



**PATHWAYS TO MIGRANT PROTECTION:  
A MAPPING OF NATIONAL PRACTICE FOR  
ADMISSION AND STAY ON HUMAN RIGHTS  
AND HUMANITARIAN GROUNDS IN  
ASIA AND THE PACIFIC**



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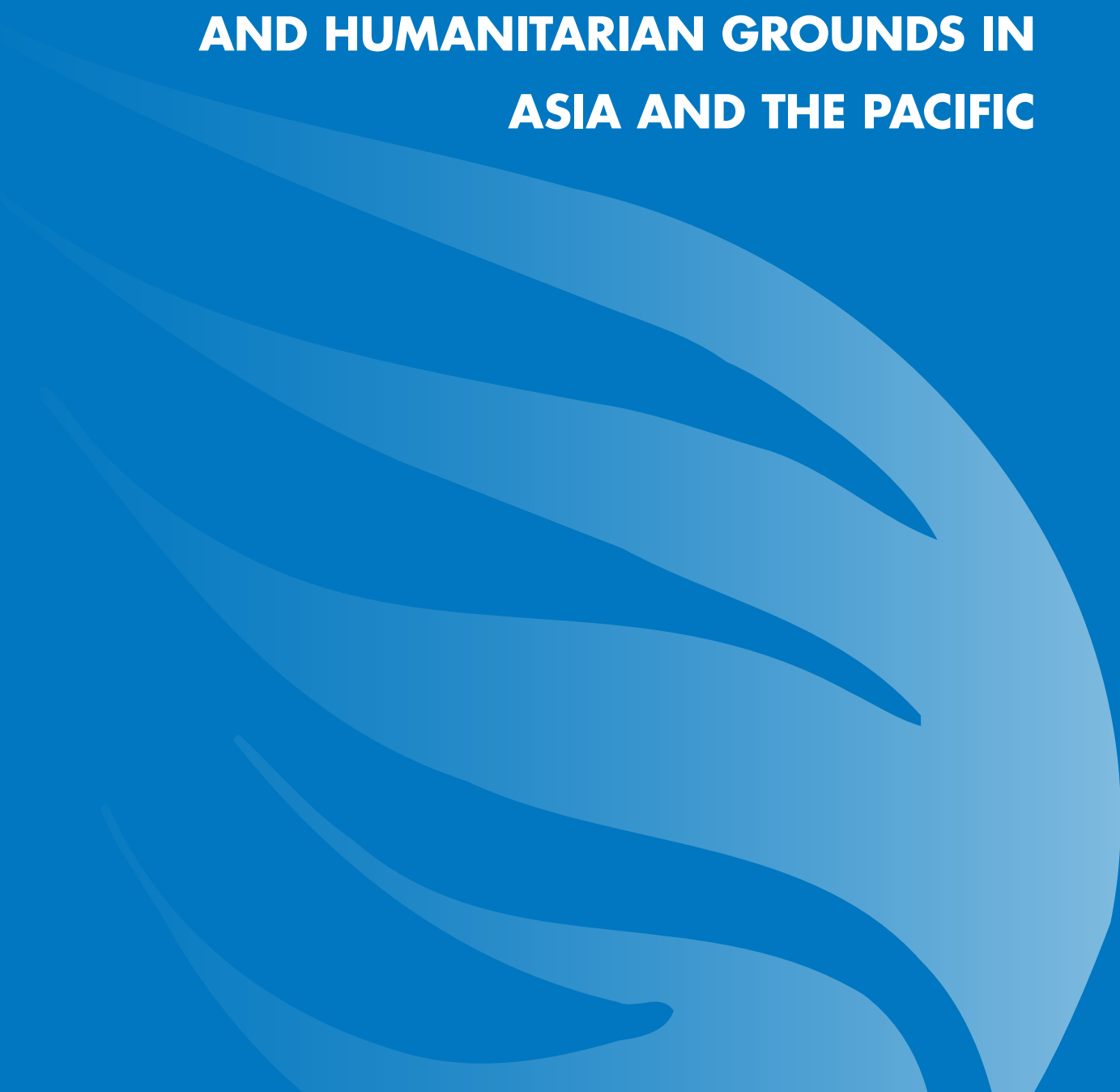
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# I. INTRODUCTION



(Eloisa Lopez/REUTERS)



## I. INTRODUCTION

***“Fulfilling the commitment to expanding and diversifying pathways for safe, orderly and regular migration is critical for preventing and addressing vulnerabilities throughout the migration journey.”<sup>1</sup>***

– UN Secretary-General

### BACKGROUND

The Asia Pacific region hosts and is home to a significant proportion of the world’s international migrants.<sup>2</sup> According to official data, in 2020 roughly one in three of the 282 million international migrants in the world originally came from the region and one in seven are living in the region.<sup>3</sup> Of considerable importance for the subject of this study, to these numbers must be added a sizeable but usually uncounted population of migrants in irregular status.

The countries of the Asia Pacific region are countries of origin, transit and destination for migrants; and at some level most are all three. The region is also the world’s most populous (home to 60% of the global population) and among the most rapidly developing. At the same time, it has some of the highest levels of wealth and income inequality within and between countries, some of the largest and fastest ageing populations per country, and sizeable youth populations. Several Asia Pacific countries are highly vulnerable to climate change and natural disasters, and the region includes most of the world’s low-lying cities and vulnerable small island States. Half of the region’s people live in low-lying coastal areas, and the majority (more than 60%) work in sectors that are highly susceptible to changing weather patterns. Entrenched patterns of discrimination, conflict and violence, as well as poverty, socio-economic inequality, family separation, and environmental factors drive mobility within and from the region.<sup>4</sup>

Migration in and from the region is driven by numerous factors, including as a response to situations of vulnerability. In general, nevertheless, regional discussions of mobility have not considered the need for migration pathways that protect migrants’ rights, including mechanisms of admission and stay (whether these originate before migrants arrive or after they enter a territory) that are designed to comply with human rights obligations and/or correspond to compassionate and humanitarian imperatives. For instance, they may engage the principle of non-refoulement, the right to private and family life and the derived obligation to maintain family unity, the right to protection from gender-

Regular migration pathways for admission and stay are legal, policy and/or administrative mechanisms that enable regular travel, admission and/or stay in the territory of a State (regardless of whether the initial entry was regular and/or temporary).

Migrants may access regular migration pathways by obtaining the required documentation on or before arrival at a port of entry. Permits may also be available to migrants upon arrival to the country of destination. For those already in the territory, regular status may be secured or maintained by making adjustments to migration status (for example, where a status is expiring or a different suitable status is available), or by granting or regularizing stay permits for migrants in an irregular situation.<sup>a</sup>

<sup>a</sup> United Nations Network on Migration (2021), 'Guidance Note: Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability', paras. 14 and 16, at [https://migrationnetwork.un.org/sites/default/files/docs/guidance\\_note\\_regular\\_pathways\\_for\\_admission\\_and\\_stay\\_for\\_migrants\\_in\\_situations\\_of\\_vulnerability\\_final.pdf](https://migrationnetwork.un.org/sites/default/files/docs/guidance_note_regular_pathways_for_admission_and_stay_for_migrants_in_situations_of_vulnerability_final.pdf).

based violence, the principle of the best interests of the child, the right to rehabilitation for torture victims, or the right to health.<sup>5</sup>

Discussions of migration pathways in the Asia Pacific region tend to focus on labour migration, and in particular on the temporary migration of low-wage workers.<sup>6</sup> Regulation of these forms of migration varies across the region; numerous bilateral agreements apply and countries have different visa options and requirements for labour mobility. The procedures that regular labour migrants must complete are often complicated and time-consuming and as a result, many migrants choose to use irregular channels (where these are available to them). Others enter via regular channels but subsequently lose their regular status due to a range of reasons.

It is already well-recognized that labour migration is a critical phenomenon in the Asia Pacific region and States have affirmed that labour pathways must be rights-based. This study contends that the region needs in addition to devise and implement pathways that respond to other imperatives such as: the impacts of environmental degradation and climate change on countries of origin; health status and lack of access to health care in countries of origin (including the effects of pollution and other environmental threats to health); protection of the right to family life in the country of destination; the occurrence of torture and failure to provide rehabilitation after torture; protection from (and remedies for) gender-based violence or labour exploitation in destination countries; situations in which migrants are smuggled, are witnesses to or victims of trafficking, or of other crimes; and in the context of statelessness.

Further, many people in the region are compelled to leave their homes for reasons that do not fall within the international law definition of a refugee.<sup>7</sup> Where migrants in situations of vulnerability fall outside the specific legal category of 'refugee', they continue to be rights-holders who are entitled to have their human rights respected, protected and fulfilled (see Box 1). Human rights and humanitarian grounds of admission and/or stay enable migrants in vulnerable situations to access safe and regular migration pathways, addressing this protection gap.<sup>8</sup>



### Box 1. Migrants in vulnerable situations

The term ‘migrants in situations of vulnerability’ recognizes that structural factors create precarity for some migrants, who therefore need specific protection. They are vulnerable because of the situations they left behind, the circumstances in which they travel, or the conditions they face on arrival; or because they are subject to discrimination on the basis of personal characteristics, such as their age, gender identity, disability, or health status. An individual may experience multiple forms of discrimination, which may intersect, compounding the harm caused.<sup>a</sup> In the Global Compact for Migration, States have committed to apply a gender-responsive and child-sensitive approach when responding to the needs of migrants in situations of vulnerability (Objective 7).

The Global Compact on Migration encourages States to implement relevant recommendations of the ‘Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations’, developed by the United Nations Office of the High Commissioner for Human Rights and the Global Migration Group.<sup>b</sup> This document calls on States to promote safe and accessible pathways for migration across different types of migration and make available humanitarian pathways to entry.<sup>c</sup>

<sup>a</sup> OHCHR and the Global Migration Group (2018), at PrinciplesAndGuidelines.pdf (ohchr.org).

<sup>b</sup> UN General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration’, A/RES/73/195, 19 December 2018, para. 27(l), at N1845199.pdf (un.org); OHCHR and the Global Migration Group (2018), ‘Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations’, at PrinciplesAndGuidelines.pdf (ohchr.org).

<sup>c</sup> OHCHR and the Global Migration Group (2018), ‘Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations’, Principle 20, Guideline 4, at PrinciplesAndGuidelines.pdf (ohchr.org).

## A snapshot of pathways for humanitarian and human rights entry and stay in the Asia Pacific region

Although pathways are nascent in much of the region, most of the States profiled in this study offer some options that potentially permit migrants in vulnerable situations entry and stay and to secure at least temporary regular status (see Box 2).<sup>9</sup> Common forms of protective pathways available in the region include

- discretionary humanitarian entry based on conditions in the country of origin or the specific circumstances of the individual;
- permits on medical grounds or for study (often including visas for accompanying carers, parents or guardians);
- family union mechanisms;
- interventions to protect the rights of trafficked persons;
- visas to enable the stay of migrants who have been victims of domestic violence;
- **regularization mechanisms that are periodic or on a case-by-case basis**
- legislation enabling access to birth registration and other interventions that provide protection to stateless persons.

Some countries also grant residence permits based on factors such as a migrant’s length of residence, employment, children’s school attendance, and other enduring local social ties and evidence of integration. Pathways that enable entry for medical treatment or to study may permit migrants to realize human rights, such as the right to education or the right to health, particularly where the treatment or study is unavailable in the country of origin or where removal would cause a breach of these rights.

For obvious reasons, the number of and the need for regular pathways are greater in countries which are, or perceive themselves to be, countries of destination. For the State, such measures support social cohesion, by avoiding needless disruption to lives, workplaces, and communities. By preventing extended periods of irregularity, they also reduce the risk that migrants will be unable to access healthcare, housing and justice or be exploited at work. They equally enhance their social inclusion and protect their human rights

**Box 2. Some examples of promising practices from the region that offer pathways to regular status for migrants in vulnerable situations.<sup>a</sup>**

## **SOUTHEAST ASIA**

### Indonesia

Indonesia has pledged to address statelessness, including by improving its birth registration procedures and the provision of infrastructure related to its national citizenship registry.

### Malaysia

Migrants may apply for a Special Pass, a temporary and usually short-term visa issued at the discretion of the Immigration Department that enables migrants to extend their stay, because of special circumstances (such as illness or accident) or because a situation in the migrant's country of origin prevents safe return.

### Philippines

The Special Committee on Facilitated Naturalization for Refugees and Stateless Individuals, created in 2020, will be able to expedite the process by which refugees and stateless persons can acquire citizenship.

### Singapore

A Special Pass card, that regularizes a migrant's stay in Singapore, can be issued for specific purposes, for example to enable a migrant to assist in an investigation, pursue a work injury or salary claim, or attend court.

### Thailand

Since the 1990s, Thailand's nationality verification process has regularized the residence status of millions of undocumented migrants from three neighboring countries, enabling them to live and work regularly in Thailand for up to two years without having to return to their country of origin.

## **SOUTH ASIA**

### Bangladesh

The Foreigners Act (1946) grants authority to exempt any individual migrant or group of migrants from the requirements of the Act (article 10), which potentially offers a pathway for migrants in vulnerable situations.

### India

The e-Emergency X-Misc visa was introduced to facilitate and fast track urgent applications by any foreign nationals who require to enter India urgently for emergency or compassionate reasons. This visa was designed, inter alia, to enable Afghan nationals, irrespective of religion, to travel to India as a result of the situation in that country.

### Maldives

Special visas can be granted to migrants seeking to enter or remain in the country for several reasons, including for humanitarian stay. Special visas may be granted to migrants who need to continue medical treatment, or who are involved in legal proceedings when these involve their rights and they are required to be present at the proceedings.

## Box 2. *continued*

### **EAST ASIA**

#### China

Provisions in China's laws and regulations provide humanitarian grounds for entry and stay in order to give effect to China's international obligations. Such provisions are available to migrants who need to enter China urgently for humanitarian reasons.

#### Hong Kong SAR (China)

The Dependent Visa in Hong Kong SAR permits a migrant's immediate family members to relocate to the country, including through same-sex civil partnership, union or marriage.

#### Japan

The Minister of Justice may grant Special Permission to Stay to a migrant on certain grounds. These include family circumstances, humanitarian reasons, health grounds, or due to the "potential impact on other persons without legal status in Japan". Although the permission is at ministerial discretion, migrants granted Special Permission to Stay are able to access health, education, housing, and employment.

#### Republic of Korea

Temporary residence status will be granted to undocumented migrant children who were enrolled in the public education system, to ensure that such children are able to access basic services, including healthcare and child welfare services. The requirement to report immigration status has also been lifted for public servants working in the education and child development sectors.

### **PACIFIC**

#### Australia

Under the Family Violence Provisions of the Migration Regulations (1994), migrants on a Partner visa who are victims of violence committed by their partner may continue to apply to remain permanently in Australia even though the relationship has ended.

#### Fiji

Migrants may apply for a Special Purpose Permit on Medical Grounds on the recommendation of a certified medical practitioner. This entitles them to stay in Fiji while they undergo treatment.

#### New Zealand

The Migrant Exploitation Protection Visa (MEPV), announced in July 2021, protects migrant workers who have formally reported exploitation by employers whose practices or behaviours threatened their economic, social, physical or emotional well-being. Migrants on this visa are permitted to stay for up to six months and to work anywhere in the country.

#### Papua New Guinea

Under Section 208G of the Criminal Code (Amendment) Act (2013), the Minister is empowered to grant medical, psychological and material assistance to migrants who have been trafficked. These powers allow the Minister to authorize a migrant to remain in Papua New Guinea on humanitarian grounds.

#### Tuvalu

Migrants as well as their family members and dependants who are seeking to appeal a denial of entry or a deportation order may receive an interim permit under Tuvalu's Immigration Act (Section 16(2)). This interim permit entitles the migrant to enter and stay in Tuvalu or to remain in Tuvalu pending the determination of their appeal.

<sup>a</sup> See the country chapters for more information and citations.

## Global Compact for Migration

The Global Compact for Safe, Orderly and Regular Migration recognizes the importance of mobility pathways, and specifically the need for pathways that are protection sensitive. It undertakes to “adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and *responds to the needs of migrants in a situation of vulnerability*” (Objective 5, emphasis added).

Via this framework, States have explicitly recognized that pathways for regular migration, including new and expanded regular pathways to admission and stay, can be an effective tool to protect migrants’ human rights. Facilitation of regular migration helps States to meet their commitments under the Global Compact for Migration.<sup>10</sup> Enhancing the availability and flexibility of regular migration pathways is also consistent with, and supports, long-standing commitments that States have made to promote and protect universal human rights, realize sustainable development,<sup>11</sup> and ensure that efforts to combat transnational crime and respond to irregular migration guarantee the safety and rights of migrants who need protection.<sup>12</sup> The UN Secretary-General has issued guidance and made fostering of regular migration, through diversified pathways and other opportunities for regularization, a priority of the 2022 International Migration Review Forum.<sup>13</sup>

### **Box 3. Recognition of the importance of pathways for regular migration in the Global Compact for Safe, Orderly and Regular Migration**

The Global Compact for Migration recognizes the need for regular pathways first and foremost in its core aim, which is to improve migration governance. Under Objective 5, Member States explicitly undertake to expand and diversify pathways for regular migration.

The need for accessible regular pathways is also recognized in:

- Objective 7, in which States commit to address and reduce vulnerabilities in the context of migration;
- Objective 12, in which States commit to increase the legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based screening and assessment mechanisms.

Further, under commitments and actions, States undertake, inter alia, to:

- Minimize the structural factors that compel people to leave their country of origin (Objective 2);
- Provide information on regular pathways (Objective 3);
- Strengthen the transnational response to smuggling of migrants (Objective 9);
- Prevent, combat and eradicate trafficking in persons in the context of international migration (Objective 10);
- Provide access to basic services for migrants (Objective 15);
- Strengthen international cooperation and global partnerships for safe, orderly and regular migration (Objective 23).

## Research methodology

This non-exhaustive review of national practices for admission and stay in selected Asia Pacific countries was prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR). The countries it selected for review host significant numbers of migrants and/or promote principled migration governance including through the Champion Countries initiative of the Global Compact for Migration.<sup>14</sup> Though not comprehensive, the study aims to provide a snapshot of this complex region, and to provide some examples from each sub-region in Asia and the Pacific (South East Asia, South Asia, East Asia, and the Pacific).

The study seeks to understand how human rights obligations may be embedded in mechanisms for entry and stay, and thereby assist States to know and understand the policy options that are available to them to govern migration and promote and protect the human rights of all migrants under their jurisdiction. It also aims to provide States and other stakeholders with information and analysis of practices that currently exist in the region or have potential to offer regular pathways for migrants in vulnerable situations, including practices that have been put in place between 2020-21 in response to the COVID-19 pandemic. This information may assist States to identify best practices for improving migration governance and eventually for enhancing implementation of the Global Compact for Migration.<sup>15</sup>

Each country chapter contains the following information:

- The applicable *legislative framework* in the countries reviewed.
- *Human rights and humanitarian grounds of admission and stay* at national level, including pathways responsive to trafficking in persons, child protection and family reunion and pathways in the context of statelessness.
- *The grounds and content of protective pathways* and the rights attached to the pathway. In other words, what are the conditions that result from such pathways; do they only suspend removal or do they also involve the grant of residence (temporary, long-term or permanent) along with rights to access services, justice etc?
- *Assessment procedures* that States have put in place to evaluate claims on human rights and humanitarian grounds.
- Information about the *implementation in practice* of measures for entry and stay.
- *Responses to the COVID-19 pandemic* that are relevant to admission and stay legislation (see Box 4).

It should be noted that each country chapter also briefly describes relevant asylum pathways, or pathways responsive to the situation of refugees, while acknowledging the complexity of situations on the ground and that some pathways provide protection to a range of people on the move. This is because the Asia Pacific region is generally characterized by a lack of effective refugee protection mechanisms.<sup>16</sup>

States' ratifications of core international human rights treaties, as well as other relevant international law standards, are provided in the Annex.

The pathways documented here are non-exhaustive. The absence of a State from this study does not mean that State offers no pathways of interest or use to migrants in situations of vulnerability. The descriptions draw on open-source information on national legislation (in some cases, in unofficial translation), administrative or other regulations, and, in some instances, case law. All regular pathways carry administrative requirements, usually including fees; these often vary with nationality. The accuracy of that information has not been independently verified and OHCHR recognizes that there may be additional concerns or gaps in their implementation in practice. Nothing in this report should be read as legal advice on applying for regular entry or stay. OHCHR recognizes that requirements for regular entry and stay are subject to change, sometimes at short notice, and that in the context of the COVID-19 pandemic such changes have often been complex to track. To the best of OHCHR's understanding, the information in this study on entry and stay pathways (including in the COVID-19 context) is up to date until 31 December 2021.

#### Box 4. Pathways for entry and stay during the COVID-19 pandemic

The research for this study was conducted in 2020-2021 during the COVID-19 pandemic. Across the globe, multiple restrictions were placed on many of the available pathways for mobility in an effort to halt the spread of the virus; borders were closed and migrants forced to return to countries which struggled to reintegrate them. More positively, during this period countries adapted their regulations to enable migrants to access regular stay options in the context of pandemic entry and travel restrictions, responding as they did so to the human rights situation of vulnerable migrants.

Several good practices have been evident, including in the Asia Pacific region as this study shows. For example, some States extended work and residency permits; simplified access to or removed application and renewal procedures, particularly for migrants in sectors deemed critical (such as agriculture, food processing, health care, other forms of care work); regularized the status of migrant workers, or allowed migrants to change visas and categories while inside the country; strengthened the protection afforded by regular status, to ensure access to healthcare and other essential services; and improved access to livelihoods, including for those on temporary visas or seeking regularization.

As the international community continues to rebuild and recover from the pandemic, the lessons that were learned on the governance of international migration should not be forgotten. On the one hand, continuing inequalities in access to COVID-19 vaccines and treatment as well as an emphasis on restrictive policies related to international mobility may in practice serve to maintain and widen disparities in access to regular pathways for migrants.<sup>a</sup> On the other hand, however, the pandemic has highlighted that easy access to immigration-related processes and to stable and protective forms of status can buffer against the effects of rights violations, socio-economic shocks, and related challenges, to the benefit of migrants as well as the communities that host them and those they have left behind. States should seize this opportunity to embed the practices and lessons learned in this period and seek to put in place entry and stay pathways that respond to the needs of migrants in situations of vulnerability and that are grounded in a human rights-based approach.

<sup>a</sup> See UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, paras. 61, 70.

## Endnotes

- 1 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, para. 61.
- 2 There is no universal, legal definition of a 'migrant'. In accordance with the mandate of the High Commissioner to promote and protect the human rights of all persons, and in the absence of a universal, legal definition of a 'migrant', the Office of the United Nations High Commissioner for Human Rights (OHCHR) has described an international migrant as "any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence". 'Migrant' is thereby used as a neutral term to describe a group of people who have in common a lack of citizenship attachment to their host country. It is used without prejudice to the protection regimes that exist under international law for specific legal categories of people, such as refugees, stateless persons, trafficked persons and migrant workers. See OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (2014), page 4, at [https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR\\_Recommended\\_Principles\\_Guidelines.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf)
- 3 International Organization for Migration (IOM, 2021), 'Asia-Pacific Migration Data Report 2020', IOM Asia-Pacific Regional Data Hub, at <https://publications.iom.int/system/files/pdf/Asia-Pacific-Migration-%20Data-Report-2020.pdf>; and UN Department of Economic and Social Affairs (DESA) (2020), 'International Migrant Stock 2020', at <https://www.un.org/development/desa/pd/content/international-migrant-stock>.
- 4 Most international migration in the region is intra-regional. Almost 39 million migrants from Asia-Pacific countries (representing 42% of all emigrants from the region) moved to other countries in the region; 82% of foreign-born populations came from within the region. See IOM (2021), 'Asia-Pacific Migration Data Report 2020', at <https://publications.iom.int/system/files/pdf/Asia-Pacific-Migration-%20Data-Report-2020.pdf>.
- 5 This study draws on and applies United Nations Network on Migration (2021), 'Guidance Note: Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability', at [https://migrationnetwork.un.org/sites/default/files/docs/guidance\\_note\\_regular\\_pathways\\_for\\_admission\\_and\\_stay\\_for\\_migrants\\_in\\_situations\\_of\\_vulnerability\\_final.pdf](https://migrationnetwork.un.org/sites/default/files/docs/guidance_note_regular_pathways_for_admission_and_stay_for_migrants_in_situations_of_vulnerability_final.pdf). The Guidance Note lists 15 considerations that assist States to implement the Global Compact for Safe, Orderly and Regular Migration and provide regular pathways for migrants in vulnerable situations.

- 6 United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (2020), *Asia-Pacific Migration Report 2020: Assessing Implementation of the Global Compact for Migration*, ST/ESCAP/2801.
- 7 Report of the UN Secretary-General, 'In Safety and Dignity: Addressing large movements of refugees and migrants', A/70/59, 21 April 2016, para. 18.
- 8 OHCHR-DIA Piper (2018), 'Admission and stay based on human rights and humanitarian grounds. A mapping of national practice', at [https://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_DIA\\_Piper\\_Study.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DIA_Piper_Study.pdf). See also Platform for International Cooperation on Undocumented Migrants (PICUM) (2022), 'Barriers to return: Protection in international, EU and national frameworks', at [https://picum.org/wp-content/uploads/2022/02/Barriers-to-return\\_Protection-in-international-EU-and-national-frameworks.pdf](https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf).
- 9 It is beyond the scope of this desk-based study to assess in detail how pathways function in practice, although each country chapter offers some examples of promising practices as well as concerns or gaps with regard to implementation. Where the research indicates challenges to implementation, these are provided as starting points to look further into the potential of that pathway and to support efforts to expand and diversify rights-based pathways for safe and dignified migration.
- 10 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', A/RES/73/195, 19 December 2018. at N1845199.pdf (un.org).
- 11 2030 Agenda for Sustainable Development (2015), target 10.7.
- 12 International Conference on Population and Development (ICPD), Programme of Action, Cairo, 5-13 September 1994, A/CONF.171/13, 18 October 1994, para. 10.16(b).
- 13 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, para. 9.
- 14 For more on the Champion Country initiative, see the UN Migration Network website at <https://migrationnetwork.un.org/champion-countries>
- 15 The United Nations Secretary General has urged States to cooperate through State-led and other regional, subregional and cross-regional processes and platforms to expand and diversify rights-based pathways for regular migration. He has noted that such efforts should be grounded in labour market realities and decent work; promote pathways for migrants affected by disasters, climate change and environmental degradation and other migrants in vulnerable situations; and facilitate family reunification and regularization of migrants in irregular situations. UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, para. 101.
- 16 See Annex 1 (chart of ratifications).

## II. SOUTHEAST ASIA







# 1. INDONESIA



## LEGISLATION

The Constitution of the Republic of Indonesia (1945) protects various human rights of every person in Indonesia (including foreign nationals living in Indonesia as well as Indonesian citizens), including the rights to life, freedom from torture, freedom of thought and conscience, to adhere to a religion, and equality before the law; they equally prohibit slavery, discrimination, and prosecution based on retroactive legislation. Law on Human Rights No. 39 (1999),<sup>1</sup> refers to Indonesia's "moral and legal responsibility to respect, execute, and uphold the Universal Declaration on Human Rights".<sup>2</sup> Torture is prohibited under articles 1 and 4 of the human rights law, and article 34 further provides that: "No one shall be subjected to arbitrary arrest, detention, torture and exile". Article 7 of Law No. 39 establishes the right to a remedy.

Indonesia's National Human Rights Commission (Komnas HAM) was established by the Government of Indonesia in 1996 as an independent agency.<sup>3</sup> Komnas HAM has a mandate, inter alia, to monitor and investigate the implementation of human rights in the country and make recommendations to relevant government agencies. It has authority to examine allegations of violations of the rights of Indonesian migrant workers and of foreign workers in Indonesia, and is responsible for monitoring conditions in detention centres. For the 2017 – 2022 period, Komnas HAM has set up two sub-committees, namely the sub-committee on human rights promotion and the sub-committee on human rights enforcement.<sup>4</sup>

Law No. 6 (2011) on Immigration<sup>5</sup> governs the treatment including legal status of migrants in Indonesia based, inter alia, on the recognition that greater mobility of people causes a variety of impacts both advantageous and disadvantageous to Indonesia's interests. The law provides legal certainty in line with obligations to respect, protect and promote human rights.<sup>6</sup> The Ministry of Law and Human Rights is responsible for immigration control in Indonesia.

Taken together with article 28D of the Constitution, articles 3(2), 5, 17, 18, and 66(6) of Law No. 39 (1999) on human rights recognize the right to equality before the law, which implies access to courts and to legal assistance. The Criminal Procedural Code of Indonesia also recognizes the right to legal assistance.<sup>7</sup>

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Law No. 6 on Immigration lists criteria for temporary or permanent stay of migrants in Indonesia, enabling a migrant to change their status from stay permits for visitor to temporary and then to permanent stay. These changes are to be established by a Ministerial Decision.<sup>8</sup>

A permanent stay permit grants the holder permission to remain for five years; it may be extended indefinitely if it is not cancelled. Holders of a permanent stay permit are required to report to an Immigration Officer every five years.<sup>9</sup>

Indonesia offers student visas to individuals accepted onto a course at a higher education institution in the country. The visa process has four stages: applicants need three official documents (a study permit, an Entrance Visa (VITAS), and a temporary residence permit (KITAS)), and also a Certificate of Police Registration. Study permit holders are not allowed to work during their stay in Indonesia. Once they have received a temporary residence permit (KITAS), they may be able to bring immediate family members (spouse and children) into Indonesia on a Dependant's Visa, also known as a family KITAS. Applicants must first obtain an Entry Visa and subsequently apply for a Dependant Visa at a local Indonesian immigration office.<sup>10</sup>

### 2. PROTECTION FOR TRAFFICKED PERSONS

Articles 86 and 87 of Law No. 6 (2011) include an exclusionary clause for victims of people smuggling and human trafficking, who are not subject to the same treatment as migrants in irregular status. Law No. 21 (2007), on the eradication of trafficking in persons, states that trafficked persons are entitled to keep their identity confidential<sup>11</sup> and have the right to compensation for loss of income, suffering, costs of medical treatment, and other losses arising from their trafficking.<sup>12</sup> They are also entitled to medical and social rehabilitation, return assistance, and social reintegration.<sup>13</sup> The national and provincial governments must establish shelters and trauma centres; the law permits community or social organizations to provide these services.<sup>14</sup>

Where trafficked persons are foreign nationals located in Indonesia, the government is required to make efforts to provide protection to them and return them to their countries of origin in coordination with consular officials.<sup>15</sup> Given its stated emphasis on return, the law envisages no pathway for trafficked persons to stay; however, the requirement to protect trafficked persons might in future make it possible to include pathways to remain for those who require such protection and in line with the recommendations of UN human rights mechanisms.<sup>16</sup>

The Indonesian government has established a Task Force for the Prevention and Handling of the Crime of Trafficking in Persons (Gugus Tugas Pencegahan dan Penanganan Tindak Pidana Perdagangan Orang/GT-PP-TPPO). Its mandate is set out in Government Regulation No. 69 (2008).<sup>17</sup>

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

The Family Union Visa (Index - C317) is a temporary stay permit available to dependants and family members of an Indonesian citizen, or to persons holding a permit for limited or permanent stay.<sup>18</sup> The Limited Stay Visa (ITAS Izin Tinggal Terbatas (ITAS) or Kartu Izin Tinggal Terbatas (KITAS)) is valid for one year and up to a maximum of two years. Migrants who have been married to an Indonesian citizen for two years and already have a Limited Stay Visa can apply for a permanent residency permit.<sup>19</sup> The latter is valid for five years and can be extended an unlimited number of times.<sup>20</sup> Applicants must provide documentation, including their marriage certificate, family registration, the birth certificates of any children, and a copy of the Indonesian spouse's ID card.

### 4. PROTECTION OF REFUGEES

Indonesia's Constitution affirms the right to asylum,<sup>21</sup> and embedded this right in national law for the first time. Law No. 39 (1999) on Human Rights, recognized the right to seek political asylum; Chapter VI of Law No 37 (1999), on foreign relations, also affirmed the right to apply for asylum in Indonesia. Under the Constitution, the permit to stay of a foreigner who has been granted refugee status by the United Nations High Commissioner for Refugees (UNHCR) in Indonesia will not be questioned, "provided they do not violate the laws and regulations".<sup>22</sup>

Presidential Regulation no. 125 (2016) on handling of foreign refugees, sets out how the right to asylum recognized in Law no. 37 (1999) is to be implemented.<sup>23</sup> Article 2 of the Presidential Regulation states that the treatment of refugees is conducted through cooperation between the Central Government and the UNHCR and the IOM.<sup>24</sup>

Coordination of matters that fall under Presidential Regulation 125 (2016) is undertaken by the Coordinating Ministry for Politics, Law and Security, which has established the Foreign Refugee Handling Task Force to implement the Presidential Regulation.

## 5. PROTECTION FROM STATELESSNESS

The Constitution of the Republic of Indonesia (1945) guarantees that “Every person shall have the right to citizenship status”<sup>25</sup> and grants every person the right to choose their citizenship.<sup>26</sup> Citizenship requires residency (a minimum of five consecutive years) and also includes language and economic requirements.<sup>27</sup>

The 2006 Citizenship Law aims to reduce the incidence of statelessness among certain groups, by granting citizenship to the children of a legally-married Indonesian mother and stateless father<sup>28</sup> and to children born in Indonesian territory whose parents were stateless or whose nationality was not clear when they were born.<sup>29</sup> Citizenship can also be granted to foundlings in Indonesia. Indonesian citizens cannot lose their citizenship if this will result in statelessness.<sup>30</sup>

Under Law No. 24/2013 on civil administration, birth certificates are issued free of charge. This change increased the number of children with birth certificates from 32.25% in 2014 to 90.56% in 2019. The government has pledged to address statelessness, including by improving its birth registration procedures and the provision of infrastructure related to its national citizenship registry,<sup>31</sup> and has made efforts to do so.<sup>32</sup>

## PROCEDURES

Indonesia’s immigration law sets out the documentation that individuals require to enter the State, and to prevent entry of undocumented migrants as well as those who are “affiliated with any network of prostitution, human trafficking, and people smuggling activities or practices”.<sup>33</sup>

Indonesia’s immigration laws make it possible to convert a permit allowing temporary stay to one allowing permanent stay.<sup>34</sup> The permanent stay permit requires applicants to have been in permanent residence in Indonesia for three consecutive years; they must also sign a Statement of Integration. For family reunification permits the couple is required to be married for two years and to sign a Statement of Integration.<sup>35</sup>

Residence permits associated with education visas are valid for 12 months and must be renewed annually throughout the education programme.

## IMPLEMENTATION IN PRACTICE

For many years, Indonesian policymakers overlooked immigration because Indonesia was considered a country of emigration. In fact, it is increasingly a destination: official figures indicate that in 2020 there were some 149,000 migrants in the country.<sup>36</sup> It is also an important transit country, including for refugees, many of whom are smuggled through Indonesia and become stranded there.<sup>37</sup> Indonesia’s geography, notably its long and porous maritime borders, generates many of the country’s migration challenges and opportunities.

Despite this changing reality, the Indonesian government’s focus remains primarily on the outward migration of Indonesians. It has progressively developed mechanisms for protecting the human rights of Indonesian migrants abroad and is a Champion country of the Global Compact for Migration.<sup>38</sup> However, it still offers few protection-oriented pathways for migrants entering the country, whether they are migrant workers, asylum seekers, migrants in vulnerable situations, including victims of trafficking, or others living and working in an irregular situation.<sup>39</sup>

Although Indonesia is party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, it continues to lack a comprehensive national legal framework on migration. The Committee on Migrant Workers has called on Indonesia to develop a comprehensive, gender-responsive and human rights-compliant strategy on migration that is supported by sufficient human, technical and financial resources, and includes a mechanism for monitoring implementation.<sup>40</sup> Despite the formal legal protections offered by Indonesia's 1945 Constitution and Law No 39 (1999), migrants who are in situations of vulnerability can struggle to access this protection in practice.

Indonesia's immigration law authorizes immigration officials to refuse access to the territory to anyone who lacks a valid travel document or visa, without requiring an assessment of the individual's need for protection based on international human rights law. The Committee Against Torture has expressed concern that Indonesian national law fails to prohibit refoulement, leaving article 3 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment open to violation.

Indonesia's 2006 citizenship law aims to protect individuals from statelessness.<sup>41</sup> In order to strengthen these protections, the UN has recommended that Indonesia should implement universal birth registration for all children born in the country, including migrants, and reduce administrative and practical barriers by, for example, simplifying procedures, reducing documentary requirements, de-linking birth registration from marriage registration, and removing fines for late registration.<sup>42</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

As stipulated in articles 4 and 5 of Regulation No. 11 (2020) of the Minister of Law and Human Rights, during the COVID-19 pandemic an Emergency Stay Permit automatically applied to all foreign nationals whose permission to stay (of any form) expired or could no longer be extended and who could not return to their countries due to the pandemic. Holders were not required to resubmit an application to the immigration office; and their overstay was free of charge and did not attract a fine. The Emergency Stay Permit was applicable to any foreign citizen then in Indonesia, including foreigners who held a stay permit of another country, and the spouse or child of foreign citizens whose visa had expired or could not be extended. To support recovery of Indonesia's economy, in October 2020 the Minister of Law and Human Rights passed Regulation No. 26, on visa and stay permits in the New Normal Adaptation, which allowed qualified migrants to enter Indonesia after satisfying pandemic-related conditions of entry.

After months of being prevented by entry restrictions from returning to Indonesia, migrant members of mixed nationality families abroad were allowed to rejoin their families in Indonesia, thanks to a change in visa policy announced in September 2020. The Law and Human Rights Ministry's immigration office announced that it would allow foreign spouses and children of mixed nationality marriages living abroad to apply for a Limited Stay Visa for family reunification (VITAS 317).<sup>43</sup>

Temporary entry restrictions were reinstated from 1 January to 8 February 2021,<sup>44</sup> with exemptions only for holders of diplomatic and official/service stay permits and holders of the Indonesia Temporary Residence Card (KITAS)<sup>45</sup> or Indonesia Permanent Residence Card (KITAP).<sup>46</sup> A Temporary Stay Visa may be granted to foreigners for work activity or non-work activity. A Temporary Stay Visa for non-work activity may be granted to a foreigner for the purpose of family reunification.<sup>47</sup>

Until mid-2021, the Indonesian government prohibited foreign visitors from transiting through or travelling to Indonesian territory unless they were in possession of a valid residence permit or certain classes of visa.

## 2. MALAYSIA



### LEGISLATION

Article 8 of the Federal Constitution of Malaysia (1957, with amendments through to 2007) guarantees equality before the law and equal protection of the law to all persons. The Constitution affirms that “all persons are equal before the law” (article 8). article 5 provides that every person has the right to be informed of the grounds of their arrest as soon as possible and to consult and be defended by a legal practitioner of their choosing. The Constitution also provides for citizenship by registration or naturalization (articles 15 and 19, respectively).

The Human Rights Commission of Malaysia (SUHAKAM) was established by Parliament under the Human Rights Commission of Malaysia Act 1999, Act 597, which was gazetted on 9 September 1999.<sup>48</sup> Its goal is to achieve greater fulfilment of civil, cultural, economic, political and social rights. The Commission pays particular attention to monitoring the human rights impact of the Government’s law reforms, the exercise of freedom of assembly, and conditions in places of detention. It also works to ensure the rights of vulnerable groups, including migrant workers, refugees, asylum seekers and detainees.<sup>49</sup>

The Immigration Act 1959/63 forms the cornerstone of the Malaysian immigration system and grants the Director General of Immigration authority to prohibit or limit entry into Malaysia of any individual or group of people and to cancel any pass or permit, on grounds of public security or due to any economic, industrial, social, educational or other conditions in the country, either for a stated period or permanently.<sup>50</sup> Other relevant laws include the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (2010). The Ministry of Home Affairs has primary responsibility for migration governance.

### GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

#### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Migrants who are in a situation of vulnerability may apply for a Special Pass. This temporary pass, usually short-term (for 30 days), is issued at the discretion of the Immigration Department and enables individuals to extend their stay due to special circumstances, such as illness, accident, or a situation in the migrant’s country of origin (for example, conflict) that prevents safe return. A Special Pass may also be issued to give the administration time to process other permits (such as an Employment Pass) or to enable migrants to make arrangements to leave the country shortly after their permits have expired.<sup>51</sup>

Under Section 55(1) of Malaysia’s Immigration Act, the Minister is provided broad discretion to exempt ‘any person or class of persons’ from the provisions and penalties of the Act.

Malaysia offers a Student Pass to any person who wishes to pursue their education (at any level, including language courses) in the country.<sup>52</sup> The immediate family of a foreign student studying in Malaysia, as well as individuals who seek medical treatment in Malaysia, along with an escort, may apply for a Long-Term Social Visit Pass.<sup>53</sup>

#### 2. PROTECTION FOR TRAFFICKED PERSONS

The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM Act 2007, last amended in 2021) covers trafficking cases within and outside Malaysia, as well as offences committed outside the country by Malaysian citizens and permanent residents.<sup>54</sup> Under the Act, a trafficked person should not be charged for crimes such as irregular entry or residence, or the procurement or possession of any fraudulent travel or identity document for the purpose of entering or transiting a country.<sup>55</sup> The Act does not provide immunity from prosecution for offences committed by individuals as a consequence of their trafficking, though case-by-case exemptions are permissible under the Penal Code.<sup>56</sup>

Under the Anti-Trafficking Act, Malaysia accommodates potential victims of trafficking in government shelters under the responsibility of protection officers attached to the Ministry of Women, Family and Community Development. Interim protection orders for suspected victims last 21 days, while protection orders for identified/certified victims last 90 days; the latter are able to work.<sup>57</sup> However, when their protection order lapses, migrants who have been trafficked are liable to

be returned to their country of origin. Protection orders are rarely extended, and most extensions are made on the condition that victims cooperate with an investigation. A few individuals have been permitted to stay in shelters after securing new employment in the stipulated period and receiving temporary employment passes, although reports indicate that this option has only been made available to migrants who have regular status.<sup>58</sup> The amendments to ATIPSOM Act 2007 in 2021 focused on identification of victims and improvements regarding the definition of trafficking in persons, aiming at better prosecution and conviction of trafficking cases as well as providing heavier sentences to perpetrators. The amended Act also includes a measure to compensate trafficked persons; linked to the Criminal Procedure Code, it only becomes available on conviction of the trafficker.<sup>59</sup> Trafficked persons may also file a civil claim for compensation or raise claims against their employers through either the Labour Department (for unpaid wages or any other payments due to them) or the Industrial Relations Department (for unfair dismissal).<sup>60</sup> The latest National Action Plan (see below) promises to explore a mechanism for compensating victims of trafficking in persons.<sup>61</sup>

The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants was established in 2008. It is responsible, inter alia, for coordinating implementation of the Anti-Trafficking Act in cooperation with government departments and international organizations, and for collecting data and monitoring migration patterns with a view to formulating and implementing anti-trafficking policies and programmes that focus on prevention of trafficking and protection of trafficked victims.<sup>62</sup> It is also responsible for drawing up National Plans of Action.

