

# TEMPORARY HUMANITARIAN CONCERN VISA FACT SHEET – 08 APRIL 2014

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## **What is this Fact Sheet about?**

This Fact Sheet is about Temporary Humanitarian Concern (Subclass 786) visas, Humanitarian Stay (Temporary) (Subclass 449) visas, and the recent decision of the Australian Senate to disallow Migration Regulation clause 866.222.

The law in this Fact Sheet is current as at 08 April, 2014.

## **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](http://www.mara.gov.au).*

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

## **To whom is this Fact Sheet relevant?**

This fact sheet is only relevant for asylum seekers who:

- arrived in Australia by boat without a valid visa
- arrived in Australia by plane but were not immigration cleared (i.e. were sent directly to an immigration detention centre from the airport)
- did not have a valid visa when they last arrived in Australia

If you are an asylum seeker and you arrived in Australia with a valid visa (i.e. tourist visa, student visa, visitor visa) this Fact Sheet is not relevant. This is because none of the recent changes in the law with respect to regulation 866.222 affect you.

## **Background information on Temporary Humanitarian Concern Visas and Regulation 866.222**

### **Introduction of Migration Regulation clause 866.222**

*Migration Regulations 1994* (Cth) clause 866.222 was introduced by the Government in December 2013. It stated that asylum seekers would not be eligible for a permanent protection (Class XA Subclass 866) visa if they arrived in Australia by boat without a visa, arrived in Australia by plane but were not immigration cleared at the airport or did not have a valid visa when they last arrived in Australia.

### **Humanitarian Stay (Temporary) Visas and Temporary Humanitarian Concern Visas:**

In February 2014, the Department of Immigration and Border Protection (DIBP) began to reject some asylum seekers' applications for a permanent protection visa due to the *Migration Regulations 1994* (Cth), clause 866.222.

The DIBP invited those same asylum seekers to attend an appointment at the DIBP where they could be offered a Humanitarian Stay (Temporary) (Subclass 449) visa and subsequently a Temporary Humanitarian Concern (Subclass 786) visa.

People who have been granted the **Temporary Humanitarian Concern Visa** are:

- Allowed to live in the community
- Hold the visa for up to 3 years (exact length of visa is decided, and can be varied, by the Minister)
- Allowed to work
- Have access to Medicare
- If no income – Centrelink payments

- Not allowed to return if they leave Australia
- Not allowed to sponsor family members to come to Australia
- Not allowed to remain in Australia once the Temporary Humanitarian Concern Visa expires unless the Minister offers another visa
- Never eligible for the subsequent grant of a protection visa unless the Minister lifts the bar under section 91L of the *Migration Act 1958* (Cth)
- Not allowed to apply for a different type of visa (e.g. partner visa, skilled visa) while in Australia.

### **The law as it applies today:**

#### **What happened in the Australian Senate on 27 March, 2014?**

On the 27 March, 2014 the Australian Senate disallowed Migration Regulation clause 866.222. This means that this regulation no longer exists.

It has been reported in the media that on 27 March, 2014 the Australian Senate disallowed Temporary Humanitarian Concern Visas. This is not accurate. Temporary Humanitarian Concern Visas still exist.

#### **What does the Senate disallowance of regulation 866.222 mean for you?**

This depends entirely on when you arrived in Australia and at what stage of the refugee determination process you are currently at. The simplest way to answer this question is to begin with the date that you arrived in Australia:

1. After 19 July 2013
2. After 13 August 2012 and before 19 July 2013
3. Before 13 August 2012

### **1. I arrived after 19 July 2013.**

If you arrived after the 19 July 2013, unfortunately you are at risk of being removed from Australia for offshore processing in Nauru or Manus Island (PNG). As the last stands today, you will never be allowed to lodge a valid application for a protection visa in Australia and you will not be resettled in Australia if you are found to be a refugee in Nauru or PNG.

We do not know if at some stage DIBP might offer you a Humanitarian Stay (Temporary) (Subclass 449) visa and a Temporary Humanitarian Concern (Subclass 786) visa. If they do, you will have to decide whether accepting this visa (with the conditions outlined above) is preferable to being taken offshore for processing.

