

## Migration and Refugee Division Commentary

### Family visas

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# Subclass 102: Adoption Visa

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## Overview

The Subclass 102 (Adoption) visa is a subclass of the Class AH (Child (Migrant)) visa which also comprises Subclasses 101 (Child), and 117 (Orphan Relative). The Subclass 102 visa is designed for an offshore visa applicant who has been adopted, or is a 'child for adoption' by an Australian relative. Onshore visa applicants who are adopted children may meet the requirements for a Subclass 802 (Child) visa.

Applicants for a Subclass 102 (Adoption) visa must not have turned 18 and have been, or will be, adopted overseas by an Australian citizen, permanent resident or an eligible New Zealand citizen under certain types of adoption arrangements.

In addition to the Subclass 102 visa, it is possible that an adopted child may meet the criteria for a:

- Subclass 101 (Child) visa which is for a person adopted overseas by a person who, at the time of adoption, was *not* an Australian relative; or
- Subclass 802 (Child) visa which is for onshore visa applicants where the child is adopted.

For further information on these subclasses see MRD Legal Services Commentary: [Subclass 101 and 802 - Child visas](#).

## Merits review

A decision to refuse a Subclass 102 visa is a-reviewable decision under Part 5 of the Migration Act 1958 (the Act) if the visa applicant is sponsored by an Australian citizen, the holder of a permanent visa or a New Zealand citizen holding a special category visa.<sup>1</sup> The sponsor has standing to apply for review.<sup>2</sup>

## Visa application requirements

Item 1108 of Schedule 1 to the Migration Regulations 1994 (the Regulations) sets out the requirements for making a valid visa application for a Class AH Child (Migrant) visa. The Schedule 1 requirements specify the approved form; any prescribed fees and where the application must be made. Provision is also made for applications by members of the family unit of a primary applicant.<sup>3</sup> The particular requirements will depend on the date that the visa application was made.

For applications prior to 18 April 2015, the application must be made on the approved form and must be made outside Australia. For applications made on or after 18 April 2015, the application must be made on the form and made at the place and in the manner specified by the Minister in a legislative instrument and the applicant must be outside Australia.<sup>4</sup> An application made by a person claiming to

<sup>1</sup> s.338(5)(b).

<sup>2</sup> s.347(2)(b).

<sup>3</sup> Item 1108(1)-(3).

<sup>4</sup> Items 1108(1), (3)(a) and (3)(aa) as amended by the Migration Amendment (2015 Measures No.1) Regulation 2015, SLI 2015, No.34.

be the member of the family unit of a primary applicant, may be made at the same time as, and combined with the application by that person.<sup>5</sup>

Valid applications cannot be made on or after 14 December 2015 by applicants seeking to meet the requirements of cl.102.211(2) of Schedule 2 to the Regulations on the basis of an overseas adoption by an Australian who has been residing overseas for at least twelve months if the country of adoption and period in which it occurred is specified in a legislative instrument.<sup>6</sup>

## Visa Criteria

The criteria for a Subclass 102 (Adoption) visa are contained in Part 102 of Schedule 2 to the Regulations. They comprise primary and secondary time of application and time of decision criteria. At least one person included in the application must meet the primary criteria.

The primary criteria are outlined below. The secondary criteria are minimal and relate primarily to being the member of the primary applicant's family unit, and satisfying various public interest criteria, sponsorship and Assurance of Support criteria. For further information on the secondary criteria, please consult with MRD Legal Services.

### Time of application criteria

Aside from requirements concerning sponsorship and compliance with adoption laws, the time of application criteria consist of four alternative adoption scenario criteria which must be met. In short, at the time of application, the applicant must meet the following criteria:

- **age and acceptable adoption arrangements** – he or she must not have turned 18;<sup>7</sup> and the adoption must be in accordance with specified requirements relating to:
  - expatriate (private overseas) adoptions;
  - certain State/Territory arranged adoptions;
  - Hague Adoption Convention or bilateral adoptions; or
  - third country Hague Adoption Convention adoptions.<sup>8</sup>

These requirements are outlined in more detail [below](#).

- **sponsorship** – the applicant must be sponsored by a person who is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, and that person is:
  - *for children for adoption* – a prospective adoptive parent of the child; or
  - *for adopted child* – an adoptive parent of the child;<sup>9</sup> and

<sup>5</sup> Item 1108(3)(b).

<sup>6</sup> Item 1108(3)(c), as inserted by Part 1 of Schedule 1 to the Migration Legislation Amendment (2015 Measures No.4) Regulation 2015 (SLI 2015, No.243). For the relevant legislative instrument, see the 'Schedule 1 Child Visa App' tab in the [Register of Instruments - Family Visas](#).

<sup>7</sup> cl.102.211(2)(a), (3)(a), (4)(a) and (5)(a). This requirement also appears in the definition of adoption in r.1.04(1). For further information on r.1.04 see MRD Legal Services Commentary: [Definition of Adoption - r.1.04](#).

<sup>8</sup> cl.102.211 was introduced on 1 September 1994 and has been subject to frequent amendment, disallowance and substitution, most recently being amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) for visa applications made on or after 1 July 2009.

<sup>9</sup> cl.102.212. This requirement was introduced on 1 September 1994 and has been subject to frequent amendment, disallowance and substitution, most recently being amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) for visa applications made on or after 1 July 2009.

- **lawful adoption** – the laws relating to adoption of the country in which the child is normally resident have been complied with.<sup>10</sup>

### Time of decision criteria

At the time of decision the applicant must meet the following criteria:

- **age, lawful and acceptable adoption** – the applicant must continue to satisfy the criteria time of application criteria identified above relating to age, acceptable types of adoption and compliance with adoption laws.<sup>11</sup>
- **approved departure of child** - *for visa applications made on or after 2 April 2005* - if the adoption was a State/Territory adoption (i.e. one satisfying cl.102.211(3)), a competent overseas authority has approved the departure of the applicant for adoption in Australia, or in the custody of the prospective adoptive parent/s;<sup>12</sup>
- **adoption compliance certificate** - if the adoption was a Hague Adoption Convention / bilateral adoption or a third party Hague Adoption Convention adoption (i.e. one satisfying cl.102.211(4) or (5)) and the adoption took place overseas, an adoption compliance certificate is in force in relation to the adoption;<sup>13</sup>
- **permission to depart** - if the adoption was a Hague Adoption Convention / bilateral adoption (i.e. one satisfying cl.102.211(4)) and the adoption is to take place in Australia, a competent overseas authority must have given permission for the child to leave the country in the care of a prospective adoptive parent for the purposes of adoption in Australia;<sup>14</sup>
- **sponsorship** – the sponsorship must be approved and in force;<sup>15</sup>
- **public interest criteria** – the applicant must satisfy certain public interest criteria,<sup>16</sup> and each member of the family unit of the applicant must also satisfy certain public interest criteria;<sup>17</sup>
- **Assurance of Support** – any requested assurance of support must have been accepted;<sup>18</sup> and

<sup>10</sup> cl.102.213. In *Rani v MIAC* [2012] FMCA 705 (Burchardt FM, 20 August 2012), the Court upheld the Tribunal's decision not to accept as conclusive (by reference to other evidence) an Indian Court decision approving the grant of the deed of adoption. Whether the laws relating to adoption of the country in which the child is normally resident have been complied with is a matter of fact for the Tribunal.

<sup>11</sup> cl.102.221.

<sup>12</sup> cl.102.227A, as inserted by Migration Amendment Regulations 2004 (No.8) (SR 2004, No.390).

<sup>13</sup> cl.102.228(1), inserted on 1 September 1998 by Migration Amendment Regulations 1998 (No.7) (SR 1998, No.284). An 'adoption compliance certificate' means an adoption compliance certificate within the meaning of the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998 or the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998: r.1.03.

<sup>14</sup> cl.102.228(2), inserted on 1 September 1998 by SR 1998, No.284.

<sup>15</sup> cl.102.222.

<sup>16</sup> cl.102.223. Clause 102.223 was amended by Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256), to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4021 requires either: that the applicant hold a valid passport that was issued by an official source, is in the form issued by that source; and is not in a class of passports specified by the Minister in an instrument in writing for cl.4021(a); OR that it would be unreasonable to require the applicant to hold a passport. This amendment applies to all visa applications made on or after 24 November 2012. A similar requirement was previously contained in cl.102.229 which was repealed with effect from 24 November 2012: see SLI 2012, No.256. Clause 102.223 was further amended by Migration Legislation Amendment Regulation (2013) (No.3) (SLI No.146, 2013) to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular). These changes apply to visa applications made but not finally determined before 1 July 2013 and those made on or after that date. See MRD Legal Services Commentary on [Bogus Documents/False or Misleading Information/ PIC4020](#).

<sup>17</sup> cl.102.226 and 102.227 were introduced on 1 September 2004 with cl.102.226 most recently amended by Migration Amendment Regulations 2003 (No.7) (SR 2003, No.239) for visa applications made on or after 1 November 2003 and cl.102.227 most recently amended through substitution by Migration Amendment Regulations (No.2) SR 2000, No.62 for visa applications made on or after 1 July 2000 (except for additional applicants).

<sup>18</sup> cl.102.225.

- **passport** – for visa applications made on or after 1 July 2005 and prior to 24 November 2012, certain passport requirements are met.<sup>19</sup>

## Common Issues

### Acceptable types of adoption arrangements – cl.102.211

Subclass 102 covers both private adoption by Australians resident overseas and adoptions arranged with the involvement of adoption authorities. In order to meet the requirements of cl.102.211(1), the applicant must be subject to one of four kinds of acceptable adoption arrangements, namely:

- [Expatriate \(private overseas\) adoptions](#);<sup>20</sup>
- [Pre December 1998 and other State/Territory arranged adoptions](#);<sup>21</sup>
- [Hague Adoption Convention or bilateral adoptions](#);<sup>22</sup> or
- [Third country Hague Adoption Convention \(overseas\) adoptions](#).<sup>23</sup>

The most common form of adoption arrangements arising for consideration are those under the Hague Adoption Convention, although each is considered in more detail below.

In general and except for expatriate (private overseas) adoptions, the adoption of children from an overseas country are undertaken through the relevant State/Territory adoption authorities. The relevant authority makes an assessment of the suitability of the parent(s) to adopt and gives approval before the adoption takes place.<sup>24</sup> This may involve assessing health, financial circumstances, age and maturity, motivations and expectations, past and current relationships, as well as an understanding of, and an ability to meet, the specific needs of adopted children.<sup>25</sup> In practice, there is also a waiting period between approval and receipt of a placement proposal from an overseas country by the relevant State/Territory authority.<sup>26</sup>

Private adoptions that are privately arranged without the involvement of the adoption authority of the relevant State/Territory are generally illegal except where the child was adopted outside Australia by a person living outside Australia for more than a year. This includes the adoption of relatives,<sup>27</sup> although

<sup>19</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.102.229. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (see cl.102.223).

<sup>20</sup> cl.102.211(2).

<sup>21</sup> cl.102.211(3).

<sup>22</sup> cl.102.211(4).

<sup>23</sup> cl.102.211(5).

<sup>24</sup> See for example NSW Department of Family and Community Services, Adoption of a relative or an unrelated specific child who lives in an overseas country, August 2010, accessed 20/01/17,

[http://www.community.nsw.gov.au/\\_data/assets/pdf\\_file/0003/327801/relative\\_overseas\\_adoption\\_fact.pdf](http://www.community.nsw.gov.au/_data/assets/pdf_file/0003/327801/relative_overseas_adoption_fact.pdf), accessed 20/01/17; and the Victorian Department of Human Services, Intercountry Adoption Service Information Kit,

<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/intercountry-adoption-service-information-kit>, June 2016, accessed 20/01/17.

<sup>25</sup> See, for example, *Adoption Act 2000* (NSW), s.45(1)(a) and Adoption Regulation 2015 (NSW), r.45; *Adoption Act 1984* (Vic), s.15(1)(a) and Adoption Regulations 2008 (Vic), r.35.

<sup>26</sup> See, for example, NSW Department of Family and Community Services, Thinking about Adoption, June 2013 [http://www.community.nsw.gov.au/\\_data/assets/pdf\\_file/0009/319617/Thinking-about-adoption.pdf](http://www.community.nsw.gov.au/_data/assets/pdf_file/0009/319617/Thinking-about-adoption.pdf), accessed 20/01/17.

<sup>27</sup> See for example DIBP website 'How can I adopt a child from outside Australia?' <http://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/how-can-i-adopt-a-child-from-outside-australia>, accessed 20/01/2017.

there may be special arrangements in place for that circumstance specific to the State/Territory which require consideration.<sup>28</sup> These are discussed in further detail immediately below.

### ***Expatriate (private overseas) adoptions – cl.102.211(2)***

There are only limited circumstances where an adoption would be recognised for the purposes of migration law without the involvement of the competent authorities in Australia. One such circumstance is referred to as expatriate (private overseas) adoption.<sup>29</sup> This occurs where the child has been adopted outside Australia by a person who has been living outside Australia for more than 12 months at the time the visa application was made.

For the purposes of satisfying the Subclass 102 criteria on the basis of an expatriate (private overseas) adoption, cl.102.211(2)(b)-(d) requires that at the time of application:

- the applicant must have been adopted overseas by a person who was, at the time of the adoption, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen,<sup>30</sup> and
- the adopting parent/s had been residing overseas for more than 12 months at the time of the application,<sup>31</sup> and
- the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption; and
- the adoptive parent has lawfully acquired full and permanent parental rights by the adoption.<sup>32</sup>

### Adoption by an Australian citizen, permanent resident or NZ citizen

To satisfy cl.102.211(2)(b), the applicant must have been adopted overseas by a person who was, at the time of the adoption, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen.<sup>33</sup>

The requirement to be a person holding a permanent visa is different from being an Australian permanent resident as defined in r.1.03 insofar as the usual residence aspect of the Australian permanent resident definition presumably do not need to be met in this case. Rather, all that is required is that the sponsor was, at the time of the adoption, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen.

This is a question of fact for the decision maker and may be evidenced by way of, for example, a dated adoption order or similar officially-sourced documentation.

### 12 months overseas residence

The applicant must have been adopted by a person who had been residing overseas for more than 12 months at the time of the application.<sup>34</sup> However, there is no requirement that the residence overseas

<sup>28</sup> See, for example, NSW Department of Human Services, Adoption of a relative or an unrelated specific child who lives in an overseas country, August 2010, [http://www.community.nsw.gov.au/data/assets/pdf\\_file/0003/327801/relative\\_overseas\\_adoption\\_fact.pdf](http://www.community.nsw.gov.au/data/assets/pdf_file/0003/327801/relative_overseas_adoption_fact.pdf), accessed 20/01/17.

<sup>29</sup> See for example DIBP website 'Adoptions by Australians who are outside Australia' <http://www.border.gov.au/Trav/Life/Adoption-of-children/australians-overseas> accessed 20/01/17.

<sup>30</sup> cl.102.211(2)(b)(i).

<sup>31</sup> cl.102.211(2)(b)(ii). This requirement is replicated for onshore Child visas in cl.802.213(5)(b)(i).

<sup>32</sup> cl.102.211(2)(b)-(d). For visa applications made prior to 2 April 2005, the applicant must also meet cl.102.211(2)(e), which provides that a competent authority in the overseas country has approved the departure of the applicant to Australia. Clause 102.211(2)(e) was removed on 2 April 2005 by SR 2004, No.390. Clause 102.211(2)(b) was most recently amended by SR 2003, No.239 for visa applications made from 1 November 2003.

<sup>33</sup> cl.102.211(2)(b).



be in a single country; merely that the person be 'residing overseas' for the requisite period. Nor is there a requirement that the residence be in the country where the adoption took place.<sup>35</sup>

It is not entirely clear, however, whether cl.102.211(2)(b)(ii) requires 12 months *continuous* residence overseas. In *Nguyet Huong Phung v MIEA*,<sup>36</sup> the Court considered a similarly worded, previous version of the provision which required that the applicant be 'a child who has not turned 18 adopted by an Australian citizen...where: the adoptive parent has been residing overseas for more than 12 months at the time of the application...'. The Court held that this required the 12 months or more to be prior to the time of application (impliedly, *immediately* prior to the time of application) and it was not sufficient if the adoptive parent has had, at some earlier time, a period of more than 12 months overseas residence.<sup>37</sup> While this does not directly address the issue of *continuous* residence, the language appears to suggest a single period of 12 months or more is required and not several periods amounting to 12 months or more.

Departmental guidelines (PAM3) state that '[b]rief visits to Australia by the adoptive parent during that period may be counted towards the 12 month period of absence from Australia. (A visit may be considered incidental if it was brief (a matter of weeks) and for business or personal reasons)'.<sup>38</sup> Brief breaks within the 12 month period are not expressly addressed in the regulations. However, temporary travel to Australia during the relevant period is not necessarily inconsistent with a period of residence overseas, if it can be said that the person nevertheless continues to *reside* overseas. In this regard, the concept of 'residence' has received considerable attention in common law, usually in the context of taxation or social security legislation. Relevantly, it was considered by the High Court in *Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation*, where Justice Williams made the following observation regarding residence:

The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode.<sup>39</sup>

Ultimately, however, whether or not the adoptive parent had been *residing* overseas for more than 12 months at the relevant will be a factual matter for the decision maker.<sup>40</sup>

#### The residence overseas was not contrived

To meet the expatriate (private overseas) adoption requirements, the decision maker must be satisfied that the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption.<sup>41</sup>

Amongst other things, this requires consideration of the intentions of the adopting parents as well as the particular requirements that would apply for entry to Australia of children for adoption under the

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<sup>34</sup> cl.102.211(2)(b)(ii). This requirement is replicated for onshore Child visas in cl.802.213(5)(b)(i) and may be waived for onshore Subclass 802 visa applications seeking to satisfy the adoption alternative if there are compelling or compassionate circumstances: cl.802.213(5)(b)(ii).

<sup>35</sup> PAM3: Sch2 Visa 102 - Adoption - Expatriate (Private) Overseas Adoption - 102.211(2) – Other category-specific visa requirements - Adoptive parent resided outside Australia for more than 12 months (compilation 01/01/17).

<sup>36</sup> (1997) 74 FCR 422.

<sup>37</sup> *Nguyet Huong Phung v MIEA* (1997) 74 FCR 422 at 428.

<sup>38</sup> PAM3: Sch2 Visa 102 - Adoption - Expatriate (Private) Overseas Adoption - 102.211(2) – Other category-specific visa requirements - Adoptive parent resided outside Australia for more than 12 months (compilation 01/01/17).

<sup>39</sup> (1941) 64 CLR 241 at 249.

<sup>40</sup> For further discussion of residence, albeit in the context of the broader and inherently more flexible concept of 'usual residence', please see Commentary: [Usually Resident](#).

<sup>41</sup> cl.102.211(2)(c). This requirement is replicated for onshore Child visas in cl.802.213(5)(c).



laws and policies for intercountry adoptions in Australia and the State/Territory in which the adoptive parent will reside.<sup>42</sup>

However, simply going overseas for the purpose of adopting a child would not be enough to find the residence was contrived. PAM3 notes that 'officers should keep an open mind when assessing the contrivance aspect: although an adoptive parent may have taken up residence outside Australia for the purpose of adopting a child, it does not necessarily mean that they 'contrived to circumvent' Australian state/territory adoption law.'<sup>43</sup>

#### Full and permanent parental rights

To be an acceptable expatriate (private overseas) adoption, the adoptive parent has lawfully acquired full and permanent parental rights by the adoption.<sup>44</sup> This is a factual finding which requires consideration of the nature of the adoption.

Generally speaking, full and permanent parental rights confer on the adoptive parent/s, among other things, the right to decide where the child shall live. Departmental guidelines (PAM3) note that this can be contrasted with guardianship only rights, rights relating to custody or parental responsibility for the day-to-day care of the child or other lesser rights, which would not satisfy this provision. In most cases the nature of the rights should be apparent from the text of the adoption order.<sup>45</sup>

In particular, this question arises in the context of customary adoptions in which case the decision maker will need to assess whether the customary adoption has conferred full and permanent parental rights.

#### ***Pre December 1998 and other State/Territory arranged adoptions – cl102.211(3)***

A child may be adopted under other bilateral prospective adoption agreements administered by State or Territory central adoption authorities other than under the Hague Adoption Convention or a bilateral adoption arrangement. This usually occurs under agreements that were negotiated before the Hague Adoption Convention commenced on 1 December 1998. In these cases, the adoption will either be finalised or recognised by a court in Australia after the child enters Australia. These adoptions will satisfy cl.102.211(3)(b)-(d) provided that at the time of application:

- the applicant is resident in an overseas country;<sup>46</sup>
- either an Australian citizen, holder of a permanent visa or eligible New Zealand citizen or a couple, being spouses or de facto partners, at least one of whom is an Australian citizen, holder of a permanent visa or an eligible New Zealand citizen, must have undertaken in writing to adopt the applicant;<sup>47</sup> and

<sup>42</sup> See s.111C of the *Family Law Act 1975* (Cth), and the following Acts as relevant to the State/Territory in which the adoptive parent resides: *Adoption Act 2000* (NSW); *Adoption Act 1984* (Vic); *Adoption Act 2009* (Qld); *Adoption Act 1994* (WA); *Adoption Act 1988* (SA); *Adoption of Children Act 1994* (NT); *Adoption Act 1998* (Tas); *Adoption Act 1993* (ACT).

<sup>43</sup> PAM3: Sch2 Visa 102 - Adoption - Expatriate (Private) Overseas Adoption - 102.211(2) – Other category-specific visa requirements – Purpose of the adoptive parent's residency outside Australia (compilation 01/01/17).

<sup>44</sup> cl.102.211(2)(d). This requirement is replicated for onshore Child visas in cl.802.213(5)(d).

<sup>45</sup> PAM3: Sch2 Visa 102 - Adoption - Expatriate (Private) Overseas Adoption - 102.211(2) – Other category-specific visa requirements – Full parental rights (compilation 01/01/17).

<sup>46</sup> cl.102.211(3)(b).

<sup>47</sup> cl.102.211(3)(c), Clause 102.211(3)(c)(i) was amended by SR 2003, No.239 for visa applications made from 1 November 2003. For visa applications made prior to 1 July 2009, cl.102.211(3)(c)(i) refers to 'an unmarried person', while cl.102.211(3)(c)(ii) refers to 'spouses' (as defined in the then r.1.15A). For visa applications made on or after 1 July 2009, cl.102.211(3)(c)(i) refers to 'a person who is not in a married relationship or de facto relationship', and cl.102.211(3)(ii) refers spouses or de facto partners' (as defined in ss.5F and 5CB of the Act): SLI 2009, No.144.

- a 'competent authority' in Australia must have approved the prospective adoptive parent, or the prospective adoptive parent and his/her partner, as suitable adoptive parents for the applicant.<sup>48</sup>

See the discussion below on [Competent authorities](#) for list of Australian competent authorities.

### **Hague Adoption Convention and bilateral adoptions – cl.102.211(4)**

An adoption either under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993 (the Hague Adoption Convention) or under a bilateral adoption arrangement made in accordance with Australian law with another country, is also an acceptable form of adoption for Subclass 102, provided the requirements in cl.102.211(4)(b)-(e) are met.

Those requirements are:

- the applicant must be resident in an overseas country;<sup>49</sup>
- a competent authority in the overseas country must have allocated the applicant for prospective adoption by a person who is an Australian citizen, a holder of a permanent visa, or an eligible New Zealand citizen, or such a person and the person's partner;<sup>50</sup>
- the adoption must either be arranged in accordance with the Hague Adoption Convention or be of a kind that may be accorded recognition under r.5 of the Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998;<sup>51</sup> and
- a 'competent authority' in Australia must have approved the prospective adoptive parent, or the prospective adoptive parent and his/her partner, as suitable adoptive parents for the applicant.<sup>52</sup>

### Allocation for adoption

A competent authority in the overseas country must have allocated the applicant for prospective adoption. The 'allocation' of a child for adoption normally would entail the matching of a person or persons wishing to adopt a child and a child who is available for adoption by taking into account the interests and welfare of the child and the wishes of the parent/s of the child and the person or persons wishing to adopt.

It is a question of fact for the decision maker as to whether the overseas country has allocated the child for adoption, and while it is a question of whether it is the overseas country that has done the allocation, PAM3 guidelines note that this would generally 'be evidenced by an approval letter issued

<sup>48</sup> cl.102.211(3)(d). Clause 102.211(3)(d) was substituted on 1 September 1998 by SR 1998, No.284. For visa applications made prior to 2 April 2005, the applicant must also be required to meet cl.102.211(3)(e), which provided that a competent authority in the overseas country had approved the departure of the applicant for adoption in Australia, or in the custody of the prospective adoptive parent or parents, as the case requires: Omitted by SR 2004, No.290.

<sup>49</sup> cl.102.211(4)(b).

<sup>50</sup> cl.102.211(4)(c), as amended by Clause 102.211(4)(c) was amended by SR 2003, No.239 for visa applications made from 1 November 2003. For visa applications made prior to 1 July 2009, cl.102.211(4)(c) refers to 'spouse' (as defined in the then r.1.15A) and for visa applications made on or after 1 July 2009, cl.102.211(4)(c) refers to 'spouse or de facto partner' (as defined in ss.5F and 5CB of the Act and inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective 1 July 2009): Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144).

<sup>51</sup> cl.102.211(4)(d). For a child to be adopted in accordance with the Adoption Convention the adoption must be organised by the competent authorities in both Convention countries. See Adoption Convention, Articles 4, 5, and Ch IV.

<sup>52</sup> cl.102.211(4) (e). For visa applications made prior to 1 July 2009, cl.102.211(4)(e)(ii) refers to 'spouse' (as defined in the then r.1.15A) and for visa applications made on or after 1 July 2009, cl.102.211(4)(e)(ii) refers to 'spouse or de facto partner' (as defined in ss.5F and 5CB of the Act and inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective 1 July 2009): SLI 2009, No.144. See [Competent authorities](#) for list of Australian competent authorities.

to the prospective adoptive parent/s by the relevant Australian authority that identifies the allocated child by name, sex and date of birth.<sup>53</sup>

#### Adoptions under the Hague Adoption Convention

There are four kinds of Hague Adoption Convention adoptions, three of which can be relied upon to meet cl.102.211(4), and another which is relevant to cl.102.211(5):

- **full adoption** - where the adoption takes place in a Convention country other than Australia, but involve the adoption central authorities of both Australia and the other Convention country. These are evidenced by an Article 23 Adoption Compliance Certificate and adoptions are finalised before the child enters Australia. This covers adoptions from Chile, Colombia, Lithuania, People's Republic of China and Sri Lanka and can be relied upon to satisfy cl.102.211(4) as they involve a competent authority in Australia.
- **simple adoption** - where the country's adoption laws do not sever the child's legal ties to the birth parents, but the country approves the child to come to Australia where the adoption is finalised. These adoptions involve a State /Territory adoption authority and the authority of the Convention country. This covers adoption arrangements with Thailand and also can be relied upon to satisfy cl.102.211(4).
- **guardianship arrangements** - where the adoption is finalised in Australia after a placement period in Australia under relevant Australian State or Territory Central Adoption Authority monitoring and reporting to the other country's Central Adoption Authority and no problems have occurred. This covers adoption arrangements with Hong Kong and the Philippines and also can be relied upon to satisfy cl.102.211(4).
- **third country Convention adoption**, where Australian adoptive parents habitually resident in a Convention country other than Australia, adopt from another Convention country (not Australia) and an Adoption Compliance Certificate (not necessarily an Article 23 ACC) has been issued. These adoptions are relevant to cl.102.211(5).

#### Competent authorities

Clause 102.211(4)(e)(i) requires the involvement of a competent authority in Australia in an adoption under the Hague Adoption Convention or a bilateral agreement. For a child to be adopted in accordance with the Adoption Convention, and to meet the requirements of cl.102.211(4), the adoption must be organised by the competent authorities in both Convention countries.<sup>54</sup> A 'competent authority' is defined in r.1.03, and means:

- *for Australia:*
  - in the case of an adoption to which the Adoption Convention applies - the Attorney General's Department, being a State Central Authority within the meaning of the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Hague Convention Regulations);<sup>55</sup>
  - in the case of an adoption to which a bilateral adoption arrangement<sup>56</sup> applies - a competent authority within the meaning of the Family Law (Bilateral Arrangements -

<sup>53</sup> PAM3: Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Other category-specific visa requirements – Child allocated for adoption (compilation 01/01/17).

<sup>54</sup> See Adoption Convention, Articles 4, 5, and Ch IV.

<sup>55</sup> For the current list of the relevant Australian authorities, see:

[www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Pages/Australianstateandterritorycentralauthorities.aspx](http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Pages/Australianstateandterritorycentralauthorities.aspx).

<sup>56</sup> A 'bilateral adoption arrangement' means an arrangement between Australia and another country that allows the adoption of a child from the other country to be recognised in Australia under the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998: r.1.03.

Intercountry Adoption) Regulations 1998. Relevantly, that is, for the State in which the person adopting the child habitually resides - a person, body or office in the State's jurisdiction responsible for approving the adoption of children;<sup>57</sup>

- in any other case - the child welfare authorities of an Australian State or Territory;<sup>58</sup>
- *for an Adoption Convention country*<sup>59</sup> - a Central Authority within the meaning of the Hague Convention Regulations;
- *for a prescribed overseas jurisdiction* - a competent authority within the meaning of the Hague Convention Regulations. That is, in cases of adoption under a bilateral agreement, a person, body or office in the jurisdiction responsible for approving the adoption of children;<sup>60</sup>
- *for any other overseas country* - a person, body or office in that overseas country responsible for approving the adoption of children.

For the current list of countries with which Australia has intercountry adoption arrangements, see the Attorney General Department's website:

[www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/CountryProgrammes/Pages/default.aspx](http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/CountryProgrammes/Pages/default.aspx).

In determining whether or not the adoption has been organised by a competent authority in Australia, Departmental guidelines state that the application should be accompanied by a signed and dated letter from Australian authority supporting the adoption on appropriate letterhead and contain:

- details of the visa applicant including name, sex, date of birth, nationality and place of usual residence;
- a statement that the applicant has been allocated to the prospective adoptive parents (that is, the sponsors) by a competent authority in the country of the child's usual residence giving the full names of the prospective parents and the name and address of the competent authority;
- a statement that the arrangements have been made in accordance with the Hague Adoption Convention.<sup>61</sup>

#### **Overseas adoption – adoption compliance certificate**

If the applicant met cl.102.211(4) or (5) and the adoption took place overseas, an adoption compliance certificate must be in force in relation to the adoption at the time of decision.<sup>62</sup>

An 'adoption compliance certificate' means an adoption compliance certificate within the meaning of the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998 or the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998.<sup>63</sup> These certificates are issued under Article 23 of the Hague Adoption Convention and are certification that a full and permanent adoption has occurred under the Hague Convention or a bilateral agreement. Once issued, the adoption is

<sup>57</sup> r.3, Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998.

<sup>58</sup> For example, in NSW, the relevant authority is the Department of Family and Community Services; in Victoria it is the Department of Human Services.

<sup>59</sup> An 'Adoption Convention country' means a country that is a Convention country under the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998: r.1.03.

<sup>60</sup> Prescribed overseas jurisdiction is defined r.3 of the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998 to mean an overseas jurisdiction mentioned in Schedule 1 to the Regulations. At present, these are the Federal Democratic Republic of Ethiopia, the Republic of Korea and Taiwan. Competent authority is defined in r.3 of those Regulations.

<sup>61</sup> PAM3: Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Documentation requirements – To be submitted at the time of application (compilation 01/01/17).

<sup>62</sup> cl.102.228(1), inserted on 1 September 1998 by SR 1998, No.284.

<sup>63</sup> r.1.03.

recognised in Australia and there is no need for the adoptive parents to seek further recognition of the adoption in Australia.

Departmental guidelines (PAM3) note that '[a]lthough the format of an [Adoption Compliance Certificate] may vary, the certificate will usually:

- specify the date and place where the adoption took place;
- identify the child and the adoptive parents by name; and
- identify the two countries involved in the adoption.<sup>64</sup>

### ***Adoption in Australia – permission to depart***

If the applicant met cl.102.211(4) and the adoption is to take place in Australia, a competent overseas authority must have given permission for the child to leave the country in the care of a prospective adoptive parent for the purposes of adoption in Australia.<sup>65</sup>

See discussion [above](#) on the meaning of competent authority.

Department Guidelines states that to enable visa grant this would require a 'letter from the competent authority outside Australia (either the CAA or its accredited agent) giving permission for the applicant to travel to Australia in the care of the prospective adoptive parents for adoption in Australia in accordance with the Hague Adoption Convention.'<sup>66</sup>

### ***Bilateral adoption arrangements***

Another means of formally adopting a child, which is acceptable under cl.102.211(4)(d)(ii), is to adopt under a bilateral arrangement between the child's country and Australia. Bilateral adoption arrangements are adoption programs negotiated with another country that is not a party to the Hague Adoption Convention.

Australia has bilateral arrangements in place to provide automatic recognition of adoptions from South Korea, Taiwan and Ethiopia that have not been finalised and future adoptions from South Korea and Taiwan under the Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998.<sup>67</sup>

Clause 102.211(4)(d)(ii) covers children adopted, with the involvement of an Australian State or Territory central adoption authority under bilateral adoption arrangements made in accordance with Australian law and South Korea, Taiwan and Ethiopia. These adoptions are full adoptions and recognised in Australia under Australian law. The visa application can be made before the adoption is finalised (but the child must have at least been allocated for adoption).

### ***Third country Hague Adoption Convention (overseas) adoptions – cl.102.211(5)***

Sometimes Australia is not involved in the adoption process, but two other Convention states facilitate the adoption. This situation is contemplated in cl.102.211(5). In those situations, where the Hague Adoption Convention applies but an Australian adoption authority was *not* involved in the adoption arrangements, an applicant may still meet cl.102.211(5) provided that the adoption arrangements

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<sup>64</sup> PAM3: Sch2 Visa 102 - Adoption - About the AH-102 visa – Terminology – Adoption compliance certificate (compilation 01/01/17).