Malaysia has developed five-year National Plans of Action to Combat Trafficking in Persons (NAPTIPs) since 2010. The guiding principles of the third plan (NAPTIP 3.0, 2021-2025) state that policies will be human rights-based and gender-responsive. The plan is structured around four pillars: prevention; prosecution and enforcement; protection; and partnership.<sup>63</sup> Its protection objectives include establishing and maintaining an effective national referral mechanism (NRM) so that victims and possible victims are able to access justice, receive protection, and obtain comprehensive assistance and support from services that are trauma-informed, non-discriminatory, and gender and age-responsive. The NRM will also enhance the capacity of frontline personnel and agencies involved in victim protection and assistance. The plan has an additional objective that may benefit migrants: "To facilitate safe reintegration in the community for victims who choose to work and safe repatriation for victims who choose to return to their home country".<sup>64</sup>

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Individuals who apply for a Malaysian Entry Permit (permanent residency) may include their spouse and children in their application, though such permits are only available to certain categories of migrant.<sup>65</sup>

Migrant spouses of Malaysian citizens or permanent residents, and children under 18 years of age, may apply for a Residence Pass. The in-laws of a Malaysian citizen (i.e., parents of the migrant spouse) are also eligible. There are residency requirements: in addition to stipulated documents and fees, migrant family members of a Malaysian citizen must have been staying in Malaysia on a valid long-term pass for at least three years, and migrant family members of a permanent resident for at least five years.<sup>66</sup>

In addition, migrants holding an Employment Pass, who have been in the country for at least six months, are eligible to apply for a Long-Term Social Visit Pass for their parents, parents-in-law and any biological or legally-adopted children over 18 years of age. The duration of the Social Visit Pass and the pass of the Employment Pass holder should match.<sup>67</sup> Migrant spouses of Malaysian citizens (whose marriage is legally registered in Malaysia) may also be eligible for long-term social visit passes for up to five years; as may the migrant wife of a permanent resident, children (including step-children) under seven years of age, and elderly members of a family (over 60 years of age) who do not have family in the country of origin.<sup>68</sup>

Malaysia has operated periodic regularisation programmes which offer opportunities for undocumented migrants to regularise their situation in the country. Most recently, in November 2020 the 'Labour Recalibration Programme' allowed migrants in irregular situations who were present in Peninsular Malaysia to regularise their stay through their employer. The regularisation programme was limited to migrants from specific countries and concerned employment in certain job sectors.<sup>69</sup>

#### 4. PROTECTION OF REFUGEES

Malaysia lacks a comprehensive legal or administrative framework for managing refugees, although the immigration law does contain provisions that could be used to provide protection to refugees who have entered the country through irregular channels. For example, an order may be made exempting them from penalization.<sup>70</sup>

Malaysia hosts some 181,510 refugees and asylum-seekers registered with UNHCR in Malaysia, the majority from Myanmar, including some 103,000 Rohingyas. The remaining are from 50 other countries, including Pakistan, Yemen, Syria, and Somalia.<sup>71</sup> With no right to remain in Malaysia lawfully, refugees cannot work legally and have very limited access to healthcare and education. In the absence of a national administrative framework, UNHCR conducts all activities relating to the reception, registration, documentation and status determination of refugees.<sup>72</sup>

#### 5. PROTECTION FROM STATELESSNESS

Malaysia distinguishes between stateless persons and non-citizens. The latter refers to individuals who do not possess Malaysian citizenship and lack legal identity documents but who are entitled to citizenship of another country.

The Malaysian Federal Constitution contains some provisions that can prevent and reduce statelessness. Citizenship by registration is limited to wives of male citizens whose marriage is legally recognized in the State, and who are of good character, have resided in Malaysia for the two years preceding their application, and intend to remain permanently.<sup>73</sup> Children of registered citizens or children in special circumstances may also be granted citizenship.<sup>74</sup> Citizenship by naturalization is available to individuals who are over 21 years of age, are of good character, have resided in Malaysia for at least 10 of the 12 years immediately preceding the date of their application, intend to live in the country permanently if citizenship is granted, and have an adequate knowledge of the Malay language.

By law, children born in Malaysia are granted Malaysian citizenship if they do not have citizenship of another country or cannot acquire another citizenship within one year of birth.<sup>75</sup> In addition, the Constitution prohibits deprivation of citizenship if it will result in statelessness,<sup>76</sup> and enables citizenship to be acquired by naturalization.<sup>77</sup> The citizenship of an individual is determined based on the marital status and the citizenship status of the biological parents at the time of birth in accordance with the provisions under Part III of the Federal Constitution, Citizenship Rules 1964 [LN82/1964] as well as other relevant legislation in force.<sup>78</sup>

However, a number of gaps remain, both in the legislation and its implementation. For example, no legislative provision prevents renunciation of nationality if it will result in statelessness. Malaysian women married to foreigners are not entitled to transmit their nationality to their children born abroad or to transmit their nationality to their spouses on an equal basis with Malaysian men.<sup>79</sup> Finally, foundlings born in Malaysia do not acquire nationality as a right,<sup>80</sup> and Malaysian men are unable to confer citizenship on a child born outside a legally-recognized marriage.<sup>81</sup>

In a landmark judgement in September 2021, the Kuala Lumpur High Court decided that Malaysian women have the same right as Malaysian men to pass on nationality to their children born overseas.<sup>82</sup>

## PROCEDURES

All migrants arriving at Malaysia's international borders are subject to immigration procedures and processes. Irregular entry and stay are criminalized in Malaysia under the Immigration Act<sup>83</sup> and individuals found to be in violation of the Act are detained in immigration detention centres. Any immigration officer or senior police officer may arrest any migrant without a warrant if it is reasonable to believe the migrant is eligible for removal from Malaysia. Under this Act, individuals found to have irregular status will be returned to their country of origin.<sup>84</sup> The Act exempts immigration offences from various due process rights; in particular it suppresses the rights to be heard or to submit a case for judicial review.<sup>85</sup>

The Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of the Immigration Act, including penalization due to irregular entry.<sup>86</sup> Under the Immigration Act, an individual may appeal a removal order and, at the discretion of the Director-General and subject to conditions, may be released from detention pending a decision.<sup>87</sup>

To obtain permits, various requirements must be met. These may include: knowledge of the language; specific residency periods; documentation on the applicant (and family members where relevant). In some cases, applicants are asked to provide a sponsor. To obtain a Special Pass, migrants must submit their application to the Immigration Department before their current pass expires.

A person identified by an enforcement officer as a potential trafficking victim will be brought before a magistrate. Under Section 44 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, the Magistrate may make an interim protection order and put the migrant in a place of refuge for 21 days.<sup>88</sup>

## IMPLEMENTATION IN PRACTICE

Malaysia is a major destination country for migrants, many of whom arrive from Southeast Asia and South Asia. Official data issued by the Immigration Department, Ministry of Home Affairs, show that 1.98 million regular migrant workers were employed in Malaysia in September 2019.<sup>89</sup> In addition, estimates suggest that between two and four million undocumented migrants live in the country.<sup>90</sup>

The drivers of migration to Malaysia are varied and often mixed. Many migrants seek employment opportunities; migrant workers constitute about one fifth of the labour force and predominantly work in the manufacturing, plantation, agriculture and services (hospitality and security) sector. A significant number of migrants arrive in the country seeking reunification with their family members in Malaysia in some cases to long-established diaspora communities. The absence of regular pathways to entry means that many migrants are compelled to take smuggling routes; some fall prey to traffickers.

Political and public discussion has tended to focus on migration as an issue of national security. Commentators often suggest that migrants (particularly undocumented migrants or migrants employed in low-wage sectors) damage the country's social and economic development prospects or are a threat to the safety of Malaysian citizens. In principle, the several million migrants in an irregular situation in Malaysia are subject to criminal penalties under the Immigration Act. Human rights experts have expressed concern that criminalizing migrants whose status is irregular increases their social vulnerability, puts them at higher risk of trafficking, and deters them from reporting exploitation.<sup>91</sup>

Under Malaysia's Immigration Act, private actors (whether individuals or companies) may also be liable to sanctions if they facilitate the entry or stay of migrants whose status is irregular.<sup>92</sup> Employers are also liable under the Act and may be subject to a fine and/or imprisonment of up to a year for each employee whose status is irregular.<sup>93</sup> Similarly, it is forbidden to provide accommodation to such migrants; persons convicted for doing so are subject to a fine and/or imprisonment (for up to a year) for each migrant found on their premises.<sup>94</sup>

Statelessness is a continuing concern in Malaysia. Groups at risk include some 12,300 stateless ethnic Indian Tamils from West Malaysia, the Bajau Laut, descendants of Indonesian and Filipino migrant workers, indigenous peoples, and street children in East Malaysia.<sup>95</sup> UNHCR also estimates there are an additional 35,000 unregistered asylum seekers in Malaysia, who are mostly Rohingya, however data are not publicly available, particularly on East Malaysia. Malaysian law requires the registration of all births regardless of the nationality or legal status of the parents.<sup>96</sup> However, the relevant laws are not consistently applied, and gaps remain in practice. Migrant parents, particularly parents who are undocumented or in irregular situations, often face obstacles when they seek to register the birth of their children.<sup>97</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

Following the COVID-19 outbreak, the Malaysian government issued a nationwide Movement Control Order (MCO), effective from 18 March 2020, followed by a Conditional Movement Control Order (extended to 31 December 2020) to increase social distancing and slow transmission of the virus. From 7 September 2020, the government imposed a general entry ban that barred citizens, residents and persons with long-term visit passes from travelling to Malaysia from countries with more than 150,000 positive COVID-19 cases. The government subsequently softened these requirements: expatriates and their dependants, including migrant domestic workers and foreigners holding a valid long-term pass or an approved pass application, were permitted to enter the country. When the MCO ended, migrants who were living in Malaysia with



expired passes were given 14 working days (from 1 January 2020) to leave the country, without having to apply for passes or approval from the authorities. The entire country remained under a Recovery Movement Control Order (RMCO) until 31 March 2021. Long-term pass holders whose passes expired before or during the RMCO had to visit the immigration authorities and apply for an extension. Exit and return to Malaysia during the RMCO were only granted on a case-by-case basis for medical reasons and other emergencies.<sup>98</sup>

In November 2020, the Malaysian government published the Labour Recalibration Plan, which allowed employers in the construction, manufacturing, plantation and agriculture sectors to employ undocumented migrant workers legally. In April 2021, due to a shortage of workers, this facility was extended to employers in certain sub-sectors of the service economy, such as restaurants, cargo-handling, wholesale and retail, and cleaning services. The programmes were open to migrants from Bangladesh, Cambodia, India, Indonesia, Kazakhstan, Lao PDR, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Thailand, Turkmenistan, Uzbekistan, and Vietnam.<sup>99</sup> A Recalibration Program (Repatriation) also facilitated the return to their countries of undocumented migrants who had overstayed, or had entered and stayed in Malaysia without a valid pass, or had violated conditions stipulated in their pass.<sup>100</sup> The Recalibration Plan was extended to 31 December 2021, or until the National COVID-19 Immunisation Programme (PICK) ended. The Secretary General of the Ministry of Home Affairs reported that, as of 1 July 2021, 248,083 migrants in irregular status had signed up under the two programmes, 97,892 to return to their country of origin under the Return Recalibration Programme and 149,889 for the Labour Recalibration Programme. It was also announced in late June that the programme, initially limited to Peninsular Malaysia, would be extended to Sabah and Sarawak.<sup>101</sup> The Recalibration Plan offered a pathway to regularization for migrants whose status was irregular and who wanted to stay rather than return. The Ministry of Home Affairs announced that it would restore enforcement of immigration rules when the Plan ended.<sup>102</sup>

## 3. PHILIPPINES



### LEGISLATION

Section 11 of the Constitution of the Philippines (1987) declares that the State will value the dignity of every human person and guarantee full respect for human rights. It charges Congress to prioritize measures that protect and enhance the right of every person to human dignity, reduce social, economic and political inequalities, and remove cultural inequities by spreading wealth and political power equitably for the common good.<sup>103</sup> Article III of the Constitution contains a bill of rights. This guarantees that no person shall be deprived of life, liberty, or property without due process, or denied equal protection of the law.<sup>104</sup> Section 19 prohibits cruel, degrading or inhuman punishment. Section 14 of Article III states that no person shall be held to answer for a criminal offence without due process of law; other sections grant additional procedural rights.

The Constitution also established an independent Commission on Human Rights, which investigates, at its own initiative or in response to a complaint by any party, all forms of violation of civil and political rights. The Commission also monitors the Philippine Government's compliance with its international human rights treaty obligations, designs appropriate legal measures for protecting the human rights of all persons within the Philippines, and provides preventive and legal aid services to the underprivileged whose human rights have been violated or need protection.<sup>105</sup>

Immigration to the Philippines is regulated by Commonwealth Act No. 613 (1940), known as the Philippine Immigration Act, which has been amended several times. The Bureau of Immigration, located in the Department of Justice, has "sole authority to enforce and administer immigration and foreign nationals registration laws including the admission, registration, exclusion and deportation and repatriation of foreign nationals".<sup>106</sup>

As a country of origin of large numbers of international migrants, a range of Philippine laws address aspects of migration, covering Filipino migrants overseas and also trafficking in persons.<sup>107</sup> The relevant primary law is the Migrant Workers and Overseas Filipinos Act (also known as the Republic Act 8042 of 1995, amended by Republic Act 10022), applied through a range of government bodies, policies and programmes.

### GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

#### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

The Philippine Immigration Act (1940) states that "quota immigrants" are allowed to enter the country in numbers that do not exceed five hundred persons of any one nationality in a given calendar year; the quota is also applicable to people who are stateless.<sup>108</sup> It accords preference to migrants who are parents of adult Philippine citizens (aged over 21), individuals married to migrants who are already lawfully recognized as permanent residents, and children (aged under 21) of permanent residents.<sup>109</sup>

The Act also authorizes the entry of other categories of migrant, termed "non-quota immigrants", who may be admitted in any number. Non-quota immigrants include migrants who have a "pre-arranged employment" contract and their spouse and children.<sup>110</sup>

Persons coming to perform manual labour and those who are not properly documented for admission under the provisions of the Immigration Act are normally excluded from entry into the Philippines, unless they are in possession of the required non-quota immigration visa.<sup>111</sup>

The President is given broad discretion to admit foreigners for humanitarian reasons, including individuals "who are refugees for religious, political, or racial reasons", provided that doing so is not against the public interest.<sup>112</sup> The President is also authorized to admit foreigners temporarily when doing so would be in the public interest.<sup>113</sup>

The Philippines enables the entry of international students. However, students are not permitted to take employment while they are studying and no clear pathway to obtain a work permit is available after graduation. To be accepted and to enrol, foreign students need a Student Visa and to have been accepted on a course at one of the selected schools accredited by the Bureau of Immigration. If the applicant is a child (under 18) or is taking a non-degree course, they need to apply instead for a Special Study Permit (SSP) that is issued under the Temporary Visitor's Visa and must be extended each semester.<sup>114</sup>

Retirees aged at least 50 years old who require medical or clinical care can apply for a special Non-Immigrant Visa called the Special Resident Retiree's Visa (SRRV). To qualify, they must show that they have adequate financial means.<sup>115</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

The Anti-Trafficking in Persons Act (2003), amended by the Expanded Anti-Trafficking in Persons Act (2012), aims to support trafficked persons and ensure their recovery, rehabilitation and reintegration into society.<sup>116</sup> The law includes a non-criminalization provision which states that trafficked persons will not be penalized for crimes committed as a direct or indirect result of the acts of trafficking enumerated in the Act or in obedience to an order issued by a trafficker.<sup>117</sup> In addition, trafficked persons are entitled to appropriate protection, assistance and services under the Act, including emergency shelter or appropriate housing, counselling, free legal services, medical and psychological services, and livelihood and skills training.<sup>118</sup> The Department of Social Welfare and Development is tasked with implementing rehabilitation and protection programmes for trafficked persons, including the provision of counselling and free temporary shelters.<sup>119</sup> The Expanded Act states that anyone suspected of being a victim of trafficking or attempted trafficking is to be placed in the temporary custody of the local social welfare and development office, or in any accredited or licensed shelter institution that works to protect trafficked persons after their rescue.<sup>120</sup> These shelter and assistance provisions may offer a pathway to protection for affected migrants.

Migrants who are trafficked in the Philippines are entitled to the protection, assistance and services afforded to trafficked persons, and are allowed to remain in the country for 59 days. However, this facility is conditional. It is offered in the context of a prosecution and can be extended only if a trial prosecutor confirms that the migrant's further testimony is essential to prosecution of a case. Relevant registration and immigration fees are waived if an extension of stay is granted.<sup>121</sup>

The Victim Compensation Program provides compensation to victims of unjust imprisonment or detention, and victims of violent crimes. Trafficked persons or members of their family may file a claim for compensation with the Board of Claims at the Department of Justice or the Office of the Regional State Prosecutor.<sup>122</sup>

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Section 13 of the Immigration Act regulates the admission of non-quota immigrants who belong to one of seven listed sub-categories. The seven categories concentrate on the entry of spouses and children of Filipino citizens or permanent residents.<sup>123</sup> Provision is also made for the entry of women who have lost their Philippine citizenship as a result of marriage or whose husband has lost his citizenship. The same pathways are available to their children.

## 4. PROTECTION OF REFUGEES

No specific national legislation addresses the protection of refugees. The Philippines regulates its refugee and stateless determination procedures through Department Circular No. 58, issued by the Department of Justice. This preserves and promotes family unity and applies several other essential principles. Specifically, it prohibits: detention for being stateless or a refugee; deprivation of refugee status; discrimination in application of the Conventions; refoulement; and punishment for illegal entry or presence in the country.<sup>124</sup> Refugees can seek employment provided they possess a Certificate of Recognition of their refugee status.

As noted, for humanitarian reasons and when it is not against the public interest, the President has power under the Immigration Act to admit foreigners who are refugees for religious, political, or racial reasons.<sup>125</sup>

## 5. PROTECTION FROM STATELESSNESS

Department Circular No. 58 of the Department of Justice sets out the procedures for determining statelessness. Stateless persons can file applications at the Refugees and Stateless Persons Protection Unit, which is in charge of identifying, determining and protecting refugees and stateless persons.<sup>126</sup> Applying has a suspensive effect: once the application has been received, any proceeding to deport or exclude the applicant and/or their dependants is suspended. Applicants have the right to legal counsel and are entitled to the services of an interpreter at all stages of status determination.<sup>127</sup> After an interview by a Protection Officer, the Secretary of Justice issues a written decision. When an application is denied, the applicant is entitled to request the authorities to reconsider the decision within 30 days.<sup>128</sup>

In 2017, the Government launched a 10-year National Action Plan to end statelessness (2015-2024), in line with UNHCR's Global Action Plan to End Statelessness. It affirms that the government will: resolve existing cases of statelessness; ensure that no child is born stateless; remove gender discrimination from nationality laws; grant protection status and facilitate the naturalization of refugees and stateless persons; ensure birth registration to prevent statelessness; accede to the UN Statelessness Conventions; and improve quantitative and qualitative data on stateless populations.<sup>129</sup> These steps are in line with commitments made at the High-Level Segment on Statelessness convened by UNHCR in October 2019.<sup>130</sup>

In 2020, the Philippines established a new committee, the Special Committee on Facilitated Naturalization for Refugees and Stateless Individuals, to accelerate naturalization of refugees and stateless people in the country. The Special Committee is tasked with enhancing and finalizing draft rules to facilitate judicial naturalization of refugees and stateless people in the Philippines. Once approved, the rules will provide a pathway enabling recognized refugees and stateless persons to acquire Philippine citizenship through an expedited process.<sup>131</sup>

## PROCEDURES

The Bureau of Immigration regulates the entry, stay, and exit of foreign nationals in compliance with Philippine laws and other legal procedures. It issues immigration documents and cancels them upon violation of immigration laws, and investigates, arrests, and detains foreigners who are in violation of immigration regulations and other Philippine laws.<sup>132</sup> To determine whether persons arriving in the Philippines have regular status, immigration officers are authorized to detain passengers on the vessel they arrive in or bring them to a detention centre for a period of time sufficient to determine whether or not they should be granted entry, which is three days under the Constitution.<sup>133</sup>

If an examining immigration officer at the port of arrival has any doubt that a migrant is entitled to enter, the case is examined by a board of special inquiry. The board's decision can be appealed to the Board of Commissioners, whose decision is final. At appeal, migrants have the right to legal representation. The burden of proof is on migrants to show that they entered by regular channels. Any person entering the country in violation of the Philippine Immigration Act may be arrested and deported once the Board of Commissioners has determined the existence of a relevant ground. No person may be deported without being informed of the specific grounds for deportation or without a hearing by the Commissioner of Immigration.<sup>134</sup>

## IMPLEMENTATION IN PRACTICE

The institutions, legal frameworks and policies on migration governance in the Philippines have focused largely on regulating and governing the emigration of Philippine citizens. According to the Commission on Filipinos Overseas, in 2020 10.2 million Philippine citizens were living and working in over two hundred destination countries and territories: of these, 4.8 million were permanent migrants, 4.2 million were temporary migrants (so called "Overseas Filipino Workers" or OFWs), and 1.2 million were in irregular situations.<sup>135</sup> In 2018, the Philippines, which registered remittance inflows of USD 34 billion in that year, was the world's fourth largest recipient of remittances after India, China and Mexico.<sup>136</sup>

Nevertheless, the Philippines is also a country of destination as well as transit, and official statistics indicate that some 108,000 international migrants lived in the country in 2020.<sup>137</sup> The Philippines receives 20,000 migrants annually, the majority of whom arrive in the country from parts of Asia, including China and more recently the Republic of Korea.<sup>138</sup>

The Philippines is a Champion Country of the Global Compact for Migration. Immigration policies in the Philippines focus mainly on enforcement and border control; relatively limited attention has been given to establishing protection-oriented and comprehensive responses to the entry and stay of migrants in the country.

As a State Party to the International Convention on the Protection of the Rights of All Migrant workers and Members of their Families, the Philippines is obliged to ensure that its own domestic framework of migration governance is in line with the requirements of that instrument. The Committee on Migrant Workers has expressed concern that a pathway to continued residence is not available for migrants who lose their employment status while in the country. The Committee has asked the Philippines to ensure that the residence entitlements of migrant workers are not revoked if they lose their employment prematurely.<sup>139</sup> Concerns have also been expressed by the human rights mechanisms about Section 29(a)(2) of the Immigration Act, which allows the authorities to prohibit entry or expel individual migrants on discriminatory grounds, for example because the migrant has a disability or is pregnant.<sup>140</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

On 4 May 2020, the Bureau of Immigration and the Department of Labour and Employment released two directives in response to the pandemic: the extended Enhanced Community Quarantine (ECQ); and the General Community Quarantine (GCQ). All foreign nationals whose visas had expired were allowed to file applications for extension without fine or penalty provided they submitted an application within 30 days after the ECQ was lifted in their locality. The Bureau of Immigration waived the payment of fines and penalties related to applications for visa extensions by all outbound passengers whose visa extension had expired during the period of the ECQ/GCQ. Requests to renew migrant Alien Employment Permits that fell due during the ECQ and GCQ could be submitted within 45 working days after the ECQ and GCQ were lifted, without penalty or fine.

Foreigners whose converted working, student, or resident visas expired between 16 March 2020 and 4 July 2021 were given until 30 November 2021 to file for visa renewal or amendment. Foreigners were also given a non-extendable grace period of six months from the date on which their visas expired to file an application for renewal or extension. Foreigners who failed to file an application before 30 November were subject to deportation proceedings for irregular stay.

The Philippine government also imposed temporary entry restrictions in response to the pandemic, operated in various phases.<sup>141</sup> Important exemptions to these were announced on 1 February 2021. Exemptions included: diplomats and members of international organizations and their dependants; foreign seafarers holding a valid visa; holders of the 13 series visa under the amended Immigration Act, including holders of a temporary resident visa, permanent resident visa, or native born visa;<sup>142</sup> foreign spouses of Filipino nationals; foreign minor children and foreign children with special needs. The latter have been allowed to enter provided the Filipino spouse/parent resides in the Philippines and they possess a valid visa at the time of entry. Foreign parents of minor Filipino children and of Filipino children with special needs (regardless of age) have also been allowed entry, provided the child is in the Philippines and the parents possess valid visas at the time of entry. Finally, the foreign spouses and the children of Filipino citizens and former citizens are allowed to enter from countries for which the Philippines does not require a visa, provided they are accompanied by the citizens or former citizens concerned.

## 4. SINGAPORE



### LEGISLATION

Part IV of the Constitution of the Republic of Singapore (1965) grants several fundamental liberties to non-citizens, including the right to life and personal liberty (Article 9), equality of all persons before the law, and equal protection of the law (Article 12).

Singapore has not established an independent national human rights institution. The Inter-Ministerial Committee on Human Rights, composed of 15 government agencies, coordinates the implementation of cross-cutting human rights policies within government.<sup>143</sup>

Singapore's Immigration Act (1959) governs the admission and stay of migrants.<sup>144</sup> Section 6 controls entry into and departure from Singapore and restricts regular entry to migrants who hold a valid entry or re-entry permit or a valid pass. The Immigration Regulations provide further detail on the implementation of Singapore's Immigration Act.<sup>145</sup> Singapore's Passports Act (Cap. 220) regulates the issuance of Singapore passports and other travel documents.

The Immigration and Checkpoints Authority (ICA) operates under the Ministry of Home Affairs (MHA) and is the primary agency responsible for frontline border control operations at air, sea and rail ports in Singapore.

## GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Migrants who do not hold a valid entry or re-entry permit may be granted entry to Singapore under Section 56 of the Immigration Act at the discretion of the Minister, who has power to exempt any person or class of person from provisions of the Act either absolutely or conditionally.

A Special Pass card, which regularizes a foreigner's stay in Singapore, can be issued for specific purposes. These include assisting an investigation, pursuing a work injury or salary claim, or attending court. It may also be issued to stateless persons residing in Singapore.<sup>146</sup> The Special Pass card does not itself give the holder a right to work in Singapore. However, holders are entitled to apply to the Ministry of Manpower to obtain authorization to seek employment. Where permission is granted, the validity of the employment authorization is tied to the validity of the Special Pass, and holders do not need to reapply if they change employers.<sup>147</sup> The Special Pass is usually only for short term stays and must be renewed periodically.

Singapore grants entry to foreign students who have been accepted by listed educational institutions for full-time study. Listed institutions run from kindergartens and childcare centres to higher education establishments. Individuals must obtain a Student Pass and are only allowed to work if they meet specific conditions. Immediate family members of a Student Pass holder are also permitted entry.<sup>148</sup>

### 2. PROTECTION FOR TRAFFICKED PERSONS

The Prevention of Human Trafficking Act (2014) instructs the Director-General of Social Welfare to provide assistance that is deemed practicable and necessary to trafficked persons, including temporary shelter and counselling services. The Act permits such assistance to be provided by civil society organizations.<sup>149</sup> Children who have been trafficked should be given shelter in a place of safety or temporary care and protection, or be placed in the care of an appropriate person.<sup>150</sup>

Singapore's Inter-Agency Taskforce on Trafficking in Persons, established in 2010, launched a 10-year National Approach Against Trafficking in Persons in March 2016. It asserts that victim care is crucial to the country's anti-trafficking efforts; Singapore should facilitate their stay in the country as well as return to their home country. Where investigations are ongoing, the authorities issue trafficked persons a Special Pass, which enables them to access assistance and a range of services. The Taskforce recognizes that working is an important component of rehabilitation for some trafficked persons

and the National Approach recommends the adoption of a flexible approach, enabling victims of trafficking to seek temporary employment or, if this is not available or suitable, work with civil society organizations to obtain skills training or do other activities.<sup>151</sup> However, there is a conditionality requirement which is that temporary stay is offered on condition that trafficked persons cooperate in legal proceedings.

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Permanent residency in Singapore is an immigration status, second only to Singapore citizenship in terms of privileges. Singapore permanent residents have most of the rights, privileges, obligations, and responsibilities afforded to citizens. A Singapore permanent resident who is older than 21 and has least two years of permanent residence may apply for Singapore citizenship.<sup>152</sup>

Migrants are eligible to apply for permanent residence if they are spouses or unmarried children (below 21 years old) of Singapore citizens or permanent residents; are aged parents or legal guardians of Singapore citizens; or are dependants of migrant workers in Singapore who possess valid work permits. Family members are also entitled to “appeal for entry into Singapore under compassionate reasons” for short periods, to attend a family event such as a funeral, or visit a family member who is critically ill.<sup>153</sup>

Immediate family members of migrants who have been granted a Student Pass (see above) are also permitted entry.<sup>154</sup>

### 4. PROTECTION OF REFUGEES

Singapore has no national asylum or refugee legislation or procedures. UNHCR can conduct registration and refugee status determination remotely. Refugees registered with UNHCR do not benefit from legal status in Singapore and any that enter or remain in the country in an irregular status may be prosecuted and detained prior to deportation under Section 8 of the 1959 Immigration Act.<sup>155</sup>

### 5. PROTECTION FROM STATELESSNESS

Stateless children are usually granted a Long-Term Visit Pass or student visa. In such cases, however, healthcare costs, childcare costs, and primary, secondary and tertiary education costs can be prohibitively high, especially for low-income families. Many children in this situation do not go on to higher education.<sup>156</sup>

Stateless persons are entitled to a Special Pass card (see above), and on this basis can seek permission to work and to reside in Singapore. Stateless persons are also able to apply for Permanent Residency in Singapore.

Until 2004, Singaporean fathers conferred Singapore citizenship on their children. In April 2004, an amendment to the 1965 Constitution allowed children to acquire citizenship by descent from Singaporean mothers; but the amended law applied only to children born on or after 15 May 2004.<sup>157</sup> Children born outside the country to a parent who is a Singaporean citizen by descent may become stateless if the parent has not met residence requirements.<sup>158</sup> Children born in Singapore to migrant parents are not entitled to citizenship, though the government may register them as citizens at its discretion.<sup>159</sup> The Constitution does not provide that children born in the country automatically acquire legal citizenship if they would otherwise become stateless. Indeed, children may lose citizenship if their parents renounce or are deprived of their citizenship.<sup>160</sup>

## PROCEDURES

The Immigration and Checkpoints Authority administers immigration and registration services, such as immigration passes and permits to foreigners. The Immigration Act provides that entry into Singapore shall only be through approved routes and with valid travel documents, including a Singapore visa.<sup>161</sup> Violation of these conditions incurs penalties, including fines, imprisonment, or caning.<sup>162</sup> Migrants in situations of vulnerability who enter Singapore are regularly classed as “prohibited immigrants” and are subject to arrest, detention<sup>163</sup> and deportation.<sup>164</sup> Any person under an order of removal may appeal to the Minister of Home Affairs; however, an appeal does not have suspensive effect.<sup>165</sup>

Any person seeking to enter Singapore who is not entitled to enter as a citizen or does not possess a valid entry pass, or who is seeking to remain in the country after the expiry of a valid pass, needs to apply for an entry permit or a re-entry permit.<sup>166</sup> These are issued by the Controller of Immigration, who can at any time vary or revoke a permit or subject it to any condition.<sup>167</sup> The Controller should notify the permit holder of any change to conditions and should give the holder an opportunity to argue why the change should not be imposed.<sup>168</sup> The holder may also appeal against a decision of the Controller of Immigration by petitioning the Minister of Home Affairs in writing within 30 days of being notified; the Minister's decision is final.<sup>169</sup> No judicial review is available in any court of any act or decision made by the Minister or the Controller under provisions of the Immigration Act, except if the act or decision fails to comply with procedural requirements or breaches the regulation governing that act or decision.<sup>170</sup>

The Ministry of Manpower (MOM) and the Immigration and Checkpoints Authority (ICA) have responsibility for issuing Special Pass cards (see above).

Every application by a stateless person for permanent residency is evaluated according to criteria which include length of stay in Singapore, family profile, economic contributions, education qualifications, age, family ties to Singaporeans, and reasons for the person's statelessness.<sup>171</sup>

## IMPLEMENTATION IN PRACTICE

Around one-third of Singapore's population is classed as 'non-resident' (migrants who work, study or live in Singapore but have not been granted permanent residence).<sup>172</sup> During the 19th and 20th centuries, Singapore's development was powered by the arrival of migrants from many parts of Asia and for many years after it was founded the majority of Singapore's population were migrants. In recent years, migrants have continued to come to Singapore from neighbouring China, India and other countries in South Asia, as well as the Malay Archipelago and further afield in South East Asia. According to official figures, 1,411,131 migrants resided in Singapore in 2020.<sup>173</sup> Singapore has one of the fastest-ageing populations in the world. It has been estimated that by 2030 around one quarter will be 65 or older.<sup>174</sup> In part due to its demography, Singapore is host to large numbers of low-skilled and high-skilled migrant workers. The emphasis is on low-wage and temporary labour migration to sectors such as fisheries, domestic work and construction; one quarter of Singapore's total workforce are migrants.<sup>175</sup>

Migrants in Singapore can face serious challenges in accessing their human rights; public attitudes to migrants can also be hostile. One recent survey noted that more than half of Singaporean respondents agreed with the statement that migrant workers threatened their country's culture and heritage.<sup>176</sup> Moreover, pathways to entry and stay are strictly controlled and irregular entry and stay are penalized harshly. Migrants are often subject to detention and corporal punishment when they are deemed to have violated the provisions of the 1959 Immigration Act, and concerns have been raised about their equal access to justice. A person commits an offence under the Immigration Act if they give food or shelter to a person who is in breach of the Act or whose status in breach of the Act they fail to ascertain.<sup>177</sup>

Migrants who are Special Pass holders are only permitted to work on a case-by-case basis. As a result, many depend on civil society organizations for their basic needs, including food and medical care, or are at risk of destitution.<sup>178</sup>

Notwithstanding the promising practices noted above, some pathways for entry and stay in Singapore have been cause for human rights concern. The Committee on the Elimination of Racial Discrimination has called on Singapore to cease mandatory testing and deportation of female migrant workers who are pregnant or have infectious diseases. It has also expressed concern that employment in the services sector is permitted only to migrant workers of certain nationalities, which amounts to discrimination based on nationality.<sup>179</sup> The Committee on the Rights of the Child has expressed concern that children whose parents' immigration status is uncertain face insecurity and may be at risk of separation or deportation.<sup>180</sup>



## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

In the context of the COVID-19 pandemic, the government created Safe Travel lanes, based on travellers' profiles and motives for travel, to facilitate controlled entry into Singapore. Permanent residents returning from all other countries and regions were permitted to return to Singapore without seeking entry approval. Long Term Pass holders and immediate relatives of Singapore citizens and permanent residents were required to apply for permission to enter Singapore through one of two lanes: the Singapore citizen/ permanent resident/family ties lane;<sup>181</sup> or the Work Pass holder/General Lane.<sup>182</sup>

Singapore did not introduce general visa amnesties in the context of COVID-19. However, the Ministry of Manpower extended expiring work passes to meet industry needs. In November 2020, all work pass holders were given three additional months to complete their medical examination, and employers were able to process workers' passes without the examination. In addition, if an employer cancelled an employee's pass but the employee was unable to leave Singapore owing to travel restrictions, that employer was required to request an extension of stay. Sectoral work permits were periodically extended. In the construction, marine shipyard and processing sectors, for example, workers whose permits expired between July and December 2021 were allowed to renew them for up to two years even if they did not meet the renewal criteria. A job-matching scheme was also announced that enabled workers in these sectors to remain in Singapore after their work permits lapsed.<sup>183</sup>

## 5. THAILAND



### LEGISLATION

The 2017 Constitution of the Kingdom of Thailand reserves most of its human rights protections (Chapter 3) for Thai people, excluding migrants. However, some economic and social rights are guaranteed for all, including the right to health care (Section 55) and the right to work for a reasonable standard of living in a safe work environment (Section 74). The Constitution also states that “necessary and appropriate” legal aid and representation shall be provided to underprivileged persons to ensure they have access to justice (Section 68).

Thailand’s fourth Human Rights Action Plan from 2019 to 2022 was approved by the Cabinet on 30 June 2020. The plan includes ten sectoral plans and 12 plans for vulnerable groups.

The National Human Rights Commission of Thailand (NHRCT) was established as an independent organization under the 2017 Constitution of the Kingdom of Thailand.<sup>184</sup> The Constitution authorizes the NHRCT to monitor human rights violations and suggest measures to prevent or redress human rights violations, including the provision of remedies.<sup>185</sup>

The Immigration Act (1979) regulates entry into the Kingdom. It asserts that those entering the country without completing formal procedures will be subject to deportation<sup>186</sup> and imposes criminal penalties for irregular entry or stay, including arrest and detention in immigration detention centres before deportation; there is no provision for judicial oversight.<sup>187</sup> Unauthorized entry and/or stay are punishable by a fine and up to two years of imprisonment.<sup>188</sup>

## GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Nationals of three neighbouring countries are able to acquire regular status in Thailand under Memoranda of Understanding (MoU) on employment cooperation that Thailand has signed with The Lao People’s Democratic Republic,<sup>189</sup> Cambodia,<sup>190</sup> and Myanmar.<sup>191</sup> This is an important pathway for low-wage migrants. Since the 1990s, the Thai Government has periodically attempted to identify and register undocumented migrants from these three countries who are already present in Thailand. Between July 2017 and June 2018, for example, a registration and nationality verification process regularized the status of over 1.2 million migrants from these countries, after concerns were expressed that new penalty provisions for irregular migration (in the 2017 Royal Ordinance on the Management of Foreign Workers Employment B.E. 2560) would cause workers to leave.<sup>192</sup> These large scale exercises, which are legislated through Cabinet resolutions, have typically been held every couple of years and grant undocumented migrants permission to live and work in Thailand for up to two years without having to return to their country of origin.

Section 17 of the Immigration Act (1979) declares that the Minister of Home Affairs, with Cabinet approval, may permit any individual migrant or group of migrants to stay, in “certain special cases” and on certain conditions, or otherwise provide exemption from provisions of the Act.

The approval of the Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country-of-Origin B.E. 2562 and its associated National Screening Mechanism (see section on refugee protection below) opens up in principle an avenue for enhanced protection of the rights of migrants in situations of vulnerability who are unable or unwilling to return to their countries of origin, in the context of international human rights law. Article 20(1) of the Regulation makes reference to Thailand’s obligations under international law, albeit without providing detail on the precise grounds for the provision of protection.<sup>193</sup>

Any migrant accepted onto a full-time educational course, training programme, or internship in Thailand can apply for an Education Visa (a Non-Immigrant ‘ED’ Visa). This visa is initially valid for three months but can be extended while the holder is in Thailand. Each extension is for a period of one year and extensions can be repeated as long as the migrant is enrolled in full-time study or training as set out in the visa requirements.

Permits to avail of medical treatment are available for foreign nationals to access health services in Thailand. The 'O Medical Visa', which requires proof of sufficient financial resources for treatment and stay, may be renewed for the period of the required medical treatment and may also be made available to accompanying carers.

## 2. PROTECTION FOR TRAFFICKED PERSONS

Section 29 of the Anti-Trafficking in Persons Act B.E. 2551 (2008)<sup>194</sup> permits officials to take individuals suspected of having been trafficked into government custody for up to 24 hours, or up to seven days with the permission of a court. During this time, officers conduct victim identification interviews. Chapter 4 of the Anti-Trafficking in Persons Act states that individuals who have been trafficked or subject to forced labour are entitled to assistance and protection, including food, shelter, medical treatment, physical and mental rehabilitation, education, training, and legal aid (Section 33). Officials must ensure that those in their care are informed that they are entitled to protection throughout the process, and that they can claim compensation and receive legal aid (Sections 33-35). Formal identification is necessary before victims can obtain a legal right to services, including access to the government's trafficking shelters.<sup>195</sup> Rohingya victims of trafficking are in practice excluded from the protections afforded by the Anti-Trafficking in Persons Act; the authorities justify this practice on national security grounds.<sup>196</sup>

Trafficked persons may be granted temporary stay in the country and may be assisted to obtain a temporary work permit. Crucially, assistance may be provided to trafficked persons whether or not they are willing to participate in legal proceedings against traffickers; but humanitarian considerations are taken into account. Temporary stay may also be granted to permit a person to receive medical treatment, for rehabilitation, or to enable a trafficked person to pursue a claim for compensation (Section 37).

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

The Nationality Verification process entitles dependants of a migrant worker from the three MOU countries of Myanmar, Cambodia and Lao PDR to reside regularly in Thailand for the same period as the migrant worker.<sup>197</sup> Most children of migrant workers and other dependents remain undocumented, although some registration exercises have included migrant children.<sup>198</sup> Spouses and minor children (under 18 years) must already be in Thailand at the time of registration.

The migrant spouse of a Thai national, or family members of a migrant working in Thailand, including children up to 20 years old, can apply for a Non Immigrant 'O' (Dependant) Visa. These are valid for up to one year. The parents or legal guardians of a student with a Non-Immigrant 'ED' Visa (see above) can apply for an 'O' dependant visa, based on the fact that they will support the student during their stay in Thailand. Like the ED visa, it can be extended after arrival in the country for the length of the student/trainee's course of study.

Permanent residency is only available to individuals who, in advance of making an application, have held a valid Non-Immigrant Visa for at least three years (three consecutive yearly extensions).<sup>199</sup> It is not available to people who have been in the country on other visas, such as tourist visas. Migrants seeking a pathway to family unification can apply for permanent residency under the Support a family or Humanity Reasons category.<sup>200</sup> Applicants must be able to prove they have a relationship with a Thai citizen or with a migrant who already possesses a residence permit. Eligible relationships include: spouse (after at least two years of marriage), parent, or guardian of a Thai child under 20 years of age. Applicants are expected to possess a reasonable command of the Thai language because interviews are conducted in Thai. The procedure deters many potential applicants because it requires candidates to produce numerous documents from the individual's home country, employer, and the Thai government, and takes several months. Candidates are granted temporary stay while their application is processed.<sup>201</sup> Permanent residents are required to register their place of residence every year and after ten consecutive years can apply to become a naturalized Thai citizen.

