



THE HON ANDREW GILES MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS23-002366

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Burns

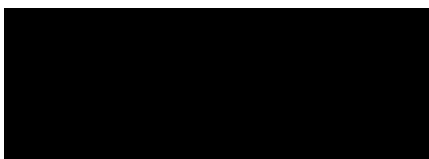
Migration Amendment (Resolution of Status Visa) Regulations 2023
[F2023L01393]

I refer to your correspondence/representation of 15 November 2023 to the Minister for Home Affairs and Minister for Cyber Security, the Hon Claire O'Neil MP, concerning the above instrument. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

Please find attached a response to your request, including advice in relation to the specific matter raised at paragraph 1.46 of the above report.

I hope this information assists the Committee in its consideration of this instrument.

Yours sincerely



ANDREW GILES

23/11/2023



OFFICIAL

Response to the Parliamentary Joint Committee on Human Rights

Report 12 of 2023 – Migration Amendment (Resolution of Status Visa) Regulations 2023

In Report 12 of 2023, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the *Migration Amendment (Resolution of Status Visa) Regulations 2023* [F2023L01393] (RoS visa Regulations)

The RoS visa Regulations amend the *Migration Regulations 1994* (Regulations) to:

- Include certain additional cohorts as being able to apply for, or have their existing Temporary Protection visa (TPV)/Safe Haven Enterprise visa (SHEV) application converted to an application for, a Resolution of Status (RoS) visa (Schedule 1); and
- Add additional visa criteria relating to identity for RoS applicants transitioning from the TPV/SHEV caseload (Schedule 2).

Committee view

1.44 The committee notes that expanding the cohort of people who may apply for a permanent Resolution of Status (RoS) visa promotes a number of rights, including the rights to social security, an adequate standard of living, education, protection of the family and freedom of movement.

1.45 However, the committee notes that by requiring that an application for a RoS visa must be refused where an applicant does not provide personal identification information, this measure also engages and may limit human rights, including the right to protection of the family as it may separate family members, the right to equality and non-discrimination as it may have a disproportionate impact on people of certain nationalities, and the right to liberty as refusal of the visa may lead to mandatory immigration detention. These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.46 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

(a) whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) is a legitimate objective addressing an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights;

(b) what is the legislative source that establishes that the minister must refuse a visa application where identity requirements have not been met;

OFFICIAL

(c) why giving a decision-maker the discretion to refuse a visa on identity[1]related grounds, as opposed to requiring that they must refuse a visa, would be ineffective to achieve the objective of the measure;

(d) what is meant by 'substantial identity-related concerns';

(e) what circumstances are likely to constitute 'compelling or compassionate grounds' and whether the fact that a person has resided in Australia continuously for 10 years would itself constitute a compelling reason for granting a permanent visa;

(f) what legal and social supports are available to people in this cohort in applying for these visas and seeking to obtain and translate identity documents from countries outside Australia;

(g) what happens if a person is refused a RoS visa: can they apply for a new RoS visa and in what timeframe would they need to do this. Noting unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so, is this ministerial discretion, rather than a legislative requirement, an appropriate safeguard;

(h) if refusal of a RoS visa leads to cancellation of the existing TPV or SHEV, will this be treated as a decision to refuse the RoS or a decision to cancel the TPV/SHEV, and what review rights apply;

(i) noting that a person can still receive a RoS visa if it is demonstrated that they meet the criteria for a protection visa, will this require a reopening of the person's protection visa claims and what process will be followed to assess such claims, and how will this ensure procedural fairness; and

(j) whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment.

Minister's response

(a) whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) is a legitimate objective addressing an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights;

A number of visa subclasses make use of Public Interest Criterion (PIC) 4020 to establish a legislative requirement for the Minister (or delegate) to be satisfied as to the visa applicant's identity. However PIC 4020 does not apply to either the RoS visa, nor the TPV or SHEV from which this cohort has transitioned. The Government acknowledges that in some cases, it will not be possible to positively establish the identity of some applicants in the TPV/SHEV cohort due to their complex and vulnerable circumstances.

The amendments made by Schedule 2 to the RoS visa Regulations are instead aimed at facilitating the RoS visa applicant's cooperation in attempting to establish their identity, and not impose an actual requirement that identity be confirmed. In the context of the transition to

permanent residence, the intention is to take action prior to the grant of permanent residence to resolve, as far as possible, any doubts that may exist in relation to an applicant's identity.

