

This is a Guide only and is intended to provide general information. Users of this Guide are strongly encouraged to consult with a migration agent or lawyer before taking any course of action related to information, ideas or opinions expressed in this Guide.

INFORMATION SHEET #1 - 17 FEBRUARY 2014

ONLY For Asylum Seekers who have been refused the grant of a Protection Visa (866) and received a letter regarding a Temporary (Humanitarian Concern) Visa (786)

Please note this information sheet is subject to change and updates. Please frequently check the ASRC website at: www.asrc.org.au for updated versions of information sheets.

Disclaimer:

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This is an information sheet only and not legal advice. Anyone using this resource should obtain advice from a registered migration agent or a practicing lawyer. For information about registered migration agents please visit www.mara.gov.au.

The ASRC strongly recommends that any asylum seeker potentially affected by these provisions get independent advice.

WHO DOES THIS INFORMATION SHEET COVER?

This information is only relevant to you if you are an asylum seeker and the following has happened:-

- (i) You have received a notification letter from the Department of Immigration and Border Protection (“**the Department**”) and your protection visa (Class XA) visa has been refused “because you did not satisfy clause 866.222 of the *Migration Regulations*”; and
- (ii) You have also been informed that the Department have assessed you as “engaging Australia’s protection obligations and [you] are eligible for the grant of a Temporary (Humanitarian Concern) visa (“**THCV**”).

Your case may be different to what is discussed in this information sheet. For example, you might be in the following situation:-

- You have been granted a HSTV or a THCV without any interview or process.
- You have never applied for a protection (class XA) visa but have been granted or offered a HSTV or a THCV.

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This information sheet is not applicable or relevant to the above situations. The ASRC is aiming to soon provide information sheets that might cover your situation and you should obtain legal advice.

This information sheet should be read as a whole but is divided into two parts: (i) common questions and answers; and (ii) practical information.

(i) Common questions and answers

How will I know if I have been invited to consider a Temporary (Humanitarian Concern) Visa?

This information sheet is only relevant to you if you have received a letter from the Department of Immigration & Border Protection ("**the Department**") that says the following amongst other things:

1. Notification of Decision on Protection (Class XA) Visa as a heading.
2. It will state that "you have been refused the grant of a Protection Visa (CLASS XA) 866..."
3. "Although a decision has been made to refuse the application, you have been assessed as engaging Australia's obligations and are eligible for the grant of a Temporary (Humanitarian Concern) Visa'.

Why have I been refused a protection visa?

All people who arrived in Australia by boat or without a visa (by plane) are no longer eligible for a protection visa. This is because the government recently changed the law. This is what the clause 866.222 in your letter is referring to.

The change in law is currently being challenged in two cases that are before the High Court and might also be challenged by the Senate. At the moment however the law is that if you arrived by boat or without visa or 'immigration clearance' you are not eligible for a protection visa.

What is a Temporary Humanitarian Concern Visa?

It is a visa (that will last up to 3 years) that the Australian Government has invited you to consider because you have come by boat or without a visa to Australia and have been found to be owed protection.

You will first be offered a subclass 449 Humanitarian Stay (Temporary) visa and then a subclass 786 Temporary (Humanitarian Concern) visa ("**THCV**"). You might be offered and granted both of these at the same time or at different times.

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How do I actually get this THCV?

You will be invited to attend the Department to be processed & granted a THCV at a set date & time that will be stated in the same letter. Please NOTE the letter itself is not the grant of a visa just an invitation to come into DIBP to be offered and granted one.

The Department have stated that “*the offer of a 449 [Humanitarian Stay Temporary Visa that then leads to a Temporary Humanitarian Concern Visa] is to be made in person*”. This means that it cannot be offered or accepted, for example, in an email or a fax.

Although this visa is actually an old one, its current use and this process is only very new. This means that it is not entirely clear if the Department is adopting the same approach in all cases.

You may also receive a phone call from the Department, attempting to discuss with you the THCV.

What should I do?

If you have received the letter or the offer discussed above, **we urge you to get advice from a registered migration agent. If you have a current migration agent, we encourage you to contact them immediately.**

What you are reading now is just an information sheet. Getting proper legal advice is important so that you can make an informed decision, knowing all the positives and negatives of any decision.

If I say YES to a THCV what will this mean?

