

Factsheet

REFUGEE STATUS DETERMINATION IN AUSTRALIA

Last updated: November 2020

The process for deciding refugee claims in Australia varies depending on how a person seeking asylum arrives in the country. Those arriving with a valid visa access a standard refugee status determination process, as explained below. Those arriving without a valid visa are subject to a 'fast-track' process with diminished rights.

What is 'refugee status determination'?

Refugee status determination (**RSD**) in Australia is the process by which a person (asylum seeker) may be recognised by the government as a refugee and receive protection. Asylum seekers have the opportunity to put forward the reasons why they fear that they will be persecuted or subjected to other significant harm if they are returned to their country of origin.

Strictly speaking, RSD does not 'make' someone a refugee but simply recognises or 'declares' that the person is a refugee. This is because under international law, a person is a refugee as soon as they meet the definition set out in the [Refugee Convention](#). This may be the time when they leave their country or after their arrival in Australia ('sur place'). In reality, a person needs to be officially recognised as a refugee in order to receive the rights and entitlements that attach to refugee status.

The Refugee Convention does not set out procedures that must be followed in an RSD system, but there are many non-binding international [standards](#). For Australia to comply with its obligations under the Refugee Convention, it must have a procedure in place that enables the government to accurately identify the people to whom it owes protection.

The RSD process is also used to determine whether a person is entitled to complementary protection, based on serious human rights violations under the International Covenant on Civil and Political Rights and the Convention against Torture (see our factsheet on [Complementary Protection](#)). All applications made for protection in Australia are considered against Australia's domestic legislation on refugee status and complementary protection, concurrently.

RSD in Australia - how it applies

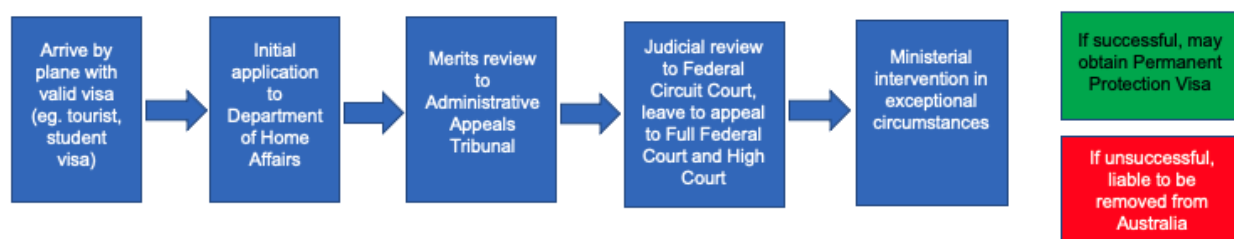
Currently, different RSD processes apply for people who arrive in Australia with a valid visa and those who arrive without a valid visa.

In summary:

- Only people who arrive with a valid visa may access the 'regular' RSD process. These are mostly individuals who enter Australia by plane with a valid visa (such as a visitor, business or student visa), pass through immigration clearance, and apply for refugee status after arrival. Some arrive intending to claim refugee status; some learn of the possibility of applying for refugee status after they are here; others apply because circumstances change in their home country while they are in Australia that make it unsafe for them to return. If a person arrived in Australia with a valid visa, they can make a claim for protection to the Department of Home Affairs. This process is described in further detail below.
- Asylum seekers who arrive by boat, or who do not pass through immigration clearance at the airport, are no longer entitled to access the regular RSD process. Instead, they are barred from applying for a protection visa, unless the Minister exercises a personal, non-compellable discretion to allow them to do so (known as 'lifting the bar'). This has resulted in asylum seekers waiting up to four years to submit their initial application. Once the Minister lifts the bar, these asylum seekers are subject to a 'fast track' RSD process, with more limited appeal rights. This process is described in further detail below.

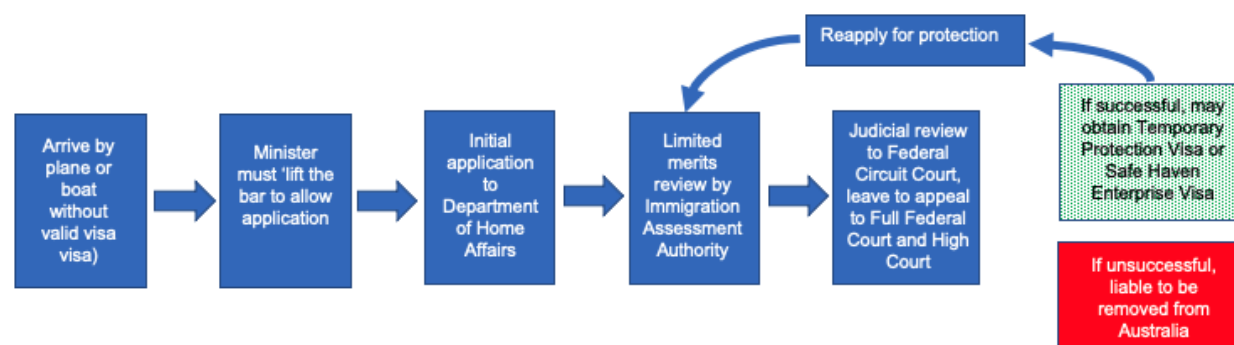
Regular RSD process

Asylum seeker usually lives in community throughout process



Fast track RSD process

Asylum seeker is placed in detention upon arrival but may be sent to community detention or allowed to live in the community.



