

Briefing note for lawyers:

Bridging visas for people seeking asylum during judicial review

This briefing note is intended to assist lawyers assisting asylum seekers with their judicial review matters in understanding their clients' rights to bridging visas and work rights during that process. The information in this briefing note only relates to people who have lodged a protection visa application. It does not cover all Bridging Visa conditions, and focuses instead on eligibility for work rights.

How do I know if my client is entitled to work rights on their bridging visa?

A summary of the applicable law and policy affecting entitlements to bridging visas and work rights for people seeking asylum at primary and merits review stages is below. Over the page is a summary of affecting people seeking asylum at judicial review or Ministerial stages.

| Primary and merits review stage | | |
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| Client's situation | BV, work rights | Applicable law and policy |
| Arrived by plane, immigration cleared. Lodged an application for a protection visa while holding a substantive visa (student, tourist, visitors for example). | BVA with work rights. | Eligible under the Schedule 1 Item 1301 (3) and the Schedule 2 criteria at 010.211(2): has made a valid application for a substantive visa which has not been finally determined and held a substantive visa at the time the protection visa application was made. Conditions: Schedule 2 010.611(1): Nil (work rights granted). |
| Arrived by plane, immigration cleared. Lodged an application for a protection visa after the substantive visa expired. | BVC with no work rights. Work rights may be sought by completing a Form 1005 and demonstrating compelling need to work. If this is successful: BVC with work rights. | Eligible under the Schedule 1 criteria item 1303 (3) and the Schedule 2 criteria at 030.212(2): has made a valid application for a substantive visa which has not been finally determined. Eligible for work rights by application under the Schedule 2 criteria 030.212(3) where hold a BVC subject to condition 8101 and the Minister is satisfied the applicant has a compelling need to work. |
| An unlawful non-citizen. Including those who arrived by boat to Australia and were initially detained, then released on a BVE grant under the Ministerial 195A power and will be or have now lodged a protection visa application under fast track. | BVE Work rights may be sought by completing a Form 1005 and demonstrating a compelling need to work; <i>and</i> acceptable reasons for the delay in making their protection visa application as per 050.212(8)(b) and (c) | Eligible for a BVE as they meet under the Schedule 1 criteria item 1305(3)(ba) a non-citizen who has been immigration cleared s72(1), and the Schedule 2 criteria: 050.212(3) has made or will apply within a period allowed for a substantive visa application not finally determined. Conditions: Eligible for work rights by application under the Schedule 2 criteria as per 050.212(8)(b) and (c); further 050.613A or 051.611A. A person previously granted a BVE under section 195A is specified under legislative instrument IMMI15/026 for the purposes of 050.613A(1)(b) and 051.611A(1)(c) and as such work rights may be granted. Must sign a Code of Behaviour and abide by it if over 18. |

