

INFORMATION SHEET AS OF 17 FEBRUARY 2014

FAQ for Registered Migration Agents & Community Workers

Please note this 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. Unless you are a registered Migration Agent providing such advice is a contravention of the Migration Act, and as such, you should encourage your clients to seek advice from a Migration Agent.

Who does this information sheet cover?

This information sheet covers and is relevant to asylum seekers who are in the following situation:-

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

There are other groups of asylum seekers who this information sheet does not cover. There are certain groups of asylum seekers who, because of their particular status or time of entry into Australia, may not be entitled to apply for a protection visa, unless the Minister exercises his discretion to lift the bar pursuant to s46A of the *Migration Act*. There are also asylum seekers who are subject to offshore processing unless the Minister determines that it does not apply.

The ASRC has been told of asylum seekers who are receiving notifications from the DIBP that they have been granted a subclass THCV pursuant to the exercise of the Minister’s discretion under section 195A of the *Migration Act*. They have been granted these visas without knowingly being offered or invited to attend any interview. In these cases, there has been no decision in relation to a protection visa that can be reviewed before the

Refugee Review Tribunal (“RRT”) because they were not entitled to make such an application in the first place.

It is therefore clear that there are different groups of asylum seekers and their situation may vary as they may have different or more limited options available to them. The ASRC will aim to provide information sheets that cover these other potential groups. **This information however is strictly limited to the group of asylum seekers who have received both a (i) refusal of their protection visa; and (ii) notice that they are eligible for the grant of a THCV (as outlined above).**

This information sheet should be read as a whole but is divided into two sections (i) general overview; and (ii) practical steps.

(i) GENERAL OVERVIEW

What has happened?

The Abbott Government is trying to deny refugees their legal right to a Protection Visa (866 XA Visa), which is a *permanent* visa.

Just before Christmas, Scott Morrison changed the law so that all asylum seekers who have come by boat or without a valid visa by plane, are no longer eligible for a Protection Visa - even after being **found to be a refugee**.

This was done by inserting clause 866.222 as a new criterion for a protection visa. This criterion excludes from eligibility for a permanent protection visa:

- 'unauthorised maritime arrivals' or
- persons not 'immigration cleared.'

Instead, the Department of Immigration and Border Protection (DIBP) have recently begun utilising old visas; the Humanitarian Stay (Temporary) Visa 449 (HSTV) and the Temporary (Humanitarian Concern) Visa 786 (THCV) for these now excluded people.

The key concern is the THCV may bar a refugee from ever applying for a permanent visa.

In this way, it is different from the old Temporary Protection Visa (TPV), because people were not barred from permanent protection after holding a TPV.

Also, there are currently challenges both in the Senate and the High Court to try and change this new exclusion to permanent visas. This means there may be changes to the right to permanent protection soon.

Therefore, any asylum seeker that receives a letter to attend a meeting with DIBP regarding an invitation for a HSTV and/or a THCV should immediately obtain legal advice before making a decision.

What is a THCV and what are asylum seekers rights on it?

Please see the Fact Sheet from DIBP called “Temporary Humanitarian Concern Visa”.

Asylum seekers will receive a copy of this if they are invited to receive a THCV. It is also available in full on the ASRC website at: www.asrc.org.au.

How does a THCV work?

Asylum seekers cannot apply BUT they *may be invited by the DIBP to apply* for a 786 Temporary (Humanitarian Concern) Visa (THCV).

Who may be invited to apply for a THCV?

Asylum seekers (in detention or the community) who have come by boat (& people who came by plane without a valid visa) *who are found to be refugees*.

At this stage, we know only what DIBP have advised IAAAS providers, which is:

“for the immediate future the applicants are primarily being drawn from IMAs who arrived before 13 August 2012 & some UAAs (unaccompanied minors)”.

The volume & frequency of these invitations for THCV is unknown at this stage.

How will an asylum seeker know they have been invited to consider a THCV?

The group of asylum seekers that this information sheet covers will have received a letter from the DIBP 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’.

How will people offered a THCV actually get one?

Asylum Seekers will be invited to attend a DIBP meeting to be processed & granted the THCV at a set date & time that will be stated in the same letter.

According to the DIBP policy, the letter itself is NOT the offer or grant of a visa, but just an invitation to come into DIBP to be offered and granted one. However, the ASRC has recently been told that some asylum seekers have received letters which look like an offer

in writing. Further inquiries are being made about this issue and any new information will be included in an update.

Asylum seekers are likely to be invited to attend an interview for processing for a Subclass 449 Humanitarian Stay (Temporary) visa first and then a Subclass 786 Temporary (Humanitarian Concern) visa. It is expected that processing for both visas will take place at the same time.

Please note however that the ASRC is hearing reports that it varies whether asylum seekers are granted both the Humanitarian Stay (Temporary) visa and the Temporary (Humanitarian Concern) visa at the same time. An asylum seeker might be granted the Humanitarian Stay (Temporary) visa for a week and then be asked to return for the grant of the Temporary (Humanitarian Concern) visa.