‘Regular’ RSD process in Australia - an overview

The key steps in the ‘regular’ RSD process in Australia, as set out in the flowchart above, are:

- An asylum seeker lodges an application for a protection visa with the Department of Home Affairs;
- After an application is lodged the asylum seeker will be interviewed by a Department of Home Affairs officer. The officer will ask questions to check the asylum seeker’s identity, credibility (whether they are telling the truth) and their refugee claims. An officer of the Department makes a decision as to whether the asylum seeker is entitled to protection (as a refugee or as a beneficiary of complementary protection). This decision is known as the ‘primary decision’.
- If refused, an asylum seeker may apply for a review of the decision by the Migration and Refugee Division of the Administrative Appeals Tribunal ([MRD-AAT](#)). This is known as the merits review stage. The MRD-AAT decision maker must make the decision afresh and ‘step into the shoes’ of the Department of Home Affairs to decide whether an asylum seeker is entitled to protection.
- If an asylum seeker is unsuccessful at the merits review stage, they may appeal to the Federal Circuit Court of Australia for judicial review based on a legal error in the decision-making process. The court does not review the substantive merits of the asylum seeker’s application, but only considers if there has been an error of law by the decision-makers. If an asylum seeker is unsuccessful at the Federal Circuit Court they may seek leave to appeal to the Federal Court of Australia, or in exceptional cases, the High Court of Australia. If an asylum seeker’s application for judicial review is successful, their application is sent back to the MRD-AAT and the decision must be made afresh by the MRD-AAT.
- If all the application and appeal avenues described above fail, as a last resort, an asylum seeker may request that the Minister personally intervene to grant them a visa. A visa grant at this stage is very rare.

If an asylum seeker is found to be owed protection at the primary or merits review stage, they will (subject to identity and security checks) be granted a protection visa (visa subclass 866), meaning they will be recognised as a refugee by Australia and will receive permanent protection.

‘Fast track’ RSD process in Australia - an overview

A ‘fast track process’ now applies to asylum seekers who arrive without a valid visa, including those asylum seekers in the ‘legacy caseload’. The fast track process curtails appeal rights and, in some instances, removes the opportunity of an independent review altogether.

The fast track process applies to people who arrived in Australia without a valid visa between 13 August 2012 and 1 January 2014. It also applies to people who are reapplying for a Temporary Protection Visa (**TPV**) or Safe Haven Enterprise Visa (**SHEV**), and other people designated as ‘fast track applicants’ by legislative instrument.

The key steps in the 'fast track' RSD process, as set out in the flowchart above, are:

- Asylum seekers subject to the fast track process are not automatically entitled to apply for protection but must wait for the Minister of Immigration to exercise a personal, non-compellable discretion to allow them to apply (known as 'lifting the bar').
- If the Minister 'lifts the bar', the asylum seeker can lodge an application for protection. They will then be interviewed by a Department of Home Affairs officer. The officer will ask questions to check the asylum seeker's identity, credibility (whether they are telling the truth) and their refugee claims. The time periods specified in the legislation for asylum seekers to provide information and attend interviews are much shorter for those in the fast track process compared to those in the regular RSD process.
- Fast track applicants do not have access to the MRD-AAT. Instead, applicants who receive a negative decision are referred to a newly established body, the Immigration Assessment Authority (**IAA**). Review through the IAA is a more limited form of review, generally without an interview and generally with no new information allowed (other than in exceptional circumstances).
- If a fast track applicant is unsuccessful at the IAA, they may appeal to the Federal Circuit Court of Australia for judicial review based on a legal error in the decision-making process. If unsuccessful at the Federal Circuit Court, they may seek leave to appeal to the Federal Court of Australia, or in exceptional cases, the High Court of Australia.
- There is also a category of asylum seekers deemed by the Act to be 'excluded fast track review applicants' who have no access to any form of merits review. Excluded fast track review applicants' can seek judicial review of the Department's decision to refuse them a visa, and of the decision to exclude them from the fast track review process.

If an asylum seeker is found to be owed protection at the primary or IAA review stage, he or she will (subject to identity and security checks) be granted a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV). After expiry of their temporary visa (either a TPV or SHEV), they must reapply for protection (or another visa, if eligible). Learn more about in our [factsheet on TPVs and SHEVs](#).

For a more detailed analysis of the 'fast track' RSD process (including significant legal developments since the process was first introduced) see our [research brief on 'fast track' refugee status determination](#).