

Overview of the legal process for seeking asylum in Australia

Who is this Infosheet for?

This Infosheet provides a basic overview of the legal process for seeking asylum in Australia. The information contained in this document is general information and does not constitute legal or migration advice. We recommend that anyone seeking asylum in Australia obtain legal or migration advice about their personal circumstances.

What is the process for determining refugee status in Australia?

People who are fearful of returning to their home country may be able to apply for a protection visa in Australia. The type of protection visa you can apply for is determined by when you came to Australia and how you arrived in Australia. The table on the next page shows visa eligibility based on how you arrived. Some people are not able to apply for a protection visa, even if they are afraid to return to their home country, if they fall within certain groups of people who are prevented by law from lodging a valid visa application. These groups include people who arrived by boat between 2010-August 2012 and who have never been invited to apply for a protection visa, and also people who were transferred from PNG or Nauru offshore processing centres to Australia for medical treatment.

It is important to note that a person only has one opportunity to apply for a protection visa and is not allowed to lodge a repeat application unless there are special circumstances where the Minister has allowed that specific person to apply again, due to an exceptional reason.

Your application for a Protection visa will first be assessed by the Department of Home Affairs (the **Department/DHA**), who will decide whether you satisfy the definition of a refugee, or whether you should be granted complementary protection (see below for definitions). The Department may invite you to an interview to further discuss your claims. This may be conducted in-person, by video conference or over the telephone. Sometimes the Department does not offer an interview and may decide your application based on the documents you have submitted. This is why it is very important to make sure all of your claims and evidence are provided with your initial application, in writing.

If you are refused a Protection visa by the Department, you may then apply (but only within strict time limits, 28 days for community applicants and 7 working days for detention applicants) to have that decision reviewed by the Administrative Appeals Tribunal (**AAT**), or if you are what's known as a "Fast Track" applicant, (as you arrived by boat after 12 August 2012), the Immigration Assessment Authority (**IAA**) will automatically review the Department's decision. See our other info sheets for further important information about these merits review processes.

If your visa refusal is affirmed (which means the IAA or AAT agree with the Department's decision not to grant you a visa), you may then be able to seek review of this decision in the Federal Circuit Court (**FCC**) within 35 days if there are legal errors which have been identified in the IAA/AAT decision.

Who is a refugee under Australian law?

Under Australian law, a refugee is defined as a person with a 'well-founded fear of persecution' from their country of origin and who is unable or unwilling to return to that country due to that fear.¹ A person may have a well-founded fear of persecution if they fear they may be persecuted due to their race, religion, nationality, political opinion or membership of a particular social group, and there is a real chance that they will be persecuted for one or more of those reasons.² It must also be shown that the person cannot relocate to another part of the country to avoid that persecution, that there are no effective ways that they can protect themselves from that persecution, and that they cannot reasonably be expected to modify their behaviour, appearance, or be forced to do a certain thing, in order to avoid that persecution.³

It is also important to note that where a person provides a document that is not genuine (a 'bogus document') in support of their application, or destroyed or disposed of their genuine documents, that person will not be granted a visa, unless there is a reasonable explanation for the person doing so.⁴ This means that even if you satisfy the definition of a refugee or meet the complementary protection criteria, your application may be refused if you provide the DHA documents that are not genuine or if you destroy or dispose of your genuine documents.

A person may not be granted a protection visa even if they satisfy the definition of a refugee if they have a serious criminal record before or during their application for their Protection visa, or if they are considered a risk to the community.⁵

What is complementary protection?

If a person seeking asylum does not satisfy the definition of a refugee, a person will be automatically considered against the 'complementary protection' criteria. This means that they may still be granted a Protection visa if they face a real risk of significant harm in their country of origin.⁶ As with the refugee criteria, a person owed complementary protection may not be granted a protection visa if they have a serious criminal record before or during their application for their Protection visa, or if they are considered a danger to Australia's security.⁷

For more information on complementary protection, see our '[HRLP Infosheet – Complementary Protection](#)'.

¹ *Migration Act 1986* (Cth) s 5H(1).

