RACS REFUGEE ADVICE & CASEWORK SERVICE

449/786 visa offers for 866 applicants

Since 3 February 2014 some people who came by boat to Australia have had their applications for an 866 permanent protection visa refused on the grounds of Migration Regulation 866.222 which provides that a person will not qualify for a permanent protection visa if they:

- arrived by boat without a valid Australian visa (i.e., unauthorised maritime arrivals);
- were not immigration cleared when they last entered Australia (eg., unauthorised plane arrivals); or
- did not have a valid visa which was in effect on last entry to Australia.

The Department advises RACS that those whose protection visa applications have been refused on this basis and who have been assessed as engaging Australia's protection obligations are currently being invited to an interview with a view to consideration to the grant of a Humanitarian Stay (Temporary) (Subclass 449) visa in combination with a Temporary (Humanitarian Concern) Subclass 786 visa.

A small number RACS clients are currently receiving 866.222 refusals and are also receiving notice that they have been "assessed as engaging Australia's protection obligations".

Most are being told that this has not yet been assessed but that "the initial assessment of protection claims indicates that they may engage protection obligations" – these clients are not being invited to interviews as yet.

Generally those who receive an invitation to an interview also receive a letter confirming that they have been assessed as engaging Australia's protection obligations.

It is important to check the notification of decision on protection class XA visa letters carefully to determine whether a person has been found to be assessed as engaging Australia's protection obligations.

<u>Important consequences of being offered a 449 visa for asylum seekers</u>

Being offered a 449 visa means that a person is then prevented from being granted a permanent protection visa in Australia.

This is because:

- regulation 866.227(2) applies at time of decision, and prevents the grant of a protection visa where a 449 visa has previously been offered, unless the Minister personally lifts the bar under s 91L.

<u>Is being invited to an interview the same as being offered a 449 visa?</u>

The Department has advised RACS that "the offer of a 449 visa must be made in person, it cannot be offered or accepted in an email or a facsimile message". This seems to be supported by the PAMS and the regulations.

GPO Box 2107, Sydney NSW 2001 **T: 02 9114 1600 F: 02 9114 1794**
Level 12, 173- 175 Phillip St, Sydney NSW 2000 **E: admin@racs.org.au W: www.racs.org.au**

According to policy and regulation 2.07AC(2) a valid application for a 449 visa is made where a person is invited to apply, the person indicates that they accept the offer of temporary stay by signing and dating it, and that an authorised officer endorses the process by co-signing and noting their position number.

However some RACS clients are currently receiving documents which look like offer in writing from the Department.

Accordingly it is difficult to know whether a person has received an offer or not. RACS is seeking clarification from the Department about this.

Most likely invitations to an interview are to receive an offer at interview.

RACS understands that the Department generally asks those attending interviews to accept or refuse at the time of offer in person at their interview.

Departmental policy states that the offer remains open indefinitely should it not be formally accepted or refused, although the Department can withdraw the offer at any time.

Appealing the refusal of the 866 permanent protection visa to the RRT

Anyone refused an 866 visa because of 866.222 (a person is not qualified for a protection visa because they came by boat) has the right to appeal that refusal to the RRT and to ask that the Tribunal make a determination as to whether the person is a person to whom Australia has protection obligations for the purposes of their liability for the Tribunal fee under regulation 4.31B, relying on the Department's decision and reasons for the decision.

There is generally no prejudice to appealing to the RRT on 866.222 refusals, and it remains open to a person to appeal to the RRT and to accept a 449/786 visa, although just receiving an offer of a 449 visa creates another barrier to an 866 visa.

The main risks would be that the Tribunal could make a finding that a person is not owed protection obligations, and if so, they could be liable to pay a hearing fee. To mitigate this risk, it is suggested that applicants clarify that the scope of the review is limited only to the criterion that formed the reason for the application's refusal: 866.222. Direction 27 of *Principal Member Direction 4, "Efficient Conduct of Merit Reviews",* provides that "Members should address only those elements of the criteria for a protection visa that are necessary to resolve the application for review."

The main advantage would be that it keeps the 866 application on foot, although is by no means a certain route to an 866 permanent protection visa as it requires 866.222 to be either disallowed by Parliament or found unlawful by the High Court before the "time of decision", which are each not certain. It also requires that a person not receive an offer of a 449 visa under 866.227, which is may not be possible to avoid.

It is possible that while a person's appeal remains on foot, a new version of temporary protection visas could become law again, either because six months has passed since the first version was disallowed (in April 2014), or under legislation after July 2014 when the balance of the Senate alters.

