



**Australian Government  
Independent Protection Assessment Office**

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**LEGAL OPTIONAL STANDARD PARAGRAPHS**

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THE PARTICULAR CASE**

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### ***Non Convention related matters for referral to the Minister***

Although [I OR the reviewer] has concluded that the claimant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol, this case nevertheless raises issues that should be brought to the Minister's attention. Those issues are:

[insert details of non-Convention related matters that warrant referral].

### ***Persecution***

Article 1A(2) of the Refugees Convention requires that a refugee have a well-founded fear of *being persecuted*. For the purposes of determining that issue, s.91R(1) of the Act provides that Article 1A(2) does not apply to persecution unless: one or more of the Convention reasons is the essential and significant reason or reasons for the persecution (s.91R(1)(a)); the persecution involves serious harm (s.91R(1)(b)); and the persecution involves systematic and discriminatory conduct (s.91R(1)(c)).

Examples of 'serious harm' are set out in s.91R(2) of the Act. These include: a threat to life or liberty; significant physical harassment or ill-treatment and significant economic hardship or denial of access to basic services or a capacity to earn a livelihood, where such hardship or denial threatens the person's capacity to subsist.

### ***Well-founded fear***

Article 1A(2) of the Refugees Convention requires that a person's fear of persecution must be a "well-founded fear". The High Court in *Chan Yee Kin v MIEA* (1989) 169 CLR 379 held that the concept of "well-founded fear" involves both a subjective and an objective element. That is, there must be a state of mind, a fear, and an objective basis for that fear. There will be a basis for that fear if there is a "real chance" of being persecuted. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

### ***Relocation***

The definition of “refugee” in Article 1A(2) of the Refugees Convention requires a person to be outside their country *owing to* a well-founded fear of being persecuted for a Convention reason, and unable because of such fear or unwilling to avail themselves of the protection of that country. If a person has chosen to seek asylum in a foreign country, rather than relocate to a place within their own country where they have no well-founded fear of persecution, and where they could reasonably be expected to relocate, it could not be said that they are outside their country owing to a well-founded fear of being persecuted for a Convention reason.

Therefore, a person will not be a “refugee” if in all the circumstances it would be reasonable, in the sense of “practicable”, for him or her to seek refuge in another part of the same country where, objectively, there is no appreciable risk of the occurrence of the feared persecution. What is “reasonable” will depend upon the particular circumstances of the person and the impact upon that person of relocation. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense:

*SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* (2007) 233 CLR 51; and *Randhawa v MILGEE* (1994) 52 FCR 437.

### ***Conduct in Australia - s.91R(3)***

A person may claim a well-founded fear of persecution as a consequence of events occurring since his or her departure from their country of origin. However, where these events occur in Australia, consideration must be given to s.91R(3) of the Act. Section 91R(3) provides that any conduct engaged in by the claimant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the claimant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention and Protocol.

Not all conduct in Australia will fall within the ambit of s.91R(3). The conduct must be that of the claimant (or instigated by the claimant) and not the independent actions of third parties. Furthermore, s.91R(3) will only be enlivened if such conduct was engaged in for the sole purpose of strengthening such claim: *MIAC v SZJGV* (2009) 238 CLR 642.

### ***Particular social group***

The expression “particular social group” has been the subject of considerable judicial consideration. In *Applicant S v MIMA* (2004) 217 CLR 387 at [36], the High Court noted that for a group to be considered a “particular social group”, it must firstly be identifiable by a characteristic or attribute common to all members of the group. Secondly, that common characteristic or attribute cannot be the shared fear of persecution. Thirdly, the possession of the characteristic or attribute must distinguish the group from society at large. Whilst a particular social group must be cognisable within a society, and perceptions held by the society may amount to evidence that a social group is cognisable, there is no requirement that the group be recognised or perceived as such by the relevant society: *Applicant S* at [27].

Whether a posited group is a “particular social group” in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the society. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be for reasons of the person’s membership of the particular social group.

### ***Third country protection***

Subsection 36(2) of the Act, which specifies the “protection obligations” criterion for a protection visa, is qualified by ss.36(3), (4) and (5) of the Act. Relevantly, those provisions provide that Australia does not have protection obligations to a person who has not taken all possible steps to avail him or herself of a right to enter and reside in a country, other than Australia, where he or she does not have a well-founded fear of being persecuted and does not have a well-founded fear of being returned to another country where they will be persecuted for a Convention reason.

