Legal Aid ACT

THE EFFICACY, FAIRNESS, TIMELINESS AND COSTS OF THE PROCESSING AND GRANTING OF VISA CLASSES WHICH PROVIDE FOR OR ALLOW FOR FAMILY AND PARTNER REUNIONS

Submission on behalf of

Legal Aid ACT

to the

Legal and Constitutional Affairs References Committee

April 2021

Legal Aid ACT is an independent statutory authority established by the *Legal Aid ACT Act 1977* (ACT). The primary purpose of the Legal Aid ACT is to provide vulnerable and disadvantaged Australians with access to justice through a range of non-legal and legal services and in 2019 – 2020, Legal Aid ACT provided 50,780 services to the ACT community.

We aim to promote a just society in the ACT by ensuring that vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests, develop an improved community understanding of the law and seek reform of laws that adversely affect those they assist.

Legal Aid ACT currently employs approximately 110 staff in a diverse range of legal and non-legal positions. Legal Aid ACT offers services in relation to family, criminal, civil and family violence law, immigration law as well as non-legal support services such as family dispute resolution and the Community Liaison Unit.

Limitations on Eligibility to Apply for Relevant Visas

1.1 An applicant for a Parent visa must meet the balance of family test. If at least half of their children and stepchildren are eligible children, or there are more eligible children than children living in any other single country the applicant will meet the test. There are no options to waive this test event if exceptional or compelling circumstances existed. It may be argued that the balance of family test associated with eligibility for Parent visas precludes a significant portion of applicants from lodging applications for Parent visas.

1.2 Whilst Legal Aid ACT does not specialise in assisting individuals in applying for Parent visas, it should be noted that these applications have lengthy processing delays.

1.3 The cost associated with visa applications is another significant barrier to eligibility for visas. This is highlighted by the increased cost associated with applications for a Partner visa.

1.4 Since 2011, the cost of an application for a Partner visa has increased by $4,755 (from $2,960 in 2011 to $7,715 in 2021).[1] Further, costs correlated to the applicant's number of dependants have been introduced. An applicant is expected to pay $1,935 for each dependent under the age of 18 (and $3,860 for each dependent over the age of 18).[2]

1.5 Unsurprisingly, a significant number of potential Partner visa applicants are precluded by way of financial constraints. In these instances, individuals must resort to tourist visas in order to reunite with their partner/children in Australia. We have assisted many victims of family violence who were unable to apply for a Partner visa whilst in a relationship. When the relationship breaks down due to family violence, the victim has limited, if any options to remain in Australia. Leaving Australia may not be an option where there are Australian citizen children involved. The victim faces uncertainty with their migration status and is unable to access welfare, housing and health supports.

Waiting Times for Processing and Integrity Checking of Applications for Relevant Visas

2.1 Waiting times for processing relevant family and partner reunion visas have significantly increased in the past 10 years, presenting adverse implications for applicants.

2.2 In the 2010-2011 calendar year, the 90th percentile of partner visa applications under subclass 801 were processed in 337 days.[3] In the 2018-2019 calendar year, the 90th percentile of the same partner visa applications were processed in 768 days.[4]

2.3 This represents an increase in processing times for Partner Visas (subclass 801) of 431 days.

2.4 This processing time does not include the time spent on a temporary partner visa (either onshore or offshore).

2.5 Another compounding issue in relation to processing times is the ad hoc manner in which applications are assessed. This has been exacerbated by a decrease in tourism as a result of the COVID-19 pandemic, meaning more resources have been allocated to the processing of partner visas.

2.6 Considering the significant cost incurred by individuals at the lodgement of their application, it should be expected that these applications be processed chronologically.

2.7 In relation to FV exemptions to Partner Visas, once notified by the victim, the delay in the Department of Home Affair's inquiry into these allegations can be problematic.

2.8 In some instances, the significant delay between the offences perpetrated by the visa sponsor and the assessment of the claim, re-traumatises the victim whilst precluding them from successfully integrating with the community.

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[1] *Migration Regulations 1994*; 2021 Sch 1, Part 1 CONT Item 1124B (2) (vii) , see also 2011; *Migration Regulations 1994* Sch 1, Part 1 CONT Item 1124B (2) (vii)

[2] *Migration Regulations 1994*; Sch 1, Part 1 CONT

[3] https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/qon Question 383

[4] Ibid.