866.222 is currently subject to both a High Court challenge (to be heard 7.3.14 – judgment could be many months later) and disallowance by Parliament (to be considered 6.3.14). It is also not clear what

directions and findings the RRT will make in terms of whether they will only consider the basis for the refusal (866.222), or whether they will re-open and re-consider the issue of whether a person is owed protection obligations by Australia.

The route to an 866 via the RRT would also require that the RRT find in a person's favour at the right time, remit to the Department in time for TPVs not to become law again in the future, either after six months have passed since they were last introduced by disallowable instrument in April 2014, or by legislation which may be possible after July 2014. The RRT is subject to a s 499 direction (direction 57 of 2013) in terms of processing priority, so appeals to the RRT for boat arrivals may not be determined quickly.

So the chances of success for a person to obtain an 866 permanent protection visa through an RRT appeal are not strong.

The main benefits of lodging with the RRT are:

- to preserve a person's 866 application in the event that 866.222 is found to be unlawful by the High Court;
- because unless a person has received an offer of a 449/786 visa, they have received no positive decision that they have been found to be owed protection obligations by Australia.

Is it possible to decline to attend the interview and not receive an offer?

It is possible to ask to decline to attend the interview, although a risk of doing this is that the Department may interpret this as a refusal or may not repeat the invitation to attend. The Department has advised RACS that it should not be assumed that the invitation will be repeated. For anyone wanting to decline to attend, a letter could be sent to the Department:

> Please be advised that I intend to lodge an appeal of my 866 refusal to the RRT.
>
> Accordingly I ask the Department to delay consideration of any offer of a 449 visa until the outcome of my 866 refusal appeal is finalised.

Advising clients to not attend these interviews ought not to be done without full consideration by the client of the ramifications of avoiding the offer of these temporary visas.

Important consequences of not attending an interview for a 449 visa grant

Those intending on not attending an interview need to be advised that they do not currently qualify for the 866 visa under the law as it currently stands. They also need to be aware that in not taking a 786 visa, they could be living in Australia without financial support (on a 786 they would be entitled to Special Benefit from Centrelink).

The Department has advised that for those who do not attend or refuse the 449/786 visas, there is no guarantee they will be offered again.

Those who appeal to the RRT the refusal of their protection visa will be granted a bridging visa which will run until 28 days after notification of the RRT decision.

However if this route to a visa is not successful after a person has exhausted their legal options in relation to the 866 visa refusal, they could end up remaining indefinitely in Australia without a bridging visa, financial support or work rights.

FOIs protection obligation decisions for those found that they "may" engage protection obligations

RACS has been advised by the Department that you will only be offered a 449/786 visa if the Minister has assessed that Australia owes you protection obligations. Having said that, some of the current letters inviting 866 visa applicants to interviews state:

> Initial assessments of your protection claims indicate that you may engage Australia's protection obligations. Therefore you may be eligible for the grant of Humanitarian Stay (Temporary) visa subject to relevant clearances.

Because the Department has advised RACS that consideration of a 449/786 visa will only occur where a person has been assessed as engaging Australia's protection obligations, where a person intends to decline to attend their interview and appeal the 866 refusal, we suggest that anyone refused an 866 on 866.222 lodge a request under FOI (form 424A) seeking "decision records on protection visa application (CLFXX/XXXXX)." The advantage of doing this is to find out whether a person has in fact been found to be owed protection obligations already by the Department. The significance of this decision would be both to not be liable to pay a fee on appeal at the RRT, and further to prevent refoulement (return to a person's home country) in the future.

What if a person accepts the 449 and 786 visas?

On a 786 visa a person has the right to remain in Australia for the time specified on the 786 visa (usually three years). Beyond this three year period, rights to stay in Australia remain subject to both Ministerial discretion and further changes to the law.

On a 786 visa a person has the right to receive Special Benefit from Centrelink, to work and to study.

It is not possible to sponsor family members.

You can accept a 449/786 visa and appeal to the RRT at the same time, but the RRT application will only be successful if the High Court in the future finds both 866.222 and 866.227 unlawful.

What if the High Court finds 866.222 unlawful?

If this happens, any client refused an 866 visa on 866.222 should write to the Department asking them to revisit the decision under the principal in Bhardwaj: [*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597]. Under this principal executive decision makers may lawfully revisit decisions that can properly be considered as wholly invalid without a court order subject to the proviso that the decision must have involved a jurisdictional error. 866.222 decisions would arguably be jurisdictional error and should be regarded in law as no decision at all: *Plaintiff S157/2002 v Commonwealth of Australia*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said at 506 [76].