DIBP 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, e.g.: it cannot be offered or accepted in an email or a facsimile”. *This means that people have to attend in person to be offered and then accept the visa.*

However, it is important to note that simply attending an interview with DIBP and being offered the visa (regardless of whether you then refuse it) may be enough to bar an asylum seeker from being eligible for a permanent Protection Visa.

Also, it should be noted that there is a possibility that they may also receive a phone call from the Department, attempting to discuss the Humanitarian Stay Temporary Visa (HSTV) and/or a THCV.

What should asylum seekers do?

Much remains unclear; we don't really know what's going to happen from here and the environment is constantly changing.

The High Court is currently hearing two challenges against parts of these new laws barring asylum seekers from Protection Visas in March 2014. There will also be attempts to have the law disallowed by the Senate.

If either of these avenues succeeds, asylum seekers found to be refugees will possibly once again be entitled to a *permanent* Protection Visa. When the High Court or Senate will give an actual decision is uncertain.

Should asylum seekers accept the offer of a THCV or not attend their DIBP appointment to be offered a THCV?

They should be referred to obtain legal advice.

It is for people to decide for themselves. They must make their own decision about what they would like to do.

Obviously it is an unjust and very difficult position people are being placed in. This new law

will be devastating news for many refugees, as they're denied not just permanent protection, but the right to sponsor their family.

A good thing to do is give asylum seekers all the information to enable them to make the most informed decision possible in such difficult times.

If an asylum seeker in the community says Yes to a THCV:

The key concern is that when an asylum seeker accepts the THCV they may be barred from ever applying for a permanent visa, regardless of what the Senate or High Court decides, because they will already have accepted the THCV and its terms.

Given this concern and the outstanding High Court challenge and potential Senate disallowance, any client that receives a letter to attend a meeting with DIBP regarding an invitation for a THCV ***should immediately obtain legal advice before making such a decision.***

If a refugee decides to accept the THCV visa:

Positives

- Able to work
- Access to Medicare
- Access to Centrelink income
- Valid visa for *up to* 3 years (it is unclear how long they will be granted for)
- No risk of detention if comply with visa

Risks

- Unable to apply for a *permanent* visa (this will possibly still be the case even if the High Court or Senate strike down the current laws in full, as the THCV has already been accepted)
- A temporary visa, not a permanent visa
- Unable to sponsor family
- If you leave Australia, you cannot return
- THCV may be for 3 years *or less*; it is unclear how long the visa will be granted for
- Required to prove refugee status all over again before the THCV expires

If an asylum seeker in the community makes a decision to not attend the interview at DIBP to be offered the THCV, what are the positives & risks?

Positives

- They may avoid the risk of being permanently barred from applying for a permanent visa. This may protect their right to receive a permanent visa in future, if the law changes.

Risks

- They may not be offered another THCV. According to DIBP “People invited to attend the departments offices for the above purposes [of getting a THCV] should not assume that the invitation will be repeated”. Even if the Senate or High Court change the current laws denying people found to be Refugees the right to a Protection Visa, they still cannot receive one unless the Minister for Immigration allows it.
- If the High Court or Senate don't change the current laws denying people found to be Refugees the right to a Protection Visa, they might be left in limbo without a visa.
- Risk of being placed in detention – unclear how likely, but it is possible
- Risk of having no visa status if currently have no Bridging Visa. It is unclear if people who do not accept an offer of a THCV will have their Bridging Visas renewed
- If currently no right to work, will remain with no right to work for a period of time (unclear how long)
- If currently no access to Medicare, will remain with no Medicare for a period of time (unclear how long)
- If currently no income support, will remain with no income support for a period of time (unclear how long)
- Asylum Seekers who have signed the Code of Behaviour could be in breach of the Code by failing to comply with what may be considered by DIBP as reasonable requests to attend an interview with the Department.

If an asylum seeker is in Detention are there any additional risks?

Yes. It appears that asylum seekers in detention who do not attend an appointment with DIBP to be offered a THCV are likely to not be released from detention if the current laws do not change.

Can an asylum seeker appeal to the Refugee Review Tribunal (“the RRT”)?

An asylum seeker can apply to the RRT whether or not they accept the offer of the THCV. The application to the RRT however only relates to the DIBP’s decision to refuse the asylum seekers protection visa application. It does not relate to the invitation or offer of a THCV.

Strict time limits apply to the RRT. An asylum seeker must 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. If in community detention or detention, asylum seekers only have 7 days to appeal to the RRT.

(see section below “Applying to the RRT” for more information including as to any costs associated with going to the RRT and what could happen there).

(II) PRACTICAL STEPS

This section offers information as to practical steps that might be taken *after an asylum seeker has obtained legal advice* and reached a decision as to what they will do.

If an asylum seeker wants to accept THCV what should they do?

They should attend their scheduled interview with DIBP, where it is our understanding that asylum seekers will be granted first a 449 Temporary Humanitarian Stay Visa (THSV) and at the same time a 786 Temporary Humanitarian Concern Visa (THCV). However, this is uncertain.

