

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 #2 - 17 FEBRUARY 2014

ONLY For Asylum Seekers who have been refused the grant of a Protection Visa (866) and received a letter regarding a Humanitarian Stay (Temporary) Visa (449) (HSTV)

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:

The contents of this document are intended and provided for information purposes only. The ASRC has attempted to ensure that the resource is current and accurate but cannot guarantee this. The resource is provided on the basis that persons accessing it undertake responsibility for assessing the relevance and accuracy of its content. The ASRC does not accept any liability to any person or body for the information (or the use of such information) which is provided in this resource.

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) In the letter you received from the Department it states:

“Initial assessments of your protection claims indicate that you **may** engage Australia’s protection obligations. Therefore you are eligible for a grant of a Humanitarian Stay (Temporary) Visa (HSTV). This will allow you to reside in the Australian community for a specified period of time while your protection assessment is finalised. The Department will contact you to schedule an appointment for you to be granted a HSTV. Please note that this appointment may be conducted by phone or in person at a DIBP office.”

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If you are not in the above category of only being offered a HSTV but have instead been invited to attend to be assessed for both a HSTV and a Temporary Humanitarian Concern Visa (THCV), please read *Information Sheet #1* and obtain legal advice about the options available to you.

If you have been granted a HSTV or a THCV without any interview or process, this information sheet is not applicable or relevant to you as your situation may be different. If you are in this position, you should obtain urgent legal advice. The ASRC is also aiming to soon provide information sheets that might cover your situation.

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 considered by DIBP for a Humanitarian Stay (Temporary) Visa (HSTV)?

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. “Initial assessments of your protection claims indicate that you **may** engage Australia’s protection obligations. Therefore you are eligible for a grant of a Humanitarian Stay (Temporary) Visa (HSTV).”

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.

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What is a Humanitarian Stay (Temporary) Visa (HSTV)?

It is a temporary, short term visa that the Australian Government has deemed you eligible to receive because you have come by boat or without a visa to Australia and have been initially assessed as *potentially* being owed protection.

If you are later found to definitely be owed protection by Australia, you may be offered a Temporary (Humanitarian Concern) Visa (THCV). Please see *Information Sheet #1* for information regarding a THCV.

It is very important you understand the nature of the THCV also; because that is the visa you may be offered if you are found to be a refugee.

How do I actually get this HSTV?

Please NOTE the letter you have received is not the grant of a visa just a notice from the DIBP by that you are eligible to be offered and granted one.

You may be invited to attend the Department for an appointment to be offered a HSTV.

You may also receive a phone call from the Department, attempting to discuss with you a Humanitarian Stay Temporary Visa (HSTV) over the phone.

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.

What should I do?

If you have received the letter 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 to discuss your situation.**

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 HSTV what will this mean?

We have outlined below the potential positives and negatives are of accepting a HSTV.

The HSTV is a pathway to being offered a THCV if you are later found to be owed protection by Australia. You therefore need to understand the positive and negatives of both visas to be informed about your future options. You can read *Information Sheet #1* for general information regarding the THCV. You should speak to your lawyer regarding your situation.

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Positives

- If you are currently without a valid Bridging Visa (due to it expiring & not being renewed) , you will again be in the community on a valid visa
- You will be in a position to be offered a THCV if you are found to be owed protection (you need to understand this visa to determine the risks to your future claims. Please see *Information Sheet #1* and speak to your lawyer)

Risks

- It is only a temporary visa for a short time. The timeframe is unknown as it is up to the Minister
- You can never sponsor your family
- You will be prevented from applying for any further visa, including a Protection Visa (PV), the only exception is you may be offered a THCV (a visa valid for up to 3 years) which also bars you from any other visa including a Protection Visa
- If you leave Australia, you cannot return
- It is unknown whether there will be the right to work, this is at the discretion of DIBP
- No right to financial support or assistance from the government

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 HSTV and the challenge is successful, you might still be prevented from applying for any permanent protection visas because you have accepted the HSTV.

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 HSTV 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 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 HSTV. 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".

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- You will not be eligible for a THCV
- 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.

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 HSTV 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 HSTV.

However, the application to the RRT only relates to the Department's decision to refuse your Protection Visa application. It does not relate to an invitation or offer of a HSTV.

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).

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(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 HSTV what can I do?

You will need to attend any scheduled interview with the Department where it is our understanding that you will be granted a 449 Humanitarian Stay (Temporary) Visa (HSTV).

If you do decide to accept the HSTV, 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 Humanitarian Stay (Temporary) Visa and/or 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 any interview or discuss by phone an offer of the HSTV what can I do?

Again, we stress the importance of obtaining legal advice before making a decision. You should urgently speak to your Migration Agent if you have one. If you then decide that you do not wish to attend the interview, you can do the following:

1. Notify the Department that you are seeking legal advice on the rejection of your Protection Visa and seeking advice and information on the HSTV (you are not refusing an offer of a HSTV, as no formal offer has been made) & are appealing the decision to refuse a Protection Visa to the Refugee Review Tribunal as your first step.
2. Such a reply could be made in writing and we have attached a sample letter that can be used as a guide called **“I am seeking advice on my PV app and the HSTV.”**
3. 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.

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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 HSTV & 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.

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 HSTV & 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 HSTV.

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).

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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.

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.