² *Migration Act 1986* (Cth) s 5J(1).

³ *Migration Act 1986* (Cth) ss 5J(1)(c), (2), (3).

⁴ *Migration Act 1986* (Cth) s 91WA.

⁵ *Migration Act 1986* (Cth) ss 5H(2), 36(1C).

⁶ A real risk of significant harm includes the loss of life, the carrying out of the death penalty or torture, cruel or inhuman treatment or punishment or degrading treatment or punishment: *Migration Act 1986* (Cth) s 36(2A).

⁷ *Migration Act 1986* (Cth) s 36(2C).

Will I have to undergo any checks before being granted a visa?

If your application is accepted and you are found to be a refugee or owed complementary protection, your visa will not be granted until you have satisfied health,⁸ security and character⁹ checks. The DHA will contact you to arrange to have these checks done. You will likely need to undergo some specific medical checks (but you cannot be refused a protection visa if you have a health condition). Most applicants have to pay for these tests themselves.

In undergoing the character checks, DHA will undertake its own checks by searching your details on national or international databases to determine if you have engaged in criminal activity. You will also likely be requested to provide police clearance certificates for any country you have lived in for more than 12 months within the past 10 years, except for the country against which you are seeking asylum. You are expected to arrange these checks yourself if requested. In some situations where it is impossible for you to provide these checks, you may be able to seek a waiver. You may be asked to comment in writing on any character information that DHA obtains or occasionally, be invited to an interview to discuss any character issues arising.

If the Department decides that you have failed the character test, then your visa application will be refused, and this refusal can be reviewed.

What types of visas am I eligible for?

How you arrived in Australia will determine what types of protection visas for which you may be eligible. The table below shows visa eligibility based on method of arrival.

It is recommended you obtain independent legal advice and/or migration advice before attempting to apply for any of these visas. If you may have any other visa options aside from a protection visa, (for example, family or skilled visa options) then it is important that you get migration advice about those options before you apply for a protection visa.

⁸ More information on these health checks can be found on the DHA website: <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/health>. The health checks may be subject to COVID-19 procedures.

⁹ More information on these character checks can be found on the DHA website: <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character>

| | | Visa Eligibility | | |
|---------------|--|---|---------------------------------|-----------------------------------|
| | How did you arrive in Australia? | Permanent Protection Visa (PPV) | Temporary Protection Visa (TPV) | Safe Haven Enterprise Visa (SHEV) |
| Plane Arrival | Arrived by plane with a valid visa and are immigration cleared | ✓ | | |
| Boat Arrival | Arrived by boat prior to 14 Aug 2012 (pre-Fast Track) ¹⁰ | | ✓ | ✓ |
| | Arrived by boat between Fast Track period (14 Aug 2012 – 31 Dec 2014) ¹¹ | | ✓ | ✓ |
| | Arrived by boat via Ashmore Reef | <i>You need to wait for a bar lift to allow you to apply for a protection visa (SHEV or TPV). If you submit a protection visa application before you receive confirmation that you can apply, your application will be invalid.</i> | | |

Choosing between a TPV and a SHEV

If you are eligible to apply for either a TPV or a SHEV, you will need to make a decision about which visa to apply for. The following table outlines the key differences between the visas.

