

## Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156

FRLI: F2013L02038

Portfolio: Immigration and Border Protection

Tabled: House of Representatives and Senate, 5 December 2013

### Summary of committee concerns

2.29 The committee notes that this instrument has now been revoked by the Minister. The committee has still considered the instrument and identified its concerns about human rights compatibility as the instrument is legislation which has come before the Parliament. However, the committee does not intend to seek any further information from the Minister at this stage.

### Overview

2.30 This instrument determined that the maximum number of visas that may be granted in the financial year 1 July 2013 to 30 June 2014 for Protection (Class XA) visas is 1650.<sup>1</sup> The instrument applied to all applicants who have applied for a Protection (Class XA) visa, including applicants who have applied before the implementation of this cap. This instrument has now been revoked by the Minister.<sup>2</sup>

### Compatibility with human rights

#### *Statement of compatibility*

2.31 The committee notes that this instrument is exempt from the requirement to provide a statement of compatibility as it is not defined as a disallowable legislative instrument within the meaning of section 42 of the *Legislative Instruments Act 2003*.<sup>3</sup>

2.32 As a matter of best practice, however, the committee considers that legislative instruments which have the potential to affect human rights should be accompanied by a statement of compatibility.

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- 1 Section 85 of the *Migration Act 1958* provides that the Minister may determine by instrument in writing the maximum number of the visas of a specified class that may be granted in a specified financial year.
  - 2 *Revocation of IMMI13/156 'Granting of Protection Class XA Visas in 2013/2014 Financial Year' – IMMI 13/159.*
  - 3 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires statements of compatibility only for legislative instruments within the meaning of section 42 of the *Legislative Instruments Act 2003*. The committee's scrutiny mandate, however, is not limited by the section 42 definition and extends to all legislative instruments: see section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Committee view on compatibility**

2.33 The committee understands that there are approximately 33,000 people who have arrived in Australia by boat and whose claims for protection have yet to be processed.<sup>4</sup> Approximately 5,800 persons are held in immigration detention, 3,300 are in community detention, 22,900 are in the community on bridging visas and 1,800 are in offshore processing centres.<sup>5</sup> The committee also understands that the cap of 1650 determined by this instrument for this financial year has already been reached.<sup>6</sup> The effect of this instrument would therefore appear to freeze the processing of the claims of those 33,000 persons who have arrived in Australia.

2.34 The committee considers that further information on the effect of this instrument would be necessary to assess its compatibility with human rights. However, the committee considers that to the extent that the instrument results in a freeze on processing, it may give rise to issues of compatibility with a number of human rights.

**2.35 The committee considers that this instrument raises several areas of concern, including:**

- **whether a freeze on the issuing of protection visas to those held in immigration detention onshore and offshore is compatible with the prohibition on arbitrary detention, the right to humane treatment, the right to health, and children's rights;**
- **whether a freeze on the issuing of protection visas to those who arrived in Australia after 13 August 2012 who are in the community on bridging visas is compatible with the right to work, the right to social security, and the right to an adequate standard of living; and**
- **whether a freeze on the issuing of protection visas is compatible with rights relating to the protection of the family.**

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4 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Government acts swiftly to deny people smugglers' promise of permanent visas', Media release, 4 December 2013.

5 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, Supplementary Budget Estimates Hansard, 19 November 2013, p 37.

6 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Government acts swiftly to deny people smugglers' promise of permanent visas', Media release, 4 December 2013, in which the Minister stated '[t]he government has acted swiftly to ensure that none of the 33,000 people who arrived in Australia illegally by boat under Labor's watch and were yet to be processed will be granted a permanent visa'.