

Recent changes

The introduction and disallowance of temporary protection visas: 18.10.13-2.12.13

On 18 October 2013, the Minister for Immigration introduced temporary protection (subclass 785) visas under the *Migration Amendment (Temporary Protection Visas) Regulation 2013* which amends the *Migration Regulations 1994*.

On 2 December 2013 this regulation was disallowed by the Senate. This means that it ceased to have effect on that day, but remained in effect between registration (i.e., 18 October 2013) and disallowance. Because disallowance has occurred, a similar regulation cannot be made again within six months without approval of the Senate.

22 temporary protection visas were granted between 18 October 2013 and 2 December 2013 and those people continue to hold those temporary protection visas. These 22 temporary protection visas were issued to asylum seekers who:

- 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); and
- did not have a valid visa which was in effect on last entry to Australia.

Under the (now disallowed) regulations, temporary protection visas applied to the above group of asylum seekers regardless of the date of their arrival. So it is only the date of grant of their visa (between 18 October 2013 and 2 December 2013) that determined their obtaining the 785 temporary protection visa.

On a temporary protection visa it is not possible to sponsor family members to come to Australia and there is no access to Australian citizenship. Temporary protection visas last up to 3 years, and the only further visa it is possible to obtain (with the Minister's personal approval) is another temporary protection visa.

Temporary protection visa holders have work rights, and should apply for both Special Benefit and a Health Care Card from Centrelink.

Temporary protection visas are subject to the following conditions:

- must not engage in criminal conduct; and
- must report a change of address to the Department of Immigration within 14 days.

A temporary protection visa could be cancelled where these conditions are not followed.

The capping and uncapping of Class XA protection visas: 4.12.13-20.12.13

On 4 December 2013 under the *Migration Act 1958 – Determination of Protection Class XA Visas in 2013/2014 Financial Year IMMI 13/156*¹ the maximum number of Class XA protection visas to be

¹ Accessible at: <http://www.comlaw.gov.au/Details/F2013L02038>.

granted in the 2013/2014 financial year was capped at 1650, the number already granted as at that date.

This meant that while currently temporary protection visas are no longer possible, no further grants of onshore protection visas would have been possible for any protection visa applicants, regardless of mode of arrival, until 1 July 2014.

On 20 December 2013 this instrument was revoked².

Changes to the qualification criteria for a protection visa 866.222: 14.12.13

On 14 December 2013 the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013³ changed the qualification for an 866 permanent protection visa to include a requirement that a person must have held a visa in effect on last entry into Australia, not be an unauthorised maritime arrival, and have been immigration cleared on last entry to Australia.

A number of asylum seekers have lodged a challenge to this qualification rule with the High Court⁴.

This regulation also remains subject to disallowance in 2014.

The law in relation to people who came to Australia by boat seeking asylum remains uncertain.

449/786 visa offers on 866.222 refusals: 3.2.14

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.

For more information about this, please see our factsheet about these offers and what they mean

A stop to "lifting of the bar": 18.9.13 onwards

Currently a large number of asylum seekers who arrived by boat are barred under statute from making a valid application for a protection visa in Australia – a bar which only the Minister for Immigration may personally lift. The bar applies to both "unauthorised maritime arrivals"⁵ in Australia

² Accessible at: <http://www.comlaw.gov.au/Details/F2013L02163>.

³ Accessible at: <http://www.comlaw.gov.au/Details/F2013L02104>.

⁴ Accessible at: <http://www.austlii.edu.au/au/other/HCATrans/2013/329.html>.

⁵ Section 46A(1) prevents a valid application for a visa being made by a person who is an unauthorised maritime arrival who is in Australia and is an unlawful non-citizen unless the Minister has personally intervened in the public interest under s 46A(2).

without a current visa in effect, and to any asylum seeker who was released from immigration detention on a bridging visa and also granted a temporary safe haven visa.⁶ We understand that most asylum seekers living in the Australian community on bridging visas who arrived by boat after 13 August 2012 are likely to have been granted a temporary safe haven visa. The bar applies to all visas, not just protection visas, which means the Minister for Immigration must personally approve the grant of new bridging visas.

