Chapter 2
Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Legislative instruments

Migration Amendment (Resolution of Status Visa) Regulations 2023[2]

FRL No.	F2023L01393
Purpose	Schedule 1 amends the *Migration Regulations 1994* to expand the cohort of persons on temporary visas who may apply for a permanent Resolution of Status visa. Schedule 2 requires that a permanent visa must be refused where a person fails to provide identity information
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 19 October 2023 and in the Senate on 6 November 2023. Notice of motion to disallow must be given by 5 December 2023 in the Senate and by 14 February 2024 in the House)[3]
Rights	Equality and non-discrimination; protection of the family; liberty

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Resolution of Status Visa) Regulations 2023, *Report 13 of 2023*; [2023] AUPJCHR 125.

3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

2.3 The committee requested a response from the minister in relation to the instrument in *Report 12 of 2023*.[4]

Refusal of permanent visas on identity grounds

2.4 This legislative instrument amends the circumstances in which people on certain temporary visas may apply for a permanent visa, and the circumstances in which such an application must be refused. Most people to whom this measure relates are people who sought to claim asylum in Australia after travelling by boat without a valid visa ('unauthorised maritime arrivals').[5]

2.5 In February 2023, the *Migration Regulations 1994* were amended to enable persons who arrived in Australia before 14 February 2023 and who applied for, or obtained, temporary protection in Australia through a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV) to transition to a permanent visa.[6] The explanatory statement accompanying that measure stated that there is a group of approximately 18,500 people who have been found to engage protection obligations (or to be members of the same family unit as someone who has) and who have been granted temporary protection visas, most of whom have been living in Australia temporarily for almost a decade and have no realistic prospects for permanency.[7]

2.6 The explanatory statement states that it was identified that further amendments were required to address gaps in the legislative scheme, which had inadvertently excluded certain persons from eligibility for a permanent Resolution of

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4 Parliamentary Joint Committee on Human Rights, *Report 12 of 2023* (15 November 2023), pp. 20-30.

5 Statement of compatibility, p. 11. Specifically, this measure would appear to relate to those unauthorised maritime arrivals who arrived in Australia by boat without a visa between 13 August 2012 and the end of December 2013, after which time such persons were subject to mandatory removal for offshore processing. The total number of people in the 'legacy caseload' is about 31,000 as at March 2023. See, Department of Home Affairs, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

6 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099].

7 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099], explanatory statement, p. 4.

Status (RoS) visa application.[8] Schedule 1 of this measure enables people in these categories to apply for a RoS visa.[9]

2.7 In addition, the measure adds a new ground on which a RoS visa application must be refused. In applying for this visa, an applicant must provide evidence of their identity (by producing documents from their home country or a place they were in before they came to Australia) or otherwise provide a reasonable excuse as to why they cannot.[10] Schedule 2 inserts new criteria for the issue of this visa where an invitation to give identity information has been issued, and the applicant either does not provide the requested information, or provides a bogus document or false or misleading information (and does not have a reasonable explanation for doing so and does not take reasonable steps to provide the information).[11] New section 851.229 provides that where there are 'substantial concerns' with previous identity findings, the applicant will only be eligible for the visa if: they would be eligible for a protection visa; there are compassionate or compelling circumstances for granting the RoS visa; or they are a family member of a person with a RoS visa. The statement of compatibility states that these amendments have the effect that if these criteria are not met, the application must be refused.[12]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to equality and non-discrimination; protection of the family; liberty

2.8 Schedule 2, by requiring that an application must be refused where an applicant does not satisfy an invitation to provide personal identification information, engages and may limit human rights.[13] The refusal of a RoS visa may have significant

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8 Specifically, the measure permits applications by: persons who held a TPV or SHEV on 14 February 2023, but who failed to apply for a RoS visa before their TPV or SHEV ceased, who were previously unable to apply for a RoS visa; initial TPV or SHEV applicants (who do not have their own claims for protection, but are a family member of a person who does) who were previously unable to have their TPV or SHEV application converted to a RoS visa application if the family member is found to engage protection obligations; persons who did not hold a TPV or SHEV on 14 February 2023, but who had held a TPV or SHEV before that day, who were previously unable to have their TPV or SHEV application converted to a RoS visa application; and persons who have previously made a valid application for a TPV or SHEV which was finalised, but who have never held a TPV or SHEV, and who were previously unable to have the current TPV or SHEV application converted to a RoS visa application.

