

# Research Brief REFUGEE STATUS DETERMINATION IN AUSTRALIA

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## What is 'refugee status determination'?

Refugee status determination (RSD) is the process by which a person (asylum seeker) may be recognized as a refugee. The asylum seeker has the opportunity to put forward the reasons why they fear that they will be persecuted or subjected to other significant harm if they are returned to their country.

Strictly speaking, RSD does not 'make' someone a refugee, but simply recognizes or 'declares' that the person is a refugee. This is because under international law, a person is a refugee as soon as they meet the definition set out in the 1951 *Convention Relating to the Status of Refugees* and its 1967 Protocol (Refugee Convention).<sup>1</sup> In reality, though, a person needs to be officially recognized as a refugee in order to receive the rights and entitlements that attach to refugee status.

The Refugee Convention does not set out the procedures that must be followed in an RSD system, but there are many non-binding international standards.<sup>2</sup> It is clear that for Australia to comply with its obligations under the Refugee Convention, it must have a procedure in place that enables it to identify accurately the people to whom it owes protection obligations.

## RSD in Australia

In Australia, an asylum seeker's initial claim is considered by a government official. If the claim is rejected, then the asylum seeker may appeal to the Migration and Refugee Division of the Administrative Appeals Tribunal (MRD-AAT) to have the claim reviewed by an independent decision-maker.

In Australia, the same process is used to determine whether a person is entitled to complementary protection, based on serious human rights violations under the International Covenant on Civil and Political Rights and the Convention against Torture). (For more on complementary protection, see our ['Complementary protection' factsheet](#).)

**Fig 1: Simplified diagram of RSD process.**

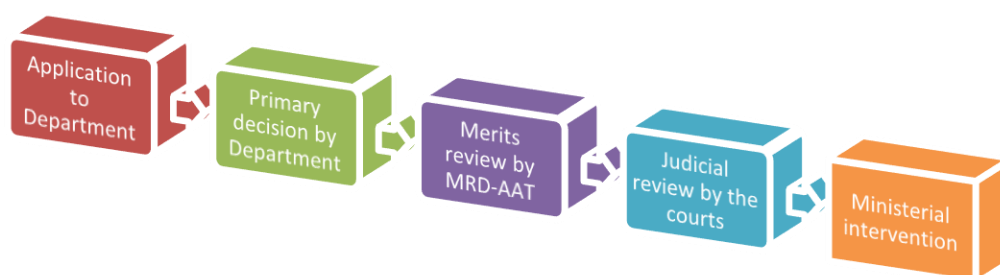


Figure 1 sets out, in simplified form, the key steps in the RSD process in Australia. These are:

- the asylum seeker lodges an application, using Form 866, which is submitted to the Department of Immigration and Border Protection (the Department)
- an officer of the Department makes a primary decision as to whether the asylum seeker is entitled to protection (as a refugee or beneficiary of complementary protection)
- if the officer refuses the application, the asylum seeker may apply for merits review by the MRD-AAT<sup>3</sup>
- if the refusal is upheld, the asylum seeker may appeal to the Federal Circuit Court, Federal Court, or in exceptional cases the High Court, for judicial review (based on a legal error in the decision-making process) not merits review

- as a last resort, the asylum seeker may request that the Immigration Minister personally intervene to grant him/her a visa

## Who can access RSD in Australia?

Currently, only asylum seekers who arrive with a valid visa may access the RSD process in Australia. Under the *Migration Act 1958* (Cth) (the Act), and with very limited exceptions, all non-citizens must hold a valid visa to be considered a 'lawful non-citizen'. Those who do not are considered 'unlawful non-citizens'.<sup>4</sup>

Asylum seekers who enter Australia by plane will usually have a valid visa, such as a tourist or student visa, and will only apply for refugee status after arrival. Some arrive intending to claim refugee status; some learn of the possibility of applying for refugee status after they are here; others apply for refugee status because circumstances change in their home country while they are in Australia that make it unsafe for them to return.

Asylum seekers who arrive by boat and do not have a valid visa are no longer entitled to access the RSD process described in this factsheet. Instead, since 1 June 2013, all unauthorised maritime arrivals (as they are termed in the *Migration Act 1958* (Cth)) are barred from applying for a protection visa, unless the Immigration Minister exercises a personal, non-compellable discretion to allow them to do so (known as 'lifting the bar').<sup>5</sup> Previously, if the Minister chose to 'lift the bar', the process described in this factsheet applied. However, a 'fast tracking process' now applies to asylum seekers who arrived irregularly (that is, without a valid visa) between 13 August 2012 and 1 January 2014. This process is described in our ['Fast tracking' factsheet](#).