## 4. PROTECTION OF REFUGEES

At present, Thailand hosts some 91,363 refugees from Myanmar in nine official temporary shelters on the Thai/Myanmar border, in addition to approximately 5,000 urban refugees and asylum-seekers from over 40 countries. In practice, the country has hosted large numbers of refugees over the past four decades but continues to lack a specific regulatory framework on refugees as well as formal asylum procedures, with governance of asylum taking place under the 1979 Immigration Act. UNHCR continues to conduct Refugee Status Determination in Thailand, and issues recognised refugees with identity documentation.<sup>202</sup>

The Royal Thai Government adopted the Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country-of-Origin B.E. 2562 in December 2019. The Regulation provides a framework for the Royal Thai Government to govern the situation of individuals who are unable to return to their country of origin, defining a ‘protected person’ as someone who enters into or resides in Thailand, and is unable to, or unwilling to, return to their country of domicile due to a “reasonable cause that such person will suffer danger due to persecution”.<sup>203</sup> In cases where there are substantial grounds for believing that persons would be at risk on return, it permits the government to grant them temporary stay in the Kingdom, under special circumstances and in conformity with the Immigration Act. Individuals granted such protection would in principle be entitled to access education and healthcare. The Regulation entered into force in June 2020 but has yet to be implemented.<sup>204</sup> The Regulation aims to establish a screening committee and screening procedures for the identification and protection of protected persons and a National Screening Mechanism (NSM) has been set up. However, as of 31 December 2021 the Standard Operating Procedures for the NSM had not yet been finalized.

## 5. PROTECTION FROM STATELESSNESS

Amendments to the Civil Registration Act (No. 2) B.E. 2551 (2008) and Nationality Act (No. 4) B.E. 2551 (2008) permit the registration of all children born in Thailand, regardless of the status of their parents. The amended nationality law also allows a child born outside marriage to inherit nationality from its Thai father.<sup>205</sup> Thailand had 479,943 registered stateless persons as of 30 June 2020.<sup>206</sup>

Thailand has continued to work to end and prevent statelessness, and protect stateless persons, and has demonstrated its political will to do so, including through law and policy reform. However, stateless persons do not enjoy full freedom of movement and are unable to access all the rights afforded to Thai nationals.<sup>207</sup> Noting that the incidence of statelessness remains high in Thailand, human rights mechanisms have recommended that Thailand should intensify efforts to facilitate access to birth registration and citizenship, by putting in place measures that, inter alia, would benefit migrants, including in remote areas.<sup>208</sup>

## PROCEDURES

Since 2009, undocumented migrants have been required to complete a nationality verification process and obtain a temporary passport or certificate of identity and a work permit in order to regularize their stay in Thailand.<sup>209</sup> Employers of migrant workers are required to submit the names of their employees online and pay relevant fees to renew work permits and visas in person. They are also required to organize health checks and purchase health insurance from public hospitals. (Migrant workers who are already registered in the national social security system can conduct their health checks at private hospitals.) Migrants are then able to request a visa stamp from the Immigration Office, and apply for a work permit online and for an identity card (known as the ‘pink card’) from the appropriate District Office. In recent years, the procedure has been simplified to make regularization more efficient and less costly for migrants. One-Stop Service Centres have been established by the Thai Ministry of Labour, at which migrants can initiate and complete the nationality verification process.

The Royal Thai Immigration Commission is responsible for granting, processing and rejecting applications for permanent residency. The Minister is authorized to impose annual quotas for permanent residency; a maximum of 100 persons may be granted residency per country, plus up to fifty stateless persons.<sup>210</sup>

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## IMPLEMENTATION IN PRACTICE

Thailand has become a key destination for migrants from neighbouring countries, and increasingly from further afield in ASEAN and Asia. As of November 2020, 2,323,124 migrant workers were registered in Thailand.<sup>213</sup> Migrants are predominately employed in low-wage jobs, notably in fishing, agriculture, construction, manufacturing, domestic work, and other services. Thailand has enacted policies that guarantee migrants access to many essential services regardless of legal status, including education and health care. However, barriers continue to hamper their use of these services in practice.

In 2019, only half of all eligible migrants were enrolled in public health insurance schemes, while up to 200,000 migrant children remained out of school.<sup>214</sup>

In addition to low-wage migrant workers from The Lao People's Democratic Republic, Myanmar and Cambodia, a wide variety of other groups live in the country who do not hold citizenship, including documented and undocumented migrants from other countries, stateless persons, asylum seekers and refugees, foreign investors, foreigners married to Thai nationals, students, and retirees.

Between 1992 and 2012, the Thai Cabinet approved more than 20 resolutions permitting identified groups of migrant workers in irregular status to remain in Thailand under certain conditions. As noted, these periodic regularization initiatives have continued. At the same time, migrants who wish to secure regular entry and stay in Thailand must overcome significant obstacles. In the absence of a coherent immigration policy, Thailand relies on a myriad of laws, Royal Ordinances and Decrees, regulations, periodic regularizations of migrants in irregular status, and a nationality verification process. In addition, frequent changes of procedure create uncertainty and can have major effects on applicants. For example, the severe penalty provisions in the Royal Ordinance on the Management of Foreign Workers Employment B.E. 2560 caused thousands of migrant workers from neighbouring countries to return home after June 2017; many of its restrictions and penalties were subsequently amended in the Royal Decree on Managing the Work of Foreigners (No. 2) B.E. 2561 (2018).<sup>215</sup> Concerns have also been raised that migrants who register during the periodic regularization exercises are not granted an enduring solution to their situation, because technically they continue to be subject to immigration controls due to their "illegal entry".<sup>216</sup> In addition, it has been argued that the National Verification process and the MOU labour import system are unregulated, complicated, take time, and are expensive for migrants.<sup>217</sup> Only migrants who already have a work permit under the annual registration are allowed to make applications to the Nationality Verification process.

Further, undocumented migrants from other countries, including low-wage migrants from Bangladesh, China, Nepal and Vietnam, are not recognized by the regularization exercises and therefore have no channel to become regularized while present in Thailand.

The limited number of accessible pathways to regular status, combined with more intense enforcement of sanctions against irregular migration, create conditions in which migrants, including asylum seekers and refugees, can experience human rights abuses as well as exploitation. In practice, migrants apprehended in anti-trafficking raids are often arrested and detained, rather than treated as victims of or witnesses to a crime.<sup>218</sup> The Committee on the Elimination of Racial Discrimination has expressed concern that identification and referral measures for trafficking victims are insufficient, and that corruption and official complicity are prevalent in trafficking cases.<sup>219</sup>

Human rights mechanisms have recommended that Thailand should take measures to ensure that all children born in the territory are registered at birth, especially children who are currently not registered because of their economic status or the immigration status of their parents.<sup>220</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

In March 2020, the Royal Thai Government introduced a visa amnesty. It offered an automatic visa extension to those holding temporary stay status and suspended the 90-day residence reporting requirement for migrants who were unable to leave Thailand due to the country's COVID-19 control measures. Under the terms of the amnesty, migrants were required to leave the country within seven days after border checkpoints reopened.<sup>221</sup> Amnesties were repeatedly extended, up to 26 November 2021.<sup>222</sup>

Labour shortages caused by the COVID-19 pandemic compelled the Royal Thai Government in November 2020 and September 2021 to allow legally registered migrant workers from Myanmar, the Lao People's Democratic Republic, and Cambodia, whose work permits were due to expire in 2021 and 2022, to continue working in Thailand for up to two more years, provided they renewed their work permits as soon as the old ones expired.<sup>223</sup> Both employed and unemployed migrant workers are eligible for the scheme which was approved by the cabinet on 29 December 2020.<sup>224</sup> Large numbers of migrants applied. Some 190,000 did so during the first 10 days of the registration period. However, concerns have been raised about barriers to access in practice, including high registration fees, onerous requirements (including biometric and health checks), and language barriers. These may deter migrant workers whose status is irregular from registering.

## Endnotes

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- 12 Ibid., article 48.
- 13 Ibid., article 51.
- 14 Ibid., articles 52(2) and 52(3).
- 15 Ibid., article 54(2).
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# III. SOUTH ASIA

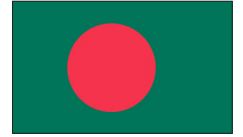


Migrant workers and their families wait to get on a bus to reach a railway station to board a train to their home state of Uttar Pradesh, during an extended lockdown to slow the spreading of the coronavirus disease (COVID-19), in New Delhi, India, May 26, 2020.

(REUTERS/Adnan Abidi)



# 1. BANGLADESH



## LEGISLATION

Part III of the Constitution of the People's Republic of Bangladesh (1972) guarantees a range of human rights.<sup>1</sup> Many apply only to citizens, including equality before the law, the right to protection of the law, freedom of movement, and freedom of assembly.<sup>2</sup> However, every person is guaranteed the right to life and to personal liberty and due process safeguards in the context of arrest and detention.<sup>3</sup> In its preamble, the Constitution pledges that Bangladesh will work to achieve a society free of exploitation based on the rule of law and underpinned by respect for fundamental human rights and freedoms.<sup>4</sup>

The National Human Rights Commission of Bangladesh (NHRC Bangladesh) was formed on 1 December 2008.<sup>5</sup> The Commission has several functions, including education, and a mandate to raise awareness of human rights issues through research, seminars, symposiums, and workshops. It has authority to investigate allegations of human rights violations received from any individual or quarter, and can initiate investigations into any incident on its own initiative. If a human rights violation is proved, the NHRC can settle the matter or pass it on to the courts or relevant authorities. The Commission offers mediation and conciliation in human rights disputes.<sup>6</sup>

Key laws relevant to migrants in Bangladesh include the Passport Act (1920), the Registration of Foreigners Act (1939), the Foreigners Act (1946), the Foreigners Order (1951), the Bangladesh Control of Entry Act (1952), and the Registration of Foreigners Rules (1966).

The Foreigners Act (1946) enables the government to place restrictions on entry (article 3) and requires providers of accommodation to submit details of foreigners/migrants in residence (article 7). Under article 3, the administrative detention of irregular migrants is restricted to a maximum of 6 months, unless approval otherwise is received from an advisory board containing at least two members of the supreme court.<sup>7</sup>

The Bangladesh Control of Entry Act (1952) specifically addresses the entry into Bangladesh of Indian citizens (article 3) and prescribes a fine, imprisonment of up to one year, and deportation for any individual found to be in breach of the Act (article 7).

## FOUNDATIONS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

The Foreigners Act (1946) grants authority to exempt any individual migrant or group of migrants from the requirements of the Act (article 10). This potentially offers a pathway for migrants in vulnerable situations.

Additionally, citizens of any country that has diplomatic relations with Bangladesh are permitted to enter for purposes of meeting family, study, or religion.<sup>8</sup>

Migrants seeking to study in an officially recognized educational institution in Bangladesh are entitled to entry and stay, and to bring their spouse and dependent children to Bangladesh with them.<sup>9</sup>

### 2. PROTECTION FOR TRAFFICKED PERSONS

The Prevention and Suppression of Human Trafficking Act (2012), which also addresses bonded labour, requires the Government of Bangladesh to provide support and protection to trafficked persons.<sup>10</sup> They are entitled to shelter in homes and rehabilitation centres and have the right to pursue compensation through civil suits and to receive legal aid.<sup>11</sup> However, these measures address Bangladesh citizens who are trafficked in Bangladesh and abroad. With respect to trafficked foreign migrants, the Act (as well as its Prevention and Suppression of Human Trafficking Rules, 2017) envisages their return to countries of origin after recording a statement.<sup>12</sup>

The National Plan of Action on preventing human trafficking 2018-22 (NPA) provides trafficked persons with necessary support, including enhanced access to social services, and gives particular attention to children.<sup>13</sup> While the NPA also focuses primarily on citizens, it could potentially offer a pathway for migrants who have been trafficked and cannot safely return to their countries of origin.

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Under the Registration of Foreigners (Exemption) Order (1966), the provisions of the Registration of Foreigners Rules (1966) do not apply to non-national children under the age of 16 years; they are entitled to enter and stay in Bangladesh without having to report or register their presence.

Former Bangladeshi citizens, the spouses of current or former Bangladeshi citizens, and foreign-born children of current or former Bangladeshi citizens, are eligible to apply for a Bangladesh “No Visa Required” stamp that allows them to enter Bangladesh multiple times for an unlimited duration as long as their passport is valid.

Migrants who are temporarily in Bangladesh and who qualify under defined professional visa categories are entitled to bring their spouses and dependent children into the country.<sup>14</sup>

### 4. PROTECTION OF REFUGEES

No domestic law in Bangladesh covers refugees: the Foreigners Act (1946), supplemented by specific strategies, remains the key law governing their status. UNHCR operates in Bangladesh under a 1993 Memorandum of Understanding and also conducts refugee status determination (RSD) of urban asylum-seekers in the capital city of Dhaka.

Some 900,000 Rohingya refugees from neighbouring Myanmar are assisted by the international community in camps in Bangladesh.<sup>15</sup> A National Strategy on Myanmar Refugees and Undocumented Myanmar Nationals in Bangladesh was approved in 2014. The Strategy created a national task force (NTF), chaired by the Ministry of Foreign Affairs, in which 29 other Ministries and entities participate. The task force oversees and provides strategic guidance on matters related to Rohingya refugees.

## 5. PROTECTION FROM STATELESSNESS

According to the Citizenship Act (1951), any child born outside Bangladesh to a Bangladeshi citizen is granted citizenship by descent, provided the birth is registered. Any woman married to a citizen of Bangladesh, and minor children of a citizen of Bangladesh, can acquire Bangladeshi citizenship.<sup>16</sup> The government may register as a citizen of Bangladesh any person who is ordinarily resident in a country outside Bangladesh but who was born, or whose father or grandfather was born, on the Indo-Pakistani subcontinent.<sup>17</sup> A 2009 amendment to the 1951 Citizenship Act provides that anyone born in Bangladesh to either a Bangladeshi mother or father acquires Bangladeshi nationality; the amendment did not have retroactive effect.

In 2014, Bangladesh agreed to register in the country's civil registry the births of all refugee children born in official camps, via its online birth registration system.<sup>18</sup>

## PROCEDURES

Entry into any part of Bangladesh is prohibited for any person who is not in possession of a passport. A person who enters Bangladesh without regular documentation is liable to arrest.<sup>19</sup>

Any foreigner entering or present in Bangladesh, who fails to report his presence to the appropriate authority, may be imprisoned for up to one year, or fined, or both.<sup>20</sup> Article 3 of the Passport Order of Bangladesh (1973) also prohibits any person from leaving or attempting to leave Bangladesh without a valid passport or travel document. Any person who fails to produce for inspection a legitimate passport or travel document when called upon to do so by the prescribed authority is subject to criminal and/or administrative penalties.<sup>21</sup>

## IMPLEMENTATION IN PRACTICE

Bangladesh is a country of destination and transit in addition to being a major country of origin of migrants and is a Champion Country for the Global Compact for Migration. It is the sixth largest origin country for international migrants in the world with some 12 million Bangladeshi migrants living abroad as of 2020.<sup>22</sup> In the same year, according to official statistics, 1,021,430 migrants (including refugees) were living in Bangladesh,<sup>23</sup> which was reported to host 918,841 refugees in January 2022.<sup>24</sup> Despite this complex reality, Bangladesh has no clear and comprehensive legal framework governing immigration or the entry and stay of migrants in the country.

Policy measures have focused on the emigration of Bangladeshis as migrant workers. In 2018, the Bureau of Manpower, Employment and Training reported that some 750,000 migrants leave Bangladesh for employment every year.<sup>25</sup> A recent survey on the drivers of migration from Bangladesh found that the majority of potential migrants were young, working aged men who had attained at least some level of formal education. Forty per cent of potential migrants were unemployed before deciding to migrate, and 90 per cent had no personal income or insufficient income.<sup>26</sup> The Eighth Five-Year Plan of Bangladesh (2021–2025) recognizes that migration, and remittances from migrant workers, make essential contributions to the country's development.

Bangladesh is a signatory to the International Convention on the Rights of All Migrant Workers and Members of their Families. However, when implementing its treaty obligations, it has focused on citizens who migrate; giving limited attention to the human rights of incoming migrants, particularly those who enter and stay in irregular situations.<sup>27</sup> The United Nations has recommended that Bangladesh should decriminalize irregular entry into the country under the 1946 Foreigners Act and ensure that border governance measures address and combat all forms of discrimination at international borders. It has noted concerns in relation to the principle of non-refoulement and the prohibition of arbitrary and collective expulsions.<sup>28</sup>

Migrants who arrive by regular means have the same access as nationals to government-funded education in Bangladesh. They face no restrictions on access to primary, secondary or tertiary education. However, foreign nationals are not entitled to benefit from official social safety net programmes. The government has not published clear rules on permanent residence for migrants living in Bangladesh and has made little specific information available on whether foreigners can access long-term residence permits.<sup>29</sup>

The draft of a new citizenship law is currently being considered. If enacted into law, it would replace both the Citizenship Act (1951) and the Bangladesh Citizenship (Temporary Provision) Order (1972). Concerns have been raised that, as currently drafted, this law is not in line with international standards and might increase statelessness in Bangladesh.<sup>30</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

In common with neighbouring countries, Bangladesh employed a range of border restrictions in response to the COVID-19 pandemic. In March 2020 the Ministry of Foreign Affairs announced that foreign nationals staying in Bangladesh with valid visas would have the option to extend their visas by three months.



## 2. INDIA



### LEGISLATION

Part III of the Constitution of India (1950) sets out 'fundamental rights'.<sup>31</sup> Article 14 guarantees equality before the law and equal protection of the law to every person in the territory of India. Article 21 grants the right to life and personal liberty to every person. Article 22 grants non-citizens fundamental rights with regard to arrest and detention. Articles 25-28 guarantee non-citizens freedom of religion. The Constitution limits its non-discrimination protections (article 15) and equality of opportunity in matters of public employment (article 16) to citizens. Similarly, legal aid is guaranteed only for citizens (article 39A); but all persons – citizens and migrants – are allowed to appeal to the Supreme Court when rights covered in Part III of the Constitution have been violated (article 32). Under the Directive Principles of State Policy, the Constitution also requires the State to "promote international peace and security" (article 51a) and "foster respect for international law and treaty obligations" (article 51c). Indian courts have repeatedly ruled that the Constitution's human rights principles include foreigners.<sup>32</sup>

The National Human Rights Commission of India was envisaged by the Protection of Human Rights Act, 1993 and established on 12 October 1993. It has a wide mandate that includes civil, political, social, economic and cultural rights. The Commission's functions include inquiry and investigation into complaints, intervening in judicial proceedings involving allegations of human rights violations, visiting jails and other detention centres, and reviewing legislation.<sup>33</sup>

In a landmark case in 1996, *National Human Rights Commission v. State of Arunachal Pradesh & Anr*, the Indian Supreme Court confirmed that articles 14 and 21 of the Constitution protect all persons within India, including non-citizens, asserting that "while all rights are available to citizens, persons including foreign citizens are entitled to the right to equality and the right to life, among others".<sup>34</sup>

In the absence of specific national legislation, all Indian laws apply to foreigners as well. The Foreigners Act (1946) empowers the Central Government to govern the entry, presence and departure of migrants.<sup>35</sup> The Foreigners Act grants significant administrative discretion. The Passport Act (1967) and several other regulations also play a part in the regulation of entry and stay in India.<sup>36</sup> Section 6 of the Registration of Foreigners Rules (1939, the 1939 Rules) sets out procedures relevant to the registration of foreigners visiting India.

The Right of Children to (Free and Compulsory) Education (RTE) Act which entered into force in 2009, stipulates that all children between the age of 6 to 14 residing in India are entitled to free and compulsory education.<sup>37</sup>

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

The Indian Government introduced a Long-Term Visa (LTV) policy for migrants from certain neighbouring countries who entered India on or before 31 December 2014, either without valid documents (passport/other travel document) or with documents whose validity had expired. The LTV offers humanitarian leave to stay in India temporarily. Nationals of Pakistan, Afghanistan and Bangladesh are entitled to apply for an LTV in certain cases, including "cases of extreme compassion".<sup>38</sup> Also eligible to apply are members of minority communities (Hindu, Sikh, Buddhist, Jain, Parsi and Christian) from these three countries, as well as women of Indian origin who are returning to India due to widowhood or divorce. An LTV entitles the holder to reside in India for a defined period, seek employment in the private sector, and study (including in tertiary education institutions).<sup>39</sup> The minority communities above have certain additional entitlements, including to purchase housing and obtain a driving licence and identity card.

An Urgent/Emergency Indian e-Visa is available for foreign nationals who are of Indian origin to enter the country for emergency or compassionate reasons. In August 2021, the Indian government introduced a new e-Emergency X-Misc Visa to facilitate and fast track urgent applications by any foreign nationals who require to enter the country urgently. The Ministry of Home Affairs specified that this visa was designed, inter alia, to enable Afghan nationals, irrespective

of religion, to leave Afghanistan and travel to India as a result of the situation in that country following installation of the Taliban government.<sup>40</sup> As of 24 November 2021, 200 e-Emergency X-Misc visas had been issued to Afghans seeking to enter India, while, in view of the situation in Afghanistan, the government also extended the stay visa of 4,557 Afghan nationals who were already in India.<sup>41</sup>

The Citizenship (Amendment) Act (2019, CAA) amended the Citizenship Act of 1955 by providing a path to Indian citizenship for migrants in irregular status who were (a) members of Hindu, Sikh, Buddhist, Jain, Parsi, or Christian religious minorities, (b) came originally from Pakistan, Bangladesh and Afghanistan, and (c) arrived in India before 2015. Under the CAA, migrants who had entered India by 31 December 2014 and who had suffered “religious persecution or fear of religious persecution” in their country of origin became eligible for citizenship. The amendment also lowered the residence requirement for naturalization of these migrants from 12 years to six.<sup>42</sup> The CAA did not introduce any new legal bar to citizenship for migrants of other faiths; Muslims continued to have access to citizenship under the more onerous requirements of the original Citizenship Act, which preclude citizenship by registration or naturalization to “illegal migrants” (defined as persons who entered or stayed in India irregularly).<sup>43</sup>

Article 3(1) of the Foreigners Act provides the Central Government with wide discretion to prohibit, regulate and restrict the entry and stay of migrants in the country.

Under the Peace and Friendship treaty between Nepal and India (1950), Nepalis have the right to live and work in India and in theory have the same rights as Indian citizens, with the exception of voting rights. Article 7 of the Treaty states: “The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.”

Citizens of Bhutan are also entitled to enter India without obtaining a visa.<sup>44</sup>

Under the medical visa (MED Visa), a migrant whose sole purpose for entering India is to seek medical treatment in an established/recognized/specialized hospital or treatment centre is entitled to stay for up to one year, which may be renewed for a further period of up to one year (or longer) at the discretion of the Ministry of Home Affairs.

A student visa can be granted to a foreign national whose sole objective is to pursue an on-campus, full time course in a recognized institution, and who can furnish proof of financial standing. Student visas are issued for the duration of a course or for five years, whichever is shorter. Notably, it is also possible to apply for a provisional student visa, valid for six months, which enables the holder to explore admission or take admission tests. Adults with student visas are entitled to sponsor their spouse and dependent children, but minor children are not entitled to sponsor their parents (who may enter through another visa category for which they are eligible). A spouse and dependent family members of a student must apply for an Entry Visa; this terminates when the student’s visa ends.<sup>45</sup>

## *2. PROTECTION FOR TRAFFICKED PERSONS*

Article 23(1) of India’s Constitution prohibits trafficking in human beings. The country’s anti-trafficking law, the Immoral Traffic (Prevention) Act (1956, ITPA),<sup>46</sup> focuses trafficking only around the prevention of prostitution (of women and children only), which is not in line with the UN definition of trafficking in persons.<sup>47</sup>

The ITPA in its Section 21 requires the State government to establish shelters (protection homes) for women and children who have been trafficked. Authorities detain foreign sex trafficking victims in such shelters until deportation; bureaucratic constraints mean that the repatriation or deportation of foreign victims may not take place for several years.<sup>48</sup> The ITPA also lacks adequate mechanisms to identify and refer, assist and support, and provide remedies for trafficked persons, including those who are migrants.<sup>49</sup>

## *3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS*

India offers several pathways for migrants in regular status to reunite with their families. For instance migrants who hold temporary resident status in certain categories have a legal right to sponsor their spouse or minor children.<sup>50</sup>

Spouses and minor children of Indian citizens, and Overseas Citizen of India (OCI) cardholders, are able to enter and stay in India for five years, on a renewable basis. Under the OCI scheme, a child, a grandchild or a great grandchild as well as a spouse of an Indian citizen or OCI cardholder may be eligible to become a permanent resident.<sup>51</sup>

Migrants who are present in India “for many years due to marriage with Indian nationals” can apply to regularize their stay while in the country. Migrants are entitled to stay in India after the death of their Indian spouse if the couple have had children. Immigrants are also entitled to stay in India after divorce but only if they have children and have been granted custody.<sup>52</sup>

Women with Pakistani or Bangladeshi nationality married to Indians, and Afghan nationals married to Indian nationals, are entitled to a Long Term Visa (see above).

Migrant children resident in India, regardless of their status, are entitled to free education under the Right to Education Act (2009), while children of Nepali migrants are similarly entitled free access to Indian government schools, provided they have the required documentation under the Peace and Friendship treaty (1950).

#### 4. PROTECTION OF REFUGEES

India lacks a national framework on asylum, but historically it has enabled the entry and stay of large communities of refugees from neighbouring countries, including East Pakistan, Tibet (China) and Sri Lanka.<sup>53</sup>

In the absence of a national legal and administrative framework, UNHCR, based in New Delhi, conducts refugee status determination (RSD) for asylum-seekers from non-neighbouring countries, as well as Afghanistan and Myanmar. Holders of documentation provided by UNHCR are able to obtain temporary residence permits from the authorities.

The policy of granting temporary residence permits or long-term visas is applied to refugees on a case-by-case basis under a standard operating procedure (SOP) set out in an internal letter of the Indian Ministry of Home Affairs, dated 29 December 2011.<sup>54</sup> It applies to “foreign nationals claiming to be refugees” and defines “refugee” broadly to include persons who flee persecution on the basis of sex and ethnic identity.

#### 5. PROTECTION FROM STATELESSNESS

In India, citizenship is granted through birth, registration, naturalization, or descent. The country has no national legal framework on statelessness. The Constitution recognizes as Indian citizens all those who were born in India or have at least one parent born in India or who have been ordinary residents of India for five years prior to 26 January 1950.<sup>55</sup> Articles 5 to 9 address citizenship and Articles 10 and 11 confer on Parliament the right to make laws that determine eligibility for citizenship.

The Citizenship Act (1955) and the Foreigners Act (1946) govern citizenship after 1950.<sup>56</sup> The Citizenship Act was amended in 1985,<sup>57</sup> 1986,<sup>58</sup> 2003,<sup>59</sup> 2015 and most recently by the Citizenship Amendment Act (CAA) in 2019. The 2003 amendment introduced the concept of “illegal migrant”, defined as a foreigner who entered India in an irregular manner.<sup>60</sup> “Illegal migrants” were denied the possibility to obtain citizenship through registration or naturalization, unlike a migrant with regular status who could naturalize legally after 11 years of ordinary residence in India; the effect is to create a risk of statelessness.<sup>61</sup>

In 2019 the Government decided to prepare and update a National Population Register (NPR), via door-to-door enumeration, throughout the country except for the state of Assam.

## PROCEDURES

Foreigners who enter or remain in India irregularly, because they do not possess travel documents or their travel documents have expired, are liable to prosecution under Section 14 of the Foreigners Act.

The Registration of Foreigners Act (1939) and the Registration of Foreigners Rules (1992) require certain categories of foreigners to register with an appropriate Registration Officer and receive a certificate of registration, under the terms of their visa or because they intend to stay in India longer than authorized.<sup>62</sup>

The Foreigners Regional Registration Office (FRRO), a government agency of the Bureau of Immigration, is responsible for registering foreigners and for other functions related to immigration. It makes the final decision on issuance of visas. Its decisions are not subject to review and it is not required to provide reasons for rejection. Cases that fall outside the FRRO's delegated powers are decided by the Home Department of the State Government/Union Territory Administration or the Ministry of Home Affairs. Final decisions are communicated by the competent authority to the Foreigners Regional Registration Office concerned.<sup>63</sup>

Migrants can apply for a Long-Term Visa (LTV) which is granted for between one year (for compassionate cases) and five years (for all other categories) and can be extended. LTVs provide a legal safety net that recognizes the stay of certain groups of migrants in India.

The e-Emergency X-Misc Visa can be applied for online. This visa is valid for six months and is designed to provide an emergency response in urgent situations. In the context of the crisis in Afghanistan in 2021, the e-visa permitted Afghan citizens to apply for a visa without having to travel to an embassy or consulate.

## IMPLEMENTATION IN PRACTICE

The largest and most populous country in South Asia, India is also the largest country of origin of international migrants. Some 17.5 million Indian citizens live abroad; India also receives the most remittances of any country (USD 78.6bn in 2020).<sup>64</sup> India officially hosts some 5 million migrants, in addition to a significant population of migrants who have arrived or remained irregularly, although precise figures for the latter are unavailable.<sup>65</sup> Most of the migrants who arrive in India originate from neighbouring countries. In 2019, 95.3% of India's immigrants came from the South Asia sub-region, including Bangladesh, Pakistan, Nepal, Sri Lanka, Afghanistan and Bhutan.<sup>66</sup>

Responses to the situation of migrants who seek entry or stay in India have tended to be reactive and framed in terms of economic or security concerns. As a result, the treatment of different groups of migrants has varied according to their nationality or religious affiliation. India lacks a comprehensive immigration policy framework, and official reluctance to recognize that India is a country of immigration has tended to restrict pathways for entry and stay, and on occasion curtailed the rights of migrants in India.<sup>67</sup>

Precise statistics on the number of migrants from neighbouring countries such as Nepal or Bangladesh are not easily available, although estimates suggest that up to 1.6 million Nepali migrants were present in India in 2020. Similarly, low-wage migration and family reunification have brought some 3 million Bangladeshi migrants to live in India in the decades since Partition and the creation of Bangladesh in 1971. Many such irregular migrants work and live in precarity.<sup>68</sup>

Where in principle Nepalis are entitled to move freely to India and enjoy the same rights as Indian citizens, many experience barriers to access these rights in practice. For instance, Nepali migrants often struggle to obtain the correct papers needed to attend school; consequently, they are compelled to pay for their children's education in private schools or keep their children out of school.

Under the Aadhaar programme, distinguished as the largest biometric identification system in the world, many migrants living in India are eligible to receive documentation (the Aadhaar Card) which enables their access to various government benefits and services. However, following a 2018 Supreme Court ruling<sup>69</sup>, migrants in irregular situations are not eligible to receive the card, while reports indicate that some migrants in regular situations also struggle to access it in practice due to multiple barriers including their lack of access to necessary documentation, language difficulties and other obstacles.<sup>70</sup>

The Special Rapporteur on Violence against Women has urged India to address the situation of migrant women in irregular status, to improve their access to services and their participation and representation in public life.<sup>71</sup>

Human rights experts and activists have criticized recent efforts to adopt a new law, the Draft Trafficking of Persons (Prevention, Care, and Rehabilitation) Bill (2021), because it continues to over-criminalize the response to migration, conflates trafficking with sex work, and fails to consider sufficiently the rights of trafficked persons and their need of effective protection.<sup>72</sup>

Concerns have been raised about risks of statelessness in relation to an ongoing national registration process, already completed in the state of Assam under the direct oversight of the Supreme Court.<sup>73</sup> Further, many migrants in India are practically excluded from applying for citizenship because they are unable to produce a visa or residence permit to show they have resided continuously in the country for 12 years.

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

From 5 May 2020, the Ministry of Home Affairs extended support to foreign nationals who were stranded in India due to travel restrictions caused by COVID-19.<sup>74</sup> The regular visas, e-visas and stay documents of foreign nationals, that had expired or would expire, were extended on submission of an online application. Extensions were granted for up to 30 days without charge or overstay penalty. The visas of Afghan nationals living in India were extended indefinitely without charge.<sup>75</sup>

From 2 September 2020, Tibetan migrants resident in India, who held a certificate of identity issued by the Ministry of External Affairs and a Return Visa, were permitted to re-enter India. The official notice highlighted that immigration checkpoints would exclude Tibetans from restrictions on passenger traffic into India.<sup>76</sup>

## 3. MALDIVES



### LEGISLATION

Chapter II of the Constitution of the Maldives (2008) guarantees a range of human rights protections to all persons.<sup>77</sup> Specifically, every person: is equal before the law and has the right to equal protection of the law (article 20); has the right to life, liberty and security (article 21); has the right to family life (article 24); has the right to marry and found a family (article 34); and can enjoy economic, social and cultural rights, including the right to education without discrimination of any kind (article 36).

With respect to procedural rights, the Constitution grants the right to a fair, speedy and public trial; judicial independence; victim's rights; special privileges for juveniles in a criminal process; the right to administrative action that is lawful, procedurally fair, and expeditious; the right to counsel; and protection from unjustified restraint.<sup>78</sup> Anyone whose rights under the Constitution have been violated is allowed to apply to a court to obtain a just remedy (article 65).

The Human Rights Commission of the Maldives was established as an independent statutory body on 10 December 2003 by the Human Rights Commission Act 6/2006.<sup>79</sup> The Commission has a broad mandate to promote and protect human rights in the Maldives. It has authority to: investigate complaints of human rights violations; visit any authority, jail or organization in the Maldives; submit recommendations for the protection of human rights; review laws, regulations or administrative rules in terms of human rights standards; and, as necessary, provide advice and recommendations to the Government.<sup>80</sup>

Migrants seeking to enter and stay in the Maldives are subject to the provisions of the Maldives Immigration Act (2007), which requires immigrants to hold a valid passport and entry permit.<sup>81</sup> Migrants who violate the Act are subject to a fine. The Controller of Immigration and Emigration has the discretion to detain and deport such individuals and prohibit them from entering the Maldives for a specified period.<sup>82</sup>

Section 42 of the Act on the Prohibition and Prevention of Torture incorporates article 3 of the Convention against Torture into the domestic law of the Maldives.<sup>83</sup> The Act mandates the Human Rights Commission, functioning as the National Preventive Mechanism, to take direct and indirect measures to prevent all forms of torture in the Maldives.

## GROUND AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Migrants who seek to enter or remain in the Maldives may be granted a special visa for a number of reasons, including for humanitarian stay.<sup>84</sup> Special visas may be granted to migrants who need to continue medical treatment,<sup>85</sup> and to migrants who are involved in legal proceedings when these involve their rights and they are required to be present at the proceedings.<sup>86</sup>

The Immigration Act grants a degree of discretion to government authorities, who are authorized to provide a special visa when they believe a foreign national, whose visa has expired, needs imperatively to remain in the Maldives.<sup>87</sup>

Migrants wanting to study in the Maldives may apply for a student visa.<sup>88</sup> Student visas are issued for one year and are renewable to the end of the course. Applicants must demonstrate that they have sufficient financial resources. Holders of student visas are not entitled to work but may undertake internships.<sup>89</sup> Family members or guardians of a migrant under 18 who has been granted a student visa can apply for a Dependant visa.<sup>90</sup>

The Maldives allows migrants who are in irregular status to regularize their status on a periodic and case-by-case basis (see Procedure below).<sup>91</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

Article 25a of the Maldives Constitution (2008) prohibits slavery, servitude and forced labour. The Prevention of Human Trafficking Act (2013) also prohibits forced labour and fraudulent recruitment. The 2013 Act does not criminalize undocumented migrants who are victims of trafficking in persons if they entered the country irregularly as a result of being trafficked and offers such irregular migrants legal protection if they choose to stay.<sup>92</sup> Migrants who are trafficked may not be detained based on their migration status if they have been trafficked or it is suspected they have been trafficked.<sup>93</sup> Section 40 of the Act requires the authorities to facilitate the return of migrant victims of trafficking to their country of origin if they so request.

The Prevention of Human Trafficking Act provides assistance to trafficked persons regardless of their migration status and whether or not they cooperate in any criminal investigation.<sup>94</sup> The authorities are required to ensure that potential victims of trafficking receive living accommodation for the duration of their stay, can access health care, and can obtain confidential counselling services and interpretation as needed. They are also entitled to information on how to obtain legal assistance, including advice on permits for regular entry and stay, and (if shown to have been trafficked) on civil proceedings for compensation.<sup>95</sup>

Persons who may have been trafficked are permitted a reflection period of 90 days to decide if they will cooperate with an investigation.<sup>96</sup> Migrants who are shown to have been trafficked can receive a special visa that allows them to remain in the country and work during the period of investigation and prosecution. This visa lasts for between three and 12 months but can be extended if the prosecution requests it. The Controller has authority to grant a trafficked person a different type of visa, providing a regular pathway to stay, if the individual wishes to remain in the Maldives.<sup>97</sup>

The National Steering Committee on Human Trafficking was established in 2016 but remained inactive between 2017 and 2019 due to lack of commitment and staff shortages.<sup>98</sup> The National Anti-Human Trafficking Action Plan 2020-2022 does not address protection.<sup>99</sup> The Maldives government has recognized that budgetary constraints, the absence of permanent shelter, and lack of victim support are obstacles to an effective response to human trafficking.<sup>100</sup>

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

A migrant who travels to the Maldives to marry a Maldivian, or who is already married to a Maldivian national, can enter and stay in the country under a marriage visa. The individual needs to be sponsored before arrival. If they have migrated to marry, the migrant must complete the legal marriage process and apply for a marriage visa within 30 days of arrival. Where the migrant is already residing in the Maldives under another visa category, a visa transfer must be made to a marriage visa once the legal marriage procedure has been completed. A marriage visa is issued for one year, if it is a new application.<sup>101</sup>

However, the laws on marriage discriminate on grounds of gender and religion: a Maldivian woman cannot marry a non-Muslim foreigner who does not convert to Islam beforehand. Maldivian men can marry non-Muslim foreigners but the latter must convert to Islam before the marriage unless they are Christian or Jewish.<sup>102</sup> Marriage to a Maldivian national does not confer any right to citizenship or permanent residency but does facilitate long-term residence.<sup>103</sup> Human rights mechanisms have recommended that the Maldives should revise its nationality laws to remove such discrimination.<sup>104</sup>

The 2nd Amendment to the 2007 Immigration Act allows a resident visa to be granted to foreigners who wish to stay with their children following their divorce from, or the death of, their Maldivian spouse. This Amendment also extended the duration of a resident permit to five years (previously one year). A visa issued for a new application still lasts for one year.<sup>105</sup>

Under the Maldives Immigration Act, a dependent spouse or the child of a migrant with regular status may apply for a dependant visa.<sup>106</sup>

A Maldives dependant visa may be granted to the immediate family, to the spouse, to a minor child or to the parents of a migrant who is employed as a 'professional' in the Maldives; it is valid for the same duration as the sponsoring migrant's visa. It is possible to change visa status and to apply for a dependant visa from within the country; it is not necessary to leave the country to apply for it.<sup>107</sup> Migrants who are employed in so-called 'non-professional' sectors (which would include the majority of low-wage migrants in the country) are not entitled to sponsor dependant visas.

#### 4. PROTECTION OF REFUGEES

The Maldives does not have a national asylum adjudication system and has not established any national refugee protection mechanisms. UNHCR, which is not physically present in the Maldives and operates remotely from New Delhi, has reported that in recent years the Maldives has received asylum claims from some individuals who had been detained by the immigration authorities for irregular entry or departure.<sup>108</sup>

#### 5. PROTECTION FROM STATELESSNESS

Article 9(b) of the Constitution affirms that no citizen of the Maldives may be deprived of citizenship. Despite this, no national legislation has been enacted that prevents or reduces statelessness or protects stateless persons. Children of migrants in the Maldives acquire citizenship if at least one parent is a citizen.<sup>109</sup>

Of particular concern are the provisions in the Constitution that prohibit non-Muslims from obtaining citizenship of the Maldives.<sup>110</sup> The pathway to citizenship is restrictive in other respects as well. Applicants must demonstrate a long period of continuous residency (12 years) before they are eligible to apply; must be able to speak Dhivehi; must renounce any other citizenship they hold; and must be able to provide “distinguished service to the Maldives”.<sup>111</sup> A person who applies for Maldivian citizenship is at risk of becoming stateless if the application is refused, because they must renounce existing citizenships as part of the application process. Furthermore, the Government interprets the conversion by a Muslim to another religion as a violation of Islamic law, which can result in punishment, including loss of the convert’s citizenship, in violation of the right to freedom of religion or belief.<sup>112</sup>

### PROCEDURES

Some visa categories (including dependant visas) allow status adjustments without requiring the migrant to leave the country. The authorities may determine changes of status using a standard procedure or may take special circumstances into account.

Candidates may apply for the Special Visa using a form available on the Maldives Immigration website.<sup>113</sup>

Little information is publicly available about the various regularization programmes that take place periodically, such as the Shared Responsibility Programme conducted in 2015 that regularized the status of hundreds of undocumented migrants (without requiring them to leave the country). The expatriate work visa regularization form indicates that the migrant must nominate a new employer in order to be able to apply for regularization; the procedure includes a registration and verification process.<sup>114</sup> On 19 September 2020, the Ministry of Economic Development initiated a one-year long regularization programme. Migrants who applied under the programme were issued with registration cards before they completed the verification process in order to facilitate their access to services, such as healthcare.<sup>115</sup>

The Controller of Immigration and Emigration has the authority to order the deportation of foreign nationals who do not qualify for a Maldives entry permit.<sup>116</sup>

A National Task Force on Issues Related to Migrant Workers was established on 17 September 2019 to formulate policy on all issues relating to migrants.

### IMPLEMENTATION IN PRACTICE

The Maldives is a country that consists entirely of atolls, coral reefs and low-lying coral islands; it is composed of 22 geographical atolls comprising around 1,200 islands. In recent years, Maldives has witnessed high levels of economic growth, based primarily on the development of high-end tourism.<sup>117</sup> Largely as a result of this economic model, the number of migrants present in the Maldives has steadily increased as well. In 2020 there were an estimated 145,000 regular migrants and 63,000 undocumented migrants present in the country. These figures imply that nearly one third of the population are migrants, the highest ratio of migrants to citizens in South Asia.<sup>118</sup> The majority of migrants in the Maldives are men from Bangladesh and India who work in the construction and tourism industries. Other major countries of origin include Sri Lanka, Pakistan, Nepal, Indonesia and the Philippines.