Since coming into office on 18 September 2013, the Minister for Immigration has not lifted the bar for any asylum seekers who arrived by boat. This mainly impacts upon asylum seekers who arrived by boat on or after 13 August 2012, including:

- for those previously allocated a lawyer or migration agent under IAAAS and who have submitted a protection visa application to the Department of Immigration which has not been validly lodged, but rather remains with the Department of Immigration pending consideration of the 91K bar being lifted;
- for those without a lawyer or migration agent under IAAAS who remain in the community;
- for those in immigration detention;
- for those who require the Minister's personal intervention to renew their bridging visas.⁷

Immigration Minister Scott Morrison recently announced on 4 December 2013 that he has "no intention of lifting any bar so long as in this country the option of temporary protection visas is not available."⁸

Code of Conduct for bridging visa E holders: 14.12.13

On 14 December 2013⁹ an enforceable code of behaviour came into effect for bridging visa E holders. To be eligible for a bridging visa E applicants are required to sign a code of behaviour.

The condition (PIC 4022) applies for all applicants for BVEs who are over 18 and who hold or previously held a BVE granted by the Minister under s 195A.

Anyone who has had a BVE cancelled due to criminal conduct or a breach of the code of behaviour is prevented from applying for a further bridging visa.

Medicare for boat arrivals: 27.5.13

On 27 May 2013 maritime arrivals were declared in a gazette notice to be eligible persons for the purpose of Medicare.

Transfer to offshore processing centres – Nauru or PNG: 19.7.13 onwards

⁶ Section 91K prevents a valid application for a visa being made by a person who has not left Australia since previously holding a temporary safe haven visa unless the Minister has personally intervened in the public interest under s 91L.

⁷ Previously when a person's bridging visa E expired, a person would be taken into "detention" (at a Departmental office), and the person would be granted a new bridging visa under the Minister's power under s 195A (the Ministerial intervention from detention). This needed to happen upon expiry of the previous bridging visa as a person who holds a current bridging visa could not be taken into detention.

⁸ Sydney Morning Herald, 4 December 2013, accessible at: <http://www.smh.com.au/federal-politics/political-news/scott-morrison-being-mean-for-the-hell-of-it-to-asylum-seekers-labor-20131204-2ypst.html>.

⁹ <http://www.comlaw.gov.au/Details/F2013L02102/Download>

It remains government policy that those who arrive by boat after 19 July 2013 will be transferred to Nauru or PNG and will not be settled in Australia unless exempted by the Minister for Immigration.

For people who arrived after 13 August 2012 but before 19 July 2013¹⁰ the Migration Act provides that they can be transferred to a regional processing country (i.e., Nauru or PNG). However, in practice the majority of asylum seekers from this cohort have not been transferred to a regional processing country.

On 8 November 2013 Immigration Minister Scott Morrison announced that there will be “no exceptions to offshore processing for people who arrived after 19 July 2013”.¹¹ This suggests that the Department of Immigration will continue to apply the policy of allowing those who arrived in Australia by boat prior to 19 July 2013 to have their claims assessed in Australia after a lengthy wait, but that arrivals post 19 July 2013 will be transferred to PNG or Nauru. The Minister for Immigration does have a non-compellable discretionary power to exempt people from transfer to a regional processing country where it is in the public interest to do so. Further, transfer can only occur where it is reasonably practicable.

We note that the practice of not transferring those who arrived after 13 August 2012 and before 19 July 2013 is policy and not backed up within any legally enforceable rights. Asylum seekers who arrived after 13 August 2012 remain at risk of transfer to a regional processing centre under the Migration Act.

Proposed cessation of complementary protection: possible in the future

The *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*¹² was introduced on 4 December 2013. The effect of the Bill would be to remove the criterion for grant of a protection visa on complementary protection grounds.

Since 24 March 2012 the complementary protection framework has been available for those who are not refugees as defined in the Refugees Convention, but who cannot be returned to their home country because there is a real risk they would suffer significant types of harm that would engage Australia's international non-refoulement obligations under certain treaties. These include the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The changes, if passed, will apply to protection visa applications already in the pipeline where a decision about the application has not been made before the start of the proposed legislation and any future application made after the proposed legislation comes into effect. According to the Explanatory Memorandum to the Bill, where a matter has been reviewed by the Refugee Review Tribunal or judicially reviewed by Court and is remitted, it will not be considered against complementary protection after the start of the proposed legislation (if passed). In practice, the changes, if passed, could potentially affect anyone seeking protection on complementary protection grounds who had not been granted a protection visa as at 4 December 2013 (the date when the number of protection visas was capped for the 2013/2014 financial year). This could include those who are found to be owed protection under complementary protection by the Refugee Review Tribunal.