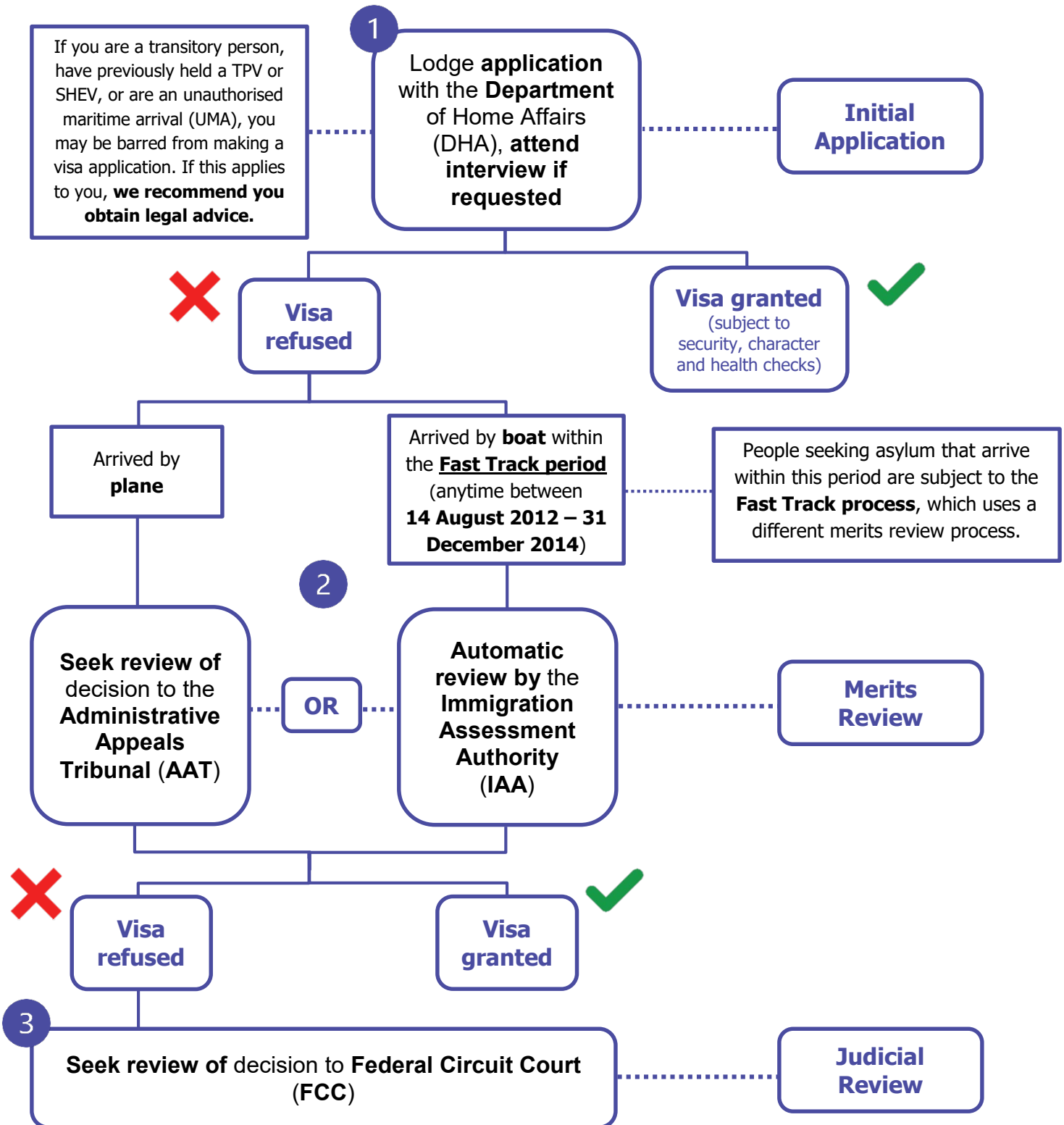
| | Temporary Protection Visa (TPV) | Safe Haven Enterprise Visa (SHEV) |
|---|--|---|
| Duration of visa | 3 years | 5 years |
| Can you work and study in Australia? | Yes | Yes, but if you want to meet the pathway requirements , you need to be employed or study while living in regional Australia. |
| Can you obtain Centrelink? | Yes, access to limited Centrelink benefits | Yes, access to limited Centrelink benefits but if you want to meet the pathway |

¹⁰ If you lodged an application before 16 December 2014 for a PPV and didn't receive a decision, your application was for a PPV was likely converted into an application for a TPV or SHEV.