The Maldives government has recognized that migration governance remains a major challenge for the country and is taking steps to improve the governance framework.

Regularization programmes have taken place periodically, although often (as noted above) little public information is available about them. Reports suggest that, in practice, migrants have struggled to achieve regularization for a number of reasons: many migrants are unfamiliar with the rules and procedures; translators are lacking; and distrust of the authorities is likely to deter undocumented migrants from coming forward.<sup>119</sup> In February 2020, nevertheless, the government reported that 14,056 migrant workers had registered for the 2019 regularization programme between September and December 2019.<sup>120</sup>

Admission and entry policies for migrant workers are supported by a quota system. A Maldivian national who wants to employ a foreign worker must apply for a place within the quota. As a result, migrant workers depend heavily on their employers for their immigration status and the rights attached to it. The most common pathway to irregularity for migrant workers is through the practice of 'quota trading'. Employers who are able to obtain permission to bring in more workers than they need 'trade' surplus workers to other employers.<sup>121</sup> In August 2020, the government published a new migrant worker regulation, 2020/R-62, which clarified the responsibilities of employers to arrange migrants' arrival in the Maldives, including accommodation, registration, and return.<sup>122</sup>

Concerns have been raised that the principle of non-refoulement is not honoured in practice. The Committee against Torture has called on the Maldives to comply with its obligation not to return any migrant when there is reason to believe the person would be at risk of torture on return, and to ensure that decisions on expulsion or deportation are subject to judicial review and are reviewed individually.<sup>123</sup>

Despite the fact that it is conditional, the pathway offered by the special visa for victims of trafficking has been used by two migrant workers who were identified as trafficked during the Nationwide Regularization Program for Undocumented Workers which the Ministry of Defence launched in September 2019.<sup>124</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

Visa services were put "on hold" from mid-March 2020, due to the COVID-19 pandemic. Soon afterwards, the Maldives immigration service announced that visas would be extended. Foreigners who had arrived in the Maldives after 1 March 2020 for employment and who had not yet applied for a work visa were told to submit their visa application within ten working days of government offices re-opening. The holders of other forms of visa that were due to expire during the lockdown were told to apply to renew or extend them within ten working days of government offices re-opening. Foreigners who wished to leave the Maldives during the lockdown could do so if they completed an "Application for Emergency Departure" form (provided by their employer or sponsor) and certain other documents. Visa holders who complied with these guidelines were not charged for overstaying in the Maldives.<sup>125</sup> From May to July 2021, all arrivals from South Asian countries were suspended with the exception of healthcare professionals.<sup>126</sup>

In April 2020, the Government initiated a voluntary return programme for migrants, which repatriated more than 3,000 irregular migrants in the first three months of operation.<sup>127</sup>

## Endnotes

- 1 Act No. 76 of 1972.
- 2 Bangladesh Constitution (1972), articles 27, 31, 36, 37.
- 3 Ibid, articles 32, 33.
- 4 Ibid, articles 10, 34.
- 5 NHRC Bangladesh, 'Establishment of the National Human Rights Commission' at <http://www.nhrc.org.bd/site/page/>.
- 6 Commonwealth Forum of National Human Rights Institutions, 'Bangladesh Human Rights Commission', at <https://cfnhri.org/members/asia/bangladesh/>.
- 7 Section 3 and 2nd Schedule of the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. 8 of 1973)
- 8 Ibid.
- 9 Bangladesh Department of Immigration and Passports, 'Types and Essential Documents and Visas', at: [https://dip.portal.gov.bd/sites/default/files/files/dip.portal.gov.bd/policies/b59c9216\\_c188\\_42cc\\_b815\\_2e15c27e61ed/Citizen%20charter%20update.pdf](https://dip.portal.gov.bd/sites/default/files/files/dip.portal.gov.bd/policies/b59c9216_c188_42cc_b815_2e15c27e61ed/Citizen%20charter%20update.pdf).
- 10 The Prevention and Suppression of Human Trafficking Act (2012), Chapter 5: Assistance, protection and rehabilitation of the victims of human trafficking and witnesses.
- 11 Ibid, Sections 35, 39, and 40, respectively.
- 12 Ibid, Section 33(4); and Prevention and Suppression of Human Trafficking Rules (2017), paras. 8(7) and 13.
- 13 Note: the NPA is not available online. This description is based on the outline in Ministry of Home Affairs, 'Bangladesh Country Report: 2018 - Combating Human Trafficking', at [https://mhpsd.portal.gov.bd/sites/default/files/files/mhpsd.portal.gov.bd/annual\\_reports/0cc28f8e\\_1dcf\\_4b4e\\_9a38\\_264aaa42510c/Final%20\\_%20Country%20Report%202018%20\\_%2018.12.19%20\(2\).pdf](https://mhpsd.portal.gov.bd/sites/default/files/files/mhpsd.portal.gov.bd/annual_reports/0cc28f8e_1dcf_4b4e_9a38_264aaa42510c/Final%20_%20Country%20Report%202018%20_%2018.12.19%20(2).pdf). See also, Hasan, K., 'Five year NPA for fighting human trafficking launched', Dhaka Tribune, 3 December 2018, at <https://www.dhakatribune.com/bangladesh/event/2018/12/03/five-year-npa-for-fighting-human-traffickinglaunched>.
- 14 Bangladesh Department of Immigration and Passports, 'Types and Essential Documents and Visas', at: [https://dip.portal.gov.bd/sites/default/files/files/dip.portal.gov.bd/policies/b59c9216\\_c188\\_42cc\\_b815\\_2e15c27e61ed/Citizen%20charter%20update.pdf](https://dip.portal.gov.bd/sites/default/files/files/dip.portal.gov.bd/policies/b59c9216_c188_42cc_b815_2e15c27e61ed/Citizen%20charter%20update.pdf).
- 15 UNHCR (2020), 'Bangladesh: Fact Sheet', at <https://reporting.unhcr.org/document/501>.
- 16 Citizenship Act of 1951, article 5.
- 17 Ibid, article 8.
- 18 Ibid. Note: the Cox's Bazar district administration suspended registration on 19 September 2017. The suspension was reversed in November 2019 and from 1 September 2020 local authorities were authorized to resume issuing birth certificates. See Relief Web Bangladesh (2021), 'Impact of the suspension of birth registration on the host community in Cox's Bazar, Thematic Report', at <https://reliefweb.int/report/bangladesh/bangladesh-impact-suspension-birth-registration-host-community-coxs-bazar>.
- 19 The Passport Act (1920), article 3(2)(a).
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# IV. EAST ASIA

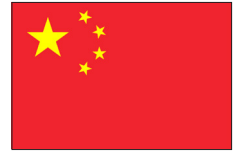


In photos taken on June 30, 2020, migrant workers protest in front of the Presidential Office, demanding that steps be taken to support them amid the outbreak of the coronavirus pandemic and to eliminate discrimination.

(Jang Seon-lm via Yonhap / Latin America News Agency via Reuters Connect)



# 1. THE PEOPLE'S REPUBLIC OF CHINA



## LEGISLATION

The fundamental rights set out in the 1982 Constitution of the People's Republic of China apply only to Chinese citizens.<sup>1</sup> However, one of its "General Principles" in Chapter 1 of the Constitution protects "the lawful rights and interests of foreigners within Chinese territory", who must abide by the laws of the State.<sup>2</sup> The Constitution was amended in 2004 to affirm that the State "respects and protects human rights"<sup>3</sup>

The People's Republic of China has not established an independent national human rights institution in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).<sup>4</sup>

The Human Rights Action Plan of China (2021-2025) addresses migration but focuses primarily on Chinese migrants, including returnees and internal migrants.<sup>5</sup>

The primary law governing the entry and stay of migrants to China is the 2012 Exit and Entry Administration Law of the People's Republic of China, particularly Chapter III, which regulates the entry and exit of foreigners and is the first comprehensive legal framework for regulating foreigners' visas, residence, and rights in China.<sup>6</sup> The law came into force in July 2013. Article 3 states that "[t]he legitimate rights and interests of foreigners in China shall be protected by laws". The accompanying Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners set out the pathways available to migrants seeking entry or stay in China and include a commitment to make information on these available.<sup>7</sup>

The National Immigration Administration (NIA), established in 2018, is the country's first national migration agency. It is formally responsible for both arrivals and departures and for coordinating migration affairs across the government. The NIA's work includes coordinating the formulation of immigration policies and organizing their implementation, issues of social integration as well as strengthening border control capacity and undertaking international cooperation in the field of immigration.<sup>8</sup>

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

A number of provisions in China’s laws and regulations relating to the entry and stay of foreigners provide grounds for the humanitarian stay of migrants.

Article 20 of the Exit and Entry Law allows any foreigners who “need to enter China urgently for humanitarian reasons” to apply for a visa to enter China. Article 23 of the same law provides a visa pathway for migrants who “need to enter China temporarily due to force majeure or for any other urgent reason”. Article 31 enables foreigners to change their status from stay to residence “for humanitarian or other reasons”.

A humanitarian residence permit may be granted to migrants who “need to reside in China for other personal matters”.<sup>9</sup> This permit may also be issued to spouses, parents, children under the age of 18, or parents-in-law of foreigners who are residing in China to work, study or for other purposes and who apply for a long-term visit to China. It differs from the residence permit for reunion, described in the section below, issued for the purpose of family unification and/or child protection.

### 2. PROTECTION FOR TRAFFICKED PERSONS

The Criminal Law of the People’s Republic of China prohibits some forms of human trafficking, including forced labour while anti-trafficking provisions focus primarily on crimes against women and children.<sup>10</sup> In 2010, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly issued the Notice on Issuing the Opinions on Legally Punishing the Crimes of Abducting and Trafficking in Women and Children.<sup>11</sup> The Inter-Ministerial Joint Conference for Anti-Trafficking in Women and Children is tasked with drafting national action plans; coordinating relevant government departments; establishing cooperation mechanisms; directing provinces in the implementation of anti-trafficking activities; and coordinating and promoting international anti-trafficking cooperation. The second National Plan of Action to Combat Human Trafficking ran from 2013 to 2020. A third National Action Plan, started in 2021 and will run for ten years.<sup>12</sup> Under the Human Rights Action Plan (see above), China has undertaken to redouble its efforts to protect workers’ rights and interests and punish cases of forced labour.<sup>13</sup> The plan contains less detail about what assistance may be made available to affected migrants, including any temporary or permanent pathways for victims of trafficking.

The Ministry of Public Security promulgated written instructions in 2016 for law enforcement officers throughout the country, which clarified procedures for identifying trafficking victims in the sex sector and in forced or fraudulent marriages. In the Universal Periodic Review, China has been urged to provide assistance to migrants who have been trafficked.<sup>14</sup>

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

China’s permanent residence rules, enacted in 2004, recognize three categories of foreigners, as well as their spouses and minor children, who are also eligible to apply for permanent residence in China. In addition, the following family members of a Chinese citizen or permanent resident may apply for permanent residence: a spouse married to a Chinese citizen, or to a person who has been a permanent resident for at least five years, who has at least five consecutive years of residency in China, is physically present in China for at least nine months each year, and has a stable source of livelihood and a dwelling in China. Unmarried children under the age of eighteen are also eligible to apply, as are direct relatives who are sixty years of age or older, who have no direct relatives in any country other than China, who have resided in China for at least five consecutive years, who are physically present in China for at least nine months each year, and who have a stable source of livelihood and a dwelling in China.<sup>15</sup>

Under the 2012 Exit and Entry Administration Law, family members of Chinese citizens or foreigners with permanent Chinese residence, including spouses, parents, sons, daughters, spouses of sons or daughters, brothers, sisters, grandparents, grandsons, granddaughters and parents-in-law, may enter China for purposes of family reunion. The Q1 visa is issued to family members of Chinese citizens and family members of foreigners with permanent residence status in China who apply for residence in China for family reunion, as well as to persons who apply for residence in China for fosterage or for other purposes. The Q1 visa does not permit holders to work in China although they can apply separately for work permits and work-type residence permits.<sup>16</sup>



#### 4. PROTECTION OF REFUGEES

Article 32 of the 1982 Constitution states that the People's Republic of China may grant asylum to foreigners who request it for political reasons.

According to article 46 of the 2012 Exit and Entry Law, foreigners who apply for refugee status in China may, during the screening process, stay in China with temporary identity certificates issued by public security organs.<sup>17</sup> In the absence of a national asylum law or system, UNHCR currently conducts refugee status determination under its mandate and communicates its refugee status determination decisions to the Chinese authorities. Once they are recognized by UNHCR, the Government permits refugees to remain in China temporarily, while UNHCR seeks a durable solution (resettlement or voluntary return, but not local integration).<sup>18</sup>

#### 5. PROTECTION FROM STATELESSNESS

Article 4 of the Nationality Law of the People's Republic of China grants Chinese nationality to any person born in the country who has at least one parent who is a Chinese national. Any person born in China whose parents are stateless or of uncertain nationality and who has settled in China is also entitled to Chinese nationality.<sup>19</sup> Foreign nationals or stateless persons who are willing to abide by China's Constitution and other laws may be naturalized on approval of their applications, if they are near-relatives of Chinese nationals, or they have settled in China, or they have other legitimate reasons.<sup>20</sup>

The rate of birth registration is lower in areas of mainland China that are remote or experience high rates of poverty. It is also low among some adopted children, children born to migrant parents, and children whose birth would put a family above the limit of the sanctioned family size. In these groups, there is a high risk of statelessness. In 2015, the General Office of the State Council issued regulations to enable persons without registered household registration who delivered children outside midwifery institutions to access birth certificates on the basis of appropriate paternity test certificates.<sup>21</sup>

## PROCEDURES

The Ministry of Public Security and the Ministry of Foreign Affairs are responsible for administering exit and entry in their areas of responsibilities. Border inspection authorities are responsible for carrying out exit and entry border inspections. Local people's governments at or above the county level are responsible for administering the stay and residence of migrants, through public security organs and their exit/entry administrations.<sup>22</sup> Border inspection authorities are authorized to order migrants who are denied entry to China to return, and to force their return if they refuse. While waiting for return, migrants are not allowed to leave the "restricted zones".<sup>23</sup>

To obtain a visa for "humanitarian reasons" under Article 20 of the Exit and Entry Administration Law, a migrant may apply upon entry to authorities that have been authorized to issue such visas by the Ministry of Public Security. Applicants are required to submit passports or other international travel documents, as well as relevant information. The "port visa" allows a single entry for a maximum stay of 30 days.

Migrants who seek temporary entry on grounds of force majeure or for any other urgent reason are required to complete formalities at the border, and a guarantee may be required. The duration of such temporary stays cannot exceed 15 days.<sup>24</sup> Article 31 of the Entry and Exit Law allows migrants to change their entry status for humanitarian reasons; foreigners who seek a residence permit are required to apply to the relevant authorities and to complete the necessary formalities.

Article 7 of the Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners (2013) provides additional information on the procedures that must be followed to obtain all categories of visa. Reports indicate that application procedures in regard to the different categories of entry and stay have been gradually streamlined and are available online.

Migrants who are dissatisfied by the way their case was handled under the Exit and Entry Administration Law, for example because they were interrogated at length or detained for investigation or their movement was restricted, may apply for administrative reconsideration. That body's decision is final and is not open to appeal.<sup>25</sup>

## IMPLEMENTATION IN PRACTICE

With a long history as a country of origin (in 2020 some 11.8 million Chinese migrants were living abroad)<sup>26</sup> China is increasingly also becoming a country of destination for international migrants. More than one million international migrants are registered in China including over 490,000 international students registered at higher education institutions in China as well as low-wage workers and marriage migrants.<sup>27</sup> Estimates indicate that there are in addition a significant population of migrants in irregular status. Migration to China is geographically diverse, encompassing migrants from neighbouring countries and other parts of Asia as well as from Africa and other geographical regions. China officially became an ageing nation in 2000, and in 2020 about one fifth of its 1.4 billion citizens were over 60 years of age. By 2030, the 60-plus population is expected to grow by 60 per cent to reach 390 million, accounting for one quarter of the total population.

In April 2018, a new National Immigration Agency was established in order to enhance migration governance in the country and as a response to an increasing number of international migrants arriving in China.<sup>28</sup> Migration governance has tended to prioritize the economic benefits of migration with a focus on attracting high-skilled foreigners; broader issues of integration and societal diversity have been discussed less often.<sup>29</sup>

Although the 2012 Entry and Exit Law provides an important pathway for migrants who are in humanitarian need, visas are not available to migrants who suffer from mental illness or who cannot guarantee that they can support themselves while they are in China. This restricts its availability in practice to some groups of migrants who are in situations of vulnerability.<sup>30</sup> Similarly, the family reunion Q visa does not allow the holder to take employment, which can limit the integration potential of this pathway.

With respect to nationals of the Democratic People's Republic of Korea, UN human rights mechanisms have expressed concern that China's policy is to forcibly return all such individuals on grounds of irregular entry, even when they have been trafficked or have a credible non-refoulement claim.<sup>31</sup>

Concerns have been raised that China's onerous administrative requirements for obtaining a birth certificate and its complex registration procedures create barriers to birth registration, including for migrant parents. The Committee on the Elimination of Racial Discrimination has urged China to ensure that all children born in the territory of China are issued with a birth certificate, irrespective of the legal status of the parents or ability to present residence registration papers. It has asked China to intensify efforts to identify stateless persons.<sup>32</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

China has implemented especially stringent pandemic border restrictions as part of its 'zero-COVID' strategy. Only migrants who hold permanent residency were allowed entry and foreign students were barred from entry.<sup>33</sup>

China's National Immigration Administration announced on 12 March 2020 that, during the epidemic prevention and control period, the period of stay of foreigners in China would be extended automatically for two months. Foreign nationals whose visas or residence permits in China had expired during the COVID-19 pandemic could obtain an automatic two-month extension until further notice; they were only allowed to engage in the activities permitted by their original visa type. Foreign nationals who obtained an automatic two-month extension were not eligible for a second automatic extension.

The Ministry of Foreign Affairs and the National Immigration Administration then announced, in September 2020, that from 28 September foreign nationals holding valid Chinese residence permits for work, personal matters, and reunion could enter China without having to apply for new visas. This meant that a still valid residence permit was sufficient for entry. The holders of residence permits that expired after 28 March 2020 could apply for a new visa of the same kind at Chinese embassies and consulates, by presenting the expired residence permit and other required documents, provided that the purpose of their stay had not changed. Once in China, they were required to apply for a new residence or work permit or its extension.

## 2. HONG KONG SPECIAL ADMINISTRATIVE REGION (SAR) OF THE PEOPLE'S REPUBLIC OF CHINA



### LEGISLATION

Article 1 of the Hong Kong Bill of Rights Ordinance (1991) recognizes that everyone is entitled to fundamental rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>34</sup> The Basic Law is a constitutional document of the Hong Kong Special Administrative Region (HKSAR) and confers fundamental rights to permanent and non-permanent residents.<sup>35</sup> It permits the Government of the HKSAR to apply immigration controls on entry into, stay in, and departure from the territory.<sup>36</sup>

Hong Kong SAR does not have an independent national human rights institution, although its Equal Opportunities Commission, established in 1996 under the Sex Discrimination Ordinance (Cap. 480), is responsible for implementing anti-discrimination ordinances.<sup>37</sup>

The Immigration Ordinance (1972, with revisions up to 2021) provides the primary framework for regulating the entry and stay of migrants in Hong Kong.<sup>38</sup> The Immigration Department is responsible for all nationality applications, in accordance with the Nationality Law of the People's Republic of China.<sup>39</sup>

### GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

#### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Section 13 of the Immigration Ordinance (1972) gives wide discretion to the Director of Immigration to authorize the stay in Hong Kong of any person who has “landed in Hong Kong unlawfully”.

The Unified Screening Mechanism (USM) is an individual screening process adopted in 2014 to determine claims made by migrants who contest their return on the grounds that it involves refoulement.<sup>40</sup> Refoulement is prohibited when there are substantial grounds to believe that a returned person would be at risk of torture. This prohibition is explicitly based in article 1.1 (definition of torture) and article 3.1 (prohibition of refoulement) of the Convention against Torture.<sup>41</sup> Non refoulement protection is also granted when there are substantial grounds to believe that return will result in a personal and substantial risk of violation of an absolute and non-derogable right under section s.5(2) of the Hong Kong Bill of Rights.<sup>42</sup> The right to life (under article 2 of the Hong Kong Bill of Rights) and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (under article 3) are absolute and non-derogable.

A dedicated pathway for entry to Hong Kong exists for migrants who wish to study at primary or secondary level, providing that they are able to meet the fees for the course, cover the living expenses for their maintenance and accommodation without working, and avoid recourse to public funds.<sup>43</sup> Migrants who have obtained a degree or higher qualification in a full-time locally-accredited programme in Hong Kong may apply to stay or return and work in Hong Kong under The Immigration Arrangements for Non-local Graduates, which was launched on 19 May 2008. Under this arrangement, migrants may remain for twelve months without other conditions, and may take and change employment during their permitted stay without prior approval by the Immigration Department.<sup>44</sup>

#### 2. PROTECTION FOR TRAFFICKED PERSONS

The Hong Kong Bill of Rights prohibits slavery, servitude, and forced or compulsory labour.<sup>45</sup> However, the Hong Kong Court of Final Appeal has ruled that this provision does not impose an obligation on the government to create a specific offence given the existence of the range of constituent offences and the broad discretion afforded to the Administration.<sup>46</sup> Hong Kong SAR does not have comprehensive anti-trafficking legislation.<sup>47</sup> The Crimes Ordinance (Cap. 200) prohibits trafficking in persons only for the purposes of prostitution.<sup>48</sup> Its legislation does not include a criminal offence in respect of forced labour. Under the Employment Ordinance (Cap. 57), employers are criminally liable if they do not pay or underpay wages, delay payment of wages, or fail to grant employees rest days and statutory holidays.<sup>49</sup> In addition, relevant offences can be found in the Human Organ Transplant Ordinance (Cap. 456) and the Immigration Ordinance, as well as other relevant ordinances which prohibit such crimes as assault, forcible taking or detention of persons with intent to sell him

or her, child abduction, deception and blackmail. Consequent duties of conducting criminal investigation and screening victims of trafficking are accordingly distributed across the Hong Kong Police Force, Immigration Department, Customs and Excise Department, and Labour Department.

To enable foreign victims of trafficking to remain temporarily in Hong Kong, the authorities may provide visa extensions and waive visa fees. However, this facility is only offered to provide witness protection; such trafficked migrants are only permitted to remain in the HKSAR if they are willing to act as prosecution witnesses in legal proceedings instituted by the police, or the immigration, customs and excise, or labour departments. Exceptionally, the Immigration Department permits migrant domestic workers to change their employer if there is evidence that an employer has exploited or abused them.<sup>50</sup>

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

The Hong Kong Bill of Rights Ordinance recognizes that “family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.<sup>51</sup> Hong Kong permanent residents may bring non-local family members to Hong Kong, including through the quota-based One-way Permit Scheme (OWPS) for family reunion with family members who are Mainland residents. These permits are administered by the Mainland authorities.<sup>52</sup> Mainland-born children are entitled to reside in Hong Kong if one of their parents is a permanent resident. Children are required to obtain a “certificate of entitlement” to prove their right of abode before entering Hong Kong.

The Dependant visa/entry permit is designed for non-Mainland residents and enables immediate family members (spouse and unmarried children below 18 years of age) to join migrants who hold a valid Hong Kong visa for employment, investment, training or study in Hong Kong, or who are permanent residents in Hong Kong.<sup>53</sup> Migrants who are in a same-sex civil partnership, civil union, or marriage are eligible to reunite with their partner through this visa.<sup>54</sup>

### 4. PROTECTION OF REFUGEES

Hong Kong has no legal framework governing the granting of asylum and has a “firm policy of not determining the refugee status of or granting asylum to anyone”.<sup>55</sup> The State does not admit that it has any legal obligations to protect refugees on its territories; persons who fall within UNHCR’s mandate are subject to domestic immigration laws and are generally not entitled to legal residency or the right to work. However, the Unified Screening Mechanism (USM, see above) is used to identify migrants facing deportation who have claims that satisfy the principle of non-refoulement; in such cases, their removal is suspended. If a claim under the USM is substantiated on grounds of persecution, the person will be referred to the UNHCR for recognition as a refugee under its mandate and for referral to durable solutions.<sup>56</sup>

### 5. PROTECTION FROM STATELESSNESS

The 1954 Convention relating to the Status of Stateless Persons was extended to the Hong Kong Special Administrative Region by China in 1997 after it formally resumed sovereignty.<sup>57</sup> As a special administrative region of China, Hong Kong does not have its own nationality law (see the section ‘Protection from statelessness’ in the chapter on the People’s Republic of China) and whether a Hong Kong resident of Chinese nationality who has subsequently acquired, or is about to acquire, a foreign nationality may lose their Chinese nationality would need to be considered in accordance with Chinese Nationality Law and the relevant interpretations by the Standing Committee of the National People’s Congress.<sup>58</sup> Children born to migrants who lack a regular status in Hong Kong are at risk of statelessness; the number of stateless children has risen sharply in recent years.<sup>59</sup> There is no clear screening mechanism for statelessness.

## PROCEDURES

Non-refoulement claims are assessed by the Immigration Department using the Unified Screening Mechanism (USM), which applies statutory procedures under the Immigration Ordinance.<sup>60</sup> From 1 August 2021, procedures for applications to the USM were revised: the changes made affected the availability of interpretation during hearings, and restricted late filing of appeal notices and submission of new evidence on appeal.<sup>61</sup> After submitting a written signification and claim form, applicants are requested to attend an interview and provide further information and evidence relevant to their claim. Migrants may appeal a USM decision by an immigration officer to the independent statutory Torture Claims Appeal Board (TCAB). An appeal (for claims based on torture) or a petition (for claims based on all applicable grounds except torture) must be filed with the TCAB or the Non Refoulment Claims Petition Office within 14 days after notification of the initial

decision, unless special circumstances justify a late submission. Access to a lawyer is guaranteed during the Immigration Department stage. However, the lawyers decide whether they will continue to represent their client at the appeal or petition stage. Publicly-funded qualified interpretation and translation services are provided to claimants as appropriate.<sup>62</sup>

A person must be subject or liable to removal from Hong Kong to commence a non-refoulement claim.<sup>63</sup> This means that migrants who have entered Hong Kong with a valid visa must first overstay their visas and so commit an immigration offence in order to be eligible to make a non-refoulement claim.

## IMPLEMENTATION IN PRACTICE

An estimated 2.9 million migrants live in HKSAR, comprising almost 40% of the population (2020 figures).<sup>64</sup> In 2020, 373,884 migrant domestic workers were working in Hong Kong, of whom approximately 55.4% were from the Philippines and 42.2% from Indonesia.<sup>65</sup>

Lodging a non-refoulement claim does not alter the irregular migrant status of the claimant, regardless of the result. All non-refoulement claimants, even if their claims are substantiated, remain migrants in irregular status; as do their children, even if they were born in Hong Kong. When a non-refoulement claim is substantiated, the removal of the migrant is temporarily halted until the claimed risks cease to exist or until the claim is withdrawn, finally deemed unsubstantiated, or a positive decision is revoked. Non-refoulement claimants may still be removed to a third State, where the claimant does not face the same risk.<sup>66</sup>

Non-refoulement claimants are not issued identity documents. When they use medical services provided by public hospitals, they are required to pay for medical expenses on the same basis as “non-eligible persons”. In case of financial difficulties, they can apply for a medical fee waiver. Non-refoulement claimants have no right to take work, including unpaid work, although substantiated claimants can apply for permission to work, which is granted on the discretion of the Immigration Department. Permission to work is only granted for six months and must be renewed on expiry. Children can only go to school if the Immigration Department does not object. Even once allocated to local schools by the Education Bureau, relevant financial support from the State is provided only in the form of reimbursement and does not cover all expenses which can constitute a barrier to meaningful access to education for some children.<sup>67</sup>

Coordination gaps between immigration officials and police can make it difficult for trafficked persons to obtain visa extensions in practice. Migrants who have been trafficked, including those who are granted temporary residency via visa extensions, are generally not permitted to work or study while they remain in Hong Kong.<sup>68</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

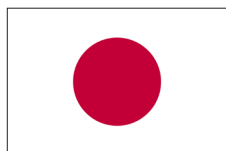
During the epidemic, to avoid gatherings, the Immigration Department requested candidates to submit applications through its homepage or mobile application, or by post or drop-in. Visitors to Hong Kong whose permits or visas were expiring could file an online application for extension of stay to the Immigration Department. This special arrangement for the COVID-19 epidemic allowed visitors to stay longer in Hong Kong if they could show a special or urgent need.<sup>69</sup> To allow sufficient time to process them, online applications were accepted only when permits or visas had five to seven days of validity. Visitors whose limit of stay had expired, or who were staying in Hong Kong as non-permanent residents, were not eligible to apply. Migrant domestic workers were permitted to change their condition of stay to remain in Hong Kong as visitors.

On 31 December 2020, the Immigration Department announced that, in view of the COVID-19 pandemic, Hong Kong non-permanent residents, who were outside Hong Kong and whose limit of stay was about to expire or had already expired, could apply for a visa or entry permit to return to Hong Kong. In general, persons admitted into Hong Kong under a range of immigration policies or schemes could apply to extend their stay within four weeks of their limit of stay expiring. Applicants were required to be physically present in Hong Kong when they applied and when they collected the relevant documents. Due to the pandemic, persons who were outside Hong Kong and whose limit of stay was expiring within four

weeks or had expired for less than 12 months, and who were not able to return to Hong Kong in a timely manner, could apply to extend their stay by submitting a duly completed application form and the supporting documents required by immigration policy or scheme in question; migrant domestic workers and other migrant workers were excluded from this arrangement. Applicants were also required to furnish a letter explaining why they were unable to return to Hong Kong to complete extension of stay formalities. Once the application was approved, the applicant would be issued with a visa or entry permit entitling them to return to Hong Kong during the validity of that visa or entry permit.<sup>70</sup>

Under a special arrangement for the COVID-19 pandemic, the Immigration Department introduced a “smart renewal” service from 5 March 2021<sup>COVID</sup>. Persons who submitted online visa applications to extend the employment of a migrant domestic worker (enabling them to renew their contract, complete their current contract, or defer home leave) could, on approval of the application, pay the visa fee and receive the visas by post, without having to complete the formalities at an office of the Department.<sup>71</sup>

## 3. JAPAN



### LEGISLATION

The Constitution of Japan (1946) provides that the people shall not be prevented from enjoying any fundamental human rights which are provided in the Constitution and conferred upon the people of this and future generations as eternal and inviolate rights (article 11). Chapter III of the Constitution guarantees various human rights, including a number of rights in criminal procedure procedural rights (in articles 37 to 40). Most of these rights are also guaranteed to foreign residents in Japan. Article 14 guarantees that all people are equal under the law and states that no person will be subject to discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Article 31 states that no person will be deprived of life or liberty, and that no other criminal penalty will be imposed except according to procedures established by law; Article 32 states that no person will be denied the right of access to the courts.

Japan has not established an independent national human rights institution.<sup>72</sup>

The Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951 (ICRRA) regulates the entry into and departure from Japan of all persons and the residence in Japan of migrants and consolidates procedures for recognizing the status of refugees. The Act has been amended several times since 1951. Additionally, the Regulation Ordinance for Enforcement of the Immigration Control and Refugee Recognition Act, Regulation Ordinance of the Ministry of Justice No. 54 of 1981 and other relevant ministerial regulations ordinances together constitute the main sources of immigration law in Japan.

The Ministry of Justice (MOJ), operating through the Immigration Services Agency (established on 1 April 2019) and its eight regional immigration services bureaus oversee migration governance in Japan. A Basic Plan for Immigration Control and Residency Management was published in April 2019 along with the 2019 Immigration Control and Residency Management Report.<sup>73</sup>

## GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Under article 12 of ICCRA, the Minister of Justice has significant discretion to permit migrants to enter Japan. The Minister may authorize entry if a migrant has received permission to re-enter or is a victim of trafficking (see below), or if “circumstances exist that warrant the granting of special permission for landing”.<sup>74</sup>

Under Article 50 of ICCRA, the Minister may grant Special Permission to Stay if they find there are applicable grounds. These may include: family circumstances; the “social history” of the migrant in Japan; humanitarian considerations; and the “potential impact on other persons without legal status in Japan”.<sup>75</sup> The official Guidelines on Special Permission to Stay in Japan specify, *inter alia*, that applications may receive favourable consideration: where the migrant has children who are enrolled in school in Japan; where treatment for a serious illness requires the migrant to stay in Japan; or where the migrant has been resident in Japan for a ‘considerable period’.<sup>76</sup>

Following revisions to ICRRA in 2004, article 61-2-2 (2) permits the Minister of Justice to examine whether there are grounds to grant special permission to stay to a migrant who has been denied recognition as a refugee. This rule complements the provisions of Article 50 (see above).<sup>77</sup>

The Government revised the ICRRA in 1989 to allow descendants of Japanese emigrants, up to the third generation, to apply for a long residence permit in Japan. The majority of these non-nationals of Japanese descent are from Brazil and Peru, to which their ancestors emigrated from the start of the twentieth century. One effect of this programme has been to limit the acceptance of other foreigners apart from those of Japanese descent.<sup>78</sup> The “Program for Further Acceptance of Fourth-Generation Japanese” started on 1 July 2018 and permits individuals who meet the requirements to stay in Japan for up to a maximum of five years if they can demonstrate an enhanced understanding of Japanese culture and lifestyle.<sup>79</sup>

Migrants seeking to study in Japan, at primary, secondary or vocational level, can apply for the status of residence entitled “Student”.<sup>80</sup> Migrants holding this status can apply to work part-time for up to 28 hours a week. In May 2019, a status of residence for “Designated Activities” was adopted to meet the needs of international students who have graduated from Japanese universities: those who wish may stay and work in Japan after completing their studies.

## 2. PROTECTION FOR TRAFFICKED PERSONS

Japan does not have a comprehensive anti-trafficking law but bases its anti-trafficking measures on the 2014 Action Plan to Combat Trafficking in Persons. Under the plan, identification of trafficked persons is based on the Methods to Deal with Trafficking in Persons (Measures for Identification of Victims). In addition to facilitating voluntary repatriation for those who want it, the Immigration Services Agency stabilizes the residence status of trafficked migrants by renewing their period of stay, changing the residence status of those in regular status, or granting residence by special permission to migrants in irregular status.<sup>81</sup>

The ICRRRA excludes victims of human trafficking from forced deportation and provides protection to trafficked persons who are living in irregular status in Japan (having overstayed, for example) by making them eligible for Special Permission to stay in the country.<sup>82</sup> On a case-by-case basis, trafficked persons who are unable or unwilling to return to their countries may be permitted to change their status of residence to allow continued stay in Japan.<sup>83</sup>

The Law Enforcement Task Force against Trafficking in Persons, comprising members from the National Police Agency, the Ministry of Justice, the Supreme Public Prosecutors Office, the Ministry of Health, Labour and Welfare, and the Japan Coast Guard was established in June 2014. In addition to cooperating and sharing information about offenses related to trafficking in persons, in September 2014, the Task Force produced “Handbook on Measures against Trafficking in Persons,” which summarizes information such as the laws applicable to trafficking in persons and specific examples of the application of these laws. The Council for the Promotion of Measures to Combat Trafficking in Persons is held annually at the ministerial level.

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Foreign spouses of Japanese nationals, the children of Japanese nationals and their foreign spouses, and foreign children adopted by Japanese nationals (in accordance with the special adoption procedures of the Civil Code<sup>84</sup>) are eligible to reside in Japan. Spouses of persons who have the status of “Permanent Resident” or “Special Permanent Resident”, and children of a permanent or special permanent resident in Japan who have been living in Japan, can also obtain residence in Japan.<sup>85</sup> These categories of family member can stay in Japan for a specified period that is determined when they obtain their residence status. The maximum length of stay is five years, but the period of stay can be renewed.<sup>86</sup> If they meet other requirements, such family members may apply for permanent resident status.

An April 2019 amendment to the labour migration provisions entitled migrant workers employed in certain sectors (currently limited to the construction and shipbuilding-related industries) under the Specified Skilled Worker 2 category to bring to Japan their immediate family members (spouse and children) and to grant the migrant and their family a path to permanent residency. However, low-wage workers within the Specified Skilled Worker 1 category continue to be unable to reunite with their families while employed in Japan.

Spouses and children of a Japanese national, and spouses of permanent residents, are eligible to apply for a long-term stay visa which may be granted for between six months and five years. Applicants are granted long-term resident visa status by the Minister of Justice, who considers the special situation of each case when setting the period of stay.<sup>87</sup> Prescribed categories for long-term residency status include second and third generation Japanese, children under six years old adopted by a Japanese citizen or long-term resident, Japanese war orphans left in China, and the relatives of such orphans.

## 4. PROTECTION OF REFUGEES

The legislative mechanisms that govern national refugee status determination in Japan are set out in ICRRRA.

An immigration inspector may grant an individual permission to land for temporary refuge when that person meets the international law definition of a refugee or on other similar grounds.<sup>88</sup> A visa is not required if the foreign national is in possession of a refugee travel document.<sup>89</sup> If a person without a legal status of residence files an application for recognition of refugee status, the Minister of Justice is to permit provisional stay in the country, as long as the individual meets certain requirements, for example that there are no reasonable grounds to suspect that the person is likely to flee.<sup>90</sup> Japan has also admitted refugees through other humanitarian admission programmes, including government-sponsored programmes.<sup>91</sup>



## 5. PROTECTION FROM STATELESSNESS

Article 2 of the Nationality Act of 1950 grants nationality at the time of birth if at least one parent is a Japanese citizen at the time, or if the father died before the child's birth and was a Japanese citizen at the time of his death. In addition, a child who was born in Japan is granted nationality in cases where both parents are unknown or are without nationality. Nationality through notification is addressed in article 3, paragraph 1, and article 17, paragraph 1 and 2, of the same Act; from article 45 through 8 of the same Act sets out the conditions for acquiring Japanese nationality by naturalization. Based on Article 8, the Minister of Justice may permit naturalization of persons who were born in Japan if they never had any nationality since the time of birth and have lived continuously have a domicile in Japan for three years or more since that time.<sup>92</sup>

Article 2(iii) and article 8(iv) of the Nationality Act contain provisions on the prevention and reduction of statelessness; but no other provisions exist in Japanese national law, and no law defines statelessness.

The Committee on the Rights of the Child has recommended that Japan consider expanding the scope of article 2(iii) of the Nationality Act to automatically grant nationality at birth to children who cannot acquire the nationality of their parents; and to review other nationality and citizenship laws to ensure that all children living in Japan are duly registered and protected from de jure statelessness, including children of irregular migrants.<sup>93</sup>

## PROCEDURES

In accordance with ICRRRA, immigration inspectors are required to ensure that migrants meet documentation and other requirements for entry.<sup>94</sup> Where an immigration inspector concludes that an individual does not meet the requirements for entry, a special inquiry officer conducts a hearing with a view to deportation.<sup>95</sup> If that hearing reaches the same finding, the special inquiry officer notifies the individual, provides the reasoning, and indicates that the migrant may file an objection with the Minister of Justice, within three days of receipt of the notice, by submitting a written statement of complaint.<sup>96</sup>

Article 12 of the Immigration Control and Refugee Recognition Act stipulates that the Minister of Justice has discretion at this stage to grant entry by special permission (see above), even if the Minister finds that the objection filed is without justification. It should be noted that, because the power is discretionary, no specific application can be made in advance for this pathway; according to Article 61(2)2-2, the ICRRRA allows the Minister to grant special permission to stay after an application for refugee status has been denied. For the same reason, the law sets out no specific avenues for appeal. Since 2004, the Ministry of Justice has published case examples to enhance the transparency and predictability of this stay category. In July 2009, the Immigration Bureau (replaced in 2019 by the Immigration Services Agency) issued Guidelines on Special Permission to Stay in Japan which are available on the official website and translated into six languages.<sup>97</sup>

The 'Program for Further Acceptance of Fourth-Generation Japanese' limits to 4,000 the number of people who can be accepted; the quota may change as a result of social situations and other factors. Requirements include Japanese language proficiency. Applicants are granted a six-month or one-year period of stay but can apply for an extension.<sup>98</sup>

## IMPLEMENTATION IN PRACTICE

Though Japan has traditionally taken pride in being a homogenous society, data indicate that in 2020, Japan was host to almost 2.8 million migrants, which constituted a little over 2% of the population.<sup>99</sup> Official figures suggest that in 2019 some 79,000 migrants were in irregular situations, the majority from Vietnam (16.9%), the Republic of Korea (16.0%), and China (13.7%).<sup>100</sup> Between 2007 and 2017, the number of foreign permanent residents increased by 70 percent and the number of international students almost doubled. By 2050, Japan's population is expected to shrink by at least 20 million, and currently some 28% of the country is over 65 years old.

In April 2019, the Immigration Bureau, which was formerly an internal department of the Ministry of Justice, was reorganised and expanded into an external Ministry bureau, the Immigration Services Agency, which was tasked with promoting the new policy of 'general coordination relating to improving the environment for the acceptance of foreign nationals' rather than the former Bureau's original remit of 'equitable control of immigration and the residence of foreign nationals'. Recent

reforms in Japan's migration governance landscape are considered to be a response to demographic realities and a 'cautious widening of doors' to the entry and stay of migrants.<sup>101</sup>

Under Article 50(2) of the ICRRA, the Minister of Justice is responsible for determining the status of residence and period of stay of migrants who are granted Special Permission to Stay. Although the ICRRA lacks explicit instructions with respect to residential status, migrants who are granted this protection should in principle be able to regularize their status, in a category that grants them access to health, education, housing, and employment on the same terms as other foreigners who stay legally in Japan; they would have access to national health care, but more limited access to social welfare assistance. Concerns have been raised that on the one hand the wide bureaucratic discretion associated with decisions to grant special permission to stay may lead to inconsistent application; however on the other hand, the system's imprecision could permit officials to be flexible when they deal with migrants in situations of vulnerability.<sup>102</sup>

UN human rights mechanisms have expressed concern that the residency requirements of the ICRRA may prevent migrant spouses from leaving abusive relationships because they fear their residency would be revoked. A pathway to grant residency visa, including permanent visas, to foreign spouses of Japanese citizens without the letter of guarantee currently required for the granting of such visas would address this protection gap.<sup>103</sup> Concerns have also been expressed about implementation of the principle of non-refoulement and reported cases of ill-treatment during deportations, which resulted in the death of one person in 2010.<sup>104</sup>

Japan lacks a mechanism for determining statelessness and statelessness is not an established criterion for regularizing legal stay or granting a work permit to persons in an irregular situation.