The Bill has been referred to the Senate's Legal and Constitutional Affairs Legislation Committee with a report due 3 March 2014.

¹⁰ Under the Regional Settlement Agreement between Australia and PNG: all asylum seekers arriving by boat on and from 19 July 2013 will be transferred to PNG.

¹¹ Minister for Immigration media: <http://www.minister.immi.gov.au/media/sm/2013/sm209431.htm>

¹² http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5155

Other changes being considered

The Senate is currently also considering a number of proposed changes including:

- removing a person's right to lodge additional protection visa applications on complementary protection grounds where those grounds were not previously considered by the Department;
- requiring that a person not being of adverse security interest as part of the qualification criteria for a protection visa, and removing any right of review in relation to a person's security findings by ASIO;
- changing the point at which a decision becomes final to when the record of that decision is made by either the Department or the RRT, rather than once it is notified or communicated to the review applicant, visa applicant or former visa holder.

They are also reviewing the Minister's request for immunity to refuse to disclose information on boat arrivals in the public interest.

Family reunion processing priorities: 19.12.13

On 19 December 2013 under Direction 62 for family visa prioritising, family stream visa applications in which the applicant's sponsor or proposed sponsor is a person who entered Australia as an "Illegal Maritime Arrival" were directed to be processed as lowest priority.

What this means is that family reunion applications for permanent residents who came to Australia by boat are likely to take an incredibly lengthy time before a visa is granted.

RRT processing priorities: 1.7.13

Direction 57 of 2013 mandates that the RRT must process protection visa applicants in the following order:

- in immigration detention;
- came on a valid visa;
- boat arrivals.

Preference within this order is to be given to those who have genuine identity documents.

What is likely to happen from here for people who arrived by boat?

The future for people who have arrived by boat seeking asylum is very uncertain.

It is likely that new legislation or a new legislative instrument reintroducing temporary protection visas will be introduced.

After 1 July 2014, the composition of the Senate will change¹³.

The position of the new Senate on temporary protection visas is not yet clear.

A further cap of class XA protection visas is possible after 1 July 2014 under the Migration Act if temporary protection visas are not made law. The Greens have introduced a Bill¹⁴ to make further caps "disallowable".

¹³ Parliament House, composition of the Senate, accessible at:
http://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition.

Advice to asylum seekers who arrived by boat after 13 August 2012

At this stage, RACS is advising people who arrived by boat after 13 August 2012 that:

- the situation at the moment is very uncertain: you could be sent to a offshore processing centre under Australian law (although in practice it seems unlikely), or you could be allowed to make an application for protection in Australia – we don't know yet.

if you are allowed to make a protection visa application in Australia in the future, the Department of Immigration will let you know so keep in contact with the Department of Immigration and once you hear anything - if you're not allocated a lawyer/migration act under IAAAS - contact RACS;

- if you're allowed to apply for protection in Australia, any visa you are granted may only be a temporary visa and would not allow you to sponsor family members, although this is not yet the law – we are waiting to find out;
- for now, we advise you to make some notes (in your own language) about your reasons for leaving your country and what you fear may happen if you return, so you don't forget the details when you are asked about your claims in the future;
- if you have medical needs, you should contact your ASAS or CAS provider (eg Red Cross or SSI). If you can't access Medicare you may be eligible for medical assistance through the Medical Benefits Scheme.
- the Department of Immigration can (but currently aren't) renewing bridging visas – keep in contact with the Department of Immigration in case you are able to renew your bridging visa. If this happens, you will need to sign a Code of Conduct.
- we are not currently aware of anyone being taken to detention by the Department of Immigration because their bridging visa has expired, although this remains possible. If this happens, please call RACS for advice.
- continue to comply with the conditions of your previous bridging visa – don't work if you previously did not have work rights, don't engage in any criminal conduct, and tell the Department before you change your address or contact details. If you had work rights previously but that bridging visa has expired, by working you are at risk of being taken into detention.

RACS is currently exploring the possibility of a Legal Help for Refugees Clinic during 2014 with a view to providing pro bono legal assistance to people who arrived by boat after 13 August 2012 but who have not yet seen a lawyer. We are currently seeking volunteer interpreters to help with this Clinic.

¹⁴ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s941.