## When is an asylum seeker entitled to protection?

### The protection visa

The class of visa for refugees is known as the 'protection visa' (visa subclass 866). The main criteria for this visa are set out in section 36 of the Act.

The first consideration is whether the person is owed protection obligations as a refugee. Originally, the Act relied upon the definition of refugee given by the Refugee Convention, but this was amended in 2014 to adopt a statutory definition that can be changed by the Australian Parliament.<sup>6</sup> The current definition is encapsulated within section 5H of the Act, which stipulates that a refugee is a person outside the country of their nationality or habitual residence (if stateless) and unable or unwilling to return due to a well-founded fear of persecution.<sup>7</sup>

A person may also be entitled to a protection visa because there 'there are substantial grounds for believing that there is a real risk he or she will suffer significant harm if removed to a receiving country' (complementary protection). This is based on additional obligations

Australia has under international human rights law not to return people to certain forms of harm, and was included in the *Migration Act* in 2011.<sup>8</sup> The Act requires decision-makers to first determine whether a person meets the refugee definition, and if not, whether they meet the complementary protection criteria. The criteria are described in our '[Complementary Protection](#)' factsheet.

Section 36 also provides that a person is ineligible for a protection visa, if, for example:

- there is a finding that there is a 'safe third country' where the applicant could reside
- there is a finding that the applicant could safely relocate within their own country (internal flight alternative)
- the applicant has been assessed as a security risk by the Australian Security Intelligence Organisation (for further information, see our Factsheet on [refugees with an adverse security assessment by ASIO](#))
- the Minister has serious reasons for considering that the non-citizen has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, or an act contrary to the purposes and principles of the United Nations<sup>9</sup>
- in relation to the complementary protection ground, the Minister reasonably considers that the non-citizen is a danger to Australia's security or, having been convicted of a particularly serious crime, is a danger to the Australian community.

The *Migration Regulations 1994* (Cth) also specify additional criteria that must be met at the time the decision is made to grant a visa, including in relation to health, character and security. If the applicant is an adult, they must sign a 'values statement'.<sup>10</sup>

Finally, protection visas may be granted to immediate family members of a person who holds a protection visa.

## Application

A person must apply for a protection visa using Form 866,<sup>11</sup> which currently has 87 questions. For people with a valid visa application, the application must be lodged with a fee of \$35. The application is submitted to the Immigration Department, and applicants may be required to provide 'personal identifiers' (a digital photograph and a scan of fingerprints). For practical information on the application process, see the Refugee Advice Casework Service guides.<sup>12</sup>

## Decision by the Department

An officer of the Department then invites the applicant for an interview,<sup>13</sup> where further questions are asked about the nature of the claim. Interpreters are provided and migration agents may attend the interview. The Department can ask for further information following this interview. A written decision is then made and notified to the applicant.

The length of time between the interview and the decision can vary significantly. Until the passage of the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), the Department was required to report the percentage of decisions made within 90 days of application. In 2013–14, the Department made seven per cent of initial decisions and decisions after remittal (from what was then the Refugee Review Tribunal) within this timeframe, while in the previous year, 2012–13, 51 per cent of decisions were made within the 90-day timeframe.<sup>14</sup>

## Review by the MRD-AAT

Decisions to refuse to grant, or to cancel, a protection visa are generally reviewable by the MRD-AAT.<sup>15</sup> This is an independent administrative tribunal which has the power to look at the claim from scratch. This is known as ‘merits review’.<sup>16</sup>

Merits review by the MRD-AAT involves the reconsideration of a case by a Tribunal Member, who takes into account the law, facts and government policy as they stand at the present time to determine afresh whether Australia has protection obligations to an asylum seeker.<sup>17</sup> In reconsidering a case, the Member effectively ‘stands in the shoes’ of the primary decision-maker (an immigration official).<sup>18</sup> The Member is bound by the same legal framework as the primary decision-maker and exercises the same powers and discretions conferred on the primary decision-maker.<sup>19</sup> However, the Member is not limited to the material and evidence before the primary decision-maker: the Member considers all of the evidence available, including any additional evidence from the applicant and information from other sources (such as information about conditions in the applicant’s country of origin, which might have changed since the original decision was made).<sup>20</sup> The MRD-AAT may affirm the original decision, vary it, set it aside and substitute a new decision, or return a matter to the Department for reconsideration, with specific directions or recommendations.<sup>21</sup>

