

## **An overview of the current legal situation for asylum seekers**

This factsheet sets out an overview of the current legal situation for asylum seekers who come to Australia by plane or boat.

### **How do refugees travel to Australia?**

There are three main ways a person may come to Australia as a refugee:

1. arriving on short-term visas (e.g., tourist, student or business visa) by plane and then seek protection;
2. arriving by boat without any visa for Australia;
3. having been assessed to be refugees while residing in another country and coming through Australia's offshore resettlement program.

Asylum seekers may also travel to Australia without a visa for Australia or a genuine passport by plane, however this is more unusual than travelling to Australia without a visa or passport by boat.

People coming by plane or boat and seeking asylum in Australia (1) or (2) above, must then have their case assessed by Australia to determine whether or not they are owed protection obligations.

Australia treats people seeking asylum differently depending on how they came to Australia: whether they arrived in Australia with a visa (like a tourist visa) by plane or with no visa by boat.

### **What is the process of seeking asylum?**

For both plane, and boat arrivals, the process to ask for protection is that you must fill out a visa application form, in English, answering questions like – why did you leave your country? How did you get to Australia? What would happen if you were forced to go back? You have to give all your previous address, jobs, schools and travel to any other countries. You have to go to an interview where an officer of the Department of Immigration will ask you about your past and your life.

But there are big differences in the conditions and processes depending on whether you came by boat or plane.

### **What are the rules for people seeking asylum who came by plane?**

People who come to Australia by plane with a visa for Australia (for example they came here on a tourist, a student or a business visa) can make a valid protection visa application at any time. They won't be in detention while they are waiting, and may have work rights while they are waiting.

If they are successful they're eligible for a permanent protection visa. Permanent protection visas mean that you are immediately a permanent resident of Australia, and can become a citizen and sponsor your family to join you here in Australia.

### **What are the rules for people seeking asylum who came by boat**

If you come by boat now, or after 1 January 2014 you must be transferred offshore to either Nauru or PNG to have claims assessed by those countries.

There's a group of around 30,000 people already in Australia who arrived over an 18 month period in 2012 and 2013. This group of people are now in the process of receiving permissions to apply for a

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protection visa. Until now, they didn't have permission. It's expected to take some years for permissions to be granted. For some people, it could be 6 years from the time they arrived in Australia until the time they are allowed to apply for protection. For more information about this please see our factsheet on "Fast track Processing".

### **Rights while in Australia**

Our policy of mandatory detention says that if you don't have a visa when you come, you must be put into immigration detention. For the 30,000 or so people seeking asylum who came by boat, they were initially placed in immigration detention. After a period there, most were granted bridging visas. But the government's policy at the time of allowing "no advantage" to those who come by boat compared with those seeking protection with UNHCR in regional areas meant that although this group were allowed to live in the community, they were not allowed to work. For some people this was more than two and a half years of surviving without working. Then in around December 2014 Bridging Visas with work rights started being granted. A condition of bridging visas which applies only to people who come by boat is that they must sign and abide by a Code of Behaviour, making certain kinds of behaviour (over and above our criminal laws) punishable by cancellation of that Bridging Visa, and therefore detention.

### **Visas available**

People seeking asylum who come Australia by boat can only be granted a temporary visa – either a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV). On either form of temporary visa, it is not possible to become a citizen, or to sponsor your overseas family members to come to Australia. The Safe Haven Enterprise Visa does allow you to then apply for a limited range of other kinds of visas if you work or study for 3.5 years in designated regional areas. But unfortunately there are significant barriers to most of the boat arrivals currently in Australia from being in a position to take this up. For example it may be hard to qualify for a skilled visa when you also have to fund your own study and survive without any social security or financial support while working or doing a university course.

### **Asylum seeker children**

For children under 18 years old, you live in a house with some other children who are also asylum seekers. We call it detention, but it's not like a detention centre. It's like a normal house but you have to follow rules like not going out after a certain time and not staying overnight anywhere else. It sounds fun but most kids find it lonely because they are on the other side of the world from their parents in a new country. Also, for many children in this situation, their parents and brothers and sisters are living in dangerous situations, so they worry about them a lot. They find it hard to concentrate at school.

### **What does it mean to be a refugee?**

A person is a refugee if the person:

- in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Complementary protection**

A person may be entitled to protection in Australia where there are substantial grounds for believing that, if they are removed from Australia to their home country, there is a real risk that the person will suffer significant harm. Significant harm includes application of the death penalty, arbitrary deprivation of life, torture, cruel and inhumane treatment and degrading treatment.

### **Who is owed protection by Australia?**

A person may be owed protection obligations by Australia where they are either a refugee, owed complementary protection obligations, or are the spouse, dependent child, or various other dependents as prescribed of the family head who is either a refugee or owed complementary protection obligations.

### **Are there other criteria that Australia considers?**

Yes. In addition to satisfying the protection criteria as a refugee or under complementary protection, there are also public interest criteria that must be satisfied for a person to be granted a protection visa in Australia, including security checks, criminal/character requirements and undergoing health assessments.

### **What work does RACS do with asylum seekers?**

RACS's core work is to advise and represent asylum seekers in their onshore applications for protection visas, and appeals to the Immigration Assessment Authority and the Administrative Appeals Tribunal. We advise and sometimes represent people who hold permanent protection visas with applications to bring their family members here. Initial inquiries may be made by any person who accesses RACS telephone advice or drop in advice services.

RACS accepts matters referred by the Department under its Primary Application Information Service (PAIS) and IAAAS contracts. For all other matters, RACS has an absolute discretion as to whether we will represent a client on an ongoing basis and to establish the nature and extent of the assistance it will provide. In exercising that discretion, RACS will consider:

- an assessment by RACS legal staff as to the merits of each case – whether the case has reasonable prospects of success;
- the material difference in the outcome of the case which RACS' assistance is likely to make;
- the client's ability to self-advocate or to perform the work required without ongoing assistance;
- the legal, technical and factual complexity of the case and the time and resources required for RACS to provide ongoing assistance of the service standard required.
- the client's ability to access alternative advice / assistance (from a community or private migration agent);
- the public interest in acting on the case;
- whether the resources of RACS and the existing workload of staff will allow ongoing casework to be provided without compromising service standards;
- the particular circumstances of each individual case.

**Please note:** This factsheet contains general information only. It does not constitute legal or migration advice. If you would like more detailed information on any aspect, please refer to RACS fact sheets available at [www.racs.org.au](http://www.racs.org.au). RACS is entirely independent of the Department of Immigration. All assistance is free. This factsheet was prepared in October 2016.