The “right” referred to in s.36(3) may be temporary or permanent but must be a legally enforceable, and presently existing, right: *MIMA v Applicant C* (2001) FCR 154; *Suntharajah v MIMA* [2001] FCA 1391.

### ***State protection***

To meet the definition of 'refugee' in Article 1A(2) of the Convention, a person must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection by the state is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

Harm emanating from non-state agents may amount to persecution for a Convention reason if the motivation of the non-state actors is Convention-related, and the state is unable or unwilling to provide an adequate level of protection against the harm. Depending on the nature of the harm, this may include measures to protect the lives and safety of its citizens, including an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system: *MIMA v Respondents S152/2003* (2004) 222 CLR 1. Similarly, harm from non-state actors which is not motivated by a Convention reason may amount to persecution for a Convention reason if the protection of the state is withheld or denied for a Convention reason: *MIMA v Khawar* (2002) 210 CLR 1.

## INDEPENDENT MERITS REVIEW

**Review case number(s):** (insert all claimant's boat IDs eg: TRK002, TRK003)

**Claimant name(s):** (list all claimants' names)

**DIAC reference(s):** (list all claimants' file numbers)

**Country of reference:**

**Reviewer:**

**Date of report:**

### RECOMMENDATION OF REVIEWER:

*(Insert finding/ recommendation for each claimant - duplicate if necessary, delete irrelevant text)*

I find that:

- the claimant, \_\_\_\_\_, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. I recommend that the claimant be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

**OR**

- the claimant, \_\_\_\_\_ meets the criterion for a protection visa in s.36(2)(b)(i) of the *Migration Act 1958*. I recommend the claimant be recognised as a member of the same family unit as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

**OR**

- the claimant, \_\_\_\_\_, does not meet the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. I recommend that the claimant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, or as a member of the same family unit as such a person.

## STATEMENT OF REASONS

### INTRODUCTION

1. This is a review of a negative assessment made by a delegate of the Minister for Immigration and Citizenship on .
2. The claimants arrived in Australia on .
3. On , they made a request for a refugee status assessment (RSA) and, on , the claimants applied for an Independent Merits Review.
4. This independent review will consider afresh all claims for protection as they relate to the Refugees Convention, taking into account all available information, including information available to the refugee status assessment officer in reaching the unfavourable refugee status assessment, information provided by or on behalf of the claimant and any additional information the independent reviewer may consider relevant.

### RELEVANT LAW

5. Australia is a party to the 1951 Convention relating to the Status of Refugees (the Convention) and 1967 Protocol relating to the Status of Refugees (the Protocol) and, generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention.

#### Definition of 'refugee'

6. Article 1A(2) of the Refugees Conventions defines a refugee as any person who:  
[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. [...]
7. In conducting an independent merits review, the reviewer is bound by certain provisions of the *Migration Act 1958* (the Act) relevant to establishing whether a person is owed refugee protection and the case law bearing upon those provisions. The common law rules of natural justice apply.
8. The question that this assessment must address is whether the claimants, although not applicants for a protection visa, meet the criterion for a protection visa set out in s 36(2) of the Act which requires that the person is a non-citizen in Australia either to whom the Minister is satisfied Australia has protection obligations under the Convention and Protocol, or is a member of the same family unit as such a person who has been granted a protection visa. That question is to be understood by reference to other relevant provisions of the Act, including ss 36(3)-(7), 91R-91U, and the decided court cases that bear upon those provisions.
9. Section 36(3) of the Act limits the operation of s.36(2) in specified circumstances, and ss 91R-to 91U qualify some aspects of Article 1 of the Convention for the purposes of the application of the Act and the regulations to a particular person.

## CLAIMS AND EVIDENCE

*(Set out all evidence relevant to finds of fact)*

10.

- Relevant material from the IPAO/Department's file(s) relating to the claimant
- The claimant's claims to engage Australia's protection obligations under the Refugees Convention
- Submissions from the claimant/claimant's agent
- Any other relevant evidence

*(Summarise evidence and claims of claimant, including responses to information adverse to claimant)*

11.

### **Interview details (if interview conducted)**

12. The claimants were interviewed at \_\_\_\_\_ on \_\_\_\_\_. Their migration agent was present/not present. The interview was conducted with the assistance of an interpreter in the \_\_\_\_\_ language.

13. A witness, \_\_\_\_\_, also gave oral evidence.

### **Country Information**

*(Summarise relevant country information)*

14.