Under section 65 of the *Migration Act 1958* (the Act), the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where, when considering the RoS visa application, the Minister invites the applicant (under section 56 of the Act) to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(b) what is the legislative source that establishes that the minister must refuse a visa application where identity requirements have not been met;

Under section 65 of the the Act, the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where if, when considering the RoS visa application, the Minister invites the applicant, under section 56 of the Act, to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(c) why giving a decision-maker the discretion to refuse a visa on identity-related grounds, as opposed to requiring that they must refuse a visa, would be ineffective to achieve the objective of the measure;

The requirements set out in paragraphs 851.228(1) and (2) set a clear expectation with the applicant that their cooperation in attempting to establish their identity is a requirement. Given the importance of establishing the identity of permanent visa applicants, this is in line with community expectations. However, as noted above, given the complex and vulnerable circumstances of some applicants in the TPV/SHEV cohort, those who cannot provide the required further identity information that has been requested need to have a reasonable explanation for not providing the information and have taken reasonable steps to provide it, which gives discretion for decision-makers to consider the person's reasons for not providing the requested information.

(d) what is meant by 'substantial identity-related concerns';

'Substantial identity-related concerns' is not defined in the Act or the Regulations. Based on the policy guidance prepared by the Department substantial identity-related concerns, in relation to a relevant matter set out in subclause 851.228(2), is a suspicion or a finding that the applicant's identity as claimed and accepted in making the previous protection finding (paragraph 851.229(2)(a)), visa grant (paragraph 851.229(2)(b)) or record (paragraphs 851.229(2)(c) or (d)) was inaccurate and had information about their correct identity been known at that time, it could have affected the outcome of the protection finding, visa grant or record.

For example:

Example 1: A substantial identity-related concern might not exist in respect of Person A if the Minister has information about their identity which reveals that their name has been previously misspelt in Departmental records, including records relevant to any visa application, but there is no evidence that information considered as part of the RoS visa application would lead to doubts about their correct identity.

Example 2: A substantial identity-related concern might not exist in respect of Person B if the Minister has information about their identity which reveals that the applicant presented incorrect information to the Minister/Department in making the previous protection finding, however even if the current information about their identity had of been known it would not have had a material impact on the previous protection finding/grant/record.

Example 3: A substantial identity-related concern might exist in respect of Person C if the Minister has information about their identity that reveals that their receiving country is Country A, and is not Country B as was claimed and accepted in making the previous protection finding.

Example 4: A substantial identity-related concern might exist in respect of Person D if the Minister has information about their identity that reveals that their identity is Mr X and not Mr Y as was claimed and accepted in making the previous protection finding/grant/record, and that being Mr Y formed a key component of the claims for protection or of an assessment of whether the person was a member of the same family unit (MSFU) of a protection visa applicant.

Example 5: A substantial identity-related concern might exist in respect of Person E if the Minister has information about the composition of the family unit that reveals that Person E may not have been a MSFU of a person granted a protection visa.

(e) what circumstances are likely to constitute ‘compelling or compassionate grounds’ and whether the fact that a person has resided in Australia continuously for 10 years would itself constitute a compelling reason for granting a permanent visa;

A compelling or compassionate reason is not defined in the Act or the Regulations and for assessing a RoS visa application is given its ordinary meaning. Based on the policy guidance prepared by the Department, it is possible that a person who has resided in Australia continuously for 10 years would have some community connections that could constitute a compelling or compassionate reason to grant the RoS visa.

The policy guidance provides as follows in relation to what can be a compelling or compassionate reason:

Compelling reason

A compelling reason may affect the interests of Australia such as its economy, or an Australian community.

Examples (non-exhaustive):

- The applicant is employed as a highly skilled worker (ANZSCO 1-2) and removal of the applicant from this occupation would adversely affect the operations of the business or its clients;
- The applicant is meaningfully employed (has a paid job) and makes an economic contribution to Australian society (earns a sufficient amount to contribute to Australia’s taxation system);
- Essential worker in one of the following vocations:

OFFICIAL

- Health, welfare, social and aged care.
- Emergency services, safety, law enforcement, justice and correctional services.
- Energy, resources and water, and waste management.
- Education and childcare.
- Ongoing engagement in an activity, paid or unpaid, that makes a significant/valuable contribution to Australia or its communities;
- Requires the support of Australian services due to mental health concerns, or illness/injury of applicant.

Compassionate reason

A compassionate reason may relate to the applicant's personal circumstances or the circumstances of another person.

Examples (non-exhaustive):

- The applicant is a member of the same family unit (MSFU) of an Australian citizen or permanent resident;
- Where an Australian citizen or permanent resident is dependent upon the applicant for financial and/or emotional support;
- Disability or serious illness of family member in Australia where the applicant has carer responsibilities;
- Substantial community ties, which may include school age children, member of community/religious groups, volunteer worker, or extended family reside in Australia.

Not a compelling or compassionate reason

The following circumstances are unlikely to satisfy regulation 851.229(3)(b):

- Past compelling or compassionate reason no longer applicable.
- Compelling or compassionate reason not enduring in nature at time of decision, that is, the reason will cease to exist in the immediate future.
- Compelling or compassionate reason that arose as a result of direct and deliberate action of the applicant (or another person) in order to create a circumstance for the sole purpose of satisfying 851.229(3)(b).

