



Australian Government
Department of Immigration and Border Protection

Submission

For information

ExecCorro Reg.Number 5M2013/03183

To **Minister for Immigration and Border Protection**
Subject **Transitional arrangements for current permanent Protection visa applicants**
Timing *Please action by 24 October 2013*

Recommendations

That you:

1. note that without legislative change there are risks that cannot be removed associated with achieving the Government policy that no IMA in the current backlog receives a permanent visa.
2. note that a small number of permanent Protection visas may need to be granted to IMAs who have met all the prescribed criteria for the visa grant prior to TPV transitional arrangements being implemented;
3. the number of people who may be in this group are subsets of those who have already had the application bar lifted, or who did not require the bar to be lifted and who are still in the refugee status determination process. This is potentially some 700 people;
4. prior to the Act change we have done / will do the following to reduce the risk of needing to grant a permanent visa to an IMA:
 - change the *Migration Regulations 1994* to prevent grant of a permanent Protection visa to unauthorised arrivals (as part of the TPV regulations);
 - strengthen procedural guidance for the Ministerial Direction under s499 of the *Migration Act 1958* (the Act) on the 'Order of consideration of Protection visas'; and
 - request the Director General of Security to align ASIO security processing priorities with the s499 direction.

noted / please discuss

noted / please discuss

noted / please discuss

noted / please discuss

Cabinet decision

Minister for Immigration and Border Protection

Signature

Date: 14/10/2013

Minister / Based on our meeting with departmental officials on 10 October, the worst case scenario following the introduction of the TPV Regs. on 18 October is that a TPV would be granted. However, some risks still exist - the TPV Regs are disallowable instruments and there is also the potential for court challenge. Bob. 14/10.

Received
10 OCT 2013
Minister for Immigration and Border Protection

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Minister's Comments

Rejected Yes/No	Timely Yes/No	Relevance <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	Length <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	Quality Poor 1.....2.....3.....4.....5 Excellent Comments:
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Key Issues

1. Of some 30 000 IMAs who have not yet had a decision made on their protection claims, about 23 000 are subject to an application bar (under either s46A or s91K of the Act) preventing them from making a valid application. Once the proposed temporary protection visa (TPV) regulations are in place these people will only be able to make a valid application for a TPV. They will, therefore, not be eligible for grant of a permanent Protection visa (PPV).
2. As at 30 August 2013, there are some 7 600 IMAs at various stages in the statutory refugee determination process who have either had the relevant application bar lifted, or were granted a bridging visa and were not barred from making an application, or who arrived directly to the Australian mainland prior to legislative changes effective from 1 June 2013 and therefore did not have any bar preventing a valid application. Within this group is a smaller cohort that have been refused a visa and is at merits or judicial review and, if successful, may also fall back into processing under the Act.
3. While many of the above are not at advanced stages of processing, it is estimated that some 1 700 IMAs have reached the point where they have been found to be owed protection obligations either at the primary decision or review stage, however most of these have further checks to be actioned prior to decision on visa grant. Most are likely to be finalised after the reintroduction of TPVs and will not be eligible for a PPV.
4. In response to your question on TA2013/03128, as at 13 September 2013 there are some 70 people who had no health, character or security checks outstanding, with only final pre-grant checks to be completed (for example, quality assurance and Movement Alert List checks). This group is the highest risk of requiring a permanent grant. However, without the mitigation strategies outlined below the total number could be as high as 700 as there is approximately a further 620 people who have had most of the additional checks completed.
5. Under s65 of the Act if a person has made a valid visa application and met all the relevant prescribed criteria for the visa, you or your delegate 'must' grant them the visa. This means that the Department is required to grant a PPV to IMAs who have been found to be owed Australia's protection and who have met all the other prescribed criteria for grant of that visa if no TPV option exists at that time.
6. The Department has put in place the strategies outlined below to reduce the likelihood that we will be required to grant a permanent Protection visa. However, even with these strategies in place there is a risk that a permanent visa may need to be granted to a small number of people who are already at an advanced stage of processing. This risk will increase with the time taken to make an Act change to support the TPV regulations.

Strategies to reduce the likelihood of a permanent Protection visa grant.

7. The first strategy to reduce the risk of a PPV grant is the proposed (TA2013/03128) regulations to re-introduce TPVs. These regulations will provide that all new applications made by unauthorised arrivals will be valid only for consideration of a TPV. Unauthorised arrivals will not be eligible for the grant of a permanent Protection visa.
8. A new 'time of decision criterion' added to the permanent visa regulations will ensure that current applications for permanent Protection visas from unauthorised arrivals cannot meet the criteria for grant of a permanent visa and a deeming provision will make them applications for a TPV as well. This will enable the permanent visa application to be refused. However, legal advice suggests this

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regulation change should be supported by an Act amendment to deem currently existing applications for a PPV made by unauthorised arrivals as not to be valid applications for a PPV. This would eliminate the need to formally refuse the PPV and reduce the likelihood of flow to review when only a TPV is granted.