9 Schedule 1, items 1-16.

10 Department of Home Affairs, *Identity requirements for protection visa applicants*.

11 Schedule 2, Section 851.228.

12 Statement of compatibility, p. 11.

13 Schedule 1, by enabling more people who arrived in Australia by boat without a valid visa (and have been in Australia for 10 years) to apply for a permanent visa engages and promotes several human rights, including the right to social security, an adequate standard of living, education, protection of the family, and freedom of movement.

consequences for an individual. As the statement of compatibility notes, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes).[14] Were this to occur, the person would be liable for removal from Australia as an unlawful non-citizen[15] and would be subject to mandatory immigration detention (with no maximum detention period) while awaiting removal. As such, the measure may engage and limit the right to liberty, which prohibits the arbitrary and unlawful deprivation of liberty, including with respect to immigration detention.[16]

2.9 If a person who is refused a RoS visa does not secure another visa and is required to leave Australia, this may limit the right to protection of the family for those with family members in Australia. This right requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[17] An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Further, if this measure were to disproportionately impact on people of a particular nationality in practice, it may engage the right to equality and non-discrimination.[18] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[19] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[20] Indirect discrimination occurs

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14 Statement of compatibility, p. 8.

15 Note that section 197C of the *Migration Act 1958* provides that a non-citizen cannot be removed to the country in relation to which their protection claims have been accepted, unless the non-refoulement obligations no longer apply or the person requests in writing to be removed.

16 International Covenant on Civil and Political Rights, article 9.

17 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

18 In this regard, it is noted that in April 2023, the Department of Home Affairs stated that the majority of the 'unauthorised maritime arrival legacy caseload' with visa processes finalised (that is, either refused or approved) were from Iran and Afghanistan, whereas those where visa applications were on hand were primarily Iranian and stateless. See, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

19 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

20 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[21]

2.10 The rights to protection of the family and to liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[22]

2.11 Questions arose as to whether the stated objectives would be sufficient to constitute a legitimate objective for the purposes of international human rights law. A further important consideration is whether the limitation on these rights is proportionate to the objective being sought. In this respect, it is necessary to consider whether the limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and the possibility of oversight and the availability of review.

Committee's initial view

2.12 The committee considered further information was required to assess the compatibility of this measure with these rights, and as such sought the minister's advice in relation to the questions as set out below.

2.13 The full initial analysis is set out in *Report 12 of 2023.*

Minister's response[23]

2.14 The minister advised:

(a) whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) is a legitimate objective addressing an issue

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21 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

22 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

23 The minister's response to the committee's inquiries was received on 24 November 2023. This is an extract of the response. The response is available in full on the committee's website.

of public or social concern that is pressing and substantial enough to warrant limiting these rights;

A number of visa subclasses make use of Public Interest Criterion (PIC) 4020 to establish a legislative requirement for the Minster (or delegate) to be satisfied as to the visa applicant's identity. However PIC 4020 does not apply to either the RoS visa, nor the TPV or SHEV from which this cohort has transitioned. The Government acknowledges that in some cases, it will not be possible to positively establish the identity of some applicants in the TPV/SHEV cohort due to their complex and vulnerable circumstances.

The amendments made by Schedule 2 to the RoS visa Regulations are instead aimed at facilitating the RoS visa applicant's cooperation in attempting to establish their identity, and not impose an actual requirement that identity be confirmed. In the context of the transition to permanent residence, the intention is to take action prior to the grant of permanent residence to resolve, as far as possible, any doubts that may exist in relation to an applicant's identity.

Under section 65 of the *Migration Act 1958* (the Act), the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where, when considering the RoS visa application, the Minister invites the applicant (under section 56 of the Act) to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(b) what is the legislative source that establishes that the minister must refuse a visa application where identity requirements have not been met;

Under section 65 of the Act, the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where if, when considering the RoS visa application, the Minister invites the applicant, under section 56 of the Act, to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and

has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(c) why giving a decision-maker the discretion to refuse a visa on identity-related grounds, as opposed to requiring that they must refuse a visa, would be ineffective to achieve the objective of the measure;

The requirements set out in paragraphs 851.228(1) and (2) set a clear expectation with the applicant that their cooperation in attempting to establish their identity is a requirement. Given the importance of establishing the identity of permanent visa applicants, this is in line with community expectations. However, as noted above, given the complex and vulnerable circumstances of some applicants in the TPV/SHEV cohort, those who cannot provide the required further identity information that has been requested need to have a reasonable explanation for not providing the information and have taken reasonable steps to provide it, which gives discretion for decision-makers to consider the person's reasons for not providing the requested information.