### **2. I arrived after 13 August 2012 and before 19 July 2013**

If you arrived after 13 August 2012 and before 19 July 2013 the information regarding Temporary Humanitarian Concern visas will be different for you depending, in part, on whether you have already made a valid application for a protection visa. Your application for a protection visa is only valid if the Minister has 'lifted the bar' (allowed you to apply) under section 46A or, where applicable, section 91L of the *Migration Act 1958* (Cth)

There are several categories of asylum seekers who arrived between these two dates. Each of those categories is addressed below.

- You have made a valid application for a protection visa and you have not yet been rejected by DIBP, or
- You have made a valid application for a protection visa but DIBP refused the application because of regulation 866.222. However you have not yet been offered a 786 visa and/or a 449 visa, or
- You have already been found to be a refugee by the RRT but when your case was remitted back to the DIBP your protection visa was not granted because of regulation 866.222, or
- You have made a valid application for a protection visa which was rejected by DIBP because of regulation 866.222 and you were offered a 786 visa and/or 449 visa, or
- You have not yet been allowed to make a valid application for a protection visa and you have not yet been offered a 786 visa and/or 449 visa
- You have not yet been allowed to make a valid application for a protection visa and you have been offered a 786 visa and/or 449 visa

**2.a - You have made a valid application for a protection visa and you have not yet been rejected by DIBP:**

If you have already made a valid application for a protection visa and you have not received notification from the DIBP that your application was refused due to *Migration Regulations 1994 (Cth)*, clause 866.222, we believe that your application for a protection visa should continue to be processed. If you are found by the DIBP to be a refugee you should now be eligible for a protection visa. However, you will not be granted that visa at the moment because there is currently a freeze on the grant of protection visas to all asylum seekers (see the ASRC fact sheet “Visa Freeze” on our website: <http://www.asrc.org.au/resources/visa-freeze/>).

In the future if your application for a protection visa is rejected by the DIBP you will have the right to apply for a review of that decision to the RRT and you should ensure that you do that within the required time limit (7 days after notification of the DIBP decision if you are in detention/community detention or 28 days after notification of the DIBP decision if you are living in the community with a bridging visa).

It is still possible that you will be offered a Humanitarian Stay (Temporary) (Subclass 449) visa and a Temporary Humanitarian Concern (Subclass 786) visa. If that happens, you may be barred from being granted a permanent protection visa in the future. This is because, once a person has been offered a 449 visa, subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

If you accept a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you will be on the 786 visa and you will have all of the rights and restrictions described in the first section of this Fact Sheet.

If you are in detention/community detention, or you do not currently have a bridging visa, it may be that you do not get the choice to accept or reject the visa. This is because under section 195A of the Migration Act 1958 (Cth) the Minister can grant you any visa, regardless of whether you applied for that visa.

If you are invited to attend an appointment at the DIBP to discuss an offer of a 449 visa or 786 visa it is in your interests to seek urgent advice from a migration agent before attending.

**2.b - You have made a valid application for a protection visa but DIBP refused the application because of regulation 866.222. You were not offered a 786 visa and/or a 449 visa**

If you fall into this category it is in your interests to make an application for review to the RRT, if you have not done so already. Remember that you only have 28 days after the date of notification of rejection by the DIBP, or 7 days if you are in detention or community detention, to lodge an application for review at the RRT.

Currently we do not know how the RRT will process these cases. If you are invited to a hearing at the RRT it is important that you prepare your

case and that you attend the hearing as required. If you are successful at the RRT your case will be remitted back to the DIBP. You should be aware that even if the DIBP does make a final finding that you are eligible for a protection visa, you will not be granted a protection visa immediately due to the current cap on the grant of all protection visas. (See the ASRC fact sheet “Visa Freeze” on our website: <http://www.asrc.org.au/resources/visa-freeze/>).

It is still possible that you will be offered a Humanitarian Stay (Temporary) (Subclass 449) visa and a Temporary Humanitarian Concern (Subclass 786) visa.

If that happens, you may be barred from being granted a permanent protection visa in the future. This is because once a person has been offered a 449 visa, subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

If you accept a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you will be on the 786 visa and you will have all of the rights and restrictions described in the first section of this Fact Sheet.

