There may be exogenous factors which help to explain the high unemployment experienced by some immigrants in the PLSIA with bachelor degrees, such as the existence of high unemployment in the occupational fields for which such immigrants are qualified. Certainly, Smith[3] found that, in the late 1980s, there were very large additions to the engineering work force in terms of both local graduates and recently arrived immigrants but a reduced demand for engineers over the same period. The high unemployment experienced by engineering/building associates and technicians in the PLSIA supports his finding. Likewise, it is generally recognised that there has been an oversupply of school teachers since at least the early 1990s. The existence of discrimination in the labour market is also a possibility.

The small sample size of the PLSIA makes it difficult to draw definite conclusions about the factors shaping the employment situation of tertiary-qualfied immigrants. However, the full LSIA plans to interview 5000 immigrant households over five years (between 1994 and 1999). This will provide a source of information which can be used to analyse this question in greater depth and with more confidence.

References

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HUMANITARIAN CLAIMS FOR PERMANENT RESIDENCE

Katharine Betts

The guidelines for recommending who among on-shore applicants should be considered for a visa on humanitarian grounds have changed. The changes increase the Minister's discretion. This may make it harder to repatriate non-residents who fail to gain visas under the November 1993 amnesties.

In May 1994 the Minister for Immigration and Ethnic Affairs, Senator Bolkus, announced policy changes in the rules for on-shore applicants seeking permanent residence on humanitarian grounds. These changes appear to make it easier for foreigners in Australia to be considered for permanent residence on these grounds, and they appear to give the Minister more discretion.

In recent years the immigration system has been convulsed by legal changes, especially the Migration Amendment Act of 1989 and the Migration Reform Act of 1992. The thrust of these changes has been to codify offshore and on-shore selection policy into law, and into regulations derived from the law, and to reduce Ministerial discretion in decision-making in all possible circumstances. In many cases the Minister now has no discretion: in others he can only use discretion after the legal rules have been applied and

after all formal avenues of appeal have been exhausted. He may then, if he so decides, intervene and replace a decision that is unfavourable to an applicant with one that is favourable, provided that he tables this decision in Parliament.

The changes which codified policy into law and limited Ministerial discretion were introduced for two reasons. The first was the problem of coping with an ever-increasing number of requests for the Minister to intervene in individual cases: for example, during the 12-month period from March 1977 to March 1978, 15,500 representations were made to the Minister, 60 per cent of which required his signature.[1] These requests represented a heavy administrative burden, made it difficult for the Minister and the Department to make decisions that were consistent and fair, and they were the focus of much political lobbying. The second reason was the growing number of legal challenges mounted against adverse Ministerial decisions, particularly by on-shore applicants.

These legal challenges were made possible by changes in administrative law in the late 1970s, particularly the *Administrative Decisions (Judicial Review) Act* of 1977, and by the fact that the applicant was resident in Australia and therefore able to make use of the law.[2] Decisions based on the Minister's interpretation of policy, or on policy interpretations made by his officers, were relatively easily challenged and the courts made a number of judgments in which these decisions were overruled. The cumulative effect of this was that the executive began to feel that they were losing control of immigration policy to the judiciary. If policy were codified into legally binding regulations which minimised discretionary decision-making, migrant selection could, in Kathryn Cronin's words, be made 'judge proof'.[3] The two aims of fairness and of the return of selection policy to the executive could be achieved.

While all categories of the immigration programme came under pressure from on-shore applicants in the 1970s and 1980s (particularly from people applying on the basis of legal or de facto marriage or of employment), applications from foreigners requesting permanent visas on humanitarian or compassionate grounds were numerous. And, if people in these categories were initially denied visas, they found it relatively easy to appeal to the courts and to get a more favourable decision.[4] (A humanitarian claim would rest on the applicant being in a situation similar to that of a refugee, but not meeting all of the criteria specified by the Geneva Convention, while a compassionate claim would depend on family circumstances or other personal problems of the applicant.)

