situations of generalized violence who also have a well-founded fear of persecution on 1951 Convention grounds and who should be granted refugee status.⁸

Preferred procedure

15. The Agenda of Protection, a programme of action adopted by States and UNHCR in 2002, asked States to:

... consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.

⁸ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of Protection Granted, 28 January 2005.

16. The 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection:⁹

Encourages States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied (para. q).

17. While some States have separate procedures, UNHCR considers a single procedure may be more efficient for determining whether a person is in need of international protection. This would entail – in any application for asylum - first an examination of the Refugee Convention grounds, to be followed, as necessary and appropriate, by an examination of the possible grounds for the grant of a complementary form of protection. A single procedure would also make it easier to ensure that appropriate legal guarantees, including a right of appeal to an independent body, are available in relation to all decisions concerning a person's entitlement to international protection.
18. UNHCR therefore welcomes the Australian proposal to introduce a clear, two-step process by which an assessment is made first of eligibility for refugee status, and secondly for complementary protection needs. In this regard, UNHCR believes it will be important to maintain a clear distinction and rigorous approach to assessing refugee claims first, and complementary protection needs only after the refugee claim has been considered. It might be desirable to establish a clear requirement that written reasons for decisions state specifically why refugee status was declined, including in the case where no refugee status was claimed, but the claim for complementary protection was accepted.
19. Clear guidelines and training for decision makers will be crucial in ensuring that the primacy and integrity of the Refugee Convention is maintained, but should also specify that a claimant's need for complementary protection should be considered, even if he/she has not specifically asked for it to be considered.

What Standard of Treatment for Complementary Forms of Protection?

20. UNHCR welcomes the intention of the Australian Government to grant all persons recognized to be in need of international protection similar basic civil, political, economic and social rights as those afforded to refugees and the acknowledgement that their need for protection can be as long in duration.

⁹ No. 103 (LVI) – 2005.

21. Beneficiaries of complementary forms of protection should enjoy a formal legal status with defined rights and obligations, and should be issued with documents certifying that status. It should last for as long as protection is required. The ending of complementary status, just like the cessation of refugee status, should be based on objective legal criteria, and should never be arbitrary. It also needs to be based on objective and reliable country of origin information.
22. The status afforded to beneficiaries should reflect basic rights as defined in relevant international and regional instruments. In some States or regions, domestic or regional human rights provisions may require standards of treatment which are higher than those of other States or regions, but the standards to be respected should not fall below a certain minimal level.¹⁰
23. The family is acknowledged in human rights instruments as the natural and fundamental group unit of society. The importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by EXCOM on a number of occasions.¹¹ UNHCR welcomes the intention of the Australian Government to enable grant of a protection visa to family members of persons granted a protection visa on complementary protection grounds.

Travel Documents

24. UNHCR is of the view that Refugee Convention Travel Documents should normally be limited to Convention refugees, but that complementary protection holders should be able to exercise their rights to freedom of movement, as per Article 12 of the ICCPR, and should be provided with a travel document which enables them to leave and return to Australia.

Standard of Proof

25. UNHCR is of the view that there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection. The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face, are all arguments in favour of adopting an approach that is no more demanding for people potentially in need of complementary protection than it is for refugees. It would be desirable to include the standard of proof in legislation to ensure consistency.

¹⁰ Set out in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child. Regional instruments such as the European Convention for the Protection of Human Fundamental freedoms, the African Charter on Human and Peoples' Rights and the American Convention Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.

¹¹ See for example Conclusions 9(XXVII)-1977; 24 (XXXII) – 1981, 88(L)-1999.

Character Issues

26. The 1951 Refugee Convention envisages that a person who is properly excluded from that Convention under Article 1F may be returned to his or her home country, notwithstanding that person may have a well-founded fear of persecution. In this regard, UNHCR's Guidelines on the application of the exclusion clauses make the following point:

While a State's decision to exclude removes the individual from the protection of the Convention, that State is not compelled to follow a particular course of action upon making such a determination (unless other provisions of international law call for the extradition or prosecution of the individual). States retain the sovereign right to grant other status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against refoulement by the application of other international instruments, notably Article 3 of the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [3] and Article 22 (8) of the 1969 American Convention on Human Rights.[4]¹²

