

Briefing note for Registered Migration Agents

Family membership and protection visa applications

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An issue which can arise in practice is family membership in relation to protection visa applications. The relevant law and policy are summarised below.

Protection claims based on family membership

[Section 36(2)] A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
- (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a **member of the same family unit** as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
- (c) a non-citizen in Australia who is a **member of the same family unit** as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.

A **member of the same family unit** is defined in s5(1):

A person is a member of the same family unit as another person if:

- either is a **member of the family unit** of the other or
- each is a **member of the family unit** of a third person.

Reg 1.12(4) **Member of the family unit for all protection, refugee and humanitarian visas**

[1.12(4)] A person is a member of the family unit of another person (the family head) if the person is:

- (a) a spouse or de facto partner of the family head; or
- (b) a dependent child of:
 - (i) the family head; or
 - (ii) a spouse or de facto partner of the family head; or
- (c) a dependent child of a dependent child of:
 - (i) the family head; or
 - (ii) a spouse or de facto partner of the family head; or
- (d) a relative, of the family head or of a spouse or de facto partner of the family head, who:
 - (i) does not have a spouse or de facto partner; and
 - (ii) is usually resident in the family head's household; and
 - (iii) is dependent on the family head.

Reg 1.05A **Dependent**

A person is dependent on another person for the purposes of an application for a protection visa if the first person is wholly or substantially reliant on them for financial, psychological or physical support.

[Note: According to the Department's PAMs, psychological support shouldn't be confused or equated with the normal emotional ties between family members, such as love, joy, fidelity and loyalty.]

Reg 1.03: **Relative** means:

- (i) **a close relative;** or
- (ii) a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-niece or step-nephew; or
- (iii) a first or second cousin.

Reg 1.03: **Close relative** means:

- (a) the spouse or de facto partner of the person; or
- (b) a child, parent, brother or sister of the person; or
- (c) a step-child, step-brother or step-sister of the person.

Reg 1.03: **Dependent child** means:

the child or step-child of the person (other than a child or step-child who is engaged to be married or has a spouse or de facto partner), being a child or step-child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
 - (i) is dependent on that person; or
 - (ii) is incapacitated for work due to the total or partial loss of the child's or step child's bodily or mental functions.

Common examples of people pleading claims based on family membership:

- The spouse of the applicant.
- The spouse and child or children of the applicant.
- The parents or parent of a dependent child applicant.

Other examples of people pleading claims based on family membership:

- The grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-niece or step-nephew or a first or second cousin of the applicant who does not have a spouse or de facto partner; and is usually resident in the applicant's household; and is dependent on the applicant including only psychologically.
- The sibling of the applicant (including an adult sibling) who does not have a spouse or de facto partner; and is usually resident in the applicant's household; and is dependent on the applicant including only psychologically.

Case study: Can my brother and I make claims based on family membership?

You are acting a client here in Australia with their brother. The brothers have no living relatives. They instruct you they want to be considered on the same application form and to have their claims heard together.

Discussion:

Claims can be made on behalf of membership of the same family unit: s36(2)(b) or (c). The two brothers, could be a member of the same family unit under the definition in s5(1). They are each other's close relatives (brothers) under reg 1.03. Assuming they are living in the same house and are unmarried and single each is a relative of the other as family head under reg 1.12(e) Regardless of whether they are on the same application form, or different application forms, claims can be pleaded on the basis of family membership provided neither has a visa grant yet. The benefits of this approach are that only one needs to establish claims for both to be successful.

Since 18.4.15 claims cannot be pleaded on the basis of family membership with relatives who already hold a visa:

S91WB: Application for protection visa by member of the same family unit

Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.

Inserted by Act No 35 of 2015 with effect from 18.4.15.

Case study: My husband holds a permanent protection visa – am I a refugee?

Your client arrived to Australia by boat. Her husband has lived in Australia for several years and holds a permanent protection visa. Does your client need to establish claims of her own for her application for a protection visa to be successful? Would your advice change if he held a TPV granted last month?