(d) what is meant by 'substantial identity-related concerns';

'Substantial identity-related concerns' is not defined in the Act or the Regulations. Based on the policy guidance prepared by the Department substantial identity-related concerns, in relation to a relevant matter set out in subclause 851.228(2), is a suspicion or a finding that the applicant's identity as claimed and accepted in making the previous protection finding (paragraph 851.229(2)(a)), visa grant (paragraph 851.229(2)(b)) or record (paragraphs 851.229(2)(c) or (d)) was inaccurate and had information about their correct identity been known at that time, it could have affected the outcome of the protection finding, visa grant or record.

For example:

Example 1: A substantial identity-related concern might not exist in respect of Person A if the Minister has information about their identity which reveals that their name has been previously misspelt in Departmental records, including records relevant to any visa application, but there is no evidence that information considered as part of the RoS visa application would lead to doubts about their correct identity.

Example 2: A substantial identity-related concern might not exist in respect of Person B if the Minister has information about their identity which reveals that the applicant presented incorrect information to the Minister/Department in making the previous protection finding, however even if the current information about their identity had of been known it would not have had a material impact on the previous protection finding/grant/record.

Example 3: A substantial identity-related concern might exist in respect of Person C if the Minister has information about their identity that reveals

that their receiving country is Country A, and is not Country B as was claimed and accepted in making the previous protection finding.

Example 4: A substantial identity-related concern might exist in respect of Person D if the Minister has information about their identity that reveals that their identity is Mr X and not Mr Y as was claimed and accepted in making the previous protection finding/grant/record, and that being Mr Y formed a key component of the claims for protection or of an assessment of whether the person was a member of the same family unit (MSFU) of a protection visa applicant.

Example 5: A substantial identity-related concern might exist in respect of Person E if the Minister has information about the composition of the family unit that reveals that Person E may not have been a MSFU of a person granted a protection visa.

(e) what circumstances are likely to constitute 'compelling or compassionate grounds' and whether the fact that a person has resided in Australia continuously for 10 years would itself constitute a compelling reason for granting a permanent visa;

A compelling or compassionate reason is not defined in the Act or the Regulations and for assessing a RoS visa application is given its ordinary meaning. Based on the policy guidance prepared by the Department, it is possible that a person who has resided in Australia continuously for 10 years would have some community connections that could constitute a compelling or compassionate reason to grant the RoS visa.

The policy guidance provides as follows in relation to what can be a compelling or compassionate reason:

<u>Compelling reason</u>

A compelling reason may affect the interests of Australia such as its economy, or an Australian community.

Examples (non-exhaustive):

- The applicant is employed as a highly skilled worker (ANZSCO 1-2) and removal of the applicant from this occupation would adversely affect the operations of the business or its clients;
- The applicant is meaningfully employed (has a paid job) and makes an economic contribution to Australian society (earns a sufficient amount to contribute to Australia's taxation system);
- Essential worker in one of the following vocations:
  - Health, welfare, social and aged care.
  - Emergency services, safety, law enforcement, justice and correctional services.
  - Energy, resources and water, and waste management.

- Education and childcare.

- Ongoing engagement in an activity, paid or unpaid, that makes a significant/valuable contribution to Australia or its communities;

- Requires the support of Australian services due to mental health concerns, or illness/injury of applicant.

Compassionate reason

A compassionate reason may relate to the applicant's personal circumstances or the circumstances of another person.

Examples (non-exhaustive):

- The applicant is a member of the same family unit (MSFU) of an Australian citizen or permanent resident;

- Where an Australian citizen or permanent resident is dependent upon the applicant for financial and/or emotional support;

- Disability or serious illness of family member in Australia where the applicant has carer responsibilities;

- Substantial community ties, which may include school age children, member of community/religious groups, volunteer worker, or extended family reside in Australia.

Not a compelling or compassionate reason

The following circumstances are unlikely to satisfy regulation 851.229(3)(b):

- Past compelling or compassionate reason no longer applicable.

- Compelling or compassionate reason not enduring in nature at time of decision, that is, the reason will cease to exist in the immediate future.

- Compelling or compassionate reason that arose as a result of direct and deliberate action of the applicant (or another person) in order to create a circumstance for the sole purpose of satisfying 851.229(3)(b)

(f) what legal and social supports are available to people in this cohort in applying for these visas and seeking to obtain and translate identity documents from countries outside Australia;

RoS visa applicants receive free access to legal assistance providers and free access to document translations support. They also have access to Medicare, full work rights and asylum seeker-related non-government organisations for social support.