The 1989 Act applied rigorous limits to the possibility of making on-shore humanitarian and compassionate claims. The family circumstances that might have been covered by a former application on compassionate grounds were carefully defined in the regulations.[5] And, though people claiming refugee status as set out in the Geneva Convention could still put their case, opportunities for those who fell short of this definition were strictly circumscribed. A foreigner within Australia could only apply for residence on humanitarian grounds if they could show: that a natural disaster or political upheaval had occurred in their country of origin; and that this directly affected them; and that the country in which the disaster or upheaval had occurred had been gazetted by the Minister. Five thousand people applied for residence on these

grounds between December 1989 and December 1990 but, as the Minister had not gazetted any countries, none were successful.[6]

Late in 1990 this situation changed and the procedures for applying to remain in Australia on humanitarian grounds were incorporated into the procedures for applying for refugee status. This incorporation meant that an applicant must first apply for refugee status and then be rejected both by the primary decision-maker in the Department (often referred to as the 'case officer' or the 'review officer') and by the appeal body reviewing determinations of refugee status. Between December 1990 and July 1993 the forum for appeal was the Refugee Status Review Committee (RSRC); from July 1993 it became the Refugee Review Tribunal (RRT). After an applicant for refugee status had been rejected at the primary level and on appeal, either the RSRC or the RRT, together with the review officer who had made the primary decision, could then recommend to the Minister that the applicant should be considered for a visa on humanitarian grounds.

The Minister was not obliged to consider the case and, in 1991, the then Minister, Mr Hand, issued guidelines to the appeal body and the review officers. These guidelines indicated that few people would be found to be eligible if he should decide to examine their case. They specified that only people whose circumstances and personal characteristics provided them 'with a sound basis for expecting to face a significant threat to personal security on return as a result of targeted actions' against them should be put forward. (Mr Hand also made it clear that, while the guidelines were intended to help the appeal body and the review officer in exercising their recommendatory functions, they were not intended to be exhaustive.)[7]

The May 1994 guidelines announced by Senator Bolkus replace those set out by Hand. The main differences appear to be these: the individual's 'sound basis' for expecting a significant threat to personal security has become a 'continuing subjective fear' and the statement that the guidelines are not exhaustive has been given added emphasis. Senator Bolkus makes it clear that they are 'not intended as a set of criteria but as a framework which can be interpreted broadly where there are compelling claims for consideration of humanitarian access'. It is also curious that, while the previous guidelines required that the recommendation come from both the appeal body and the original review officer, the new ones simply return the responsibility for the recommendation to the review officer.[8]

Sources within the RRT and the Department explain the change in this way. Members of the RSRC had had a formal responsibility to consider for humanitarian status those applicants who had been denied refugee status. If they thought that an applicant had a case, they were obliged to recommend that the Minister consider it. But the RSRC had only been a policy advisory committee. In contrast, the RRT was established by the 1992 Reform Act as a statutory body. This Act makes no mention of recommendations for humanitarian status as part of the its legal powers, and members of the RRT are not keen to take on what they regard as a question of policy, not one of law. They see the question of humanitarian status as one that goes beyond their charter and they do not wish to be seen to be trying to extend that charter. Apparently members feel that, if the RRT is to guard its independence, it should not be seen to be

issuing recommendations to the Minister on matters of policy, recommendations which could look like orders.

If a decision to recommend an applicant for a humanitarian visa reverts to being the sole responsibility of the case officer, this in effect means that it may be the sole responsibility of the Minister. For his part, the Minister appears to welcome the increased scope for personal decision-making that the RRT's reticence offers. Many people make representations to him and the new arrangements give him rather more opportunity to intervene if he wishes.