We have outlined below the potential positives and negatives are of accepting a THCV:

Positives

- If you currently have no work rights, you will get work rights with THCV
- If you currently have no Medicare, you will get Medicare with THCV
- If you currently have no income, you will get Centrelink payments
- You will get a visa for up to 3 years to stay in Australia
- You will not be detained, because you will have a valid visa

Risks

- It's only a temporary visa, not a permanent visa
- You can never sponsor your family to come to Australia
- If leave Australia, you cannot return
- While your THCV may be for 3 years, it could be less if the government decides you are no longer in need of protection

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- You will need to prove all over again that you are a refugee before your THCV expires. DIBP on their THCV Fact Sheet state “Your claims will need to be reassessed before your visa expires to determine whether you still need Australia’s protection”.

As stated above, we don’t know what the High Court will decide but if the challenge is successful then you might be eligible again for a permanent protection visa.

Another risk is that if you do accept the THCV and the challenge is successful, you might still be prevented from applying for a permanent protection visas because you have accepted the THCV.

This concept or information might be difficult to understand and again we urge you to obtain legal advice so that you fully understand the potential risks of any decision you make.

If I decide to not attend my Department interview to receive my THCV what will happen to me?

We have outlined below the potential positives and negatives of NOT accepting a THCV:

Positives

- You may not have the possible risk of being barred from applying for a permanent visa later down the track, if the legal changes discussed above are successful.

Risks

- You might not be offered another THCV. According to *the Department* “People invited to attend the departments offices for the above purposes [of getting a THCV] should not assume that the invitation will be repeated”.
- You might be left in limbo without a visa, as under Australian law you currently cannot apply for any visa unless the Minister for Immigration lifts the bar to allow you to.
- There is a risk of being placed in detention – it is unclear how likely this is, but it’s possible
- There is a risk you will have no visa status if you currently have no Bridging Visa
- If you have no work rights, you will remain with no right to work for a period of time (unclear how long)
- If you have no Medicare, you will remain with no Medicare for a period of time (unclear how long)
- If you have no income, you will remain with no income for a period of time (unclear how long)
- If you have signed the Code of Behaviour you could be in breach of the Code by failing to comply with what may be considered by the Department as reasonable requests to attend an interview with the Department.

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The potential risks outlined above are obviously very serious and again you should speak to a migration agent or lawyer to discuss your legal situation.

If I am in detention and do not attend an appointment are there any additional risks?

Yes. We believe that if you are in detention and do not attend an appointment with the Department to be offered a THCV you are likely to not be released from detention if the current laws do not change.

Can I apply to the Refugee Review Tribunal (“the RRT”)?

You can apply to the RRT whether or not you accept an offer of the THCV.

However, the application to the RRT only relates to the Department’s decision to refuse your protection visa application. It does not relate to the invitation or offer of a THCV.

Strict time limits apply to the RRT. You must apply within 28 days of the letter from the Department to the RRT. Your Bridging Visa will continue until 28 days after a decision from the RRT. If in community detention or detention, you only have 7 days to appeal to the RRT.

(see section below called “practical information” for more information about the RRT, including any costs that apply and what might happen there).

(ii) Practical information

It is extremely important that you obtain legal advice from a lawyer or registered migration agent. **If you have a current migration agent, we encourage you to contact them immediately.** Again, this information sheet and the attached sample letters are not a substitute for you obtaining legal advice and assistance. **The sample letters are guides only and may not be accurate or relevant to your individual situation.**

I have decided to accept the THCV what should I do?

You will need to attend your scheduled interview with the Department where it is our understanding that you will be granted first a 449 Temporary Humanitarian Stay Visa (THSV) and at the same time a 786 Temporary Humanitarian Concern Visa (THCV). This however might not be what happens in your case.

The ASRC is hearing reports that some asylum seekers might be granted the Humanitarian Stay (Temporary) visa for a period of time and then be asked to return for the grant of the Temporary (Humanitarian Concern) visa.

You should also note that the Department may decide to conduct their appointment with you by phone instead.

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If you do decide to accept the THCV, it may be helpful to make clear the reasons why you are accepting the offer, for example, ‘you are accepting it because you are ineligible for another visa.’ If the law does end up changing and the legal challenges are successful, it might help you if you have documented the reasons why you are accepting the offer.

We don’t know if it will help, but it might be a cautious thing to do. Please see the Guide “**Acceptance of the offer of a Temporary (Humanitarian Concern) visa**”. This is a guide only and may need to be changed to reflect your circumstances. Any letter should be signed, dated and you should keep a copy and give a copy to the Department to place on their file. If you need an interpreter, you should not write or sign any letters in English without one.