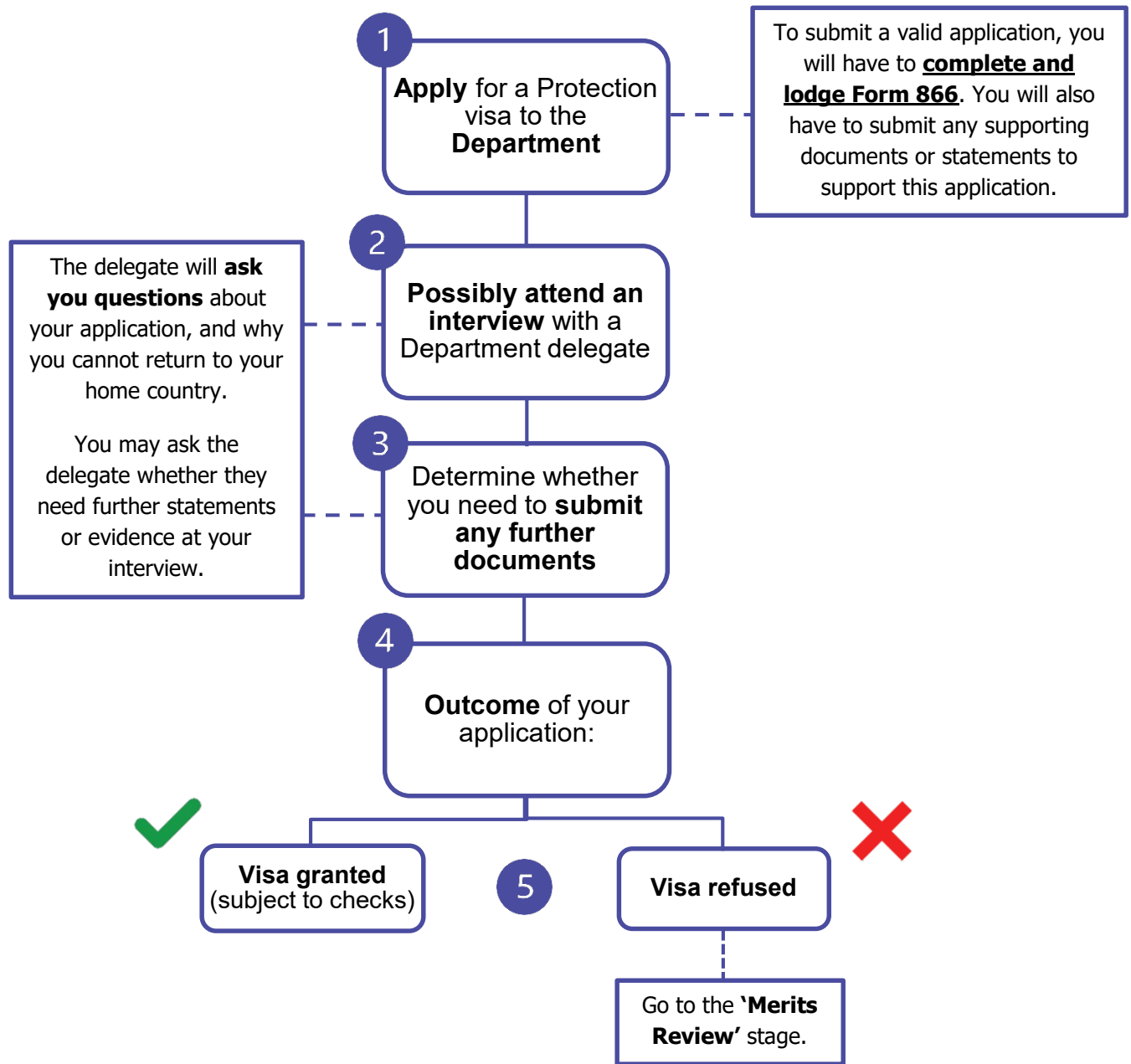
¹¹ If you arrived on or after 19 July 2013, and were transferred offshore for processing in Nauru or Papua New Guinea, you must follow a different process to apply for a visa from immigration detention. For more information, see our **'HRLP Infosheet – Information for people applying for visas from detention (s 195A)'**.