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

In March 2020, in order to alleviate congestion at immigration counters during the coronavirus outbreak, the Immigration Services Agency of Japan announced that it would give foreign nationals whose stay expired in July (excluding those residing with the status of residence of "Temporary Visitor" or "Designated Activities (Period for preparation for departure)") a three-month extension after the expiration date of the period of stay. The agency had earlier granted a three-month grace period to foreign nationals whose residency status or period of stay expired between March and June in view of COVID-10 border restrictions in many countries. The agency stated that foreign nationals who were unable to return home were permitted to extend the period of their stay by 90 days under a "temporary visitor visa".<sup>105</sup>

Foreign nationals in Japan who were unable to return home and faced difficulties maintaining their livelihood were permitted to change their status of residence to "Designated Activities", enabling them to work in Japan. Individuals in Japan under the resident status of "Temporary Visitor" who were normally not entitled to work in Japan were similarly permitted to engage in activities other than those allowed under their previous status of residence.<sup>106</sup>

The residence and work permits of migrants who had not been able to work for a period of three months or more due to the pandemic were not subject to revocation, provided they could show a "justifiable reason" (such as closure of the business that employed them) for staying in Japan without engaging in the economic activities foreseen. In such cases, foreign nationals were also permitted to change their residence status to "Designated Activities (6 Months, Work Not Permitted)". The Immigration Services Agency set up a dedicated hotline to support migrants facing a "difficult situation" due to the COVID-19 pandemic. It provided advice on remaining in Japan and matters such as visa expiry and inability to return to country of origin.<sup>107</sup>

In principle, with the single exception of special permanent residents with ancestral ties to Japan, all migrants (including permanent residents) who left Japan on or after April 3 were denied the opportunity to return. Following criticism that this measure interfered, *inter alia*, with the right to family life, Japan eased restrictions on 1 September 2020. All migrants with residence status were allowed to re-enter on certain grounds, for example to preserve family unity, access healthcare in a Japanese medical institution, or permit children to return to schools in which they were already enrolled. On 29 November 2021, in response to the COVID-19 Omicron variant, the Ministry of Foreign Affairs announced new and stringent restrictions on the entry of foreign nationals to Japan. Under these restrictions foreigners were denied entry, except migrant spouses and children of Japanese citizens, re-entry permit holders, and migrants recognized to be in exceptional personal circumstances (such as humanitarian need).<sup>108</sup>

## 4. REPUBLIC OF KOREA



### LEGISLATION

Article 6(2) of the Constitution of the Republic of Korea enumerates the rights of citizens but states that the status of non-citizens shall be guaranteed according to international law and treaties.<sup>109</sup>

In 2018 the Republic of Korea drew up the third National Action Plan for the Promotion and Protection of Human Rights 2018-2022. The plan covers 272 human rights-related tasks and outlines the commitment of the Republic of Korea to enhance human rights protection in line with its international obligations.<sup>110</sup>

The National Human Rights Commission of Korea was established in 2001 as a national advocacy institution for human rights protection under the National Human Rights Commission of Korea Act. It is committed to fulfilling human rights in a broad sense, including by upholding the dignity, value and freedom of every human being, as set out in international human rights conventions and treaties to which the Republic of Korea is a signatory. Its functions include, inter alia, to conduct human rights research and issue policy recommendations; to investigate cases of discrimination and other violations of human rights and provide access to remedies; to promote human rights education and raise public awareness of human rights; and to promote and monitor national implementation of international human rights treaties.<sup>111</sup>

The Immigration Act, supported by its Enforcement Decree and Regulations, provides the core legal framework that protects migrants' rights in the Republic of Korea. It governs all matters relating to the immigration control of individuals who enter or depart from Korea (Article 1).<sup>112</sup> Chapter III of the Immigration Act addresses the entry and stay of migrants and other foreign nationals. The Refugee Act of Korea governs the granting of refugee status and humanitarian protection of other migrants.<sup>113</sup>

The Framework Act on Treatment of Foreigners Residing in the Republic of Korea is the basis of the government's rolling five-year plans for immigration policy. The Republic of Korea adopted the third Master Plan for Immigration Policy (2018-2022) on 12 February 2018.<sup>114</sup>

Immigration policies are enforced by the Ministry of Justice (MoJ). The Korea Immigration Service (KIS), under the MoJ, issues visas and work permits and monitors the length of stay, overstay, status changes, and re-entry of migrants.

## GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Migrants in vulnerable situations may be recognized as humanitarian status holders under the Refugee Act<sup>115</sup> and granted a stay permit for no longer than one year at a time. Humanitarian status holders are assured that they will not be forcibly returned against their will.<sup>116</sup>

Article 25 of the Immigration Act provides grounds for the extension of stay of migrants beyond the permitted period of their visa.<sup>117</sup> Migrants who are victims of some categories of crime during their stay in the Republic of Korea may thus be granted temporary stay, which may be granted regardless of their willingness to cooperate with investigation and prosecution of the crime. Victims of domestic violence, sexual crimes, and child abuse may also be granted extension of stay (under a G-1 Miscellaneous visa) until civil or criminal proceedings are completed or in such circumstances as the Minister of Justice deems it necessary (such as a necessary period of time for a migrant to recover from an injury).<sup>118</sup> Similar entry and stay permits are also available in principle to migrants who are involved in a lawsuit, or those who are seeking to remain in the country due to pregnancy or childbirth. G-1 visa holders are permitted to stay in Korea regardless of whether or not they cooperate with investigation and prosecution, and may remain until the completion of judicial proceedings.

Migrants who require to stay in Korea for medical treatment or recuperation are entitled to apply for the C-3-M or G-1-M visa. Individuals may thereby be granted extension of stay until their long-term treatment, rehabilitation, and/or other remedies for violations of their rights have been completed, and the same applies to their immediate family members.

Some categories of G-visa holders are allowed to undertake employment, including humanitarian status holders (G-1-6), however in general G-1 (Miscellaneous) visa holders are prohibited in engaging in employment. To work in a field that requires professional skills, they need to meet the conditions specified in the Immigration Act (i.e., secure a work permit). They must find employers willing to hire them and be given “permission to engage in employment activities”.<sup>119</sup>

Korea also offers Student (D-2 and D-4) visas to individuals who take up a course of study in the country, from elementary school to a doctorate degree, including foreign language training.<sup>120</sup>

Even when the Ministry of Justice refuses an administrative appeal against a deportation order, it may grant special permission to stay, for example if the appellant was a former national of the Republic of Korea, or in “exceptional circumstances”.<sup>121</sup> The latter might include circumstances “of national interest” or “humanitarian reasons”.<sup>122</sup>

On occasion, policy measures have also been put in place to enable temporary stay for migrants already present in Korea from countries experiencing crisis. In 2021, “measures for humanitarian special stay” were extended to nationals from Myanmar and Afghanistan until the situation in their countries had stabilised. These measures extended the stay permit of individuals who otherwise were not eligible for extension, or deferred departure orders for overstayers.<sup>123</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

Chapter 31 of the Criminal Act (2013) addresses crimes of trafficking in persons.<sup>124</sup> In March 2021, the National Assembly adopted the Act on the Prevention of Human Trafficking-Exploitation, the Protection of Victims, Etc., which will go into effect in 2023.

Trafficked persons may be able to secure a temporary stay on a G-1 visa (issued to foreign victims of crime), that enables them to stay and work in the country for up to one year or longer if such extension is necessary to achieve a remedy, and this pathway is provided to G-1 visa holders regardless of whether or not they cooperate with investigation and prosecution. The Ministry of Justice has introduced and enforced Special Rules for Victims of Sexual Crimes (under Article 25-3 (Special Rules for Victims of Sexual Crimes) of the Immigration Act) to enable victims of such crimes to receive further extensions of stay following the conclusion of relevant procedures, in the event that such an extension is deemed necessary for the migrant to recover from injury or other similar situations.<sup>125</sup>

Under Article 8-2 of the Crime Victim Protection Act and Article 10-2 of the Enforcement Decree of the aforementioned Act, judicial police officers who investigate crimes are required to provide victims with information, in writing, on available support measures. Where the person is suspected of being a victim of sex trafficking or a trafficked child they must be provided with a booklet containing information and contact details for support services for victims of crime.<sup>126</sup>

The Act on the Protection of Children and Youth Against Sex Offenses has been amended to require prosecutors and judicial police officers to notify relevant support service providers of the presence of children or youth victims of sex trafficking.<sup>127</sup>

To help identify trafficked persons and improve protection, the National Human Rights Commission of Korea has developed an Index on Identification and Protection of Human Trafficking Victims, which the government has distributed to police, prosecutors, and coast guard officials.<sup>128</sup>

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

In 2021, the Ministry of Justice announced measures to grant residence status to undocumented migrant children enrolled in the public education system. Following public consultation in 2021-22, it was announced that children who were born or had arrived in Korea before the age of six and had resided in Korea for six years or more, as well as children who had arrived in Korea after the age of six and had resided in Korea for seven years or more, and who were currently attending compulsory education would receive temporary stay permits (D-4 or G-1 visas) along with their parents.<sup>129</sup>

Further to that, and in order to ensure their access to basic services, the Ministry of Education announced that undocumented migrant children would receive temporary foreign national registration numbers, allowing them to access healthcare and child welfare services and to participate in state-administered exams. Public servants working in the fields of education and child development, mirroring the health sector, would no longer be required to report on the immigration status of children in their care.

Migrant women are allowed to remain in Korea after a divorce, provided they have custody of their children or parental visitation rights. Until recently, childless migrants had to prove that the breakdown of the marriage was not their fault. However, a recent ruling of the Supreme Court granted extension of residence status to a migrant woman after her divorce from a Korean national even though it was found that she was partially responsible for the end of the marriage.<sup>130</sup>

The F-3 dependent family visa enables migrants living, working, and studying regularly in the Republic of Korea to reunite with their families (spouses and children under the age of 18). The visa is issued as a single entry and its length is determined by the conditions of stay of the primary visa holder (specific residence status holders from D-1 to E-7 with the exception of D-3).

#### 4. PROTECTION OF REFUGEES

A non-citizen who arrives at a border port-of-entry can submit a written application for Refugee Status Recognition during the entry inspection, to the immigration office or branch office with jurisdiction over the port of entry.<sup>131</sup> Individuals making refugee claims in Korea must lodge applications for Refugee Status Recognition (RSR) at an immigration office having jurisdiction over their stay, and their applications will be adjudicated after their interviews are completed. If their application for refugee status is denied, applicants may file an appeal within 90 days of the date on which they received the "Notice on Non-Recognition of Refugee Status".<sup>132</sup> A refugee status applicant has the right to receive assistance from an attorney and an interpreter and can request the presence of a trusted individual during the interview.<sup>133</sup> A total of 73,383 individuals applied for RSR between 1994 and 2021, among which 1,163 applicants were granted refugee status and 2,412 claimants received humanitarian status; successful RSR cases constituted 1.6 percent of all applications.<sup>134</sup>

#### 5. PROTECTION FROM STATELESSNESS

Article 2 of the Nationality Act of Korea grants nationality at birth to any person, where one parent is a national of the Republic of Korea at the time of the birth, or whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth. It also grants nationality to a person born in the Republic of Korea, where both parents are stateless, or who is found abandoned.<sup>135</sup>

The Nationality Act provides for the naturalization of migrants with ties to Korea through consecutive stay or through their Korean parents or spouse. Where a marriage has ended, due to the death or disappearance of the Korean spouse or to other causes for which the non-national spouse was not responsible, the migrant may be able to obtain permission to naturalize if the Minister of Justice considers the request reasonable.<sup>136</sup>

## PROCEDURES

The application process for the various visa categories listed above including most G Visas is generally not different from other visa applications, subject to specific documentation requirements dependent on the visa type.<sup>137</sup> However, there is no separate application procedure for a humanitarian stay permit which is considered as a residual step through the application for refugee status and awarded at the discretion of the authorities.

When they annul a deportation order, courts use a balancing test of proportionality; humanitarian concerns may also influence the court's determination in this context. Special permission to stay may additionally be granted to subjects of a deportation order who make an administrative appeal against the order within seven days of receipt of the notice, and then have their appeal dismissed.<sup>138</sup>

Victims of sexual crimes, domestic violence and child abuse who are involved in legal proceedings may apply to the Immigration Office to extend their stay at any time during the investigation or trial of their case.

The Korean National Police Agency (KNPA) runs 376 Assistance Centers for Foreigners nationwide in order to receive complaints from migrants who have been victims of crime and to provide relevant legal advice.

## IMPLEMENTATION IN PRACTICE

Migration into the Republic of Korea has grown substantially in recent years. The country has the lowest birth rate (1.19) and the fastest ageing population of all OECD countries. As of January 2021, according to government immigration statistics, 2,014,433 foreigners were living in the Republic of Korea, representing about 5% of the population.<sup>139</sup> The authorities estimated in 2019 that 390,281 migrants were living in irregular status in the country.<sup>140</sup> Along with labour migration, marriage migration to Korea has also become more common, accounting for between 7-10% of all marriages in the country. In 2018, 22,698 international marriages took place, up 9% from the previous year; most foreign spouses were from Vietnam and China.<sup>141</sup>

Under the 3rd Master Plan for Immigration Policy, the government has undertaken to “complement and enhance support” for humanitarian status holders (G-1-6 visa holders).<sup>142</sup> However, concerns have been raised that humanitarian status does not fully protect the human rights of holder. In particular, the G-1-6 visa only permits family reunification in limited cases<sup>143</sup> and provides lower social benefits and protection compared to recognized refugees who receive the F-2 (residence) visa.<sup>144</sup> For example, the benefit rate is that set for low-income citizens (National Basic Living Security). The G-type visa does not allow humanitarian status holders to apply for citizenship, regardless of their length of stay. Humanitarian status holders are also denied the right to appeal against non-recognition decisions.<sup>145</sup> The National Human Rights Commission has raised concerns about the practical consequences of the requirement to renew the humanitarian visa every few months or every year. This rule effectively bars holders from obtaining insurance and other financial services.<sup>146</sup>

Human rights mechanisms have expressed reservations in regard to the 2021 amendments to the legislation related to trafficking (see above), noting in particular that the amendments defer protection of migrant victims of trafficking to the Immigration Act wherein the individual is not guaranteed residence in Korea, nor protected from deportation including return to a situation of human rights violations and potential re-trafficking.<sup>147</sup> Concerns have also been raised that formal referral procedures to enable trafficked persons to access assistance and services are not generally available in practice.<sup>148</sup>

Concerns have also been raised about the practical access to birth registration for children who are born in the country to migrant parents who are unable to confer their nationality on their children. Foreign nationals in the Republic of Korea are not able to register their children through the Korean family register and are expected to apply to their embassies to register the births of their children, which can be difficult or impossible for some migrants including humanitarian status holders and refugees.<sup>149</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

In the context of the pandemic, in February 2020 the Ministry of Justice announced that foreigners who had overstayed their visa could report to the local immigration offices and would not be fined for visa overstay or prohibited from re-entering the country if they declared they were ready to leave the country by 30 June 2020. They could apply for a Korean re-entry visa (Category C-3 with a maximum stay of 90 days) three to six months after they had voluntarily returned to their home country. The expiring employment contracts of temporary foreign workers were extended by 50 days, and all long-term visas were automatically extended in order to stem the spread of COVID-19 by minimizing non-essential visits to Immigration Offices. In addition, short-term visa holders were able to apply for an extension online, and the grace period for migrants with scheduled departures was extended from 30 to 60 days. Further extensions were announced in April and December 2020.

On 19 July 2021, the Ministry of Justice announced a further three-month extension of the Period of Stay for some 90,000 migrants who were regularly present in Korea and whose visas were due to expire between July and September 2021. The extension did not apply to migrants holding G-1 status or migrants in an irregular situation.<sup>150</sup>

## Endnotes

- 1 Constitution of the People's Republic of China (1982), Chapter II, at [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm).
- 2 Constitution of the People's Republic of China (1982), article 32.
- 3 Ibid., article 33.
- 4 The Committee on Economic, Social and Cultural Rights has recommended that China establish an independent national human rights institution with a broad mandate to promote and protect human rights, including economic, social and cultural rights, and provide it with adequate financial and human resources. Universal Periodic Review, Compilation on China: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/31/CHN/2, 27 August 2018, para 11.
- 5 The State Council Information Office of the People's Republic of China (2021), 'Human Rights Action Plan of China (2021-2025)', at [http://gd.china-embassy.org/eng/zxhd\\_1/202109/t20210910\\_10184439.htm](http://gd.china-embassy.org/eng/zxhd_1/202109/t20210910_10184439.htm).
- 6 Exit and Entry Administration Law of the People's Republic of China, Order of the President of the People's Republic of China No. 57 (2012), at <https://www.fmprc.gov.cn/ce/cgla/eng/visa/mailservice/t1544768.htm>.
- 7 Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners (2013), article 4. The Regulations were adopted at the 15th Executive Meeting of the State Council on 3 July 2013 and came into force on 1 September 2013, at <https://www.mfa.gov.cn/ce/cohk/eng/vtc/t1137367.htm>.
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- 10 Criminal Law of the People's Republic of China (1997), articles 240, 244, 262, 333 and 358, at [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content\\_1384075.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384075.htm). See also, Law of the People's Republic of China on the Protection of Rights and Interests of Women (1992, revised 2005), article 39.
- 11 Research Center for Women and Family under the Zhejiang Academy of Social Sciences, 'The Report of Chinese Women's NGOs on the Combined Seventh and Eighth Periodic Report Submitted by China under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Anti-trafficking and Forced Prostitution (Article 6)', September 2014, at The Shadow Report of Chinese Women's NGOs ([ohchr.org](http://ohchr.org)).
- 12 'China issues action plan to fight human trafficking', *Xinhua*, 29 April 2021, at [http://english.www.gov.cn/policies/latestreleases/202104/29/content\\_WS6089e6b4c6d0df57f98d8c5d.html](http://english.www.gov.cn/policies/latestreleases/202104/29/content_WS6089e6b4c6d0df57f98d8c5d.html).
- 13 The State Council Information Office of the People's Republic of China, 'Human Rights Action Plan of China (2021-2025)', September 2021, at [http://gd.china-embassy.org/eng/zxhd\\_1/202109/t20210910\\_10184439.htm](http://gd.china-embassy.org/eng/zxhd_1/202109/t20210910_10184439.htm).
- 14 Report of the Working Group on the Universal Periodic Review: 'China', A/HRC/40/6, 26 December 2018, para. 28.172.
- 15 Ministry of Public Security and Ministry of Foreign Affairs (2004), 'Measures for the Administration of the Examination and Approval of Foreigners' Permanent Residence in China', Order No. 74, article 6.
- 16 See article 6(8) of the Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners (2013). The S1 visa is issued to the spouses, parents, children under the age of 18, or parents-in-law of foreigners who reside in China in order to work, to study or for other purposes and apply for a long-term visit to China; and to persons who need to reside in China for other personal matters. See article 6(10) of the Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners (2013).
- 17 Exit and Entry Administration Law of the People's Republic of China (2012), article 46.
- 18 UNHCR (2018), 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: People's Republic of China and the Special Administrative Regions of Hong Kong and Macao', March 2018, 3rd Cycle, at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5887&file=EnglishTranslation>.
- 19 Nationality Law of the People's Republic of China (1980), article 6.
- 20 Ibid, article 7.
- 21 Information received from the Government of the People's Republic of China.
- 22 Exit and Entry Administration Law of the People's Republic of China (2013), article 4.
- 23 Ibid, article 26.
- 24 Ibid, article 23.
- 25 Exit and Entry Administration Law of the People's Republic of China (2013), article 64.
- 26 IOM (2020), World Migration Report 2020, p. 3, at [https://publications.iom.int/system/files/pdf/wmr\\_2020.pdf](https://publications.iom.int/system/files/pdf/wmr_2020.pdf)
- 27 UN DESA, Population Division (2020), 'International Migration 2020 Highlights', ST/ESA/SER.A/452, at [undesa\\_pd\\_2020\\_international\\_migration\\_highlights\\_updated.pdf](https://publications.un.org/undesa_pd_2020_international_migration_highlights_updated.pdf).
- 28 IOM (2020), World Migration Report 2020, p. 80, at [https://publications.iom.int/system/files/pdf/wmr\\_2020.pdf](https://publications.iom.int/system/files/pdf/wmr_2020.pdf)
- 29 The authorities have noted that relevant departments of the government have issued a series of supporting policies and measures to ensure that migrants who enter China for humanitarian or family reasons can live, work and reside in China. Information received from the Government of the People's Republic of China.
- 30 Exit and Entry Administration Law of the People's Republic of China (2013), article 21.
- 31 Committee against Torture, 'Concluding observations on the fifth periodic report of China', CAT/C/CHN/CO/5, 3 February 2016, para.47(b). See also, Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)', 19 September 2018, CERD/C/CHN/CO/14-17, para. 9.
- 32 Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)', 19 September 2018, CERD/C/CHN/CO/14-17, para. 53. The authorities have noted that in 2020, the National Health Commission and the

- Ministry of Public Security jointly issued a notice requiring all localities to rely on the national integrated online government service platform in order to process online application for birth certificates. Information received from the Government of China.
- 33 Haugen, H. Ø., Speelman, T. (2022), 'China's Rapid Development Has Transformed Its Migration Trends', Migration Policy Institute, at <https://www.migrationpolicy.org/article/china-development-transformed-migration>.
  - 34 Hong Kong Bill of Rights Ordinance, Cap. 383 (2017), Part II, Section 8, article 1(1), at <https://www.elegislation.gov.hk/hk/cap383>.
  - 35 The Basic Law, Chapter III, at <https://www.basiclaw.gov.hk/en/index/>. Chapter II enumerates the fundamental rights and obligations of citizens, at <https://www.basiclaw.gov.hk/en/constitution/index.html>.
  - 36 *Ibid*, article 154.
  - 37 The Committee on the Elimination of Racial Discrimination has expressed concern that the Commission, which was assigned a C rating by the Global Alliance of National Human Rights Institutions, is not fully independent or accessible to victims. See, Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)', 19 September 2018, CERD/C/CHN/CO/14-17, para. 9.
  - 38 Immigration Ordinance (1972), at [https://www.elegislation.gov.hk/hk/cap115?xid=ID\\_1438402608535\\_003](https://www.elegislation.gov.hk/hk/cap115?xid=ID_1438402608535_003). See also, Immigration (Amendment) Ordinance (2021), Hong Kong SAR Ordinance No. 7 (2021), at <https://www.legco.gov.hk/yr20-21/english/ord/2021ord007e.pdf>.
  - 39 'National Laws to be Applied in the Hong Kong Special Administrative Region - Instrument 13: Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region' (1996), para. 6, at [https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclaw\\_full\\_text.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclaw_full_text.pdf).
  - 40 Human Rights Committee, 'Fourth periodic report submitted by Hong Kong, China under article 40 of the Covenant, due in 2018 [Date received: 19 September 2019]', CCPR/C/CHN-HKG/4, 14 February 2020, paras. 46-7, 51 and Annex 7B: 'Screening of Claims for Non-refoulement Protection'. See also, Immigration Department, 'Making a Claim for Non-refoulement Protection in Hong Kong', at [https://www.immd.gov.hk/eng/useful\\_information/non-refoulement-making-claim.html](https://www.immd.gov.hk/eng/useful_information/non-refoulement-making-claim.html). The Court of Final Appeal has ruled that the Director of Immigration is required to independently determine whether a claim for non-refoulement is well-founded before exercising powers to execute the removal or deportation. *C & Ors v the Director of Immigration and Another* (2013) 16 HKCFAR 280. Relevant case law is also summarised by the Legislative Council in Annex A of LC Paper No. CB(2)1426/17-18(01), at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs54/papers/hs5420180521cb2-1426-1e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1426-1e.pdf).
  - 41 Immigration Ordinance, section 37U, Cap. 115 and Part VIIC.
  - 42 Court of Final Appeal, *Ubamaka v the Secretary for Security* (2013), 2 HKC 75.
  - 43 Immigration Department of the Hong Kong Government, 'Students', at <https://www.immd.gov.hk/eng/services/visas/study.html#firstTab>.
  - 44 Immigration Department of the Hong Kong Government, 'Hong Kong: The Facts – Immigration', at <https://www.gov.hk/en/about/abouthk/factsheets/docs/immigration.pdf>.
  - 45 Hong Kong Bill of Rights Ordinance, Cap. 383 (2017), Part II, Section 8, article 4, at <https://www.elegislation.gov.hk/hk/cap383>.
  - 46 Kwan, M. (2020), 'Protection against human trafficking in Hong Kong: A disappointment', Oxford Human Rights Hub (OxHRH Blog), at <https://ohrh.law.ox.ac.uk/protection-against-human-trafficking-in-hong-kong-a-disappointment/>.
  - 47 Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)', 19 September 2018, CERD/C/CHN/CO/14-17, para. 49.
  - 48 Crimes Ordinance, Cap. 200 (1972), article 129.
  - 49 Employment Ordinance, Cap. 57 (1970), article 63, at <https://www.elegislation.gov.hk/hk/cap57>.
  - 50 Human Rights Committee, 'Fourth periodic report submitted by Hong Kong, China, Annex to State party report', INT/CCPR/ADR/HKG/38565/E, Annex 8C, paras. (e) and (f).
  - 51 Hong Kong Bill of Rights Ordinance Cap. 383 (2017), article 19(1).
  - 52 Human Rights Committee, 'Fourth periodic report submitted by Hong Kong, China, Annex to State party report', INT/CCPR/ADR/HKG/38565/E, Annex 23B, para. 3.
  - 53 Research Office: Legislative Council Secretariat, 'Information Note: Immigration policy for family migration in selected places', IN13/19-20, p. 4.
  - 54 Immigration Department, 'Dependants', at [https://www.immd.gov.hk/eng/services/visas/residence\\_as\\_dependant.html](https://www.immd.gov.hk/eng/services/visas/residence_as_dependant.html).
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  - 58 Paragraph 8, Paper No. 25, Legislative Council Bills Committee on National Security (Legislative Provisions) Bill. Available at <https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55-25-e.pdf>. See also: SCMP, "Carrie Lam confirms Hong Kong 'strictly enforcing' policy of not recognising dual nationality", 9 February 2021. Available at <https://www.scmp.com/news/hong-kong/politics/article/3121148/carrie-lam-confirms-hong-kong-strictly-enforcing-policy-not>.
  - 59 Reuters, 'Hong Kong's stateless children lost in translation as refugee claims soar', 19 June 2016, at <http://news.trust.org/item/20160619020416-jqi57/>.
  - 60 Immigration Ordinance (Cap. 115), Part VIIC. These rules were passed into law by the Legislative Council in July 2012 and came into effect in December 2012: Immigration Department, IMM2019: Removal Assessment and Litigation Branch, at [https://www.immd.gov.hk/publications/a\\_report\\_2019/en/chapter6.html](https://www.immd.gov.hk/publications/a_report_2019/en/chapter6.html).
  - 61 Immigration (Amendment) Ordinance (2021), including Sections 10, 18 and 19. At <https://www.legco.gov.hk/yr20-21/english/ord/2021ord007e.pdf>.

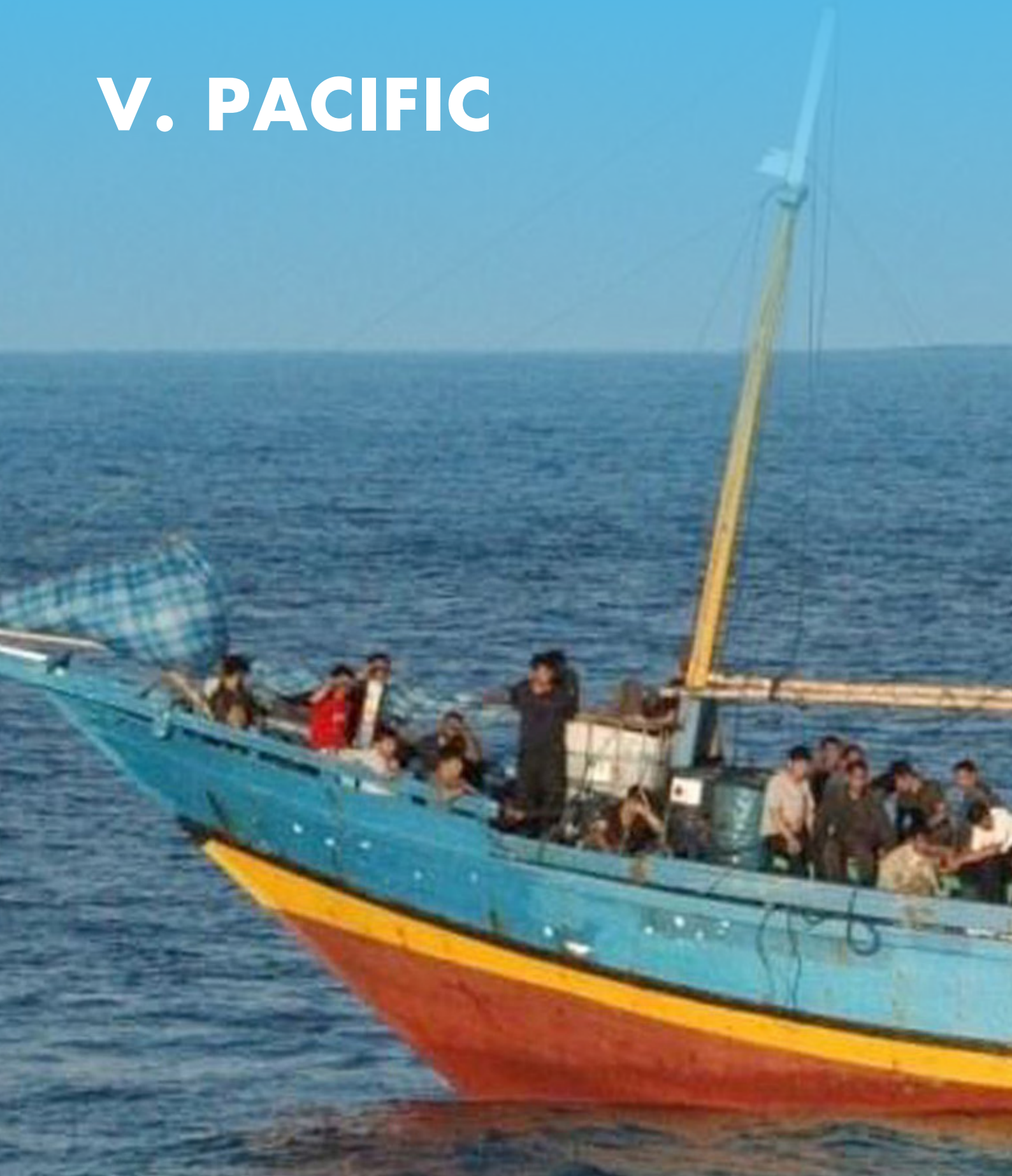


- 62 Human Rights Committee, 'Fourth periodic report submitted by Hong Kong, China under article 40 of the Covenant, due in 2018 [Date received: 19 September 2019]', CCPR/C/CHN-HKG/4, 14 February 2020, paras. 48, 49, 52. See also, Immigration Ordinance (Cap. 115), Part VIII.
- 63 Immigration Ordinance (Cap. 115) (2021), Section 37W (1).
- 64 UN DESA, Population Division (2020), 'International Migration 2020 Highlights', ST/ESA/SER.A/452, at [undesa\\_pd\\_2020\\_international\\_migration\\_highlights\\_updated.pdf](https://undesa_pd_2020_international_migration_highlights_updated.pdf).
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- 70 Government of the Hong Kong Special Administrative Region, 'The Immigration Department accepts applications for return to Hong Kong from Hong Kong non-permanent residents outside Hong Kong under the pandemic', press release, 31 December 2020, at <https://www.info.gov.hk/gia/general/202012/31/P2020123100764.htm>.
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- 73 Immigration Services Agency Japan, Immigration Control and Residency Management, 2019 at <https://www.moj.go.jp/isa/content/930004564.pdf>
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- 76 Ministry of Justice, 'Guidelines on Special Permission to Stay in Japan', revised in July 2009, at <https://www.moj.go.jp/isa/content/930002562.pdf>. See also [https://www.moj.go.jp/isa/publications/materials/nyukan\\_nyukan25.html](https://www.moj.go.jp/isa/publications/materials/nyukan_nyukan25.html). The Government of Japan has observed that "[F]lexible treatment is accorded within the framework of immigration and residence management administration by granting permission to stay even to those who do not fall under the definition of refugee ... Such persons include, for example, those who will find it difficult to return to their home country due to the circumstances of their home country or those for whom there are special circumstances necessitating that permission to stay in Japan be granted." Human Rights Committee, 'Seventh periodic report submitted by Japan under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2018', 28 April 2020, CCPR/C/JPN/7, para 195.
- 77 This status is called 'special permission to stay' (zairyū tokubetsu kyōka) on humanitarian grounds (ICRRA 2009, article 61-2-2(2)). See Aycock, B., Hashimoto, N. (2021), 'Complementary Protection in Japan: To What Extent Does Japan Offer Effective International Protection for Those Who Fall outside the 1951 Refugee Convention?', *Laws*, 10(1), 16, at <https://doi.org/10.3390/laws10010016>.
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- 79 Ministry of Justice (2019), brochure produced for the 14th session of the UN Congress on Crime Prevention and Criminal Justice, held in Kyoto, Japan, in 2021, p. 23, at <https://www.moj.go.jp/content/001299509.pdf>.
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- 81 Ministerial Meeting Concerning Measures Against Crime (2014), 'Japan's 2014 Action Plan to Combat Trafficking in Persons (Action Plan)', at <https://perma.cc/D8ET-QAE6>. See also, Ministry of Foreign Affairs, (no date), 'Japan's Actions to Combat Trafficking in Persons: A Prompt and Appropriate Response from a Humanitarian Perspective', at [https://www.mofa.go.jp/policy/i\\_crime/people/pamphlet.pdf](https://www.mofa.go.jp/policy/i_crime/people/pamphlet.pdf). See also, Human Rights Committee, 'Concluding observations on the sixth periodic report of Japan', CCPR/C/JPN/CO/6, 20 August 2014, para.15. See also, US Department of State (2021), '2021 Trafficking in Persons Report: Japan', at <https://www.state.gov/reports/2021-trafficking-in-persons-report/japan/>.
- 82 Working Group on the Universal Periodic Review (2017), 'National report: Japan', A/HRC/WG.6/28/JPN/1, 31 August 2017, para.48
- 83 Information received from the Government of Japan.
- 84 Minpō [Civil Code], Act No. 89 of 1896, last amended by Act No. 94 of 2013, article 817-2.
- 85 Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of October 4, 1951, amended by Act No. 27 of 2012, article 2-2 (1).
- 86 Immigration Control and Refugee Recognition Act, article 21.
- 87 Ministerial Ordinance to Provide for Criteria Pursuant to Article 7, paragraph 1, item 2 of the Immigration Control and Refugee Recognition Act.
- 88 Immigration Control and Refugee Recognition Act, Act No. 319 of 1951, article 18-2(1).
- 89 Ibid, article 6(1).
- 90 Ibid, articles 61-2 (1), 61-2-4(1).

- 91 UNHCR (2017), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review, 3rd Cycle, 28th Session: Japan', March 2017.
- 92 Nationality Act, Act No. 147 of 4 May 1950, article 8(iv). Information provided by the Government of Japan.
- 93 Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Japan', 5 March 2019, CRC/C/JPN/CO/4-5, para 23(a).
- 94 Immigration Control and Refugee Recognition Act, Act No. 319 of 1951, articles 5, 7.
- 95 *Ibid*, article 10.
- 96 *Ibid*, articles 10(10), 11(1).
- 97 Ministry of Justice (2015), 'Basic Plan for Immigration Control' (5th Edition), p. 41, at <https://www.moj.go.jp/isa/content/930003137.pdf>.
- 98 Ministry of Justice (2019), brochure produced for the 14th session of the UN Congress on Crime Prevention and Criminal Justice, held in Kyoto, Japan, in 2021, p. 23, at <https://www.moj.go.jp/content/001299509.pdf>.
- 99 UN DESA, Population Division (2020), 'International Migration 2020 Highlights', ST/ESA/SER.A/452, at [undesa\\_pd\\_2020\\_international\\_migration\\_highlights\\_updated.pdf](https://undesa_pd_2020_international_migration_highlights_updated.pdf).
- 100 See statistics (in Japanese), at <https://www.moj.go.jp/isa/content/930004453.pdf>.
- 101 See inter alia Saburo Takizawa, Japan's Immigration Policy 2015-2020: Implications for Human Security of Immigrant Workers and Refugees, *Journal of Human Security Studies*. Vol.10, No.2 (Special Issue 2021). pp.51-78, at [https://www.jstage.jst.go.jp/article/jahss/10/2/10\\_51/\\_pdf/-char/ja](https://www.jstage.jst.go.jp/article/jahss/10/2/10_51/_pdf/-char/ja)
- 102 For instance, officials can grant permission to stay to migrants who face particular economic hardship in their country of origin, to protect children at risk, or to avoid returns that would interfere with migrants' right to family life in Japan. See Aycock, B., Hashimoto, N. (2021), 'Complementary Protection in Japan: To What Extent Does Japan Offer Effective International Protection for Those Who Fall outside the 1951 Refugee Convention?', *Laws*, 10(1), 16, pp. 11, 14, at <https://doi.org/10.3390/laws10010016>.
- 103 Immigration Control Act, Articles 22-4. See also, Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined tenth and eleventh periodic reports of Japan', CERD/C/JPN/CO/10-11, 26 September 2018, paras.25, 26(c). The Government of Japan has noted that in the revocation of status of residence as a "Spouse or Child of a Japanese national", separation due to domestic violence is treated as a legitimate ground.
- 104 Human Rights Committee, 'Concluding observations on the sixth periodic report of Japan', CCPR/C/JPN/CO/6, 20 August 2014, para. 19.
- 105 Information from the Government of Japan.
- 106 Ministry of Justice, Immigration Services Agency of Japan (2020), 'Handling of foreign nationals who have difficulty returning to their home country or other country', at <https://www.moj.go.jp/isa/content/930005849.pdf> and information from the Government of Japan.
- 107 Foreign Residents Support Centre (FRESC), at <https://www.isa.go.jp/en/support/fresc/fresc01.html>.
- 108 Ministry of Foreign Affairs of Japan, Consular Services, 'Application for Visa for foreign nationals eligible for Phased Measures toward Resuming Cross-Border Travel, update', 18 January 2022, at: [https://www.mofa.go.jp/ca/fna/page22e\\_000921.html](https://www.mofa.go.jp/ca/fna/page22e_000921.html).
- 109 Constitution of the Republic of Korea (1948), at <http://www.unesco.org/education/edurights/media/docs/4b4abd5424bc5613231d4a3e93db0af3597e51a9.pdf>.
- 110 'Candidature of the Republic of Korea to the Human Rights Council, 2020-2022: Voluntary pledges and commitments pursuant to General Assembly resolution 60/251', at [https://www.universal-rights.org/wp-content/uploads/2019/07/VoluntaryPledges\\_ROK\\_HRC.pdf](https://www.universal-rights.org/wp-content/uploads/2019/07/VoluntaryPledges_ROK_HRC.pdf).
- 111 National Human Rights Commission of Korea, 'Mandate and Function', at <https://www.humanrights.go.kr/site/homepage/menu/viewMenu?menuid=002001002>.
- 112 Immigration Act No. 15492. Since its enactment in 1983, the Immigration Act has been amended more than twenty times.
- 113 Refugee Act No. 14408 (2016)
- 114 Ministry of Justice, Korean Immigration Service, 'The 3rd Master Plan for Immigration Policy 2018-2022', at <http://www.immigration.go.kr/bbs/immigration/226/336950/download.do>.
- 115 A person who is given "permission to stay on humanitarian grounds" under this Act refers to an individual for whom there are reasonable grounds to believe that their life or personal freedom may be egregiously violated by torture or other inhumane treatment or punishment or other circumstances, and who is given permission to stay by the Minister of Justice in accordance with the Presidential Decree. Refugee Act (Article 2(3)). See also Article 2 of the Enforcement Decree of the Refugee Act, at [https://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=52130&type=part&key=7](https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=52130&type=part&key=7)
- 116 Refugee Act, articles 2.3, 3, 39. See also, UNHCR (2017), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review, 3rd Cycle, 28th Session: Republic of Korea'.
- 117 Immigration Act, article 25 which provides that an Ordinance of the Ministry of Justice would set out the standards on whether to grant permission to extend the period of stay.
- 118 Immigration Act, articles 3, 25-3. While outside the temporal scope of this report, note that a further amendment to the Act, which comes into force in May 2022, has included a new Article 25-5 (Special Provisions for Permission for Extension of Period of Stay in National Emergency, etc.) which enables the Minister of Justice to grant permission to extend stay if departure is restricted without any cause attributable to the migrant such as the closure of international borders, long-term flight suspensions and other similar factors.
- 119 IMADR (2021), 'Summary Report: 2021 Online Series: Racism in East Asia', p. 8, at <https://imadr.org/summary-report-racism-eastasia-2021/>.
- 120 Korea Visa Portal, at <https://www.visa.go.kr/>.
- 121 Immigration Act, article 61.
- 122 Enforcement Decree of the Immigration Act, article 76, at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=9673&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=9673&lang=ENG). See also the distinct but related decision of a district court that revoked the deportation order against a Korean-born Nigerian on the grounds that he had never been to Nigeria, having always lived and completed his education in Korea: Cheongju District Court 2017GuHap2276, decided on 17 May 2018.