The aim of merits review is to ensure that the ‘correct or preferable’ decision is reached in a particular case.<sup>22</sup> In this sense, it can be distinguished from judicial review (by a court), which is concerned only with the very limited question whether a decision was affected by jurisdictional error. Judicial review does not permit reconsideration of the merits of the case, both because the merits are irrelevant to the issue of whether there has been a jurisdictional error and because the judiciary has not been given the task of determining an outcome on the merits.<sup>23</sup>

Although the MRD-AAT can make a decision favourable to an applicant without a hearing, in practice it generally conducts a hearing. In 2013–14, the Refugee Review Tribunal made only one per cent of its decisions without a hearing.<sup>24</sup> The process is ‘inquisitorial’ rather than ‘adversarial’, in that the Member identifies the relevant issues, asks questions directly of the applicant, and can initiate investigations or inquiries to supplement the evidence.<sup>25</sup>

Some classes of asylum seekers do not have the right to merits review by the MRD-AAT. In addition to irregular arrivals subject to the new ‘fast tracking’ process (see our [‘Fast tracking’](#) factsheet), exceptions include cases where the decision-maker believes the asylum seeker

poses a security risk; where the decision-maker believes the asylum seeker has committed a war crime, a crime against humanity or peace, a serious non-political crime, or acts contrary to the principles of the United Nations; where the Minister has made a decision to cancel a visa personally; where the decision concerns an asylum seeker not within Australia at the time the decision was made; and where the Minister has issued a conclusive certificate on the grounds of national interest which prevents the decision from being reviewed.<sup>26</sup>

In July 2015, the Refugee Review Tribunal was merged with the Administrative Appeals Tribunal to create the Migration and Refugee Division of the Tribunal (MRD-AAT). (See our legislative brief on the [Tribunals Amalgamation Bill 2014](#)).

## Judicial review in the Federal Circuit Court and Federal Court

An applicant may apply to the Federal Circuit Court for judicial review of the MRD-AAT's decision.<sup>27</sup> The Federal Court also has limited jurisdiction for the review of MRD-AAT decisions.<sup>28</sup>

Unlike the review undertaken by the MRD-AAT, which reconsiders the claim on its merits, the Federal Circuit Court and Federal Court may only grant relief if the MRD-AAT fell into legal (jurisdictional) error. Some of the most commonly argued forms of legal error in protection visa claims include:

- failure to afford the applicant a fair hearing
- failure to consider relevant information available to it
- that the decision was unreasonable or irrational, or lacked an evident and intelligible justification
- the decision maker was affected by actual or apprehended bias
- that the MRD-AAT failed to put adverse information to the applicant in accordance with section 424A of the Act.

Both courts have the same original jurisdiction in relation to migration decisions as is conferred on the High Court by section 75(v) of the Australian Constitution. This jurisdiction includes writs of mandamus (remitting the decision back to the officer so that it may be remade in a lawful manner); prohibition (prohibiting an officer from doing something contrary to the Court's decision); and an ancillary power of certiorari (quashing the decision under review).

## Ministerial intervention

If all other avenues of appeal have been exhausted, an asylum seeker may seek the personal intervention of the Immigration Minister. This is a non-compellable and non-reviewable discretion under s 417 of the Migration Act. This means that the Minister does not have to consider the claim and is under no obligation to grant a visa even if they do.

However, if the Minister thinks it is in the public interest, they may personally substitute a decision more favourable to the applicant (in other words, grant the asylum seeker a visa of some kind).<sup>29</sup> The reasons for intervening must be laid before Parliament, although are usually very brief. The Minister is only likely to intervene where there has been a significant change in the applicant's circumstances.<sup>30</sup>

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## Endnotes

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<sup>1</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 51.