If you are in detention/community detention, or you do not currently have a bridging visa, it may be that you do not get the choice to accept or reject the visa. This is because under section 195A of the Migration Act 1958 (Cth) the Minister can grant you any visa, regardless of whether you applied for that visa.

If you are invited to attend an appointment at the DIBP to discuss an offer of a 449 visa or 786 visa it is in your interests to seek urgent advice from a migration agent before attending.

### **2.c - You have already been found to be a refugee by the RRT but when your case was remitted to the DIBP your protection visa was not granted because of regulation 866.222.**

If you fall into this category it is in your interests to make an application for review to the RRT, if you have not done so already. Remember that you only have 28 days after the date of notification of rejection by the DIBP, or 7 days if you are in detention or community detention, to lodge an application for review at the RRT.

You might wish to write to the RRT and ask them to expedite the review of your case based on the fact that the RRT previously found that you may be owed protection obligations, and regulation 866.222 has been disallowed by the Senate. (Please find an example letter on our website <http://www.asrc.org.au/resources/>). If you are successful again at the RRT your case will be remitted to the DIBP.

You should be aware that even if the DIBP does make a final finding that you are eligible for a protection visa, you will not be granted that visa yet due to the current cap on the grant of all protection visas. (See the ASRC fact sheet “Visa Freeze” on our website:

<http://www.asrc.org.au/resources/visa-freeze/>).

It is still possible that you will be offered a Humanitarian Stay (Temporary) (Subclass 449) visa and a Temporary Humanitarian Concern (Subclass 786) visa.

If that happens, you may be barred from being granted a permanent protection visa in the future. This is because once a person has been offered a 449 visa, subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

If you accept a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you will be on the 786 visa and you will have all of the rights and restrictions described in the first section of this Fact Sheet.

If you are in detention/community detention, or you do not currently have a bridging visa, it may be that you do not get the choice to accept or reject the visa. This is because under section 195A of the Migration Act 1958 (Cth) the Minister can grant you any visa, regardless of whether you applied for that visa.

If you are invited to attend an appointment at the DIBP to discuss an offer of a 449 visa or 786 visa it is in your interests to seek urgent advice from a migration agent before attending.

**2.d - You have made a valid application for a protection visa which was rejected by DIBP because of regulation 866.222 and you were offered a 786 visa and/or 449 visa**

If you fall into this category, you may be barred from being granted a permanent protection visa in the future. This is because, once a person has been offered a 449 visa, subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek urgent legal advice about the best way to mount this challenge.

If you accepted a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you are currently on the 786 visa and have all of the rights and restrictions described in the first section of this Fact Sheet.

If you fall into this category it is in your interests to make an application for review to the RRT, if you have not done so already. Remember that you only have 28 days after the date of notification of rejection by the DIBP, or 7 days if you are in detention or community detention, to lodge an application for review at the RRT. Currently we do not know how the RRT will process these cases. If you are invited to a hearing at the RRT it is important that you prepare your case and that you attend the hearing as required.

If you make an application for review to the RRT you might still need to challenge the offer of the 449 visa so that you may be eligible again for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

**2.e - You have not yet been allowed to make a valid application for a protection visa and you have not yet been offered a 786 visa and/or 449 visa**

As stated above, anybody who arrived by boat in Australia between 13 August 2012 and 19 July 2013 is not allowed to automatically make a valid application for a protection visa. You must wait until the Minister 'lifts the bar' (allows you to apply) under section 46A of the *Migration Act 1958* (Cth). Unfortunately if this has not happened yet it is possible that the Minister will not 'lift the bar' in the foreseeable future. In this case, you are still at risk of remaining in detention, or in the community with very limited rights, or being sent to Nauru or PNG for offshore processing.

You may also still be offered a 786 and/or 449 visa. If you are in detention/community detention, or you do not currently have a bridging visa, it may be that you do not get the choice to accept or reject the visa. This is because under section 195A of the *Migration Act 1958* (Cth) the Minister can grant you any visa, regardless of whether you applied for that visa.