27. Thus, an applicant excluded from refugee protection may be protected against *refoulement* under international human rights law, but could face trial and punishment in the country of asylum or at an international level for the alleged crimes which would have excluded him or her from international protection under the 1951 Refugee Convention, and may not necessarily obtain the full status and rights granted either under the Refugee Convention or under a complementary protection regime.
28. In the case of refugees, UNHCR believes article 1F of the 1951 Refugee Convention, properly applied,¹³ presents a rigorous and exhaustive exclusion test. Similarly, UNHCR is of the view that article 33 (2) of the Refugee Convention represents the definitive exception to the *non-refoulement* principle.
29. Where refugees have not been excluded under the Refugee Convention, including possibly following review by the Administrative Appeals Tribunal, they are nevertheless required – in order to obtain a protection visa and the usual rights provided to refugees in Australia - to satisfy a 'character' test outside the framework of the 1951 Refugee Convention, which could be significantly broader than the exclusion test in the Convention. UNHCR notes this is already the case in Australia.

¹² See UNHCR "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", HCR/GIP/03/05, 4 September 2003, para. 7.

¹³ Ibid. and accompanying UNHCR "Background Note".

30. Similarly, persons who do not meet the refugee definition, but who are in need of complementary protection must pass a ‘character’ test to receive a protection visa.
31. UNHCR is of the view that any decision to deny someone protection because they pose a threat to national security/public order/the public interest must be adequately defined and consistently applied. In the case of refugees, UNHCR is of the view that the 1951 Refugee Convention provides a robust legal framework.
32. In the case of persons who are excluded from refugee protection, including following review by the Administrative Appeals Tribunal, the Department’s Process Flowchart suggests their complementary protection needs will be the subject of ministerial discretion. UNHCR does not see the need to leave these cases in the realm of ministerial discretion. While UNHCR appreciates that the rights and entitlements of such persons may need to be considered exceptionally, it is of the general view that any decision with regard to a substantive legal obligation not to *refouler* pursuant to an international obligation should be circumscribed by legislation rather than left to ministerial discretion. Following this decision, the relevant standard of treatment to be afforded to people who cannot be removed, but who may have committed serious crimes or present a threat to security or the community can be considered.
33. In both the cases of refugees and non-refugees denied protection visas on ‘character’ grounds, but who are not excluded from refugee protection, UNHCR is of the view that some further consideration should be given to what sort of status such persons should have and provision for change of such status to avoid indefinite uncertainty. While UNHCR recognizes that the recent use of the Removal Pending Bridging Visa represents an advance on indefinite detention, UNHCR nevertheless believes it merits some further consideration in light of a review of the Australian visa regime. This is particularly so since it denies holders, in some cases refugees, a right to family reunion until such time as they may apply for a more permanent visa. Where a refugee has committed a crime and has atoned for the crime, for instance, UNHCR is of the view that he or she should prima facie be entitled, at a minimum, to the benefits and rights established by the Refugee Convention, and that family reunion should not be denied in such a case.
34. UNHCR in this context also wishes to recall ExCom’s guidance that while “States may decide to allow prolonged stay for compassionate or practical reasons....such cases must be clearly distinguished from cases where there are international protection needs.”¹⁴

¹⁴ 2005 ExCom Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection (No. 103 (LVI)), para. (j).

Stateless persons

35. Complementary protection should not be a substitute for the application, in good faith, of the Statelessness Conventions.¹⁵
36. UNHCR's role in relation to stateless persons has arisen from concerns that, due to their lack of national protection, stateless persons are placed in a position analogous to that of refugees.
37. The protection obligations under the 1954 Statelessness Convention (originally a protocol to the 1951 Refugee Convention) are virtually identical to those under the 1951 Refugee Convention, the main differences being that the 1954 Convention does not include the obligations of *non-refoulement* and of not imposing penalties for illegal entry or presence.
38. In implementing its obligations under the 1961 Convention, Australia is required to grant an application for citizenship made by a person born in Australia who is and has always been stateless (and UNHCR notes s. 21 (8) of the Citizenship Act gives this obligation domestic legal effect). In implementing its obligations under the 1954 Convention, Australia has as far as possible to facilitate the naturalization of stateless persons who are not already entitled to citizenship under the 1961 Convention. In both cases, there should be a procedure for determining whether the applicant is stateless. However, such a procedure should not be confused with complementary protection since it cannot be considered as complementary to the international refugee protection regime.
39. Nevertheless, stateless persons are particularly vulnerable and the borderline between complementary protection and protection under the 1954 Convention may sometimes be blurred, given that where a stateless person is unable to regularize his or her situation in any country, return of that person by Australia to another country could in certain cases raise an issue of cruel, inhuman or degrading treatment. Due to a lack of nationality, stateless people can also spend long periods in detention awaiting deportation or be stuck in orbit, both of which are unacceptable under international human rights law.¹⁶