Cost of Applying for Relevant Visas

3.1 Further to paragraph 2, the cost associated with Partner Visas has increased significantly in the past 10 years, exacerbated by the introduction of application fees for dependants.

3.2 In keeping with paragraph 3.6, the Department of Home Affairs offers a pay to use service by way of the visa process.

3.3 Whilst applicants expend significant financial resources at the outset of the application process, they receive little in return from the Department of Home Affairs by way of progress updates, notice of missing documentation or anything else a paying user could reasonably expect from a service provider.

3.4 As a result, a number of applicants have their applications refused on grounds that may have been easily avoided.

3.5 In the event that an application is refused, the applicant is often faced with the need to begin proceedings in the Administrative Appeals Tribunal, representing further financial cost and further delays.

CASE STUDY

Legal Aid ACT is aware of one individual who had their partner visa application refused due to the absence of one necessary document, despite the totality of the application indicating that this individual would be able to provide this documentation.

The applicant in this instance was required to submit their AFP certificate, which they had obtained. The sponsor thought he had uploaded this certificate to his partner's immi account.
It was not until the application was refused that they became aware that the certificate did not upload.

Had the applicant been notified of the absence of this document, she would have been able to provide it in a timely manner. Instead the applicant has had to lodge an appeal to the AAT causing further expense and processing delays of at least another 2-3 years.

Commitments Required for the Granting of Relevant Visas

4.1 As above, applications for visas providing for or relating to family or partner reunions require a significant financial commitment.

4.2 The COVID-19 pandemic brought another significant commitment to the fore.

4.3 In some countries, such as Afghanistan, individuals may be expected to cross international borders in order to have their biometric screenings completed. In doing so, these individuals are placing themselves in significant danger.

4.4 The commitments expected of visa applicants on the basis of their on-shore or off-shore processing stream is highly arbitrary and may present significant danger to the applicant.

CASE STUDY

Legal Aid ACT has assisted one individual who has been subject to the arbitrary distinction between onshore and offshore visa applications. This individual is **precluded from the protection of FV exemptions due to the offshore nature of their relevant partner visa.**

This individual's husband sponsored her offshore partner visa. Since the lodgement of this application, she has been residing in Australia on tourist visa for approximately one year.

In this time, she was subject to significant FV inflicted by her husband. However, due to the offshore status of her partner visa application, she is not protected by FV exemptions.

Subsequently, this individual now resides in a women's refuge on a bridging visa. She is unable to work and support herself.

The distinction between onshore and offshore processing is arbitrary when considering the significant implications of FV on vulnerable individuals who are often in a foreign environment, with little to no support networks other than the perpetrator.

Government policy settings regarding relevant visas and the role of family reunion in the migration program

5.1 Direction 80 (8), outlines the order for considering and disposing of family visa applications.[5]

5.2 In general, the processing of applications for skilled migration, partner and children's visas are given preference. Subsequently, parent and permanent protection visas are often given a lower processing priority.

5.3 Moreover, under direction 80 (8), applications sponsored by Unauthorised Maritime Arrivals ('UMAs') are the lowest priority.

5.4 In practice, this means that applicants sponsored by individuals other than UMAs are processed before those sponsored by UMAs, regardless of the date at which they were lodged or the fees that have been paid by applicants.

5.5 Therefore, refugees classified as UMAs may never be able to reunite with their families. This reality is heavily focussed on general deterrence and subsequently arbitrary interference with family.[6]

[5] AGLC 4

[6] https://humanrights.gov.au/sites/default/files/document/publication/2015_AusHRC_99.pdf

Eligibility for and access to family reunion for people who have sought protection in Australia

6.1 As raised in paragraph 6.3, applications sponsored by UMAs are the last priority for processing, regardless of the date of lodgement or the significant financial commitment made by applicants.

6.2 The distinction between individuals on the basis of their method of arrival is arbitrary and means some individuals may never be reunited with their family.

6.3 Individuals who have been granted a Safe Haven Enterprise Visa (SHEV) are eligible to remain in Australia for 5 years. At the conclusion of 5 years, if they have not transitioned to another appropriate visa subclass, they may reapply for another SHEV.