## FINDINGS AND REASONS

*(Set out findings and reasons for each claimant – repeat as necessary, delete unnecessary phrases)*

### **Possible referral of non-refoulement issues to the Minister**

15. I find that the claimant, \_\_\_\_\_, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*.

**OR**

16. I find that the claimant, \_\_\_\_\_, meets the criterion for a protection visa set out in s.36(2)(b)(i) of the *Migration Act 1958*.

**OR**

17. I find that the claimant, \_\_\_\_\_, does not meet the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*.



**RECOMMENDATION**

*(Insert recommendation for each claimant – repeat as necessary, delete unnecessary paragraphs)*

18. I recommend that the claimant, \_\_\_\_\_ be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

**OR**

19. I recommend that the claimant, \_\_\_\_\_, be recognised as a member of the same family unit as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

**OR**

20. I recommend that the claimant, \_\_\_\_\_ not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, or as a member of the same family unit as such a person.

Signature: .....

Name of Reviewer: .....

Date: .....

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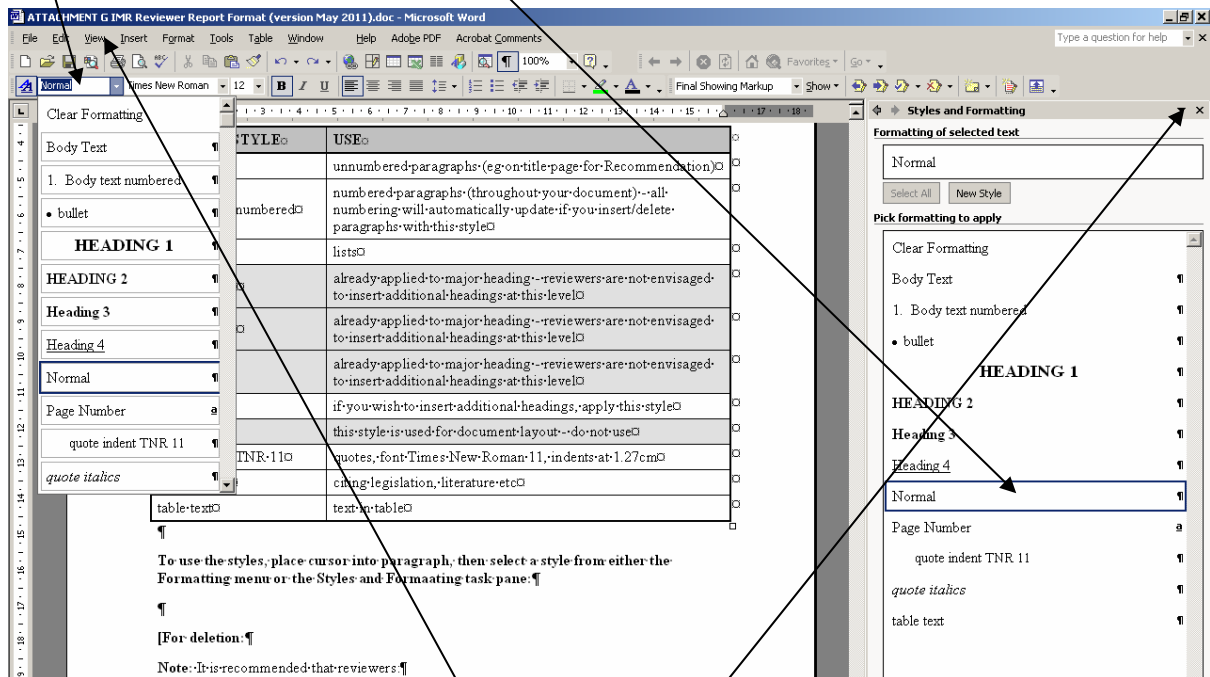
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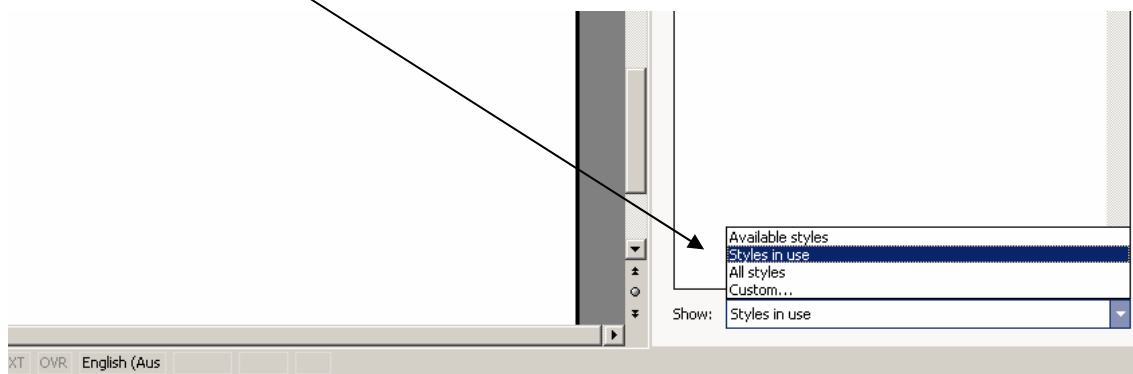
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## INDEPENDENT MERITS REVIEW