| | | |
|--|---|--|
| | | <p>requirements, you cannot access some payments.</p> |
| <p>What happens when your visa expires?</p> | <p>You can apply for another TPV or a SHEV, provided your first TPV/SHEV has not yet expired. If the DHA believes that Australia still owes you protection obligations, you may then be granted another TPV for 3 years or a SHEV for 5 years. If you do not apply before your visa expires then your situation becomes very difficult and you may need to leave Australia.</p> | <p>If you have met the pathway requirements, you may be able to apply for certain permanent visas. For more information on these requirements, see our 'HRLP Infosheet – Safe Haven Enterprise Visa (SHEV) Pathways and Requirements'.</p> <p>If you haven't met the pathway requirements, or even if you have, but you cannot meet the requirements for a permanent visa, you can only apply for another SHEV or a TPV. You must apply prior to your first TPV/SHEV expiring. If the DHA believes that Australia still owes you protection obligations, you may be granted another TPV for 3 years or a SHEV for 5 years. If you do not apply before your visa expires then your situation becomes very difficult and you may need to leave Australia.</p> |

The legal process for determining refugee status in Australia



What happens at the 'Initial Application' stage?



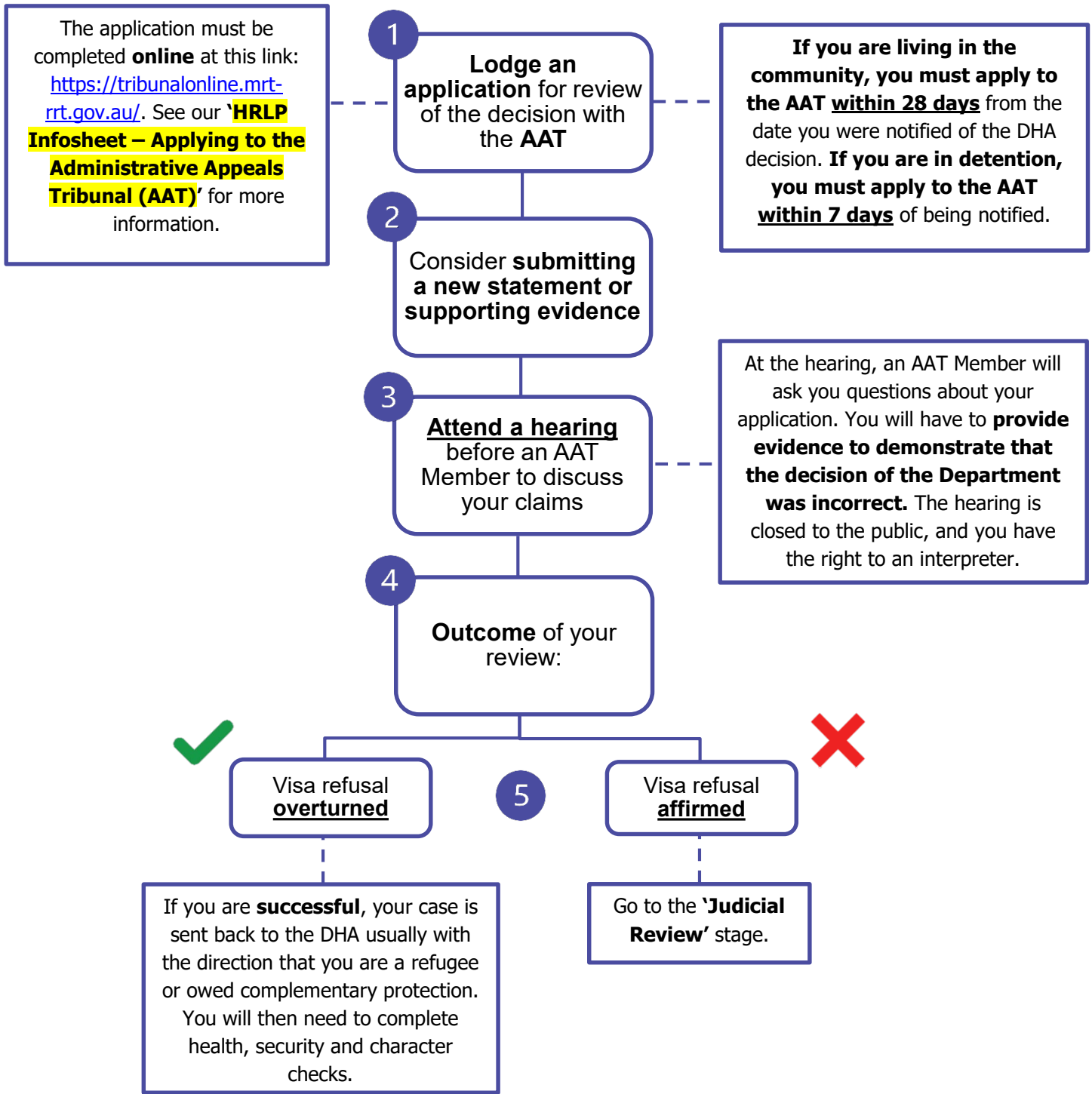
You can access **Form 866 – 'Application for a protection visa'** online, but you will generally need to submit the application via your ImmiAccount.¹² It is **recommended** you obtain independent legal advice to assist you with your initial application.