The error would arguably be jurisdictional error because 866.222 has been found invalid, and as such the Department has applied "a wrong and inadmissible test" "misconceived its duty" or "not applied itself to the question which the law prescribes: *The King v War Pensions Entitlement Appeal Tribunal [Ex parte Bott]* [1933] HCA 30; (1933) 50 CLR 228 at 242-3].

This is very confusing: what is the best thing for a person in this situation to do?

It is difficult for RACS to advise as to the best course of action, we can only point to the possible options and risks.

All decisions must be made by each individual person refused an 866 visa.

Those refusing 449/786 visa ought to be fully appraised of the possible consequences.

Those unsure what to do may want to appeal to the RRT to preserve their 866 application, and to take the 786 visa to safeguard their rights to financial support and to remain in Australia for the duration of that visa.

Are there any legal options to challenge this for all clients?

866.222 is currently the subject of a legal challenge. If this is successful and if they meet all the other criteria for an 866 visa, clients should write to the Department asking for their 866 visa application to be processed in accordance with s 65A of the Migration Act, and could consider a Mandamus to force the application to proceed.

Arguably the 449/786 offers are predicated on the 866.222 refusals, which may be found to be unlawful in the future by the High Court, in which case there could be scope to challenge the offers themselves as unlawful.

866.227 has never been used in this way to block a person's existing application for a protection visa – there may be an argument that this is being used for an improper purpose.

These arguments would need to be considered by a higher court after a person has appealed their 866.222 refusal to the RRT. This may take some time because of the RRT's direction to process boat arrivals last.

In the meantime, some advocates are writing letters:

- seeking to delay consideration of a 449 offer until the outcome of their RRT appeal is known, pointing to the PAMS on 449 which make clear there is no legal barrier to considering time on an offer and contain a number of cautions to ensure that subclass 449 applicants understand the impact of a 449 offer and to be sensitive to allow clients to understand the issues which need to be understood which are both complex and sensitive.
- pointing out that those refused visas on 866.222 have not been allowed an adequate opportunity to respond to the adverse information upon which the decision was based.
- to accompany clients to interviews for the clients to give to the Department noting they are accepting the 449 offers under duress.

How do I explain this simply to my client?

- The current government wants to only give temporary visas to those who came to Australia by boat.
- It looks like you've probably been accepted to be a refugee and the Department wants to give you a temporary visa.
- On the temporary 786 visa you can receive Centrelink and have work rights.
- On the temporary 786 visa you can stay in Australia for three years, and beyond that it requires either the Minister's personal approval or a change to the law.

- Because your permanent visa has been refused you have the right to appeal that refusal to the RRT.
- On the current law, you don't qualify for the permanent visa, but the appeal would be in the hope that the law might change.
- This is not certain because it would depend on what Parliament, the High Court and the RRT choose to do in the coming months – which we don't know at the moment.
- It's also a very low chance that it will result in a permanent visa: To be successful in obtaining a permanent visa this way you would need the law to change by the High Court or the Parliament, and for this to happen at the right time.
- However at this stage, there is not much risk to an appeal to the RRT. The risks could include that you could be liable for a fee, and the RRT could have a hearing about whether you are owed protection obligations and find against you.
- It is probably a good idea to appeal to the RRT if you haven't yet had a positive decision that you have been found to be owed protection obligations, or any other offer of a visa.
- If you are offered a 449 visa while your appeal is on foot, this may mean your appeal cannot succeed unless the law changes, although you can still accept the visa and continue with the RRT appeal.
- If you get an interview for a 449/786 visa and don't attend, and then don't get an 866 visa at the end of your appeal, you could end up living in Australia at length without any financial support, you could possibly be detained, and to stay you could need to keep going to the RRT or to Court repeatedly.
- To refuse to attend an interview, you would need to be prepared to take this risk on the basis that the law may change in relation to the 866 in the future.

And for all clients:

- All decisions are yours alone to make.

<u>Can RACS represent people who want to appeal an 866.222 refusal to the RRT?</u>

RACS is keen to assist those refused an 866 visa on 866.222 grounds with help to lodge with the RRT if they are keen to do so.

People wanting assistance, provide RACS with a copy of the notification and decision letter, and if possible, a valid email address to allow us to assist the person in lodging electronically, and then call during our telephone advice times to speak to a migration agent.

We unfortunately cannot commit to representation – all decisions about casework intake are made on a case by case basis depending on our current capacity and on the merits of the case.