If you are living in the community with a bridging visa, you can still elect to accept or reject the 449 and/or 786 visa. If faced with this decision you should seek legal advice about whether to accept or reject it. You will need to weigh up the following factors:

- If you reject an offer of a 449 visa you may be barred from being granted a permanent protection visa in the future. This is because once a person has been offered a 449 visa, subclause 866.227 (2) of the *Migration Regulations* could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer of that visa before you are found to be eligible for the grant of a protection visa. You would need to seek legal advice about the options to mount this challenge.
- If you accept the 786 visa and/or 449 visa you will only be allowed to apply for a protection visa if the Minister lifts the bar under section 91L of the *Migration Act*.
- If you accepted a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you are currently on the 786 visa and have all of the rights and restrictions described in the first section of this Fact Sheet.
- It is also important to note that if you do not accept the 449 or 786 visa you are technically at risk of being transferred to Nauru or PNG for offshore processing.

If you think that you would rather be on a 786 visa, you may have to wait until the Minister offers you the visa because you cannot apply for it.



## **2.f - You have not yet been allowed to make a valid application for a protection visa and you have been offered a 786 visa and/or 449 visa**

As we have stated above, anybody who arrived by boat in Australia between 13 August 2012 and 19 July 2013 is not allowed to automatically make a valid application for a protection visa. You must wait until the Minister 'lifts the bar' (allows you to apply) under section 46A of the *Migration Act 1958* (Cth). Unfortunately if this has not happened yet it is possible that the Minister will not 'lift the bar' in the foreseeable future.

If you rejected an offer of a 449 visa you may be barred from being granted a permanent protection visa in the future. This is because once a person has been offered a 449 visa subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

If you accepted a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you are currently on the 786 visa and have all of the rights and restrictions described in the first section of this Fact Sheet. You will only be allowed to apply for a protection visa if the Minister lifts the bar under section 91L of the Migration Act. While you are on this visa, you are not at risk of being sent to Nauru or PNG for offshore processing.

If you are in detention/community detention, or you do not currently have a bridging visa, it may be that you do not get the choice to accept or reject the visa. This is because under section 195A of the Migration Act 1958 (Cth) the Minister can grant you any visa, regardless of whether you applied for that visa.

## **I arrived before 13 August 2012**

If you arrived before 13 August 2012 we believe that it is most likely that you have already lodged an application for a protection visa. You are likely to be at one of the following stages of the refugee determination process in Australia:

- still awaiting a decision from the DIBP,
- currently awaiting review of a negative DIBP decision by the RRT,
- back at the DIBP after the RRT found you to be a refugee,
- currently before a Court, or
- awaiting a decision of the Minister regarding your application for ministerial intervention.

You may have received a letter from the DIBP before the 27 March 2014 stating that you were not granted a protection visa because of

regulation 866.222 when it was in force. If this is the case – please read sections 2.a, 2.b or 2.d above – as they may relate to your situation.

If you were found to be a refugee by the RRT and when your case was remitted to the DIBP you were told you were not eligible for a protection visa because of regulation 866.222, please look at section 2.c above.

You should be aware that even if the DIBP does make a final finding that you are eligible for a protection visa, you will not be granted that visa yet due to the current cap on the grant of all protection visas. (See the ASRC fact sheet “Visa Freeze” on our website: <http://www.asrc.org.au/resources/visa-freeze/>).

If you have been offered a 449 visa you may be barred from being granted a permanent protection visa. This is because once a person has been offered a 449 visa subclause 866.227 (2) of the Migration Regulations could prevent the grant of a permanent protection visa. If this is the case you may have to challenge the offer/grant of that visa before you are found to be eligible for the grant of a protection visa. You should seek legal advice about the best way to mount this challenge.

If you accepted a Humanitarian Stay (Temporary) (Subclass 449) visa and then a Temporary Humanitarian Concern (Subclass 786) visa you are currently on the 786 visa and have all of the rights and restrictions described in the first section of this Fact Sheet.

It is still possible that you will be offered a Humanitarian Stay (Temporary) (Subclass 449) visa and a Temporary Humanitarian Concern (Subclass 786) visa. If you are currently in detention/community detention or you do not have a bridging visa it is within the Minister’s power under section 195A of the Migration Act to grant you any visa, regardless of whether you have applied for that visa. If you are invited to attend an appointment at the DIBP to discuss an offer of a 449 visa or 786 visa it is in your interests to seek urgent advice from a migration agent before attending.

**If you arrived before 19 July 2013 (to be read in conjunction with commentary above):**