If I decide to not attend the interview at the Department to be offered the THCV what can I do?

Again, we stress the importance of obtaining legal advice before making a decision. If you then decide that you do not wish to attend the interview, you can do the following:

1. You can choose not to attend in person at the Department’s office. This might be preferable to avoid the risk of being offered a visa when you go into the office, even though you did not want such an offer to be made. However, it is very important to communicate with the Department to ensure compliance with requests.
2. Notify the Department that you will not attend the appointment to be offered a THCV – you may say that you are not attending as you would like to seek legal advice (you are not refusing the offer as no formal offer has been made – this can only be done in person) & are appealing the decision to refuse a Protection Visa to the Refugee Review Tribunal as your first step.
3. Such a reply could be made in writing and we have attached a sample letter that can be used as a guide called “**I will not be attending my DIPB appointment.**”
4. You can lodge an appeal to the RRT against the refusal to grant you a permanent protection visa. You must do this within 28 days of receiving the letter from the Department notifying you of their decision and the offer of the THCV or 7 days if you are in detention or community detention.

I am in the community on a current bridging visa, do I become unlawful if I do not attend the interview at the Department to be offered the THCV & instead just appeal to the RRT the decision to refuse a Protection Visa?

NO. As long as you apply within 28 days of the letter from DIBP to the RRT their Bridging Visa will continue until 28 days after a decision from the RRT.

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I am in the community but my bridging visa has expired & not been renewed, do I become unlawful if I do not attend the interview at the Department to be offered the THCV & instead just appeal to the RRT the decision to refuse a Protection Visa?

This is unclear. There are currently over 13,000 asylum seekers in the community whose Bridging Visas have expired, we do not know at this stage if the Department will still renew your expired Bridging Visa if you do not accept the offer of a THCV.

What are the benefits of applying to the RRT?

The benefits of applying to the RRT for a review of the Department's decision to refuse your protection visa are as follows:-

- It might be a way to protect your right to a permanent protection visa, if the legal challenges discussed in this information sheet are successful.
- It will ensure that you will remain lawful in the community, if you are already in the community.
- It will provide you a valid basis for not accepting the offer of a THCV, if that is what you decide to do.

There are strict time limits that apply and these are discussed elsewhere in this information sheet.

The form you must complete is called an "Application for review to the Refugee Review Tribunal". You can find this application on the RRT website right here: <https://forms.tpt.business.gov.au/smartforms/mrt-rrt/r1-application-form>

What is the cost of going to the RRT?

Free. There is no cost to apply to the RRT.

However you will owe a debt in the amount of \$1,604 to the Australian Government if you lose your case at the RRT. This is a debt that will not be waived and you will have to pay this back (unless you win an appeal against this decision in the courts and the odds of this are at this stage unknown and you would need to obtain legal advice concerning your case).

It is also important to note that if you apply to the RRT there are circumstances where you *may* still be liable for the fee (\$1604) even if you are successful.

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What is the likely decision of the RRT?

It is unknown.

1. If the High Court or Senate changes the current laws that deny refugees a Protection Visa, you are likely to be found to be a refugee by the RRT given the Department have already accepted that you are owed protection. This outcome however, very much depends on what will happen with the legal challenge.
2. If the High Court or Senate do not change the current laws denying you the right to a protection visa, the RRT will refuse your case as they cannot find you to be a refugee under the *Migration Act* as it currently stands.

It might be that you lodge an RRT application and the hearing comes on quickly. The legal challenges in the High Court are expected to be heard in March of this year. We don't know when a decision will be reached. The RRT might make a decision before this time. If they do, then as outlined in paragraph [2] above, your case will be refused because currently you are not eligible for a permanent protection visa.

To assist with the RRT hearing occurring after the High Court challenges are decided, we suggest that as a first step, an application should be made to the RRT to adjourn your case. It is open to the RRT to refuse this application. Please see the Guide “**Request for adjournment of my RRT hearing**” for an example of how you might request an adjournment.

How long will the RRT take to decide my case?

It is unclear how long the RRT will take to make a decision. At the moment asylum seekers who come by boat are given the lowest priority in terms of deciding their cases based on the directions of the Minister. This may change at any time and a decision may be handed down quickly. It is uncertain.