(g) what happens if a person is refused a RoS visa: can they apply for a new RoS visa and in what timeframe would they need to do this. Noting unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so, is

this ministerial discretion, rather than a legislative requirement, an appropriate safeguard;

If a RoS visa is refused:

- under section 65 of the Act on the grounds of failure to satisfy PIC 4002 or 4003A, or
- under subsection 501(1) of the Act on the grounds of failure to satisfy PIC 4001 or the character test in subsection 501(6) of the Act,

the decision will be merits reviewable by the AAT General Division under Part 9 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If a RoS visa is refused on non-character or security grounds, including on the basis of the criteria concerning the collection of identity-related information, the decision will be merits reviewable under Part 5 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If the RoS visa refusal is affirmed at merits review the applicant, can seek judicial review of the merits review decision.

Alternatively, or if the person is unsuccessful at merits and/or judicial review, the person can apply for another RoS visa (unless an application bar applies and Ministerial Intervention is required for the person to apply for another RoS visa.). However, as noted in the Statement of Compatibility, the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift.

(h) if refusal of a RoS visa leads to cancellation of the existing TPV or SHEV, will this be treated as a decision to refuse the RoS or a decision to cancel the TPV/SHEV, and what review rights apply;

As noted in the Statement of Compatibility, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases, by operation of law, 35 days after the RoS visa application is finally determined (a term which includes the completion of merits review processes, if merits review is sought). This is treated as a decision to refuse the RoS visa and this decision is merits reviewable (refer to the answer for question (g)).

Refusal of the RoS visa does not in and of itself enliven grounds for cancellation of the TPV or SHEV. In the event that a TPV or SHEV were cancelled for some reason, such as on character or national security grounds, prior to it ceasing as outlined above, both the RoS visa refusal would be merits reviewable (refer to the answer for question (g)) and the decision to cancel the TPV or SHEV would be merits reviewable (under Part 7 or Part 9 of the Act, depending on what cancellation power was used).

(i) noting that a person can still receive a RoS visa if it is demonstrated that they meet the criteria for a protection visa, will this require a reopening of the person's protection visa claims and what process will be followed to assess such claims, and how will this ensure procedural fairness; and

If an officer is assessing paragraph 851.229(3)(a) an assessment of protection obligations, and whether an applicant would satisfy the criteria for a protection visa paragraph under 851.229(3)(a), is not an assessment for an actual protection visa application. Rather, it is an assessment of whether the applicant *would have* satisfied the criteria for the visa had they made a valid application for one when they made the RoS visa application.

The term 'protection visa' covers subclass 785, 790 and 866 visas. Therefore the applicant need only satisfy the criteria for any one of those visas, noting that the criteria are replicated across section 36 of the Act and Schedule 2 to the Regulations. To satisfy paragraph 851.229(3)(a), the applicant must satisfy the criteria at section 36 of the Act and Schedule 2 of the relevant visa (785, 790 or 866) of the Regulations.

The term in paragraph 851.229(3)(a) "if the applicant had made a valid application" assumes the applicant had made a valid application for a protection visa, and therefore there is no requirement for the officer to consider Schedule 1 to the Regulations or give any consideration to whether the applicant could have made a valid application at that time.

The term in paragraph 851.229(3)(a) "at the same time as the applicant made the application for the Subclass 851 (Resolution of Status) visa" assumes the hypothetical protection visa application was made at the same time as the RoS visa application; therefore when considering the criteria in section 36 of the Act and Schedule 2 to the Regulations the officer will have regard to the version of the Act and the Regulations as they applied at that time.

The assessing officer will contact the applicant under section 56 of the Act to obtain further information and protection claims from the applicant and will apply the full procedural fairness requirements set out in the Act, which apply to the consideration of all visa applications.

The aim of these provisions is, for RoS visa applicants who are found to have a substantially different identity to what they previously were found to have, to have an opportunity to have protection obligations assessed in their 'new' identity and allow a RoS visa to be granted if protection obligations are found to be engaged. As noted in the Statement of Compatibility, if the applicant provides information that confirms a different identity, which could include that they are a national of a different country to what had previously been claimed, the effect of these provisions is that the applicant does not have to have their RoS visa application refused and go through a new protection visa process in order to assess the protection claims they may have in their 'new' identity. In some cases the assessment

of protection obligations as part of the RoS visa may involve looking at the person's previous protection claims, however ultimately the assessment is of their current protection claims.