- 123 Around 400 Afghans and 25,000 Myanmar nationals benefited from this measure in 2021. See Ministry of Justice press releases at [https://www.moj.go.kr/moj\\_eng/index.do](https://www.moj.go.kr/moj_eng/index.do)
- 124 Criminal Act No. 11731 (2013), at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=28627&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG).
- 125 Information provided by the Government of the Republic of Korea.
- 126 Information provided by the Government of the Republic of Korea.
- 127 Ibid.
- 128 National Human Rights Commission of Korea (2016), at <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7001828>.
- 129 Information received from the Government of the Republic of Korea. Also National Human Rights Commission of Korea, 'NHRCK Chairperson's Statement on welcoming the Ministry of Justice's decision to expand the residence eligibility for undocumented migrant children', 21 February 2022, at <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&pagesize=10&boardtypeid=7003&boardid=7607682>. In October 2019, the Committee on the Rights of the Child called on the Republic of Korea to regulate the status of long-term resident migrant children. See, Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea', 24 October 2019, CRC/C/KOR/CO/5-6, para 43(b).
- 130 Korea Herald, 'Migrant woman can maintain residency after divorce: top court', 12 July 2019, at <http://www.koreaherald.com/view.php?ud=20190710000656>.
- 131 Refugee Act, article 6(1).
- 132 Administrative Litigation Act, article 20.
- 133 Refugee Act, articles 12-14 and 40-43.
- 134 Information received from the Government of the Republic of Korea.
- 135 Nationality Act, No. 14183, at [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=40003&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=40003&lang=ENG).
- 136 Nationality Act No. 14183, articles 5, 6, 7.
- 137 Information on visa categories and application procedures is available through a "Sojourn Guide for Foreigners" issued by the Ministry of Justice and made available on the website of the Korea Immigration Service: [https://www.hikorea.go.kr/board/BoardNtcDetailR.pt?BBS\\_SEQ=1&BBS\\_GB\\_CD=BS10&NTCCTT\\_SEQ=1062&page=5](https://www.hikorea.go.kr/board/BoardNtcDetailR.pt?BBS_SEQ=1&BBS_GB_CD=BS10&NTCCTT_SEQ=1062&page=5)
- 138 Immigration Act, articles 60 (1) and 60 (3) and 61.
- 139 IMADR (2021), 'Summary Report: 2021 Online Series: Racism in East Asia', p. 5, at <https://imadr.org/summary-report-racism-eastasia-2021/>.
- 140 Republic of Korea, 'Voluntary GCM Review - Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration', UN ESCAP, Bangkok, 10-12 March 2021, at [https://www.unescap.org/sites/default/d8files/event-documents/Republic%20of%20Korea\\_Voluntary%20GCM%20Survey%20Report.pdf](https://www.unescap.org/sites/default/d8files/event-documents/Republic%20of%20Korea_Voluntary%20GCM%20Survey%20Report.pdf).
- 141 A 2017 survey by the National Human Rights Commission of Korea found that more than 42% of foreign wives reported that they had experienced domestic violence, including physical, verbal, sexual, or financial abuse. Asia Pacific Forum of National Human Rights Institutions (2019), 'Survey shines light on violence against foreign-born wives', at <https://www.asiapacificforum.net/news/survey-shines-light-violence-against-foreign-born-wives/>.
- 142 Korean Immigration Service (2018), 'The 3rd Master Plan for Immigration Policy 2018-2022', p. 74, at <http://www.immigration.go.kr/bbs/immigration/226/336950/download.do>.
- 143 An individual on a humanitarian status can apply for a G-1-12 (other status) for their spouse or minor children who are already present in the country. Family members outside Korea are not entitled to family reunification. Information provided by the Government of the Republic of Korea.
- 144 Ibid, p. 8.
- 145 A 2018 decision of the Seoul Administrative Court found for the first time that the Convention Against Torture requires the State to recognize the right to appeal for refugee recognition but there continues to be no right to appeal to stay in Korea on a humanitarian status. Seoul Administrative Court Decision 2018KuDan15406, 7 December 2018.
- 146 National Human Rights Commission of Korea, 'NHRCK Chairperson's Statement on World Refugee Day (June 20): Statement stresses need to protect status of humanitarian status holders and treat them in accordance with international standards', at <https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=2&menuid=002002001&pagesize=10&boardtypeid=7003&boardid=7606931>.
- 147 Joint open letter from the mandates of the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, OL KOR 2/2021, 15 March 2021, at [https://www.ohchr.org/sites/default/files/Documents/Issues/Slavery/SR/JointOpenLetter\\_OL\\_KOR\\_15.03.21.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Slavery/SR/JointOpenLetter_OL_KOR_15.03.21.pdf) The government has noted that proposed amendments to the Immigration Act, articles 25-5 and 62-2 (submitted in December 2020 and as of December 2021 pending approval by the National Assembly) would protect non-national victims from forced departure and ensure their stay in Korea. Information received from the Government of the Republic of Korea.
- 148 National Human Rights Commission of Korea, Press release: Police Violates Rights of Migrant Woman with Forceful Interrogation during Hospital Stay and Non-compliance with Procedures for Recognition of Victims of Human Trafficking, 18 May 2021, at <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7606623>
- 149 Human Rights Committee, 'Concluding observations on the fourth periodic report of the Republic of Korea', CCPR/C/KOR/CO/4, 3 December 2015, para. 56. See also, UNCHR (2017), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 28th Session: Republic of Korea'.
- 150 Ministry of Justice, 'MOJ enforces fourth extension of stay by authority for 90,000 foreign residents to minimize local travel amid the COVID pandemic', press release, 19 July 2021, at [https://viewer.moj.go.kr/skin/doc.html?rs=/result/bbs/49&fn=temp\\_1629358808094100](https://viewer.moj.go.kr/skin/doc.html?rs=/result/bbs/49&fn=temp_1629358808094100).

# V. PACIFIC



Handout photo of boat carrying suspected illegal immigrants in Australian waters

A boat carrying suspected illegal immigrants is photographed from a Border Protection Command aircraft in Australian waters in this handout photo taken September 12, 2009. Australian Prime Minister Julia Gillard unveiled a new asylum policy on July 6, 2010 aimed at allaying voter fears ahead of elections about rising boat people numbers, with the centrepiece a possible East Timor processing centre.

(REUTERS/Australian Customs and Border Protection Service/Handout)



# 1. AUSTRALIA



## LEGISLATION

The Australian Constitution (1900) establishes the federal governance system of Australia by establishing a national legislature, executive and judiciary which sit over the already established governments of the 6 Australian State Governments. It confers power on the Commonwealth Parliament to make laws on immigration and emigration, and affirms five individual rights, including the right to trial by jury (Section 80).<sup>1</sup>

The Australian Human Rights Commission Act (1986) describes the powers and functions of the Australian Human Rights Commission, which is the Commonwealth agency responsible for monitoring and promoting human rights protection. The Commission also has responsibilities under the Racial Discrimination Act (1975), the Sex Discrimination Act (1984), the Disability Discrimination Act (1992), and the Age Discrimination Act (1996). It is mandated to: investigate and conciliate discrimination and human rights complaints; review legislation and advocate in favour of human rights policies; conduct research; provide legal advice to courts on human rights obligations; and monitor and scrutinize Australia's performance in meeting its international human rights commitments.

The main source of migration law in Australia is the Migration Act (1958), which has been amended many times since it was first enacted.<sup>2</sup> Its implementation is guided by procedures set out in the Migration Regulations (1994).<sup>3</sup> The stated purpose of the Migration Act is to regulate entry and stay in Australia.<sup>4</sup> It emphasizes processes for entry into and enforced departure from Australia. All migrants who enter Australia without a valid visa, or who remain in the country after their visa has expired or has been cancelled, are classified by law as "unlawful non-citizens" and are subject to mandatory immigration detention without a time limit unless they are granted a visa or removed from Australia.<sup>5</sup>

The Migration Act also covers processes for granting, refusing or cancelling visas; further rules are found in the Regulations.<sup>6</sup> It grants the Minister for Immigration with extensive discretion in relation to the grant, refusal or cancellation of visas.

Trafficking in persons is addressed in Divisions 270 and 271 of the Criminal Code Act (1995). The Act covers a range of offences. Divisions 270 and 271 of the Criminal Code Act 1995 (Cth) criminalise human trafficking, slavery and slavery-like practices (including servitude, forced labour, deceptive recruitment, forced marriage and debt bondage), with penalties of up to 25 years' imprisonment. Australia's offences for slavery and slavery-like practices have universal or extended geographic jurisdiction.

The Australian Citizenship Act (2007) (Commonwealth) sets out the legal framework for citizenship in Australia. Part 2 of the Act addresses pathways to citizenship, including for individuals who have already obtained permanent residency. The Australian Citizenship Amendment (Citizenship Cessation) Act (2020) (Commonwealth) (2020 Amendment Act) was signed into law on 17 September 2020.

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

A Protection Visa is available to individuals who have entered the country on a visa and meet complementary protection criteria. Complementary protection is provided under the Migration Act to individuals who are not refugees according to the Act, but who cannot safely return to their country of origin due to a risk of significant harm that engages Australia's other protection obligations under international human rights law. This is a high threshold, defined as arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment.<sup>7</sup> The Administrative Appeals Tribunal has prepared a Guide to Refugee Law in Australia and more detail regarding complementary protection is set out in Chapter 10 to that Guide. In the definition of 'significant harm', they include extreme circumstances of socio-economic deprivation, inadequate medical treatment, rape, female genital mutilation, forced abortion or sterilisation, forced marriage or domestic violence, corporal punishment, or imprisonment.<sup>8</sup> The subclass 866 visa entitles holders to permanent residency and a broad range of entitlements. They include: income assistance; employment services; free public health care; access to education; language training; entitlement to sponsor visa applications by immediate family members; and overseas travel. As permanent residents, holders of Protection Visas may apply for citizenship if they remain in Australia for a certain period.

A Global Special Humanitarian Visa through the Special Humanitarian Program (SHP) may be granted to individuals who are subject to substantial discrimination amounting to gross violation of their human rights and who are living outside their home country.<sup>9</sup> This permanent visa requires a sponsor inside Australia. Holders may work and study, can enrol in Australia's public healthcare scheme Medicare, and can propose family members for permanent residence.

Under the Family Violence Provisions of the Migration Regulations (1994), migrants on a Partner visa who are victims of violence committed by their partner may continue to apply to remain permanently in Australia even though the relationship has ended.<sup>10</sup>

The country also operates a large temporary migration programme. The programme issues temporary visas to enable migrants to enter and remain in Australia during specified periods, for events or with a specific status. The programme offers several temporary labour migration pathways: examples include Student (subclass 500) visas; Temporary Graduate (subclass 485) visas; and Temporary Activity (subclass 408) visas. These visas may be granted on human rights and humanitarian grounds. Some include pathways to permanent residence and citizenship.<sup>11</sup>

A Student visa can be issued to individuals who are more than six years old and who are enrolled in a full-time course at a recognized educational institution. The visa is available for education from school to post-graduate level and includes vocational education and training.<sup>12</sup> Guardians of student visa holders can obtain a visa to provide care and support.<sup>13</sup>

Australia's Medical Treatment visa is a temporary visa that enables individuals to travel to Australia or remain in Australia for medical treatment. Migrants aged 50 years or older who are already present in Australia, and who have been refused an Australian permanent visa on health grounds only and are unfit to depart Australia can receive this visa. Further, carers who are supporting someone in need of medical treatment who holds or has applied for this visa are also eligible. The visa is valid for the duration of consultations or treatment and includes specific arrangements between the Western Province of Papua New Guinea and the Queensland Department of Health.<sup>14</sup>

Bridging visas are non-substantive temporary visas that allow migrants to remain lawful while they are in Australia temporarily awaiting the outcome of a substantive visa application, seeking merits or judicial review of a visa or citizenship decision, seeking ministerial intervention, making arrangements to depart Australia, or while they are assisting with an investigation into a human trafficking or slavery-related offence. Depending on the visa conditions that are applied to the bridging visa, it may be possible for a person to work in Australia while they hold the bridging visa.<sup>15</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

The National Action Plan to Combat Modern Slavery 2020-25 affirms the principle that Australia will provide “holistic, gender-sensitive, culturally responsive, trauma-informed, victim centred protection and support” to trafficked persons. Support and protection is one of the Plan’s five national strategic priorities.<sup>16</sup> The Support for Trafficked People Programme<sup>17</sup> provides support services: the programme can refer trafficked migrants for legal and migration advice, and, once the Australian Federal Police have formally identified them as suspected victims of modern slavery, can meet their basic needs. The support programme provides at least 45 days’ intensive support to all trafficked people referred by the AFP, irrespective of whether they are willing or able to assist with the investigation or prosecution of a human trafficking or slavery-related offence. To continue to receive support under the programme after this time, adults must cooperate with the criminal justice process. However, victims of forced marriage who are regularly present in the country are entitled to access extended support, for up to 200 days even if they are unwilling to assist with a criminal investigation. Children are automatically entitled to access the Extended Intensive Support Stream if it is in their best interest.<sup>18</sup>

Migrants who have been trafficked and formally identified as suspected victims of human trafficking may be eligible for temporary or permanent stay under Australia’s Human Trafficking Visa Framework. However, both the visas that are available to them are conditional: : trafficked persons must cooperate with a criminal investigation or prosecution of a related trafficking offence.<sup>19</sup> The Bridging F visa (subclass 060) is intended for trafficked persons who do not hold a substantive visa: it offers a reflection period of up to 90 days but and can also facilitate the longer-term temporary stay of trafficked people who are assisting with the criminal justice processes. The Bridging F visa (subclass 060) can also allow entry or re-entry after short-term travel overseas, to commence or resume assistance in the criminal justice process. Holders of this visa are may be eligible for some social security payments.

The Referred Stay (Permanent) visa (subclass 852) is a permanent visa that may be granted to victims or witnesses of trafficking who have contributed to an investigation or prosecution and would face danger in their country of origin as a result. After clearing health and character checks, holders of this visa can access a broad range of social security payments. (See the section below on Procedure).

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Various pathways under Australia’s migration law are available to family members of citizens or permanent residents who want to migrate to Australia. Family migration visas may be available to partners (including married and de facto partners under Partner [subclasses 820 and 801] visas); fiancés/fiancées under Prospective Marriage [subclass 300] ; children (under the Child [subclass 101/802] visa and the Dependent Child [subclass 445] visa), Adoption [subclass 102], Orphan Relative [subclass 117]; parents under the Contributory Parent [subclasses 173/143 or 884/864], and Parent [subclass 103/804]), Parents may also apply for the Sponsored Parent (Temporary) [subclass 870] visa).<sup>558</sup> Permanent residents, including partners of citizens are able to apply for citizenship by conferral after four years in Australia, including 12 months as a permanent resident.<sup>20</sup> Returning Australian citizens, members of whose family were born overseas, can apply for their children to acquire Australian citizenship by descent; special provisions apply to family members of New Zealand citizens.<sup>21</sup>

Migrants with valid visas may be entitled to travel with or bring family members, depending on the specifications of their visa.<sup>22</sup> Many visas require specific health and character checks. (See the section on Procedure.)

The ‘split family’ provisions under Australia’s Humanitarian Program allow permanent protection and humanitarian visa holders (subclasses 200, 201, 202, 203, 204, 866 and 851) in Australia to propose immediate family members for resettlement, usually on the same visa subclass as the proposer. The provisions assist to reunite immediate family members who have been separated while escaping persecution or discrimination. The Special Humanitarian Program (SHP) was introduced in 1981 for people who, while not identified as refugees, were living outside their home country and were subject to substantial discrimination amounting to a gross violation of human rights in their home country, and who had

family or community ties to Australia. Australian citizens, permanent residents (including Permanent Protection visa holders), eligible New Zealand citizens and organisations based in Australia may propose displaced persons for resettlement in Australia through the SHP.<sup>23</sup>

#### 4. PROTECTION OF REFUGEES

Section 36(2) of the Migration Act incorporates article 1A(2) of the Refugee Convention into Australian domestic law and states that a protection visa will be granted to a “non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol”.

Individuals who arrive lawfully in Australia seeking asylum, who are found to engage Australia’s obligations may be granted permanent protection, subject to fulfilling relevant visa criteria and the health, character and security requirements that apply to all Australian visas. Unlawful arrivals are only eligible for temporary protection if they are found to engage Australia’s protection obligations (that is, either a Temporary Protection (subclass 785) visa (TPV) valid for three years or a Safe Haven Enterprise (subclass 790) visa (SHEV) valid for five years). SHEV holders who have worked without accessing special benefits and/or studied full time or a combination of both, in a specified regional area for a period totalling 42 months, meet “pathway requirements” and are eligible to apply for other visas, including prescribed permanent visas.<sup>24</sup>

The Department of Immigration and Citizenship (DIAC) assesses whether individuals who are found not to be refugees qualify for complementary protection (see the section above).

Australia operates a significant offshore Humanitarian Program under which are included the following refugee visa subclasses, including: Refugee (subclass 200) visa; In-Country Special Humanitarian (subclass 201) visa; Emergency Rescue (subclass 203) visa; and Woman at Risk (subclass 204) visa. The latter provides a pathway to Australia for women living outside their home country; who are subject to persecution in their home country or are registered with the UNHCR as being ‘of concern’; without the protection of a male relative; and in danger of victimisation, harassment or serious abuse because they are female.

#### 5. PROTECTION FROM STATELESSNESS

Under the Australian Citizenship Act, children born in Australia are automatically entitled to Australian citizenship if one or both of their parents was an Australian citizen or a permanent resident of Australia at the time of birth, or if the children were ordinarily resident in the country throughout the 10-year period from their day of birth.<sup>25</sup> In addition, an individual may apply for citizenship. A person born outside Australia to an Australian citizen parent is eligible to apply for citizenship by descent.<sup>26</sup>

The Citizenship Act permits people who are stateless to apply for citizenship.<sup>27</sup> Stateless migrants must be over 18 and of good character. Assessments of ‘good character’ take into account factors such as employment status, community involvement, and stability of family life.<sup>28</sup>

The Citizenship Amendment (Citizenship Cessation) Act (2020) amended the Australian Citizenship Act (2007) (Commonwealth) and replaced the system established by the Australian Citizenship Amendment (Allegiance to Australia) Act (2015) (Commonwealth) (2015 Amendment Act). It permits the Minister for Home Affairs to cease the Australian citizenship of a person if the Minister is satisfied the person has engaged in specified terrorism-related conduct or been convicted to a minimum three years for a terrorism-related offence, that the conduct or conviction demonstrates the person has repudiated their allegiance to Australia, and that the person would not become a person who is not a national or citizen of any country.<sup>29</sup> Concerns have been raised that the Act lowers the existing threshold for cessation of citizenship and could increase the risk that some individuals will become stateless.<sup>30</sup>

Australia has not established a procedure for determining statelessness in its national law. This impedes the identification of stateless persons and efforts to resolve their situation and can put them at risk of prolonged immigration detention.<sup>31</sup>



## PROCEDURES

Entry and stay pathways in Australia vary according to whether the person arrives lawfully (with a valid visa) or unlawfully (without a valid visa). Those arriving without a valid visa (typically by sea) are subjected to more restrictive government policies than those who arrive with a valid visa (typically by air) and can only apply for temporary protection. The Australian government maintains that individuals arriving by sea without a valid visa will not be settled permanently in Australia.<sup>32</sup>

The Department of Home Affairs oversees the initial assessments and interviews of migrants arriving in Australia. Each visa involves specific procedural eligibility requirements and conditions. For example, to obtain a Global Special Humanitarian Visa, individuals must be outside Australia and outside their country of origin and must be proposed by an Australian citizen, permanent resident, eligible New Zealand citizen, or an organization based in Australia. In the case of student visas, individuals can apply online in or outside Australia, but they need to possess the required health insurance and, if a child, to prove they have a welfare arrangement.

Standard visa conditions include the requirements that everyone named on the application meets health<sup>33</sup> and character<sup>34</sup> requirements. The authorities may waive the health requirement in compassionate and compelling circumstances. Everyone named on the application who is over the age of 18 must sign or accept the Australian Values Statement, confirming that they will respect the Australian way of life and obey Australian laws.<sup>35</sup> Applications may be refused on character grounds where there is evidence of criminal conduct or if the applicant is judged to represent a security threat or danger to the Australian community.<sup>36</sup>

Decisions made by the Immigration Department can be reviewed on their merits by the Administrative Appeals Tribunal (AAT), an independent statutory body. The AAT cannot review decisions of the Minister, only decisions of delegated officials. Migrants are also able to challenge the legality of a decision through the courts. In certain circumstances, the Minister has the authority to set aside an original decision. Ministerial decisions are subject to very limited review. The lawfulness of all decisions to grant or refuse a visa are subject to judicial review by the Federal Court or the High Court of Australia, which can set aside the original decision, prevent the Minister from acting on the decision, and return the case to the decision-maker to be reconsidered. The court cannot however reassess visa decisions. Some requests for judicial review must be made within 35 days of the date of the migration decision, although statutory periods of review vary between courts, and applicants may apply for an extension of time in which to seek review.<sup>37</sup>

The Department of Home Affairs Child Safeguarding Framework, revised in 2019, sets out how the Department will protect children in the context of immigration programmes.<sup>38</sup>

## IMPLEMENTATION IN PRACTICE

Migration is central to Australia and an enduring issue in its national conversations on identity. In mid-2020, over 7.6 million migrants were living in the country. Nearly one third of the population was born overseas. Most countries are represented in Australia's migrant population but the UK, India and China account for the highest number.<sup>39</sup> There were also at least 4,025 recorded stateless persons in the country.<sup>40</sup> In addition, it is estimated that one hundred thousand migrants live and work in an irregular situation.<sup>41</sup> Australia operates an annual cap on visas for people who want to migrate permanently to the country. 160,000 places were allocated in 2021-22, across three streams: skilled, family, and special eligibility.<sup>42</sup> The temporary migration programme is increasingly significant: between 1 July 2015 and 31 July 2020 the number of temporary visa holders in Australia increased from approximately 1.7 million to just under 2 million (a rise of 16%).<sup>43</sup>

For migrants in situations of vulnerability, many of the visa categories they can obtain in principle are limited in their availability or involve lengthy processing. The so-called 'two-step immigration policy', under which migrants enter on a temporary visas and subsequently transfer to other temporary or permanent visas, has created a complicated and expensive system that is difficult to navigate.<sup>44</sup> Visa applicants can face long delays; processing cases can take months or even years. Stateless persons applying for citizenship can also face significant delays and administrative barriers. Even in the case of applicants who meet all the criteria, the Citizenship Act does not impose any deadlines for completing citizenship applications.<sup>45</sup>

Australia's migration policies can tend to restrict pathways to permanency for migrants in irregular status. This can leave them in a state of 'permanent temporariness', needing to regularly renew temporary visas even when they need long-term protection or have established enduring ties in Australia. Australia has been requested to introduce clear, consistent and accessible pathways for temporary visa holders who seek to become permanent residents, both to alleviate the vulnerability of migrants on temporary visas and facilitate social cohesion.<sup>46</sup> It has also been noted that some temporary visa holders and their dependents are generally ineligible to receive government income support, language assistance, income support, and Medicare.

The Special Rapporteur on migrants has noted that many temporary migrant workers who had worked in Australia for several years were unable to their families to live with them. He recommended that family reunification should be available to all permanent residents, as well as to all temporary migrant workers who effectively spend more than one year in Australia.<sup>47</sup>

Concerns have been expressed about the visa condition 8105 which prohibits international students from working more than 40 hours per fortnight while their course of study is in session. Experts have noted that this restriction contributes to the exploitation of international students who need to work to support their tuition and living expenses.<sup>48</sup>

While Australia's approach to human trafficking provides examples of good practice, it has also been criticized for its focus on prosecution. Concern has been expressed that the criminalisation provisions of the Migration Act may deny protection to trafficked persons, including by misidentifying them and prosecuting them for violating immigration laws, thereby breaching their rights. This problem arises because the Act states that the authorities may refuse or cancel a visa if the applicant has any previous criminal activity in any country, or has provided incorrect information in a visa application, or has associated with people or groups who have been or may have been involved in criminal conduct.<sup>49</sup> In the context of trafficking, these conditions exclude from entry pathways all trafficked migrants who do not choose, or are unable, to cooperate in criminal prosecutions. They also limit the access of trafficked migrants to an effective remedy.<sup>50</sup>

In April 2021 a Temporary Visa Holders Experiencing Violence pilot program was introduced to support women who are in Australia on temporary visas and affected by domestic and family violence. It does not provide a pathway to entry and stay, but gives women access to financial assistance, legal assistance, and migration support. Information gathered from the pilot will be used to determine whether a specific visa is required to support visa holders experiencing domestic and family violence in the future.<sup>51</sup>

Unaccompanied migrant children are placed under the care of the Minister for Home Affairs, who retains guardianship and responsibility for them until they turn 18, even if a custodian is appointed. The Minister may revoke custody if it is deemed that this is in "the interests of the child".<sup>52</sup> If they arrived regularly, such children are entitled to apply for government-funded free legal assistance under the IAAAS.<sup>53</sup> Migrants in a situation of vulnerability may be eligible to receive financial assistance through the Status Resolution Support Services (SRSS), pending an official decision on their visa application.<sup>54</sup>

On 18 September 2013, Australia initiated "Operation Sovereign Borders" as a whole-of-government response to irregular arrivals. Since then, all non-citizens who arrive anywhere in Australia by sea without a valid visa are subject to "on-water" assessment of their protection needs. This is a reportedly hurried process in which migrants do not have access to legal counsel and cannot challenge the decision in an effective way.<sup>55</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

Travel to Australia was severely limited during the pandemic: only Australian citizens, permanent residents, and travellers in an exempt category could travel. For most of 2020 and 2021, Australia's travel restrictions were designed to exclude the majority of travellers from entering Australia and there was very limited access for individuals who had a compassionate or compelling reason to enter the country. Within Australia, travel was subject to state and territory domestic travel restrictions.<sup>56</sup> From 15 December 2021, fully vaccinated holders of eligible visas, including temporary visa holders, were able to enter Australia without obtaining an individual exemption.<sup>57</sup>

Amendments to the Migration Regulations 1994 were made to allow for the grant of a COVID-19 Pandemic Temporary Activity Visa to people who were unable to leave Australia because of COVID-19 restrictions but whose visas had or would cease, and to those wishing to enter Australia in order to working in critical sectors of the economy and society (agriculture, food processing, health care, aged care, disability care, childcare, and tourism and hospitality). Applicants whose visas were due to expire in 90 days or less, or whose temporary visa had expired within 28 days, could remain in Australia if they had no other visa options and were unable to leave the country because of COVID-19 travel restrictions. The visa permitted applicants who worked in a critical sector to stay for up to 12 months, and other applicants to stay for up to three months.<sup>58</sup> Anyone who was unable to support themselves was encouraged to return home. The visa was available free of charge; applicants had to be present in Australia and were required to maintain adequate health insurance. Applicants whose substantive visa expired while the authorities were processing their application were granted a bridging visa. As of 31 May 2021, 12,698 people in Australia held the COVID-19 Pandemic Event Visa.<sup>59</sup>

The Australian Government also introduced a number of COVID-19 visa concessions, starting on 1 February 2020.<sup>60</sup> For example, concessions were introduced to support international students and graduates affected by COVID-19 international travel restrictions. These included including allowing Student visa holders to work more than 40 hours per fortnight in key sectors, and the temporary removal of all work restrictions in January 2022; allowing people to apply for the Temporary Graduate (subclass 485) offshore, or for a replacement visa if COVID-19 travel restrictions had prevented them from using the full time permitted on their first visa. Time spent studying online outside of Australia can also count towards qualifying for a post-study work visa.

In 2020 and 2021, a number of changes were introduced to a number of Family visas to support applicants who continued to face difficulties in entering or departing Australia because of COVID-19 related restrictions. This included Visa Application Charge refunds, extensions of visa validity periods for visa holders and applicants, as well as the removal of the requirement to be outside or in Australia at the time of visa grant.<sup>61</sup> The Australian authorities extended the visas of Pacific migrant workers on the Seasonal Worker Programme and Pacific Labour Scheme, and made border exceptions for migrant workers.<sup>62</sup> By March 2021, over 300 Fijians had secured work in Australia, for example.<sup>63</sup>

Reports indicate that, during the COVID-19 pandemic, many temporary visa holders in Australia who were unwilling or unable to return to their countries of origin lacked access to income or social support, including welfare packages that were introduced in response to the crisis.<sup>64</sup>

## 2. FIJI



### LEGISLATION

Recognizing the importance of migration to the country, the Constitution of the Republic of Fiji (2013) declares that its people are “the descendants of the settlers and immigrants to Fiji”. The Constitution commits the people of Fiji “to the recognition and protection of human rights, and respect for human dignity”. Although its preamble notes that the Constitution is the supreme law of the country and provides “the framework for the conduct of Government and all Fijians”, most of its Bill of Rights applies to all people, affirms human dignity, equality, and freedom, and aligns with applicable international law.<sup>65</sup> The Constitution recognizes several rights: to be free from torture and cruel, inhumane, degrading or disproportionately severe treatment or punishment; to liberty; to equal protection, treatment and benefit of the law; and to the full and equal enjoyment of all rights and freedoms recognized in the Bill of Rights and other written laws.<sup>66</sup> The Constitution states that migrants who possess regular status are permitted to stay in Fiji unless a court or a lawful decision by the Minister responsible for immigration orders their removal.<sup>67</sup>

The Fiji Human Rights and Anti-Discrimination Commission is a constitutional office established under Section 42 of Fiji’s 1997 Constitution. Its enabling legislation is the Human Rights Commission Act (1999). Under Section 7(1) of the HRC Act (1999), the Commission is mandated, *inter alia*, to: increase public awareness of human rights; receive representations from members of the public on any matter affecting human rights; and investigate allegations of violations of human rights on its own cognisance or as the result of a complaint. It is not mandated to examine complaints about the lawfulness of legislation adopted between 2006 and 2013.<sup>68</sup>

The Immigration Act (2003) provides the statutory basis for migration governance in Fiji.<sup>69</sup> It is complemented by Immigration Regulations (2007), that set out rules for implementing the Act.<sup>70</sup> The Immigration Act also covers trafficking in persons and refugee determination.

Section 5 of the Constitution of the Republic of Fiji (2013), the Citizenship of Fiji Decree (2009), and the Passports Act (2002) regulate matters relating to citizenship.<sup>71</sup> A person who is registered in the ‘Vola ni Kawabula’, the official Fijian register of native landowners, maintained by the Native Lands Commission under the Native Lands Act,<sup>72</sup> is entitled under the Immigration Act of 2003 to enter, reside and work in the Fiji Islands without having obtained an entry permit.<sup>73</sup>

Finally, Goal A of Fiji’s five-year National Development Plan (2017-2021) includes a commitment to review immigration laws and procedures in order to remove obstacles for migrant workers and accommodate extended stays by visitors.<sup>74</sup> The National Climate Change Policy 2018–2030 declares that human mobility is a priority issue for human and national security.

The Fiji Department of Immigration (DoI) sits under the Office of the Prime Minister. It is responsible for the governance of international migration in Fiji, and particularly for administration and enforcement of the Immigration, Passports and Citizenship Acts.

## GROUNDINGS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY OR STAY

The Permanent Secretary responsible for the Immigration Act is authorized under the Immigration Regulations to approve the issue of a ‘special purpose permit’ that is valid for up to three years. This permit authorizes a migrant to enter Fiji for a specific period or until a certain date, for a given purpose or “on such other ground as the Permanent Secretary considers appropriate”. Special Purpose Permit holders are not entitled to work or to engage in research or study.<sup>75</sup>

Individuals may apply for a Special Purpose Permit on medical grounds on the recommendation of a certified medical practitioner.<sup>76</sup> They may also apply to stay in Fiji temporarily on compassionate or medical grounds.<sup>77</sup> More broadly, the Immigration Act gives the Minister for Immigration discretion to authorize the entry of “classes of citizens” from another country, to exempt them from the obligation to obtain a visa to enter Fiji, and to determine their conditions of entry.<sup>78</sup>

A migrant who is subject to a deportation order for irregular entry or stay is entitled to appeal to the Minister for Immigration within 21 days. The Minister is authorized in principle to review and change the decision.<sup>79</sup> Section 51(7) of the Immigration Act permits the Minister, after court proceedings have been completed, to refuse to approve a deportation order.

The Immigration Act allows the entry of students to Fiji to undertake “education, apprenticeship or technical instruction”. The Minister for Immigration has discretion to offer and extend permits for education.<sup>80</sup> Fiji offers visas for students to study at primary, secondary, tertiary and vocational institutions, as well as universities. The country is a hub for tertiary education in the Pacific Islands. Research permits are available to individuals undertaking research. Students who have enrolled on a course, or who have a letter of acceptance from a secondary or tertiary educational institution, may apply for a Student Permit. If granted, the permit is valid for up to three years. Application requirements include proof of financing, medical reports, and police reports. To satisfy the conditions of the permit, students must attend 80% of course hours, and must achieve a satisfactory academic result. Foreign students are not allowed to change educational institutions without giving notification in advance. Under the Immigration Act, migrants who enter Fiji on a student permit are not permitted to take paid work, except when work is a component of their education, apprenticeship or technical instruction, or the employment in question has been approved by the Permanent Secretary.<sup>81</sup> After completing their course, students may apply for a permit to do an internship; these are issued for three or six month periods.<sup>82</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

Section 10 of the Bill of Rights of the Constitution of the Republic of Fiji guarantees all persons freedom from slavery, servitude, forced labour and human trafficking. Trafficking in persons is addressed in Part 5 of the 2003 Immigration Act and also under Division 6 of the Crimes Act (2009), which includes provisions that deal with specific offences for trafficking in persons, and gives particular attention to the situation of children.<sup>83</sup> Section 31 of the Immigration Act grants immunity from criminal prosecution to migrants who have been trafficked for irregular entry or stay in the Fiji Islands. Trafficked persons are similarly not subject to prosecution if they procured or possessed fraudulent travel or identity documents in the course of being trafficked.

Renewable six-month work visas are in principle available to trafficked persons who cooperate with investigations. The Constitution declares that every person is entitled to be represented by a legal practitioner and to receive legal aid where needed, and should be able to apply to the High Court for redress if their rights are violated.<sup>84</sup>

Fiji’s National Anti-Human Trafficking Strategies and Action Plan (2021-2026) were endorsed by the Cabinet in January 2021 and officially launched by the Permanent Secretary for Defence and National Security in February 2021.<sup>85</sup>

## 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Several permits enable family unification, and address different family circumstances. The spouse or child of a Fijian citizen may apply for exemption status. Applicants need to provide proof of their relationship to the citizen, as well as police and medical checks. Individuals who apply for a permanent residence permit may include their spouse, and children under twenty-one years of age, in their application.

A Special Purpose Permit to Reside with a Family Member enables an individual to enter Fiji and stay with a family member who is a citizen or has documentation granting regular status “in view of their dependence on each other”.<sup>86</sup>

Dependents of permit holders (including holders of temporary permits) may be granted a Co-Extensive Permit to enter and reside in Fiji with the principal applicant. Applications for such a permit may be lodged separately or with the principal application. Applicants for permanent residence permits may include a spouse, and children under twenty-one years of age, in their application.<sup>87</sup>

Temporary family visits may be made on a visitor visa. The Immigration Regulations (2007) allow an immigration officer to grant entry for the purpose of visiting a friend or relative.<sup>88</sup> A visitor visa permits a stay of up to four months in a single year from the date of issue; the visa can be extended for two months on application. A multiple entry visa that is valid for 12 months allows multiple entries to the country for stays of up to four months at a time. Applicants must submit a range of supporting documentation including proof of funds; visitor permit holders are allowed to work only under limited circumstances and for up to 14 days, though this may be extended at the discretion of the Permanent Secretary responsible for immigration.<sup>89</sup>

Individuals who have been living in regular status in Fiji for at least five years may apply for a permanent residence permit. If granted, this is valid for five years. The applicant may include family members (spouse, and children under 21) in the request form. Applicants must provide copies of relevant documents (such as marriage and birth certificates), a recent medical report, and a police report.<sup>90</sup>

#### 4. PROTECTION OF REFUGEES

Only a small number of people seek asylum in Fiji. The 2003 Immigration Act provides the statutory basis for refugee status determination and the appeal process in Fiji's domestic law. The refugee provisions of the Immigration Act affirm the principle of non-refoulement.<sup>91</sup>

A claim to seek asylum under Section 39 of the 2003 Immigration Act has been made as soon as a person declares to an immigration officer that they seek to be protected or recognized as a refugee in the Fiji Islands. The Permanent Secretary may determine whether an asylum seeker is to be recognized as a refugee; but it is unclear whether the Minister's decision is subject to judicial review. Individuals recognized as refugees in Fiji are granted a protection permit that is valid for three years and may be extended. They are not permitted to work until they have secured this permit. Neither asylum seekers nor refugees are entitled to welfare assistance.<sup>92</sup>

#### 5. PROTECTION FROM STATELESSNESS

The citizenship provisions of the Constitution assert that citizenship can only be acquired by birth, registration or naturalisation. The Constitution undertakes to provide a law to prevent statelessness, as well as the renunciation and deprivation of citizenship.<sup>93</sup> The Citizenship of Fiji Decree (2009) contains provisions that ensure the right of every child to acquire Fijian nationality, including if the child was born outside the country, provided that at least one parent is a Fijian citizen. Section 6 ensures that the acquisition and transmission of nationality is not discriminatory, also provided that either parent is a citizen. No provision ensures that a child born on the territory of Fiji who is otherwise stateless acquires Fijian nationality, either automatically or by registration.<sup>94</sup>

Under the Citizenship Decree, a pathway to citizenship by naturalisation is available to individuals who have been living in Fiji, in regular status, for five of the last 10 years; and to individuals who are married to a Fiji citizen and have been in Fiji (in regular status) for at least three of the five years prior to the application. Other requirements include familiarity with the language (English, Fijian or Hindi); being of good character; and taking an Oath of Loyalty.<sup>95</sup> In addition, under the Citizenship of Fiji Act (2009), a migrant who is married to a Fijian citizen, is the widow/er of a Fijian citizen, or is the child of a Fijian citizen, is permitted to enter and reside in Fiji.<sup>96</sup>

## PROCEDURES

The Immigration Act requires all non-citizens to possess a visa or permit before entering Fiji, unless they are covered by one of the exemptions laid out in the Act.<sup>97</sup> Citizens of 113 countries do not need a visa to travel to Fiji, but may require a permit, depending on their purpose in the country.<sup>98</sup> Anyone found entering irregularly is prohibited from entering.<sup>99</sup> Migrants in irregular status who have entered cannot obtain a permit while they remain in Fiji.<sup>100</sup>

Individuals applying for visas to enter and stay in Fiji, or to acquire citizenship, need to satisfy specific documentation requirements, and may need to submit medical and police reports.<sup>101</sup>

The notice of a decision to refuse to issue, extend or vary a permit must give written reasons to explain the decision. Such notices must also state the right to appeal, the period within which an appeal must be made, and where it must be made.<sup>102</sup>

If a migrant is subject to deportation, a copy of a deportation order must be served on the individual as soon as practicable after it is made and the deportee may be detained as the Minister directs. The deportee may be placed on a ship or aircraft that is scheduled to leave the Fiji Islands.<sup>103</sup>

## IMPLEMENTATION IN PRACTICE

Fiji is an archipelagic country in the South Pacific, composed of more than 330 islands and more than 520 islets. It has long been a centre of economic and social development in the region and is both a country of origin as well as destination, primarily for migrants from the Asia Pacific region. Fiji hosts more migrants than any other Pacific Island nation except Papua New Guinea and is similarly one of the most populous countries in the sub-region. The most recent census (2017) recorded 884,887 inhabitants.<sup>104</sup> It is estimated that just over 14,000 international migrants were living in Fiji in 2019 (1.8% of the population). Most came from Australia (14%), Pakistan (13%), Bangladesh and Tonga (both 10%) and India (9%).<sup>105</sup> Numerous short-term visitors come to the country: more than 968,000 were recorded in 2019. Between 2013 and 2019, nearly 3,900 migrants were estimated to have overstayed their permit, or were awaiting decisions on visa applications or work permit renewals, and thereby entering into irregular situations.<sup>106</sup>

The country ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in 2019. This decision opened an important opportunity to establish a comprehensive system of migration governance, including the creation of pathways for irregular migrants and other migrants in vulnerable situations.

Fiji has a well-established birth registration system, though there have been reports that people living in rural areas or on remote islands have found it difficult to access it due to the high cost of travelling to registration offices; these are mainly located in urban areas.<sup>107</sup> Fiji is working to improve the system.<sup>108</sup>

Cases of trafficking in persons remain under-identified and under-reported across the region, for lack of specialized frontline officials and knowledge. Trafficked migrants do not have access to effective protection mechanisms. Security responses concentrate on repatriation and deportation,<sup>109</sup> while trafficking laws focus on criminalisation and prosecution. Efforts to provide redress or support services to trafficked persons are insufficient and underfunded.<sup>110</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

Fiji closed its borders and ports early in the COVID-19 pandemic and only Fijian citizens and residents were permitted to enter the country. All foreign nationals who were stranded in the country due to pandemic response measures were advised to contact the Fijian Immigration Office to obtain guidance on how to maintain their legal status. This instruction was given to all categories of permit holder.

Migrants holding visitor permits were allowed to transition to a special purpose permit that was valid for up to six months, or longer if they were unable to return due to border closures. Student permit holders were similarly allowed to transition to a special purpose permit. In the cases of students from Vanuatu and Tuvalu, bilateral agreements stipulated that students were not required to pay the normal permit fee. Finally, temporary work permit holders who were unable to leave Fiji due to border restrictions were able to obtain extensions to their work permits and to change employers while remaining in Fiji.<sup>111</sup>

Fiji reopened its borders to fully vaccinated foreign nationals from 1 December 2021, prioritizing those from named Travel Partner Countries.<sup>112</sup>

## 3. NEW ZEALAND



### LEGISLATION

The Realm of New Zealand (comprising New Zealand, Tokelau, the Ross Dependency and the self-governing States of the Cook Islands and Niue) does not have a single written constitution.<sup>113</sup> Most of the rights enumerated in the New Zealand Bill of Rights Act (1990) apply to everyone in the country, irrespective of their immigration status.<sup>114</sup> The 1990 Act affirms certain civil and political rights, including the rights not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment, and to receive legal assistance without cost if the individual does not have sufficient means.<sup>115</sup> However, under the Legal Services Act (2011), individuals on temporary visas or who are in irregular status and subject to deportation may not be granted legal aid to challenge their deportation orders.<sup>116</sup>

The Human Rights Act (1993) focuses on protection from discrimination and also establishes and details the role of the Human Rights Commission and the functions and powers of the Human Rights Review Tribunal. Under this Act, migrants to New Zealand are protected from discrimination, primarily on the prohibited grounds of ethnic or national origins, which includes nationality or citizenship.<sup>117</sup>

The New Zealand Human Rights Commission is mandated to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society, and to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society. Its functions include to receive human rights complaints, and to provide a dispute resolution service for allegations of unlawful discrimination and racial or sexual harassment. However, it cannot act on complaints relating to migrants, or bring any action, or take part in immigration proceedings.<sup>118</sup>

The Immigration Act (2009, as amended) governs immigration in New Zealand. It states that persons who are not New Zealand citizens must hold a visa to travel to and stay in New Zealand and cannot apply for a visa from within the country if their status is irregular.<sup>119</sup>

The Citizenship Act 1977 declares that New Zealand citizenship can be acquired by birth, descent or grant. New Zealand does not have a special citizenship process for foreign spouses of New Zealand citizens; they need to follow the same citizenship process as other migrants.

