

Briefing note for migration agents

Identity documents and protection visa applications – s91W and s91WA

A new legal issue affecting protection visa applications is the operation of the law and policy following a request for identity documents under section 91W of the Migration Act. The relevant law and policy are summarised below and include:

Section 91W – Evidence of identity and bogus documents

- (1) The Minister may request an applicant for a protection visa produce documentary evidence of their identity, nationality or citizenship

Section 91WA – Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant if the applicant produces a bogus document as evidence of their identity, nationality or citizenship or if the applicant has destroyed or disposed of such documentary evidence.
- (2) (1) does not apply if the Minister is satisfied that the applicant has a reasonable explanation and either produces documentary evidence of their identity, nationality or citizenship or has taken reasonable steps to provide such evidence.

Section 91W has existed for some time, but section 91WA has only had effect from 18.4.15 and was introduced by the Migration Amendment (Protection and Other Measures) Act 2015.

PAMS on 91WA: A 'reasonable explanation' could include acts by a third party which involve destroying or removing documents from the applicant's possession, or theft, but the deliberate destruction or disposal could be considered not to be a 'reasonable explanation'.

A "91W request": All applications for protection visa lodged from 18 April 2015 receive an acknowledgement letter which includes a 91W request to: *"Please provide certified copies of any documentary evidence of your identity nationality or citizenship."*

Documents are to be provided within 14 days, and acknowledgment letters include a warning that failure to respond could result in refusal of the application.

Section 5: Bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

This definition was moved from section 97 by Act No. 35 of 2015 with effect on and from 18/04/2015.

Section 487ZI Prohibition on, and forfeiture of, bogus documents

Section 487ZI(1) A person must not provide a bogus document to the Department.

Section 487ZIJ(2) A bogus document provided to the Department is forfeited.

Section 487ZJ(1) If the Department reasonably suspect a document is forfeited, it may be seized.

Section 487ZJ(3) After seizure, the Department must provide notice of seizure and of proposed condemnation of the document as forfeited unless proceedings are instituted within 90 days.

Section 487ZI was inserted by Act No. 116 of 2014 with effect on and from 04/11/2014. 487ZI(1) was amended by Act No 116 of 2014 with effect on and from 18/4/2015.

Section 5: An excluded fast track review applicant is an applicant who in the opinion of the Minister without reasonable explanation gives a bogus document in support of their application. Definition inserted by Act No. 135 of 2014 with effect from 18/04/2015.

Excluded fast track applicants have no rights to merits review of the refusal of their application.

Example - plain English advice on 91W and 91WA

The Department will want to see any documents you have about your identity. The types of documents they want include your birth certificate, national ID card and passport.

If you don't give these documents, you must explain why. If your explanation is not accepted, your application could be refused. Your application could also be refused if you destroyed or threw away genuine identity documents and you don't give reasons for why you did this. An identity document could cause problems if it:

- *is fake or has been altered; or*
- *has incorrect information on it, whether or not this was on purpose; or*
- *looks like it was issued to you, but wasn't actually issued to you.*

If you give the Department documents like this, it could negatively your protection visa application.

If you have any documents that you think might cause you problems, please make some notes about step, by step, exactly how you got them. It's best to be very clear about this, because while having a problematic document may not necessarily mean your case is refused, giving different information at different times about how you got the document could cause your case to fail.

Areas to seek instructions on from protection visa applicants include where their identity documents are now, the reasons for any destruction of documents, and explanations for documents with inconsistent names or dates of birth. New areas of advice include on appeal rights following seizure of a document and how decisions on documents can affect protection visa applications in relation to potential refusal under s91WA and denial of merits review as an excluded fast track applicant.

Caselaw

There are no reported cases yet in relation to challenges to seizure of documents under s 487ZL.

There are limited reported cases yet on the correct interpretation of s91WA in relation to refusals of protection visas, only confirming the independence of s91WA as ground of visa refusal:

SZFLW v Minister for Immigration & Border Protection & Anor [2015] FCCA 2603 (22 September 2015): A rejection of an application based on s91WA is independent of adverse credibility findings in respect of the applicant's claims for protection [47]. Where the Tribunal is not satisfied that the applicant had a reasonable explanation for providing a bogus document, rejecting the application is mandated by s91WA [46].

AZE16 v Minister for Immigration & Anor [2016] FCCA 1941 (28 July 2016): S91WA is a separate and independent reason why an applicant may be precluded from the grant of a visa [29].

The Department and the Tribunal have made positive assessments on s36(2)(a) in a number of cases, notwithstanding provision of bogus documents or use of false identity documents, and found the grant of the visa to not be prevented by s91WA:

1409316 (Refugee) [2015] AATA 3536 (31 August 2015) – a fake Bangladeshi Drivers Licence.

1409422 [2015] RRTA 233 (29 April 2015) – another person's passport used to enter Australia, and citizenship of a third country previously cancelled due to use of a false identity. The Tribunal queried whether 91WA applies to bogus identity documents produced in relation to an earlier, unrelated visa application, but found even if it did, s 91WA(2) applied as the applicant's fear of persecution and desire to seek asylum was a reasonable explanation for entering Australia on a bogus document.

91WA is a new area of law with important implications for people seeking asylum. There are significant barriers for people to challenge seizure on the basis of the Minister's reasonable suspicion that a document is bogus, particularly when reasons for that assessment are not provided. It will be interesting to see the caselaw that will likely emerge on this issue in the future.

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 September 2016.