<sup>65</sup> cl.102.228(2), inserted on 1 September 1998 by SR 1998, No.284.

<sup>66</sup> PAM3: Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Documentation requirements – After adoption (compilation 01/01/17).

<sup>67</sup> Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998, Sch 1 as amended on 4 March 2014. Until 2012 Australia had such a bilateral agreement in place with the PRC, but since then intercountry adoptions undertaken in PRC with the involvement of both Central Adoption Authorities are taken to be full adoptions under the Hague Adoption Convention.

were between two countries other than Australia and both countries were parties to the Hague Adoption Convention. In these cases, cl.102.211(5)(b) requires that at the time of application, the applicant must have been adopted in accordance with the Hague Adoption Convention, in an Adoption Convention country, by a person who was an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen when the adoption took place, or by such a person and that person's partner.<sup>68</sup>

An 'Adoption Convention country' means a country that is a Convention country under the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998.<sup>69</sup>

These adoptions are rare. For further assistance in relation to such adoptions, contact MRD Legal Services.

#### **Meaning of adoption, adopt, and adopted – r.1.04**

Regulation 1.03 states that 'adoption' has the meaning set out in r.1.04. 'Adopt' and 'adopted' have corresponding meanings.<sup>70</sup> In summary, the key requirements contained in r.1.04 are:

- the adopter must have assumed a parental role in relation to the adoptee;
  - before the adoptee attained 18 years of age, and
  - which occurred under certain arrangements, namely:
    - formal adoption arrangements under Australian (or state/territory) law;
    - formal adoption arrangements under foreign law, where the adoption results in the legal recognition of the adopter(s) as the parent(s), in place of the previously recognised parents; or
    - certain other arrangements entered into outside Australia that are 'in the nature of adoption' (referred to as 'customary adoption').

Formal adoptions may be undertaken for example in accordance with the Hague Convention or under a bilateral agreement, but this is not necessary and a customary adoption may be sufficient. In those 'customary adoptions' cases where the adoption falls within r.1.04(2) for being an 'arrangement in the nature of adoption', the sponsoring parent should provide documentation from a competent authority (if any) in the country where the adoption took place recognising that customary adoption is available.<sup>71</sup> For further guidance on the definition of adoption, see MRD Legal Services Commentary: [Definition of Adoption - r.1.04](#).

#### **Adoption compliance certification and permission to depart - cl.102.228**

Clause 102.228 imposes additional time of decision criteria if the applicant met cl.102.211(4) (Hague Adoption Convention / Bilateral adoption) or cl.102.211(5) (third party Hague Adoption Convention adoption), depending upon whether the adoption took place overseas, or is to take place in Australia.

<sup>68</sup> cl.102.211(5)(b). Clause 102.211(5) was inserted on 1 September 1998 by SR 1998, No.284. Clause 102.211(5)(b) was amended by SR 2003, No.239, for visa applications made from 1 November 2003. For visa applications made prior to 1 July 2009, cl.102.211(5)(b) refers to 'spouse' (as defined in the then r.1.15A) and for visa applications made from 1 July 2009, cl.102.211(5)(b) refers to 'spouse or de facto partner' (as defined in s.5F, which was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* and s.5CB of the Act, which was inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective 1 July 2009): SLI 2009, No.144.

<sup>69</sup> r.1.03.

<sup>70</sup> *Acts Interpretation Act 1901 (Cth)*, s.18A.

<sup>71</sup> See for example, guidance provided to decision makers in PAM3: Sch2 Visa 802 – Child – Child (Standard cases) – Adoption cases – Expatriate adoptions – Full parental rights – If a customary adoption(compilation 01/01/17).



## **Sponsorship – cl.102.212 102.222, r.1.20KB**

At the time of application, the applicant must be sponsored by a prospective adoptive parent (if the applicant is a child for adoption) or an adoptive parent (if the applicant is adopted) who is an Australian citizen, holder of a permanent visa or an eligible New Zealand citizen.<sup>72</sup> Regulation 1.20KB was introduced on 27 March 2010 and places limitations on sponsorship of a child by ‘sponsors of concern’, and is intended to prevent sponsorship of a child by a person who has been charged or convicted of a serious offence indicating that the person might pose a risk to a child.<sup>73</sup>

Regulation 1.20KB applies to applications for:

- Child (Migrant) (Class AH) visas;
- Child (Residence) (Class BT) visas;
- Extended Eligibility (Temporary) (Class TK) visas;
- Partner (Temporary) (Class UK) visas;
- Prospective Marriage (Temporary) (Class TO) visas; and
- Partner (Provisional) (Class UF) visas.<sup>74</sup>

It only applies to applications for these visas made on or after 27 March 2010.<sup>75</sup>

For the purpose of adoption visa applications, the sponsor of an applicant for a visa is defined in r.1.20 of the Regulations to mean a person who undertakes certain specified obligations in relation to the applicant, and sponsorship is defined in r.1.03 to mean an undertaking of the kind referred to in r.1.20 to sponsor an applicant. Those undertakings vary depending on the type of application.

At the time of decision, the sponsorship referred to at the time of application has been approved by the Minister and still be in force.<sup>76</sup> Under departmental policy, the decision maker needs to be satisfied that the sponsor understands and in completing the relevant sponsorship form has undertaken to accept their obligations under r.1.20(2).<sup>77</sup> If a decision maker is not satisfied that the sponsor is eligible (e.g. does not meet the age or residence requirement or no longer has a relevant relationship with the person(s) being sponsored) **or** is not satisfied that the sponsor can fulfill the sponsorship undertaking, the visa applicant does not satisfy the Schedule 2 time of decision criteria relating to sponsorship and accordingly must refuse the visa.

For more detailed discussion on the question as to whether the Tribunal can accept a sponsorship on review, albeit in the Skilled visa context, see MRD Legal Services Commentary: [Nomination / Sponsorship - Skilled visas](#).

### **Limitation on sponsorship**

There is limitation on approval of sponsorships that applies to Child (Migrant) (Class AH) and Child (Residence) (Class BT) visas if one of the applicants is under 18 at the time of application. This limitation requires the Minister to refuse to approve the sponsorship of a person under 18 if the sponsor or their spouse or de facto partner has been charged with, or convicted of, a registrable

<sup>72</sup> cl.102.212.

<sup>73</sup> Migration Amendment Regulations 2010 (No.2) (SLI 2010 No.50) and Explanatory Statement to SLI 2010, No.50.

<sup>74</sup> r.1.20KB(1).

<sup>75</sup> SLI 2010 No.50.

<sup>76</sup> cl.102.222.

<sup>77</sup> See e.g. MSI 378: Form 40 – Sponsors and sponsorship (1/7/10 – 20/8/10); PAM3 Division 1.4 – Form 40 sponsors and sponsorship – Sponsors and the sponsorship undertaking – Sponsorship undertakings by subclass – Reg 1.20(2) (compilation 01/01/17) -. Guidelines specifically for Subclasses 176, 886, 475, 487 and 489 are to similar effect.



offence unless the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction or the conviction has been quashed or otherwise set aside.<sup>78</sup> 'Registrable offences' is defined for the purposes of the limitation provision and includes offences under the relevant State and Territory legislation for registering or reporting on child sex offences or other serious crimes indicating the person may pose a significant risk to a child.<sup>79</sup>

Where the sponsor or their spouse or de facto partner has been convicted of a registrable offence, the sponsorship may be approved if certain circumstances are met. These are that none of the applicants for the visa are under 18 or the sponsor or their spouse or de facto partner has:

- completed the sentence imposed more than 5 years before the date of the application for approval of the sponsorship; and
- has not been charged with a registrable offence since completing the sentence<sup>80</sup> or, if there was a charge, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; and
- there are compelling circumstances affecting the sponsor or the applicant.<sup>81</sup>

Additionally, where the Minister has requested the sponsor or his or her spouse/de facto partner to provide a police check and it is not provided within a reasonable time, the Minister may refuse to approve the sponsorship of all applicants for the visa.<sup>82</sup> See further MRD Legal Services Commentary on [Limitation on Sponsorships – Partner and Family Visas](#) for further information.

#### Relevant Case Law

[Nguyet Huong Phung v MIEA \[1997\] 74 FCR 422](#)

[Rani v MIAC \[2012\] FMCA 705](#)

[Summary](#)

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 1998 (No.7)</a>	SR 1998, No.284
<a href="#">Migration Amendment Regulations 2003 (No.7)</a>	SR 2003, No.239
<a href="#">Migration Amendment Regulations 2004 (No.8)</a>	SR 2004, No.390
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2010 (No.2)</a>	SLI 2010, No.50
<a href="#">Migration Legislation Amendment Regulation 2012 (No.5)</a>	SLI 2012, No.256
<a href="#">Migration Legislation Amendment Regulation 2013 (No.3)</a>	SLI 2013, No.146

<sup>78</sup> Regulation 1.20KB inserted by Migration Amendment Regulations 2010 (No.2) (SLI 2010, No.50) for visa applications made on or after 27 March 2010.

<sup>79</sup> r.1.20KB(13).

<sup>80</sup> Note r.1.20KB(9)(b) appears to contain a typographical error as it states that the Minister may decide to approve the sponsorship if 'the spouse or de facto partner has not been charged with a registrable offence since the *sponsor* completed that sentence' (emphasis added). It appears that it should refer to 'since the *spouse or de facto partner* completed that sentence'.

<sup>81</sup> r.1.20KB(4) and (5).

<sup>82</sup> r.1.20KB(12). Regulation 1.20KB(11) provides that the Minister may request a police check from a jurisdiction in Australia or a country in which the sponsor or their spouse or de facto partner lived for a period or a total period of at least 12 months.

**Available Decision Templates**

There is no specific decision template available for Subclass 102 visa reviews. Members should use the generic visa refusal template and seek further assistance from MRD Legal Services if required.

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# Subclass 114 and 838: Aged Dependent Relative visas

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## Overview

The Aged Dependent Relative visa subclasses enable the reunion of aged dependent relatives of Australian residents in recognition of kinship ties and the bonds of mutual dependency and support within families. A non-citizen may apply as an 'aged dependent relative' of a relative who is an Australian citizen, permanent resident or eligible New Zealand citizen.

This commentary focuses on the requirements applying post 1 July 2009. Please speak to MRD Legal if you need information on pre 1 July 2009 applications.

There are two subclasses of Aged Dependent Relative visa:

- the Subclass 114 (Aged Dependent Relative) visa, which was initially introduced on 1 November 1998,<sup>1</sup> is one of the subclasses within the Other Family (Migrant) Class BO and must be applied for outside Australia; and
- the Subclass 838 (Aged Dependent Relative) visa, which was introduced on 1 November 1999,<sup>2</sup> is one of the subclasses within the Other Family (Residence) (Class BU) visa class and must be applied for in Australia.<sup>3</sup>

For a short period only during 2014, the Subclass 114 (Aged Dependent Relative) and Subclass 838 (Aged Dependent Relative) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>4</sup>

## Merits review

A decision to refuse the grant of Subclass 838 visa is a reviewable decision under s.338(2) of the *Migration Act 1958* (the Act). The visa applicant has standing to apply for review, and the application for review must be made whilst he or she is in Australia.<sup>5</sup>

The refusal of a Subclass 114 visa is reviewable under s.338(5) of the Act. The visa applicant's sponsor has standing to apply for review.<sup>6</sup>

<sup>1</sup> Migration Amendment Regulations 1998 (No.8) (SR 1998, No.285) inserted this visa with effect from 1 November 1998. It was subsequently disallowed by the Senate on 31 March 1999 and by operation of s.48(6) of the *Acts Interpretation Act 1901*, Subclass 114 was effectively repealed on and from 31 March 1999. It was reintroduced on 1 November 1999 in essentially the same form: Migration Amendment Regulations 1999 (No.13) (SR 1999, No.259).

<sup>2</sup> Inserted by SR 1999, No.259.

<sup>3</sup> Items 1123A and 1123B of Schedule 1 to the Migration Regulations 1994. The other subclasses in those classes are Remaining Relative and Carer.

<sup>4</sup> Between 2 June 2014 to 25 September 2014 all Class BO and Class BU visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse/ de facto partner/ dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class BO and Class BU visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

<sup>5</sup> s.347(2)(a), (3).

<sup>6</sup> s.347(2)(b).

## Visa application requirements

### Applications lodged prior to 18 April 2015

An application for a Subclass 114 (Aged Dependent Relative) (Migrant) (Class BO) visa must be made outside Australia on the approved form and be accompanied by the prescribed fee.<sup>7</sup>

An application for a Subclass 838 (Aged Dependent Relative) (Residence) (Class BU) visa must be made inside Australia while the applicant is inside Australia (but not in immigration clearance) on the approved form and be accompanied by the prescribed fee.<sup>8</sup> In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.<sup>9</sup>

### Applications lodged on or after 18 April 2015

An application for a Subclass 114 (Aged Dependent Relative) (Migrant) (Class BO) visa must be made on the form, at the place, and in the manner specified by the Minister in a legislative instrument and the applicant must be outside Australia.<sup>10</sup>

An application for a Subclass 838 (Aged Dependent Relative) (Residence) (Class BU) visa must be made while the applicant is inside Australia (but not in immigration clearance) on the form, at the place, and in the manner specified by the Minister in a legislative instrument.<sup>11</sup>

## Visa criteria

The criteria for Subclass 114 and 838 are set out in Parts 114 and 838 of Schedule 2 to the Migration Regulations 1994 (the Regulations). They comprise primary and secondary criteria which are divided between time of application and time of decision requirements. At least one person included in the application must meet the primary criteria. Both Subclass 114 and 838 contain similar criteria in including whether or not the applicant is an 'aged dependent relative' of an Australian citizen, Australian permanent resident, or eligible New Zealand citizen as defined in r.1.03 of the Regulations.

### Primary criteria

The requirements which must be satisfied by primary applicants for either a Subclass 114 or 838 visa are:

- **Aged Dependent relative** – the applicant must be, both at the time of application<sup>12</sup> and at the time of decision,<sup>13</sup> an 'aged dependent relative' of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen (Australian relative);

<sup>7</sup> Item 1123A(1) and (2) of Schedule 1 to the Regulations.

<sup>8</sup> Item 1123B(1), (2) and (3).

<sup>9</sup> Item 1123B(3)(ca) as inserted by Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (SLI 2013, No.118).

<sup>10</sup> Items 1123A(1), (3)(a) and (3)(aa) as amended by the Migration Amendment (2015 Measures No.1) Regulation 2015, (SLI 2015, No.34).

<sup>11</sup> Item 1123B(1) and (3)(a) as amended by SLI 2015, No.34.

<sup>12</sup> cl.114.211 and cl.838.212. Clause 838.212 as amended by Migration Amendment Regulations 2002 (No.2) (SR 2002, No.86) for visa applications made on or after 1 July 2002, actually requires that the applicant be an 'aged dependent relative of an 'Australian relative'. 'Australian relative' is however defined in cl.838.111 as 'a relative of the applicant who is an Australian citizen, Australian permanent resident or an eligible New Zealand citizen.'

<sup>13</sup> cl.114.221 and cl.838.221.

- **Sponsorship** – at the time of application, the applicant must be sponsored by either:
  - the Australian relative (i.e. the person mentioned in cl.114.211 or 838.212) who has turned 18 and is a settled Australian citizen, permanent resident or eligible New Zealand citizen; or
  - the Australian relative's spouse or de facto partner, where the partner has turned 18, cohabits with the relative and is a settled Australian citizen, permanent resident or eligible New Zealand citizen.<sup>14</sup>

At time of decision, the sponsorship mentioned in the relevant time of application criterion must be approved by the Minister and be in force.<sup>15</sup>

- **Visa status of Subclass 838 applicants** - applicants for a Subclass 838 visa must also at the time of application either:
  - hold a substantive visa other than a Subclass 771 (Transit) visa; or
  - if they do not hold a substantive visa, their last substantive visa must not have been a Subclass 771 (Transit) visa and they must satisfy Schedule 3 criterion 3002.<sup>16</sup>
- **Assurance of support** – at the time of decision, an assurance of support in relation to the applicant must have been accepted by the Secretary of Social Services (formerly the Secretary of the Department of Family and Community Services).<sup>17</sup>
- **Public interest criteria** – the applicant and each member of the family unit of the applicant who is an applicant for the visa must satisfy public interest criteria 4001 (character),<sup>18</sup> 4002 (security), 4003 (weapons of mass destruction), 4004 (debt to Commonwealth), 4005 (health), 4009 (intention to reside permanently), 4010 (establishment) and 4020 (fraud/bogus documents).<sup>19</sup> Depending on the date of visa application, the primary applicant must also satisfy PIC 4021 (valid passport),<sup>20</sup> 4019 (Australian values),<sup>21</sup> and, for a Subclass 838 applicant who has not turned 18, PIC 4017 (lawful removal of child)<sup>22</sup> and 4018 (best interests of child).<sup>23</sup> Similarly, depending on the date of visa application, each member of the applicant's family unit who is also a visa applicant must also satisfy PIC 4019 if they have turned 18 at the time of application,<sup>24</sup> or otherwise PIC 4015, and 4016.<sup>25</sup>

<sup>14</sup> cl.114.212 and cl.838.213. 'Settled' is defined in r.1.03 to mean lawfully resident in Australia for a reasonable period.

<sup>15</sup> cl.114.222 and cl.838.227.

<sup>16</sup> cl.838.211. 'Substantive visa' is defined in r.1.03 as a visa other than a bridging visa, criminal justice visa or enforcement visa.

<sup>17</sup> cl.114.225 and cl.838.222. This criterion was substituted by Migration Amendment Regulations 2004 (No.2) (SR 2004, No.391) to apply to both applications made on or after that date and applications made before, but not finally determined as at 1 July 2004. For applications made on or after 22 March 2014, reference to the 'Department of Family and Community Services' have been replaced by 'Department of Social Services': Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30). An assurance of support that has been accepted previously by the Secretary of the Department of Family and Community Services or the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs at the relevant times would be taken to satisfy this criterion: s.19B(2) of the *Acts Interpretation Act 1901* (see the Acts Interpretation (Substituted References - Section 19B) Order 1997).

<sup>18</sup> See MRD Legal Services commentary: [Public Interest Criterion 4001](#).

<sup>19</sup> Clauses 114.223, 114.226(1)(a), 838.223 and 838.224(1)(a) as amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146) to include a requirement to satisfy PIC 4020. These changes applied to visa applications made prior to, but not finally determined as at 1 July 2013 and those made on or after that date. For further information, see MRD Legal Services commentary: [Bogus Documents / False or Misleading Information / PIC 4020](#).

<sup>20</sup> cl.114.223 and cl.838.223 as amended by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256) for visa applications made on or after 24 November 2012.

<sup>21</sup> cl.114.223 and cl.838.223 as amended by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.314) for visa applications made on or after 15 October 2007.

<sup>22</sup> cl.838.226 inserted by Migration Amendment Regulations 2000 (No.2) (SR 2000, No.62) for visa applications made on or after 1 July 2000.

<sup>23</sup> cl.838.226 inserted by SR 2000, No.62 for visa applications made on or after 1 July 2000.

<sup>24</sup> cl.114.226(1)(aa) and cl.838.224(1)(b) substituted by SLI 2007, No.314 for visa applications made on or after 15 October 2007.

<sup>25</sup> cl.114.227 and cl.838.225 substituted by SR 2000, No.62 for visa applications made on or after 1 July 2000.

In addition, it is a primary criterion for both Subclass 115 and 835 that each member of the family unit who is *not* an applicant for the visa must satisfy PIC 4001, 4002, 4003, 4004 and 4005.<sup>26</sup>

- **Special return criteria** – for Subclass 115, the applicant and each member of the family unit of the applicant who is an applicant for the visa must satisfy special return criteria 5001 and 5002.<sup>27</sup>
- **Passport requirements** – for applications made on or after 1 July 2005 and before 24 November 2012, the applicant must satisfy either cl.115.228 or cl.835.228 (as relevant) – that is, he or she must hold a valid passport that was issued to the applicant by an official source, and is in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport. This criterion has been replaced by the very similarly termed PIC 4021, inserted into cl.114.223 and cl.838.223, which applies to visa applications made on or after 24 November 2012.<sup>28</sup>

## Secondary criteria

For secondary applicants the time of application criteria require:

- that he or she is ‘a member of the family unit’ of, and have made a combined application with, a person who satisfies (Subclass 114) or appears to satisfy (Subclass 838) the primary time of application criteria;<sup>29</sup> and
- the sponsorship in relation to the primary applicant has been approved by the Minister, is in force and includes the secondary applicant.<sup>30</sup>

In addition, secondary applicants must satisfy the following criteria at time of decision:

- he or she continues to be a member of the family unit of a person who is the holder of a Subclass 114 (for a Subclass 114 visa), or a member of the family unit of a person who having satisfied the primary criteria, holds a Subclass 838 visa (for a Subclass 838 visa);<sup>31</sup>
- the sponsorship of the primary applicant has been approved, is in force and includes sponsorship of the secondary applicant;<sup>32</sup>
- an assurance of support has been accepted by the Secretary of Social Services (formerly the Secretary of the Department of Family and Community Services) in relation to the secondary applicant, or the applicant is included in the assurance of support accepted in relation to the primary applicant;<sup>33</sup>
- for visa applications made on or after 1 July 2005 and prior to 24 November 2012, the secondary applicant holds a valid passport or, it would be unreasonable to require him /her to

<sup>26</sup> cl.114.226(2) and cl.838.224(2).

<sup>27</sup> cl.114.224 and cl.114.226(1)(aa). For further information, see MRD Legal Services commentary: [Special Return Criteria](#).

<sup>28</sup> cl.114.228 and cl.838.228, inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005, No.134) and repealed by SLI 2012, No.256.

<sup>29</sup> cl.114.311 and cl.838.311. ‘Member of the family unit’ is defined in r.1.12. See MRD Legal Services Commentary: [Member of the Family Unit](#).

<sup>30</sup> cl.114.312 and cl.838.312.

<sup>31</sup> cl.114.321 and cl.838.321.

<sup>32</sup> cl.114.322 and cl.838.325, as amended by Migration Amendment Regulations 2009 (No.2) (SLI 2009, No.42). The amendments apply to applications made prior to but not finally determined on 1 July 2009 and those made on or after 1 July 2009.

<sup>33</sup> cl.114.325 and cl.838.323 were amended by SLI 2014, No.30 to replace reference to the ‘Department of Family and Community Services’ with ‘Social Services’ for visa applications made on or after 22 March 2014.



be the holder of a passport;<sup>34</sup> and

- the secondary applicant satisfies certain public interest criteria (and special return criteria for Subclass 114).<sup>35</sup>

## Key issues

### Sponsorship

At the time of application, the applicant must be sponsored by either the Australian relative or a cohabiting partner who satisfies certain requirements.<sup>36</sup> At time of decision, the sponsorship must be approved by the Minister and be in force.<sup>37</sup>

With limited exceptions, sponsorship provisions are set out in r.1.20 of the Regulations.<sup>38</sup> Relevantly, the sponsor of an applicant for a visa is a person who undertakes the obligations set out in sub-regulation (2) in relation to a visa applicant and vary depending upon the type of visa being sought and whether the applicant is in Australia or offshore at the time of applying.<sup>39</sup>

### Changing sponsor

The time of decision criteria expressly require that the sponsorship referred to<sup>40</sup> or mentioned<sup>41</sup> at time of application to be approved and in force. While it may be open to contend this requires only that there is a sponsorship of the kind set out in the time of application criteria and, therefore, that the sponsor can be changed, this interpretation is not supported by a plain reading of the provisions. Specifically, reference to *the* sponsorship set out in the time of application criterion suggests that the sponsor must be the same at time of application and time of decision. This is further supported by guidance in PAM3 which states that there is no provision in the Regulations to change the sponsor.<sup>42</sup> Accordingly, on the later preferred view, it is not open for the sponsor to change.

### Multiple sponsors

There is also some uncertainty about whether an applicant can be sponsored for the visa by more than one person at the same time. Although the language in r.1.20(1) (e.g. – ‘*the* sponsor of an applicant...’ and the relevant schedule 2 criteria is expressed in the singular suggesting that only one sponsor is contemplated (e.g. – ‘that the applicant is sponsored by *the* Australian relative...’ and that ‘*the* sponsorship...has been approved by the Minister and is still in force’),<sup>43</sup> the Court in *Fernandez v MIBP* observed, in *obiter*, that it was not persuaded by the correctness of that view and that it seemed

<sup>34</sup> cl.114.327 and cl.838.326 inserted by SLI 2005 No. 134 and by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for secondary applicants are contained in PIC 4021 (see cl.114.323(a) and cl.838.322(a), as amended by SLI 2012, No.256.

<sup>35</sup> See clauses 114.323, 114.324, 114.326, 838.322 and 838.324. Clauses 114.323(a) and 838.322(a) were amended by SLI 2012, No.256, to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. It applies to all visa applications made on or after 24 November 2012. This requirement was previously contained in cl.114.327 and cl.838.326 which were repealed with effect from 24 November 2012, see SLI 2012, No.256. Clauses 114.323(a) and 838.322(a) were further amended by SLI 2013, No.146 to include a requirement to satisfy PIC 4020 for visa applications made prior to, but not finally determined as at 1 July 2013 and those made on or after that date.

<sup>36</sup> In order to be a sponsor, the co-habiting partner must: be the spouse or de facto partner of the Australian Relative; be 18 years of age; and be a settled Australian Citizen, Australian Permanent Resident or eligible New Zealand Citizen who is usually resident in Australia: cl.114.212 and cl.838.213.

<sup>37</sup> cl.114.212 and cl.114.222, cl.114.222 and cl.838.227.

<sup>38</sup> Regulation 1.20 does not apply to a limited number of visa types – see r.1.20(4) of the Regulations.

<sup>39</sup> r.1.20(2).

<sup>40</sup> cl.114.222.

<sup>41</sup> cl.838.227.

<sup>42</sup> PAM 3, Sch2 Visa 114 Aged Dependent Relative at [8] and PAM3- Sch2 Visa 838 Aged Dependent Relative at [9].

<sup>43</sup> cl.838.213 and cl.838.227.

at least possible to read r.1.20(1) as allowing for a visa applicant to be sponsored by more than one person.<sup>44</sup>

### **Aged dependent relative**

It is both a time of application and time of decision criterion that the visa applicant be the aged dependent relative of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.<sup>45</sup> 'Aged dependent relative' is defined in r.1.03 of the Regulations.<sup>46</sup> An applicant is an 'aged dependent relative' if he or she:

- does not have a spouse or de facto partner;
- has been, and remains, dependent on the Australian citizen, Australian permanent resident or eligible New Zealand citizen for a reasonable period; and
- is old enough to be granted an age pension under the *Social Security Act 1991*.

Individual components of these definitions are further defined in the Act and Regulations, and have also been the subject of judicial consideration (see below).

#### **Meaning of 'relative'**

For the purpose of an Aged Dependent Relative visa, 'relative' is defined in r.1.03 of the Regulations to mean:

- a 'close relative' which is defined by r.1.03 to mean a spouse or de facto partner, child (including adopted child), parent, brother or sister or their step equivalents; or
- a grandparent, grandchild, aunt, uncle, niece or nephew or their step equivalents.

Some of these terms are further defined by the Act and Regulations:

- 'Spouse' is defined in s.5F of the Act (married relationship);
- 'De facto partner' is defined in s.5CB of the Act (de facto relationship);
- 'Parent' is defined in s.5(1) of the Act and r.1.14A(1) of the Regulations;
- 'Child' is defined in s.5CA of the Act and r.1.14A(2) of the Regulations; and
- 'Step-child' is defined in r.1.03, and includes reference to a parent's 'de facto partner'.

#### **Does not have a spouse or de facto partner**

To meet the definition of 'aged dependent relative', the applicant must not have a spouse or de facto partner. 'Spouse' is defined for these purposes in s.5(1) of the Act as having the meaning given by s.5F. Section 5F provides that a person is the spouse of another person if the 2 persons are in a married relationship as set out in s.5F(2). Regulation 1.15A is relevant for the purposes of determining whether the conditions in s.5F(2) exist, although it's not a mandatory consideration for this subclass. See MRD Legal Services Commentary [Spouse and de facto partner](#) for further information.

<sup>44</sup> [2015] FCA 1265 (Robertson J, 20 November 2015). However the Court was not required to consider this issue and at [84] to [92] expressly declined to do so.

<sup>45</sup> Clauses 114.211, 114.221, 838.212 (see also definition in cl.838.111) and 838.221. 'Australian permanent resident' and 'eligible New Zealand citizen' are defined in r.1.03.

<sup>46</sup> Note the definition of 'aged dependent relative' was repealed by SLI 2014, No.65 for primary applications and most secondary applications made from 2 June 2014.

'De facto partner' is defined in s.5(1) of the Act as having the meaning given by s.5CB. Section 5CB provides that a person is the de facto partner of another person if the person is in a de facto relationship as set out in s.5CB(2). Regulation 1.09A is relevant for the purposes of determining whether the conditions in s.5CB(2) exist, although it too is not a mandatory consideration for this subclass. In addition, r.2.03A sets out the additional criteria that must be considered when determining whether someone is in a de facto relationship for the purposes of a visa application. These include: the minimum age of both parties being 18, and that the relationship must have existed for at least 12 months prior to the visa application, unless compelling and compassionate circumstances exist for grant of visa.<sup>47</sup> See MRD Legal Services Commentary [Spouse and de facto partner](#) for further information.

### ***Dependent on 'another person'***

To meet the definition of 'aged dependent relative' the visa applicant must be dependent on an Australian citizen, Australian permanent resident or eligible New Zealand citizen relative. 'Dependent' is defined in r.1.05A of the Regulations, although the definition differs depending upon the date of visa application. For detailed consideration of 'dependent' see MRD Legal Services commentary: [Dependent and Dependent Child](#).

### ***Dependent for a 'reasonable period'***

The definition of 'aged dependent relative' also requires that the visa applicant must be dependent on the relative for 'a reasonable period' and remain so dependent. This is a finding of fact for the Tribunal on all the evidence before it.

The definition of 'dependent' itself requires a person to be substantially reliant on another person for a 'substantial period'. How this requirement is reconciled with the requirement in the definition of aged dependent relative that the applicant be dependent for a 'reasonable period' was considered in *Huang v MIMA*.<sup>48</sup> In that case, the Court noted that the clear purpose of the Regulations was to ensure that the sponsor had a genuine opportunity to support the applicant and had been doing so for long enough prior to the application to demonstrate the alleged relationship of dependence was real and enduring.<sup>49</sup> In short, 'substantial period' should be understood to be a lengthy period.<sup>50</sup> The Court in *Huang* contrasted this with 'reasonable period' which it noted, need not be lengthy. In reconciling these two differing concepts, the Court concluded that r.1.03 the definition of 'aged dependent relative' with its reference to 'reasonable period', was the predominant provision and took precedence over the definition of 'dependent' in r.1.05A. The consequence being that the reference in the definition of 'dependent' to 'substantial period' was required to be read down to mean a period not more substantial than a reasonable period.<sup>51</sup>

'Reasonable period' is not defined in the Regulations and has been the subject of limited judicial consideration. In *Huang v MIMA*, the Court commented that it need not be a lengthy period, and that individual circumstances will affect what amounts to a reasonable period.<sup>52</sup> In *Fernandez v MIBP*, the Court found no error in the Tribunal's statement that, in the particular facts of that case, '*...any assessment of a reasonable period when the applicant has been dependant upon the sponsor must include a period of time prior to this arrival in Australia, when he was resident in Uruguay*'.<sup>53</sup> Other

<sup>47</sup> r.2.03A(3). The 12 month relationship requirement only applies in relation to applications for permanent, Business Skills (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or GSM visas.

<sup>48</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007).

<sup>49</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007) at [37], [43].

<sup>50</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007) at [43].

<sup>51</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007) at [47].

<sup>52</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007) at [44].

<sup>53</sup> [2015] FCCA 1698 (Judge Street, 19 June 2015) at [13] to [15]. Upheld on appeal in *Fernandez v MIBP* [2015] FCA 1265 (Robertson J, 20 November 2015).

judicial consideration of the definition of 'aged dependent relative' provides little guidance as to the meaning of 'reasonable period'. The Court in *Zeng v MIMIA* considered the concepts of 'substantially reliant' and 'substantial period' in relation to r.1.05A ('dependent') in the context of the definition of 'aged dependent relative' (r.1.03), but did not expressly consider the meaning of 'reasonable period'.<sup>54</sup> Whilst the Court's observations in relation to 'substantial period' are relevant to the consideration of the definition of aged dependent relative, they must nevertheless not be read as requiring a period that is more than reasonable in the circumstances. For a full discussion of *Zeng* and 'substantial period' see MRD Legal Services commentary [Dependent and Dependent Child](#).

Departmental guidelines (PAM3) interpret a 'reasonable period' in this context as being three years, or a lesser period if otherwise satisfied that the applicant has received ongoing support from the Australian relative.<sup>55</sup> However, this interpretation is difficult to reconcile with the Departmental guidelines on r.1.05A, which state that a 'substantial period' for the purpose of assessing r.1.05A is a period of 'at least 12 months'.<sup>56</sup> This is particularly so in light of the finding in *Huang v MIMIA* that the term 'substantial period' in r.1.05A is to be read down to mean a period not more substantial than a 'reasonable period'.<sup>57</sup> Accordingly, whilst guidelines in PAM3 offer one interpretation of the term 'reasonable period', decision-makers should be cautious in adopting this interpretation without considering whether it is appropriate in the individual case.

#### ***Old enough to be granted an age pension under the Social Security Act 1991***

To meet the definition of 'aged dependent relative' the applicant must also be old enough to be granted an aged pension under the *Social Security Act 1991*. Different age qualifications apply for men and women, and will depend upon a factual finding of the particular applicant's date of birth.