Discussion:

Under 36(2), you need to either be owed protection obligations or you must be a member of the same family unit as someone who holds a protection visa of the same class as the one you applied for. A permanent protection visa is class XA subclass 866, a TPV is an XD and a SHEV is an XE. Your client can't apply for an XA because she came by boat. So protection claims will need to be established by your client for the grant of her protection visa (either a TPV or a SHEV).

What if instead of a permanent protection visa, the husband held a TPV granted last month? Now that the visa has been granted, section 91WB(2) means that generally, family members making later applications need to show protection obligations, unless the application has not yet been determined at the time the later family members arrive.

Babies born to an applicant after an application is lodged

Babies born to an applicant after an application is lodged are automatically included but evidence (an amended application form, a birth certificate and passport sized photographs) must be provided to the Department.

Regulation 2.08(1) Application by newborn child

If: (a) a non-citizen applies for a visa; and (b) after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to the non-citizen; then: (c) the child is taken to have applied for a visa of the same class at the time he or she was born; and (d) the child's application is taken to be combined with the non-citizen's application.

Babies born to an applicant who may be entitled to citizenship

Babies born in Australia who may be entitled to citizenship include those born to an Australian citizen or permanent resident parent, and those who are stateless. Each of these categories may include babies born to a person seeking asylum who arrived to Australia by boat.

(1) Born in Australia to an Australian (citizen or permanent resident) parent:

- A child born in Australia is an Australian citizen automatically if one parent is an Australian citizen or a permanent resident at the time the child is born.
- No application is needed to become an Australian citizen in this situation. The child acquires citizenship automatically at birth: s 12(1)(a) *Citizenship Act 2007*.
- However we recommend you apply for evidence of the child's Australian citizenship by completing the Form 119 "Application for Evidence of Australian Citizenship" as soon as possible to avoid any problems.
- There is no fee for this application – it is free.
- The supporting documents you will generally need to provide with the application include:
 - The child's birth certificate;
 - Evidence of the parent's Australian citizenship and parentage of the child.

- An endorsed passport size photo of the child;
- The child's passport, if any;
- Identification documents for the responsible parent making the application on the child's behalf, including a signature, photograph and current address – for example drivers licence and credit card or utilities bill.

(2) *Babies born in Australia who are stateless:*

- A child born in Australia who is stateless may apply for Australian citizenship: s 21(8) *Citizenship Act*.
- To apply you must complete the Form 1290 "Application for Australian Citizenship other situations".
- The supporting documents you will generally need to provide include:
 - The child's birth certificate;
 - Evidence of statelessness and lack of nationality of any country including statutory declarations from the child's parents and submissions on statelessness / an absence of nationality or citizenship of any country.
 - An endorsed passport size photo of the child;
 - Identification documents for the responsible parent making the application on the child's behalf, including a signature, photograph and current address – for example drivers licence and credit card or utilities bill.
 - Any available identification documents for either the parents or the child such as copy of a protection visa application, copies of any UNHCR cards, marriage certificate, medicare card.
- Citizenship doesn't take effect until the day the application is approved by the Department. We recommend applications be made as soon as possible for any child eligible for citizenship.

Boat arrivals and family unity

Under section 46A people who arrived by boat are not able to make an application for any visa without Ministerial permission:

46A (1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) either (i) is an unlawful non-citizen or (ii) holds a bridging visa or a temporary protection visa, or a temporary visa of any kind (however described) prescribed for the purposes of this subparagraph.

46A(2): Minister may by written notice determine subsection (1) does not apply for a visa of a class specified in the determination.

Under section 5AA(1A) people who arrived by boat include those born to them in Australia:

[5AA] (1A) For the purposes of this Act, a person is also an unauthorised maritime arrival if:

(a) the person is born in the migration zone; and

(b) a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and

(c) the person is not an Australian citizen at the time of birth.

(with effect from 16.12.14 but applied to all babies born prior.)

Under the definition in section 5(1)(a), fast track applicants are persons who:

- are unauthorised maritime arrivals as defined in s5AA of the Act
- arrived in Australia on or after 13 August 2012 but before 1 January 2014
- have not been taken to a regional processing country (RPC) and
- make a valid application for a protection visa on or after 18 April 2015.

There are currently three legislative instruments that define further classes of people who are “fast track applicants”.