(j) whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment.

The RoS Regulations are not designed to target or have a disproportionate effect on any cohort or any person on the basis of any characteristic about them. They are applied individually on a case by case basis and entirely focus on whether the Department has sufficient information to establish a person's identity or whether an invitation to give further information in relation to their identity will be made.

Concluding comments

International human rights legal advice

Legitimate objective

2.15 Further information was sought as to whether this measure seeks to achieve a legitimate objective and, in particular, whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) seeks to address an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights. The minister stated that these amendments are 'aimed at facilitating the RoS visa applicant's cooperation in attempting to establish their identity' and does not impose an actual requirement that identity be confirmed. In this regard, the minister stated that several visa subclasses make use of Public Interest Criterion (PIC) 4020 to establish a legislative requirement for the minster to be satisfied as to the visa applicant's identity. However, this information does not address the question of why 'facilitating' the applicant's cooperation in attempting to establish their identity is itself necessary, nor does it identify whether there is an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights. A limit on a human right will not be permissible if it does not seek to achieve an objective which would be considered legitimate under international human rights law. In this regard, as noted in the preliminary legal advice, Australia has obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) to facilitate the provision of identity documents to 'ensure that all refugees, even those not lawfully residing in the territory, [are] spared the hardship of having no identity papers at all'.[24] People in Australia on a SHEV or TPVs who do not have, and cannot obtain, a passport recognised

[24] 1967 Convention on the Status of Refugees, article 27. See further, UN High Commissioner on Refugees, *Identity Documents for Refugees Executive Committee Meeting, EC/SCP/33* (20 July 1984). While this Convention does not fall within this committee's statutory remit, it is nevertheless a relevant consideration and forms part of Australia's international human rights law obligations.

by the Australian Government are provided with photographic identification to provide evidence of their 'commencement of identity' in Australia.[25] It does not appear that imposing a higher threshold for acceptable identification documents with respect to people who sought to claim asylum in Australia by boat ten years prior (and who may therefore be less likely to be in a position to secure identity documents now) in order to be eligible for a permanent visa would be consistent with the Refugee Convention. The statement of compatibility states that the primary objective of the measure is to ensure that any person granted a permanent visa has properly established their identity, in line with the expectations of the Australian community.[26] It also states that 'the Department of Home Affairs has identified instances of suspected identity fraud in this caseload'. However, as noted in the initial analysis it is not clear that establishing identity to standards that meet 'community expectations' meets a pressing and substantial need. The minister's response also did not provide any further detail regarding the prevalence of suspected identity fraud and the only further information provided as to the necessity of the measure is that it is aimed at securing the applicant's cooperation in establishing their identity – not why they need to establish their identity. On the basis of this information, it does not appear that this measure aims to achieve an objective that is pressing and substantial enough to warrant limiting rights, for the purposes of international human rights law.

Proportionality

2.16 Further information was also sought in order to establish whether the measure would constitute a proportionate limit on human rights. The minister advised that it is section 65 of the Migration Act that establishes the legislative requirement for the minister (or delegate) to refuse to grant a visa if they are not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. As to why giving a decision-maker the discretion to refuse a visa on identity-related grounds (rather than requiring that they must) would be ineffective to achieve the objective of the measure, the minister stated that the requirements set a clear expectation that the applicant's cooperation in attempting to establish their identity is a requirement, while given the complex and vulnerable circumstances of some applicants in the TPV/SHEV cohort, those who cannot provide the required further identity information can fail to provide it if they can demonstrate they have a reasonable explanation for not providing it and have taken reasonable steps to provide it. The minister states this gives discretion for decision-makers to consider the person's reasons for not providing the requested information. That is, while a decision-maker must refuse a visa where the criteria has not been satisfied, that criteria itself contains discretion to determine that the criteria has been satisfied.

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25 Department of Home Affairs, Immicard.