9. Legal advice is that for this cohort, until there are changes to the Act, it will be necessary to formally refuse the grant of a PPV and grant a TPV. This potentially opens the door to review by the Refugee Review Tribunal under current arrangements.

10. Under s65A you or your delegate are required to make a decision within 90 days starting on the day the applications was made or in the circumstances prescribed by the regulations. With the increase in application in recent years this timeframe is less frequently met; however there is some risk that pending the implementation of the amendments to the Migration Regulations a small number of IMAs will meet all the prescribed conditions for grant and be past the 90 days. Changing the regulations as soon as possible could mitigate this risk. Once policy authority has been given by Government for the regulations changes, they will be presented to the first available Executive Council in October or November.

- Note that the secretary of the Attorney General's Department has asked that senior counsel's advice be sought on the legal risks associated with the draft TPV regulations. Seeking this advice and making any recommended changes may delay finalisation of the proposed regulations.

11. The second strategy will be strengthening the procedural advice around Ministerial Direction No. 57 made under s499 of the Act. This directs all persons and bodies having powers under the Act, including the Refugee Review Tribunal and the Administrative Appeals Tribunal, to consider and dispose of applications for Protection visas in a particular order. Tighter implementation of Direction No. 57 on the order of processing will reduce the number of IMAs potentially becoming grant-ready. A copy of the Direction No. 57 is at Attachment A.

12. In effect, this direction requires the Department to consider non-IMA applications first when assessing claims and processing Protection visa applications. Procedural advice is being strengthened to require this direction to be more tightly applied at all stages of the protection process, including allocation to case officers, pending further changes to processing arising out of the rapid audit.

13. A further approach for IMAs who are close to final stages of processing is to tightly manage final checks for this cohort. The Secretary has written to the Director General of Security to request that ASIO, while not formally bound by Direction No.57, aligns the processing of security checks closely with the s499 direction to assist processing priorities in the Department. Without this, based on recent average flows, some 30 additional security clearances a week could be expected in the IMA caseload.

Granting a different type of visa

14. In TA2013/03128 (Attachment B) you sought advice about the possibility of granting a different type of visa instead of a PPV. Special Counsel has advised that this is not an option under s65 as the section requires you or your delegate to grant the visa that is the subject of the application.

15. Where a person is in detention you are able to grant them a visa under s195A of the Act. While you could grant a different visa with this power, legal advice is that this does not extinguish your duty to grant a visa under s65 to someone who meets all the prescribed criteria.

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Background

16. IMAs who arrived on or after 19 July 2013 are subject to Regional Resettlement Arrangements. There are some 30 000 IMAs in Australia who arrived before 19 July 2013. An IMA cannot make a valid visa application while in Australia as an unlawful non-citizen (s46A). Section 47 makes it clear that an application that is not a valid application cannot be considered, and a decision that an application is not valid and cannot be considered is not a decision to refuse to grant the visa, therefore while the application bar remains in place, consideration of a PPV application cannot occur.

17. Some IMAs released into the community on Bridging Visas under the statutory process between 24 March 2012 and 12 August 2012 could apply for a PPV as the application bar had been lifted.

- Others were granted a Humanitarian Stay (Temporary) visa concurrently with a Bridging visa which imposed an application bar under s91K. This bar has been lifted for some 1300 IMAs who have made a valid PV application.
- Some 7 600 valid applications have been made by IMAs, and are at varying stages in the statutory refugee status determination process, of which:
 - some 70 have already met all requirements and are at final stages of quality assurance, Migration Alert List or other final pre-grant checks;
 - some 620 are close to meeting all legal requirements for Protection visa grant; and
 - others are pending merits or judicial review outcomes.

18. Of some 70 IMA applications which had had no outstanding checks as at 13 September 2013, fewer than 10 were in detention. These are the highest risk and need early action. We propose that these are the first to be granted TPVs unless grant of a PPV cannot be avoided. It is not unreasonable for other pre-grant checks to take a week or so (e.g. Quality Assurance, Migration Alert List) for those in the community.

19. Once a valid visa application is made and all legal criteria prescribed for that visa are satisfied, s65 of the Act requires that the visa be granted. If the TPV option is unavailable when that point is reached, grant of a PPV may be unavoidable. This would also apply to cases remitted from the RRT or the courts once they reach the grant-ready stage.

Consultation – internal/external

Irregular Migration and Protection Policy Branch – policy implications of transitional arrangements.

Service delivery implications

Communications products are being developed to provide information to affected IMAs regarding TPVs.

IMAs, agents and advocates who are aware of the processing situation continue to press for a visa outcome.

Financial/systems/legislation implications

We are working with the Department of Finance and Deregulation to cost implementation of TPVs. You will be briefed on this at a later date.

Systems changes are currently being scoped and will be implemented as soon as possible.

Regulations changes are being discussed with your office. Future legislative change will be discussed in the context of the rapid audit.