**Review case number:** (insert all claimant's boat IDs eg: TRK002, TRK003)

**Claimant name(s):** (list all claimants' names)

**DIAC reference(s):** (list all claimants' file numbers)

**Country of reference:**

**Reviewer:**

**Date of report:**

### RECOMMENDATION OF REVIEWER

I find that the claimant, \_\_\_\_\_, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. Accordingly, I recommend that the claimant be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugees Convention')

**OR**

I find that the claimant, \_\_\_\_\_, does not meet the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. Accordingly, I recommend that the claimant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugees Convention').

## STATEMENT OF REASONS

### INTRODUCTION

1. This is a review of a negative assessment made by a delegate of the Minister for Immigration and Citizenship on .
2. The claimant arrived in Australia on .
3. On , he/she made a request for a refugee status assessment (RSA) and, on , the claimant applied for an Independent Merits Review.
4. This independent review will consider afresh all claims for protection as they relate to the Refugees Convention, taking into account all available information, including information available to the refugee status assessment officer in reaching the unfavourable refugee status assessment, information provided by or on behalf of the claimant and any additional information the independent reviewer may consider relevant.

### RELEVANT LAW

5. Australia is a party to the 1951 Convention relating to the Status of Refugees (the Convention) and 1967 Protocol relating to the Status of Refugees (the Protocol) and, generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Refugees Convention.

#### Definition of 'refugee'

6. Article 1A(2) of the Refugees Conventions defines a refugee as any person who:  
[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. [...]
7. In conducting an independent merits review, the reviewer is bound by certain provisions of the *Migration Act 1958* (the Act) relevant to establishing whether a person is owed refugee protection and the case law bearing upon those provisions. The common law rules of natural justice apply.
8. The question that this assessment must address is whether the claimant, although not an applicant for a protection visa, meets the criterion for a protection visa set out in s 36(2) of the Act which relevantly refers to a non-citizen to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees. That question is to be understood by reference to other relevant provisions of the Act, including ss 36(3)-(7), 91R-91U, and the decided court cases that bear upon those provisions.
9. Section 36(3) of the Act limits the operation of s 36(2) in specified circumstances, and ss 91R-91U qualify some aspects of Article 1 of the Convention for the purposes of the application of the Act and the regulations to a particular person.

## CLAIMS AND EVIDENCE

*(Set out all evidence relevant to findings of fact)*

10.

- Relevant material from the IPAO/Department's file(s) relating to the claimant
- The claimant's claims to engage Australia's protection obligations under the Refugees Convention
- Submissions from the claimant/claimant's agent
- Any other relevant evidence

*( Summarise evidence evidence and claims of claimant, including responses to information adverse to the claimant)*

11.

### **Interview *(if interview conducted)***

12. The claimant was interviewed at \_\_\_\_\_ on \_\_\_\_\_. His/Her migration agent was present/not present. The interview was conducted with the assistance of an interpreter in the \_\_\_\_\_ language.

13. A witness, \_\_\_\_\_, also gave oral evidence.

### **Country Information**

*(Summarise relevant country information)*

14.

## FINDINGS AND REASONS

*(Set out findings and reasons)*

### **Possible referral of non-refoulement issues to the Minister**

15. I find that the claimant, \_\_\_\_\_, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*.

**OR**

16. I find that the claimant, \_\_\_\_\_, does not meet the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*.

## RECOMMENDATION

17. I recommend that the claimant be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

**OR**

18. I recommend that the claimant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

Signature: .....

Name of Reviewer: .....

Date: .....