2.17 As noted in the initial analysis, the capacity to provide an explanation for not providing documents may have safeguard value, depending on how this is applied in practice. The explanatory statement also noted that a 'reasonable explanation' for failing to provide identity information may include where the person could only obtain a particular document by requesting it directly from the authorities of the country in relation to which they have made protection claims and it would not be reasonable to expect them to contact those authorities.[27] This would appear to provide applicants with a degree of flexibility in seeking to comply. However, in this regard, it is noted that recent case law relating to similar legislative identity requirements would appear to suggest that the threshold for a reasonable excuse may be high in practice.[28]

2.18 Further, a decision-maker's discretion to determine that the criteria has been satisfied is only enlivened where a visa holder *responds* to an invitation to provide identity information and engages with the department in relation to this. If a person does not engage, such as where they have not received correspondence sent by the department inviting them to provide information, or personal circumstances mean they have not responded to the letter, the criteria will not be satisfied and section 65 of the Migration Act would require that the visa application must be refused. In this regard, it is noted that this measure may operate in relation to people who lodged a TPV/SHEV application with the department before 14 February 2023 and whose application is automatically converted to a RoS application, and who may therefore not have engaged with the department in some time.[29] As the minister notes, some of the people in this cohort have complex and vulnerable circumstances. Indeed, numerous studies identify that asylum seekers may have experienced significant trauma before they arrived in Australia and in seeking to claim asylum by boat,[30] which may have been compounded by virtue of the uncertainty of being on temporary visas

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27 Explanatory statement, p. 19.

28 For example, in *DXG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FedCFamC2G 175 (8 March 2023) the Federal Court considered section 91W of the *Migration Act 1958*, which establishes the identity requirements for the issue of a protection visa. The court noted that it allows the minister to request that an applicant provide documents falling into the broad category of documents that show the applicant's identity, nationality or citizenship, and permits them to require certain documents that an applicant claimed to have been in possession of in the past. It found that, by extension, finding that the applicant did not have a reasonable explanation for failing to produce the documents that were once in his possession meant that it could not be satisfied that he had a reasonable explanation for failing to comply with the request, even if he could have provided a reasonable explanation as to why there were some types of identity documents that he never held (at [85]).

29 Department of Home Affairs, *TPV/SHEV transition to permanent visas Factsheet*, p. 1.

30 See, for example, Miriam Posselt, Heather McIntyre, Mtho Ngcanga, Thomas Lines and Nicholas Procter, 'The mental health status of asylum seekers in middle- to high-income countries: a synthesis of current global evidence', *British Medical Bulletin*, vol. 134, no. 1, 2020, pp. 4-20.

for extended periods.[31] There may be a risk that persons affected by this measure do not have a stable mailing address, or regular access to an email or mobile phone, and so may face additional challenges receiving correspondence from the department.[32] It is not clear that it is the least rights restrictive approach to require that their visa be rejected in circumstances where they have not engaged with the department, with the onus being on them to provide a reasonable explanation as to why they are not able to provide the requisite information.

2.19 Further information was also sought in relation to the circumstances where an applicant has responded to an invitation to provide information to establish or confirm their identity, and the minister is satisfied that 'substantial-identity related concerns' exist in relation to a prior protection finding or the grant of a temporary protection visa.[33] As to the meaning of 'substantial identity-related concerns', the minister noted that this term is not defined by law, but that policy guidance has been prepared by the department in relation to it. The minister stated that 'substantial identity-related concerns' is a suspicion or a finding that the applicant's identity as claimed and accepted in making the previous finding was inaccurate and had information about their correct identity been known at that time, it could have affected the outcome. The minister provided five examples as to how this may operate in practice, indicating that such a concern may not exist if the person's name was misspelt in departmental records, but may exist if information indicated that the person is from a different country, they are a different person to whom they claimed to be or are not in fact part of the family unit of a protection visa applicant.

2.20 If substantial identity-related concerns did arise in relation to a person, the instrument provides they may still be granted a RoS visa. One such basis for granting a visa is where there is a 'compelling or compassionate reason' to do so. The minister advised that the term 'compelling or compassionate reason' is not defined and is given its ordinary meaning, and that policy guidance prepared by the department provides information in relation to what can be a compelling or compassionate reason. The minister advised that a compelling reason is one that may affect the interests of Australia and may include the person's employment as an essential worker, ongoing activities that make a significant contribution to Australia, or where a person requires

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31 See, for example, Mary Anne Kenny, Nicholas Procter and Carol Grech, 'Mental deterioration of refugees and asylum seekers with uncertain legal status in Australia: Perceptions and responses of legal representatives', *International Journal of Social Psychiatry*, vol. 69, no. 5, 2023, pp. 1277-1284; and Angela Nickerson et al, 'The association between visa insecurity and mental health, disability and social engagement in refugees living in Australia', *European Journal of Psychotraumatology*, vol. 10, no. 1, 2019.