## GROUND AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Individuals who do not meet the definition of refugee, but would face harm (defined as torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment) were they to return to their home country, may be granted protected person status in New Zealand.<sup>120</sup> The definition of "arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment" explicitly excludes countries that are subject to lawful sanctions, and unavailable or poor quality health care in the country of origin.<sup>121</sup> The Immigration and Protection Tribunal (IPT) examines appeals against decisions to refuse migrants residence and to return them. Since 2013, it has systematically explored the application of international human rights law to situations of environmental and climate change. A related decision of the Supreme Court in 2015 explicitly noted that such a pathway might come to exist in the future.<sup>122</sup>

Recognition of protected status does not automatically trigger residency status. However, protected persons can apply for permanent or temporary resident visas.<sup>123</sup> The IPT may order the authorities to give effect to its decisions, including by granting a resident or temporary visa for up to 12 months, subject to any conditions it attaches. If granted a temporary visa, the holder cannot appeal against deportation when it expires. The Tribunal also has the option to delay deportation of an individual whose appeal was unsuccessful; it may grant a temporary visa for up to 12 months to allow the person to prepare for return. This too cannot be appealed.<sup>124</sup> A new visa, the Migrant Exploitation Protection Visa (MEPV), was announced in July 2021 to help protect migrant workers who have formally reported exploitation, from employers whose



practices or behaviours threaten their economic, social, physical or emotional well-being. Migrants on this visa will be permitted to stay for up to six months and to work anywhere in the country. Dependent children cannot be included in a MEPV visa application but can apply for visas based on their relationship to the visa holder.<sup>125</sup>

Migrants in New Zealand may be granted a temporary visa if their relationship with a New Zealand citizen, or with a holder of a residence class visa, ended due to domestic violence. This visa, the Victims of Family Violence Work Visa, grants a six month stay. As the name suggests, holders can take work anywhere in New Zealand with any employer. However, dependent children need to apply for personal visas based on their relationship to the visa holder.<sup>126</sup>

Under the Immigration Act (2009), immigration officers are required to cancel a deportation order if they receive information concerning the potential deportee's circumstances that relate to New Zealand's obligations under international law. Officers may reach any conclusion they think fit and they are not under an obligation to apply any specific legal test, or inquire further into the personal circumstances of the person, or give reasons for a decision beyond those required by section 177 of the Immigration Act. (This requires officers to name the international obligations implicated and related facts concerning the person's circumstances.) The officer's decision is subject to review by the IPT.<sup>127</sup>

An individual can apply for a Limited Visa, which allows entry and stay for an express purpose, such as medical treatment or a family emergency (such as an illness or accident). The visa covers the time required to achieve the express purpose. If holders need more time to carry out that purpose, they may apply for a second Limited Visa while they are in New Zealand.<sup>128</sup> Limited Visa holders are not permitted to work in New Zealand.<sup>129</sup>

New Zealand offers a range of visas to study in the country. They are tailored to the needs of the applicant (age, point of origin, passport, length of study, financing by fees or grant, etc.).<sup>130</sup> One option, the Pathway Student Visa, allows an individual to study up to three consecutive courses on a single student visa. This visa allows a student to stay in New Zealand for up to five years, during which the holder may work for up to 20 hours a week during term time and full-time during holidays. Visa holders cannot include their partner or dependent children in the student visa application; however, partners and dependent children can apply for personal visas based on their relationship to the student visa holder.<sup>131</sup>

Finally, in recognition of its close ties with the Pacific region, New Zealand offers some visa options that permit migrants from Pacific countries to enter and stay in the country. The Pacific Access Category Resident Visa is available to citizens of Kiribati, Tuvalu, Tonga or Fiji. The Samoan Quota Resident Visa is available to citizens of Samoa. In both cases, eligible individuals are able to register for a ballot for a resident visa.<sup>132</sup>

## 2. PROTECTION FOR TRAFFICKED PERSONS

The Crimes Act (1961) (amended) criminalizes trafficking of persons but does not address or provide protection for trafficked persons.<sup>133</sup> Protection is one of three pillars of New Zealand's Plan of Action against Forced Labour, People Trafficking and Slavery. Under this plan, various services may be available to trafficked persons. They may receive support to obtain accommodation, counselling, medical care, legal assistance, visas, and repatriation.<sup>134</sup>

Adult or child victims of trafficking, who have been identified and certified by the police, are legally eligible to remain in New Zealand temporarily, and in some instances permanently. They are eligible for a range of specific visas: the Trafficking Victim Work Visa; the Trafficking Child Victim Student Visa; the Trafficking Child Victim Visitor Visa; and the Trafficking Victim Resident Visa. Individuals who are granted one of these temporary visas may subsequently be able to apply for a Trafficking Victim Resident Visa.<sup>135</sup> Migrants who have been victims of human trafficking may be granted a Resident Visa that permits indefinite stay, if they cannot return home because they would face danger, are at risk of being re-victimised, or are at risk of suffering significant social stigma and financial hardship as a result of being trafficked. The residence category recognizes New Zealand's obligations under international law, which require it to offer protection and assistance to victims of human trafficking who are likely to be suffering the effects of trauma and abuse, and enable trafficking offenders to be prosecuted.<sup>136</sup>

## FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Partners<sup>137</sup> (of the same or a different gender), dependent children,<sup>138</sup> and parents of New Zealand citizens or residents, and (in certain cases) of temporary visa holders, may seek a temporary or resident visa based on their relationship.<sup>139</sup>

Partners of New Zealand citizens or residents can apply to live in the country permanently with their partner's support. The couple's dependent children (if they are 24 years old or less) can be included in the visa application.<sup>140</sup> Holders of a New Zealander Resident Visa are permitted to live, work and study in New Zealand indefinitely.<sup>141</sup> The Partner of a New Zealander Work Visa permits migrants to work or study in New Zealand for up to three months, while living with their citizen or resident partner. The visa is valid for up to two years, depending on the duration of the relationship (two years if the partners have been living together for more than 12 months, one year if they have been together for less time). Migrants can apply for residence, based on the partnership, before the Partner of a New Zealander Work Visa expires.<sup>142</sup> Under the Partner of a Worker Work Visa, the partners of migrant workers in New Zealand who possess a valid visa of more than six months duration may be able to join their partners in the country, and work, for the duration of the partner's visa.<sup>143</sup>

Dependent children aged 19 years or less can travel with or join migrants who are applying for a work visa. A Child of a Worker Visitor Visa, if approved, is aligned to the parent's work visa; however, children are entitled to attend school in New Zealand for only three months. To study for a longer period, children need to secure student visas. Not all work visa holders are eligible to support applications for this visa; for example, seasonal workers are excluded.<sup>144</sup> Dependent children of individuals on student visas can apply for a visa to join them in New Zealand.<sup>145</sup>

A parent or legal guardian of a child, who is under 17 years of age and who is in New Zealand on a Student visa, can apply to stay with the child for the duration of the student visa. This visa is only granted to one parent or legal guardian at any one time.<sup>146</sup> Parents and grandparents of a New Zealand citizen or resident can apply for a Parent and Grandparent Visitor Visa. Holders may stay for up to six months at a time and may stay for a maximum of 18 months over three years. Visa applicants can include their partner in the visa application, but other dependent children need personal visas.<sup>147</sup>

New Zealand has in the past operated regularisation initiatives to manage the situation of migrants who are irregularly present in the country. In 2000, a time-limited two-step regularisation programme was made available for migrants who had established enduring ties to the country, such as residence for more than 5 years, individuals with New Zealand citizen or resident partners, or those who had children born in New Zealand.<sup>148</sup>

### 3. PROTECTION OF REFUGEES

New Zealand's refugee determination procedures are set out in the Immigration Act (2009).<sup>149</sup>

The New Zealand resettlement programme accepts refugees and related family cases.<sup>150</sup> Since July 2020, New Zealand offers an annual Refugee Quota of 1,500 places<sup>151</sup>

Legal aid is available to people claiming refugee status and for matters relating to a refugee's immigration claim or status.<sup>152</sup> Once granted a residence visa, refugees may be eligible to sponsor some family members to join them in New Zealand.<sup>153</sup>

### 4. PROTECTION FROM STATELESSNESS

Statelessness in New Zealand is rare. It is legally possible to deprive an individual of citizenship; but it is impermissible if they would be left stateless.<sup>154</sup> Under the Citizenship Act (1977), children born in New Zealand who would otherwise be stateless can acquire citizenship automatically;<sup>155</sup> and children who were born abroad to a New Zealand citizen by descent can be registered as a citizen if they would otherwise be stateless.<sup>156</sup> Individuals found abandoned in the country soon after birth are deemed to be New Zealand citizens, if investigation fails to establish the identity of at least one parent.<sup>157</sup> Any person who would otherwise be stateless may be granted citizenship, if the Minister for Internal Affairs deems it appropriate.<sup>158</sup> New Zealand ensures that all children born in New Zealand are registered at birth; as are all births that occur on an aircraft or ship flying the New Zealand flag, and all new born foundlings in the country.<sup>159</sup>

Applicants for citizenship are generally required to possess in advance the right, under the Immigration Act, to stay indefinitely without conditions.<sup>160</sup> There are additional requirements. Candidates must: be over 16 years of age; have been present in the country for most of each of the previous five years; be judged to be of good character; understand the responsibilities and privileges of citizenship; have adequate knowledge of the English language (unless compliance with this rule would cause the applicant to suffer undue hardship); and intend to continue to reside in New Zealand.<sup>161</sup> The requirement to be entitled to remain indefinitely may be waived if applicants can show that they are entitled to reside indefinitely in the Cook Islands, Niue, or Tokelau.<sup>162</sup>

## PROCEDURES

Part 3 of the Immigration Act (2009) sets out the visas that are available for migrants to New Zealand, and the general rules and conditions that apply. In terms of stay, there are residence class visas, consisting of permanent resident visas or resident visas, and temporary entry class visas, consisting of temporary, limited or interim visas.<sup>163</sup> Different rights are associated with different types of visas and each visa may be permanent or of limited duration.<sup>164</sup> Visa options for entry and stay are tied to various requirements, including tests of health and good character. The health requirement is focused on making sure that the applicant will not pose a danger to the health of people already in the country and will not cause an undue cost to New Zealand's health or special education services.<sup>165</sup> The test of good character includes a police check and a declaration of any past crimes or racist activities.<sup>166</sup>

Immigration New Zealand (INZ) is part of New Zealand's Ministry of Business, Innovation and Employment and is responsible for managing immigration to New Zealand, including the provision of asylum and resettlement.

Part 7 of the Immigration Act (2009) describes the processes for appeal, review, and other proceedings. Claims for refugee or protected status are assessed in a single procedure. The right to appeal on humanitarian grounds is limited. In some cases, the appeal on humanitarian grounds is a separate and parallel process, which acts as a 'fall back' position if appeal(s) on different grounds fail.<sup>167</sup> In other cases, appeals on matters of fact are not permitted and an appeal on humanitarian grounds against deportation is likely to be the only option.<sup>168</sup>

Migrants, including migrants in irregular status, may appeal to the Immigration and Protection Tribunal (IPT) to stay on humanitarian grounds.<sup>169</sup> The IPT focuses primarily focus on the personal circumstances of individuals who face deportation, including their immediate family members. For an appeal to succeed, individuals needs to demonstrate that exceptional humanitarian circumstances exist that would make it unjust or unduly harsh to deport them, and that allowing them to remain in New Zealand would not be contrary to the public interest.<sup>170</sup> In practice, it has proved important in such appeals to demonstrate a significant connection with New Zealand. Connections might include connections with the local community, family, other personal relationships, and participation in community life.<sup>171</sup> The tribunal is administered by the Ministry of Justice.

## IMPLEMENTATION IN PRACTICE

New Zealand occupies a relatively isolated geographic position, approximately 1,600 kilometres from Australia and the nearest Pacific Islands. However, it receives many visitors, including significant numbers of migrants. Nearly one in four New Zealanders was born overseas.<sup>172</sup> Migration rates have risen since the 1990s; over 120 countries are represented in the migrant population. In March 2019, just under 495,000 people held migrant visas; most came from the United Kingdom, China, India, Australia and South Africa.<sup>173</sup> Data on migrants in irregular situations are not easily available, but one recent report noted the presence of some 13-14,000 undocumented Tuvaluan migrants alone.<sup>174</sup> New Zealand authorities have indicated that most of the migrants who are granted residence remain in the country, and believe this 'retention rate' has been slowly increasing.<sup>175</sup>

Migrants with permanent visas have access to education (including free public education and fee subsidies and student loans at tertiary level) and to social welfare.<sup>176</sup> Migrants on temporary visas or permits, including their family members, are not eligible to receive social security benefits; this rule creates hardship and vulnerability for some individuals.

Under Section 19 of the Prostitution Reform Act, migrants who are granted the right to work under the terms of their visas are prohibited from engaging in sex work.<sup>177</sup> The Committee on the Elimination of Discrimination Against Women has expressed concern that migrant women engaged in prostitution may be exposed to exploitation due to this ban, which prevents migrants from reporting abuse for fear of deportation.<sup>178</sup>

Victims of trafficking must be certified by New Zealand Police to qualify for any of the visas for trafficked persons. It has been noted that this rule could restrict use of pathways for trafficked persons.

Immigration New Zealand's 'Operational Manual' (available online) provides guidance for people who want to come to New Zealand permanently or temporarily, including on how New Zealand determines claims for refugee status. It describes the criteria that applicants need to meet, the evidence they must produce to show they meet the criteria, and how Immigration New Zealand assesses and verifies applications. It is regularly updated to reflect changes in policy.<sup>179</sup> Under Section 6 of the Immigration Advisers Licensing Act (2007), anyone who provides immigration advice with respect to New Zealand must be licensed; licences must be renewed annually.

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

The New Zealand government operated a COVID-19 elimination strategy from March 2020 to December 2021. Travel into and out of the country was drastically reduced, international visitors were banned, lockdowns were imposed, arrivals faced self-isolation and quarantine.<sup>180</sup> Exceptions to the entry ban included temporary visa holders and their spouses and children. Rare cases of compassionate entry were allowed. In September 2021 the government created the 2021 Resident Visa, a one-off, simplified pathway to residence for around 165,000 migrants currently in New Zealand. The visa was available to migrants who already held work visas in various sectors relevant to pandemic recovery, including healthcare, and included migrants' family members.<sup>181</sup>

The New Zealand Government's Epidemic Management Notice relating to immigration matters took effect on 2 April 2020. It provided that work, student, visitor, limited or interim visas that expired on or before 9 July 2020 would be extended to 25 September 2020. The Notice applied only to holders of temporary entry class visas who were in New Zealand when the Notice was issued and whose visas would have expired within 14 days of expiry of the original Epidemic Management Notice.<sup>182</sup> People whose visa expired before 1 April 2020 were in irregular status as the COVID-19 response started; they needed either to leave the country immediately or to request a special temporary or resident visa under Section 61 of the Immigration Act 2009. These were only granted in some cases. From 5 October 2020, Australian citizens, permanent residents, and people from visa-waiver countries could request to travel to New Zealand, provided they could prove they were the partner of a New Zealand citizen or resident.

New Zealand Immigration provided visa, work, and welfare information to migrants or refugees in New Zealand during the pandemic.<sup>183</sup> The Government adapted visa processes for migrants whose visas were about to expire and who were unable to leave New Zealand, and also relaxed visa conditions for temporary migrant workers employed in essential services, to support those services during the COVID-19 response.<sup>184</sup> Additionally, public hospital services remained free during the pandemic for anyone who was suspected to have COVID-19. This included all holders of visitor and temporary visas, who would normally not be eligible to obtain free or subsidized health and disability services in New Zealand.

A new COVID-19 Short-term Visitor Visa was made available to individuals who were genuinely unable to leave New Zealand, due to the impact of the pandemic. It was valid for two months. Holders of the visa were permitted to study but were not permitted to work.<sup>185</sup> Supplementary Seasonal Employer (SSE) work visas were extended for six months in June 2021; the extended SSE visas allowed migrants to work in any sector. Maximum stay limits were removed for all Recognized Seasonal Employer (RSE) workers, meaning that RSE workers were able to apply for further RSE Limited Visas.<sup>186</sup>

## 4. PAPUA NEW GUINEA



### LEGISLATION

The Constitution of the Independent State of Papua New Guinea (1975) guarantees to everyone the right to life (Section 35) and freedom from inhuman treatment, including torture (Section 36). It grants every person the right to full protection of the law, and states that this right is to be fully available, especially to persons in custody or charged with offences (Section 37). Certain rights are held only by citizens, including the right to equality (Section 55), and freedom of information (Section 51); and most of the rights articulated in the Constitution are qualified.<sup>187</sup> The Migration Act (1978) further qualifies some Constitutional protections: it regulates or restricts rights in regard to the public interest, public order and public welfare, specifically, freedom from arbitrary search and entry (Section 44), the right to privacy (Section 49), and the right to liberty of the person (Section 42).<sup>188</sup>

In 1997, the government undertook in principle to establish a human rights commission for Papua New Guinea, to be aligned with the minimum standards set by the Paris Principles. A draft organic law for the establishment of a human rights commission was prepared in 2008. However, in 2021 the government was still consulting on the bill, declaring that it lacked the resources to establish and operationalize its functions.<sup>189</sup>

The Migration Act (1978, with amendments) and the Migration Regulation (1979) regulate migration into Papua New Guinea. They set out the procedures for and conditions of entry into the country, and the procedures for dealing with persons whose status is irregular. The Migration Act (1978) prohibits persons without an entry permit from entering Papua New Guinea, unless they qualify to enter under an exemption granted by the Minister for Immigration and Border Security (Sections 3, 20). Entry or stay without a permit or exemption results in removal with possible detention beforehand (Sections 7, 10, 12, 13, 21). The Minister may vary or revoke a removal order (Section 12(3)) but the Minister's decisions on entry and stay are not open to review or challenge in any court on any ground (Section 19(2)).

The Constitution of Papua New Guinea (1975) provides pathways to citizenship by descent or naturalisation.<sup>190</sup> Citizenship by descent is open to those who were born in the country, who have one parent who was or is a citizen, or have one parent who would have been entitled to become a citizen if they had survived to Independence Day (16 September 1975).<sup>191</sup> Birth registration and protection of child rights are regulated by the Civil Registration Act (1963) and the Family Protection Act (2013).

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Section 20 of the Migration Act (1978) empowers the Minister to exempt absolutely or conditionally a person or a class or description of persons from all or any of the provisions of the Act.

A Special Exemption visa may be granted to migrants for a range of reasons, including to migrants who seek entry in the context of a natural or national disaster.<sup>192</sup>

Papua New Guinea offers visas to migrants who wish to study at a recognized educational institution in the country.<sup>193</sup> Migrants who wish to undertake workplace-based training, in order to upgrade or develop their skills, can apply for an Occupational Trainee visa.<sup>194</sup>

### 2. PROTECTION FOR TRAFFICKED PERSONS

Papua New Guinea does not have a specific anti-trafficking law. However, the Criminal Code (Amendment) Act (2013) criminalizes trafficking in persons. Section 208F of the Act grants immunity from prosecution to trafficked persons for any criminal offence, including prostitution, that is a direct consequence of trafficking. Section 208G addresses assistance to and protection of trafficked persons. It authorizes the Minister to take all appropriate measures in favour of the trafficked person. Measures may include medical, psychological and material assistance for migrants who have been trafficked, as well as repatriation or ongoing stay in Papua New Guinea on humanitarian grounds.

Following passage of the amended Act, the country formed a National Human Trafficking Committee to strengthen its anti-trafficking response by promoting cooperative efforts, information sharing, and partnership between concerned stakeholders. This initiative culminated in the development of a PNG Human Trafficking National Action Plan 2015-2020 and associated Standard Operating Procedures (SOPs) that contain guidelines on victim identification, referral procedures, and a protection mechanism.<sup>195</sup>

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Individuals need to have lived in Papua New Guinea for a minimum of five years in regular status before they can apply for permanent residency. They may qualify under several categories.

The spouse of a Papua New Guinea citizen may apply for citizenship if the relationship has lasted for at least five years.<sup>196</sup> The spouse must be over 18 years of age and cannot be the same sex as the applicant. The couple must provide documentary evidence that they are legally married. Any dependent children (under 18 years of age) of the applicant need to be included in the initial application; they may be granted a dependent entry permit, but only for the purpose of residing in Papua New Guinea with the substantive Resident (Long Term) Entry Permit holder. Dependents are prohibited from taking work, but the spouse may work in a family-run business.<sup>197</sup> There are other requirements. Applicants must have knowledge of English or a local language; must be of good character and good standing in the community; must provide certified police clearances from all countries in which they have resided in the last ten years.<sup>198</sup> The child of a Papua New Guinea citizen, who is aged 19 or more and who is not a Papua New Guinea citizen, may apply for Permanent Residence if they are working in a voluntary capacity at a community or social level.<sup>199</sup>

Amendments to the Constitution (in 2016) and to the Citizenship Act enable certain migrants in Papua New Guinea to seek citizenship or dual citizenship. Migrants may have a pathway to citizenship by naturalization (long term residency) if they have regular status and, before submitting their application, have resided continuously in Papua New Guinea for more than eight years, leaving the country for no longer than 180 days in that period. Applicants may include their biological or legally adopted non-citizen minor children in the application; once the child reaches 18 years of age they can make an independent application for dual citizenship. Spouses would need to submit separate applications.

Migrants who are legally married to a Papua New Guinea citizen may apply for citizenship by marriage. They will need to have resided in the country for at least 12 months in the three years that precede the application. They cannot include dependent children in the application. Individuals who do not wish to seek dual citizenship will be required to renounce all other citizenships as part of the Papua New Guinea citizenship ceremony. Once citizenship is approved, the rights of Papua New Guinea citizens who hold dual citizenship are subject to limitations under the Constitution: dual citizens do not have the right to vote in elections, to hold public office, or to acquire freehold land; their freedom of information rights are also restricted (Sections 50, 51, and 53).

### 4. PROTECTION OF REFUGEES

The national legislative framework governing asylum in PNG is set out in the Migration Act (1980) and the Migration Regulation (1979). Under Section 15A of the Migration Act (1978),<sup>200</sup> the Minister may determine that a non-citizen is a refugee.

Officers of the Immigration and Citizenship Authority determine refugee status in Papua New Guinea.<sup>201</sup> Individuals can appeal against negative decisions before an independent panel. Under the Migration Act, the Minister for Immigration and Border Security makes the final determination of a claimant's refugee status. While the above procedures permit negative first instance decisions to be reviewed on merit, once the Minister has endorsed it, a decision cannot be reopened for further review; this means that significant subsequent changes in the individual's personal circumstances cannot be assessed.<sup>202</sup>

### 5. PROTECTION FROM STATELESSNESS

Papua New Guinea has no statelessness determination procedure and no provisions in its immigration law grant legal residence or provide other rights to stateless persons.<sup>203</sup> Papua New Guinea's Civil Registration Act (1963) and the Civil Registration (Amendment) Act (2014) contain some safeguards to prevent children from becoming stateless, including in the context of migration; the country has established a national register of births.

## PROCEDURES

The Papua New Guinea Immigration and Citizenship Authority is responsible for managing Papua New Guinea's borders and the movement of people into and out of the country.

Special Exemption visas fall under the ministerial discretion provision of the Migration Act. Eligibility requirements vary according to the applicant's circumstances, including the purpose and period of stay. The eligibility requirements for migrants who seek to enter Papua New Guinea to study or for workplace training also vary according to their circumstances. In some cases, visa holders are able to extend their stay in Papua New Guinea without leaving the country.

Citizenship applicants must meet good character criteria, and must provide character references from two Papua New Guinea citizens who have known the applicant for at least two years and can attest to their good character and suitability for citizenship. Applicants must also provide police clearance certificates from all countries in which they have resided for more than six months in the last 10 years.<sup>204</sup> Migrants who apply for entry or stay permits on the basis of their relationship with a Papua New Guinea citizen (as a spouse or the child of a citizen) must provide documentary evidence of that relationship.<sup>205</sup>

A migrant in irregular status is liable to be removed by Papua New Guinea. The Migration Act (1978) requires the authorities to issue a removal order to such migrants; the order must indicate the date by which they should leave the country or be removed. They may be held in pre-removal detention. The Minister for Immigration and Border Security may vary or revoke a removal order.<sup>206</sup>

## IMPLEMENTATION IN PRACTICE

Migration is increasingly relevant to Papua New Guinea. Increasing numbers of migrants, including migrant workers, arrive in the country in search of opportunities, notably in the mining and natural gas industry and in related construction and retail sectors.<sup>207</sup> The country has some 8.5 million citizens. In March 2017, the Papua New Guinea National Statistics Office reported that 48,919 migrants had arrived for purposes of employment, family reunion, and study. The majority came from Australia, the Philippines, and China.<sup>208</sup>

Between 6 August 2013 and the end of 2021, the government of Papua New Guinea had an agreement with the government of Australia for the forcible transfer of asylum seekers to Papua New Guinea under a Regional Resettlement Arrangement (RRA).<sup>209</sup> Following a decision by the Supreme Court in 2016, the regional resettlement centre on Manus Island was permanently closed in 2017. In March 2021, about 130 individuals remained in Papua New Guinea. In addition, Papua New Guinea hosts approximately 10,000 Indonesian (Papuan) refugees, many of whom have been in the country for more than three decades, and a small population of refugees who arrived independently.

The United Nations has noted that Papua New Guinea has not codified into domestic law its obligation to prevent the refoulement of migrants under international human rights law standards, including the International Covenant on Civil and Political Rights. This creates a gap in the protection of migrants in vulnerable situations.<sup>210</sup> The fact that entry or stay decisions by the Minister for Immigration and Border Security are not open to review or challenge also raises procedural safeguard concerns for migrants.<sup>211</sup>

Reports have noted that, although legislation permits victims of trafficking to remain in Papua New Guinea, this provision has not yet been used to give protection in practice. Further, the Act does not enable victims to seek compensation through civil suits. Reports have also noted that the authorities need urgently to finalize and implement an updated national trafficking action plan and standard operating procedures (SOPs).<sup>212</sup>

A further issue concerns the children of migrant and refugee men in relationships with Papua New Guinea nationals: some have faced challenges in registering their marriages and births. It is believed that more than forty children of men who were subject to offshore processing may face statelessness.<sup>213</sup> More broadly, most births in Papua New Guinea are not reported in the civil registration system; between 2015 and 2019, only 176,524 new births were recorded in the civil registry, less than 15% of estimated births.<sup>214</sup>

Refugees who were transferred to Papua New Guinea under the Memorandum of Agreement with Australia and who do not agree to be transferred to Nauru by the end of 2021 will have their refugee claims assessed by Papua New Guinea. In principle, those who remain may be able to obtain permanent settlement through pathways to citizenship. Those who are able to do this would have access to long-term support, settlement packages, and family reunification. Concerns have been raised, however, about the absence of clear information or policy on this question.<sup>215</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

On 6 May 2020, in light of the pandemic, the State of Emergency Office of the Migration Controller of Papua New Guinea published a notice on penalty exemptions. It informed holders of short-term entry permits that were nearing expiration or had expired that they would not have to pay a penalty fee or pay to extend their permits during the State of Emergency period. Overseas students and holders of temporary resident visas were expected to apply and pay an extension, but were exempted from paying penalty fees if their visas expired during the State of Emergency period. Non-citizens who were temporary residents and did not meet the change of visa status requirements were not required, during the state of emergency, to exit the country before applying for a new visa.<sup>216</sup>

In a statement on 9 April 2021, the Chief Migration Officer urged non-citizens to report immediately in person to the Immigration and Citizenship Authority if they had been unable to leave Papua New Guinea because of the pandemic and the closure of international borders, and had therefore overstayed their visa and were in irregular status. Announcing a two month grace period, the Chief Migration Officer stated that the authorities would assist affected individuals by making it possible to apply for a new visa without leaving the country. The Immigration and Citizenship Authority offered this incentive to encourage migrants in irregular status, and those whose visa was nearing expiration, to come forward voluntarily to sort out their situation.<sup>217</sup>

At the end of 2021, border restrictions remained in place and travellers or migrants were not permitted to enter Papua New Guinea unless they had received written exemption from the National Pandemic Controller or a delegated official.



## 5. TUVALU



### LEGISLATION

The 2008 Constitution of Tuvalu outlines in its principles that the life and the laws of Tuvalu should be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them.<sup>218</sup> The Constitution's Bill of Rights acknowledges fundamental human rights and freedom, including the right not to be deprived of life, and the right to personal liberty, security and protection of the law.<sup>219</sup>

Tuvalu does not have a national human rights institution. However, in 2017 a Cabinet Meeting endorsed tabling in Parliament the National Human Rights Institution Bill 2017 and the Leadership (Amendment) Code 2017. The NHRI Act 2017 was passed during the second reading of the third sitting of Parliament in December 2017.<sup>220</sup>

Tuvalu's Te Kakeega III - National Strategy for Sustainable Development-2016-2020 (TK III), lays out the government's development agenda. In 2016, the Tuvalu government published the Te Kakeega III (TK III) Tuvalu Human Rights National Action Plan (NAP) 2016-2020, the first of its kind in the Pacific. Under Goal 10 of the National Action Plan, Section 10.7 outlines the goal to "Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".<sup>221</sup> Under the NAP, Tuvalu has committed to work towards ratification of core human rights treaties and to hold a parliamentary discussion on ratification inter alia of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.<sup>222</sup>

The Immigration Act (2008) constitutes the statutory basis for migration governance in the country.<sup>223</sup> The Immigration Regulations of 2014, under section 18 of the Immigration Act, set out the requirements and conditions for entry and residence in Tuvalu, and outline the application process for entry and residence permits. The Ministry for Foreign Affairs, Trade, Tourism, Environment and Labour has policy responsibility for migration, while the Tuvalu Customs Revenue and Border Protection Service is charged with its enactment.

Tuvalu's Te Kaniva: Tuvalu Climate Change Policy 2012–2021 policy highlights its status as a nation, its cultural identity and the need to build its capacity to ensure a safe, resilient and prosperous future. Protection of sovereignty is highlighted but so is the need for migration and resettlement, both internal and external, so that Tuvaluans may have a safe place to live. The policy notes strategies for responding to anticipated migration or resettlement, which include securing places to live, enhancing resilience and preparedness, and working on an international framework for the cross-border movement of its affected population, though it does not specify how these measures are to be implemented or achieved.<sup>224</sup>

## GROUNDS AND CONTENT OF PROTECTIVE PATHWAYS

### 1. HUMAN RIGHTS AND HUMANITARIAN GROUNDS OF ENTRY AND STAY

Under Section 7 of the Immigration Act the Minister for Immigration is entitled to authorize the entry without a prior permit of a number of categories of migrants, including a wide-ranging residual category of "any other person or class or group of persons whom the Minister may by order specify". Further, Section 11 of the Act provides the Principal Immigration Officer, acting under the authority of the Minister, with "complete discretion" to grant or extend permits to migrants as they deem necessary.

The Act also makes available (through the discretion of the Principal Immigration Officer) an interim permit to migrants as well as their family members and dependants who have either been denied entry or are under deportation orders and are intending to lodge an appeal with the Minister. The interim permit entitles the migrant to enter and stay in Tuvalu or to remain in Tuvalu pending the determination of their appeal (Section 16(2)).

### 2. PROTECTION FOR TRAFFICKED PERSONS

Tuvalu has legislation on trafficking in persons and human smuggling under the Counter Terrorism and Transnational Organised Crime Act of 2009. In Part 8, Section 67 of this Act, '(1) A person must not engage in trafficking in a person or be involved in the arranging of trafficking in a person, knowing that the person's entry into Tuvalu or any other state

is or was arranged by specified means. (2) Any person who breaches subsection (1) commits an offence and is liable on conviction to an imprisonment term not exceeding 25 years.<sup>225</sup> However, to date Tuvalu lacks a comprehensive anti-trafficking or plan of action.

### 3. FAMILY UNIFICATION AND CHILD PROTECTION PATHWAYS

Family reunification permits are available according to the Immigration Regulations of 2014. Under Section 3 in the Regulations, the Principal Immigration Officer may issue a permit to enter and reside under section 8 of the Act to a person entering Tuvalu for (f) a family re-union or family support purpose or (g) the purpose of accompanying a person entering Tuvalu.<sup>226</sup> Permits to enter and reside in Tuvalu are granted for one year, and they can be extended. There is a path to citizenship, in which immigrants are able to become citizens after seven years of residency according to the Citizenship Act of 1979, revised in 2008.

Section 7 of the Immigration Act includes in the list of migrants who are not required to obtain a prior permit to enter a student of any age both of whose parents are or whose only parent is resident in Tuvalu, who is re-entering Tuvalu on vacation from or on completion of studies at a university, university college, school or other educational establishment.

The Education (Compulsory Education) Order from 1984, revised in 2008, provides that all children between the ages of 7–15 years resident in Tuvalu are entitled to primary and secondary education. This applies equally to migrant children, with the exception of children of migrants who are employed by the Government or by a foreign institution.

### 4. PROTECTION OF REFUGEES

Tuvalu does not have a national asylum law, regulations or an operational framework for refugee status determination. Tuvalu's 2008 Immigration Act does not mention asylum seekers or refugees. However, it ratified both the 1951 Convention relating to the Status of Refugees and 1967 Protocol in 1986.

### 5. PROTECTION FROM STATELESSNESS

Tuvalu has put in place legislative provisions to prevent statelessness and grant protection to stateless persons. This includes, section 8 of Tuvalu's Citizenship Act and section 43 of the Constitution. Pursuant to regulation 7(3) of the Passports Ordinance 1979, a "stateless person" outside Tuvalu can obtain a Tuvalu passport for the sole purpose of travel to Tuvalu if he or she can show a 'connection with Tuvalu'.

Tuvalu's Constitution (Part III) provides that children born in Tuvalu can only acquire nationality if one of their parents is also Tuvaluan.

## PROCEDURES

Visas to Tuvalu are only issued upon arrival for a small variable fee and for a maximum stay of 30 days.<sup>227</sup> There is no website clearly outlining visa options. Neither is there a formal system for applying for specific visa types prior to arrival. Visas can be obtained only on arrival for visitors from countries with a reciprocity agreement. Tuvalu has no comprehensive border information management system.

The Immigration Regulations of 2014, under section 18 of the Immigration Act, set out the requirements and conditions for entry and residence in Tuvalu, and outline the application process for entry and residence permits.<sup>228</sup>

The Principal Immigration Officer may issue a permit in the prescribed form authorising any person to enter and reside in Tuvalu, upon such conditions as to the security to be furnished, the profession or occupation which such person may exercise or engage in and the employer or employers by whom he may be employed within Tuvalu. The Principal Immigration Officer may at his discretion extend a permit issued, in accordance with directions issued by the Minister.<sup>229</sup> The Minister may make an order directing that any person who has been convicted of the offence of being unlawfully present in Tuvalu shall, on the expiry of 14 days or such longer period as the Minister may specify from the date of service of the order on such person or on the completion of any sentence of imprisonment which he may be serving, be removed from and remain out of Tuvalu, either indefinitely or for a period to be specified in the order.<sup>230</sup>

Any person aggrieved by a decision of an immigration officer under this Act may, within 14 days of such decision, or 28 days if the person aggrieved is resident outside Tuvalu, in writing record his reasons for being so aggrieved and require the matter to be referred to the Minister and the Minister may confirm, vary or overrule the decision of the immigration officer. A person provided with a deportation order may bring an appeal before the Minister of Immigration.

## IMPLEMENTATION IN PRACTICE

Tuvalu is the fourth smallest country in the world in terms of land area (26 km<sup>2</sup>), with a population of 12,066 in 2022. It is a group of six atolls and three reef islands scattered over a vast area of the Pacific, and its Exclusive Economic Zone covers almost a million square kilometres of the ocean. Tuvalu has an extensive history of outward labour migration dating back to the 1800s as one conduit for increasing development in the country. It is thus regarded primarily as a country of emigration as Tuvaluans leave in search of opportunity, education, health interventions and as a result of the adverse impacts of climate change and environmental degradation. A growing population and increasing urbanisation, a large youth population, and relatively limited options for domestic wage employment, as well as the threat of environmental degradation and global changes in the seafaring industry are important drivers of movement.<sup>231</sup> Nevertheless, the country hosts a small population of migrants; according to official statistics the number of international migrants in 2020 amounted to 239.<sup>232</sup>

Tuvalu is recognised as one of the most environmentally vulnerable states in the region.<sup>233</sup> A large number of Tuvalu's population has left their home to relocate to larger islands and neighbouring New Zealand. Rising sea levels in the Pacific are leading to a gradual loss of territory, potable water scarcity and serious impacts on traditional livelihood activities with a further 15-25cm of sea level rise expected by 2050. In 2016, Tuvalu proposed a UN resolution to create a legal framework for people displaced by climate change, and is a member of the Climate Vulnerable Forum which is an international partnership of 48 climate vulnerable countries.<sup>234</sup>

## MIGRATION PATHWAYS IN THE CONTEXT OF COVID-19 RESPONSE

Tuvalu has had no reported cases of COVID-19 due in large part to the Government of Tuvalu's decision to close its borders and declare a state of emergency in March 2020. The Government advised voluntary population relocation from the capital island, Funafuti, to either Funafuti's rural islets or the more distant outer islands as Funafuti is the location of the only international port and airport, and accordingly the most likely site of coronavirus entry into the country.<sup>235</sup>

As of 31 December 2021, the borders to Tuvalu remain closed to all non-nationals and residents. Most commercial flights to and from Tuvalu were suspended, with the exception of repatriation flights operating to return small numbers of Tuvaluan citizens.<sup>236</sup> Travelers from a high-risk country must obtain medical clearance from Tuvalu's government to enter the country. The Prime Minister is authorised to grant exemption for entry on the following grounds; provision of medical supplies, provision of food supplies, humanitarian assistance, distribution of reliefs, shipment of cargoes, fuel supply; or any other grounds in the interest of the public.

## Endnotes

- 1 Other protected individual rights are: the right to vote (Section 41); protection against acquisition of property on unjust terms (Section 51(xxxi)); freedom of religion (Section 116); and prohibition of discrimination on the basis of State of residency (Section 117). See Australian Human Rights Commission, 'How are human rights protected in Australian law?', at <https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>.
- 2 Migration Act (1958), Compilation No. 152 of 1 September 2021, at <https://www.legislation.gov.au/Details/C2021C00357>.
- 3 Migration Regulations (1994), Compilation No. 218 of 26 June 2021, at <https://www.legislation.gov.au/Details/F2021C00613>.
- 4 Migration Act (1958), Section 4.
- 5 Migration Act (1958), Section 196. An amendment to the Act affirms that, as a principle, children will only be detained as a measure of last resort, with the exception of residence determination (Section 4AA).
- 6 Migration Act (1958), Division 3 (Visas for non-citizens); Migration Regulations (1994), Part 2.
- 7 Migration Act (1958), Section 36(2)(aa); Department of Home Affairs, Refugee and Humanitarian programme, at <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program/seek-protection-in-australia/australia-protection-obligations>. See also, Administrative Appeals Tribunals, 'Guide to Refugee Law in Australia', at [https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20law/Chapter10\\_ComplementaryProtection.pdf](https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20law/Chapter10_ComplementaryProtection.pdf).
- 8 Administrative Appeals Tribunals, 'Guide to Refugee Law in Australia', Chapter 10: 'Complementary Protection', p. 19-23, at [https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20law/Chapter10\\_ComplementaryProtection.pdf](https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20law/Chapter10_ComplementaryProtection.pdf).
- 9 'Substantial discrimination' involves a lower threshold than 'persecution'. A 2011 report by the Australian Parliament stated that it could involve: arbitrary interference with the applicant's privacy, family, home or correspondence; deprivation of means of earning a livelihood; denial of work commensurate with training and qualifications, and/or payment of unreasonably low wages; relegation to substandard dwellings; exclusion from the right to education; enforced social and civil inactivity; removal of citizenship rights; denial of a passport; or constant surveillance or pressure to become an informer. See Parliament of Australia, 'Seeking asylum: Australia's humanitarian program', Updated 21 January 2011, at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/1011/SeekingAsylum#](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/SeekingAsylum#).
- 10 Department of Home Affairs, 'Domestic and family violence and your visa', at: <https://immi.homeaffairs.gov.au/visas/domestic-family-violence-and-your-visa/how-we-can-help-you>. See also, Special Rapporteur on violence against women, its causes and consequences, 'Report of her mission to Australia', A/HRC/38/47/Add.1, 17 April 2018, paras.71-2, 95(a).
- 11 Special Rapporteur on the human rights of migrants, 'Report of his mission to Australia and the regional processing centres in Nauru', 24 April 2017, A/HRC/35/25/Add.3, para. 32.
- 12 Department of Home Affairs, 'Genuine temporary entrant requirement', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/genuine-temporary-entrant>.
- 13 Department of Home Affairs, 'Subclass 590: Student Guardian visa', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-590>.
- 14 Department of Home Affairs, 'Subclass 602: Medical Treatment', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/medical-treatment-602>.
- 15 Department of Home Affairs, 'Bridging Visa A (BVA)', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/bridging-visa-a-010> and information received from the Government of Australia.
- 16 National Action Plan to Combat Modern Slavery 2020-25, at <https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>.
- 17 Department of Social Services, 'Support for Trafficked People Program', at <https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>.
- 18 Department of Social Services, 'Support for Trafficked People Program', at: <https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>. According to the government, over five hundred victims of human trafficking and slavery have been referred to the Support for Trafficked People Program (STPP) since it commenced in 2004. 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Australia', 28 December 2020, A/HRC/WG.6/37/AUS/1, para 51
- 19 The Committee on the Elimination of Discrimination against Women has recommended that all victims of trafficking should have access to the human trafficking visa framework, whether or not they cooperate with prosecution authorities. 'Universal Periodic Review, Compilation on Australia: Report of the Office of the United Nations High Commissioner for Human Rights', 13 November 2020, A/HRC/WG.6/37/AUS/2, para 39.
- 20 Information received from the Government of Australia.
- 21 Department of Home Affairs, 'Bringing a partner or family', at <https://immi.homeaffairs.gov.au/visas/bringing-someone/bringing-partner-or-family>. On citizenship by descent in such cases, see Australian Citizenship Act (2007), Section 16(2)(a).
- 22 Department of Home Affairs, 'Bringing a partner or family', at <https://immi.homeaffairs.gov.au/visas/bringing-someone/bringing-partner-or-family>. See also, Department of Home Affairs, 'Family and partner visas', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing>.
- 23 Information received from the Government of Australia.
- 24 Ibid.
- 25 Australian Citizenship Act (2007), Section 12(1).
- 26 Ibid, Section 16.
- 27 Ibid, Section 16(2)(c) and 17(2); and for stateless persons born in Australia, Section 21(8).
- 28 Good character is not defined under the Citizenship Act. But see, Australia National Audit Office (2011), 'Administering the Character Requirements of the Australian Citizenship Act 2007', at <https://www.anao.gov.au/work/performance-audit/administering-character-requirements-australian-citizenship-act-2007>.
- 29 Parliament of Australia, 'Australian Citizenship Amendment (Citizenship Cessation) Bill 2020', at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6409](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6409).