| Judicial review or Ministerial stage | | |
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| Client's situation | BV, work rights | Applicable law and policy |
| Previously held a BVA, applied for judicial review within time and applied for a bridging visa while holding that BVA. | BVA with work rights. | Eligible under the Schedule 1 criteria item 1301 (3)(c)(ii) and (d) and the Schedule 2 criteria: 010.211(3)(b) and (c): has applied within statutory time limit for judicial review and at the time of the judicial review application held a BVA. Conditions: as determined by Schedule 2 conditions 010.611(2): protection visa applicants who have applied for judicial review within time while holding a BVA: condition 8101 if that condition applied to the last visa held by the holder. |
| Previously held a BVA and applied for judicial review but applied for a further BV after previous BVA expired | BVE Work rights should be granted if they existed on the last visa held by the applicant (on the BVA). | Ineligible for a BVA under the Schedule 2 criteria for a further BVA: 010.211(3)(c) or 010.211(6)(c). The BVA application will then be treated as a BVE application and a BVE will then be granted. Work rights under the Schedule 2 criteria 050.614(1): for protection visa applicants seeking judicial review as per BVE criteria 050.212(3A): if 8101 applied to the last visa held by the applicant, that condition (is applied again). |
| Previously held a BVC with work rights and applied for JR within time and for a BV while holding that BVC. | BVC with work rights. | Eligible under the Schedule 1 criteria item 1303 (3)(c)(ii) and (d) and the Schedule 2 criteria: 030.212(5): has applied within statutory time limits for judicial review of a decision in relation to the protection visa application and held a BVC at the time of the judicial review application. Conditions: 030.612: protection visa applicants who have applied for judicial review: Condition 8101 if that condition applied to the last visa held by the holder. |
| Previously held a BVC and applied for JR out of time and / or after previous BVC expired. | BVE Work rights may be granted if they applied to the last visa held. | Ineligible for a BVC under the Schedule 1 criteria item 1303 (3)(c)(ii) and (d) and the Schedule 2 criteria: 030.212(5): has applied within statutory time limits for judicial review of a decision in relation to the protection visa application and (c) held a BVC at the time of the judicial review application. The BVC application will then be treated as a BVE application and a BVE will then be granted. Work rights under the Schedule 2 criteria 050.614(1): for protection visa applicants seeking judicial review as per BVE criteria 050.212(3A): if 8101 applied to the last visa held by the applicant, that condition (is applied again). |
| Applied for JR. (In or out of time / while holding a BV of any kind or after it expired) | BVE with work rights if held them on the last visa held. | Eligible for a BVE as they meet under the Schedule 1 criteria item 1305(3)(ba) a non-citizen who has been immigration cleared s72(1), and the Schedule 2 criteria at 050.212(3A): has applied for judicial review and those proceedings have not been completed. Schedule 2 conditions: 050.614(1): for protection visa applicants seeking judicial review as per BVE criteria 050.212(3A): if 8101 applied to the last visa held by the applicant, that condition (is applied again). |
| Seeking a BV on the grounds that a Ministerial Intervention request has been made (417/48B) | BVE Work rights discretionary. | Eligible for a BVE as they meet under the Schedule 1 criteria item 1305(3)(ba) a non-citizen who has been immigration cleared s72(1), and the Schedule 2 criteria at 050.212 (5B) seeking Ministerial intervention 417/48B. Schedule 2 conditions: 050.615: Initial requests: permitted to work if had permission to work on the last bridging visa held; and at the time of making the Ministerial intervention request, had remained lawful since the last substantive visa application was finally determined. Repeat requests: no entitlement to a bridging visa E. Clients must be making acceptable arrangements to depart for a BVE to be granted. Permission to work may be given only if exceptional and compelling circumstances requiring work. |

I am helping an asylum seeker file for judicial review – how do I make sure they get a bridging visa?

If they currently hold a BVA or a BVC: complete a form 1005 bridging visa application and submit to the Department prior to expiry of their current BVA or C with proof of the judicial review application being successfully filed within time.

If they currently hold a BVE: complete a form 1008: bridging visa E application with proof of the judicial review application having been filed.

What's the difference between the 1005 and the 1008 BV application forms?

Both the 1005 and the 1008 are prescribed forms for a BVE application, but the 1008 is a simpler form. The 1005 should be used for any applicants seeking work rights.

What's the difference between a BVE050 and a BVE051?

A BVE050 and a BVE051 are two subclasses of the class WE Bridging Visa E. To be granted a BVE of either kind under Schedule 1 item 1305(3)(ba) you need to be an eligible non-citizen under s72(1), which includes a non-citizen who has been immigration cleared, or a non-citizen who is in a prescribed class.

The schedule 2 criteria make clear who will receive a BVE050 and who will receive a BVE051. An eligible non-citizen covered by regulations 2.20(7)-(11) may be able to be granted a BVE 051, but cannot be granted a BVE 050. In other words, regulations 2.20(7)-(11) effectively determine which category of BVE (050 or 051) the non-citizen may be able to be granted. Protection visa applicants with applications not finally determined (or at judicial review of a protection visa refusal) may get a BVE051 if they are:

- (reg. 2.20(7)) are not yet 18 years old and certain child welfare authorities have certified that release from detention is in the best interests of the person, provided certain arrangements have been made for the welfare of that person
- (reg. 2.20(8)) have turned 75 years old and in respect of whom adequate arrangements have been made for community support
- (reg. 2.20(9)) can demonstrate a special need (based on health or previous experience of torture or trauma) that cannot properly be cared for in detention (as confirmed by a medical specialist) and adequate arrangements have been made for their support
- (reg. 2.20(10)) are in a genuine and continuing relationship with an Australian citizen or permanent resident or an eligible New Zealand citizen (members of the family unit of a non-citizen referred to in reg. 2.20(10) are also prescribed as eligible non-citizens (reg. 2.20(11)).