32 In 2020, the Asylum Seeker Resource Centre submitted to the Victorian Parliament that people seeking asylum have specific risk factors for homelessness and may rely on community supports to buffer their risk of homelessness while experiencing very low or no income. See, Inquiry into Homelessness in Victoria, *Submission 339*.

33 Subsection 851.229(1)(b).

the support of Australian services due to mental health concerns, or illness or injury. The minister stated that a compassionate reason may relate to the applicant's personal circumstances or those of another person and may include membership in the same family unit of an Australian citizen or permanent resident, disability or serious illness of a family member where the applicant has carer responsibilities, or substantial community ties. The minister advised that some circumstances are unlikely to constitute compelling or compassionate reasons, such as where a past compelling or compassion reason is no longer applicable or will cease to exist in the immediate future, or where it arose as a result of a direct and deliberate action in order to create a circumstance for the sole purpose of satisfying this criterion. The minister stated that it is possible that a person who has resided in Australia continuously for 10 years 'would have some community connections that could constitute a compelling or compassionate reason to grant the RoS visa'. However, it does not appear that the fact a person has resided continuously in Australia for 10 years would constitute a compassionate reason for granting a visa in and of itself. As such, while this ground may operate as a safeguard for some of those who have engaged with the department, it has no safeguard value for those who have not so engaged and, depending on how it is applied in practice, may have limited safeguard value for those who have lived in Australia for over a decade but with no family ties or who have not made a 'significant contribution' to Australia.

2.21 Where substantial identity-related concerns arise in relation to a person, they may also be granted a RoS visa if it is demonstrated that they meet the criteria for a protection claim.[34] Clarification was sought as to whether this would require a reopening of the person's protection visa claims. The minister advised that an assessment of this criteria is not an assessment for an actual protection visa application, but rather an assessment of whether the applicant *would have* satisfied the criteria for the visa had they made a valid application for one when they made the RoS visa application. The minister advised that the assessing officer will contact the applicant under section 56 of the Migration Act to obtain further information and protection claims from the applicant and will apply the full procedural fairness requirements set out in the Act. The minister stated that the aim of these provisions is, for RoS visa applicants who are found to have a substantially different identity to that they were previously found to have, to have an opportunity to have protection obligations assessed in their 'new' identity and allow a RoS visa to be granted if protection obligations are found to be engaged. The minister stated that in some cases the assessment of protection obligations as part of the RoS visa may involve looking at the person's previous protection claims, however, ultimately the assessment is of their current protection claims. It is not clear whether the procedures involved in an assessment of a protection claim in this context are as comprehensive as that involved in a protection claim for the purposes of a protection visa, and as such it is not clear

[34] Subsection 851.229(3)(a).

whether this element of the measure may operate to the benefit or detriment of affected persons.

2.22 As to what legal and social supports are available to people in this cohort in seeking support to provide the requisite information, including to obtain and translate identity documents from countries outside Australia, the minister advised that applicants have free access to legal assistance providers and free access to document translations support. In this regard, it is noted that nine community and low-cost legal services have been funded to provide this assistance across Australia.[35] The availability of free legal advice specifically in relation to this measure would likely serve as an important safeguard. However, as noted in the initial analysis, it is likely that applicants may have a high degree of vulnerability, such as having limited ability to read and speak English, limited education and/or a lack of stable housing (and therefore, a stable address).[36] As such, their capacity to engage with these legal processes may depend on access to other social support and advocacy.

2.23 Further information was also sought as to what may occur after a RoS visa application has been refused. The minister advised that where a visa is refused, the applicant may apply for merits review of the decision in the Administrative Appeals Tribunal (AAT) within 28 days from the date on which they are taken to have been notified of the decision. If the refusal is affirmed at merits review the applicant can then seek judicial review of the merits review decision. The minister stated that alternatively, or if the person is unsuccessful at the merits and/or judicial review stage, the person can apply for another RoS visa (unless an application bar applies and ministerial intervention is required for the person to apply for another RoS visa). The minister noted that the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift. However, it is noted that this lifting of the bar is purely a ministerial discretion, which could change at any time, in which case a person refused a RoS visa may have no ability to apply for another RoS visa to put forward their claim for protection. The minister further advised that persons who are refused a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (including the completion of merits review processes). The minister stated that this is treated as a decision to refuse the RoS visa meaning that this decision is merits reviewable. The minister stated that refusal of the RoS visa does not in and of itself enliven grounds for cancellation of the TPV or SHEV. The availability of merits review and judicial review assists with the proportionality of the measure, although noting that strict timeframes do apply to lodge an application for such review and requires the applicant to have the capacity to engage with legal services.