<sup>54</sup> [2005] FMCA 546 (Riethmuller FM, 27 April 2005). Riethmuller FM held that 'substantial period' must be determined having regard to the facts and circumstances of the particular case, and the following factors would be relevant: the actual period of dependence, the reason for the dependence and the extent or nature of the dependence: at [13]. In respect of the issue of 'substantial dependence' in r.1.05A, his Honour held that relevant considerations include: the nature of the person's needs, the extent to which such needs are being met from the person's own resources, the extent to which the needs are being met by the sponsor, and whether the nominator has an obligation (and the extent of that obligation) to meet such needs having regard to the nature of the relationship: at [11]. The comments in *Zeng* should be read in light of subsequent jurisprudence on the definition of 'dependent' in r.1.05A, such as *Huynh v MIMA* (2006) 152 FCR 576. See MRD Legal Services Commentary [Dependent and Dependent Child](#).

<sup>55</sup> PAM3 - > Migration Regulations - Divisions > Div 1.2 - Interpretation > Reg 1.03 - Aged dependent relative (01/07/2016 compilation) at [5.4].

<sup>56</sup> PAM3 - Migration Act > Act- defined terms instructions -s5G -s5G - Relationships and family members - Dependent family members 01/07/2016 compilation) at [42.2].

<sup>57</sup> [2007] FMCA 720 (Cameron FM, 16 May 2007) at [47].

For men, the relevant pension ages are:

<b>Period during which man was born<sup>58</sup></b>	<b>Pension age</b>
On or before 30 June 1952	65 years
1 July 1952 to 31 December 1953	65.5 years
1 January 1954 to 30 June 1955	66 years
1 July 1955 to 31 December 1956	66.5 years
On or after 1 January 1957	67 years

For women, the relevant pension ages are:

	<b>Date of Birth</b>	<b>Pension age</b>
	Before 1 July 1935 <sup>59</sup>	60 years
<b>Period within which woman was born<sup>60</sup></b>	From 1 July 1935 to 31 December 1936	60.5 years
	From 1 January 1937 to 30 June 1938	61 years
	From 1 July 1938 to 31 December 1939	61.5 years
	From 1 January 1940 to 30 June 1941	62 years
	From 1 July 1941 to 31 December 1942	62.5 years
	From 1 January 1943 to 30 June 1944	63 years
	From 1 July 1944 to 31 December 1945	63.5 years
	From 1 January 1946 to 30 June 1947	64 years
	From 1 July 1947 to 31 December 1948	64.5 years
<b>Period during which woman was born<sup>61</sup></b>	1 January 1949 to 30 June 1952	65 years
	1 July 1952 to 31 December 1953	65.5 years
	1 January 1954 to 30 June 1955	66 years
	1 July 1955 to 31 December 1956	66.5 years
	On or after 1 January 1957	67 years

<sup>58</sup> *Social Security Act 1991*, s.23(5A).

<sup>59</sup> *Social Security Act 1991*, s.23(5B).

<sup>60</sup> *Social Security Act 1991*, s.23(5C).

<sup>61</sup> *Social Security Act 1991*, s.23(5D).

## Relevant case law

<a href="#">Chakera v IRT (1993) 42 FCR 525</a>	
<i>Falk v Falk</i> (1977) FLC 90-247	
<a href="#">Guan v MIMIA [2004] FMCA 827</a>	
<a href="#">Huang v MIMA [2007] FMCA 720</a>	<a href="#">Summary</a>
<i>In the Marriage of Hodges</i> (1977) 2 Fam LR 11, 524	
<i>In the Marriage of Tye</i> (1976) 1 Fam LR 11, 235	
<a href="#">Kaur v MIMIA [2005] FMCA 839</a>	
<a href="#">Le v MIAC [2008] FMCA 1367</a>	<a href="#">Summary</a>
<i>Pavey v Pavey</i> (1976) 1 Fam LR 11, 358	
<a href="#">Zeng v MIMIA [2005] FMCA 546</a>	<a href="#">Summary</a>

## Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 1998 (No.8)</a>	SR 1998, No.285
<a href="#">Migration Amendment Regulations 1999 (No.13)</a>	SR 1999, No.259
<a href="#">Migration Amendment Regulations 2000 (No.2)</a>	SR 2000, No.62
<a href="#">Migration Amendment Regulations 2002 (No.2)</a>	SLI 2002, No.86
<a href="#">Migration Amendment Regulations 2005 (No.4)</a>	SLI 2005, No.134
<a href="#">Migration Amendment Regulations 2007 (No.7)</a>	SLI 2007, No.314
<a href="#">Migration Amendment Regulations 2009 (No.2)</a>	SLI 2009, No.42
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Legislation Amendment Regulation 2012 (No.5)</a>	SLI 2012, No.256
<a href="#">Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013</a>	SLI 2013, No.118
<a href="#">Migration Legislation Amendment Regulation 2013 (No.3)</a>	SLI 2013, No.146
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65
<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015.</a>	SLI 2015, No.34

## Available decision templates

There are two decision templates available for Subclasses 114 and 836. These are:

- **Subclass 114 Visa Refusal – Aged Dependent Relative** - This template is for use in reviews of decisions to refuse a Subclass 114 Aged Dependent Relative visa, and asks the user to nominate the criterion in issue ('aged dependent relative' criterion or 'other criteria'), and will adjust the content accordingly.
- **Subclass 838 Visa Refusal – Aged Dependent Relative** - This template is for use in reviews of decisions to refuse a Subclass 838 Aged Dependent Relative visa, and asks the user to nominate the criterion in issue ('aged dependent relative' criterion or 'other criteria'), and will adjust the content accordingly.

**Last updated/reviewed: 15 July 2019**

Released by the  
AAT under FOI on  
19 September 2019



# Assurance of Support cases – Post 1 July 2004

## Overview

### Key issues

- [Definition of assurance of support](#)
- [Assurance of support as a visa criterion](#)

### Merits Review

- Procedure for Tribunal where Assurance of Support criterion is sole issue in dispute
- Tribunal's power to revisit discretion to request an Assurance of Support

### Relevant legislative amendments

Released by the  
AAT under FOI on  
19 September 2019

## Overview

An Assurance of Support (AoS) is a legal undertaking by a person (the assurer) to repay to the Australian Government certain social security payments paid by the Department of Human Services (DHS) to a person (a visa holder) covered by the AoS.

Some visa criteria include a requirement for an AoS.<sup>1</sup> Where an AoS is required, the assurance must be accepted by the Secretary of Social Services.<sup>2</sup> The *Social Security Act 1991* provides for an AoS to be given and accepted or rejected.<sup>3</sup>

Since 1 July 2004, DHS (formerly Centrelink)<sup>4</sup> has been responsible for processing all AoS applications.<sup>5</sup> Decisions not to accept an AoS are reviewable under the *Social Security (Administration) Act 1999*.<sup>6</sup> Where a decision to refuse to grant a visa is reviewable by the Tribunal, the review may require consideration of whether an AoS has been accepted or, where an AoS is a discretionary requirement, whether an AoS should be required. However, the Migration and Refugee division of the Tribunal does not have jurisdiction to review the decision to reject the AoS as this is not a Part 5 or Part 7 reviewable decision under the *Migration Act 1958*.

## Key issues

### Definition of Assurance of Support

The term 'assurance of support' is defined in the Migration Regulations 1994 (the Regulations).

For visa applications made before 22 March 2013, r.1.03 states that an 'assurance of support':

<sup>1</sup> See cl. 101.225, 102.225, 103.226, 114.225, 115.225, 117.224, 143.228, 151.229B, 802.222, 804.224, 835.222, 837.222, and 864.226 of Schedule 2 to the Regulations. The Discretionary AoS criterion for Subclass 100, 300, 309, 801 and 820 was omitted by Migration Legislation Amendment Regulations 2011 (No.2), effective 1 January 2012.

<sup>2</sup> In practice, this power is delegated under s.234 of the *Social Security (Administration) Act 1999* by the Secretary to DHS employees. Prior to 22 March 2014, Schedule 2 AoS criteria referred to the Secretary of the Department of Family and Community Services rather than the Secretary of Social Services. However, the former reference was taken to apply to the various names of that Department. Section 19B of the *Acts Interpretation Act 1901* provides for an amending order where the names of portfolios or departments are changed. An AoS accepted by the Secretary of the Department of Social Services or the Department of Social Services at the relevant time will satisfy the Schedule 2 criteria. See Schedule 3, Part 5, Item 1 (13 March 2006) and Schedule 3, Part 7, Item 10 (18 December 2007) and Schedule 3, Part 14, Item 1 (12 November 2013) of the [Acts Interpretation \(Substituted References – Section 19B\) Order 1997](#). From 22 March 2014, the Schedule 2 AoS criteria were amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No. 30) to refer directly to the 'Secretary of Social Services'. A new definition of 'Secretary of Social Services' was also inserted into r.1.03 of the Regulations. The ES to SLI 2014, No.30 stated 'For the purposes of the Principal regulations, the term 'Secretary of Social Services' is defined to mean the Secretary of the Department that is administered by the Minister administering section 1061ZZGD of the *Social Security Act 1991* (Social Security Act). As there are multiple Ministers that administer the Social Security Act it is necessary to refer to the relevant provision relating to Assurances of Support. The defined term remains current irrespective of the name of the portfolio of that Minister or any future changes in the name of the portfolio. The purpose of the amendment is to update the reference and avoid further amendments each time the portfolio name changes'. SLI 2014, No.30 amended a total of 42 provisions in Schedule 2 to the Regulations, to omit the words 'the Department of Family and Community Services' and substitute the words 'Social Services': Schedule 1, Part 3, items [71] and [75].

<sup>3</sup> s.1061ZZGD of the *Social Security Act 1991*. The definition of *Secretary of Social Services* under r.1.03 of the Regulations is also relevant, which is defined as the Secretary of the Department that is administered by the Minister administering section 1061ZZGD of the *Social Security Act 1991*. See note [2] above.

<sup>4</sup> Centrelink was integrated into the Department of Human Services on 1 July 2011 by the *Human Services Legislation Amendment Act 2011* (No 32, 2011).

<sup>5</sup> *Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Act 2003*, s.2, Schedule 3.

<sup>6</sup> *Social Security (Administration) Act 1999*, ss.3 and 126.

*in relation to an application for the grant of a visa, means:*

- (a) *for an assurance of support accepted by the Minister before 1 July 2004 — an assurance of support under Division 2.7; and*
- (b) *in any other case — an assurance of support under Chapter 2C of the Social Security Act 1991.*

For visa applications made on or after 22 March 2014, r.1.03 states that an ‘assurance of support’:

*in relation to an application for the grant of a visa, means an assurance of support under Chapter 2C of the Social Security Act 1991.<sup>7</sup>*

‘Assurance of Support’ is separately defined for the purpose of Chapter 2C of the *Social Security Act 1991* as:

*... an undertaking by a person under this Chapter that the person will pay the Commonwealth an amount equal to the amount of social security payments that are:*

- (a) *received in respect of a period by another person who:*
  - (i) *is identified in the undertaking; and*
  - (ii) *becomes the holder under the Migration Act 1958 of a visa granted in connection with the undertaking (whether or not the person continues to hold the visa throughout the period); and*
- (b) *specified in a determination in force under section 1061ZZGH when the payments are received.<sup>8</sup>*

An Assurance of Support (AoS) is, then, a legal undertaking by the assurer to repay to the Australian Government certain security payments paid by DHS to the person covered by the AoS. The assurer must be an Australian resident.<sup>9</sup> There is no requirement that the assurer be related to the visa applicant. In most cases, the AoS operates for 2 years.<sup>10</sup> The exception applies to Contributory Parent visas, where the AoS operates for 10 years. The AoS commences at the later time of either the:

- date of the relevant visa grant if the visa is granted to an applicant in Australia; or the
- date the visa holder first arrives in Australia holding the relevant visa.<sup>11</sup>

### **Assurance of support as a visa criterion**

Acceptance of an AoS is prescribed in Schedule 2 as a time of decision criterion for the grant of certain visa subclasses (generally, permanent visas or temporary (provisional) visas likely to lead to the grant of a permanent visa).<sup>12</sup> The Schedule 2 criteria specify whether an AoS is mandatory or discretionary. Where an AoS is discretionary, the decision maker must decide whether to request an AoS. If an AoS is not requested, then the Schedule 2 criterion requiring acceptance of an AoS for that visa application does not apply.

<sup>7</sup> Regulation 1.03, as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No. 30), Schedule 1, Part 7, item [143] and applying to visa applications made on or after 22 March 2014: SLI 2014, No.30, Part 28, item [2801]. The amendment to r.1.03 omitted the redundant reference to assurances of support accepted by the Minister before 1 July 2004.

<sup>8</sup> See s.1061ZZGA of the *Social Security Act 1991*, [Social Security \(Assurances of Support\) \(DEEWR\) Determination 2008](#).

<sup>9</sup> *Social Security Act 1991*, s.1061ZZGH; Social Security (Assurances of Support) (DEEWR) Determination 2008, para 7.

<sup>10</sup> *Social Security Act 1991*, s.1061ZZGH; Social Security (Assurances of Support) (DEEWR) Determination 2008, para 17.

<sup>11</sup> *Social Security Act 1991*, s.1061ZZGF(1).

<sup>12</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > The AoS as a visa requirement > at [9.1] (re-issue date: 22/03/2014).

A mandatory AoS criterion typically states:

*The Minister is satisfied that the assurance of support in relation to the applicant has been accepted by the Secretary of the Social Services.*<sup>13</sup>

An AoS is a mandatory requirement for a Contributory Parent (Subclass 143) and Contributory Aged Parent (Subclass 864) visa.<sup>14</sup> The AoS is a discretionary requirement for other visa subclasses, including for example, Child, and Adoption.<sup>15</sup>

A discretionary AoS criterion typically states:

*If the Minister has requested an assurance of support in relation to the applicant, the Minister is satisfied that the assurance has been accepted by the Secretary of Social Services.*<sup>16</sup>

## Merits Review

Since 1 July 2004, AoS applications, including unresolved applications made prior to that date have been processed by DHS (formerly Centrelink).<sup>17</sup> Decisions to reject an AoS are reviewable under the *Social Security (Administration) Act 1999*. The review provisions provide for internal review as well review by the Tribunal in its Social Security and General divisions but not in the Migration and Refugee Division.<sup>18</sup>

### **Procedure for Tribunal where Assurance of Support criterion is sole issue in dispute**

In some cases, the visa refusal decision is solely made on the basis of the criteria requiring that an assurance of support has been accepted by the Secretary of the Department of Social Services. Where an AoS is mandatory, or has been requested (and the Tribunal agrees that it should be requested), the Tribunal may defer consideration of the matter while the applicant is referred to DHS to obtain the AoS assessment. If the assessment is favourable, the Tribunal can remit with a permissible direction relating to this AoS criterion. Where an AoS is rejected by DHS, the Tribunal

<sup>13</sup> Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No.30, Schedule 1, Part 3, item [75]. For a discussion of this change, see note [2].

<sup>14</sup> An AoS was also a mandatory requirement for a number of family visa subclasses repealed with effect from 2 June 2014 by the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 SLI No. 65 2014, including Subclasses 103 (Parent), 114 (Aged Dependent Relative), 115 (Remaining Relative), 804 (Aged Parent), 835 (Remaining Relative) and 838 (Aged Dependent Relative). For applications for these subclasses lodged before 2 June 2014, or for permitted combined applications taken to be made after that time in accordance with r.2.08 or r.2.08A, an AoS remains a mandatory Schedule 2 requirement. For matters decided on or before 1 January 2008, an AoS was also a mandatory requirement for Subclass 116 and 836 carer visas and the pre 1 September 2007 skilled migration visas (i.e. subclasses 134, 136, 137, 138, 139, 861, 862, 863, 880, 881, 882 and 883). However, this requirement was removed with effect from 1 January 2008, in respect of visa applications made but not finally determined prior to 1 January 2008 and visa applications made on or after 1 January 2008: Migration Amendment Regulations 2007 (No. 14) (SLI 2007 No. 356) and Migration Amendment Regulations 2007 (No. 7) (SLI 2007 No. 257).

<sup>15</sup> An AoS is a discretionary Schedule 2 requirement for the following visas: 101 (Child), 102 (Adoption), 117 (Orphan Relative), 151 (Former Resident), 802 (Child) and 837 (Orphan Relative). Note that there were AoS criteria for partner visas, but they were removed for visa applications not finally determined as at 1 January 2012, as well as visa applications made on or after that date: Migration Legislation Amendment Regulations 2011 (No. 2), r.7 and Schedule 5, item [1].

<sup>16</sup> Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No.30, Schedule 1, Part 3, item [75]. For a discussion of this change, see note [2].

<sup>17</sup> *Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Act 2003*, s.2, Schedule 3.

<sup>18</sup> *Social Security (Administration) Act 1999*, ss. 3, 126, 140, 142, 178, 179.

may need to consider whether it should delay its decision pending the assurer availing him/herself of the available review process. Relevant matters for consideration may include whether the applicant is taking reasonable steps to progress the review. Ultimately, if an AoS is not approved, the Tribunal must affirm the decision under review.

### ***Tribunal's power to revisit discretion to request an Assurance of Support***

Where an AoS is a discretionary requirement, an issue may arise as to whether the AoS should be requested in the first place. As the decision to impose a discretionary AoS is part of the exercise of the power under s.65 of the *Migration Act 1958* (the Act) (to grant or refuse a visa), the Tribunal can consider the question of whether to request a discretionary AoS in a particular case, pursuant to its powers under s.349 of the Act by which it can *exercise all the powers and discretions that are conferred by the Act on the person who made the original decision*.

This view finds some support in the *obiter* comments of Sackville J in *Esteron v MIEA*<sup>19</sup>, where his Honour says (in relation to a similar provision contained in the Migration Regulations 1989):

*The view I have expressed receives support from language used elsewhere in reg 131A(1) itself. Under reg 131A(1)(e), if the Minister forms the opinion that the applicant should provide an assurance of support, an assurance satisfactory to the Minister must be given. The reference to the Minister's opinion in reg 131A(1)(e) is clearly intended to include the opinion formed by the Tribunal on an application for review of the Minister's decision. This suggests that the references to "the Minister" in reg 131A(1) are not intended to be confined to the Minister or the delegate, as opposed to the Tribunal exercising its power to review the Minister's decision on the merits.*<sup>20</sup>

If considering revisiting the discretion however, the Tribunal needs to have a basis for making a decision not to request an AoS in the circumstances of the case.

Where an AoS is discretionary, Departmental guidelines contemplate that a delegate will request an AoS only if the delegate reasonably believes that an adult applicant, who needs to satisfy primary criteria, is likely to need any of the social security allowances that are recoverable under the AoS Scheme.<sup>21</sup> Departmental officers are advised, in deciding whether to request an AoS in the circumstances described above, to consider relevant social and economic aspects of the application including the applicant's age, employment prospects (including skills and qualifications) and eligibility for the prescribed allowances and, if sponsored, the ability of the sponsor to provide assistance beyond that to be provided as part of their sponsorship undertaking. On the other hand, officers are also recommended to consider whether compelling and compassionate circumstances exist that would constitute a justifiable reason to not request a discretionary AoS.<sup>22</sup>

In accordance with Departmental guidelines, relevant considerations may include the sponsor's financial status and the visa applicant's skills, education, employment history, English language ability and age. It may also be appropriate to seek information about a sponsor's social security payment

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<sup>19</sup> (1995) 57 FCR 126.

<sup>20</sup> *Esteron v MIEA* (1995) 57 FCR 126 (Sackville J, 19 May 1995).

<sup>21</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.1] (re-issue date: 22/03/2014).

<sup>22</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.2] (re-issue date: 22/03/2014).

history.<sup>23</sup> Other circumstances, including those relating to the sponsor's background, social support, medical and psychological conditions and impact of delay in processing of the visa on her/his wellbeing and future prospects, are also all potentially relevant circumstances to the exercise of the discretion to request an assurance of support. However, in the end the Tribunal's task is to make 'the correct or preferable decision' on the available material and the Tribunal should take into account all of the relevant claims and evidence in undertaking its consideration.

The Departmental guidelines consider that it is open to withdraw a request to provide an AoS prior to decision provided there is a justifiable reason to do so.<sup>24</sup> This is consistent with the position that it is open to the Tribunal on review to make a fresh decision as to whether to request an AoS. The same considerations relevant to considering whether an AoS should be requested are relevant to the consideration of whether one is no longer required, taking into account any more recent information. The Departmental guidelines suggest that an improvement in the material circumstances of the applicant and/or the sponsor would constitute a justifiable reason for withdrawal of an AoS request, and also that compelling and compassionate circumstances affecting the interests of the applicant and/or sponsor may also warrant a withdrawal.<sup>25</sup>

In considering the exercise of the discretion as to whether to request an AoS (or revisiting the request made by the delegate), the Tribunal should have regard to any lawful policy, noting that it is not bound to apply policy, and would be in error to apply it as a legal requirement. For further guidance on the appropriate application of policy see MRD Legal Services' commentary: [Application of policy](#).

If the Tribunal decides on review not to request an AoS, the Tribunal will not be able to remit with a permissible direction in relation to the AoS criterion as that criterion will no longer apply. In such a case, the Tribunal should go on to consider another criterion.<sup>26</sup>

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 2007 (No. 7)</a>	SLI 2007 No. 257
<a href="#">Migration Amendment Regulations 2007 (No. 14)</a>	SLI 2007 No. 356
<a href="#">Migration Legislation Amendment Regulations 2011 (No.2)</a>	SLI 2011 No. 250
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014 No. 30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014 No. 65

<sup>23</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.2] (re-issue date: 22/03/2014).

<sup>24</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.5] (re-issue date: 22/03/2016).

<sup>25</sup> See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.5] (re-issue date: 22/03/2016).

<sup>26</sup> Under s.349(2)(c) of the Act the Tribunal has the power to remit a matter for reconsideration in accordance with such directions as permitted by the Regulations. Regulation 4.15(1)(b) prescribes a permissible direction as that the applicant must be taken to have satisfied a specified criterion for the visa. It will be necessary for the Tribunal to identify a criterion of the visa which the applicant satisfies in order to be able to remit the matter for reconsideration in accordance with the Act.

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AAT under FOI on  
19 September 2019



# Carer visas: Subclass 116 and 836

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## Overview

The purpose of the Carer visa is to allow an Australian citizen, permanent resident or eligible New Zealand citizen, with a medical condition causing a significant level of impairment (or who has a family unit member with such an impairment), to sponsor an overseas relative to Australia to provide assistance of the kind required for the Australian relative (or their family unit member).

The Carer visa is available to both onshore and offshore applicants: Class BU (Other Family) (Residence) Subclass 836 (Carer) is for onshore applicants, whilst Class BO (Other Family) (Migrant) Subclass 116 (Carer) is for offshore applicants. Class BU and Class BO both contain two other subclasses, being Aged Dependent Relative and Remaining Relative.

The Carer visa replaced the Special Need Relative visa, which was repealed as of 1 December 1998. The Special Need Relative visa subclass had similar aims to the Carer visa subclass, but did not contain an objective requirement that the medical condition/impairment suffered by the sponsoring Australian relative (or by a family unit member of the sponsor) be assessed and certified by a health service provider. Further details are contained in the MRD Legal Services Commentary: [Special Need Relative](#).

For a short period only during 2014, the Subclass 116 (Carer) and Subclass 836 (Carer) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>1</sup>

## Merits Review

A decision to refuse a Subclass 836 visa is a reviewable decision under s.338(2) of the *Migration Act 1958* (the Act). The visa applicant has standing to apply for review.<sup>2</sup>

A decision to refuse an offshore Subclass 116 visa is reviewable under s.338(5) if the applicant is sponsored by an Australian citizen, holder of a permanent visa, or a New Zealand citizen holding a special category visa. The sponsor has standing to apply for review.<sup>3</sup>

## Visa Application Requirements

It is a requirement for making a valid visa application for a Class BO and Class BU visa as Carer, that the visa application be accompanied by satisfactory evidence that the relevant medical assessment has been sought.<sup>4</sup> If this evidence is lacking, the visa application will be invalid. Other requirements

<sup>1</sup> From 2 June 2014 to 25 September 2014, Class BO and Class BU visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class BO and Class BU visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

<sup>2</sup> s.347(2)(a).

<sup>3</sup> s.347(2)(b).

<sup>4</sup> Item 1123A(3)(c) and 1123B(3)(d) of Schedule 1 to the Migration Regulations 1994.

for making a valid visa application are set out in Schedule 1, items 1123A (Class BO) and 1123B (Class BU).

### Applications lodged prior to 18 April 2015

An application for a Subclass 116 (Carer) (Migrant) (Class BO) visa must be made outside Australia on the approved form and be accompanied by the prescribed fee.<sup>5</sup>

An application for a Subclass 836 (Carer) (Residence) (Class BU) visa must be made inside Australia while the applicant is inside Australia (but not in immigration clearance) on the approved form and be accompanied by the prescribed fee.<sup>6</sup> In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.<sup>7</sup>

An application by a person claiming to be a member of the family unit of a primary applicant both a Class BO and BU visa may be made at the same time and place as, and combined with, the application by that person.<sup>8</sup>

### Applications lodged on or after 18 April 2015

For applications lodged on or after 18 April 2015, an application for a Subclass 116 (Carer) (Migrant) (Class BO) visa must be made on the form, at the place, and in the manner specified by the Minister in a legislative instrument and the applicant must be outside Australia.<sup>9</sup>

An application for a Subclass 836 (Carer) (Residence) (Class BU) visa must be made while the applicant is inside Australia (but not in immigration clearance) on the form, at the place, and in the manner specified by the Minister in a legislative instrument.<sup>10</sup>

Application by a person claiming to be a member of the family unit of a primary applicant both a Class BO and BU visa may be made at the same time and place as, and combined with, the application by that person.<sup>11</sup>

## Visa criteria - an overview

The visa criteria for Subclass 116 and 836 are very similar. The key difference is that the onshore Subclass 836 visa has additional time of application criteria relating to immigration status, and the type of visa required to be held by the applicant, and the sponsor must be 'settled' and 'usually resident' in Australia.

Both Parts 116 and 836 also contain secondary criteria that must be satisfied by visa applicants who are members of the family unit of a person who satisfies the primary criteria.

<sup>5</sup> Item 1123A(1) and (2) of Schedule 1 to the Regulations.

<sup>6</sup> Item 1123B(1), (2) and (3).

<sup>7</sup> Item 1123B(3)(ca) as inserted by Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (SLI 2013 No.118).

<sup>8</sup> Items 1123A(3)(b) and 1123B(3)(c) in Schedule 1 for subclasses 115 and 835 respectively.

<sup>9</sup> Items 1123A(1), (3)(a) and (3)(aa) as amended by the Migration Amendment (2015 Measures No.1) Regulation 2015, SLI 2015, No.34.

<sup>10</sup> Item 1123B(1) and (3)(a) as amended by SLI 2015, No.34.

<sup>11</sup> Items 1123A(3)(b) and 1123B(3)(c).

## Subclass 116

The criteria for a Subclass 116 (Carer) visa are contained in Part 116 of Schedule 2 to the Migration Regulations 1994 (the Regulations). There are both time of application and time of decision criteria.

### ***Time of application criteria***

At the time of application, the primary applicant must satisfy two criteria. These are:

- the applicant *claims* to be the 'carer' of an 'Australian relative';<sup>12</sup>
- the applicant is sponsored by the Australian relative or by the partner<sup>13</sup> of the Australian relative.<sup>14</sup> The sponsor must have turned 18. If the partner is the sponsor, he or she must cohabit with the Australian relative and also be an Australian citizen, permanent resident or eligible New Zealand citizen.

### ***Time of decision criteria***

At the time of decision, the primary visa applicant must satisfy the following criteria:

- the applicant *is* the carer of the 'Australian relative'.<sup>15</sup> The Australian relative must be the same relative that the applicant claimed to be carer of at the time of application.
- the sponsorship has been approved and is in force;<sup>16</sup>
- the applicant and family members (including those who are not applicants for the visas) satisfy certain Public Interest Criteria (PIC), and applicable special return criteria;<sup>17</sup>
- *for applications made on or after 1 July 2005 and prior to 24 November 2012*, the applicant meets certain passport requirements;<sup>18</sup>
- *for applications made on or after 1 July 2011*, where the applicant has not turned 18, PIC 4017 and 4018 are satisfied in relation to the applicant.<sup>19</sup>

<sup>12</sup> cl.116.211 of Schedule 2 to the Regulations.

<sup>13</sup> For visa applications made before 1 July 2009, the sponsorship is limited to the relative or the relative's 'spouse' as defined in the then r.1.15A (i.e. married or opposite sex de facto partner). For visa applications made on or after 1 July 2009, the relative or the relative's 'spouse' or 'de facto partner' may be the sponsor. 'Spouse' for these purposes is defined in s.5F of the Act (i.e. married), and 'de facto partner' in s.5CB of the *Migration Act 1958*. See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* and Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). The definition of 'spouse' in s.5F was amended with effect from 9 December 2017 (applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (No. 129, 2017) to include same-sex marriages.

<sup>14</sup> cl.116.212.

<sup>15</sup> cl.116.221.

<sup>16</sup> cl.116.222.

<sup>17</sup> cll.116.223, 116.224, 116.226, 116.227. Clause 116.227 was amended on 1 July 2000. This amended version applies to visa applications made from 1 July 2000. However, if the visa application was made before 1 July 2000 and after it is made, but before it is decided, the applicant requests the Minister to have a member of his or her family unit who has not turned 18, added to the application (whether or not the request is made before 1 July 2000); and under r.2.08A(1)(e), the additional applicant is taken to have applied for a visa of the same class as the applicant, then the pre 1 July 2000 version of cl.116.227 applies: Migration Amendment Regulations 2000 (No.2) (SR 2000, No.62). Clause 116.223(a) was amended by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256), to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4021 requires either: that the applicant hold a valid passport that; was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an [instrument in writing for cl.4021\(a\)](#); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.116.228 which was repealed with effect from 24 November 2012. This amendment to cl.116.223(a) applies to all visa applications made from 24 November 2012. Clauses 116.223(a) and 116.226(1)(a) were further amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146) to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular) for visa applications made but not finally determined before 1 July 2013 and those made on or after that date.

<sup>18</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.116.228. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.116.223(a) refers – see above).

## Subclass 836

The criteria for a Subclass 836 (Carer) visa are contained in Part 836 of Schedule 2 to the Regulations. There are both time of application and time of decision criteria.

### ***Time of application criteria***

There are three criteria to be met at the time of application. These are:

- the applicant *claims* to be the 'carer' of an 'Australian relative';<sup>20</sup>
- the applicant is sponsored by the Australian relative or by the partner<sup>21</sup> of the Australian relative.<sup>22</sup> The sponsor must:
  - have turned 18;
  - be a *settled* Australian citizen, permanent resident or eligible New Zealand citizen;
  - be usually resident in Australia; and
  - if the abovementioned partner is the sponsor, he or she must cohabit with the Australian relative.
- the applicant holds substantive visa other than a Subclass 771 (Transit) visa or if not the holder of a substantive visa, satisfies the Schedule 3 criterion 3002, and did not immediately prior, hold a Subclass 771 visa.<sup>23</sup>

### ***Time of decision criteria***

At the time of decision, the primary visa applicant must satisfy the following criteria:

- the applicant *is* the carer of the 'Australian relative';<sup>24</sup> Note that the Australian relative must be the same relative that the applicant claimed to be carer of at the time of application.
- the applicant and family members (including those who are not applicants for the visas) satisfy certain Public Interest Criteria, and applicable special return criteria;<sup>25</sup>
- the sponsorship has been approved and is still in force;<sup>26</sup>

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<sup>19</sup> cl.116.229, inserted by the Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011, No.105).

<sup>20</sup> cl.836.212.

<sup>21</sup> See footnote 11 for the definition of 'spouse'.

<sup>22</sup> cl.836.213. Amended on 1 July 2002. The amended version of this criterion applies to visa applications made on or after 1 July 2002: Migration Amendment Regulations 2002 (No.2) (SR 2002, No.86).

<sup>23</sup> cl.836.211 amended by Migration Amendment Regulations 2000 (No.5) (SR 2000, No.259). The amended version commenced on 1 November 2000. While it is uncertain if the amended version was intended to have retrospective effect as there were no transitional provisions specified, it is unlikely to make any practical difference.

<sup>24</sup> cl.836.221.

<sup>25</sup> cl.836.223, 836.224, 836.225, 836.226. Clauses 836.225 and 836.226 were amended on 1 July 2000. This amended version applies to visa applications made from 1 July 2000. However, if the visa application made before 1 July 2000 and after the application is made, but before it is decided, the applicant makes a request to the Minister to have a member of his or her family unit who has not turned 18 added to the application (whether or not the request is made before 1 July 2000); and under r.2.08A(1)(e), the additional applicant is taken to have applied for a visa of the same class as the applicant, then the pre 1 July 2000 version of cl.836.225 and 836.226 apply: SLI 2000, No.62. Clause 836.223(a) was amended by SLI 2012, No.256 to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4012 requires either that the applicant hold a valid passport that was issued by an official source, is in the form issued by that source and is not in a class of passports specified by the Minister in an [instrument in writing for cl.4021\(a\)](#); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.836.228 which was repealed with effect from 24 November 2012 by SLI 2012, No.256. This amendment to cl.836.223(a) applies to all visa applications made from 24 November 2012. Clauses 836.223(a) and 836.224(1) were further amended by SLI 2013, No.146 to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular). These changes apply to visa applications made but not finally determined before 1 July 2013 and those made on or after that date.