¹² The Form may be completed online or on paper: <https://immi.homeaffairs.gov.au/form-listing/forms/866.pdf>

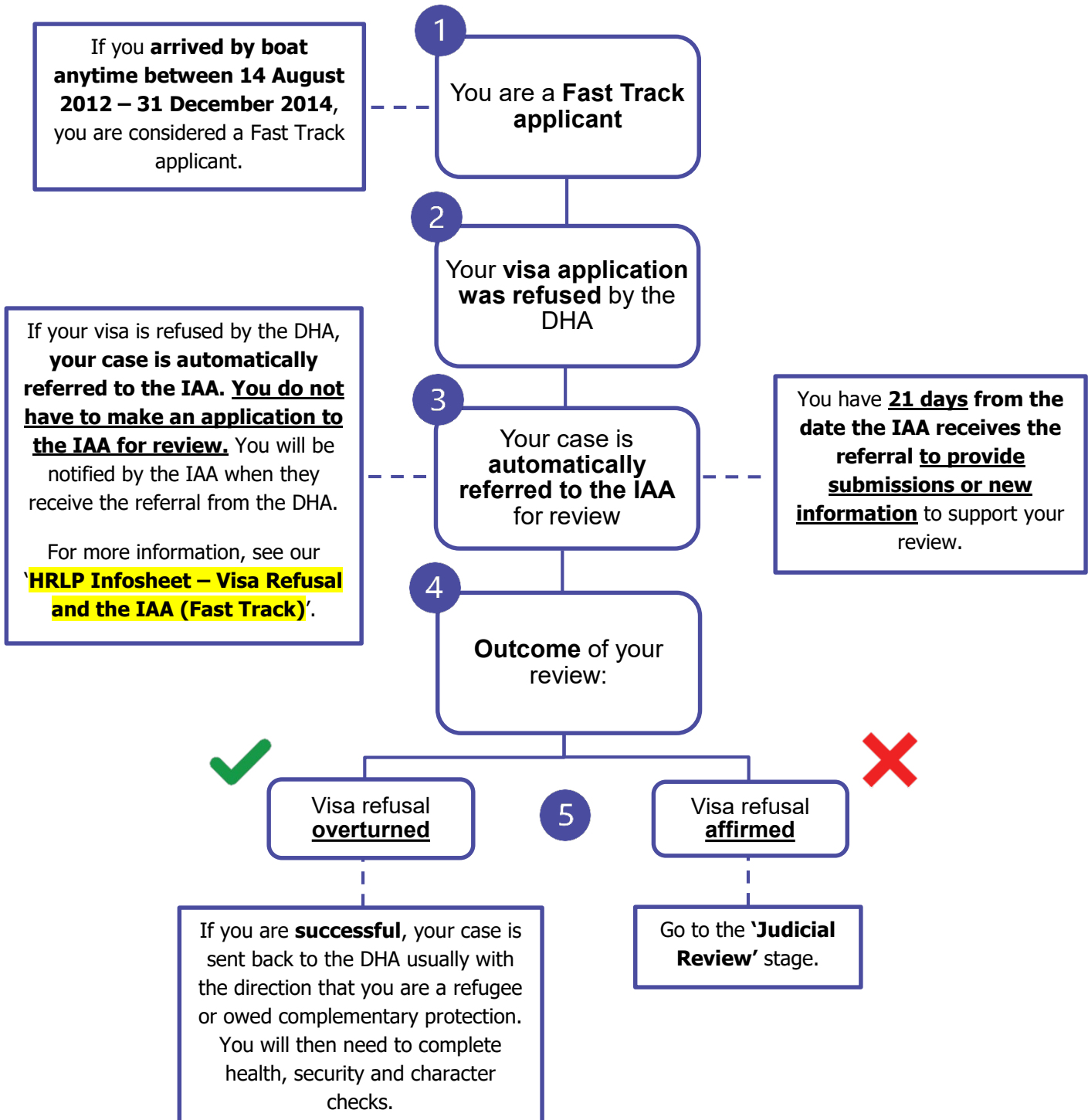
What happens at the 'Merits Review' stage?