- 30 UNHCR (2020), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 37th Session Australia'. See also, Australian Human Rights Commission (2019), 'Submission to the Parliamentary Joint Committee on Intelligence and Security with respect to its inquiry into the Australian Citizenship Amendment (Citizenship Cessation) Bill', at <https://humanrights.gov.au/our-work/legal/submission/australian-citizenship-amendment-citizenship-cessation-bill-2019-cth>. The government has noted that the provisions provide appeal avenues, including that the Minister must revoke a cessation determination if the person was not a national or citizen of any other country at the time of the decision, and citizenship is taken never to have ceased if a court finds that the person was not a national or citizen of any other country at time of the determination. Information received from the Government of Australia.
- 31 UNHCR (2020), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 37th Session Australia', July 2020, pgs. 8-9.
- 32 Department of Home Affairs, 'Operation Sovereign Borders (OSB)', at <https://osb.homeaffairs.gov.au>.
- 33 These vary but are likely to include a medical examination, chest x-ray, and HIV test. See, Department of Home Affairs, 'Meeting our health requirement', at <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/health>.
- 34 Migration Act (1958), Section 501. See also, Department of Home Affairs, 'Character requirements for visas', at <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character>.
- 35 Department of Home Affairs, 'Meeting our requirements: Australian values', at <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values>.
- 36 Migration Act (1958), Section 36 (2C).
- 37 Australian Human Rights Commission, 'Can a person seek review of a decision under section 501 to refuse or cancel a visa?', at <https://humanrights.gov.au/our-work/5-can-person-see-review-decision-under-section-501-refuse-or-cancel-visa>. See also, Federal Circuit and Family Court of Australia, 'Review of Migration Decisions by the Federal Circuit and Family Court of Australia', at <https://www.fcfcfa.gov.au/migration-law/pubs/migration-review> and information received from the Government of Australia.
- 38 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Australia', 28 December 2020, A/HRC/WG.6/37/AUS/1, para 121.
- 39 Australian Bureau of Statistics (2021), 'Migration, Australia', at <https://www.abs.gov.au/statistics/people/population/migration-australia/latest-release>.
- 40 This figure (for July 2020) is quoted in paragraph 25 of: Peter McMullin Centre on Statelessness (PMCS), Refugee Advice & Casework Service (RACS), Statelessness Network Asia Pacific (SNAP), and Institute on Statelessness and Inclusion (ISI) (2020), 'Joint Submission to the Human Rights Council at the 37th Session of the Universal Periodic Review, 09 July 2020'.
- 41 Australian Council of Trade Unions, Senate Select Committee report, para 5.64.
- 42 The special eligibility visa is for New Zealand citizens. See Department of Home Affairs, 'Migration Program planning levels', at <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels>.
- 43 In 2021 a Senate Select Committee on Temporary Migration was set up to investigate the impact temporary migration has on the Australian economy, wages and jobs, social cohesion and work place rights and conditions, which recommended that a comprehensive review be undertaken of Australia's visa system with the objective of achieving greater simplification and improving usability. Report by the Senate Select Committee on Temporary Migration (2021), para. 2.7, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf).
- 44 Ibid, paragraph 2.146 and Recommendation 7.10.
- 45 Peter McMullin Centre on Statelessness (PMCS), Refugee Advice & Casework Service (RACS), Statelessness Network Asia Pacific (SNAP), and Institute on Statelessness and Inclusion (ISI) (2020), 'Joint Submission to the Human Rights Council at the 37th Session of the Universal Periodic Review'.
- 46 Report by the Senate Select Committee on Temporary Migration (2021), para. 5.6, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf). The government has noted that migrants may be eligible to apply for the SHEV, which while providing temporary protection, also provides conditional eligibility to other more permanent visas. Information received from the Government of Australia.
- 47 Special Rapporteur on the human rights of migrants (2017), 'Report of his mission to Australia and the regional processing centres in Nauru', A/HRC/35/25/Add.3, para. 49.
- 48 Report by the Senate Select Committee on Temporary Migration (2021), para. 4.67, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf).
- 49 Special Rapporteur on the human rights of migrants (2017), 'Report on his mission to Australia and the regional processing centres in Nauru', A/HRC/35/25/Add.3, paras. 39-40. The government notes the existence of protections to ensure that victims would not be prosecuted for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to human trafficking, slavery and slavery-like practices, including through the Commonwealth Director of Public Prosecutions' 'Prosecution Policy of the Commonwealth' and the availability of certain defences, such as duress. Information received from the Government of Australia.
- 50 Special Rapporteur on trafficking in persons, especially women and children (2012), 'Report of the Mission to Australia', A/HRC/20/18/Add.1, paras. 53, 63, 82.
- 51 Information received from the Government of Australia.
- 52 Immigration (Guardianship of Children) Act 1946, sections 6(1) and 7(2). The Act does not reference the UN Convention on the Rights of the Child or its "best interests of the child" legal requirement.
- 53 Department of Home Affairs, 'Getting help from the Immigration Advice and Application Assistance Scheme (IAAAS)', at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas>.
- 54 Refugee Council of Australia, 'Status Resolution Support Services (SRSS)', at <https://www.refugeecouncil.org.au/srss/>.
- 55 Human Rights Committee, 'Concluding observations on the sixth periodic report of Australia', CCPR/C/AUS/CO/6, 1 December 2017, para. 33(c).

- 56 Australian Government (2021), 'Submission to the Special Rapporteur on the Human Rights of Migrants (pursuant to resolution 43/6 of the Human Rights Council)'. See also, Department of Home Affairs, 'COVID-19 and the border', at <https://covid19.homeaffairs.gov.au>.
- 57 See <https://travelbans.org/>.
- 58 Migrant workers who held temporary visas and who worked in, or intended to work in, tourism and hospitality, but whose COVID-19 Pandemic Event visa applications were not finalized at 14 May 2021, were allowed to extend their stay by 12 months using the 408 COVID-19 visa.
- 59 Report by the Senate Select Committee on Temporary Migration (2021), para. 2.92, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf).
- 60 Department of Home Affairs, 'COVID-19 and the border: COVID-19 visa concessions', at <https://covid19.homeaffairs.gov.au/covid-19-visa-concessions>.
- 61 Department of Home Affairs, 'COVID-19 and the border: COVID-19 visa concessions', at <https://covid19.homeaffairs.gov.au/covid-19-visa-concessions>. See also, Australian Government (2021), 'Submission to the Special Rapporteur on the Human Rights of Migrants (pursuant to resolution 43/6 of the Human Rights Council)'.
- 62 Department of Education, Skills and Employment (2020), 'New visa to support Australian farmers', at <https://ministers.dese.gov.au/cash/new-visa-support-australian-farmers>.
- 63 RNZ, 'Over 300 Fijians secure work in Australia amid Covid-19', RNZ, 24 November 2020, at <https://www.rnz.co.nz/international/pacific-news/431326/over-300-fijians-secure-work-in-australia-amid-covid-19>.
- 64 Report by the Senate Select Committee on Temporary Migration (2021), para. 5.42, at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf).
- 65 Constitution of the Republic of Fiji (2013), Section 7, at <https://www.laws.gov.fj/Home/information/constitutionoftherepublicoffiji>. All quotes are from the preamble.
- 66 *Ibid.*, Sections 9, 11, 26.
- 67 *Ibid.*, Section 21(5).
- 68 Human rights mechanisms have expressed concern that this requirement prohibits the Commission from investigating any human rights and discrimination cases relating to the 2006 coup and abrogation of the previous Constitution in 2009, and that in addition the Commission lacks independence, because of the rules that govern nomination and dismissal of members. See Universal Periodic Review of Fiji (third cycle), 'Submission of OHCHR Regional Office for the Pacific Suva, Fiji', para 19. See also, Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the fifth periodic report of Fiji', 14 March 2018, CEDAW/C/FJI/CO/5, paras 19 and 20.
- 69 Immigration Act (2003) (no. 17 of 2003).
- 70 Immigration Regulations (2007).
- 71 Constitution of the Republic of Fiji (2013), Section 5; Passports Act (2002).
- 72 Native Lands Act (1978).
- 73 Immigration Act (2003), Section 8(1)(g).
- 74 Ministry of Economy (2017), '5-Year and 20-Year National Development Plan: Transforming Fiji'.
- 75 Immigration Regulations (2007), Regulations 45 to 47.
- 76 Fijian Immigration Department, 'Special Purpose Permits on Medical Grounds', last updated on 4 January 2017, at <http://www.immigration.gov.fj/special-purpose-permits-on-medical-grounds>.
- 77 See, Fijian Immigration Department, 'Application for a Permit to Reside' (part D).
- 78 Immigration Act (2003), Section 7(2).
- 79 An appeal can only be brought in relation to a "reviewable decision" of the Permanent Secretary. Such decisions include a refusal to extend a permit related to a visit, study or residence. Immigration Act (2003), Section 58.
- 80 Immigration Act (2003), Section 10(1).
- 81 Immigration Act (2003), Section 10(2)(a).
- 82 Fijian Immigration Department, 'Study in Fiji', last updated on 30 October 2020, at <http://www.immigration.gov.fj/travel-options/study-in-fiji>. See also, Fijian Immigration Department, 'Internship/Training Attachment Permit', last updated on 4 January 2017, at <http://www.immigration.gov.fj/index.php/internship-training-attachment-permit>; Fijian Immigration Department, 'Research Permit', last updated on 4 January 2017, at <http://www.immigration.gov.fj/index.php/research-permit>; Fijian Immigration Department, 'Application for Study Permit Checklist', revised October 2021, at <http://www.immigration.gov.fj/images/pdfs/UpdatedChecklists1/APPLICATION%20FOR%20STUDY%20PERMIT.pdf>. See also, IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform.
- 83 Immigration Act (2003), Sections 17-37. (These sections also cover smuggling of migrants.) See also, Crimes Act (2009), Sections 112-117 (and, for slavery-related crimes, Sections 102-110), at <https://www.laws.gov.fj/Acts/DisplayAct/3164>.
- 84 Sections 13(1)(c), 15(10), 44(1).
- 85 The National Action Plan is designed, inter alia, to address recommendations made by the US State Department (2020) in its '2020 Trafficking in Persons Report: Fiji'. One recommendation was to provide a regular pathway for identified migrant victims of trafficking. At <https://www.state.gov/reports/2020-trafficking-in-persons-report/fiji/>.
- 86 Fijian Immigration Department, 'Special Purpose Permit to Reside with a Family Member', last updated on 4 January 2017, at <http://www.immigration.gov.fj/special-purpose-permit-to-reside-with-a-family-member>.
- 87 Immigration Act (2003), Section 9(2)(b). See also, Fijian Immigration Department, 'Co-Extensive Permit', last updated on 4 January 2017, at <http://www.immigration.gov.fj/co-extensive-permit>.
- 88 Immigration regulations (2007), Section 5(1)(a)(i).
- 89 IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform. See also Immigration Act (2003), Section 9(3); Fijian Immigration Department, 'Application for Visa - Checklist', revised October 2021, at <http://www.immigration.gov.fj/images/pdfs/UpdatedChecklists/APPLICATION%20FOR%20A%20VISA%20INTO%20FIJI%20REQUIREMENTS%20CHECKLIST.PDF>.
- 90 IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform. See also, Fijian Immigration Department, 'Application for a Permit to Reside', at [http://www.immigration.gov.fj/images/pdfs/resident\\_permit.pdf](http://www.immigration.gov.fj/images/pdfs/resident_permit.pdf).
- 91 Immigration Act (2003), Section 47.

- 92 Immigration Act (2003), Section 40. See also, IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform.
- 93 Constitution of the Republic of Fiji (2013), Section 5.
- 94 Citizenship of Fiji Decree (2009), Sections 8-10, 19(c). See also, UNHCR (2014), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: the Republic of the Fiji Islands', March 2014.
- 95 Citizenship of Fiji Decree (2009), Section 7, at <https://www.laws.gov.fj/Acts/DisplayAct/3173#>. See also, Fijian Immigration Department, 'Fiji Citizenship', last updated on 24 June 2021, at <http://www.immigration.gov.fj/index.php/travel-requirements/fiji-citizenship>. See also, IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform.
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- 97 Immigration Act (2003), Sections 7, 8. See also, Immigration Regulations, Section 3.
- 98 For a list of visa exempted countries (June 2021), see <http://www.immigration.gov.fj/travel-requirements/visa-exempted-countries>.
- 99 Immigration Act (2003), Section 7(4)
- 100 Ibid, Sections 9(6), 13.
- 101 See checklists at Fijian Immigration Department, 'Application Forms, Publications and Fees', at <http://www.immigration.gov.fj/travel-requirements/forms-pub-fees>; and 'Fiji Citizenship', at <http://www.immigration.gov.fj/index.php/travel-requirements/fiji-citizenship>.
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- 103 Immigration Act (2003), Section 53.
- 104 Government of Fiji (2017), 'Census of Population and Housing', at <https://www.statsfiji.gov.fj/statistics/2007-census-of-population-and-housing.html>.
- 105 IOM (2020), 'Migration in the Republic of Fiji: A Country Profile', at Migration in the Republic of Fiji: A Country Profile 2020 | IOM Publications Platform.
- 106 Ibid, pp. 39 and 101.
- 107 UNHCR (2014), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: the Republic of the Fiji Islands'.
- 108 UN ESCAP (2021), 'Getting everyone in the picture: A snapshot of progress midway through the Asian and Pacific Civil Registration and Vital Statistics Decade', at <https://getinthepicture.org/sites/default/files/resources/CRVS-midterm-FINAL.pdf>.
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- 111 Platform on Disaster Displacement (2021), 'In the same canoe: building the case for a regional harmonisation of approaches to humanitarian entry and stay in "our sea of islands"', p 76.
- 112 Ministry of Commerce, Trade, Tourism and Transport, 'Fiji Entry Conditions', updated on 30 November 2021, at <https://www.mcttt.gov.fj/home/traveltofini/international-travel/>. See also, Blue Lane Initiative, at <https://www.mcttt.gov.fj/covid-19-guidelines/new-quarantine-charges/blue-lane-initiative/>.
- 113 Office of the Governor-General, 'New Zealand's Constitution', at <https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution/constitution>.
- 114 See New Zealand Human Rights Commission, 'Rights of Newcomers', at <https://www.hrc.co.nz/your-rights/your-rights3/>. In line with the International Covenant on Civil and Political Rights, the Bill of Rights limits voting rights to citizens (Section 12); the right to freedom of movement (Section 18) is mostly restricted to citizens and migrants in regular status.
- 115 New Zealand Bill of Rights Act (1990), Sections 9, 24(f).
- 116 Legal Services Act (2011), Section 12.
- 117 Human Rights Act (1993), Section 21(1)(g).
- 118 See Section 392, Immigration Act (2009). The New Zealand Human Rights Commission has called for repeal of this Section. Civil society organizations have also called for the Human Rights Commission's mandate to be amended, to enable it to receive complaints of human rights violations relating to immigration laws, policies and practices. See 'New Zealand's Third Universal Periodic Review: Submission of the New Zealand Human Rights Commission', 12 July 2018. The Committee on the Elimination of Discrimination Against Women has urged New Zealand to repeal this Section and to ensure that the Commission can receive and process complaints from migrants in line with recommendations issued in 2016 by the Global Alliance of National Human Rights Institutions. See, Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of New Zealand', 25 July 2018, CEDAW/C/NZL/CO/8, para. 20.
- 119 Immigration Act (2009, as amended), Sections 14, 20. Australian citizens are exempt from the requirement to hold a visa: see New Zealand Human Rights Commission, 'Human Rights in New Zealand 2010', Chapter 20, 'Rights of Migrants', pp. 324-335.
- 120 Immigration Act (2009, as amended), Sections 130, 131, 164(4). These protections are derived from the Convention Against Torture and the International Covenant on Civil and Political Rights. Specifically, they protect individuals who are at risk of being arbitrarily killed or subjected to cruel, inhuman or degrading treatment or punishment).
- 121 Ibid., Section 131(5).
- 122 For relevant IPT rulings, see AF (Kiribati) [2013] NZIPT 800413 and C (Tuvalu) [2014] NZIPT 800517-520 at [75]. For the Supreme Court decision, see *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. See also the Human Rights Committee, *Teitiota v New Zealand*, CCCPR/C/127/D/2728/2016 (20 January 2020). See also, Platform on Disaster Displacement (2021), 'In the same canoe: building the case for a regional harmonisation of approaches to humanitarian entry and stay in "our sea of islands"', p. 57.

- 123 New Zealand Immigration, 'Operational Manual', Section C5.15: 'Recognition of claimant as refugee or protected person', at <https://www.immigration.govt.nz/opsmanual/#35439.htm>.
- 124 Immigration Act, Sections 209, 210, 216.
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- 127 Immigration Act (2009), Section 177. See also OHCHR-DIA Piper (2018), 'Admission and stay based on human rights and humanitarian grounds. A mapping of national practice', at [https://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_DIA\\_Piper\\_Study.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DIA_Piper_Study.pdf).
- 128 Immigration Act (2009), Sections 4, 81, 82. See also, New Zealand Immigration, 'Information about Limited Visa', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/limited-visa>.
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- 130 New Zealand Immigration, 'Study in New Zealand', at <https://www.immigration.govt.nz/new-zealand-visas/options/study>.
- 131 New Zealand Immigration, 'Information about Pathway Student Visa', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pathway-student-visa>.
- 132 Only 650 and 1,100 visas are offered in each category, and applicants must possess an offer of work in New Zealand in order to register. See, New Zealand Immigration, 'Information about Samoan Quota Resident Visa', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/samoan-quota-scheme-resident-visa>.
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- 136 Operational Manual, 'S4.15: Residence Category for victims of people trafficking', at <https://www.immigration.govt.nz/opsmanual/#41488.htm>. See also, New Zealand Immigration, 'Information about Trafficking Victim Resident Visa', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/visa-factsheet/trafficking-victim-resident-visa>.
- 137 New Zealand Immigration, 'Partnership', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/tools-and-information/support-family/partnership>.
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- 142 New Zealand Immigration, 'Information about Partner of a New Zealander Work Visa', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/special-work-visa-for-partners-of-new-zealand-citizens-or-residence-class-visa-holders>.
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- 154 Citizenship Act 1977, Section 17(3)(b)
- 155 Ibid, Section 6(3)(a).
- 156 Ibid, Section 7(1)(b).
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- 159 Births, Deaths, Marriages and Relationships Registration Act (1995), Sections 5, 7, 8.
- 160 Citizenship Act 1977, Sections 8(2)(a) and 8(3).
- 161 Ibid, Section 8(1), (2), (7), (8).
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- 163 Immigration Act, Section 70.
- 164 Ibid., Section 49.
- 165 Operational Manual, 'Health Requirements, A4.1 Objective', at <https://www.immigration.govt.nz/opsmanual/#35037.htm>.
- 166 Immigration New Zealand, 'Good character for temporary visas', at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/tools-and-information/character-and-identity/good-character>.
- 167 Immigration Act, Section 203.
- 168 OHCHR-DIA Piper (2018), 'Admission and stay based on human rights and humanitarian grounds. A mapping of national practice', at: [https://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_DIA\\_Piper\\_Study.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DIA_Piper_Study.pdf).
- 169 Immigration Act (2009), Sections 203, 206, 207. Section 217 describes the Immigration and Protection Tribunal. See also, Immigration and Protection Tribunal, 'Guide 2: Making a Refugee or Protected Person Appeal under sections 194 and 195 of the Immigration Act 2009', at <https://www.justice.govt.nz/assets/Documents/Publications/IPT-Guide-2-Refugee-and-Protection.pdf>.
- 170 Immigration Act (2009), Section 207(1). See also, OHCHR-DIA Piper (2018), 'Admission and stay based on human rights and humanitarian grounds: a mapping of national practice', at: [https://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_DIA\\_Piper\\_Study.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DIA_Piper_Study.pdf).
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- 172 'National report submitted for the Universal Periodic Review: New Zealand (3rd cycle)', A/HRC/WG.6/32/NZL/1, 13 November 2018, para. 129.
- 173 Statista, 'Number of immigrants from leading countries of origin to New Zealand in 2019', at <https://www.statista.com/statistics/692815/asian-immigrant-stock-of-new-zealand-by-country-of-origin/>.
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- 175 Ministry of Business, Innovation and Employment, 'Migration Trends report 2016-2017', at <https://www.mbie.govt.nz/immigration-and-tourism/immigration/migration-research-and-evaluation/migration-trends-report/>.
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- 177 The Section states that a condition of every temporary entry class visa granted under the Immigration Act (2009) is that the holder of the visa may not, while in New Zealand, provide commercial sexual services. Further, under the terms of the Act, visas will not be issued to migrant sex workers, who are liable for deportation. Prostitution Reform Act (2003), Section 19.
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- 182 At <https://www.immigration.govt.nz/about-us/covid-19/visa-conditions-epidemic-status/visa-conditions-epidemic-status>.
- 183 Immigration New Zealand, 'COVID -19: You are a migrant or refugee', at <https://www.immigration.govt.nz/about-us/covid-19/in-new-zealand/migrant-or-refugee>.
- 184 Immigration New Zealand, 'COVID -19: If you are unable to leave New Zealand', at <https://www.immigration.govt.nz/about-us/covid-19/in-new-zealand/visa-information/if-you-are-unable-to-leave-new-zealand>.
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- executions, 'Addendum, Mission to Papua New Guinea (3 to 14 March 2014)', 30 March 2015, A/HRC/29/37/Add.1, para 79. See also, 'National report to the Universal Periodic Review (3rd cycle): Papua New Guinea', A/HRC/WG.6/39/PNG/1, 1 November 2021 (Advance version), paras. 44, 125(b).
- 190 Constitution of the Independent State of Papua New Guinea (1975), Division 2 – Acquisition of Citizenship, Sections 66, 67.
- 191 *Ibid*, Section 66.
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- 195 'Papua New Guinea Country Statement on Smuggling of Migrants, Trafficking in Persons and Contemporary Forms of Slavery, and Issues of Appropriate Identification and Protection and Assistance to Migrants and Trafficking Victims', Asia-Pacific Regional Preparatory Meeting for the Global Compact for Safe, Orderly and Regular Migration, 6 to 8 November 2017, Bangkok, at [https://www.unescap.org/sites/default/files/Statement\\_Papua%20New%20Guinea\\_3%28c%29.pdf](https://www.unescap.org/sites/default/files/Statement_Papua%20New%20Guinea_3%28c%29.pdf).
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# VI. RECOMMENDATIONS



(REUTERS/Edgar Su)



Despite the importance of migration in the region and notwithstanding the promising practices that have been captured in this study, the reality in Asia and the Pacific is that regular pathways for the entry and stay of migrants are generally insufficient and those that do exist are often hard for migrants to access in practice. As a result, pathways into irregularity have proliferated. Individuals who have fewer resources, or who are structurally disadvantaged due to their gender, age, ethnicity, disability, or other circumstances, are disproportionately affected by the general absence of regular pathways, as well as by barriers to use of those that exist.

To make a meaningful difference to the human rights protection landscape, pathways for entry and stay need to be sufficient, accessible, and tailored to meet the needs of the region's migrants. Where they are not, the many forces that drive migration, the high costs of regular migration, and restrictive and complex migration policies combine to create conditions of uncertainty for States and human rights risks for migrants. This mix makes the migration cycle more dangerous for migrants because they may be forced to rely on unscrupulous facilitators, or face discrimination, violence or abuse at borders; and the circumstances of individuals who are already in a vulnerable situation become more precarious.

Based on the research for this study, and in line with the Global Compact for Migration's commitment to enhance the availability and flexibility of pathways for regular migration, OHCHR presents below a set of seven recommendations to States and stakeholders in the Asia Pacific region on entry and stay pathways for migrants, with a focus on those who are in situations of vulnerability. These recommendations present criteria to enhance human rights-based governance of migration in the region and to guide States when they develop and implement such pathways.<sup>1</sup>

## **1. Pathways should be human rights-based.**

The overarching message of this research is that States should provide effective mechanisms of admission and stay, with a particular focus on migrants who are in vulnerable situations, and that such regular migration pathways need to underpin the State's obligations under international human rights law.

These obligations include the prohibition of refoulement, which prohibits States from extraditing, deporting, expelling, returning or otherwise removing any migrant when there are substantial grounds for believing that the individual would be at risk of being subjected to torture or cruel, inhuman and degrading treatment or punishment or other irreparable harm.<sup>2</sup> The prohibition applies to everyone, irrespective of their citizenship, nationality, statelessness, or migration status. Even when States in the region respect the principle,

they do not always provide a pathway for affected migrants. In situations in which an individual assessment determines that a migrant is at foreseeable risk of refoulement if returned, States should put in place a mechanism to protect migrants from return and grant them regular status in order to address their needs and secure their rights.<sup>3</sup>

Migrants who are victims of human rights abuses or violations and who wish to remain in a State should be given access by that State to pathways for continued stay. Stay should be provided on the basis of need, unconditionally and independent of an individual's ability or willingness to assist in the investigation or prosecution of offenders. National anti-trafficking laws are in place in many countries across the region, and several States offer rights-based pathways for trafficked persons to temporarily stay and work, with others offering pathways for migrants who are survivors of domestic violence, for example by assisting them to remain in the country and protecting their residence rights.

Migrant children in situations of vulnerability could include those who have lived in the country of residence since childhood and have established ties, and those whose best interests are determined to be local integration with a secure status. While many States in the region have discretionary pathways that could respond to the human rights of migrant children, very few offer these pathways as a result of formal best interests procedures. All decisions related to the status of child migrants and children of migrants must prioritize the child's best interests and take into account all their rights.<sup>4</sup> This principle is engaged both when a decision affects a child directly and when it affects a child indirectly, for example, if a parent is under a return order.

## **2. Pathways should provide alternatives to return for migrants who are in irregular status.**

When return is the only possible outcome for migrants in irregular status, it tends to create or exacerbate exclusion, discrimination, and lack of access to rights, both in the country of origin following forced return, and in the country of destination where migrants must live in irregularity and precarity for extended periods of time. While rights-based return in conditions of safety and dignity may be the most appropriate option for some migrants, States should include alternatives to return among the options that are available to them in their governance of irregular migration.

The aim of such pathways may be mixed; to avoid returns to any country in which a migrant is at risk of human rights violations, ill-treatment, exploitation or abuse including as a result of the adverse impact of climate change; to address situations of vulnerability in the context of gender-based violence, exclusion from basic services, or labour exploitation; and/or to facilitate the enjoyment of other rights, such as a migrant's right to family and private life, the best interests of the child, or the right to health. Such pathways can also enhance the benefits of migration for States, migrants and communities, for example by facilitating social ties and integration, enhancing access to education (including vocational training and apprenticeship), and guaranteeing decent work.

## **3. Pathways should be responsive.**

Migration pathways need to be responsive to the factors that drive mobility in the region, including: the impacts of environmental degradation and climate change (see Box 5); health status and lack of access to health care (including the effects of pollution and other environmental threats to health); family separation and lack of protection of the right to family life; the occurrence of torture and failure to provide rehabilitation after torture; and protection from (and remedies for) gender-based violence and labour exploitation.

Pathways should also be responsive to the human rights of individual people on the move. They should respond to the specific needs of migrants, the situations of vulnerability they face, and their socio-demographic and economic reality. Procedures to assess claims for admission and stay submitted by migrants in situations of vulnerability should be people-centred, child-sensitive, based on the best interests of the child, gender-responsive, trauma-informed, and uphold international human rights standards, including the prohibition of discrimination.

Migration pathways should uphold the right to family life, that recognize that various forms of family exist.<sup>5</sup> While all countries included in this study have established some pathways that are responsive to family unity needs, many restrict these to migrant families of nationals or they discriminate on gender grounds, for example by restricting access to heterosexual relationships, or assuming that citizenship is held by the husband. Further, several countries in the region discriminate against certain categories of migrants in terms of their access to family unity; such as only enabling high-skilled migrant workers to be accompanied by their family members.

### Box 5. Regular pathways for environment and climate-related migration

At the International Conference on Population and Development in 1994, States agreed that governments should “consider requests for migration from countries whose existence, according to available scientific evidence, is imminently threatened by global warming and climate change”.<sup>a</sup> Twenty five years later, it is understood that migration is not caused only by the imminent threat of rapid climate change: people also move in response to slow-onset natural disasters that negatively impact their rights, livelihoods and wider socio-economic situation.

Migration that responds to climate and environmental factors may be seasonal, of short duration, long term, or permanent; and may be internal, cross-border, or involve planned relocation within a country. In the context of cross-border mobility, Objective 2 of the Global Compact for Migration recognized that the adverse effects of climate change and environmental degradation are among the forces that drive international migrants to move.<sup>b</sup>

In January 2020, in its first ruling on a complaint by an individual seeking protection from the effects of environmental degradation and climate change, the UN Human Rights Committee stated in a case involving New Zealand and Kiribati that countries may not deport individuals who face climate change-induced conditions that violate the right to life as articulated in the International Covenant on Civil and Political Rights. Reasoning that harms from environmental degradation and climate change can be induced by sudden-onset events (such as intense storms and flooding) and by slow-onset processes (such as sea rise, salinization and land degradation), the Committee clarified that individuals seeking protection from return are not required to prove that they would face imminent harm if returned to their countries.<sup>c</sup> Later that year, in December 2020, a 40-year-old Bangladeshi man with severe respiratory asthma was protected against return to Bangladesh from France. The appeals court in Bordeaux overturned his deportation order, finding that the level of air pollution in Bangladesh would exacerbate his condition and that he would be unable to access equivalent levels of healthcare. The French court’s ruling mirrored the criteria applied by the UN Human Rights Committee to account for environmental factors in decisions regarding return to the country of origin.<sup>d</sup>

States need to cooperate to identify, develop and strengthen regular pathways of admission and stay for migrants compelled to migrate due to the adverse effects of climate change and slow-onset natural disasters, recognizing that adaptation in or return to their country of origin may not be possible.<sup>e</sup> The UN Human Rights Committee has affirmed that this threat need not be imminent, since in some situations arising from the climate crisis the right to life with dignity may be violated before the risk is realized, and that this needs to be taken into account when assessing migrants’ situations and making return decisions.<sup>f</sup>

Measures that respond to environmental and climate-related migrations may make use of regular migration categories (such as temporary residence and work permits) or establish exceptional migration measures (such as humanitarian visas and temporary protection status) and should apply international human rights law standards.

<sup>a</sup> ICPD, Programme of Action, para. 10.7.

<sup>b</sup> See also, UN General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General’, A/76/642, 27 December 2021, para. 64.

<sup>c</sup> OHCHR, ‘Historic UN Human Rights case opens door to climate change asylum claims’, 21 January 2020, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482>. See also: Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, CCPR/C/127/D/2728/2016, Views adopted: 24 October 2019.

<sup>d</sup> Cour administrative d’appel de Bordeaux - 2ème chambre, 18 décembre 2020 / n° 20BX02193, n° 20BX02195, at [https://www.dalloz.fr/documentation/Document?id=CAA\\_BORDEAUX\\_2020-12-18\\_20BX02193\\_dup#texte-integral](https://www.dalloz.fr/documentation/Document?id=CAA_BORDEAUX_2020-12-18_20BX02193_dup#texte-integral).

<sup>e</sup> UN General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration’, A/RES/73/195, 19 December 2018, para. 21(h), at N1845199.pdf (un.org).

<sup>f</sup> Human Rights Committee, *Ioane Teitiota v. New Zealand*, para. 9.11.

Given the gender balance of migrants in the region, it is essential that adequate regular pathways are available to women migrants, and that they are responsive to women who have survived or are at risk of human rights violations or wish to bring family members to join them. Residency regulations should be non-discriminatory. For example, the residency permits of women migrants should not depend on the sponsorship of an employer or spouse; women should benefit from provisions that permit independent residency status.

#### **4. Pathways should be accessible.**

States can enhance the accessibility of pathways of admission and stay by ensuring that the criteria used to establish the pathways as well as the procedures to access them are clear, transparent and rights-based:

- First, migrants need to know that regular pathways (including entry and stay requirements and available forms of protection and assistance) are available to them. This requires widely publicizing accurate information on available pathways in accessible formats and in languages that migrants understand.<sup>6</sup>
- Second, authorities need to provide clear guidance on how to access pathways and negotiate relevant bureaucratic procedures, which should be streamlined to minimize the administrative burden including through ensuring that required documentation is accessible and timelines are manageable.<sup>7</sup> Migrants must be able to find out how to obtain legal assistance they may need, for example. Access to such guidance will also help migrants to avoid unscrupulous brokers.
- Third, the whole process (including the cost of permits, required documentation, fines associated with being in irregular status, etc.) needs to be affordable and where possible free of charge for migrants in vulnerable situations.
- Fourth, accessibility has a temporal aspect. Procedures for securing regular status, including regularization programmes, should be completed within a reasonable and specified time, to reduce uncertainty for migrants and their families, as well as for the State.
- Finally, if procedures are to be accessible, migrants in irregular situations need to be confident that they will not face criminal penalties if they use them.

#### **5. Pathways should be predictable.**

Migrants should be able to obtain information about available pathways in a predictable way, and their application to use pathways should be governed by rules: procedures should be described clearly and applied consistently, and outcomes should not depend on the unreviewable discretion of the authorities.<sup>8</sup>

Protective pathways may be discretionary: in other words, they are not strictly required by international law; State authorities introduce them voluntarily, to show compassion, demonstrate sovereignty, or extend international cooperation and solidarity. Nevertheless, such 'discretionary' interventions may and often do establish grounds of admission and stay that are rooted in international human rights law and associated obligations.

Every State included in this study grants wide-ranging residual discretionary powers to government authorities to authorize the entry and stay into the country of certain migrants or groups of migrants. Such mechanisms are able to provide flexibility in response and in some jurisdictions currently provide the only possible pathway for migrants in vulnerable situations. However, from the perspective of international best practice, systems that concentrate discretionary, unreviewable power in the government broadly or in the hands of the relevant Minister more narrowly, should ideally be reformed to ensure predictability, transparency and accountability. Further, the use of such discretionary power should be minimal and meet a high threshold.<sup>9</sup>

Mechanisms of admission and stay should include judicial review or independent oversight and monitoring. These, in turn, should inform the design and implementation of measures to address situations of vulnerability faced by migrants.

#### **6. Pathways should be secure.**

Clear procedures need to be in place and should provide essential procedural safeguards; wherever possible, there should be individualized assessment. Decisions should provide a status that, even if temporary, is secure. Procedures should provide documentation, including provisional documentation during completion of the procedure, and guarantee full and equal access to human rights (and specifically to justice, health, housing, education, family life and decent work).



When States grant temporary residence to migrants in vulnerable situations, they should provide avenues that offer routes to other forms of status, including long-term residence.

## 7. Pathways should ensure a whole-of-society approach.

Migrants should be involved in identifying situations of vulnerability that pathways need to address and should be able to participate meaningfully in the development, implementation, and monitoring of regular pathways to admission and stay. Other relevant stakeholders should also be able to participate, including migrant-led organizations, youth, disability, LGBTI and women's organizations, faith-based groups, diaspora groups, national human rights institutions, bar associations, academic bodies, and employer and workers' organizations – in short, all bodies that offer assistance, information, legal advice and representation to migrants in vulnerable situations.

Enhancing the availability and flexibility of pathways for regular migration requires a whole-of-government approach to ensure that policy is coherent across all sectors and levels of government and that pathways and admission and stay procedures are accessible, streamlined and timely for migrants. National strategies and policies related to climate change, disaster risk reduction, human trafficking, labour exploitation, gender-based violence, child protection, and other situations of vulnerability, should also address and incorporate pathways to admission and stay.

Since migration is by nature cross-border, approaches to migration should encourage and promote sub-regional, regional and international cooperation between States to expand and diversify rights-based pathways for regular migration. Their aim should be to ensure that migrants, including migrants in situations of vulnerability, have access to pathways for admission and stay that are effective and take account of human rights imperatives for consideration in addition to compassionate and humanitarian grounds.<sup>10</sup>

## Endnotes

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- 2 The principle of non-refoulement is affirmed explicitly in: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3; the International Covenant on Civil and Political Rights, article 7; and the International Convention on Enforced Disappearances, article 16. It has also been read into the protections afforded by the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and other core international human rights treaties. See also: UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', A/RES/73/195, 19 December 2018, Objective 21, para. 37, at N1845199.pdf (un.org). The principle is a fundamental norm of international refugee law, to prevent the return of any refugee to persecution: see the Convention relating to the Status of Refugees, article 33(1).
- 3 OHCHR and the Global Migration Group (2018), 'Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations', Principle 20, Guideline 5, at PrinciplesAndGuidelines.pdf (ohchr.org).
- 4 General migration control concerns cannot override best interest considerations: see Committee on the Rights of the Child, General Comment no. 6, para. 86; and Committee on Migrant Workers and Committee on the Rights of the Child, Joint General Comment No. 3/22, paras. 27-33.
- 5 See, inter alia, International Covenant on Civil and Political Rights, article 23; and Human Rights Committee, 'General Comment No. 19 on Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses', 27 July 1990. At <https://www.refworld.org/docid/45139bd74.html>.
- 6 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, para. 13.
- 7 Ibid.
- 8 Ibid, para. 69.
- 9 See, Australian Human Rights Commission (2003), 'Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters', at Submission to the Senate Legal and Constitutional Legislation Committee | Australian Human Rights Commission.
- 10 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General', A/76/642, 27 December 2021, para. 101, at N1845199.pdf (un.org).

## VII. ANNEX: TABLE OF RATIFICATIONS

CORE INTERNATIONAL HUMAN RIGHTS TREATIES										REFUGEES					STATELESS PERSONS					INTERNATIONAL CRIMINAL LAW		
	ICERD	ICPR	ICESCR	CEDAW	CAT	CR	ICMW	CPD	CPD	CRPD	1951 CONVENTION	1967 PROTOCOL	1954 CONVENTION	1961 CONVENTION	UNTOC	TIP PROTOCOL	SOM PROTOCOL					
<b>SOUTHEAST ASIA</b>																						
INDONESIA	1999	2006	2006	1984	1998	1990	2012	[s]	2011	2011					2009	2009	2009					
MALAYSIA				1995		1995		2010		2010					2004	2009						
PHILIPPINES	1967	1986	1974	1981	1986	1990	1995	2008	2008	2008	1981	1981	2011		2002	2002	2002					
SINGAPORE	2017			1995		1995		2013		2013					2007	2015						
THAILAND	2003	1996	1999	1985	2007	1992		[s]	2008	2008					2013	2013	[s]					
<b>SOUTH ASIA</b>																						
BANGLADESH	1979	2000	1998	1984	1998	1990	2011	2007		2007					2011	2019						
INDIA	1968	1979	1979	1993	[s]	1992		[s]	2007	2007					2011	2011	2011					
MALDIVES	1984	2006	2006	1993	2004	1991		[s]	2010	2010					2013	2016						
<b>EAST ASIA</b>																						
CHINA	1981	[s]	2001	1980	1988	1992		2008	1982	1982	1982	1982			2003	2010						
<b>HONG KONG SAR*</b>																						
JAPAN	1995	1979	1979	1985	1999	1994		2009	2014	2014	1981	1982			2017	2017	2017					
REPUBLIC OF KOREA	1978	1990	1990	1984	1995	1991		2008	2008	2008	1992	1992	1962		2015	2015	2015					
<b>PACIFIC</b>																						
AUSTRALIA	1975	1980	1975	1983	1989	1990		2008	1954	1973	1973	1973	1973		2004	2005	2004					
FJI	1973	2018	2018	1995	2016	1993	2019	2019	2017	2017	1972	1972	1972		2017	2017	2017					
NEW ZEALAND	1972	1978	1978	1985	1989	1993		2008	1960	1973	1960	1973			2002	2002	2002					
PAPUA NEW GUINEA	1982	2008	2008	1995		1993		2013	1986	1986	1986	1986			2002	2002	2002					
TUVALU				1999		1995		2013	1986	1986												


Key: [s] indicates that a State is a signatory to the treaty but has not ratified

\* Hong Kong (Special Administrative Region, China) is administered by China

<b>SHORT FORM USED IN TABLE</b>	<b>FULL TITLES AND DATES OF ADOPTION</b>
<b>CORE INTERNATIONAL HUMAN RIGHTS TREATIES</b>	
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (1965)
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (1979)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CRC	Convention on the Rights of the Child (1989)
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
CPED	International Convention for the Protection of All Persons from Enforced Disappearance (2006)
CRPD	Convention on the Rights of Persons with Disabilities (2006)
<b>INTERNATIONAL REFUGEE LAW</b>	
1951 Convention	Convention relating to the Status of Refugees (1951)
1967 Protocol	Protocol Relating to the Status of Refugees (1967)
<b>INTERNATIONAL LAW ON STATELESSNESS</b>	
1954 Convention	Convention relating to the Status of Stateless Persons (1954)
1961 Convention	Convention on the Reduction of Statelessness (1961)
<b>INTERNATIONAL CRIMINAL LAW</b>	
UNTOC	United Nations Convention against Transnational Organized Crime (2000)
TiP Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2003)
SoM Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air (2003)

Ratifications as of 31 December 2021



A large, stylized graphic of a human hand, rendered in various shades of blue, occupies the right and bottom portions of the page. The hand is shown from the side, with fingers slightly curled. The background is a solid, medium blue color.

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