- for applications made on or after 1 July 2005 and prior to 24 November 2012, the applicant meets certain passport requirements.<sup>27</sup>

## Key criteria and issues

### Carer of an Australian relative

It is a time of application and time of decision criterion for both Subclass 116 and 836 visas that the visa applicant claims to be / is the 'carer' of an Australian relative. The definition of 'Australian relative' is set out in cl.116.211 and cl.836.111. The definition of 'carer' is set out in r.1.15AA and is discussed below.

It is a requirement for the making of a valid visa application for both a Subclass 116 and 836 visas that an application by a person claiming to be a carer be accompanied by 'satisfactory evidence' that the relevant medical assessment has been sought. This means that a valid application can be made prior to the assessment having been made.<sup>28</sup> Similarly, the Schedule 2 time of application criteria only require that the applicant *claim* to be the carer of an Australian relative at that time. That is, it is not strictly required that the applicant actually meet the definition of carer at the time of application. In contrast, the criteria at time of decision (cl.116.221 and cl.836.221) require that the applicant *is* the carer of the Australian relative – it is at this point in time that the applicant must meet the requirements of r.1.15AA.

#### Meaning of 'Australian relative'

'Australian relative' means a relative of the visa applicant who is an Australian citizen, Australian permanent resident or an eligible New Zealand citizen.<sup>29</sup>

'Australian permanent resident' is relevantly defined in r.1.03 to mean a non citizen who, being usually resident in Australia, is the holder of a permanent visa. For further information on the usual residence requirement, see the MRD Legal Services Commentary: [Usually Resident](#).

'Eligible New Zealand citizen' is also defined in r.1.03 of the Regulations. It means a New Zealand citizen who is a protected SCV holder within the meaning of section 7 of the *Social Security Act 1991*. For further information see MRD Legal Services Commentary [Eligible New Zealand citizen](#).

#### Meaning of 'carer'

Regulation 1.15AA defines the term 'carer'.<sup>30</sup> It requires that:

- the visa applicant is the relative of a person who is an Australian citizen usually resident in Australia or an Australian permanent resident or an eligible New Zealand citizen ('the resident');

<sup>26</sup> cl.836.227 was amended on 1 July 2002 and applies to visa applications made from 1 July 2002 by SR 2002, No.86.

<sup>27</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.836.228. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.836.223(a) refers- see above).

<sup>28</sup> Schedule 1, items 1123A(3)(c) and 1123B(3)(d).

<sup>29</sup> cl.116.211(2), 836.111. The definition of 'Australian relative' was added to r.1.03 by Migration Amendment Regulations 2009 (No.13) (SLI 2009, No.289) to apply to visa applications made from 9 November 2009. Whilst it has the same meaning as contained in cl.116.211(2) and cl.836.111 it does not specifically apply to these Subclasses.

<sup>30</sup> Note that while the definition of 'carer' was repealed by SLI 2014, No.65 for primary applications and most secondary applications made from 2 June 2014, those amending Regulations were subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.



- the resident (or a member of the resident's family unit) has a certificate from health service provider specified by the Minister (currently Bupa) which specifies that the resident or family unit member of the resident has a medical condition which is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life;<sup>31</sup>
- for visa applications made on or after 9 November 2009, the person who has the medical condition must be an Australian citizen, permanent resident or an eligible New Zealand citizen;<sup>32</sup>
- the impairment has, under the Impairment Tables<sup>33</sup>, the rating which is specified in the certificate, and which is equal to or exceeds the impairment rating specified in the relevant instrument;<sup>34</sup>
- because of the medical condition, the person has, and will continue to have for at least two years, a need for direct assistance in attending to the practical aspects of daily life;
- if the person to whom the certificate relates is not the resident, the resident has a permanent or long term need for assistance in providing the direct assistance to the person with the condition;
- *for visa applications made prior to 9 November 2009*, the assistance cannot reasonably be obtained from any other Australian relative of the resident. For visa applications made on or after 9 November 2009, assistance cannot reasonably be *provided* by any other Australian relative of the resident,<sup>35</sup> or
- the assistance cannot reasonably be obtained from Australian welfare, hospital, nursing or community services;
- the visa applicant is willing and able to provide to the resident substantial and continuing assistance of the kind needed.

Regulation 1.15AA(3) stipulates that the opinion in a certificate from the health service provider is to be taken as correct for the purposes of whether or not the applicant satisfies the impairment criterion. In addition to satisfying r.1.15AA, the visa applicant must meet standard public interest criteria, including health and character requirements.

<sup>31</sup> Previously the regulations had specified Health Services Australia as the provider. Regulation 1.15AA was amended by Migration Amendment Regulations 2007 (No.1) (SLI 2007, No.69) from 1 January 2007 to instead prescribe that a certificate may be issued by a 'health services provider specified by the Minister in an instrument in writing': See the 'HealthServiceProvider' tab of the [Register of Instrument: Family Visas](#) for the relevant instrument. For further information about these amendments see Legislation Bulletin [No. 1/2007](#).

<sup>32</sup> r.1.15AA(1)(ba) was inserted by SLI 2009, No.289 for visa applications made on or after 9 November 2009. The Explanatory Statement accompanying the amending regulations indicates that the purpose of the amendment is to ensure that the person requiring care is an Australian citizen, Australian permanent resident or eligible New Zealand citizen.

<sup>33</sup> This refers to Impairment Tables within the meaning of s.23(1) of the *Social Security Act 1991*: as inserted by item 7 of Schedule 5 of Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390).

<sup>34</sup> As amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30). See the 'ImpairmentRating' tab of the [Register of Instruments – Family Visas](#) for the relevant instrument. At the time of writing the instrument specified an impairment rating of 30.

<sup>35</sup> Amended by SLI 2009, No.289 for visa applications made from 9 November 2009. The Explanatory Statement accompanying the amending regulations indicates that the purpose of the amendment is to ensure that 'it is open to decision-makers to conclude that assistance could reasonably be provided by relatives residing in Australia even in circumstances where those relatives residing in Australia claim to be unwilling or unable to provide assistance'.



### Usual residence of the relative requiring the assistance

Regulation 1.15AA(1) stipulates that the relative requiring the assistance be usually resident in Australia. Although the term 'usually resident' is not defined in either the Migration Act or the Regulations, it is a fundamental proposition at common law that every person will have a domicile, being at least the domicile of origin, and whether an individual 'usually resides' in any one country is largely a matter of fact and degree.

In *Scargill v MIMIA*,<sup>36</sup> the Full Federal Court considered 'usual residence' in relation to r.1.15 (Remaining Relative visa) and confirmed the full bench of the High Court's test in *Kotaki Para Rubber Estates Limited v The Federal Commissioner of Taxation*<sup>37</sup> that to find a person is 'usually resident' requires two elements:

- a physical presence in a particular place (as indicated by where a person maintains a home, eats and sleeps, even if this is in hotels or a yacht) and;
- an intention to treat that place as a home for at least the time being but not necessarily forever.

Once a person has established a home in a particular place, even if this is involuntarily, he or she does not necessarily cease to be a resident there because he or she is physically absent.<sup>38</sup>

The Federal Court decision of *Gauthiez v MIMIA*<sup>39</sup> held that the meaning ordinarily given to the phrases 'resides', 'usually resides' and 'ordinarily resides' would depend upon the particular legislative context in which the phrase appears. In the context of a now superseded version of r.1.15, Gummow J cited with approval authority on the issue of 'ordinary residence' which held that the term refers to a person's abode in a particular place or country which he or she has adopted, voluntarily and for settled purposes as part of the regular order of his or her life for the time being, whether of short or long duration. However, this was with one exception, namely where a person's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, that person cannot rely on his or her unlawful residence as constituting ordinary residence.

A more detailed discussion of the case law underpinning 'usually resident' can be located in the MRD Legal Services Commentary: [Usually Resident](#).

### Health service provider certificate and impairment tables / rating

In accordance with r.1.5AA(1)(b), to meet the definition of 'carer' the resident (or a member of the resident's family unit)<sup>40</sup> must have a certificate from a health service provider specified in the relevant instrument (currently Bupa Medical Services (Bupa))<sup>41</sup> which specifies that:

- the resident or family unit member of the resident has a medical condition;

<sup>36</sup> (2003) 129 FCR 259 at [17].

<sup>37</sup> (1941) 64 CLR 241 at 249.

<sup>38</sup> See *Commissioners of Inland Revenue v. Lysaght* (1928) AC 234 at 248 and *Keil v Keil* (1947) VR 383.

<sup>39</sup> (1994) 53 FCR 512.

<sup>40</sup> From 1 July 2009, the phrase 'members of the family unit' was incorporated in the Act at s.5(1) and defined as having the meaning given in the Regulations (as inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*). Regulation 1.12 was amended by SLI 2009, No.144 to include 'de facto partner' (as defined in s.5CB of the Migration Act) and the amended definition applies to visa applications made from 1 July 2009. (See MRD Legal Services Commentary: [Member of a Family Unit \(r. 1.12\)](#)).

<sup>41</sup> See the 'HealthServiceProvider' tab of the [Register of Instruments: Family Visas](#) for the relevant instrument. Note that from 1 February 2010, HSA became Health Services Australia trading as Medibank Health Solutions. According to PAM3, from 28 July 2014, Bupa Health Australia Pty Ltd was specified as the relevant health services provider. However, this is at odds with the content of the actual instrument which came into effect on 21 July 2014. Note that as MHS was specified as the relevant provider until 25 July 2014, there is a four day period where both Bupa and MHS were specified.

- the medical condition is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life;
- the impairment has the rating specified in the certificate (under the Impairment Tables within the meaning of s.23(1) of the *Social Security Act 1991*).<sup>42</sup> Note that impairment rating must be equal to or exceed that specified in the relevant Instrument;<sup>43</sup>
- because of the medical condition that person will continue for at least two years to have a need for direct assistance in attending to the practical aspects of daily life.<sup>44</sup>

As the existence of the medical condition, the related impairment and the need for assistance must be certified by the specified health service provider, it is not open for the tribunal to make a determination on these matters. Provided the certificate meets certain requirements the decision-maker is to take the opinion in a certificate on a matter mentioned in r.1.15AA(1)(b), to be correct for the purposes of deciding whether the applicant is a 'carer'.<sup>45</sup> These requirements are:

- that the certificate is issued on behalf of a specified health service provider and signed by the medical adviser who carried it out; or
- where the certificate relates to *review* of the issuing of a certificate, it is issued by a specified health service provider in accordance with its procedures.<sup>46</sup>

Importantly, it appears the tribunal cannot go behind a certificate that meets these requirements. However, where it does not appear to meet the relevant requirements, it may be open for the decision-maker to invite the applicant to provide an updated certificate or alternatively to refer the matter back to the health services provider advising them of the relevant defect in the certificate and asking them to rectify it. There may also be cases before the tribunal where the evidence suggests that the relevant person is no longer in need of care or where the certificate was issued well before the time of decision. In circumstances where the certificate is more than 18 months old at the time of the decision, Departmental guidelines (PAM3) suggests that a request be made to ask the person with the medical condition to undertake a fresh assessment. These guidelines also advise that as an '18 month rule' is not prescribed in the Regulations, in light of the cost of a new assessment, which is borne by the applicant, it should be applied flexibly. PAM3 goes on to suggest if the certificate is three or more years old, a request for further assessment should be made.<sup>47</sup> In such cases, it would be

<sup>42</sup> As inserted by item 7 of Schedule 5 of Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390). Prior to 10 September 2016 the term 'impairment tables' was defined in r.1.15AA(4) as 'the Tables for the Assessment of Work-related Impairment for Disability Support Pension in Schedule 1B to the *Social Security Act 1991*. Schedule 1B of the *Social Security Act* was however repealed with effect from 1 January 2012 (see item [4] Schedule 3 of the *Social Security and Other Legislation Amendment Act 2011* No.145, 2011). The impairment tables were then moved to an instrument made under s.26 of the *Social Security Act* (F2011L02716). Medical assessments for carer visa applications lodged on or after 1 January 2012 were made under these new provisions. Having regard to s.10 of the *Acts Interpretation Act 1901* (Cth) (the AIA), r.1.15AA(4) could be read as if it explicitly referred to the new Legislative Instrument (F2011L02716). In *Sefesi v MIBP* [216] FCCA 975 (Judge Cameron, 29 April 2016), the Court queried whether r.1.15AA could operate in this manner, following the repeal of Schedule 1B to the *Social Security Act 1991* and noted that the repeal would appear to make it impossible to satisfy the criteria for a Carer visa. However, the Court did not consider the effect of s.10 of the AIA and was not required to make a finding on this issue as it was not relevant to the grounds of judicial review. This anomaly is now addressed by the amendments made by Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390) which removes the definition of 'Impairment Tables' in r.1.15AA(4) and includes an updated definition in r.1.15AA(1)(b)(iii), which now refers to 'Impairment Tables (within the meaning of s.23(1) of the *Social Security Act*)', consistent with amendments to the *Social Security Act 1991*.

<sup>43</sup> See the 'Impairment Rating' tab of the [Register of Instruments: Family Visas](#) for the relevant instrument. The current impairment rating is 30.

<sup>44</sup> r.1.15AA(1)(b), (2).

<sup>45</sup> r.1.15AA(3).

<sup>46</sup> r.1.15AA(2).

<sup>47</sup> PAM3: Div1.2/reg.1.15AA – Carer - [8.1] (compilation 01/07/2016).

open for the tribunal to invite the applicant to make arrangements for the relative concerned to undertake a new health assessment.

Where an applicant does not provide a current certificate it is unclear whether or not the tribunal can rely on the certificate. The Regulations provide that so long as the certificate meets the requirements of r.1.15AA(2), the tribunal is required to take the certificate as correct.<sup>48</sup> While the Regulations do not expressly state that a certificate is only valid for a specified period, it is arguable that such a certificate cannot be relied upon. This is because the requirement to satisfy decision makers that an applicant is the carer of an Australian relative is one which must be satisfied at the time of decision<sup>49</sup> by considering whether the requirements in r.1.15AA are met at that time, including whether there is a certification in existence as to a medical condition of a particular nature requiring a need for direct assistance of a specified kind. The present tense language of r.1.15AA(1) suggests that the certification must be in relation to matters that are current as at the time of assessment of r.1.15AA. As a result, where the evidence is such that it can no longer be said that 'according to a certificate...the medical condition *is* causing physical, intellectual or sensory impairment' etc. (emphasis added) as at the time of the decision, it may be problematic for decision makers to rely on the certificate. In other contexts, there is authority regarding the validity of expert opinions the Minister is required to take as correct in circumstances where new evidence indicates that the relevant opinion may no longer be correct.<sup>50</sup>

Further, the requirement in r.1.15AA(1)(b)(iv) suggests that the certificate contains an additional temporal element insofar as it must relate to a medical condition requiring specified assistance not only as at the time of the certification, but also on a continuing basis for at least two years after that date.<sup>51</sup> While the certification can clearly cover a longer period requiring specified direct assistance than two years, in requiring the relevant health services provider to direct its attention to the need for assistance for only 'at least two years', without more it cannot be said that a particular certification has considered matters falling beyond this period. This means that in cases where the certificate is more than two years old, it may no longer be current for not having contemplated the matters directed in r.1.15AA(1)(b)(iv) as in existence as at the time of the tribunal's decision.

Should this issue arise, further advice can be obtained from MRD Legal Services.

#### *Certificate prepared by previous health service provider*

As noted above, Bupa is the current provider specified by the Minister to undertake physical examinations for Carer visa assessments.<sup>52</sup> However, there are matters currently before the tribunal where the Carer certificate was completed by the previous service provider, Medibank Health Solutions (MHS).<sup>53</sup> As r.1.15AA is assessed at the time of the tribunal's decision, a question arises as

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<sup>48</sup> r.1.15AA(3). Note that s.363(1)(d) of the Migration Act empowers the Tribunal to require the Secretary of the Department to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. However the use of this power by the tribunal may be of no practical value where the applicant refuses to arrange for a fresh medical examination to be undertaken.

<sup>49</sup> See cl.115.221 and cl.836.221.

<sup>50</sup> For example, in *Applicant Y v MIAC*,<sup>50</sup> the tribunal relied upon an opinion of a Medical Officer of the Commonwealth (MOC) in determining whether an applicant satisfied the health criteria in Public Interest Criterion 4007 that was almost 2 years old as at the time of the tribunal decision. The applicant had refused an invitation to obtain a further MOC opinion upon review, but had submitted recent reports from the applicant's doctor to the tribunal indicating an improvement in the applicant's condition since her initial diagnosis. The Federal Court found that the tribunal fell into jurisdictional error when it took as correct an opinion of a MOC which was given 23 months before the tribunal made its decision, and which, as a result of this lapse in time, could not strictly be said to address whether the requirements in paragraph 4007(1)(c) were satisfied at the time of the tribunal's decision.

<sup>51</sup> r.1.15AA(1)(b)(iv).

<sup>52</sup> Note that PAM 3 states that this change of provider came into effect on 28 July 2014. However, this appears at odds with the terms of the relevant instrument which was stated to commence on 21 July 2014. As MHS continued to be specified as a provider until 25 July 2014, there appears to be a four day period where two providers were specified: see the 'HealthServiceProvider' tab of the [Register of Instruments: Family Visas](#).

<sup>53</sup> This also includes certificates provided by Health Services Australia (HSA) while it was trading as Medibank Health Services.

to whether such a certificate meets the requirement to have been ‘carried out on behalf of a health service provider specified by the Minister’ at that time. The preferred view is that the certificate will be valid for the purposes of r.1.15AA(2)(a)(i), providing MHS was specified as the service provider at the time the certificate was issued. This is consistent with Department guidelines (PAM3) that certificates prepared by MHS continue to be able to be used for current Carer visa applications.<sup>54</sup> However, decision-makers may still need to consider whether other concerns arise, including the currency of the certificate; and whether the certificate complies with r.1.15AA(2)(a)(ii) and (b). These matters are discussed [above](#).

#### Assistance cannot reasonably be obtained from, or provided by...

For visa applications made prior to 9 November 2009, the definition of carer required consideration of whether the assistance required by the resident could not reasonably *be obtained* from either:

- any other Australian relative of the resident; or
- from welfare, hospital, nursing or community services in Australia.

However, for visa applications made on or after 9 November 2009, the requirement in relation to Australian relatives of the resident was amended so that the relevant enquiry is whether the ‘assistance cannot reasonably be *provided* by any other relative of the resident’ (emphasis added).<sup>55</sup> The purpose of the amendment was to allow decision-makers to reach a conclusion that assistance could reasonably be provided even where relatives in Australia claim to be unwilling or unable to provide assistance.<sup>56</sup> This change is significant in circumstances where there are other relative(s) of the resident in Australia and this discussed further below.

#### *Type of assistance required*

The type of assistance to be considered is the assistance referred to in the certificate provided by the health service provider, namely direct assistance in attending to the practical aspects of daily life which is needed because of an identified medical condition (r.1.15AA(1)(b)(iv)).<sup>57</sup> In *Sefesi v MIBP*,<sup>58</sup> the Court held that the tribunal is not required to turn its mind to the ‘nature and scope’ of the assistance required, rather the tribunal is required to accept the nature and scope of the person’s impairment and any consequential need for assistance as documented in the certificate prepared by the health service provider (provided that the certificate meets the requirements of r.1.15AA(2); this matter is discussed [above](#)).

#### *Meaning of ‘obtained from’ or ‘provided by relatives’*

For matters where the pre-9 November 2009 definition of ‘carer’ applies, the proper test requires a consideration of whether any relatives *wish* to provide assistance and not whether any relatives *can* reasonably provide it.<sup>59</sup> This followed the Full Federal Court’s decision of *Rafiq v MIMIA*<sup>60</sup> which highlighted that there is a difference between what a relative is capable of doing and what a relative is willing to do. This approach was also confirmed by the Federal Court in *Naidu v MIMIA* which stated that:

*in assessing whether subreg 1.15AA(1)(e) of the Regulations has been satisfied, a real conceptual distinction has to be drawn between whether the assistance can reasonably be*

<sup>54</sup> PAM3 – Migration Regulations - PAM Div 1.20 Interpretation- PAM\_ Reg 1.15AA – Carer at [5.1] (01/07/2016 compilation). For further information see the ‘HealthServiceProvider’ tab of the [Register of Instruments: Family Visas](#).

<sup>55</sup> Amended by SLI 2009, No.289 to apply to visa applications made from 9 November 2009.

<sup>56</sup> Explanatory Statement to SLI 2009, No.289.

<sup>57</sup> *Sefesi v MIBP* [2016] FCCA 975 (Judge Cameron, 29 April 2016) at [21].

<sup>58</sup> *Sefesi v MIBP* [2016] FCCA 975 (Judge Cameron, 29 April 2016) at [21].

<sup>59</sup> *Lin v MIMIA* (2004) 136 FCR 556.

<sup>60</sup> [2004] FCA 564 (Finn J, 6 May 2004).

*obtained from relatives and whether it can reasonably be provided by relatives. Whether something can be provided is a notion that is addressed from the perspective of the provider. Conversely, whether something can be obtained is addressed from the perspective of the person requiring what is to be obtained.*<sup>61</sup>

For visa applications made on or after 9 November 2009, whether any relatives can reasonably provide the assistance and what a relative is capable of doing are matters for consideration by the tribunal in determining whether assistance cannot reasonably be provided.<sup>62</sup> This is discussed further below in the context of assessing 'reasonableness'. Importantly, in *Anveel v MIBP*<sup>63</sup> the Court confirmed that as r.1.15AA(1)(e)(i) is stated in the negative, the focus of the tribunal must be on the reasons as to why the relatives cannot provide the care.<sup>64</sup>

Further, it is clear that a consideration of r.1.15AA(1)(e) is not restricted only to relatives who reside with the person in need of care.<sup>65</sup> The only qualifications as to which relatives are relevant to the assessment are that they are 'other' (i.e. not the visa applicant), and that they are Australian citizens, permanent residents or eligible New Zealand citizens.<sup>66</sup> However, the physical location of the relatives may be relevant for assessing whether they can 'reasonably' provide the care.<sup>67</sup>

Relevantly, the Court in *Yee Joy v MIBP*<sup>68</sup> noted that the length of time that the onshore visa applicant had been providing care, was, in the circumstances of that case, irrelevant to assessing whether the care could reasonably be provided by another relative.

#### *Meaning of 'obtained from community services'*

In terms of community services, the Federal Court has held that 'reasonably obtained' in relation to community services is determined by reference to *obtainability by the person requiring the assistance* and not by reference to the *availability of the service*.<sup>69</sup>

#### *Meaning of 'reasonably'*

In relation to pre-9 November 2009 cases, the Court in *Naidu v MIMIA*<sup>70</sup> clarified that 'reasonableness' must be assessed in light of the circumstances of the applicant. The Court held that the correct test requires the tribunal to focus on the ability of the person requiring the care to access the assistance s/he needs. Whilst the personal circumstances of the relative may be relevant to the question of whether services can reasonably be obtained from them, the mere fact that there may be some practical difficulties for family members in providing care does not *require* the tribunal to conclude that the services cannot be reasonably obtained from them.<sup>71</sup>

<sup>61</sup> (2004) 140 FCR 284 at [21].

<sup>62</sup> *Anveel v MIBP* [2013] FCCA 2181 (Judge Nicholls, 17 December 2013) at [61] and [62].

<sup>63</sup> [2013] FCCA 2181 (Judge Nicholls, 17 December 2013).

<sup>64</sup> *Anveel v MIBP* [2013] FCCA 2181 (Judge Nicholls, 17 December 2013) at [62]. This judgment considered the post 9 November 2009 version of r.1.15AA(1)(e)(i), however, given that the previous version of r.1.15AA(1)(e)(i) is also drafted in the negative, the Courts comments would appear equally applicable to visa applications made prior to 9 November 2009.

<sup>65</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [23]. The applicants in this case sought to contend that it was only open to consider those relatives who live in the same house as the caree, an argument which the court clearly rejected.

<sup>66</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [23].

<sup>67</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [23]. The Court observed that if the relatives live many hours away from the proposed caree, it may be that the assistance cannot reasonably be provided.

<sup>68</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [26].

<sup>69</sup> *Biyiksiz v MIMIA* [2004] FCA 814 (Gray J, 28 June 2004). Care should be taken to ensure that the question being asked under this particular limb is whether the assistance cannot reasonably be *obtained from* (as opposed to *provided by*) relevant community services. However, in *Vu v MIBP* [2015] FCCA 3378 (Judge Emmett, 17 December 2015), the Tribunal's use of the words 'provided by' was held not to amount to a jurisdictional error in circumstances where its ultimate finding was expressed in the correct terms and a fair reading of the Tribunal's decision record did not support the contention that the Tribunal misconstrued or misapplied the test (at [26] – [32]).

<sup>70</sup> (2004) 140 FCR 284 at [22].

<sup>71</sup> *Lam v MIBP* [2013] FCCA 1263 (Judge Driver, 4 October 2013) at [44] to [47]. The Court rejected an argument that the tribunal was required to consider the 'practical difficulties' of family members, in that case being the relative's own medical

Additionally for pre-9 November 2009 cases, it is necessary to ask whether, to the extent that the relatives could reasonably provide assistance, they would do so.<sup>72</sup> In *Nawaqaliva v MIBP*<sup>73</sup> the Court found that the Tribunal did not consider whether, in addition to being capable of providing assistance to the applicant's mother, they were also willing to provide such assistance. This illustrates the inference that may be drawn if the Tribunal does not expressly consider whether the unwillingness of relatives is the reason the assistance cannot reasonably be obtained.

However, a different test for 'reasonableness' applies for visa applications made on or after 9 November 2009. In *Anveel v MIBP*, the Court relied on the authoritative statement on the meaning of 'provided' set out in *Naidu v MIMIA*<sup>74</sup> to find that the most recent version of r.1.15AA(1)(e)(i) requires consideration from the perspective of the Australian relatives when determining whether the assistance cannot 'reasonably' be provided by the Australian relatives.<sup>75</sup> While the circumstances of the Australian relatives has always been a relevant factor in the assessment, this judgment emphasises the importance of this consideration to r.1.15AA(1)(e)(i).<sup>76</sup> Importantly, the Court noted that it did not mean it was not necessary for the decision-maker to also consider what care is actually required by the person needing the care when making this assessment.<sup>77</sup>

Departmental guidelines (PAM3) suggests that 'reasonable' should be given its ordinary dictionary meaning, and states 'this may be described as using commonsense, being practical or sensible, using logic, being judicious or prudent.'<sup>78</sup> Reasonableness requires a subjective assessment of the circumstances of the Australian relative and relevant factors to consider may include:

- the nature of assistance required (for example whether specialist skills are required);
- the suitability of sources of assistance in relation to:
  - accessibility (for example waiting lists) and geographic proximity (for example whether 'live-in' assistance is required) to the person requiring the care;
  - cultural factors (for example the ability to provide a specific cultural diet as in *Lin v MIMIA*<sup>79</sup> or appropriate ethnic and linguistic services as in *Biyiksiz v MIMIA*),<sup>80</sup> and
  - financial cost of community services as against the financial means of the person requiring the care.

In *Hon Anh Vuong v MIAC*<sup>81</sup> the Court confirmed the authority in *Biyiksiz v MIMIA*<sup>82</sup> and *Lin v MIMIA*<sup>83</sup> that cultural factors can be relevant to the determination of whether the relevant care is reasonably obtainable. However, the Court held that an applicant's mere preference for a particular service was to be distinguished from a cultural reason. In this case the Court found that applicant's

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condition and family pressures, in providing care to the applicant as such an argument was not supported by the terms of r.1.15AA(1)(e) or r.1.15AA(1)(b)(iv). The mandatory consideration required by r.1.15AA(1)(e) was whether the services could 'reasonably' be obtained from other relatives and r.1.15AA(1)(b)(iv) only requires consideration of the practical aspects of daily life of the person with the medical condition. The circumstances of relatives may be relevant but such a consideration was not made mandatory by r.1.15AA(1)(b)(iv).

<sup>72</sup> *Issa v MIMA* [2000] FCA 128 (Madgwick J, 4 February 2000).

<sup>73</sup> *Nawaqaliva v MIBP* [2016] FCCA 2080 (Judge Manousaridis, 17 August 2016).

<sup>74</sup> [2004] 140 FCR 284 at [22].

<sup>75</sup> *Anveel v MIBP* [2013] FCCA 2181 (Judge Nicholls, 17 December 2013) at [60]- [61] and [69]; see also *El Achkar v MIBP* [2015] FCCA 2165 (Judge Smith, 14 August 2015) at [11].

<sup>76</sup> See also *Jung v MIBP* [2016] FCCA 1026 (Judge Emmett, 19 May 2016) and *Le v MIBP* [2017] FCA 1053 (Greenwood J, 5 September 2017).

<sup>77</sup> *Anveel v MIBP* [2013] FCCA 2181 (Judge Nicholls, 17 December 2013) at [61].

<sup>78</sup> PAM3: Div1.2/reg.1.15AA – Carer at [9.5] (compilation 01/07/2016).

<sup>79</sup> [2004] FCA 606 (Branson J, 13 May 2004).

<sup>80</sup> [2004] FCA 814 (Gray J, 28 June 2004).

<sup>81</sup> [2013] FCCA 274 (Judge Emmett, 14 May 2013).

<sup>82</sup> [2004] FCA 814 (Gray J, 28 June 2004).

<sup>83</sup> [2004] FCA 606 (Branson J, 13 May 2004).



mere preference to be cared for by his children rather than by strangers was not a barrier to his obtaining welfare assistance and therefore was not a matter that the tribunal was required to consider further in its determination of r.1.15AA.<sup>84</sup> By contrast, in *Nguyen v MIBP*<sup>85</sup> the Court held that the subjective preference of the family member was not properly considered by the tribunal. The problem highlighted by the family, that the care facility could not guarantee that Vietnamese speakers would be working all the time, was not addressed by the Tribunal. In *Lam v MIBP*<sup>86</sup> the Court confirmed it is for the applicant to satisfy the tribunal that the relevant services are not reasonably obtainable.<sup>87</sup>

The Court in *Yee Joy v MIBP*,<sup>88</sup> confirmed that the physical residence of a particular relative may be a relevant consideration. In the event that a relative lives many hours away from the person in need of care, it would be relevant to assess whether the assistance could reasonably be provided in those circumstances.

Importantly, a general statement in the decision record that the tribunal 'has had regard to the evidence' before it may not be sufficient to demonstrate the decision-maker has undertaken the required consideration. In *Anveel v MIBP*<sup>89</sup> the Court observed that a mere and general reference in the tribunal's analysis that it had 'had regard to the evidence of the relatives', did not satisfactorily reveal that it had engaged with the proper test and considered whether the care that was needed could not reasonably be provided by the Australian relative.<sup>90</sup> In *MIBP v Nguyen*<sup>91</sup> the Tribunal obtained information for itself relating to residential care facilities for the applicant's mother. The information obtained formed a central part of the Tribunal's reasoning process in reaching its conclusion to affirm the delegate's decision. The Court held that the Tribunal failed to make findings in respect of the services provided by the residential care facilities and failed to make findings as to the manner in which the mother could obtain a service which matched her own personal circumstances.<sup>92</sup> Such findings of fact were 'material' to the conclusion reached and were not made. In the absence of such findings being made, it was not open to the Tribunal to express a conclusion that reasonable assistance could be obtained.<sup>93</sup> Accordingly, decision-makers should demonstrate they have had regard to all of the relevant circumstances and evidence when making findings on r.1.15AA(1)(e).

In considering whether the required care could reasonably be provided by relatives in Australia, it is not necessary for the Tribunal to specify how the care needs might precisely be met by those relatives in Australia,<sup>94</sup> However, there may be circumstances in which it may be necessary to do so, to reflect

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<sup>84</sup> *Hon Anh Vuong v MIAC* [2013] FCCA 274 (Judge Emmett, 14 May 2013) at [34]. The Court in this case distinguished the judgment in *Lin v MIMIA* [2004] FCA 606 on the basis that in that case, because the nursing home did not provide Chinese food for an applicant who had that cultural preference, the availability of Chinese food was an issue of apparent significance which the tribunal was required to address.

<sup>85</sup> *Nguyen v MIBP* [2017] FCCA 339 (Judge Howard, 28 February 2017) and not disturbed on appeal *MIBP v Nguyen* [2017] FCAFC 149 (Flick, Barker and Rangiah JJ, 20 September 2017).

<sup>86</sup> *Lam v MIBP* [2013] FCCA 1263 (Judge Driver, 4 October 2013).

<sup>87</sup> *Lam v MIBP* [2013] FCCA 1263 (Judge Driver, 4 October 2013) at [50]. See also *Vu v MIBP* [2015] FCCA 3378 (Judge Emmett, 17 December 2015) where the Court held that the Tribunal was entitled to have regard to the evidence before it that respite care and further specialised aged care team services had been declined by the review applicant in considering whether or not those services could be obtained (at [30]).

<sup>88</sup> [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [23].

<sup>89</sup> [2013] FCCA 2181 (Judge Nicholls, 17 December 2013).

<sup>90</sup> *Anveel v MIBP* [2013] FCCA 2181 (Judge Nicholls, 17 December 2013) at [69] and [71].

<sup>91</sup> *MIBP v Nguyen* [2017] FCAFC 149 (Flick, Barker and Rangiah JJ, 20 September 2017).

<sup>92</sup> *MIBP v Nguyen* [2017] FCAFC 149 (Flick, Barker and Rangiah JJ, 20 September 2017) at [33].