It should be noted that the DIBP may decide to conduct their appointment with an asylum seeker by phone instead.

For those who wish to accept the offer of a THCV, it may be helpful to make clear why they are accepting the offer, for example, because they are now ineligible for a protection visa. This should be in writing, as it may help any future court challenge if their acceptance of this visa ends up representing a bar to a permanent protection visa.

Please see the Guide “**Acceptance of the offer of a Temporary (Humanitarian Concern) visa**” for how Asylum seekers might put this in writing if they accept the THCV. This is a guide only. If a letter is used, it should outline the reasons why the individual asylum seeker is accepting the visa. Any letter should also be signed and dated and the asylum seeker should retain a copy of it and provide a copy to the Department.

If an asylum seeker makes a decision to not attend the interview at DIBP to be offered the THCV what should they do?

If the person does not wish to attend the interview, they should:

1. Notify DIBP that they will not attend the appointment to be offered a THCV – they may just say that they are not attending (please note: they are not refusing the offer as no formal offer has been made) & are appealing the decision to refuse a Protection Visa to the Refugee Review Tribunal as their first step. It can be done in writing. Please see the Guide “**I will not be attending my DIBP Interview**” for an example of how an asylum seeker might notify DIBP of this.
2. The asylum seeker can choose to NOT attend in person to DIBP office to notify them that they are not attending the interview for offer of THCV, in case they are then offered it when there (which could be enough for them to be barred from ever getting a permanent Protection Visa). The DIBP could be notified instead by email, mail or fax.
3. Lodge an appeal to the RRT (must be within 28 days of receiving letter from DIBP)

notifying them of this offer of a THCV, 7 days if in community detention or detention).

Does an asylum seeker become unlawful if they do not attend the interview at DIBP to be offered the THCV & instead just appeal to the RRT the decision to refuse a Protection Visa?

NO. As long as they 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. Remember if in community detention or detention, asylum seekers only have 7 days to appeal to the RRT.

Applying to the RRT

All asylum seekers who have had their protection visa refused are entitled to apply to the RRT. The letter that they receive from the DIBP should also inform them of this.

As stated above, it is unclear how the High Court will interpret the law and what decision they will make. Asylum seekers in this position, and after receiving legal advice, might wish to try and keep open their future prospects for a permanent visa. They may therefore decide to appeal to the RRT so as to (i) protect their right to pursue a permanent protection visa should the law change; (ii) remain lawful in the community; and (iii) have a valid basis for not accepting the offer of a THCV.

Again, it is important to note that an asylum seeker must apply within 28 days of receiving the decision, as that is the legal limit. An asylum seeker should go off the date on the front page of the letter from DIBP as the start date of your 28 days to be on the safe side).

The above does NOT APPLY to people in Detention or Community Detention who have a strict 7 days from time of decision from DIBP to apply to the RRT.

The form an asylum seeker 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 for an asylum seeker?

Free. There is no cost to apply to the RRT & appealing to the RRT should only takes 10 minutes to do.

However, an asylum seeker will owe a debt in the amount of \$1,604 to the Australian Government if they lose their case at the RRT. This is a debt that will not be waived and an asylum seeker will have to pay this back (unless they win an appeal against this decision in the courts).

Also important to note that if they apply to the RRT they *may* be liable for the fee (\$1604) even if they are successful (because the fee is only not payable where the RRT remits with the direction that they meet the refugee or CP criteria – and in their circumstances it is

possible that even if they are successful, the RRT may only remit with the direction that they meet (cl.866.222), that is Australia's obligations to provide protection.

Further information about the RRT can be obtained from the website address referred to above.

What is the likely decision of the RRT?

This is unknown and an asylum seeker should obtain legal advice. What is clear however based on the DIBP's letter is that the asylum seeker has been refused a protection visa because they do not satisfy clause 866.222. Therefore the following may happen -

1. If the High Court or Senates strike down the current laws that deny refugees a permanent Protection Visa, they may be found to be a refugee by the RRT given DIBP have already conceded that they are owed protection.

This depends on the law being overturned by the High Court or Senate *before* an asylum seekers case is decided by the RRT.

The High Court is expected to hear the legal challenges in March 2014. It is uncertain when they will make a decision. If an application is made to the RRT, a written request can also be made for the case to be adjourned. The request can be made on the basis that any decision should be adjourned until the High Court has ruled on the validity of the relevant clause in the cases currently before it of *Plaintiff M150 of 2013* and *Plaintiff S297 of 2013*.

It is open to the RRT to refuse the adjournment application. Please see the Guide "**Request for adjournment of my RRT Hearing**" for an example of how an asylum seeker might request this.

2. If the High Court or Senate do not strike down the current laws denying them the right to a protection visa – or if the RRT proceeds to consider the application before any such decision - the RRT will refuse their case, as they cannot find them to be refugees under the *Migration Act* as it currently stands.