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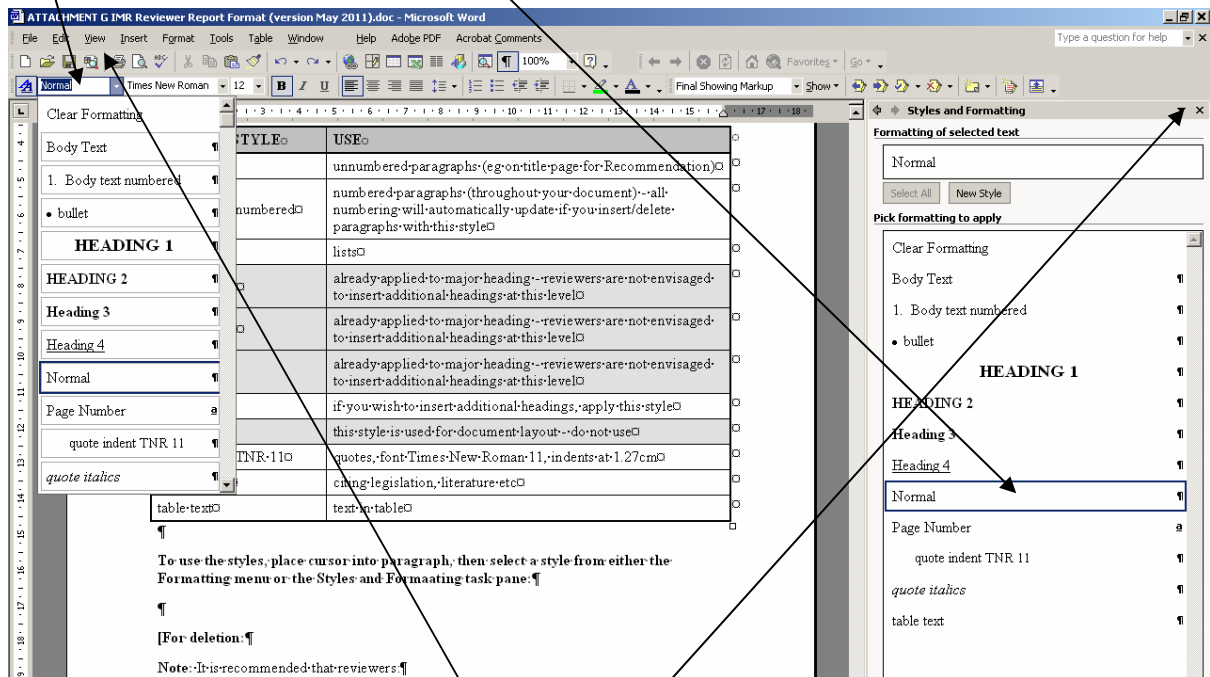
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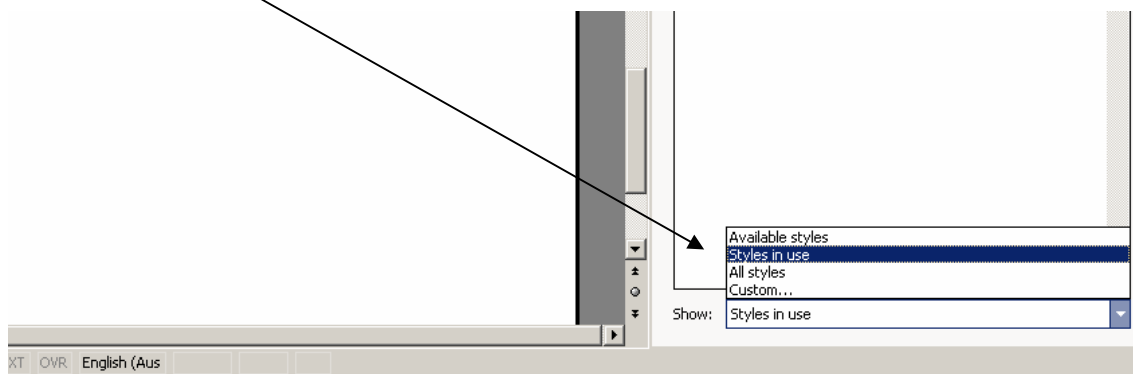


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# IMR/IPA TEMPLATE - FAMILY CLAIMANT GROUPS

## GUIDANCE NOTES

### 1. General Principles

The criterion for a protection visa is in s.36(2) of the *Migration Act 1958* (the Act) can be met if the claimant satisfies one of the two alternate limbs of that criterion. That is, the claimant is either:

- a person to whom Australia has protection obligations under the Refugees Convention and Protocol ('the first person') (s.36(2)(a)); or
- is:
  - a *member of the same family unit* of the first person (s.36(2)(b)(i)), and
  - the first person holds a protection visa (s.36(2)(b)(ii)).