<sup>93</sup> *MIBP v Nguyen* [2017] FCAFC 149 (Flick, Barker and Rangiah JJ, 20 September 2017) at [39]. See also *Ali v MIBP* [2016] FCCA 2314 (Judge Jones, 6 September 2016)<sup>93</sup> where the Court found the Tribunal's decision disclosed no analysis of the evidence or a path of reasoning from the recorded evidence to its findings with respect to r.1.15AA(1)(e)

<sup>94</sup> *Nguyen v MIBP* [2016] FCA 688 ((Buchanan J, 9 June 2016).



that the Tribunal has taken account of particular assistance requirements in considering whether the assistance could 'reasonably be provided'.<sup>95</sup>

*Whether the assistance can be provided by one relative or community service*

Although r.1.15AA(1)(e)(i) refers only to '...a relative', it should not be construed as requiring that the assistance must only be provided by a single person. In *Jajo v MIBP*,<sup>96</sup> the Court saw nothing in the language or construction of r.1.15AA(1)(e)(i) that suggested an intention that the singular (i.e. 'relative') should not also include the plural (i.e. 'relatives'). The Court found no error in the tribunal's finding that r.1.15AA(1)(e)(i) was not satisfied because the review applicant's family, as a collective, could reasonably provide the assistance required.<sup>97</sup> Similarly, the Court in *El Achkar v MIBP*, found that the care could reasonably be provided collectively by the review applicant's husband and two adult children, who were able-bodied and available in the evening, when the care was required.<sup>98</sup> On the basis of authority, depending on the circumstances of the case, it is open for the tribunal to find that the assistance can be provided by more than one relative.<sup>99</sup> However, a relevant consideration may be whether assistance provided subject to a collective arrangement is 'reasonable'.<sup>100</sup>

Depending on the circumstances of the case, it is also open for the tribunal to find that the assistance can be provided by a combination of relatives and welfare, hospital, nursing or community services for the purpose of r.1.15AA(1)(e). In *Nguyen v MIBP*,<sup>101</sup> the Court commented that the word 'or' in r.1.15AA(1)(e) is not necessarily disjunctive and can mean 'or, or as well'. It found that both alternatives in r.1.15AA(1)(e) relate to the same subject matter and, in the circumstances, 'or' should be read as conjunctive.<sup>102</sup> The Court went on to find the Tribunal was correct to proceed on the basis that the relevant assistance can be from a combination of assistance from relatives in Australia and welfare, hospital, nursing or community services.<sup>103</sup> On appeal, the Federal Court confirmed that the relevant assistance can be obtained from a combination of relatives in Australia and welfare, hospital, nursing and community services, that the services referred to in r.1.15AA(1)(e)(ii) are not restricted to public sector services and that no assumption can be made that the services will be free, or unpaid.<sup>104</sup>

There has been no explicit judicial consideration on whether the assistance can be obtained from more than one community service organisation for the purpose of r.1.15AA(1)(e)(ii). However on the basis of the above authority that the assistance can be from a plurality of sources, it would appear

<sup>95</sup> See *Kheir v MIBP* [2016] FCCA 1577 (Judge Burchardt, 6 July 2016) where the Court found the Tribunal did not properly address a sufficiently articulated claim of the difficulties that the sponsor faced in having a number of intimate functions performed with the assistance of a man other than a husband. This omission, in the circumstances of this case, meant that the applicant's case was not addressed by reference to the relevant information that the applicant and the sponsor provided.

<sup>96</sup> [2013] FCCA 1554 (Judge Emmett, 4 October 2013) at [55]. The Court found *Azzi v MIMIA* (2002) 120 FCR 48 to be of 'significant persuasive value' in construing r.1.15AA(1)(e)(i): at [55]. Although *Azzi* was concerned with the interpretation of the term 'any other relative' for the purposes of a Special Need Relative', Emmett J found no reasonable justification to depart from the construction of that term given by Allsop J, in which he had found no apparent reason to limit the enquiry to what only one person could do.

<sup>97</sup> Note this is consistent with the reasoning of the Court in *Azzi v MIMIA* (2002) 120 FCR 48 which considered the phrase 'any other relative' in the r.1.03(b)(i) 'definition of special need relative': this reasoning was followed in *El Achkar v MIBP* [2015] FCCA 2165 (Judge Smith, 14 August 2015) at [11].

<sup>98</sup> *El Achkar v MIBP* [2015] FCCA 2165 (Judge Smith, 14 August 2015) at [11]. See also *Nguyen v MIBP* [2015] FCCA 3254 (Judge Street, 1 December 2015) where the Court found that, on a proper construction of r.1.15AA(1)(e)(i), the Tribunal was correct to proceed on the basis that the assistance could reasonably be given collectively by a number of relatives. In r.1.15AA, the singular includes the plural.

<sup>99</sup> Departmental guidelines in PAM3 also supports such an approach, see PAM3 - Migration Regulations - Divisions - Div 1.2 - Interpretation – r.1.15AA - Carer at [9.4] (compilation 01/07/2016).

<sup>100</sup> See for example, *Azzi v MIMIA* (2002) 120 FCR 48.

<sup>101</sup> *Nguyen v MIBP* [2015] FCCA 3254 (Judge Street, 1 December 2015) at [42].

<sup>102</sup> *Nguyen v MIBP* [2015] FCCA 3254 (Judge Street, 1 December 2015) at [44].

<sup>103</sup> See also *Lam v MIBP* [2013] FCCA 1263 (Judge Driver, 4 October 2013) where the Court made no comment on the tribunal's finding that it was reasonable for the Australian relatives to provide some aspects of the required care while the remaining care needs could be obtained from welfare, hospital, nursing or community services.

<sup>104</sup> *Nguyen v MIBP* [2016] FCA 688 (Buchanan J, 9 June 2016). See also *Nguyen v MIBP* [2016] FCA 1460 (Bromwich J, 6 December 2016) at [69].

open to the tribunal to find that the assistance can be obtained from more than one community service organisation, depending on the circumstances of the case.

Note however that the plurality of sources required to provide the assistance may, in certain circumstances, go towards whether the assistance could still reasonably be obtained.<sup>105</sup>

#### Willing and able to provide substantial and continuing assistance of the kind needed

Whether the applicant is willing and able to provide substantial and continuing assistance of the kind needed to the relative is a question of fact to be determined by the decision-maker. It is inextricably linked to the nature of assistance that the Australian relative requires.

The Court in *Perera v MIMIA*, considering the Special Need Relative definition, confirmed that the phrase 'substantial and continuing' assistance is a composite phrase, in the sense that its two elements are cumulative.<sup>106</sup> The applicant must be willing to provide not only substantial assistance, and not only continuing assistance, but assistance which is both substantial and continuing. The word 'substantial' is directed to the level of assistance and the word 'continuing' is directed at the duration of the assistance.

The Full Federal Court in *Chow v MMIA*, also in relation to a Special Need Relative application, stated:

*the performing of domestic chores and the giving of companionship could constitute substantial and continuing assistance in some circumstances. It would be incorrect to say that assistance of that nature could never be substantial and continuing assistance.*<sup>107</sup>

This arises as an issue most commonly where the assistance the applicant is proposing is extended to a relative who is not requiring direct care but requires assistance in providing care to their relative.<sup>108</sup>

Substantial and continuing assistance can be provided by more than one person. In *Bader v MIBP*<sup>109</sup> the Court found that just because one person is providing substantial and continuing assistance, it does not follow that a second person in a supportive role and undertaking different tasks cannot also provide substantial and continuing assistance. Whether such assistance is 'substantial and continuing' requires, as in all cases, an evaluation of the assistance to be provided.

In determining the meaning of 'able' in the phrase 'willing and able' the tribunal should focus only on the objective suitability or fitness.<sup>110</sup> Actual performance is irrelevant to the tribunal's inquiry. In *Xiang v MIMIA*, the Court said:

*A visa applicant must show that he or she is 'willing and able' to provide the required assistance. The first limb (the applicant's willingness) is concerned with the applicant's state of mind. Is the applicant prepared to do what is necessary to provide the assistance? The second limb (whether the applicant is "able" to provide that assistance) calls for an objective inquiry. The question is whether the visa applicant is a person who is suitable or fit to provide the assistance. That the visa applicant may not have provided assistance to a relative during the intervening period (or indeed at any time), especially for reasons beyond the applicant's control, will normally be irrelevant to the tribunal's inquiry.*<sup>111</sup>

<sup>105</sup> *Azzi v MIMIA* (2002) 120 FCR 48 at [90].

<sup>106</sup> [2005] FCA 1120 (Gray J, 16 August 2005) at [16].

<sup>107</sup> [2003] FCAFC 88 (Moore, Emmett and Bennett JJ, 9 May 2003) at [28].

<sup>108</sup> See for example, *Jackson v MIMIA* [2003] FCAFC 203 (Lee, Carr and Moore JJ, 27 August 2003) at [21].

<sup>109</sup> [2018] FCCA 485 (Judge Driver, 20 March 2018) at [40].

<sup>110</sup> *Xiang v MIMIA* [2004] FCAFC 64 (Goldberg, Finkelstein and Weinberg JJ, 23 March 2004) and *Hettiarchchige v MIMIA* [2005] FCA 37 (Kenny J, 3 February 2005).

<sup>111</sup> [2004] FCAFC 64 (Goldberg, Finkelstein and Weinberg JJ, 23 March 2004) at [7].

In assessing the ability of the applicant to provide the assistance which is required, relevant factors to consider may include:

- his or her understanding of the assistance required and commitment to providing long term care;
- whether the applicant has specialist skills if such skills are necessary to provide the required assistance. If the applicant does not possess specialist skills, how the applicant proposes to acquire them;<sup>112</sup>
- how the applicant will be able to provide the required assistance whilst maintaining other obligations, for example where they have their own family which may need to be cared for, and;
- how the applicant proposes to financially support themselves if granted the visa.

In *Pham v MIAC*<sup>113</sup> the Court found that it was open for the tribunal to take into account the ability of the visa applicant to drive the applicant to his medical appointments, where she did not possess a licence and had no knowledge of local streets, when considering her ability to provide care of the kind needed.<sup>114</sup> In *Yee Joy v MIBP* the Court considered that when read in the context of r.1.15AA(1)(b)(iv), the ability to provide continuing assistance must be ongoing, with at least the prospect that it continue for two years.<sup>115</sup> In these circumstances, the Court found no error in the Tribunal considering whether the applicant had the time necessary to provide the required care as well as do what was necessary to provide financial support to his family who remained at home in Fiji.<sup>116</sup>

The need to balance the type of assistance required and the ability of the applicant to provide assistance that fulfils this need in a continuing and substantial way was further illustrated by the Federal Court in *Tenorio v MIMIA* where the Court upheld the tribunal's decision stating:

*the Tribunal concluded that the applicant was not capable of giving assistance to her father that was considerable or substantial, having regard to the nature of his needs. It is significant that the Tribunal observed that the applicant has no special training in nursing sick people. She was not familiar with the medicines that her father was taking, or what they were for. She is unable to drive and therefore is unable to take her father to hospital for the essential treatment that he requires. She would not even be able to take him to see the doctor if she were at home during the day.*<sup>117</sup>

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<sup>112</sup> In situations where the applicant does not hold the required skills and the tribunal is considering how the applicant will acquire those skills, if at all, the tribunal should take into account the entire circumstances including the applicant's intentions and abilities. For example, in *Truong v MIBP* [2014] FCCA 1289 (Judge McGuire, 10 July 2014), the person requiring care suffered from acute psychotic episodes and the tribunal considered that she would require at times urgent assistance with transport and urgent contact with health professionals. The tribunal noted the visa applicant's intention to obtain a driver's licence and presumed that he would also 'eventually learn English', but said that it was speculative as to how long it would take him to acquire these skills. Taking into account the nature of the medical condition, the tribunal found that without experience in caring for someone with a mental illness and without a driver's licence and the ability to speak English, the visa applicant was not able to provide the applicant with substantial and continuing assistance. The Court found no error in the tribunal's reasoning.

<sup>113</sup> [2013] FMCA 29 (Jarrett FM, 23 January 2013).

<sup>114</sup> *Pham v MIAC* [2013] FMCA 29 (Jarrett, FM, 23 January 2013) at [45].

<sup>115</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [30].

<sup>116</sup> *Yee Joy v MIBP* [2015] FCCA 2537 (Judge Smith, 17 September 2015) at [30] and [34]. See also *Vu v MIBP* [2015] FCCA 3378 (Judge Emmett, 17 December 2015), where the Court held that as the evidence before the Tribunal was that the review applicant required 24-hour care, it was open for it to find that a person such as the visa applicant - with other family obligations (a husband and two children living at home) and an English language barrier - did not satisfy the 'willing and able' requirement (at [43]).

<sup>117</sup> [2001] FCA 917 (Emmett J, 16 July 2001) at [19].

Departmental guidelines (PAM3) provide a more extensive list of assessment factors that the tribunal may have regard to in relation to this matter.<sup>118</sup>

### **Sponsorship by Australian relative**

Both Subclasses 836 and 116 require the visa applicant to be sponsored by an Australian relative or a partner<sup>119</sup> of the Australian relative who has turned 18.<sup>120</sup>

#### **Meaning of Australian relative**

'Australian relative' means a relative of the visa applicant who is an Australian citizen, Australian permanent resident or an eligible New Zealand citizen.<sup>121</sup> 'Relative' is relevantly defined in r.1.03 of the Regulations as a 'close relative';<sup>122</sup> or grandparent, grandchild, aunt, uncle, niece or nephew, or a step grandparent, step grandchild, step aunt, step uncle, step niece or step nephew' (see MRD Legal Services Commentary [Familial Relationships](#)). 'Australian permanent resident' is relevantly defined in r.1.03(b) to mean a non citizen who, being usually resident in Australia, is the holder of a permanent visa. 'Eligible New Zealand citizen' is also defined in r.1.03 of the Regulations. It means a New Zealand citizen who at the time of last entry into Australia, would have satisfied certain public interest criteria and had a certain status. For further information see the MRD Legal Services Commentary: [Eligible New Zealand citizen](#).

#### **Sponsorship by the partner of the Australian relative**

If the visa applicant is sponsored by the Australian relative's partner, both Subclass 116 and 836 require that the partner must co-habit with the Australian relative and themselves be an Australian citizen, permanent resident or eligible New Zealand citizen.

For visa applications made prior to 1 July 2009, a person is the *partner* of a visa applicant if he/she meets the definition of 'spouse' as defined in r.1.15A i.e. legally married and de-facto opposite-sex partners. For visa applications made on or after 1 July 2009, *partner* is a 'spouse' as defined in s.5F<sup>123</sup> of the Act (i.e. married) or 'de facto partner' as defined in s.5CB. (i.e. same sex or opposite sex partners) See MRD Legal Services commentary: [Spouse and de facto partner](#) for further guidance.

'Cohabits' is not defined in the Regulations. *The Macquarie Dictionary* (3<sup>rd</sup> edition) defines 'cohabit' as '1. to live together in a sexual relationship. 2. ... to dwell or reside in the company or in the same place ...'. Departmental guidelines (PAM3) advises 'cohabits' should be given its usual dictionary meaning i.e. living together in a partner relationship. Evidence of 'cohabiting' may include whether there is a current common residential address.<sup>124</sup>

<sup>118</sup> PAM3: Div1.2/reg.1.15AA - Carer - [10.2] (compilation 01/07/2016).

<sup>119</sup> For visa applications made before 1 July 2009, the sponsorship is limited to the relative or the relative's 'spouse' as defined in r.1.15A (i.e. married or opposite sex de facto partner). For visa applications made on or after 1 July 2009, the relative or the relative's 'spouse' or 'de facto partner' may be the sponsor. 'Spouse' for these purposes is defined in s.5F of the Act (i.e. married), and 'de facto partner' in s.5CB of the Act (i.e. same sex or opposite sex partners). See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* and SLI 2009, No.144.

<sup>120</sup> cl.116.212, 116.222, 836.213, 836.227.

<sup>121</sup> cl.116.211, 836.111. The definition for 'Australian relative' in r.1.03 was inserted by SLI 2009, No.289 for visa applications made from 9 November 2009. Whilst it has the same meaning as contained in cl.116.211(2) and cl.836.111 it does not specifically apply to these Subclasses.

<sup>122</sup> 'Close relative' is also defined in r.1.03 of the Regulations (see MRD Legal Services Commentary: [Familial Relationships](#)).

<sup>123</sup> The definition of 'spouse' in s.5F was amended with effect from 9 December 2017 (applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (No. 129, 2017) to include same-sex marriages.

<sup>124</sup> PAM3: Div1.4 – Form 40 Sponsors & sponsorship – [20] (compilation 01/07/2016).

### **Additional requirements for Subclass 836**

For Subclass 836 only, the sponsor (whether s/he is the Australian relative or the partner of the relative) must be 'usually resident in Australia' and must be 'settled'. 'Settled' is defined in r.1.03 of the Regulations to mean 'lawfully resident in Australia for a reasonable period'. For further guidance on the interpretation of 'settled', see the MRD Legal Services Commentary: [Settled](#). The term 'usually resident' is not defined in the Regulations - see the discussion [above](#), or the MRD Legal Services Commentary: [Usually Resident](#).

### **Assurances of Support**

The assurance of support requirement for primary and secondary applicants for Subclass 116 and Subclass 836 visas was removed by amendment from 1 January 2008.<sup>125</sup> This amendment applies to:

- visa applications made but not finally determined before 1 January 2008; and
- visa applications made on or after 1 January 2008.<sup>126</sup>

#### **Relevant case law**

<a href="#">Ali v MIBP [2016] FCCA 2314</a>	<a href="#">Summary</a>
<a href="#">Anveel v MIBP [2013] FCCA 2181</a>	<a href="#">Summary</a>
<a href="#">Azzi v MIMIA [2002] FCA 24; (2002) 120 FCR 48</a>	<a href="#">Summary</a>
<a href="#">Bader v MIBP [2018] FCCA 485</a>	<a href="#">Summary</a>
<a href="#">Biyiksiz v MIMIA [2004] FCA 814</a>	<a href="#">Summary</a>
<a href="#">Chow v MIMIA [2003] FCAFC 88</a>	<a href="#">Summary</a>
<a href="#">El Achkar v MIBP [2015] FCCA 2165</a>	
<a href="#">Gauthiez v MIMIA (1994) 53 FCR 512</a>	<a href="#">Summary</a>
<a href="#">Hettiarchchige v MIMIA [2005] FCA 37</a>	<a href="#">Summary</a>
<a href="#">Hon Anh Vuong [2013] FCCA 274</a>	<a href="#">Summary</a>
<a href="#">Jackson v MIMIA [2003] FCAFC 203; (2003) 75 ALD 643</a>	<a href="#">Summary</a>
<a href="#">Jajo v MIBP [2013] FCCA 1554</a>	<a href="#">Summary</a>
<a href="#">Kheir v MIBP [2016] FCCA 1577</a>	<a href="#">Summary</a>
<a href="#">Kotaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241</a>	
<a href="#">Lam v MIBP [2013] FCCA 1263</a>	<a href="#">Summary</a>

<sup>125</sup> By Migration Amendment Regulations 2007 (No.14) (SLI 2007, No.356). Clauses 116.225, 116.325, 836.222 and 836.323 were removed effective from 1 January 2008. Previously, assurances of support were assessed by the Department of Family and Community Services (FACS) and the decision maker's role was limited to determining whether the assurance of support has been accepted by the FACS: Migration Amendment Regulations 2004 (No.2) (SR 2004, No.93).

<sup>126</sup> SLI 2007, No.356. The expression 'finally determined' is defined in s.5(9) of the Act as meaning the primary decision 'is not, or is no longer, subject to any form of review' by the tribunal; or the time for making a valid review application has expired without such an application being made.

<a href="#">Le v MIBP [2017] FCA 1053</a>	
<a href="#">Lin v MIMIA [2004] FCA 606; (2004) 136 FCR 556</a>	
<a href="#">Naidu v MIMIA [2004] FCA 1692; (2004) 140 FCR 284</a>	<a href="#">Summary</a>
<a href="#">Nawaqaliva v MIBP [2016] FCCA 2080</a>	<a href="#">Summary</a>
<a href="#">Nguyen v MIBP [2016] FCA 688</a>	<a href="#">Summary</a>
<a href="#">Nguyen v MIBP [2017] FCCA 339</a>	<a href="#">Summary</a>
<a href="#">MIBP v Nguyen [2017] FCAFC 149</a>	<a href="#">Summary</a>
<a href="#">Perera v MIMIA [2005] FCA 1120</a>	<a href="#">Summary</a>
<a href="#">Pham v MIAC [2013] FMCA 29</a>	
<a href="#">Rafiq v MIMIA [2004] FCA 564</a>	<a href="#">Summary</a>
<a href="#">Scargill v MIMIA [2003] FCAFC 116; (2003) 129 FCR 259</a>	<a href="#">Summary</a>
<a href="#">Sefesi v MIBP [2016] FCCA 975</a>	
<a href="#">Tenorio v MIMIA [2001] FCA 917</a>	
<a href="#">Truong v MIBP [2014] FCCA 1289</a>	<a href="#">Summary</a>
<a href="#">Vu v MIBP [2015] FCCA 3378</a>	
<a href="#">Xiang v MIMIA [2004] FCAFC 64; (2004) 81 ALD 301</a>	<a href="#">Summary</a>
<a href="#">Yee Joy v MIBP [2015] FCCA [2015] 2537</a>	

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 2000 (No.2)</a>	SR 2000, No.62
<a href="#">Migration Amendment Regulations 2000 (No.5)</a>	SR 2000, No.259
<a href="#">Migration Amendment Regulations 2002 (No.2)</a>	SLI 2002, No.86
<a href="#">Migration Amendment Regulations 2004 (No.2)</a>	SR 2004, No.93
<a href="#">Migration Amendment Regulations 2007 (No.1)</a>	SLI 2007, No.69
<a href="#">Migration Amendment Regulations 2007 (No.14)</a>	SLI 2007, No.356
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2009 (No.13)</a>	SLI 2009, No.289
<a href="#">Migration Legislation Amendment Regulations 2011 No.1</a>	SLI 2011, No.105
<a href="#">Migration Legislation Amendment Regulation 2012 (No.5)</a>	SLI 2012, No.256
<a href="#">Migration Legislation Amendment Regulation 2013 (No.3)</a>	SLI 2013, No.146
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65
<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015.</a>	SLI 2015, No.34

<a href="#">Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017</a>	F2017L00816
<a href="#">Marriage Amendment (Definition and Religious Freedoms) Act 2017</a>	No. 129, 2017

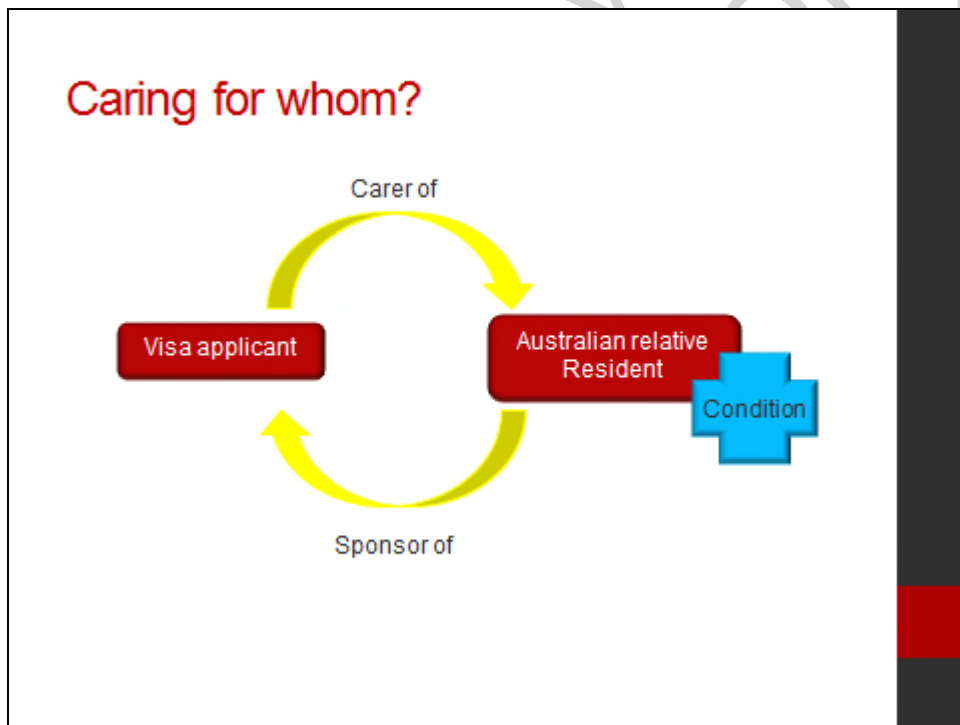
### Available decision templates

There are two separate decision templates designed specifically for Subclass 116 and 836 visa reviews:

- **Subclass 116 visa refusal - Carer:** This template is designed for use in review of a decision to refuse a Subclass 116 (Carer) visa application made on or after 1 July 2002.

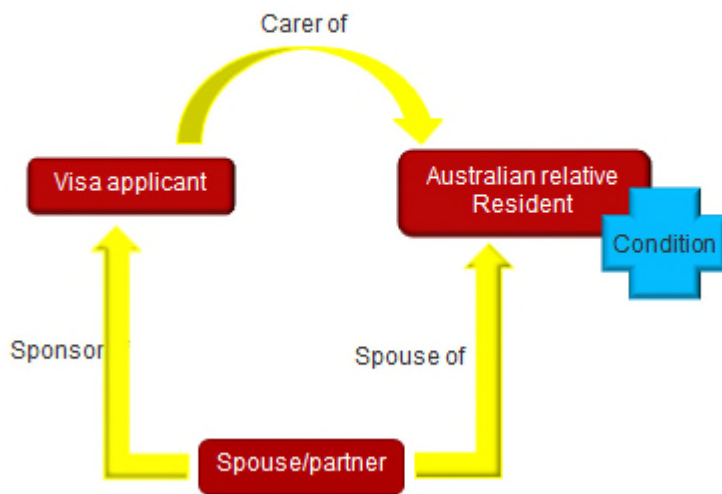
**Subclass 836 visa refusal - Carer:** This template is designed for use in review of a decision to refuse a Subclass 836 (Carer) visa application made on or after 1 July 2002.

### Carer relationship diagrams

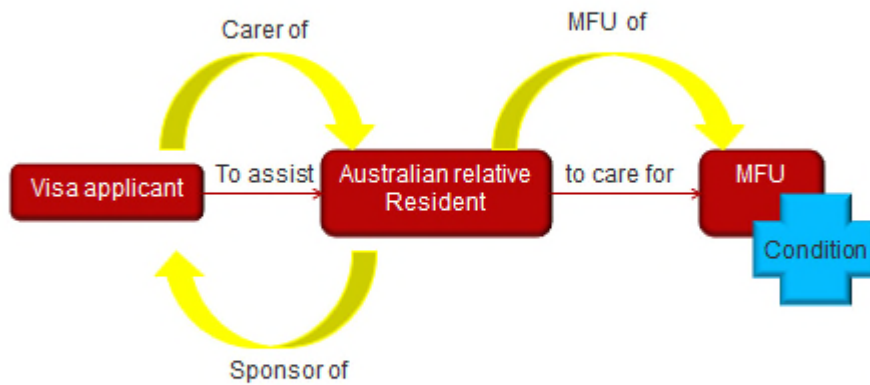


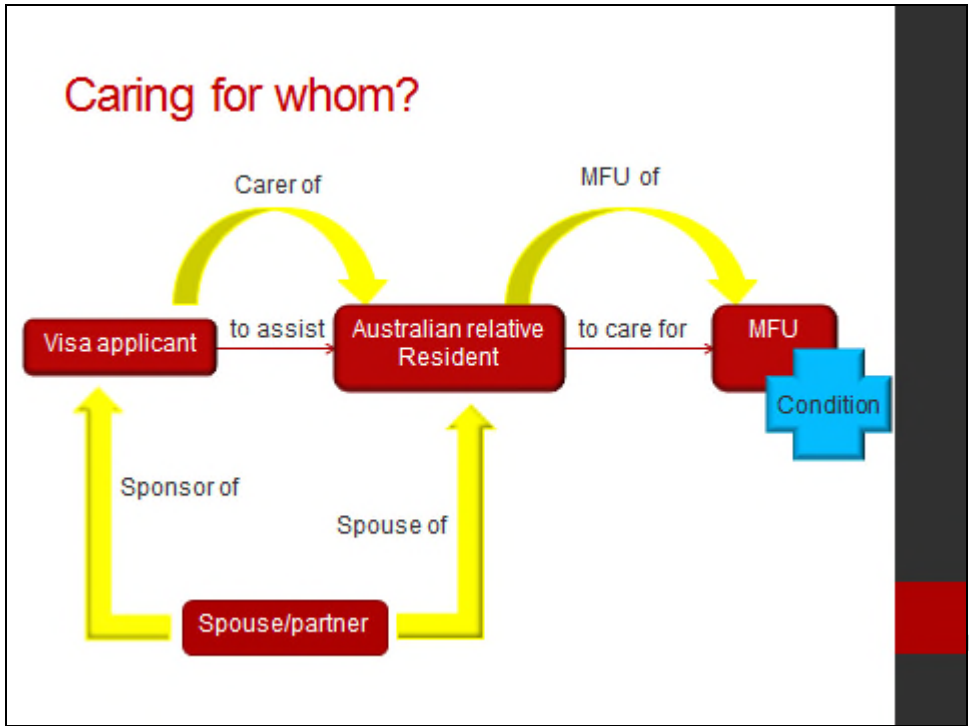


## Caring for whom?



## Caring for whom?





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19 September 2019

# Child Visas - An Overview

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## Overview

There are three classes of visas that may broadly be termed Child visas, two permanent and one temporary. The two classes of permanent Child visas are:

- The **Child (Migrant) (Class AH) visa** is a visa for offshore applicants and contains:<sup>1</sup>
  - Subclass 101 (Child)
  - Subclass 102 (Adoption) and
  - Subclass 117 (Orphan Relative).
- The **Child (Residence) (Class BT) visa** is a visa for onshore applicants and contains:<sup>2</sup>
  - Subclass 802 (Child) and
  - Subclass 837 (Orphan Relative).

The permanent child visas allow Australian citizens, permanent residents and eligible New Zealand citizens to sponsor their 'dependent children' for a permanent visa.

There is also a temporary visa class, Extended Eligibility (Temporary) (Class TK) visa, which contains only the Subclass 445 (Dependent Child) visa.<sup>3</sup> This visa is intended for the [dependent child](#)<sup>4</sup> of a [visa-holding parent](#) as defined<sup>5</sup> in circumstances where the child was not included on the parent's application for a specified visa, usually being a Subclass 309 (Partner (Provisional)) visa or Subclass 820 (Partner) visa.

## Child visa subclasses

### Permanent visas - Classes AH and BT

There are three broad types of subclasses - 'Child', 'Adoption' and 'Orphan Relative' - within the AH and BT visa classes.

The requirements for making a valid application are set out in Schedule 1 of the Migration Regulations 1994 (the Regulations). Schedule 1, item 1108 applies to the Child Migration (Class AH) visas and Schedule 1, item 1108A applies to Child (Residence) (Class BT) visas. The relevant Schedule 1 criteria specify: approved forms; any prescribed fees; where the applications can be made; and include requirements for secondary applicants. The particular requirements will depend on the date a visa application was made.

As an applicant is entitled to be assessed against the criteria of all the subclasses in the class of visa applied for, it is necessary for decision-makers to consider all of the subclasses even where the claims appear to have only been made in respect of one particular subclass.

<sup>1</sup> Item 1108(4) of Schedule 1 to the Migration Regulations 1994. Whilst the applicant can be on or offshore at the time of lodging the visa application, the applicant must be outside Australia when the visa is granted: cl.101.411, 102.411 and 117.411.

<sup>2</sup> Item 1108A(4).

<sup>3</sup> Item 1211.

<sup>4</sup> r. 1.03 of the Regulations define 'dependent child' as the [child](#) or [step-child](#) of the person (other than a child or step-child who is engaged to be married or has a [spouse](#) or [de facto partner](#)), being a child or step-child who has not turned 18; or has turned 18 and is dependent on that person; or is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions.

<sup>5</sup> cl. 445.111

### **Child visas - Subclasses 101, 802**

For applications made prior to 18 April 2015 a person seeking a permanent visa on the basis of being the 'dependent child' of an Australian citizen, the holder of a permanent visa or an eligible New Zealand citizen can be either on or offshore if applying for a Subclass 101 visa but must be in Australia if applying for a Subclass 802.<sup>6</sup>

For Subclass 101 and 802 visa applications made on or after 18 April 2015, the application must be made at the place and in the manner specified by the Minister in an instrument in writing.<sup>7</sup> Applicants for a Subclass 101 visa must be outside Australia<sup>8</sup> and applicants for a Subclass 802 visa must be in Australia but not in immigration clearance.<sup>9</sup>

If the child is adopted and is applying onshore, Subclass 802 provides for situations where adoption is recognised if the applicant was under 18 years of age at the time of the adoption.<sup>10</sup> Note that offshore applicants who are, or are being, adopted by an Australian citizen or permanent resident would ordinarily meet the criteria for Subclass 102 (Adoption) visa rather than a Subclass 101 (Child) visa. For an adopted child to meet the requirements of Subclass 101 (Child), the child must have been adopted overseas by a person who, at the time of adoption, was **not**, but **later became**, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen.<sup>11</sup> For applicants over 18 years of age at the time of visa application there are additional criteria to be met.

For further details see the MRD Legal Services Commentary: [Subclass 101 and 802 - Child Visas](#).

### **Adoption visa - Subclass 102**

There is only one specific subclass for adoption visas: Subclass 102 (Adoption). However, as noted above, an adopted child may in some circumstances meet the requirements for the grant of a Subclass 101 (Child) visa<sup>12</sup> or alternatively a Subclass 802 (Child) visa if applying onshore.<sup>13</sup>

Subclass 102 (Adoption) is intended for applicants who are offshore and have been adopted by a person who is, or a couple at least one of whom is, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen at the time of adoption.

'Adoption' is specifically defined under the Migration Regulations 1994.<sup>14</sup> Overseas adoptions must be in accordance with the Hague Adoption Convention or recognised under Australian law<sup>15</sup>, unless the adoptive parents are expatriate Australians who have been living overseas for more than 12

<sup>6</sup> Item 1108(3)(a) requires that an application for a Subclass 101 visa be made outside Australia. Item 1108A(3)(a) and (3)(b) requires that the applicant for a Subclass 802 visa be in Australia and make the application in Australia.