What are the applicable time limits to file for judicial review?

Section 477, s477A and s486A of the Act provide that, in respect of a migration decision, the time limit for applying to the Federal Circuit Court, the Federal Court or the High Court is **35 days** from the date of the migration decision.

The 'date of the migration decision' is defined in s477(3) of the Act. In terms of calculating the 35 day period, the period begins the day after the date of the migration decision (table item 5 in s36(1) of the Acts Interpretation Act) and includes 'day 35' (table item 3 in s36(1) of the Acts Interpretation Act).

Example:

If the decision by the AAT was on 5 March 2016, in counting the 35 days, 6 March 2016 is 'day 1' and 'day 35' is 9 April 2016. Therefore an application for judicial review made by 9 April 2016 (inclusive) is taken to be made within the statutory time limits for the purposes of applying for a BVA.

However bear in mind that you may have less time than this 35 day period if your client's bridging visa will expire prior and they wish to retain their BVA or BVC.

What if my client is under 18?

If your client is under the age of 18 then an adult litigation guardian is required. Judicial review won't be filed within time until an adult litigation guardian has executed the application form.

A BVA holder is notified by email of a decision of the AAT to affirm a primary decision to refuse to grant their protection visa. When will their BVA cease?

In accordance with s379C(5) of the Act, they are taken to have received that notification at the end of the day on which it was transmitted.

In accordance with 010.511(b)(iii)(A)(I), the BVA will cease to be in effect 28 days after that notification was received electronically - which is 7 days before the end of the statutory time limit for applying for judicial review

If the person applies for judicial review after that 28 days has elapsed, they will no longer hold a BVA and will therefore not satisfy 010.211(3)(c) or 010.211(6)(c).

What are the applicable time limits to appeal from a decision of a lower court?

The following time limits apply to lodge an appeal following a decision of a lower court as set out in the Federal Court and High Court rules:

- Federal Circuit Court to Federal Court of Australia – 21 days (or 14 days if seeking leave to appeal)
- Federal Court of Australia to High Court – 28 days

However, the relevant court rules also enable each court to grant an extension of time to appeal outside these periods.

How can I tell if my client has work rights on their current visa?

Condition 8101 is a "no work" condition. An absence of an 8101 condition generally means your client has permission to work. To tell whether your client has condition 8101 on their bridging visa you can:

Check VEVO

You can check whether your client has work rights by checking the Department of Immigration's Visa Entitlement Verification Online (VEVO) system. You must enter your client's Immicard details and the visa grant number or visa evidence number:

<http://www.immi.gov.au/Services/Pages/vevo/vevo-overview.aspx>.

Look at your client's last bridging visa letter

Alternatively, you can look at the most recent bridging visa grant letter from the Department of Immigration to see whether there is a condition called '8101 No work'. Under the section of the letter called 'Conditions', if there is an 8101 condition, then you do not have the right to work. If there is not an 8101 condition, then you have the right to work.

What can I do if I believe the Department has made an error in relation to my client's work rights or the bridging visa they have been granted?

For an initial enquiry to the Department you could provide your clients full details, a signed 956 if you are their authorised representative or recipient to receive correspondence on this issue and email the Department with a query.

If they came by boat, you can email ima.s195a.team@border.gov.au

If they came by plane, you can email opnsw.admin@border.gov.au

If you believe your client has had a bridging visa refused where they are entitled to the visa, appeal rights to the Tribunal will be ordinarily set out in the refusal letter decision. Time limits are strict.

Work rights for a plane arrival who applied judicial review after previous BV expired?

Your client came to Australia by plane and held a BVA until recently with work rights. They have now lodged at the Federal Circuit Court. They didn't appeal to court until after their previous bridging visa expired. The Department issued them with a BVE with no work rights. The client asks you if anything can be done about this as they would like to work while waiting for their hearing date. What can you tell them?

Discussion: As the client was on a bridging visa A with work rights in the lead up to the judicial review, then to get another bridging visa A with work rights, the client needed to apply for their further bridging visa while holding a bridging visa. As such they needed to have applied for judicial review prior to the 28 days after the AAT decision even though the timeframe to make the judicial review application is longer (within 35 days of the AAT decision).