If your application for protection is rejected by the Department you can have the decision appealed at the Administrative Appeals Tribunal (AAT), or if you are a Fast Track applicant, your case will be automatically referred to the Immigration Assessment Authority (IAA).

How do I seek review to the AAT?



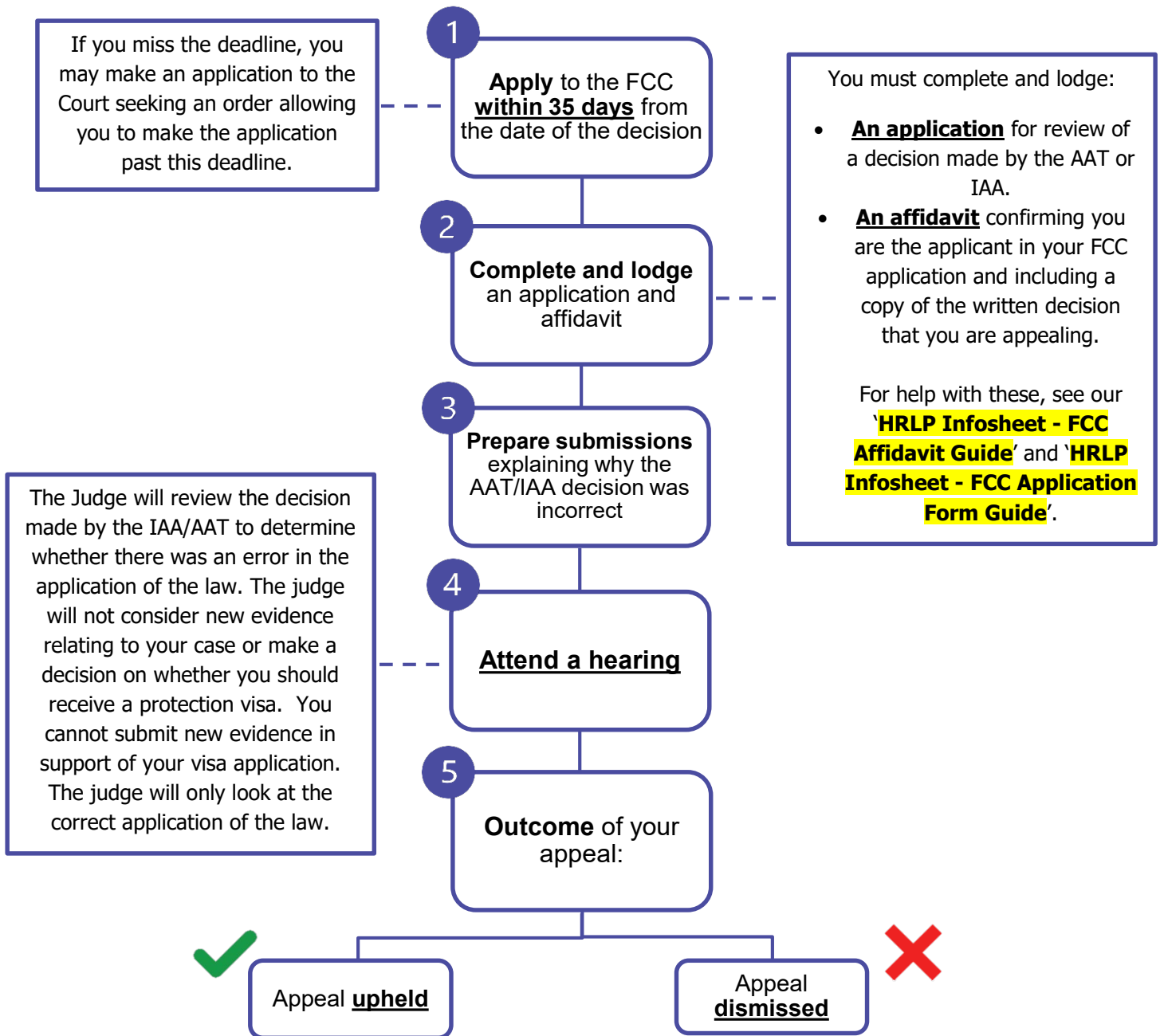
How do I seek review to the IAA? (Fast Track applicants only)