<sup>7</sup> Items 1108(3)(a) and 1108A(3)(a) as amended by Migration Amendment (2015 Measures No.1) Regulations 2015 (SLI 2015, No.34).

<sup>8</sup> Item 1108(3)(aa) as inserted by SLI 2015, No.34.

<sup>9</sup> Item 1108A(3)(b).

<sup>10</sup> cl.802.213.

<sup>11</sup> cl.101.211(1)(c)(ii).

<sup>12</sup> The child must have been adopted overseas by a person who, at the time of adoption, was not, but later became, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen: cl.101.211(1)(c)(ii). For applicants over 18 years at the time of application there are additional criteria to be met.

<sup>13</sup> For onshore applicants, Subclass 802 requires that, at the time of application, the applicant be a 'dependent child' of a person who is an Australian citizen, holder of a permanent visa, or eligible New Zealand citizen: cl.802.212. For adopted children, the specific requirements depend in part on whether the adoptive parent was or was not an Australian citizen, the holder of a permanent visa, or an eligible New Zealand citizen at the time of the adoption; and what adoption processes were used (adoption in Australia or adoption in an overseas country). For applicants over 18 years of age at the time of application there are additional criteria to be met.

<sup>14</sup> rr.1.03 and 1.04 of the Regulations. 'Adopted', 'adoption' and 'adopt' have corresponding meanings: s.18A of the *Acts Interpretation Act 1901*.

<sup>15</sup> cl.102.211(4)(d)(ii).

months.<sup>16</sup> Additionally, an applicant who is a 'child for adoption' may meet the criteria provided that they are a person who has a prospective adoptive parent(s) who is an Australian citizen, holder of a permanent visa or eligible New Zealand citizen, and the prospective adoptive parent(s) has been approved by a 'competent authority' in Australia as a suitable adoptive parent(s).<sup>17</sup>

For further details see the MRD Legal Services Commentary: [Subclass 102 - Adoption visa and Adoption \(r.1.04\)](#)

### **Orphan Relative**

The Subclass 117 and 837 (Orphan Relative) visas are for relatives of Australian citizens, permanent relatives and eligible New Zealand citizens who are under 18 years of age, unmarried and whose parents are either dead or otherwise unable to care for them. According to departmental guidelines in PAM3, these visas reflect 'immigration principles relating to reunion of relatives in recognition of kinship ties and the bonds of mutual dependency and support within families'.<sup>18</sup>

Subclasses 117 (offshore) and 837 (onshore) visas enable an orphan relative minor seeking to enter (or remain in) Australia to settle with an Australian relative under guardianship or custody provisions. The term 'orphan relative' is defined in r.1.14 of the Regulations.

These two subclasses also provide for a child who would be an orphan relative but is not only because they have been adopted by the Australian relative.<sup>19</sup> Such a child must still be assessed against the orphan relative criteria to establish that, but for the adoption, they would have been an orphan relative.<sup>20</sup>

For further details please see the MRD Legal Services Commentary: [Subclass 117 and 837: Orphan Relative Visas](#).

### **Temporary visas - Class TK**

There is only one temporary 'child' visa: the Subclass 445 (Dependent Child) visa. It is the only subclass in the Extended Eligibility (Temporary) (Class TK) visa class.

The Subclass 445 (Dependent Child) visa can be applied for whilst the applicant is on or offshore.<sup>21</sup> It allows the 'dependent child'<sup>22</sup> of certain temporary visa holders to travel or remain in Australia and apply to be included in their parents' permanent visa application.<sup>23</sup> The applicant must be the

<sup>16</sup> cl.102.211. Under r.1.03, the 'Adoption Convention' means the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* signed at The Hague on 29 May 1993, which is set out in Schedule 1 to the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998.

<sup>17</sup> cl.102.211.

<sup>18</sup> PAM3: Sch2Visa117 – Orphan Relative – at [1] About the visa 117; and PAM3: Sch2Visa837 – Orphan Relative – at [1] About the BT 837 visa (last reissued 1 July 2013).

<sup>19</sup> cl.117.211(b) and 837.211(b).

<sup>20</sup> *EC v MIMIA* (2004) 138 FCR 438 at [27].

<sup>21</sup> For visa applications made before 1 November 2002 the applicant was required to be outside Australia. This requirement was removed by Migration Amendment Regulations 2002 (No.6) (SR 2002, No.230) for visa applications made from 1 November 2002.

<sup>22</sup> 'Dependent child' is defined in r.1.03. Adopted children are specifically referenced in the definition of dependent child as it applies to visa applications made prior to 1 July 2009. For visa applications made on or after 1 July 2009 the definition refers to 'child' which includes adopted children as defined in the Regulations: see Migration Amendment Regulations 2009 (No.7) (SLI 2009 No.144). For visa applications made on or after 19 November 2016, the definition of dependent child refers to 'step-child' after the words 'a child' wherever it occurs: see Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

<sup>23</sup> cl.445.211.

'dependent child' of, and sponsored by the same nominator/sponsor, a parent, who holds, both at time of application and time of decision, one of the following visas:<sup>24</sup>

- Subclass 309 - Spouse (Provisional)<sup>25</sup>
- Subclass 309 - Partner (Provisional)<sup>26</sup>
- Subclass 310 - Interdependency (Provisional)<sup>27</sup>
- Subclass 445 - Dependent Child
- Subclass 820 – Spouse<sup>28</sup>
- Subclass 820 - Partner<sup>29</sup>
- Subclass 826 – Interdependency.<sup>30</sup>

For further details, please see MRD Legal Services Commentary: [Dependent and Dependent Child](#). There is no Commentary specifically addressing the Subclass 445 visa.

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 2002 (No.2)</a>	SR 2002, No.86
<a href="#">Migration Amendment Regulations 2002 (No.6)</a>	SR 2002, No.230
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013</a>	SLI 2013, No.118
<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015.</a>	SLI 2015, No.34
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696

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<sup>24</sup> The relevant classes have been amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) to include a change of name to the Spouse (Provisional) and Spouse visa classes effective from 1 July 2009. These classes were previously amended by Migration Amendment Regulations 2002 (No.2) (SR 2002, No.86) for visa applications made from 1 July 2002. Prior to that date, the relevant visa classes that a parent could hold were Class TK, Class UG, Class UF and Class UK.

<sup>25</sup> This visa Subclass was renamed to 'Partner (Provisional)' for visa applications made from 1 July 2009 by SLI 2009, No.144.

<sup>26</sup> This visa Subclass was renamed from 'Spouse (Provisional)' to 'Partner (Provisional)' for visa applications made from 1 July 2009 by SLI 2009, No.144.

<sup>27</sup> This visa Subclass was removed from 1 July 2009 by SLI 2009, No.144.

<sup>28</sup> This visa Subclass was renamed from 'Spouse' for visa applications made from 1 July 2009 by SLI 2009, No.144.

<sup>29</sup> This visa Subclass was renamed from 'Spouse' to 'Partner' for visa applications made from 1 July 2009 by SLI 2009, No.144.

<sup>30</sup> This visa Subclass was removed from 1 July 2009 by SLI 2009, No.144.



# Subclass 101 and 802 - Child Visas

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## Overview

The Subclass 101 (Child) and 802 (Child) visas are visas for people inside and outside Australia seeking a permanent visa on the basis of being the dependent child (natural, adopted or, in certain circumstances, step-child) of an Australian citizen, the holder of a permanent visa or an eligible New Zealand citizen.

The Subclass 101 (Child visa) is for offshore applicants and is one of three subclasses of the Child (Migrant) (Class AH) visa.<sup>1</sup> The Subclass 802 (Child) visa is for onshore applicants and is one of two subclasses of the Child (Residence) (Class BT) visa.<sup>2</sup>

This commentary examines these two subclasses. As an applicant is entitled to be assessed against the criteria of all the subclasses in the class of visa applied for, it will be necessary to consider the other subclasses in the class even where claims appear to be made only in respect of one particular subclass. More information on these other subclasses can be found in the [Orphan Relative, Subclass 102 - Adoption visa](#) and [Definition of Adoption](#) Commentaries.

## Merits review

A decision to refuse a Subclass 101 visa is a reviewable decision if the visa applicant is sponsored by an Australian citizen, the holder of a permanent visa or a New Zealand citizen holding a special category visa.<sup>3</sup> The sponsor has standing to apply for review.<sup>4</sup>

A decision to refuse a Subclass 802 visa is a reviewable decision under s.338(2) of the *Migration Act* 1958 (the Act). The visa applicant has standing to apply for review.<sup>5</sup>

## Visa application requirements

### Subclass 101 (Child) visa

Item 1108 of Schedule 1 to the Migration Regulations 1994 (the Regulations) sets out the requirements for making a valid visa application for a Class AH Child (Migrant) visa.

For applications made prior to 18 April 2015, the application must be made on the approved form and must be made outside Australia.<sup>6</sup> For applications made on or after 18 April 2015, the application must be made on the form, at the place and in the manner specified by the Minister in a legislative instrument and the applicant must be outside Australia.<sup>7</sup>

An application made by a person claiming to be the member of the family unit of a primary applicant, may be made at the same time as, and combined with the application by that person.<sup>8</sup>

<sup>1</sup> The other 2 subclasses are: Subclass 102 (Adoption) and Subclass 117 (Orphan relative).

<sup>2</sup> The other subclass is the Subclass 837 (Orphan Relative).

<sup>3</sup> s.338(5)(b).

<sup>4</sup> s.347(2)(b).

<sup>5</sup> s.347(2)(a).

<sup>6</sup> Item 1108(1) and (3)(a).

<sup>7</sup> Items 1108(1), (3)(a) and (3)(aa) as amended by the Migration Amendment (2015 Measures No.1) Regulation 2015, SLI 2015, No.34.

<sup>8</sup> Item 1108(3)(b).

## Subclass 802 (Child) visa

Item 1108A of Schedule 1 to the Migration Regulations 1994 (the Regulations) sets out the requirements for making a valid visa application for a Class BT Child (Residence) visa.

To make a valid application for a Subclass 802 visa prior to 18 April 2015, the applicant must be in Australia and the application must be made in Australia.<sup>9</sup> The application must be made on the approved form and the prescribed fee must be paid.<sup>10</sup>

For applications made on or after 18 April 2015, the application must be made on the form, at the place and in the manner specified by the Minister in a legislative instrument<sup>11</sup> and the applicant must be in Australia but not in immigration clearance.<sup>12</sup>

A member of the family unit who is also an applicant for the visa may make his/her application at the same time and place and combined with the application, unless the application was made on or after 26 April 2008 and the applicant has a letter of support<sup>13</sup> and the applicant is under 18 when the application is made.<sup>14</sup>

For visa applications made on or after 27 March 2010, an application by a person who does not hold a substantive visa and has previously had a visa refused or cancelled (i.e. s.48 of the Act applies), must not have turned 25 unless the person claims to be incapacitated for work and provides evidence of the incapacity from a medical practitioner and an approved form 40CH completed by a person claiming to be the parent at the same time and place as the application is made.<sup>15</sup>

Valid applications cannot be made on or after 14 December 2015 by applicants seeking to meet the requirements of cl.802.213(5) of Schedule 2 to the Regulations on the basis of an overseas adoption by an Australian who has been residing overseas for at least twelve months if the country of adoption and period in which it occurred is specified in a legislative instrument.<sup>16</sup>

## Visa Criteria

### Subclass 101 (Child) visa

The criteria for a Subclass 101 (Child) visa are contained in Part 101 of Schedule 2 to the Regulations. They comprise primary and secondary time of application and time of decision criteria. At least one person included in the application must meet the primary criteria.

The primary criteria are outlined below. The secondary criteria are minimal and relate primarily to being the member of the primary applicant's family unit, and satisfying various public interest criteria,

<sup>9</sup> Item 1108A(3)(a) and (b).

<sup>10</sup> Item 1108A(1) and (2).

<sup>11</sup> Item 1108A(1) and (3)(a) as amended by SLI 2015, No.34.

<sup>12</sup> Item 1108A(3)(b).

<sup>13</sup> Item 1108A(3)(c) as amended by Migration Amendment Regulations 2008 (No.2) (SLI 2008 No.56). The amendments in relation to the letter of support apply to visa applications made on or after 26 April 2008.

<sup>14</sup> Item 1108(3)(d). This requirement was inserted by SLI 2008 No.56 and applies to visa applications made on or after 26 April 2008. The requirement was reworded from 'is under 18 years of age' to 'has not turned 18' by Migration Amendment Regulations 2010 (No.1) (SLI 2010 No.38) for visa applications made on or after 27 March 2010. However, the change does not affect the applicable age limit.

<sup>15</sup> Item 1108(3)(e) as inserted by SLI 2010 No.38 for visa applications made on or after 27 March 2010. The definition of 'medical practitioner' was also inserted by the same amending regulations at item 1108A(5).

<sup>16</sup> Item 1108A(3)(f), as inserted by Part 1 of Schedule 1 to the Migration Legislation Amendment (2015 Measures No.4) Regulation 2015 (SLI 2015, No.243). For the relevant legislative instrument, see the 'Schedule 1 Child Visa App' tab in the [Register of Instruments - Family Visas](#).

sponsorship and assurance of support criteria. For further information on the secondary criteria, please consult with MRD Legal Services.

### **Criteria to be satisfied at time of application**

In addition to sponsorship and age requirements, the time of application criteria envisage either dependent natural or adopted children may apply for the visa. In short, the applicant must meet the following criteria at the time of application:

- **dependent child relationship** – he or she must be the dependent child (as defined) of an Australian citizen, permanent resident or eligible New Zealand citizen<sup>17</sup> with one of the following child - parent relationships:
  - the applicant must be the natural child or step-child (within the meaning of paragraph (b) of the definition of step-child) of the Australian citizen, permanent resident or eligible New Zealand citizen; or
  - the applicant must be adopted overseas by a person who was not an Australian citizen, permanent resident or eligible New Zealand citizen, but later became one.<sup>18</sup>
- **age** – the applicant must not have turned 25.<sup>19</sup> Where the applicant has turned 18, he or she must not be engaged to marry or have/had a partner,<sup>20</sup> must not be engaged in full-time work and, since turning 18, or within 6 months or a reasonable time after completing the equivalent of Year 12, must have been undertaking a full-time course leading to the award of a professional, trade, or vocational qualification. Applicants may be exempted from the age requirements if they are dependent and incapacitated for work due to total or partial loss of mental or bodily functions.<sup>21</sup>
- **sponsorship** – the applicant must be sponsored by a person who has turned 18 and is an Australian citizen, Australian permanent resident or eligible New Zealand citizen. That person must be either the same person upon whom they are dependent for the purpose of the Subclass criteria (see first dot point above) or their cohabiting partner.<sup>22</sup>

Some of these issues ('dependent', 'step children' and age requirements) are discussed in more detail [below](#).

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<sup>17</sup> cl.101.211(1)(a). Note the definition of 'dependent child' was amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009 No.144) to change the reference from 'spouse' to 'spouse or de facto partner' for visa applications made on or after 1 July 2009. For visa applications made on or after 19 November 2016, the definition refers to 'step-child' after the words 'a child' wherever it occurs: see Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

<sup>18</sup> cl.101.211(1)(c). 'Adoption' is defined at r.1.04 of the Regulations. This clause was amended by SLI 2009 No.144 for visa applications made on or after 1 July 2009. The reference to 'natural' was removed but the amendment is a technical one only, and designed to reflect the insertion of a definition for 'child' in s.5CA of the *Migration Act 1958* by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* from 1 July 2009. The definition of 'step-child' in r.1.03 of the Regulations was also amended to include reference to 'de facto partner' (SLI 2009 No.144) and applies to visa applications made on or after 1 July 2009.

<sup>19</sup> cl.101.211(1)(b) and (2); by reference to the definition of 'dependent child' in r.1.03 of the Regulations.

<sup>20</sup> cl.101.211(2). For visa applications made prior to 1 July 2009, the partner relationship reference is to a 'spouse' as defined in r.1.15A as it then stood (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the partner relationship reference is to 'spouse or de facto partner'. 'Spouse' for these purposes is defined in s.5F of the Act (i.e. married relationships), which was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* to include persons of the same sex or different sex, and 'de facto partner' in s.5CB of the Act as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (effective from 1 July 2009). Amendments made by the Migration Amendment Regulations 2009 (No.7) (SLI 2009 No.144) in relation to the definition of 'spouse' in r.1.15A apply to visa applications made on or after 1 July 2009.

<sup>21</sup> cl.101.213 and cl.101.211(1)(b) and (2) by reference to the definition of 'dependent child' in r.1.03 of the Regulations.

<sup>22</sup> cl.101.212. The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

### **Criteria to be satisfied at time of decision**

In addition to containing public interest, assurance of support and passport requirements, the time of decision broadly build upon the time of application criteria. Specifically, the applicant must meet the following criteria at the time of decision:

- **age requirements** – these vary according to the applicant's age at the time of application. Applicants who had *not* turned 18 at time of application must continue to satisfy the dependent child time of application criterion and not have turned 25, or if they don't satisfy that criterion, then only because they have since turned 18;<sup>23</sup> applicants who *had turned* 18 at time of application, must continue to satisfy the dependent child time of application criterion and not have not turned 25, or if they don't satisfy that criterion, only because they have since turned 25, and continue to satisfy the time of application criterion not be engaged, have/had a partner,<sup>24</sup> not be engaged in full-time work and have been undertaking the required full-time course within the relevant period;<sup>25</sup>
- **sponsorship** – the sponsorship must be approved and in force;<sup>26</sup>
- **public interest criteria** – the applicant and family members must satisfy certain public interest criteria. Note that even members of the applicant's family unit who are not applicants for the visa must satisfy public interest criteria;<sup>27</sup>
- **Assurance of Support** – any requested assurance of support has been accepted;<sup>28</sup>
- **Passport** – *for visa applications made on or after 1 July 2005 and prior to 24 November 2012-* the decision maker is satisfied certain passport requirements are met.<sup>29</sup>

Some of these issues ('dependent', 'step children' and age requirements) are discussed in more detail [below](#).

### **Subclass 802 (Child) visa**

The criteria for a Subclass 802 (Child) visa are contained in Part 802 of Schedule 2 to the Regulations. There are both time of application and time of decision criteria, which broadly reflect the Subclass 101 visa criteria, with a number of the criteria being the same. However, the criteria vary according to whether or not the visa applicant has a letter of support provided by a State or Territory

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<sup>23</sup> cl.101.221(1).

<sup>24</sup> The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

<sup>25</sup> cl.101.221(2).

<sup>26</sup> cl.101.222.

<sup>27</sup> cl.101.223, 101.226, 101.227, 101.228 and 101.227(2). Family members who are not applying must satisfy character, security and health criteria (cl.101.227(2)). Clause 101.223(a) was amended by item [6], Schedule 2, of the Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256), to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4012 requires either: that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an [instrument in writing for cl.4021\(a\)](#); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.101.229 which was repealed with effect from 24 November 2012 by SLI 2012, No.256. That amendment to cl.101.223 applied to all visa applications made on or after 24 November 2012. Clauses 101.223(a) and 101.227(1)(a) were further amended by item [4] and [5] of Schedule 7 of the Migration Legislation Amendment Regulation 2013 (No.3), SLI 2013 No.146, to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular) for visa applications made but not finally determined before 1 July 2013 and made on or after that date.

<sup>28</sup> cl.101.225.

<sup>29</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.101.229, which was originally inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005 No.134). However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.101.223(a) refers- see above).

government welfare authority that supports the child's application for permanent residency in Australia.

At least one person included in the application must meet the primary criteria, which are outlined below. The secondary criteria are minimal and relate primarily to being the member of the primary applicant's family unit, and satisfying various public interest criteria, sponsorship and assurance of support criteria. For further information on the secondary criteria, please consult with MRD Legal Services.

### ***Criteria to be satisfied at time of application***

#### Applicants supported by 'letter of support'

If the application was made on or after 26 April 2008 and, at time of application, the applicant is supported by a letter of support from a State or Territory government welfare authority, the applicant does not need to satisfy any other time of application criteria.<sup>30</sup> In these circumstances, the letter must be provided by a State or Territory government welfare authority, support the child's application for permanent residency in Australia and set out the circumstances leading to the involvement of the welfare authority in the welfare of the child. The letter must also state the authority's reasons for supporting the application for permanent residency in Australia, state the nature of their continued involvement in the welfare of the child, be on letterhead, and be signed by a manager or director employed by the welfare authority.<sup>31</sup>

#### Applicants not supported by 'letter of support'

For all other applicants, at the time of application, the applicant must:

- **dependent child relationship** – he or she must be the dependent child of an Australian citizen, permanent resident or eligible New Zealand citizen.<sup>32</sup> If they are a step-child of that person, they must be a step-child within the meaning of paragraph (b) of the definition of 'step-child' in r.1.03.<sup>33</sup> If the Australian citizen, permanent resident or eligible New Zealand citizen is an adoptive parent of the applicant, the applicant must be under 18 at the time of adoption, and:
  - the adoption was in accordance with the Adoption Convention and there is an adoption compliance certificate in force; or
  - the adoptive parent was not an Australian citizen, permanent resident or eligible New Zealand citizen at the time of adoption, but subsequently became one; or
  - the Australian citizen, permanent resident or eligible New Zealand citizen adoptive parent, was approved by the competent authority as a suitable adoptive parent; or
  - where the adoption took place overseas - the parent was an Australian citizen, permanent resident or eligible New Zealand citizen, and had been residing overseas for more than 12 months unless the decision-maker is satisfied that, because of

<sup>30</sup> cl.802.216. Clause 802.215(a) provides that an applicant satisfies the criterion if he or she has a letter of support. This requirement only applies to visa applications made on or after 26 April 2008: SLI 2008 No.56. Clause 802.111 defines 'letter of support' to mean a letter provided by a State or Territory government welfare authority that supports the child's application for permanent residency in Australia and sets out the circumstances leading to the involvement of the welfare authority in the welfare of the child. The letter must also: state the authority's reasons for supporting the application for permanent residency in Australia; state the nature of their continued involvement in the welfare of the child; be on letterhead; and be signed by a manager or director employed by the welfare authority.

<sup>31</sup> See cl.802.111.

<sup>32</sup> cl.810.212(1)(a).

<sup>33</sup> cl.802.212(1A). The definition of 'step-child' in r.1.03 was amended by SLI 2009 No.144 to include reference to 'de facto partner' as well as 'spouse' as defined from 1 July 2009 (i.e. was extended to recognise same-sex relationships) for visa applications made on or after 1 July 2009. Subparagraph (b) of the definition has also been amended by SLI 2010 No.38 to apply to visa applications made on or after, or not finally determined before, 27 March 2010.

compelling and compassionate circumstances, the 12 month residence requirement should not apply; and the the residence overseas was not contrived to circumvent the requirements for entry to Australia of children for adoption, and the adoptive parent/s<sup>34</sup> have lawfully acquired full and permanent parental rights,<sup>35</sup>

- **age** – the applicant must not have turned 25.<sup>36</sup> Where the applicant has turned 18, he or she must not be engaged to marry or have/had a partner,<sup>37</sup> must not be engaged in full-time work and, since turning 18, or within 6 months or a reasonable time after completing the equivalent of Year 12, must have been undertaking a full-time course leading to the award of a professional, trade, or vocational qualification. Applicants may be exempted from the age requirements if they are dependent and incapacitated for work due to total or partial loss of mental or bodily functions,<sup>38</sup>
- **sponsorship** – the applicant must be sponsored by a person who has turned 18 and is an Australian citizen, permanent resident or eligible New Zealand citizen. That person must be either the same person upon whom they are dependent for the purpose of the Subclass criteria (see first dot point above) or their cohabiting partner;<sup>39</sup>
- for certain applicants who were in Australia on 1 September 1994 and have not been granted a substantive visa after that date, or applied for the visa pursuant to s.48 - additional criteria must be met.<sup>40</sup>

Some of these issues ('dependent', 'step-child' and age requirements) are discussed in more detail below.

#### ***Criteria to be satisfied at time of decision***

##### Applicants supported by 'letter of support'

If the application for visa was made on or after 26 April 2008 and is supported by a letter of support from a State or Territory government welfare authority, in addition to medical examination requirements and certain Public Interest Criteria,<sup>41</sup> the decision maker must be satisfied that the grant of the visa is in the public interest and the State or Territory government welfare authority supports the applicant's application for permanent residency in Australia.<sup>42</sup>

##### Applicants not supported by 'letter of support'

For all other applicants, at the time of decision:

**age requirements** – these vary according to the applicant's age at the time of application. Applicants who had *not* turned 18 at time of application must continue to satisfy the dependent child time of application criterion and not have turned 25, or if they don't satisfy

<sup>34</sup> The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 17.

<sup>35</sup> cl.802.213.

<sup>36</sup> cl.802.212(1)(b), (2).

<sup>37</sup> cl.802.215(b). The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

<sup>38</sup> cl.802.214.

<sup>39</sup> cl.802.215(b). The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

<sup>40</sup> cl.802.211. Note, changes to the Schedule 1 requirements that apply to visa applications made on or after 27 March 2010 where s.48 applies may result in applications not being valid if the applicant has turned 25, unless claiming to be incapacitated for work, in which case additional requirements must be met: item 1108A(3)(e) as inserted by SLI 2010 No.38 for visa applications made on or after 27 March 2010.

<sup>41</sup> cl.802.226A(2)(a). Clause 802.226A(2)(a)(ii) was amended by SLI 2013, No.146 to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular) for visa applications made but not finally determined before 1 July 2013 and those made on or after that date.

<sup>42</sup> cl.802.226A(2)(b) inserted by SLI 2008 No.56.



that criterion, then only because they have since turned 18;<sup>43</sup> applicants who *had turned* 18 at time of application, must continue to satisfy the dependent child time of application criterion and not have not turned 25, or if they don't satisfy that criterion, only because they have since turned 25, and continue to satisfy the time of application criterion not be engaged, have/had a partner,<sup>44</sup> not be engaged in full-time work and have been undertaking the required full-time course within the relevant period;<sup>45</sup>

- **Assurance of Support** – any requested assurance of support has been accepted;<sup>46</sup>
- **public interest criteria** – the applicant and family members must satisfy certain public interest criteria. Note that even members of the applicant's family unit who are not applicants for the visa must satisfy public interest criteria;<sup>47</sup>
- **sponsorship** – the sponsorship must be approved and in force;<sup>48</sup> and
- **Passport** – for visa applications made on or after 1 July 2005 and prior to 24 November 2012 - the decision maker is satisfied certain passport requirements are met.<sup>49</sup>

Some of these issues ('dependent', 'step-child' and age requirements) are discussed in more detail below.

## Common Issues

### Dependent Child - cl.101.211, 802.212

Subclass 101 and 802 both require that at the time of application the visa applicant is a 'dependent child' of an Australian citizen, permanent resident or eligible New Zealand citizen.<sup>50</sup> A 'dependent child' can be under or over 18 years of age. For visa applications made prior to 1 July 2009, the term 'dependent child' is defined in r.1.03 of the Regulations as follows:

*...the natural or adopted child, or step-child, of a person (other than a child who has a spouse or is engaged to be married), being a child who:*

- (a) *has not turned 18; or*
- (b) *has turned 18 and:*
  - (i) *is dependent on that person; or*

<sup>43</sup> cl.802.221(1).

<sup>44</sup> The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

<sup>45</sup> cl.802.221(2).

<sup>46</sup> cl.802.222.

<sup>47</sup> cl.802.223, 802.224 and 802.225. Clause 802.224(2) requires these family members to satisfy health criteria 4007 unless the decision-maker is satisfied that it would be unreasonable to require the person to undergo an assessment in relation to that criterion. Clause 802.223(a) was amended by SLI 2012, No.256 to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4012 requires either: that the applicant hold a valid passport that: was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an [instrument in writing for cl.4021\(a\)](#); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.802.227 which was repealed with effect from 24 November 2012, see SLI 2012, No.256. The amendment to cl.802.223(a) applies to all visa applications made on or after 24 November 2012. Clauses 802.223(a) and 802.224(1)(a) were further amended by SLI 2013, No.146 to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular). These changes apply to visa applications made but not finally determined before 1 July 2013 and those made on or after that date.

<sup>48</sup> cl.802.226.

<sup>49</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.802.227, which was inserted by SLI 2005 No.134. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.802.223(a) refers –see above).

<sup>50</sup> cl.101.211, 802.212.

- (ii) *is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.*

For visa applications made on or after 1 July 2009, the definition has been amended to refer to a person if s/he 'is engaged to be married or has a spouse or *de facto partner*' [emphasis added].<sup>51</sup> That is, the post 1 July 2009 definition states:

- dependent child, of a person, means the child or step-child of the person (other than a child who is engaged to be married or has a spouse or de facto partner), being a child who:*
- (a) *has not turned 18; or*
  - (b) *has turned 18 and:*
    - (i) *is dependent on that person; or*
    - (ii) *is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.*

For visa applications made on or after 19 November 2016, the definition has been amended to refer to 'step-child' after the words 'a child' wherever it occurs.<sup>52</sup> That is, the definition states:

- dependent child, of a person, means the child or step-child of the person (other than a child or step-child who is engaged to be married or has a spouse or de facto partner), being a child or step-child who:*
- (a) *has not turned 18; or*
  - (b) *has turned 18 and:*
    - (i) *is dependent on that person; or*
    - (ii) *is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions.*

This amended definition clarifies that for the purposes of the definition, reference to a child includes a step child.

The meaning of 'dependent' is set out in r.1.05A of the Regulations. Detailed consideration of the legal issues relating to this term can be found in the MRD Legal Services Commentary: [Dependent & Dependent Child](#).

An applicant for a child visa who is under 18 years is a 'dependent child' merely by fact of their age and does not require consideration of whether they are also 'dependent' within the meaning of r.1.05A. Where an applicant was under 18 at the time of application they are also assessed at time of decision as if still under the age of 18, regardless of whether they have since turned 18.<sup>53</sup> The issue of whether an applicant is 'dependent' within the meaning of that term in r.1.05A therefore only arises for an applicant who is over 18 at time of application.

It is a time of decision criterion for both Subclass 101 and 802 that the applicant continues to meet this time of application criterion (with certain age concessions).<sup>54</sup>

<sup>51</sup> For visa applications made on or after 1 July 2009, 'spouse' for these purposes is defined in s.5F of the Act (i.e. married relationships), and 'de facto partner' in s.5CB of the Act as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (effective from 1 July 2009). Amendments made by SLI 2009 No.144 in relation to the definition of 'spouse' in r.1.15A apply to visa applications made on or after 1 July 2009.

<sup>52</sup> Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696).

<sup>53</sup> see cl.101.221(1)(b) and 802.221(1)(b). These clauses were inserted into the Regulations by the Migration Amendment Regulations 1999 (No. 13). The explanatory statement says the amendment was "intended to ensure that an applicant who turns 18 during the processing of the visa application, is not disqualified from the grant of the visa simply because of the change in age" (Item 2308 and 2350). While this interpretation may seem to be in conflict with other provisions of the Regulations that require 'dependence' to be assessed under r.1.05A where a child is 18 years or over, it is supported by the explanatory statement for the amending regulation and is reflected in current Departmental policy. There has not been any judicial consideration of this issue.

<sup>54</sup> see cl.101.221 and 802.221.

### **Meaning of engaged to be married**

The meaning of the term 'engaged to be married' was considered by the Court in *Awad v MIBP*<sup>55</sup> in the context of the cancellation of a Subclass 101 visa. The applicant submitted that the correct construction of the term 'engagement' in Australian Law required a voluntary mutual act and contended that her 'betrothal' did not fall within this category as it was the product of an agreement between her father and her husband. The Court observed in *obiter* comments that it doubted that the term 'engaged to be married' was limited to the understanding of that concept by reference to Australian Law and societal norms, though it ultimately declined to resolve this matter.<sup>56</sup> Rather, it held that the evidence established that the applicant had, on her own evidence, in fact entered into a voluntary and mutual relationship with an intention to marry at the time the visa was granted. Further, the Court noted that the involvement of her father in the agreement did not diminish the personal aspect of the formalisation of the relationship.<sup>57</sup>

The findings of the Court in *Awad* support that, in some circumstances, it may not be necessary for the applicant themselves to personally formalise the engagement. The Court found that that once it is accepted that it is possible for an arranged marriage to result in a 'genuine marriage' within the meaning of s.5F of the Act, it is a small step to accept that two people may be engaged to be married in circumstances where the engagement is conditional upon, or even brought about by, the involvement of one or more of the parents of the prospective spouses.<sup>58</sup> Ultimately whether the applicant is engaged to be married is a finding of fact on all the evidence before the Tribunal.

### **Step-children - cl.101.211(c)(i), 802.212(1A)**

An applicant claiming to be a dependent child of an Australian citizen, the holder of a permanent visa or an eligible New Zealand citizen on the basis of a step-relationship must be a step-child of that person within the meaning of paragraph (b) of the definition of step-child in r.1.03 of the Regulations.<sup>59</sup> This definition varies depending on the date of application to recognise from 1 July 2009 children of same-sex couples. Additionally, children of a former partner who are under 18 may in certain specified circumstances be a 'step-child' for the purposes of the Regulations.

For visa applications made prior to 1 July 2009, paragraph (b) of that definition is as follows:<sup>60</sup>

- (b) *a child of the parent who is not the natural or adopted child of the parent but:*
  - (i) *who is the natural or adopted child of a former spouse of the parent; and*
  - (ii) *who has not turned 18; and*
  - (iii) *in relation to whom the parent has:*
    - (A) *a parenting order in force under the Family Law Act 1975 under which the parent is the person with whom a child is to live, or who is responsible for the child's long-term or day-to-day care, welfare and development; or*
    - (B) *guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.*

For visa applications made on or after 1 July 2009, the definition is as follows:<sup>61</sup>

<sup>55</sup> [2015] FCCA 1381 (Judge Smith, 28 May 2015).