<sup>2</sup> See, eg, [United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees'](#) (December 2011) [189–191]; [United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' \(September 2005\)](#); 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (EC/GC/01/12, 31 May 2001) [5]; [United Nations High Commissioner for Refugees, 'Building In Quality: A Manual on Building a High Quality Asylum System'](#) (September 2011); Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status' (EXCOM Conclusions No. 8 (XXVIII), 12 October 1977); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection' (EXCOM Conclusions No. 103 (LVI), 7 October 2005); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on Local Integration' (EXCOM Conclusions No. 104 (LVI), 7 October 2005); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR' (EXCOM Conclusions No. 110 (LXI), 12 October 2010).

<sup>3</sup> Administrative Appeals Tribunal Migration and Refugee Division (MRD-AAT), [Eligibility](#) <accessed 8 August 2018>.

<sup>4</sup> This is the effect of ss 13 and 14 of the [Migration Act 1958](#) (Cth).

<sup>5</sup> This is the date the relevant provisions came into effect: see *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* Sch 1, items 10–14; [Migration Amendment \(Unauthorised Maritime Arrivals and Other Measures\) Commencement Proclamation 2013](#)' (30 May 2013). Previously, this bar applied to 'offshore entry persons' who arrived on an 'excised' territory, which included most of Australia's islands.

<sup>6</sup> *Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Act 2014* (Cth) [Sch 5 item 10](#).

<sup>7</sup> 'Well-founded fear of persecution' is defined in [section 5J](#) of the *Migration Act 1958* (Cth).

<sup>8</sup> [Migration Amendment \(Complementary Protection\) Act 2011](#) (Cth).

<sup>9</sup> The Act only specifies this expressly in relation to the complementary ground, but the definition of 'owes protection obligations' in relation to the Refugee Convention ground also excludes these categories, as they reflect Article 1F of the Refugee Convention: see [NAGV and NAGW](#) (2005) 222 CLR 161, [43]–[44].

<sup>10</sup> [Migration Regulations 1994](#) (Cth) Sch 2, its 866.223–866.225.

<sup>11</sup> Department of Home Affairs, [Form 866 – Application for a Protection Visa](#) (February 2018).

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- <sup>12</sup> Refugee Advice & Casework Service, [Legal Assistance](#) <accessed 8 August 2018>.
- <sup>13</sup> *Migration Act 1958* (Cth) [s 58](#). The interview is not required by law but is general practice.
- <sup>14</sup> Department of Immigration and Border Protection, *Annual Report 2013-2014*, '[Protection visas \(onshore\)](#)', p 110. Note that these figures include applications from irregular arrivals. The Department has stated that the difference in processing times between 2012–13 and 2013–14 was due to an increased number of applications, and the prioritisation (pursuant to Ministerial Direction 57 of July 2013) of applications by asylum seekers who arrived with a valid visa.
- <sup>15</sup> *Migration Act 1958* (Cth) [s 411](#).
- <sup>16</sup> *Migration Act 1958* (Cth) [s 420](#).
- <sup>17</sup> Administrative Appeals Tribunal, [Migration and Refugee Division](#) (July 2018) 1; Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2011–12*, 6.
- <sup>18</sup> See, eg, Garry Downes, '[Tribunals in Australia: Their Roles and Responsibilities](#)' (2004).
- <sup>19</sup> *Migration Act 1958* (Cth) [s 415](#).
- <sup>20</sup> Administrative Appeals Tribunal. Migration and Refugee Division, '[What is a merits review?](#)'; Administrative Appeals Tribunal. Migration and Refugee Division, '[Can I give information on my case?](#)'.
- <sup>21</sup> *Migration Act 1958* (Cth) [s 415](#).
- <sup>22</sup> Administrative Appeals Tribunal, Migration and Refugee Division, '[What is a merits review?](#)'. See generally *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.
- <sup>23</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6.
- <sup>24</sup> Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2013-2014*, Part 3.
- <sup>25</sup> *Migration Act 1958* (Cth) [s 424](#).
- <sup>26</sup> *Migration Act 1958* (Cth) [s 411](#).
- <sup>27</sup> *Migration Act 1958* (Cth) [s 476](#).
- <sup>28</sup> *Migration Act 1958* (Cth) [s 476A](#).
- <sup>29</sup> *Migration Act 1958* (Cth) [s 417](#).
- <sup>30</sup> According to the latest [Ministerial Intervention Statistics](#) published by the Department of Immigration and Citizenship for the period of 2012-2013 (July-December), of the 978 applications for intervention under section 417 of the Act, 209 resulted in the granting of a visa.