What happens at the 'Judicial Review' stage?

If you are unsuccessful at the AAT or IAA, then you have limited options to be granted a visa and should start thinking seriously about making other plans as you may not be able to remain in Australia.

If there have been legal errors made by the AAT or IAA which could have changed the outcome of your application, you may be able to **apply for judicial review to the Federal Circuit Court (FCC)**. The Court will hear from both sides (you/your lawyer and the Government's lawyers) and then make a decision whether your case will either be dismissed (you lose) or reconsidered by the IAA or AAT (you win). For more information on appealing to the FCC, see our **'HRLP Infosheet – Applying for Judicial Review'**.



If you are **successful**, your case is sent back to the AAT/IAA for reassessment of your Protection Visa.

It is highly **recommended** you obtain independent legal advice to assist you with your application for review to the FCC, as it is almost impossible to win in court if you do not have a lawyer assisting you, and if you lose you could also face a large costs order being made against you.

What happens if I lose my appeal at the FCC?

If you are not successful at the FCC, you have **three key options**. You may:

- **Appeal to the Federal Court of Australia (FCA)**

This is only an option if your lawyer has identified possible legal errors made by the FCC, which could have affected the outcome of your case. It is strongly recommended that you seek legal advice before appealing to the FCA. The FCA will hear from both sides, your lawyer and from the Government's lawyers, and then make a determination about whether the FCC made relevant errors in its decision. As this process can be very expensive and may not end up giving you the result you are hoping for, we highly recommend seeking further legal advice from a lawyer about the prospects of successfully appealing your FCC decision;

- **Make a request for ministerial intervention**

The Minister for Home Affairs has the power to intervene and give you a chance to lodge a new application for a protection visa, or for those who have been refused by the AAT, may directly grant you a visa.¹³ This process is known as 'ministerial intervention'.¹⁴ **The Minister only considers a very small number of cases and intervenes in even fewer cases. The Minister is not required to consider the request and no time frame is applicable.** For more information on making a request for ministerial intervention, see our '**HRLP Infosheet – Ministerial Intervention (s 417 and s 48B)**'; or

- **Return to your country of origin voluntarily** or be removed by Australian law enforcement if you do not make your own arrangements to leave. For more information on returning to your country of origin, see our '**HRLP Infosheet – Voluntary Returns & IOM**'.

Disclaimer: This fact sheet provides general information to people seeking asylum in Australia through the onshore protection visa application process according to the law in July 2021. This fact sheet is not legal advice. You should not rely on this fact sheet to make decisions about your immigration matter. We strongly recommend that you get independent advice from a qualified legal practitioner or a registered migration agent. For information please visit: <https://www.mara.gov.au>.

Date: 12 July 2021

¹³ *Migration Act 1986* (Cth) ss 351, 417, 501J.

¹⁴ To be granted ministerial intervention, you will have to prove 'unique or exceptional circumstances' that would justify the Minister intervening. Examples of these circumstances have been provided by the DHA: <https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service/ministerial-intervention#content-index-11>