<sup>56</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [14].

<sup>57</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [15] - [16].

<sup>58</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [16].

<sup>59</sup> cl.101.211(1)(c)(i) and 802.212(1A).

<sup>60</sup> Subparagraph (b)(iii) of the definition was amended by SLI 2010 No.38 for visa applications made on or after, or not finally determined before, 27 March 2010. These amendments were to ensure the references to orders in the definition of 'step-child' are consistent with the relevant terms in the *Family Law Act 1975*.

- (b) a person who is not the child of the parent but:
- (i) who is the child of the parent's former spouse or former de facto partner; and
  - (ii) who has not turned 18; and
  - (iii) in relation to whom the parent has:
    - (A) a parenting order in force under the *Family Law Act 1975* under which the parent is the person with whom a child is to live, or who is responsible for the child's long-term or day-to-day care, welfare and development; or
    - (B) guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.

This criterion limits the circumstances in which a dependent child may be granted a Child visa on the basis of a step-relationship to circumstances where:

- the child's parent is no longer a partner<sup>62</sup> of the other person but that person has legal responsibility for the child granted by a court.

'Parenting order' is defined in r.1.03 as having the meaning given by s.64B(1) of the *Family Law Act 1975*. Subsection 64B(1) of the *Family Law Act 1975* provides that a parenting order is an order (including an order until further order) dealing with a matter mentioned in subsection 64B(2), or an order discharging, varying, suspending or reviving an order, or part of an order provided above. A parenting order may deal with one or more of the following:

- the person or persons with whom a child is to live;
- the time a child is to spend with another person or other persons;
- the allocation of parental responsibility for a child;
- if two or more persons are to share parental responsibility for a child - the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- the communication a child is to have with another person or other persons;
- maintenance of a child;
- the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of: a child to whom the order relates; or the parties to the proceedings in which the order is made;
- the process to be used for resolving disputes about the terms or operation of the order; or
- any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.<sup>63</sup>

Step-children who meet paragraph (a) of the definition (i.e. is the child of a person who is in a current partner relationship with the child's parent) cannot satisfy the criterion for the grant of the visa.

<sup>61</sup> As amended by SLI 2009 No.144 for visa applications made on or after 1 July 2009. Subparagraph (b)(iii) of the definition was amended by SLI 2010 No.38 for visa applications made on or after, or not finally determined before, 27 March 2010. These amendments were to ensure the references to orders in the definition of 'step-child' are consistent with the relevant terms in the *Family Law Act 1975*.

<sup>62</sup> The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

<sup>63</sup> s.64B(2) of the *Family Law Act 1975*.

### **Adopted - cl.101.211(1)(c)(ii) and cl.802.213**

Regulation 1.03 of the Regulations provides that the term 'adoption' has the meaning set out in r.1.04 of the Regulations and includes a note stating that '*adopt* and *adopted* have corresponding meanings: see *Acts Interpretation Act 1901*, section 18A'. For further discussion on the meaning of adoption see the MRD Legal Services Commentary: [Definition of Adoption](#).

Aside from having to meet the above definition, additional time of application requirements apply in relation to the adoption, with a number of alternate options applying depending on whether the applicant has applied for the visa on or offshore. For offshore applicants, the relevant criterion which applies is that the child is adopted before the adopter became an Australian citizen, Australian permanent resident, or New Zealand citizen, but later became one. This involves a finding of fact as to when the 'adoption' took place and what the immigration status of the adopter was at that time and subsequently.

This requirement is also one of the alternate requirements for onshore applicants. The four alternatives are designed to protect the interests of children applying onshore as the adopted children of Australian citizens, Australian permanent residents or eligible New Zealand citizens.<sup>64</sup> They require:

- the child was adopted in accordance with the Adoption Convention and an adoption compliance certificate is in force: cl.802.213(2);
- the parent was approved to adopt the child by the competent Australian authority before the adoption took place (and the parent is an Australian citizen, permanent visa holder or eligible New Zealand citizen at the time of adoption): cl.802.213(4);
- the child was adopted overseas and the adoptive parent had been residing overseas for more than 12 months when the adoption took place, unless the Minister is satisfied that compelling or compassionate circumstances exist such that the 12 month period should not apply. In addition, the Minister must be satisfied that the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption, and full and permanent parental rights must have been lawfully acquired in respect of the child: cl.802.213(5).<sup>65</sup>

Similar requirements apply to offshore applicants under Part 102 (Adoption). Refer to the MRD Legal Services Commentary: [Subclass 102 - Adoption visa](#) for consideration of the relevant issues.

It is a finding of fact for the Tribunal as to whether or not the adoption meets the requirements set out in the definition in r.1.04 and Parts 101 and 802. Where an offshore applicant is claiming to be adopted but does not satisfy the criteria for a Subclass 101, it would also be necessary to consider whether the criteria for a Subclass 102 may be satisfied.

### **Age Requirements – cl.101.211(b), 101.213, 101.221, 802.214, 802.221, item 1108A**

Subclass 101 and 802 criteria impose certain age restrictions on primary applicants. The Schedule 1 requirements in relation to Subclass 802 visas contained in item 1108A also contain age restrictions for certain visa applications.

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<sup>64</sup> Refer Explanatory Statement to the Migration Amendment Regulations 1998 (No.7).

<sup>65</sup> Note that for visa applications made prior to 2 April 2005, there was an additional requirement that a competent authority in the overseas country has approved the departure of the applicant to Australia (see cl.802.213(5)(e) as it was prior to 2 April 2005). That requirement was removed with effect from 2 April 2005 (Migration Amendment Regulations 2004 (No.8) (SR 2004 No.390).

### ***Age limit when making a valid application for a subclass 802 visa***

For visa applications made on or after 26 April 2008, if the applicant has a letter of support, the applicant must be under 18 when the application is made.<sup>66</sup>

For visa applications made on or after 27 March 2010, applicants who do not hold a substantive visa and are s.48 barred,<sup>67</sup> must not have turned 25 unless the applicant claims to be incapacitated for work.<sup>68</sup> In these cases, the applicant must provide evidence from a medical practitioner as to their incapacity and also an approved form 40CH completed by a person claiming to be the parent at the same time and place as making the application.

If the age restrictions are not met, the application would not be a valid application for the visa.

### ***Age limit at time of application***

Both visa subclasses 101 and 802 require that the applicant be under 25 at time of application, unless they are incapacitated for work because of a physical or mental disability.<sup>69</sup> In the case of such incapacitation, there is no age limit.

Where an applicant was under 18 at the time of application they are assessed at time of decision as if still under the age of 18, regardless of whether they have since turned 18 (see cl.101.221(1)(b)/802.221(1)(b)).<sup>70</sup> That is, they are not required to meet the additional 'test' of financial dependency in r.1.05A.

Note that applicants who are 18 or over at time of application must satisfy additional criteria relating to marital status and full-time study (see below).

### ***Age limit at time of decision***

There is no specific age limit at time of decision unless the applicant was over 18 at the time of application. In these cases, see the additional criteria outlined immediately below.

### ***Additional criteria for applicants over 18 at time of application***

For those applicants who have turned 18 at the time of application there are additional criteria to be met both at time of application and time of decision. Specifically, cl.101.213 and 802.214 require that at the time of application, the applicant:

- not be engaged to marry or have or have had a partner;<sup>71</sup>
- not be engaged in full-time work; and,

<sup>66</sup> Item 1108A(3)(d) inserted by SLI 2008 No.56 and applies to visa applications made on or after 26 April 2008. The requirement was reworded from 'is under 18 years of age' to 'has not turned 18' by SLI 2010 No.38 to apply to visa applications made on or after 27 March 2010. However, the change does not affect the applicable age limit. 'Letter of support' is defined at item 1108A(5).

<sup>67</sup> As inserted by SLI 2010 No.38 for visa applications made on or after 27 March 2010. The intention of this insertion is to prevent persons to whom s.48 of the Act applies from making a valid application for a Child (Residence) (Class BT) visa unless the applicant can satisfy the requirement in new paragraph 1108A(3)(e) (see Explanatory Memorandum to the amending regulations for details).

<sup>68</sup> Item 1108A(3)(e) as inserted by SLI 2010 No.38 to apply to visa applications made on or after 27 March 2010. The definition of 'medical practitioner' was also inserted by the same amending regulations at item 1108A(5).

<sup>69</sup> cl.101.211(1)(b) and 802.212(1)(b).

<sup>70</sup> These clauses were inserted into the Regulations by the Migration Amendment Regulations 1999 (No. 13). The explanatory statement says the amendment was "intended to ensure that an applicant who turns 18 during the processing of the visa application, is not disqualified from the grant of the visa simply because of the change in age" (Item 2308 and 2350). While this interpretation may seem to be in conflict with other provisions of the Regulations that require 'dependence' to be assessed under r.1.05A where a child is 18 years or over, it is supported by the explanatory statement for the amending regulation and is reflected in current Departmental policy. There has not been any judicial consideration of this issue.

<sup>71</sup> The partner relationship may or may not include de facto relationships depending on whether the visa application was made prior to or after 1 July 2009. For further information see footnote 20.

- since turning 18, **or** within 6 months or a reasonable time after completing the equivalent of year 12, been undertaking a full-time course leading to the award of a professional, trade or vocational qualification. This requirement however, does not apply to persons who are dependent and incapacitated for work due to total or partial loss of mental or bodily functions.

Applicants who are subject to this time of application requirement must also continue to satisfy the requirement at the time of decision.<sup>72</sup>

#### Study requirement

Applicants who have turned 18 when they make their visa application, must be undertaking a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification. This must have been undertaken since turning 18, or within a certain time of completing the equivalent of year 12.<sup>73</sup>

#### *Type of course of Study*

Clauses 101.213 and 802.214 contemplate a qualification (such as a degree or a technical college qualification) obtained as a result of undertaking a course of study at an educational institution, although it may extend to cover a qualification that is obtained from an institution or accreditation body upon satisfaction of a variety of criteria, some of which may be fulfilled by undertaking courses at alternative institutions.<sup>74</sup>

In *Sok v MIMIA*,<sup>75</sup> the Court held there was no error in the Tribunal's finding in that case that the applicant's part time course of studies in English, Chinese and computers did not meet this provision. When considering an overseas qualification, PAM3 guidelines state that '[t]he policy intention is that it be at least the equivalent of an Australian TAFE Certificate Level course. Courses of a lesser nature, such as hobby-type courses, single subject courses, and other courses of a very short duration are not acceptable.'

However, on a plain reading of the criterion it appears that the requirement of TAFE equivalence goes beyond the requirements of the criterion itself. Whilst the Federal Court in *Lai v MIAC*<sup>76</sup> proceeded on the basis that the Tribunal's task was to determine whether the course that the applicant was undertaking was the equivalent of, or of a higher standard than, a TAFE certificate, this would appear to be the case because the applicability of PAM3 on this issue was not contended by the parties. It would be arguable that the Tribunal would potentially be asking the wrong question if it did so.

#### *Undertaking a course of study*

The Federal Court has observed that the term 'undertaking' may not necessarily be synonymous with the term 'actively participating'.<sup>77</sup> It considered that the term could be relevantly defined as 'engaging in' or 'entering upon' some enterprise, and as such the relevant question may be whether, on the evidence before the decision-maker the applicant has been engaging, or participating, or entering upon a full-time course of study.

#### *Relevant period of study*

<sup>72</sup> cl.101.221(2)(b) and 802.221(2)(b).

<sup>73</sup> See cl.101.213(1)(c) and 802.214(1)(c) (time of application), and cl.101.221(2)(b) and 802.221(2)(b) (time of decision).

<sup>74</sup> *Sok v MIMIA* [2005] FMCA 190 (Riethmuller FM, 4 March 2005).

<sup>75</sup> [2005] FMCA 190 (Riethmuller FM, 4 March 2005).

<sup>76</sup> (2010) 188 FCR 451.

<sup>77</sup> *Sok v MIAC* [2007] FCA 413 (Kenny J, 22 March 2007) at [66]. This was a successful appeal from *Sok v MIMIA* [2006] FMCA 1393 (O'Sullivan FM, 12 October 2006). Justice Kenny's comments were made in obiter.



Clauses 101.213 and 802.214 require that at the time of application the course of full-time study has been undertaken:

- since turning 18, or
- within 6 months or a 'reasonable time' after completing the equivalent of year 12 in the Australian school system.

The applicant is required to have been undertaking full-time study at the time the visa application was made, and also to have been undertaking full time study from one of the above alternative points in time.<sup>78</sup> It is possible that the applicant would meet both if s/he turned 18 before completing year 12, although it would only be necessary to consider the period after completing year 12 (being the later of the two). If the applicant has not completed the equivalent of year 12, the relevant period for the Tribunal to consider is whether the study has been undertaken since turning 18 until the time the visa application was made.

The meaning of 'since' was considered in *Wake v MIAC*.<sup>79</sup> The Court held that 'since' in this context was used in the sense of 'continuously from' the event of turning 18 and rejected the submission that it meant 'at any time after' turning 18.<sup>80</sup>

On the wording of the relevant provisions, it would appear that the consideration of 'reasonable time' is only relevant to the period between completing the equivalent of year 12 and commencing further studies. Determining what is a 'reasonable time' within the meaning of this subclause requires consideration of the surrounding circumstances, that is, actual time involved, what activities were undertaken during that time, the purpose for which those activities were undertaken and, if no relevant activities were undertaken, the reason why.<sup>81</sup> The assessment necessarily depends on all the circumstances of the case.<sup>82</sup> Examples cited by the Court in *Sok v MIMA*<sup>83</sup> of circumstances that may justify a finding that periods of time beyond six months would be reasonable include:

- a young person undertaking a one year exchange student program in another country;
- living and working in another country;
- civil unrest interrupting studies;
- illness; and
- military service.

Policy provides further examples of circumstances which may be considered reasonable including: if the break between completing studies in the Northern hemisphere and commencing studies in the Southern hemisphere is more than 6 months; a break due to giving birth; illness; or dire financial necessity; or if the applicant has commenced studies but moved between institutions and it has taken

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<sup>78</sup> In *MIAC v Henschel* [2013] FCCA 584 (Judge Lindsay, 11 June 2013), the Court saw nothing ambiguous about the requirements of the legislation, considering that '...[e]ither the applicant [had], since turning 18, been undertaking a full-time course of study...or he [had], within six months or a reasonable time after completing the equivalent of year 12 in the Australian school system, been undertaking a full-time course of study', at [7]. In this case, the Court found that the Tribunal overlooked the requirements of cl.802.214 of whether the applicant was at the relevant time undertaking a fulltime course of study as described in the Regulations, at [10]. The subsidiary enquiry was whether the study had been undertaken within the appropriate temporal limits at [11].

<sup>79</sup> *Wake v MIAC* [2010] FMCA 272 (Smith FM, 29 April 2010).

<sup>80</sup> *Wake v MIAC* [2010] FMCA 272 (Smith FM, 29 April 2010) at [25]-[26]. The Court held that this interpretation was from the ordinary meaning of the word having regard to the language and immediate legislative context.

<sup>81</sup> *Sok v MIMIA* [2005] FMCA 190 (Riethmuller FM, 4 March 2005) at [19].

<sup>82</sup> *Dai v MIAC* [2007] FMCA 1345 (McInnis FM, 10 August 2007) at [47].

<sup>83</sup> [2005] FMCA 190 (Riethmuller FM, 4 March 2005) at [21].

time to re-commence studies.<sup>84</sup> Policy further provides that the 'reasonable time' is not intended to cover breaks once post-secondary schooling has commenced including between post secondary studies and post-graduate studies. However, Policy is not binding and the Tribunal must ensure that it applies the relevant test in the Regulations and that all relevant circumstances arising on the claims and evidence are reconsidered.

Importantly, the Court's reasoning was cited with approval in *Sok v MIMIA* in respect to the approach for determining what is a 'reasonable time'.<sup>85</sup> In that case, the Court adopted the comments and reasoning of Riethmuller FM on the issue of whether subparagraph (1)(c) contemplates a single full-time course of study at a particular institution.<sup>86</sup>

The phrase 'after completing the equivalent of year 12 in the Australian school system' was considered in *Ban v MIMA*.<sup>87</sup> The Court noted that nothing in the regulations requires a finding that the applicant 'successfully' completed the year 12 equivalent. In that case, the Tribunal found that the applicant had completed his year 12 studies in 1998 notwithstanding that he had not been awarded his high school leaving certificate until July 2000 (he had failed in his first attempt and then passed baccalaureate examinations held in June / July 2000). The Court found it was open to the Tribunal to make the finding of fact that it did. The same view was taken by the Court in *Dai v MIAC*,<sup>88</sup> that the regulation does not require that the Tribunal find that the applicant has successfully completed the equivalent of year 12 or passed. His Honour further found in *Dai* that what constitutes a 'reasonable period' is a question of fact for the Tribunal taking into account the surrounding circumstances and any factors raised by the applicant.<sup>89</sup>

Further, in *Reyes v MIAC*,<sup>90</sup> Riley FM observed that this regulation is not concerned with whether a person is entitled to enter college or university. Rather, it is concerned with allowing people who are over 18 and who are thus legally adults, to continue to be eligible for the visa on the basis that they are doing full-time, career-oriented, post-secondary courses of the sort usually undertaken by young adults. Her Honour also confirmed that whether an educational qualification is the equivalent of year 12 in Australia is a question of fact for the Tribunal.<sup>91</sup>

In *MIAC v Henschel*<sup>92</sup> the Court held that the Tribunal asked an incorrect question in circumstances where the applicant had not been undertaking a course of study since turning 18 but considered whether if the applicant were now to do so, it could be categorised as an embarkation which had been undertaken within a reasonable time after completing the year 12 equivalent.<sup>93</sup> This case emphasises that the Tribunal must ensure asks the correct question having regard to the language of the provision.

#### *What if an applicant has changed his or her full-time course of study?*

Clauses 101.213(1)(c) and 802.214(1)(c) do not specifically contemplate a circumstance where an applicant may have changed their full-time course of study. The reference to an applicant having been 'undertaking a full time course of study' (our italic) suggests on a literal reading that an applicant is confined to have been undertaking only one such course. The comments of the Court in *Sok v*

<sup>84</sup> PAM3 - Migration Regulations - Schedules - Sch2 Visa 101 - Child -The Visa 101 Main Applicant and PAM3 - Migration Regulations - Schedules - Sch2 Visa 802 - Child - Child (Standard Cases) (01/01/2017 compilation).

<sup>85</sup> [2006] FMCA 1393 (O'Sullivan FM, 12 October 2006) at [111], [115].

<sup>86</sup> [2006] FMCA 1393 (O'Sullivan FM, 12 October 2006) at [120] – [121].

<sup>87</sup> [2006] FMCA 1693 (McInnis FM, 17 November 2006) at [59] – [60].

<sup>88</sup> [2007] FMCA 1345 (McInnis FM, 10 August 2007) at [46] - [48].

<sup>89</sup> *Dai v MIAC* [2007] FMCA 1345 (McInnis FM, 10 August 2007) at [47].

<sup>90</sup> [2007] FMCA 1721 (Riley FM, 29 November 2007) at [14].

<sup>91</sup> [2007] FMCA 1721 (Riley FM, 29 November 2007) at [16].

<sup>92</sup> [2013] FCCA 584 (Judge Lindsay, 11 June 2013).

<sup>93</sup> *MIAC v Henschel* [2013] FCCA 584 (Judge Lindsay, 11 June 2013).

*MIMIA*<sup>94</sup> that subparagraph (1)(c) appears to contemplate a single full-time course of study at a particular institution may also be considered support for such a view. However, the Court's comments here were in the context of a submission that three part-time courses being undertaken simultaneously should have been considered a full-time course of study and did not consider the case of an applicant changing full-time courses. Given that the purpose of the clauses is to ensure that only those who have remained dependent can satisfy the criteria, it would also appear arguable that applicants who have changed full-time courses of studies are covered by these provisions.

#### *Time of decision*

Clauses 101.221(2)(b) and 802.221(2)(b) require that at the time of decision, the applicant 'continues to satisfy' the study requirement set out in the relevant time of application criteria. As noted above, the time of application criteria require that since turning 18 or within 6 months or a reasonable time after completing the equivalent of year 12 in the Australian school system, the applicant *has been undertaking* a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification.<sup>95</sup>

In *Hussain v MIBP*, the Court held that the phrase 'has, since turning 18... been undertaking' in cl.101.213(1)(c), both in itself and read with the requirement in cl.101.221(2)(b) that a visa applicant 'continues to satisfy', requires the decision-maker, when considering the criteria at the time of decision, to look at the time period from the visa applicant commencing study within cl.101.213(1)(c) until the time of the decision and ask whether, characterised as a whole, the visa applicant's conduct in that period warrants the conclusion that the visa applicant has been undertaking relevant study in that period.<sup>96</sup> This will involve examining what the visa applicant had been doing in that interval, including the length of, nature of, and explanation for any gap in study, and regard should also be had to the fact that the nature of study is intermittent.<sup>97</sup>

Following *Hussain*, while there is no requirement for an applicant to have been 'continuously involved' in study from the time of commencement of their studies and up until the time of decision,<sup>98</sup> the visa applicant must, at the time of decision, be undertaking a full-time course. In *Opoku-Ware v MIBP*, the Court held that the provision does not permit an end to the study within the decisional time frame, and considered that the phrase 'has been undertaking' in cl.101.213(1)(c) [802.221(2)(b)] describes an action that has already commenced and remains ongoing. It stated that there are no words present in this provision to support a conclusion that the present perfect continuous tense is used to describe an action, in this case the undertaking of full-time studies, that has recently stopped. Further, the Court considered that the verb 'continues' in cl.101.221(2)(b) [802.211(2)(b)] is written in the present tense and requires that the applicant is *still* undertaking studies at the time of the decision in respect of the visa.<sup>99</sup> In *Hussain*, Judge Barnes observed that the Court in *Opoku-Ware* was addressing the need for the study to remain ongoing, in the sense of not having ceased, at the time of decision, and held that *Opoku-Ware* did not stand for the proposition that continuous involvement in study, without a pause, is required.<sup>100</sup>

Ultimately, whether an applicant has been undertaking a full-time course of study in the relevant period is a finding of fact for the Tribunal having regard to all the evidence and circumstances of the case.

<sup>94</sup> *Sok v MIMIA* [2005] FMCA 190 (Riethmuller FM, 4 March 2005) at [15]. Cited with approval in *Sok v MIMA* [2006] FMCA 1393 (O'Sullivan FM, 12 October 2006) at [120] – [121].

<sup>95</sup> cls.101.213 and 802.214.

<sup>96</sup> *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) at [111].

<sup>97</sup> *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) at [111] and [114].

<sup>98</sup> The Tribunal erred by adopting this construction: *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) at [114].

<sup>99</sup> *Opoku-Ware v MIBP* [2015] FCCA 1638 (Judge Lloyd-Jones, 19 June 2015) at [75] – [78].

<sup>100</sup> *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) at [110].

For further information please refer to the MRD Legal Services commentary: [‘Continues to Satisfy Criterion’](#).

### **Sponsorship – cl.101.212, 101.222, 802.215, 802.226, r.1.20KB**

The sponsorship requirement at time of application and time of decision for both Subclasses 101 and 802 is essentially identical. The requirement at time of application is that the applicant is sponsored by either the person whom the applicant is the dependent child of or their cohabiting spouse or de facto partner; is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen and has turned 18. This is a finding of fact and appears to require only that the person has made the relevant undertakings by completing the sponsorship application form (form 40CH).<sup>101</sup>

At time of decision, the requirement is that the sponsorship referred to at time of application has been approved by the Minister and is still in force.<sup>102</sup>

From 27 March 2010 the Minister must refuse to approve the sponsorship of a person under 18 years at the time of application if the sponsor or their spouse or de facto partner has been charged with, or convicted of, a registrable offence. The limitation does not apply where the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction or the conviction has been quashed or otherwise set aside.<sup>103</sup> ‘Registrable offences’ is defined for the purposes of the limitation provision and includes offences under the relevant State and Territory legislation for registering or reporting on child sex offences or other serious crimes indicating the person may pose a significant risk to a child.<sup>104</sup>

Where the sponsor or their spouse or de facto partner has been convicted of a registrable offence, the sponsorship may be approved if certain circumstances are met. These are that none of the applicants for the visa are under 18 years or the sponsor or their spouse or de facto partner has:

- completed the sentence imposed more than 5 years before the date of the application for approval of the sponsorship; and
- has not been charged with a registrable offence since completing the sentence<sup>105</sup> or, if there was a charge, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; and
- there are compelling circumstances affecting the sponsor or applicant.<sup>106</sup>

Additionally, where the Minister has requested the sponsor or their spouse or de facto partner to provide a police check and it is not provided within a reasonable time, the Minister may refuse to approve the sponsorship of all applicants for the visa.<sup>107</sup> See MRD Legal Services Commentary [Sponsorship Limitations](#) for further information.

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<sup>101</sup> Sponsorship undertakings are set out in r.1.20. Part N of form 40CH contains the undertakings. There is no direct reference to the sponsorship form in the Regulations but the Department requests the applicant lodge the application form 47CH and the sponsorship form 40CH together (see the first page of both forms, design date 07/14).

<sup>102</sup> cl.101.222 and 802.226.

<sup>103</sup> r.1.20KB, inserted by Migration Amendment Regulations 2010 (No. 2) (SLI 2010 No.50) for visa applications made on or after 27 March 2010.

<sup>104</sup> r.1.20KB(13).

<sup>105</sup> Note r.1.20KB(9)(b) appears to contain a typographical error as it states that the Minister may decide to approve the sponsorship if ‘the spouse or de facto partner has not been charged with a registrable offence since the *sponsor* completed that sentence’ (emphasis added). It appears that it should refer to ‘since the spouse or de facto partner completed that sentence’.

<sup>106</sup> r.1.20KB(4) and (5).

<sup>107</sup> r.1.20KB(12). Regulation 1.20KB(11) provides that the Minister may request a police check from a jurisdiction in Australia or a country in which the sponsor or their spouse or de facto partner lived for a period of a total period of at least 12 months.

## Relevant Case Law

<a href="#">Awad v MIBP [2015] FCCA 1381</a>	<a href="#">Summary</a>
<a href="#">Alblasy v MIBP [2016] FCCA 1514</a>	
<a href="#">Ban v MIMA &amp; Anor [2006] FMCA 1693</a>	
<a href="#">Dai v MIAC &amp; Anor [2007] FMCA 1345</a>	
<a href="#">Hussain v MIBP [2017] FCCA 3247</a>	<a href="#">Summary</a>
<a href="#">Lai v MIAC (2010) 188 FCR 451</a>	
<a href="#">MIAC v Henschel &amp; Anor [2013] FCCA 584</a>	<a href="#">Summary</a>
<a href="#">Opoku-Ware v MIBP [2015] FCCA 1638</a>	<a href="#">Summary</a>
<a href="#">Reyes v MIAC &amp; Anor [2007] FMCA 1721</a>	
<a href="#">Sok v MIAC [2007] FCA 413</a>	<a href="#">Summary</a>
<a href="#">Sok v MIMA [2006] FMCA 1393</a>	
<a href="#">Sok v MIMIA [2005] FMCA 190</a>	<a href="#">Summary</a>
<a href="#">Thompson v MIAC [2009] FMCA 1043</a>	
<a href="#">Wake v MIAC [2010] FMCA 272</a>	<a href="#">Summary</a>

## Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 1998 (No.7)</a>	SR 1998, No.284
<a href="#">Migration Amendment Regulations 1999 (No.13)</a>	SR 1999, No.259
<a href="#">Migration Amendment Regulations 2004 (No.8)</a>	SR 2004, No.390
<a href="#">Migration Amendment Regulations 2005 (No.4)</a>	SLI 2005, No.134
<a href="#">Migration Amendment Regulations 2008 (No.2)</a>	SLI 2008, No.56
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2010 (No.1)</a>	SLI 2010, No.38
<a href="#">Migration Amendment Regulations 2010 (No.2)</a>	SLI 2010, No.50
<a href="#">Migration Legislation Amendment Regulation 2012 (No.5)</a>	SLI 2012, No.256
<a href="#">Migration Legislation Amendment Regulation 2013 (No.3)</a>	SLI 2013, No.146
<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015</a>	SLI 2015, No.34
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696

## Available Decision Templates/Precedents

A Subclass 101 / 802 decision template is available and can be used for all Subclass 101 or 802 decisions where the visa application was lodged on or after 1 November 2003.

**Last updated/reviewed: 15 June 2018**

# Definition of adoption - r.1.04

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#### Relevant case law

#### Relevant legislative amendments

Released by the  
AAT under FOI on  
19 September 2019

## Overview

The issue of adoption arises in various contexts under the Migration Regulations 1994 (the Regulations), primarily in considering the Adoption visa Subclass 102, Child visas Subclass 101 and Subclass 802 and more generally in the context of family relationships. The term 'adoption' is defined in r.1.04 of the Regulations, as are a number of related terms which are discussed below.

This Commentary considers issues frequently arising for consideration in relation to the meaning of adoption, most of which relate to factual matters for the tribunal to determine in the circumstances of a particular case.

## Definition of 'Adoption'

The specific definition of 'adoption' applies wherever the term appears in the Regulations. Regulation 1.03 provides that 'adoption' has the meaning set out in r.1.04 and the words 'adopt' and 'adopted' have corresponding meanings.<sup>1</sup> The definition of adoption has particular relevance to:

- the post-1 July 2009 definition of 'child';<sup>2</sup>
- the r.1.03 definition of 'dependent child';<sup>3</sup>
- establishing membership of a family unit for r.1.12 purposes (by reference to 'dependent child');
- the criteria for Subclasses 101 and 802 (Child), Subclass 102 (Adoption), and Subclasses 117 and 837 (Orphan Relative); and
- establishing whether someone is a 'relative' or 'close relative' (for visa applications made prior to 1 July 2009).<sup>4</sup>

## Adoption definition requirements

The key requirements contained in r.1.04 are:

- the adopter must have assumed a parental role in relation to the adoptee;
- the role must be assumed before the adoptee attained 18 years of age;
- the role must be assumed under certain arrangements, namely:
  - formal adoption arrangements under Australian (or state/territory) law;

<sup>1</sup> *Acts Interpretation Act 1901* (Cth), s.18A.

<sup>2</sup> Inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* from 1 July 2009. This definition provides that a child for migration purposes is the same as a child within the meaning in the *Family Law Act 1975* (Cth) except for an adopted child, where the definition in the *Migration Act 1958* (the Act) and Regulations is relevant.

<sup>3</sup> As amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009 No.144) for visa applications made from 1 July 2009. Adopted children are specifically referenced in the definition of dependent child as it applies to visa applications made prior to 1 July 2009. For visa applications made on or after 1 July 2009 the definition refers to 'child' which includes adopted children as defined in the Regulations. For visa applications made on or after 19 November 2016, the definition refers to 'step-child' after the words 'a child' wherever it occurs: see Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

<sup>4</sup> The definition of 'close relative' was amended by SLI 2009, No.144. For visa applications made on or after 1 July 2009, the definition no longer makes reference to 'adopted child' separately as the new definition of 'child' in s.5CA of *Migration Act 1958* (the Act) (as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*) includes adopted children.



- formal adoption arrangements under foreign law, where the adoption results in the legal recognition of the adopter(s) as the parent(s), in place of the previously recognised parents; or
- certain other arrangements entered into outside Australia that are ‘in the nature of adoption’ (referred to as ‘customary adoption’).

‘Customary adoption’ is recognised in r.1.04(2) where:

- the arrangements were made in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter;
- the child-parent relationship between the adoptee and the adopter is significantly closer than any such relationship between the adoptee and any other person or persons;
- formal adoption was not available under the law of the place where the arrangements were made or not reasonably practicable in the circumstances; and
- the arrangements have not been contrived to circumvent Australian migration requirements.<sup>5</sup>

Customary adoption is considered further [below](#).

## Key Issues

### Child must have been under 18 years

Regulation 1.04(1) provides that a person is taken to have been adopted by another person if the adopter assumed a parental role before the adoptee turned 18.<sup>6</sup> This means that there must be a formal adoption arrangement or customary arrangement in the nature of adoption entered into outside Australia in place before the adoptee reached adulthood. Whether an adopter had ‘assumed a parental role’ at the relevant time is a question of fact for the tribunal, having regard to all relevant evidence. The fact formal adoption orders exist is relevant and could suggest assumption of at least legal responsibility consistent with a parental role. However, any other relevant matters, including the role assumed in practice, should also be considered. In any event, an adoption is not regarded as an adoption for migration law purposes if it took place after the adoptee turned 18 (including for the purposes of sponsorship, establishing membership of a family unit etc.). It is irrelevant whether that adoption is otherwise recognised under the laws of a foreign country.

There appear to be two possible constructions of r.1.04(1)(b). First, that the adopter must assume a parental role by way of formal adoption arrangements made in accordance with the law of another country (and otherwise meeting the requirements of (b)). That is, the assumption of the parental role occurs through the entering of formal adoption arrangements meeting the terms of r.1.04(1)(b). On this reading, there is no separate factual element to be satisfied, rather r.1.04(1)(b) is met if arrangements meeting the terms of r.1.04(1)(b) were in place at the relevant time (and were in place before the adoptee attained 18 years of age). Alternatively, r.1.04(1)(b) may require that the adopter has assumed a parental role in relation to the adoptee and that this assumption of a parental role occurred under certain arrangements, namely those in r.1.04(1)(b) (and that this occurred before the

<sup>5</sup> The tribunal is required to make a positive finding under s.65(1) of the Act that it is satisfied that each of these elements is met. A statement that it is not in a position to make a finding would be applying the wrong test and therefore a jurisdictional error: *MIAC v Ryerson* [2008] FMCA 1398 (Scarlett FM, 15 October 2008) at [39].