(f) what legal and social supports are available to people in this cohort in applying for these visas and seeking to obtain and translate identity documents from countries outside Australia;

RoS visa applicants receive free access to legal assistance providers and free access to document translations support. They also have access to Medicare, full work rights and asylum seeker-related non-government organisations for social support..

(g) what happens if a person is refused a RoS visa: can they apply for a new RoS visa and in what timeframe would they need to do this. Noting unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so, is this ministerial discretion, rather than a legislative requirement, an appropriate safeguard;

If a RoS visa is refused:

- under section 65 of the Act on the grounds of failure to satisfy PIC 4002 or 4003A, or
- under subsection 501(1) of the Act on the grounds of failure to satisfy PIC 4001 or the character test in subsection 501(6) of the Act,

OFFICIAL

the decision will be merits reviewable by the AAT General Division under Part 9 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If a RoS visa is refused on non-character or security grounds, including on the basis of the criteria concerning the collection of identity-related information, the decision will be merits reviewable under Part 5 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If the RoS visa refusal is affirmed at merits review the applicant, can seek judicial review of the merits review decision.

Alternatively, or if the person is unsuccessful at merits and/or judicial review, the person can apply for another RoS visa (unless an application bar applies and Ministerial Intervention is required for the person to apply for another RoS visa.). However, as noted in the Statement of Compatibility, the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift.

(h) if refusal of a RoS visa leads to cancellation of the existing TPV or SHEV, will this be treated as a decision to refuse the RoS or a decision to cancel the TPV/SHEV, and what review rights apply;

As noted in the Statement of Compatibility, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases, by operation of law, 35 days after the RoS visa application is finally determined (a term which includes the completion of merits review processes, if merits review is sought). This is treated as a decision to refuse the RoS visa and this decision is merits reviewable (refer to the answer for question (g)).

Refusal of the RoS visa does not in and of itself enliven grounds for cancellation of the TPV or SHEV. In the event that a TPV or SHEV were cancelled for some reason, such as on character or national security grounds, prior to it ceasing as outlined above, both the RoS visa refusal would be merits reviewable (refer to the answer for question (g)) and the decision to cancel the TPV or SHEV would be merits reviewable (under Part 7 or Part 9 of the Act, depending on what cancellation power was used).

(i) noting that a person can still receive a RoS visa if it is demonstrated that they meet the criteria for a protection visa, will this require a reopening of the person's protection visa claims and what process will be followed to assess such claims, and how will this ensure procedural fairness; and

If an officer is assessing paragraph 851.229(3)(a) an assessment of protection obligations, and whether an applicant would satisfy the criteria for a protection visa paragraph under 851.229(3)(a), is not an assessment for an actual protection visa application. Rather, it is an assessment of whether the applicant *would have* satisfied the criteria for the visa had they made a valid application for one when they made the RoS visa application.

The term 'protection visa' covers subclass 785, 790 and 866 visas. Therefore the applicant need only satisfy the criteria for any one of those visas, noting that the criteria are replicated across section 36 of the Act and Schedule 2 to the Regulations. To satisfy paragraph 851.229(3)(a), the applicant must satisfy the criteria at section 36 of the Act and Schedule 2 of the relevant visa (785, 790 or 866) of the Regulations.

The term in paragraph 851.229(3)(a) "if the applicant had made a valid application" assumes the applicant had made a valid application for a protection visa, and therefore there is no requirement

OFFICIAL

for the officer to consider Schedule 1 to the Regulations or give any consideration to whether the applicant could have made a valid application at that time.

The term in paragraph 851.229(3)(a) “at the same time as the applicant made the application for the Subclass 851 (Resolution of Status) visa” assumes the hypothetical protection visa application was made at the same time as the RoS visa application; therefore when considering the criteria in section 36 of the Act and Schedule 2 to the Regulations the officer will have regard to the version of the Act and the Regulations as they applied at that time.

The assessing officer will contact the applicant under section 56 of the Act to obtain further information and protection claims from the applicant and will apply the full procedural fairness requirements set out in the Act, which apply to the consideration of all visa applications.

The aim of these provisions is, for RoS visa applicants who are found to have a substantially different identity to what they previously were found to have, to have an opportunity to have protection obligations assessed in their ‘new’ identity and allow a RoS visa to be granted if protection obligations are found to be engaged. As noted in the Statement of Compatibility, if the applicant provides information that confirms a different identity, which could include that they are a national of a different country to what had previously been claimed, the effect of these provisions is that the applicant does not have to have their RoS visa application refused and go through a new protection visa process in order to assess the protection claims they may have in their ‘new’ identity. In some cases the assessment of protection obligations as part of the RoS visa may involve looking at the person’s previous protection claims, however ultimately the assessment is of their current protection claims.

(j) whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment

The RoS Regulations are not designed to target or have a disproportionate effect on any cohort or any person on the basis of any characteristic about them. They are applied individually on a case by case basis and entirely focus on whether the Department has sufficient information to establish a person’s identity or whether an invitation to give further information in relation to their identity will be made.