6.4 Holders of a Temporary Protection Visa (TPV) do not have a pathway for permanent residency.

6.5 In a practical context, SHEV or TPV holders are precluded from ever reuniting with their families, due to the temporary nature of their visa they are ineligible to sponsor their family for a partner, child or parent visa.

CASE STUDY

Legal Aid ACT has assisted one individual, **who would have been precluded from reuniting with his family if not for the intervention of the Medivac scheme.**

This individual arrived in Australia by boat, one day prior to law changes precluding UMAs from obtaining a SHEV (subclass 790). Subsequently, this individual obtained a SHEV.

Unfortunately, his wife and young daughter arrived one day later, also by boat, but were directed to offshore detention and subject to the refugee status determination process of that country.

Whilst detained offshore, their young child was subject to assault warranting the intervention of the Medivac scheme. As such, this family were able to reunite in Australia.

However, the wife and young child remain on bridging visas, with both required to renew these visas regularly.

Had it not been for the traumatising mistreatment of this young child, this family would have been precluded from reunion in Australia. The distinction of eligibility for a SHEV on the basis of the day of arrival is arbitrary and highly punitive. The temporary status of the father also prevents him from sponsoring his wife and child who a residing in Australia.

The suitability and consistency of government policy settings for relevant visas with Australia's International obligations

7.1 Legal Aid ACT acknowledges that domestic law supersedes international law to the extent of any inconsistency between the two.

7.2 However, it is worth noting that there are a number of International obligations not being satisfied by the current arrangements.

7.3 As stated at paragraph 6.4, the treatment of UMAs is highly punitive and may be in contravention with the UN *Convention and Protocol Relating to the Status of Refugees* ('*CPRSR*').[7]

7.4 The *CPRSR* stipulates that refugees should not be penalised for their entry or stay in a country. The practical implications of Direction 80 are highly punitive and preclude individuals who have arrived as UMAs from reuniting with their family on the basis of their method of arrival.

7.5 Considering the tenuous efficacy of general deterrence, the reasons for the treatment of these vulnerable individuals (other than political motivations) are unclear.

Other matters deemed relevant by the Committee

Legal Aid ACT submits that there are a number of areas for reform that would ensure that the visa application process is more heavily focussed on the provision of services and less so on the punishment of vulnerable individuals.

1. Firstly, considering the significant fees paid by applicants regardless of their respective visa class, processing of these applications should be prioritised by chronology of lodgement, rather than subclass.

   Similarly, processing should be transparent and the Department of Home Affairs should be responsive to the questions of applicants and where possible, forgiving of any administrative issues associated with applications wherever appropriate.

2. Secondly, the eligibility for the protection of FV exemptions for partner visas should not be dependent on the onshore or offshore status of the application. Individuals who are victims of FV should be unconditionally entitled to protection from this conduct by way of these exemptions.

   Furthermore, these protections may be broadened to include extended family members as perpetrators.

3. In consideration of the significant costs incurred by visa applicants, it may be worthwhile providing the opportunity for fees to be paid in instalments, rather than in one lump sum.

   Legal Aid ACT acknowledges that this would result in greater administrative work for the Department of Home Affairs. However, doing so would ensure

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that vulnerable and disadvantaged individuals are not precluded from lodging an application on the sole basis of financial capacity.

4. Finally, individuals who have arrived by boat and currently reside in Australia on a SHEV or TPV should not be precluded from reuniting with their family on the basis of the way in which they arrived in the country. These individuals are often extremely vulnerable and their current treatment is highly punitive. These visa holders also have a condition on their visa. In order to leave Australia to visit family members in a third country, their travel request must be approved by the Department.

   We call for an end to the temporary protection regime, use the allocated places that have been set aside for the Humanitarian Program that are not being used due to border closures.

   Therefore, it may be appropriate to abolish direction 80, to the extent that it unfairly prejudices the chances of UMAs to reunite with their families.

Legal Aid ACT thanks the Legal and Constitutional Reference Committee for the opportunity to provide submissions in relation to the efficacy, fairness, timeliness and costs and granting of visa classes which provide for or allow for family and partner reunion. As such, the Legal Aid ACT welcomes any questions that may arise in relation to the above submissions.