Legislative instrument [IMMI 16/049](#) commencing 7 May 2016 covers:

- Babies born on or after 1 January 2014 to a fast track applicant are fast track applicants.
- Babies born in Australia on or after 1 January 2014 to one parent who is a fast track applicant, and to an other parent who came by boat before 13 August 2012 and who lodged a valid protection visa application before 7 May 2016 are deemed to be included on this other parent’s application under this same legislative instrument.

Legislative instrument [IMMI 16/010](#) commencing 24 March 2016 covers:

- a baby born in Australia on or after 6 November 2013 and before 5 December 2014 to a parent who arrived on or after 19 July 2013 and was taken to Nauru where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa.
- the parent of this baby who came to Australia on or after 19 July 2013, was previously taken to Nauru and where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa.
- the siblings of this baby (younger or older) who came by boat to Australia and where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa.

Legislative instrument [IMMI 16/008](#) commencing 1 April 2016 covers people taken to Nauru or Manus between 13 August 2012 and 19 July 2013. Under this legislative instrument a person is a fast track applicant if they (or their children):

- were taken to Nauru or Manus during the period 13 August 2012 until 19 July 2013; and
- are now in Australian migration zone; and
- where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa.

Migration Regulations 1994 Schedule 1: items 1403(3) and 1404(3): all applicants for a TPV or a SHEV need to either:

- hold or have held a Temporary Protection, Safe Haven Enterprise, Temporary Safe Haven, Temporary (Humanitarian Concern)
- have not held a visa on last entry into Australia, is an unauthorised maritime arrival, or
- not have been immigration cleared on last entry into Australia.

Case study: Fast track mum and an 866 visa holder dad

Your client arrived by boat to Australia and has had a child in Australia to the holder of a permanent 866 protection visa. Is this child able to lodge a protection visa application? Under what section of the Act are they barred, and is there any way of overcoming this?

Discussion:

Babies born in Australia at any time to an Australian permanent resident parent are eligible for citizenship (even if the other parent arrived by boat). No application is needed to become an Australian citizen in this situation. The child acquires citizenship automatically at birth under s 12(1)(a) Citizenship Act. We recommend that an application be made for evidence of the child’s Australian citizenship. This may be done by completing the Form 119 “Application for Evidence of Australian Citizenship”.

In this case study your client is not able to receive any special treatment as the family member of a citizen and a permanent resident: she’s still barred until s 46A as a boat arrival and will need to have her claims accepted to be granted a temporary protection visa.

Case study: Student visa holder pregnant to a fast track applicant Dad

Ali has recently received a bar lift letter for permission to apply for either a TPV or a SHEV.

Since coming to Australia, he has married a woman from Indonesia who is in Australia on a student visa and they have had a baby boy.

Ali asks you whether he can include his wife and son on his TPV application.

What would you advise?

The wife is not able to be an applicant for a TPV / SHEV visa under Sch 1 1403 and 1404 of the regulations as she did not arrive by boat. She also won't qualify for a protection visa because under 36(2), you need to either be owed protection obligations or you must be a member of the same family unit as someone who holds a protection visa of the same class as the one you applied for. A permanent protection visa (which she could apply for) is class XA subclass 866, whereas the protection visas her husband may apply for are the TPV, which is an XD or a SHEV which is an XE.

The child could be included on the TPV application if the Minister lifts the 46A bar because the child is an unauthorised maritime arrival and a fast track applicant by the reasoning in the case study above. If a child is born after an application is lodged and before it's decided, the child is automatically included. But in this instance, you'd need to seek Ministerial permission to include the child on the application.

Appeal rights

If an application for a protection visa is refused, including on the basis of family membership, that refusal may be reviewed either by the Administrative Appeals Tribunal or by the Immigration Assessment Authority.

Making assessments on family membership can be complicated. If you are helping a person seeking asylum and would like to discuss their case with a RACS lawyer, please call us for some telephone advice on a Tuesday from 10 – 11.30am.

Please note: This briefing note contains general information only. It does not constitute legal or migration advice. RACS is independent of the Department of Immigration and Border Protection. All assistance is free. This briefing note was prepared in November 2016.