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35 Department of Home Affairs, *TPV/SHEV transition to permanent visas Factsheet*, p. 3.

36 See further, Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019).

2.24 As to whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment, the minister stated that the RoS regulations 'are not designed to target or have a disproportionate effect on any cohort or any person on the basis of any characteristic about them'. The minister stated that the measures are applied individually on a case by case basis and relate only to whether the department has sufficient information to establish a person's identity or whether an invitation to give further information in relation to their identity will be made. However, as noted in the preliminary legal advice, indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[37] In this regard, an individual person's lack of documentation confirming their identity may arise by virtue of their nationality, meaning that the measure may indirectly have more of an impact on people of a certain nationality, or who are stateless. It may also be more difficult for persons with disability to meet these requirements. Consequently, it would appear that there may be a risk that this measure may have a disproportionate impact on persons based on protected characteristics (such as nationality or disability). Noting that it is not clear that this measure seeks to achieve a legitimate objective, if this measure did have such a disproportionate impact, this would constitute impermissible differential treatment, and so be incompatible with the right to equality and non-discrimination.

Concluding observations

2.25 Based on the information provided, it does not appear that this measure seeks to achieve a legitimate objective – in particular, that facilitating an applicant's cooperation in attempting to establish their identity seeks to achieve an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights.

2.26 As to how this visa application process may operate in practice, where people were to engage with the department and respond to questions, it would appear that there may be sufficient legal and social supports in place to ensure that their individual circumstances are considered. However, if people do not engage with the department (including where their vulnerabilities make it too difficult to engage or because they are not aware that they have received correspondence from the department) there is

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37 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

no flexibility to support that person to engage or to issue a visa. The person would be subject to mandatory cancellation of their visa, and if they did not receive a further visa they would be liable to mandatory immigration detention. As such, there is a risk that this measure is not compatible with the right to protection of the family (if it resulted in the separation of family members), the right to equality and non-discrimination (if it had a disproportionate impact on people of certain nationalities), and the right to liberty (if the refusal of the visa led to mandatory immigration detention).

Committee view

2.27 The committee thanks the minister for this response. The committee notes that by requiring that an application for a RoS visa must be refused where an applicant does not provide personal identification information, this measure may limit a number of human rights. While the committee acknowledges that the aim of the measure is to facilitate the RoS visa applicant's cooperation in attempting to establish their identity, and not necessarily impose a requirement that identity be confirmed, the committee is concerned that in practice this may operate to the significant detriment of certain applicants. Based on the information provided by the minister, it is not clear that this measure is directed towards an objective that would be regarded as legitimate under international human rights law.

2.28 The committee considers that, in practice, were people to engage with the department, there may be sufficient legal and social supports in place to ensure that their individual circumstances are considered. However, the committee considers that there are no safeguards or flexibility where people do not engage with the department. In this regard, the committee notes that this measure operates in relation to a cohort of persons that the minister has advised are vulnerable. The committee notes that the person would be subject to mandatory cancellation of their visa, and if they did not receive a further visa they would be liable to mandatory immigration detention.

2.29 Noting the vulnerability of this cohort, the committee considers that the extent to which this measure may impermissibly limit human rights in practice will depend largely on the supports, both social and legal, that are provided to persons in this cohort. Noting that the minister has not established that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, the committee considers there is a risk that this measure is not compatible with the rights to protection of the family, equality and non-discrimination and liberty.

Suggested action

2.30 The committee considers the proportionality of this measure may be somewhat assisted were:

(a) the instrument amended to provide that the requirement that the applicant must give information does not apply if the decision maker is

satisfied that the applicant has a reasonable excuse for not providing identification documents, without requiring that the applicant have taken certain steps to establish this;[38]

(b) guidelines provided to decision-makers informing them of the vulnerability of this cohort and the need for them to significantly engage with the applicant to explain what is required of the applicant; and

(c) regular consultation undertaken with legal and community services supporting persons in relation to this measure to consider how it is working in practice, and if necessary, further provision is made to advocacy and support services to assist people affected by this measure.

2.31 The committee recommends that the minister table a report in Parliament at regular intervals during the period in which this measure is operating to advise how many applications are being processed and how many have been refused and on what basis.

2.32 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.33 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Mr Josh Burns MP

Chair

[38] See subparagraph 851.228(3)(a)(i) of the instrument which could be amended to remove 'and' and replace with 'or'.