The new guidelines introduce three changes: the Minister has more discretionary power over who shall and who shall not be considered for humanitarian status; there is a shift in the language from the objective note struck by the phrase 'a sound basis' to that of a 'continuing subjective fear'; and there is the emphasis that the guidelines are not a set of criteria but a framework for interpretation for officers to use. They can refer to them when they are debating whether or not to draw a case to the Minister's attention (in those instances where he has not already asked for the file himself). All three changes suggest that Senator Bolkus wishes to exercise more discretion in immigration matters than his predecessor.

Senator Bolkus took up the Immigration portfolio in March 1993. In 1991-92 there had been six humanitarian approvals and in 1992-93 there were 24. Between July and December 1993 there were 25.[9] Firm figures for 1994 are not yet available, but a spokeswoman for the Department estimates that around 40 have been approved between January and August. While these numbers are small, they have grown sharply under the new administration.

But the significance of the new guidelines lies not so much in this limited history but in their potential to attract significant numbers of people who fail to gain residence under the November 1993 amnesty.

Ministerial discretion, with all the scope it offers for political favouritism and legal intervention, has only recently been all but removed from migrant selection. The process was painful and difficult. The new guidelines mean that the Minister has put it on the record that he is happy to exercise what power he has to perform individual acts of clemency. Such a move reintroduces personal discretion and offers an invitation to lobbyists for special interests.

The *Chinese Post* has already alerted its readers to the new provisions.[10] Together with the amnesty, they may create further difficulties in policy implementation in the near future. Will the May 1994 guidelines reopen the door to the problem of streams of individual applications, and will they provide fresh grounds for judicial appeal?

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4 See Birrell, op. cit.

5 See Cronin op. cit., p. 94

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[8] Minister for Immigration and Ethnic Affairs and Minister Assisting the Prime Minister for Multicultural Affairs, Media Release, B28/94, 24 May 1994

[9] *Refugee Manual: A Guide for Advisers*, Refugee Advice and Casework Service, (Locked Bag 15 Camperdown P. O., NSW 2050) Chapter 9, note 6

[10] 'Rejected refugees can apply for humanitarian migration', *Ethnic Press Survey Service*, Department of Immigration and Ethnic Affairs,8 July 1994, p. 8 (A later report quoted a DIEA spokesperson denying that rejected refugee applicants can apply for human migration: 'No PR application on humanitarian grounds', *Ethnic Press Survey Service*, 29 July, 1994, p. 10.)

THE OUTCOME OF THE 1 NOVEMBER 1993 DECISIONS

Bob Birrell

Applications for the 1 November 1993 categories created by the government to resolve the status of the PRC students closed on 1 August 1994. Over 48,000 persons have applied; more than originally anticipated. But thousands of PRC students are likely to remain illegally in Australia after the applications have been processed.

On 1 November 1993 the Australian government announced a new set of measures intended to resolve the long-standing problem of People's Republic of China (PRC) nationals who have refused to return home after the expiry of their visas. Most of these nationals had originally entered Australia as English language students.

Three main categories of these PRC nationals and some others in a similar situation were affected. The first were those from the PRC who were in Australia at the time of the Tiananmen affair in June 1989 (category 815). They were to be granted permanent residence without any restriction other than 'good character and health' conditions. The second were those who had been visaed before March 1992 and had applied for asylum by November 1993 (category 816). Most of these people were from the PRC although asylum applicants from all other countries could also apply, as could certain Sri Lankan and former Yugoslavians who were in Australia on temporary humanitarian protection orders. The third category, announced on 31 January 1994 covered certain 'better qualified' people — mainly privately funded overseas students enrolled in post-graduate courses (category 818). Again, those eligible included PRC and other nationals.

The final application date for all three categories was 1 August 1994. This has now passed. Table 1, shows that 48,637 persons have applied, 40,709 of them being citizens of the PRC. These are clearly very large numbers. If most succeed in their applications, this will mean a major addition to the ranks of permanent residents from the PRC, with significant downstream demographic and social implications for Australian society. But perhaps just a serious, at least for the short term, is the looming problem of what to do about the thousands of PRC students who will fail in their applications and who will join many others who were not eligible for the 1 November categories or, though