In short, the claimant is either a refugee or a member of the same family unit of a refugee who holds a protection visa.

#### Member of the same family unit

Under s.5(1) of the Act, a person is a *member of the same family unit* of 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.

*Member of the family unit* is relevantly defined in s.5 and r.1.12(1) of the Migration Regulations 1994. Under r.1.12(1) a person will be a member of the family unit of another person (the family head) if they are:

- a *spouse* or *de facto partner* of the family head; or
- a *dependent child* (or their dependent child) of the family head or their spouse /de facto partner; or
- a *relative* of the family head or head or their spouse /de facto partner, who
  - does not have a spouse or de facto partner; and
  - is usually resident in the family head's household; and
  - is dependent on the family head.

The terms *spouse*, *de facto partner*, *dependent child*, *dependent* and *relative* are further defined in the Act and regulations.<sup>1</sup>

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<sup>1</sup> For definitions see:

*Spouse* - s.5F, r.1.15A

*De facto partner* - s.5CB, r.1.09A, r.2.03A

*Dependent child* - r.1.03 (ie child / step child who is under 18 and not engaged; or if over 18 is 'dependent' on the person)

*Dependent* - r.1.05A(2) - (ie if 'wholly or substantially reliant on the other person for financial, psychological or physical support')

*Relative* - r.1.03 (ie spouse, child, parent, brother, sister, grandparent, grandchild, aunt, uncle, niece, nephew, (+ step equivalents)).

## 2. Using the template

### Claims and evidence

As claimants can be granted a protection visa on the basis of either being a refugee or being the family member of a refugee who holds a protection visa, the recommendation report should identify whether or not each claimant claims to be a person to whom Australia has protection obligations, or whether they are relying solely on family membership.

### Findings and reasons

Each claimant in the family group must be assessed against the criterion s.36(2). That is, whether they are a person to whom Australia has protection obligations; and if not whether they are a member of the same family unit of such a person, having regard to the relevant definitions in the Act and regulations outlined on page 1 above.<sup>2</sup>

The template includes concluding findings that can be used for each claimant. A concluding finding should be inserted for each claimant in the 'family' group. The concluding findings are:

- “the claimant, XX, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*” - this finding should be used if concluding that the claimant is a person to whom Australia has protection obligations (ie a refugee)
- “the claimant, XX, meets the criterion for a protection visa set out in s.36(2)(b)(i) of the *Migration Act 1958*” - this finding should be used if concluding that the claimant is not a refugee but they are a member of the same family unit as a person to whom Australia has protection obligations. Note that the finding is restricted to s.36(2)(b)(i), as the requirements of 36(2)(b)(ii) [first person holds a protection visa] are unlikely to be met at the time of your recommendation.
- the claimant, XX, does not meet the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. - this finding should be used if concluding that the claimant is neither a refugee nor a member of the same family unit as a refugee.

### Recommendation of reviewer (front and back page)

A recommendation should be inserted for each claimant in the group. The template includes alternative recommendations that can be used. These are:

- the claimant, XX, meets the criterion for a protection visa set out in s 36(2) of the *Migration Act 1958*. I recommend that the claimant be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees - this recommendation should be used if concluding that the claimant is a person to whom Australia has protection obligations (ie a refugee).

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<sup>2</sup> Although these are alternative bases on which the criterion can be met, there are different implications (eg in regard to visa cancellation or deportation) for person granted a protection visa on the basis of being a refugee and those granted a visa on the basis of family membership. For this reason, if a person claims to be refugee, their claims should be assessed against that aspect of the criterion first.

- the claimant, XX meets the criterion for a protection visa in s.36(2)(b)(i) of the *Migration Act 1958*. I recommend the claimant be recognised as a member of the same family unit as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees. - this recommendation should be used if concluding that the claimant is not a refugee but they are a member of the same family unit as a person to whom Australia has protection obligations.
- the claimant, XX, does not meet the criterion for a protection visa set out in s 36(2) of the Migration Act 1958. I recommend that the claimant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, or as a member of the same family unit as such a person. - this recommendation should be used if concluding that the claimant is neither a refugee nor a member of the same family unit as a refugee.