¹⁵ 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

¹⁶ See Guideline 7 of the 2005 Council of Europe Guidelines on Forced Return which states: "Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible." As stated by the Council of Europe's Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) in their commentary to Guideline 7: "The rule formulated in this Guideline derives from the fact that Article 5(1) ECHR imposes a restrictive reading of the situations where such deprivation of liberty is authorised, as these are exceptions to the fundamental right to liberty and security. The European Court of Human Rights has recalled that 'any deprivation of liberty under Article 5 para. 1(f)

40. UNHCR is of the view that stateless persons should have access to refugee or complementary protection, along with all other persons.
41. If, however, the individual is stateless but has no well-founded fear of persecution or other international protection need, the 1954 and 1961 Statelessness Conventions are the reference points for determining the appropriate response.
42. There are some fundamental differences between the approach required under the 1954 Convention and the 1951 Refugee Convention and human rights instruments. In particular, while information gathered in the context of refugee status determination may be useful for determining statelessness (or even necessary under the refugee definition), there will likely be information relating to nationality or statelessness which will not be available in the refugee status determination context due, for example, to confidentiality considerations. One example would be where confirmation of nationality is sought from a specific State. A full consideration of statelessness under the 1954 Convention should not therefore be examined before refugee or complementary protection claims. As well, in many cases, stateless persons have no claims based on the 1951 Refugee Convention, CAT or ICCPR, so it does not make sense to have them go through a procedure which looks at protection needs under those Conventions.
43. UNHCR notes that currently, in Australia, there is no avenue for Australia to consider the claims of a stateless person who does not also have a refugee claim, except under ministerial discretion, which is non-compellable and non-reviewable. In UNHCR's view, it would be desirable for Australia to establish a separate and distinct procedure for determining whether or not a person is stateless.

ECHR will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1(f)' (Eur. Ct. HR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, para. 113). The Human Rights Committee adopts a similar attitude under Article 9(1) of the International Covenant on Civil and Political Rights. In *Jalloh v. the Netherlands*, it expressed the view that Article 9(1) ICCPR had not been violated, because 'Once a reasonable prospect of expelling [the author of the communication] no longer existed his detention was terminated' (communication No. 794/1998, final views of 23 March 2002). The Human Rights Committee also considers that Article 9 ICCPR excludes detention for extended periods when deportation might be impossible for legal or other considerations (see e.g., Concluding Observations relating to the United Kingdom, (2001) UN doc. CCPR/CO/73/UK, para. 16)." Nor should such persons end up being stuck in orbit, in respect of which note the case of *Harabi v. the Netherlands* in which the European Commission on Human Rights recalled that it "held that the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention (...). Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise his situation" [Application No. 10798/84, decision of 5 March 1986]).

Conclusion

44. The 1951 Refugee Convention remains the cornerstone of the international protection of refugees and provides the basic framework for such protection. A full, inclusive and dynamic interpretation of the Refugee Convention, in accordance with its object and purpose, diminishes the need for complementary forms of protection.
45. Complementary protection should be granted to all persons in need of international protection and all such persons should be treated in conformity with their international protection needs and their human rights.
46. The standards elaborated in the 1951 Refugee Convention, together with developments in international human rights law, provide an important guide to the treatment that should be afforded to all persons who are in need of international protection.
47. The standards of treatment afforded to persons not formally recognized as refugees, but nevertheless acknowledged to be in need of international protection, should provide for the protection of basic civil, political, social and economic rights on an equal footing with those granted Convention status.
48. Complementary forms of protection should be implemented in such a way as to ensure the highest degree of stability and certainty possible, including through measures to ensure respect for other important principles, such as the fundamental principle of family unity.
49. Complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime.

UNHCR's Regional Office
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