This is because in order to get a second bridging visa A with work rights, the client needs to have applied for judicial review and be on a current bridging visa A (which has not expired).

In the application for a BVA out of time, the client will receive a refusal of a BVA advising that they have not met Regulation 010.211 on the date of the decision. Specifically they needed to have met Reg 010.211(3)(c) by holding a BVA at the time of the application to meet the requirements of regulation 010.211 to get a bridging A (Class WA)(Subclass 010) visa (with work rights).

Work rights on the BVE depend on whether they previously held work rights: Schedule 2 BVE conditions: 050.614(1): for protection visa applicants seeking judicial review as per BVE criteria 050.212(3A): if 8101 applied to the last visa held by the applicant, that condition (is applied again). Your client appears to have in error not received work rights on their BVE and this ought to be raised with the Department.

Fast track judicial review and work rights

The Department of Immigration has advised RACS that:

The management of further BVEs for IMAs who have received a negative IAA outcome does not require Ministerial intervention using the Minister's s195A powers. Most fast-track applicants are now able to make their own valid applications for a BVE that can be considered by a delegate. Where this is not the case, the Department will arrange other processes. IMAs who receive a negative IAA outcome should attend a Departmental office to discuss their intentions and have their status regularised as appropriate.

As a general rule, if work rights have been granted previously, then work rights should be granted again.

It therefore appears that once the bar is lifted under 46A(2) for BVE then it remains lifted for future applications also.

I am in the process of assisting a client to file within the statutory time limit, and would like to assist my client to obtain a bridging visa with work rights. Can my client apply for a bridging visa on the basis that they intend to file for judicial review?

You can apply, but a person must have *applied* for judicial review to satisfy the criteria for their bridging visa. See for a BVA the Schedule 2 criteria at 010.211(3) which contains the past tense "applied" at 010.211(3)(b), for BVC at 030.212(5) and for a BVE the Schedule 2 criteria at 050.212(3A)(b).

Can my client obtain a bridging visa with work rights where I have applied for and been successful with an extension of time application with the court?

Sections 477(2), 477A(2) and 486A(2) provide generally that the Federal Circuit Court, the Federal Court and the High Court respectively may extend the 35-day time limit if the court is satisfied that it is necessary to do so.

For BVAs and BVCs no: the client will not qualify for these bridging visas as the Schedule 2 criteria on eligibility make clear that you must have held that kind of bridging visa at the time of your judicial review application.

For BVEs there is no problem qualifying for the BVE: 050.212(3A)(b)(i) includes a ground that the applicant has sought judicial review of a refusal of a substantive visa application. There is no reference to within time or outside of time. The PAMS on BVEs advises that the judicial review grounds for a BVE includes out of time applications: "This includes an application to the court for an extension of time, for reinstatement of a judicial review application or for leave to appeal for that purpose." *MIAC v Khandakar* [2011] FCAFC 22 the Full Federal Court found that an extension of time is an application for "judicial review" within the meaning of those words in 050.212(3A), 050.212(4)(a), 050.212(4)(d) and 050.212(4AAA)(b), which all provide that the applicant has applied for, or is the subject of, judicial review (for a BVE).

However the conditions on a BVE include that if condition 8101 applied to the person's last bridging visa, it applies again. Schedule 2 BVE conditions: 050.614(1): for protection visa applicants seeking judicial review as per BVE criteria 050.212(3A): if 8101 applied to the last visa held by the applicant, that condition (is applied again). So obtaining a bridging visa for an applicant who has filed with the court out of time with work rights will only be successful if the last bridging visa they held, had work rights.

I have just advised a client their judicial review application has very little merit and they have advised me they would like help withdrawing their application. My client asks when their bridging visa will expire.

28 days after withdrawal: see Schedule 2 When Visa is in Effect: BVA 010.513(b)(iii); BVC 030.512(b)(ii); BVE: 050.512.

We won at court! Does my client need to apply for a bridging visa?

No. When a court remits the matter to which judicial review proceedings relate to the Administrative Appeals Tribunal for reconsideration, the current bridging visa continues until 28 days after they are notified by the AAT of their decision following remittal: Schedule 2 When Visa is in Effect: BVA 010.513(c); BVC 030.512(c); BVE 050.511(b) and 050.512(c).

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. RACS is independent of the Department of Immigration. All assistance is free. This factsheet was prepared in October 2016.