<sup>6</sup> This requirement is reflected in the criteria for the grant of Subclass 102 and 802 visas, which require the applicant not have turned 18 years of age at the time of application: cl.102.211(2)(a); 102.211(3)(a); 102.211(4)(a); and 102.211(5)(a) and 802.213(1)(a).

adoptee attained 18 years of age). On this construction, the tribunal must be satisfied both that the adopter had assumed a parental role, and that this occurred in the context of formal arrangements meeting the terms of r.1.04(1)(b). While not free from doubt, and noting the absence of any judicial guidance on this question, it appears the preferable construction is the latter.<sup>7</sup> That construction gives effect to the words 'assumes a parental role' in r.1.04(1), which would on the first construction have no work to do.<sup>8</sup>

### Formal adoption arrangements

Regulation 1.04(1)(a) and (b) refers to formal adoption arrangements made under the laws of Australia and under the laws of a foreign country respectively.

Formal adoption arrangements under the laws of Australia require consideration of the laws of the State/Territory where the adoptive parent resides. Each State/Territory has responsibility for processing individual adoption applications and assessing prospective adoptive parents to determine their suitability to adopt. Under Australia's intercountry adoption process, prospective adoptive parents are required to apply to the relevant State/Territory authority and be assessed prior to their file being sent to an overseas authority for matching with a suitable child.

### Considering foreign laws

Regulation 1.04(1)(b) provides that a person (the adoptee) is taken to have been adopted by a person (the adopter) if 'formal adoption arrangements made in accordance with the law of another country, being arrangements under which the persons who were recognised by law as the parents of the adoptee before those arrangements took effect ceased to be so recognised and the adopter became so recognised'.

This requires the tribunal to make findings of fact as to whether formal adoption arrangements have been made in accordance with the law of another country, rather than requiring it to decide questions of foreign law. The tribunal must carefully consider all of the evidence before it including any country information and determine the weight to give to the evidence. For example, in *Liang v MIAC*<sup>9</sup> the Court was called upon to consider whether the tribunal had properly determined whether an adoption had occurred in the context of a sponsored skilled visa. The Court held that on the material before the tribunal, there was no evidence of any formalities having been fulfilled and that the tribunal had erred in its factual conclusion that the adoption was a 'formal' adoption within the meaning of r.1.04(1)(b).<sup>10</sup>

The same factual approach applies if considering whether a formal adoption arrangement has been severed. For example, in *Truong v MIBP*,<sup>11</sup> the issue was whether the visa applicant was the parent of his biological Australian citizen child, who had previously been adopted in Vietnam. The Court observed that foreign law is ordinarily a question of fact, and upheld the Tribunal's finding that an

<sup>7</sup> Note that the tribunal appears to have taken a different approach in matter of 0904724, where it considered the interpretation of r.1.04 and expressed the view that 'assumed a parental role' was not a separate requirement, but rather the term 'under' simply meant 'in accordance with'. In matters 1006762 and 1003499 the tribunal accepted that a parental role had been assumed but found that it was not under one of the required formal or customary arrangements. The reasoning in those matters appears to implicitly accept there are two elements in r.1.04 to be satisfied.

<sup>8</sup> See *Commonwealth v Baume* (1905) 2 CLR 405 (at 414), *Beckwith v R* (1976) 135 CLR 569 (at 574), *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at [71]) and *Plaintiff M47/2012 v Director-General of Security* (2012) 295 ALR 243 (at 290) for the principle that a construction which gives all words meaning and effect should be adopted over other possible constructions which do not.

<sup>9</sup> [2007] FMCA 1288 (Riethmuller FM, 8 August 2007).

<sup>10</sup> *Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007) at [9]. Compare this with *Irawan v MIAC* [2009] FMCA 1165 (Nicholls FM, 27 September 2009) where the evidence was equivocal as to whether the applicant as a married woman could proceed to adopt under domestic adoption procedures which applied only to single women under Indonesian adoption laws. The Court held (at [135]) that while a different tribunal member may have come to a different conclusion, it was open to the tribunal to find that the adoption did not comply with Indonesian law at the relevant time.

<sup>11</sup> *Truong v MIBP* [2017] FCCA 2713 (Street J, 7 November 2017).

order made in Vietnam purporting to terminate the adoption was not effective for the purposes of the Act or Regulations in circumstances where the child was resident in Australia.<sup>12</sup>

### ***Whether the foreign law causes recognition of the natural parents to cease***

For a foreign adoption to be recognised as a formal arrangement, the adoption must have resulted in the adopter(s) being recognised by law as the parent(s) of the adoptee, and the natural parents ceasing to be so recognised.<sup>13</sup>

Adoption in Australia, although governed by similar State / Territory laws, generally results in an adopted child legally becoming the child of the adopter or adopters, and the adopter or adopters becoming the parent or parents of the child, as if the child had been born to the adopters.<sup>14</sup>

This is not necessarily the case in other jurisdictions and foreign adoption laws may or may not sever all legal ties with the natural parents. This occurs where an adoption order does not result in the full and permanent acquisition of parental rights by the adopting parent despite the country's authorities approving the child to come to Australia once the adoption is finalised.<sup>15</sup> Where foreign adoption laws are unclear as to whether these ties are fully severed with the child's natural parents by an adoption, decision makers must determine this question by having regard to any available information including for example, relevant court orders and country information as to the adoption laws of that particular country. Should this issue arise, please consult MRD Legal Services for further assistance.

### **Customary Adoption**

An 'arrangement' that does not meet the requirements of a formal adoption arrangement in accordance with r.1.04(1)(a) and (b) may nevertheless be taken to be in the nature of adoption if it is an arrangement entered into outside Australia that meets the requirements of r.1.04(2).<sup>16</sup> That is, it is a 'customary adoption'.

To meet the customary adoption requirements in r.1.04(2):

- the arrangements must have been made in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter;
- the child-parent relationship between the adoptee and the adopter must be significantly closer than any such relationship between the adoptee and any other person or persons, having regard to the nature and duration of the arrangements;
- formal adoption must not have been available under the law of the place where the arrangements were made or not reasonably practicable in the circumstances; and
- the arrangements must not have been contrived to circumvent Australian migration requirements.<sup>17</sup>

<sup>12</sup> *Truong v MIBP* [2017] FCCA 2713 (Street J, 7 November 2017) at [42].

<sup>13</sup> r.1.04(1)(b).

<sup>14</sup> See for example *Adoption Act 1993* (ACT), s.43(1)(a); *Adoption Act 2000* (NSW), s.95(2)(c); *Adoption of Children Act 1994* (NT), s.45(1)(a); *Adoption Act 2009* (Qld), s.214(2); *Adoption Act 1988* (SA), s.9(1); *Adoption Act 1988* (Tas), s.50(1)(a); *Adoption Act 1984* (Vic), s.53(1)(a).

<sup>15</sup> This currently occurs in Thailand: POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 102 – Adoption: About the Hague Adoption Convention (reissued 1 January 2016).

<sup>16</sup> r.1.04(1)(c).

<sup>17</sup> The tribunal is required to make a positive finding under s.65(1) of the Act that it is satisfied that each of these elements is met. A statement that it is not in a position to make a finding would be applying the wrong test and therefore a jurisdictional error: see *MIAC v Ryerson* [2008] FMCA 1398 (Scarlett FM, 15 October 2008) at [39].

### **Arrangements made in accordance with the usual practice, or a recognised custom**

For customary adoptions, r.1.04(2)(a) requires the arrangement to have been made in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter. This is a factual matter for the tribunal to determine. The availability of formal adoption in a country should not preclude considering other arrangements against the customary adoption criteria.

Country information will indicate the usual practice or recognised customs in the culture of the visa applicant when assessing claims of customary adoption.

### **Closeness of the child-parent relationship**

Whether the child-parent relationship between the adoptee and the adopter is significantly closer than any such relationship between the adoptee and any other person or persons as required by r.1.04(2) is also a factual matter for the decision maker to determine. Examples of relevant considerations may include whether the claimed parents provide financial support for the child's daily needs, the child's living arrangements, the extent of contact with the natural parents and adoptive parent, and to what extent the adoptive parent has declared the child to be 'their' child (as evidenced, for example, in hospital, church or school records, or family status certificates or family books where used and maintained in the relevant country).

Departmental policy outlines the following as matters officers should take into consideration when assessing the nature of the child-parent relationship:

- Mutuality - does the information presented in the application or at interview support the claim that both parents and child have a relationship closer than any other such relationship
- Financial aspects - do the claimed parents provide financial support for the child's daily needs (insofar as it is practicable in the circumstances)
- Living arrangements - are the family's living arrangements consistent with the claim that the child has been customarily adopted:
  - How long has the child been living with the family
  - Has the child been cared for by other relatives for a period of time which might suggest a closer relationship than that with the claimed adoptive parents
- Social aspects - is there any evidence that the claimed parent-child relationship has been recognised by the extended family, community and/ or local authorities - for example, family status certificates or family books (if these documents are officially used and maintained) or hospital, religious or school records. Does the child know, to the extent it would be reasonable to expect, of other relatives, who are recognised by other children in the family
- Future plans - do the plans for the future of the family include the claimed customarily adopted child:
  - Do the parents' plans indicate an ongoing interest in and responsibility for the child
  - Does the child have an understanding of these plans appropriate to their age.<sup>18</sup>

The parent-child relationship must be 'significantly closer' than any such relationship between the adoptee and *any* other person (including, but not limited to, the natural parents) having regard to the nature and duration of the arrangements. For example, in *Hussain*, Nicholls FM found that it was reasonable and open to the tribunal to draw a compelling inference from the mere circumstance that

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<sup>18</sup> POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > Reg 1.04 – Adoption at [14.3] (reissued 1 July 2011).

the child continued to live with his biological parents and where the adopted parent was physically thousands of miles away in a different country. In these particular circumstances, which included other documentary evidence, the Court found that it was open to the tribunal to conclude the parents must have remained close to the child and played some role in day to day interaction or involvement with him.<sup>19</sup>

### **Formal adoption was not available or not reasonably practicable**

Whether or not formal adoption was available under the law of the place where the arrangements were made or whether or not it was reasonably practicable in the circumstances is a factual matter for the decision maker to determine. Country information about local adoption laws may assist together with evidence about the circumstances of the child and adoptive parent(s).

Circumstances in which formal adoption may be 'not reasonably practicable' may include situations where, for example, a person was unable to take advantage of the legal system due to barriers such as geography, finance, language, civil war etc.<sup>20</sup>

Decision makers should be aware of the distinction between adoptions which are 'not reasonably practicable' and 'not legally allowed'. This requires considering the laws of the country. Generally customary adoption is not permitted to run counter to the law of a country, operating as an adjunct to law in societies that have not codified their laws. However the two laws may also co-exist.

### **Arrangements must not be contrived**

Regulation 1.04(2)(c) requires the decision maker to be satisfied that the arrangements have not been contrived to circumvent Australian migration requirements. It is thus relevant to consider what the usual arrangements are in relation to the intercountry adoption of a child. The length of time that the customary adoption has been in place may also be a relevant factor.<sup>21</sup>

### **Custody rights**

Unlike formal adoptions, the biological parent may retain custody rights in respect of a customarily adopted child in circumstances where the customary adoption does not operate to sever the legal ties between the child and their biological parents. In these cases, the retention of custody rights will not result in an invalid adoption under r.1.04(2).

Custody rights of the child's biological parents (if alive) will be relevant where the tribunal is making a finding on Public Interest Criterion 4015 or 4017 (providing consent to the grant of a visa) or when considering the Schedule 2 criteria for certain visa subclasses. For example, while it is permissible under r.1.04(2) for some custody rights to be retained, the adopting parents must nevertheless have 'full and permanent parental rights' in order to meet the Schedule 2 criteria for certain streams within Subclass 102 and 802 visas where the child has been adopted overseas.

## **The effect of adoption on existing familial relationships**

Subject to a number of exceptions outlined below, an adopted child legally becomes the child of the adopting parent/s as if the child had been born to the adopter/s. As a result, in some cases, it may be

<sup>19</sup> In *Hussain v MIAC* [2010] FMCA 729 (Nicholls FM, 28 September 2010) and *Hussain v MIAC (No.2)* [2010] FMCA 730 (Nicholls FM, 28 September 2010).

<sup>20</sup> See POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > r.1.04- Adoption at [12.3] (reissued 1 July 2011). Policy suggests that reasons as to why formal adoption could not be accessed should comprise circumstances which imply a degree of having been beyond the control of the adoptive parent/child at the time of the adoption. However, this is not a requirement of the regulations and the tribunal must ensure it applies the correct statutory test.

<sup>21</sup> See POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > r.1.04- Adoption at [15.2] (reissued 1 July 2011).

necessary to determine whether a relative, who fell within the description of a particular defined relative (e.g. parent, sister, uncle) before a person was adopted, still meets the definition of the relevant relative after adoption. That is, to determine whether adoption nullifies the relevant pre-existing family relationship.

*The Laws of Australia*<sup>22</sup> describes the effect of adoption under Australian law as follows [footnotes modified]:

*An adopted child becomes in law the child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopters.<sup>23</sup> This is sometimes known as the 'substitution principle', because in law the adoptive parents are substituted for the birth parents.*

*In a much-quoted passage in Re K (an infant) [1953] 1 QB 117; 2 All ER 877, Jenkins LJ said that the purpose of adoption is:*

[T]o extinguish all the rights, duties, obligations and liabilities of the parent in regard to the infant, [and] to vest those rights, duties, obligations and liabilities in the adopter, and to convert the infant into the legal equivalent of a child born to the adopter in lawful wedlock, to whom the natural parent becomes in the eye of the law a mere stranger.<sup>24</sup>

*This remains the basic position, although the emergence of 'open adoption' practices and, in particular, provisions providing for rights to information about birth relationships, has meant that the adoption order may not always mean the end of the relationship between the adoptee and the birth family...*

There are three exceptions to the general substitution principle. For the purpose of criminal laws relating to incest and similar offences, the relationships between an adopted person and members of the birth family are recognised, as well as those between the adoptee and members of the adoptive family.<sup>25</sup> The same is true of the prohibitions under the *Marriage Act 1961* (Cth) on marriage between closely related people.<sup>26</sup> A child adopted under Australian law automatically acquires citizenship if he or she is in Australia as a permanent resident at the time of the adoption and if one of the adoptive parents is an Australian citizen, but an overseas adoption order, even if recognised in Australia, does not necessarily have this effect.<sup>27</sup>

Further exceptions to the substitution principle acknowledge some legal relations in respect of guardianship, custody and inheritance between birth parents and adopted persons.<sup>28</sup>

### ***The effect of adoption on family relationships under the Migration Act and Regulations***

Adoption does not *generally* preclude existing family members from continuing to meet the definition of the particular family relationship (e.g. brother, cousin) after the person to whom they are related is adopted. The situation is as follows:

<sup>22</sup> *The Laws of Australia* [17.9.1290].

[https://www.westlaw.com.au/maf/wlau/app/document?&src=search&docguid=1f455201138d11e38f45ebd1ab56cac9&epos=79&snippets=true&nsfid=std-anz-highlight&nsds=AUNZ\\_SEARCHALL&isTocNav=true&tocDs=AUNZ\\_AU\\_ENCYCLO\\_TOC&context=48&extLink=false&fullResuIt=false&searchFromLinkHome=true](https://www.westlaw.com.au/maf/wlau/app/document?&src=search&docguid=1f455201138d11e38f45ebd1ab56cac9&epos=79&snippets=true&nsfid=std-anz-highlight&nsds=AUNZ_SEARCHALL&isTocNav=true&tocDs=AUNZ_AU_ENCYCLO_TOC&context=48&extLink=false&fullResuIt=false&searchFromLinkHome=true), accessed 8 February 2019.

<sup>23</sup> *Adoption Act 1993* (ACT), s.43(1)(a); *Adoption Act 2000* (NSW), s.95(2)(c); *Adoption of Children Act 1994* (NT), s.45(1)(a); *Adoption Act 2009* (Qld), s.214(2); *Adoption Act 1988* (SA), s.9(1); *Adoption Act 1988* (Tas), s.50(1)(a); *Adoption Act 1984* (Vic), s.53(1)(a); *Adoption Act 1994* (WA), s.75(1)(a).

<sup>24</sup> *Re K (an infant)* [1953] 1 QB 117; [1952] 2 All ER 877, Jenkins LJ at 129.

<sup>25</sup> See *Adoption Act 1993* (ACT), s.43(3); *Adoption Act 2000* (NSW), s.95(4); *Adoption of Children Act 1994* (NT), s.45(2); *Adoption Act 2009* (Qld), s.214(8); *Adoption Act 1988* (Tas), s.50(2); *Adoption Act 1988* (Vic), s.53(2); *Adoption Act 1994* (WA), s.75(5).

<sup>26</sup> *Marriage Act 1961* (Cth), s.23(2) and (3).

<sup>27</sup> See, for example Department of Home Affairs Booklet, Child Migration, <https://immi.homeaffairs.gov.au/form-listing/forms/1128.pdf>, January 2019, accessed 7 February 2019.

<sup>28</sup> See, e.g. *Adoption Act 2000* (NSW), s.98.



- For visa applications made prior to 1 July 2009, some provisions should be interpreted to include biological as well as adoptive relatives.
  - The Court in *Liang v MIAC*, in the context of determining whether a sponsorship relationship existed, found that for the relevant provision the term ‘first cousin’ should be given a broad reading such that it includes first cousins whether by biology, adoption, or marriage.<sup>29</sup>
  - For a ‘customary adoption’ under r.1.04(1)(c), the legal ties to the natural (biological) parents may not have been formally severed. This means that, although the child will become a member of the child’s adoptive family unit, the child may remain a member of the family unit of their biological family.
- For visa applications made on or after 1 July 2009, if a child has been formally adopted, the child is taken to be the child of the adoptive parent or parents and not of any other person.<sup>30</sup> A child cannot have more than 2 parents (other than step-parents) unless the child was customarily adopted (in accordance with r.1.04(1)(c)).<sup>31</sup>

The Act and Regulations remain silent, however, as to the effect that adoption has on a person’s relationship to other biological relatives (such as their siblings, uncle, aunt, nephew or niece, etc). The definition of ‘Relationships and family members’ does not limit who is a member of a person’s family or relative of a person.<sup>32</sup> Additionally, ‘relative’ is broadly defined to include a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-uncle, step-niece, step-nephew or a close relative.<sup>33</sup> ‘Close relative’, in turn, is defined to include, among other persons, a brother or sister of the person.<sup>34</sup> Neither definition expressly distinguishes between biological and adoptive relations.

Relevant case law	
<a href="#">Cam Mui Chi v MIMA (1998) 84 FCR 14</a>	
<a href="#">EC v MIMIA [2004] FCA 978</a>	<a href="#">Summary</a>
<a href="#">Irawan v MIAC [2009] FMCA 1165</a>	
<a href="#">Liang v MIAC [2007] FMCA 1288</a>	<a href="#">Summary</a>
<a href="#">Hussain v MIAC [2010] FMCA 729</a>	
<a href="#">Hussain v MIAC (No.2 ) [2010] FMCA 730</a>	
<a href="#">MIAC v Ryerson [2008] FMCA 1398</a>	<a href="#">Summary</a>
<a href="#">Nguyet Huong Phung v MIEA [1997] 74 FCR 422</a>	
<a href="#">Rani v MIAC [2012] FMCA 705</a>	<a href="#">Summary</a>
<a href="#">Truong v MIBP [2017] FCCA 2713</a>	<a href="#">Summary</a>

<sup>29</sup> *Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007) at [28].

<sup>30</sup> r.1.14A, as amended by SLI 2009, No.144 for visa applications made on or after 1 July 2009.

<sup>31</sup> Note 1 of r.1.14A.

<sup>32</sup> s.5G(2), the Act.

<sup>33</sup> See r.1.03.

<sup>34</sup> See r.1.03.



**Relevant legislative amendments**

<b>Title</b>	<b>Reference number</b>
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696

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# Dependent & Dependent Child

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## Overview

Issues relating to dependency arise in relation to numerous visa subclasses. A finding of dependency may be a requirement of a definition in a particular visa subclass (e.g. aged dependent relative, child or dependent child); however more often the issue of dependency arises for secondary applicants in the context of the definition of member of a family unit.<sup>1</sup> What constitutes the relevant period of dependency can differ depending on the context of the visa subclass in which the requirement arises.

The definition of 'dependent' in the Migration Regulations 1994 (the Regulations) was significantly changed from 1 November 1999.<sup>2</sup> This commentary discusses the post 1999 definition and is relevant to visa applications made on or after 1 November 1999. For any queries regarding the pre-1 November 1999 definition, please contact MRD Legal Services.

This commentary canvasses the main issues and questions that arise for the Tribunal in making an assessment about whether an applicant is 'dependent' on another person. It addresses issues relevant to the definition of dependent and dependent child as defined in r.1.05A and r.1.03 respectively. For information relating to the definition of aged dependent relative in r.1.03 see the MRD Legal Services Commentary: [Aged Dependent Relative](#).

## Dependent

The concept of dependency in r.1.05A is limited to financial dependency, except in relation to certain specified protection and humanitarian visa classes for which it is open to consider whether the person is reliant on another for psychological or physical support.

Specifically, r.1.03 provides that 'dependent' has the meaning given by r.1.05A.<sup>3</sup> Regulation 1.05A currently states:

- 1.05A** (1) *Subject to subregulation (2), a person (the “**first person**”) is dependent on another person if:*
- (a) *at the time when it is necessary to establish whether the first person is dependent on the other person:*
    - (i) *the first person is, and has been for a substantial period immediately before that time, wholly or substantially reliant on the other person for financial support to meet the first person’s basic needs for food, clothing and shelter; **and***
    - (ii) *first person’s reliance on the other person is greater than any reliance by the first person on any other person, or source of support, for financial support to meet the first person’s basic needs for food, clothing and shelter; **or***

<sup>1</sup> r.1.12 of the Migration Regulations (1994) (the Regulations).

<sup>2</sup> For visa applications made prior to 1 November 1999, the relevant definition of 'dependent' was set out in r.1.03 as follows: 'dependent' in relation to a person, means wholly or substantially dependent on another person for financial, psychological or physical support.

<sup>3</sup> The definition in r.1.05A was inserted by r.5(1) of Migration Amendment Regulations 1999 (No.13), (SR 1999 No.259).

(b) *the first person is wholly or substantially reliant on the other person for financial support because the first person is incapacitated for work due to the total or partial loss of the first person's bodily or mental functions.*

(2) *a person (the **first person**) is dependent on another person for the purposes of an application for:*

(d) *a protection visa;<sup>4</sup> or*

(ea) *a Refugee and Humanitarian (Class XB) visa; or*

(i) *a Temporary Safe Haven (Class UJ) visa;*

*if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support.<sup>5</sup>*

A finding that a person is 'dependent' on another person therefore involves the following specific findings of fact, that:

- the applicant is 'wholly or substantially' reliant on the other person for financial support as a matter of fact; AND
- is so reliant at the time that the finding of dependence is made AND for a substantial period immediately before that time; AND
- the financial support being provided in fact is to meet the applicant's basic needs for food, clothing and shelter; AND
- the applicant's reliance on the other person is greater than his or her reliance on any other person or source of support; OR
- the applicant is wholly or substantially reliant on the other person for financial support because they are incapacitated for work as a result of total or partial loss of bodily or mental functions; OR
- for certain specified protection and humanitarian visa classes, whether the applicant is wholly or substantially reliant on the other person for psychological or physical support.

These matters are discussed further below.

### **Wholly or Substantially Reliant**

The definition of dependent requires that the person has been 'wholly or substantially reliant' upon the other person for financial support in relation to their basic needs. The notion of substantial reliance requires 'a meaningful degree of financial reliance on a person to an extent that the person might properly be described as being dependent on that person (as distinct from simply receiving some assistance from that person) for basic needs'.<sup>6</sup> It does not involve a numerical assessment, whereby

<sup>4</sup> For applications made prior to 16 December 2014, r.1.05A(2)(d) referred to a Protection (Class XD) visa. This provision was amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* No.135, 2014 and applies to applications made on or after 16 December 2014 and to applications taken to have been an application for a Temporary Protection (Class XD) visa by operation of r.2.08F(1)(b): see item 5000, Schedule 2, part 4.

<sup>5</sup> Note that r.1.05A(2)(ea) which referred to a Refugee and Humanitarian (Migration) (Class BA) visa, was removed by the *Migration Amendment (Redundant and Other Provisions) Regulation 2014*, SLI No.30, 2014 with effect from 22 March 2014.

<sup>6</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [17].

at least half the support required by the dependent person is provided by the other person, nor does it involve a concept of predominance.<sup>7</sup> Substantial reliance does not mean 'predominant or primarily', 'essentially' or 'in the main'.<sup>8</sup>

A person may be substantially reliant on more than one person, however the terms of r.1.05A(a)(ii) require identification of the person who provides the greatest amount for such support. A person can only be 'dependent' on that one person for the purposes of this definition.<sup>9</sup>

The leading authority on this definition, *Vo v Minister for Home Affairs*,<sup>10</sup> does not expressly engage with the question of whether the definition specifically requires substantial reliance on the other person to meet all three basic needs identified in r.1.05A(a)(i) (food, clothing or shelter) or whether substantial reliance to meet one or two of those needs will suffice. However, the Court adopts a holistic approach suggesting the overall position should be considered. The Court held a 'meaningful degree' of financial reliance is required, and found 'it must be sufficient that without the extent of the support provided by the other person the dependent person would be in a position where their overall basic need for food, clothing and shelter though aided by others would not be met.'<sup>11</sup> Accordingly, it appears possible for a person to be substantially reliant on another person even if some part of their needs for food, clothing or shelter is being met by another source. Whether the person is 'dependent' on that other person as defined by r.1.05A would also depend on the satisfaction of other elements of the definition, including that their reliance on that person to meet their basic needs is greater than their reliance on any other person or source.

Importantly, in *Huynh v MIMIA*,<sup>12</sup> the Full Federal Court found that the proper construction of 'dependent' under the current definition in r.1.05A does not carry any implication of the notion of necessity or lack of choice. Therefore, subject to the other requirements of the regulation, there is no need to prove more than reliance in fact.<sup>13</sup>

### Substantial Period

The person must be wholly or substantially reliant upon the other person at the relevant time and for a *substantial period immediately before the relevant time*. For example, if the definition of 'dependent' arises in relation to a time of application criterion in a visa subclass, then the applicant must be dependent on the relevant person at the time of application and for a 'substantial period' immediately

<sup>7</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [15]-[16].

<sup>8</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [19]. The interpretation adopted by the Court in *Vo* is in contrast to earlier lower court judgments, such as *Huang v MIMA* [2007] FMCA 720 (Cameron FM, 16 May 2007) which did rely on a notion of predominance and the judgment in *MIMA v Graovac* [1999] FCA 1690 (Einfeld, Branson and Hely JJ, 16 December 1999) which considered an earlier version of the definition of 'dependent'.

<sup>9</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [14], [18]. In finding that a person can be substantially reliant (per r.1.05A(a)(i)) on more than one person, the Court expressly considered the judgments in *Fernandez v MIBP* [2015] FCCA 1698 (Judge Street, 19 June 2015) and (on appeal) *Fernandez v MIBP* [2015] FCA1265 (Robertson J, 20 November 2015), confining these judgments to the question of whether a person could be dependent on two persons for the purposes of being an aged dependent relative of an Australian citizen. The judgment in *Vo* makes clear that a person can be substantially reliant on more than one person, but can only be 'dependent' within the meaning of r.1.05A on one person.

<sup>10</sup> [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019).

<sup>11</sup> [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [17].

<sup>12</sup> (2006) 152 FCR 576. Much of the analysis of the relevant provision pertains to the construction of r.1.05A(1) however, the Court's reasoning appears to extend to r.1.05A in its entirety, at [35], [36] and [39].

<sup>13</sup> *Huynh v MIMIA* (2006) 152 FCR 576 (Lander, Rares and Besanko JJ, 31 July 2006) considered the construction of 'dependent' in the context of 'dependent child', however, the conclusion as to the proper construction of 'dependent' in r.1.05A is applicable in all cases where reference is made to the term 'dependent', for example, 'relative' in the r.1.12(1)(e) 'member of a family unit' definition (pre-19 November 2016) and r.1.12(2) and (4) (post-19 November 2016) and the definition of 'aged dependent relative' in r.1.03. Significantly, this constituted a departure from the position adopted in *MIMIA v Pires* (1998) FCR 214 and *Xie v MIMA* (2000) FCA 230 which determined that the pre-1 November 1999 definition of 'dependent' did contemplate a degree of necessity. In *obiter* comments a majority of the Court in *Huynh* stated that, while it was not necessary to consider whether these cases were wrongly decided, the decisions in *Pires* and *Xie* should no longer be followed: at [41]. Refer also *Thompson v MIAC* (2010) 114 ALD 86.

before the visa application. There is no definition in the Regulations of what constitutes a 'substantial period', but in the context in which 'substantial' is used in r.1.05A it has been held that it should be understood to mean a lengthy period.<sup>14</sup>

Departmental guidelines (PAM3) interpret a 'substantial period' as usually taken to be at least 12 months.<sup>15</sup> However, while the Tribunal may have regard to Departmental policy, it is not binding on the Tribunal and the Tribunal should always consider the individual circumstances of the case to ensure that the Departmental guidelines are not treated as a legislative requirement.

In *Zeng v MIMIA*<sup>16</sup> the following factors were identified as relevant to the consideration of whether the dependence was for a 'substantial period':

- the actual period of dependence;
- the reason for the dependence; and
- the extent or nature of the dependence.<sup>17</sup>

It is possible for this element of the definition to be satisfied even if there have been breaks or changes in the level of reliance during the period being considered, the definition does not require constant and immediate reliance.<sup>18</sup> For example, a person may be dependent on someone for a substantial period, unable to meet their basic needs for food, clothing and shelter during that period without the support of that other person, even if during that period they have regular holidays living with another person who, during that time, looks after them.<sup>19</sup>

### ***Substantial period for Aged Dependent Relative visas***

It is important to note that where the definition of 'dependent' is being considered in the context of an aged dependent relative visa, the period in which dependency must be established will be different owing to a need to reconcile different relevant periods of dependency in the Regulations. While the definition of 'dependent' in r.1.05A requires reliance for a 'substantial period', the aged dependent relative definition in r.1.03 refers to being dependent for a 'reasonable period'. In these circumstances, it has been held that the predominant provision is the definition of 'aged dependent relative' and the reference to a 'reasonable period' takes precedence and the reference to 'substantial period' in r.1.05A should be read as a period not more substantial than a reasonable period.<sup>20</sup> For further discussion of this, see the discussion of 'Dependent for a 'reasonable period' in the MRD Legal Services Commentary: [Aged Dependent Relative](#).

### **Source of support**

The Regulations generally identify a single person (e.g. the primary visa applicant or the sponsor) on whom a visa applicant is required to be 'dependent'. The source of financial support relied on by a

<sup>14</sup> *Huang v MIMA* [2007] FMCA 720 (Cameron FM, 16 May 2007) at [43]. This finding was made in the context of considering the definition of 'aged dependent relative' in r.1.03 which refers to a relative who 'has been dependent on that person for a reasonable period, and remains so dependent' and how it should be reconciled with the definition of dependent in r.1.05A that the person should be wholly or substantially reliant upon the other person for a substantial period. His Honour went on to state at [44] that, by contrast, a 'reasonable period' need not be lengthy.

<sup>15</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [37.2], reissue date 14 December 2016.

<sup>16</sup> [2005] FMCA 546 (Riethmuller FM, 27 January 2005).

<sup>17</sup> *Zeng v MIMIA* [2005] FMCA 546 (Riethmuller FM, 27 April 2005) at [13].

<sup>18</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [37].

<sup>19</sup> *Vo v Minister for Home Affairs* [2019] FCAFC 108 (Derrington, Banks-Smith & Colvin JJ, 25 June 2019) at [36] – [37].

<sup>20</sup> *Huang v MIMA* [2007] FMCA 720 (Cameron FM, 16 May 2007) at [47].

visa applicant is a question fact for the Tribunal. In *Fusi v MIAC*,<sup>21</sup> the Court found that it was open for the Tribunal to explore how the visa applicant received financial support and to consider any other sources of income on which she was dependent, in this case funds from other family members, when assessing whether she was 'wholly or substantially reliant'.<sup>22</sup>

### **Financial support provided by a couple**

As a practical matter, where that person is part of a couple it may be difficult to ascertain whether that person or his or her partner is in fact the person on whom the visa applicant is reliant. To illustrate this point, it may be useful to consider as an example a Partner visa application where the primary visa applicant's elderly, widowed father is a secondary applicant for the visa. The secondary applicant is required to establish that he is dependent on his daughter (the primary visa applicant) in order to establish that he is a member of her family unit. The sponsor is the sole income earner in the family and is the only person contributing funds towards payment of accommodation, food and clothing costs. However, the primary visa applicant cares for the family and is responsible for most of the household chores.

The Federal Magistrates Court in *Al Naqi*<sup>23</sup> took the view that a 'broad practical judgment' is required in the circumstances of the particular case and this may require consideration of the underlying source of the support and the reasons for it. Federal Magistrate Riethmuller commented that 'on a broad and practical level financial support for a person's relatives, from their spouse, can be considered support by them if their spousal relationship is an essential or substantial part of the reason that the support is provided'.<sup>24</sup> Applying this to the example given above, the primary applicant may be considered to be the source of the support because it is her spousal relationship with the sponsor that is the reason for the financial support being provided to the secondary applicant.

The result may be different, however, if the secondary applicant was not the primary visa applicant's father, but the sponsor's father. In that case, the Tribunal may find that the ultimate source of support is the sponsor because he would support his father regardless of the nature of his relationship with the primary visa applicant. The reason for the support may not be based on the relationship between the sponsor and the primary visa applicant so that the support cannot be attributed to her.<sup>25</sup>

Importantly, in *Phin v MIAC*,<sup>26</sup> Burchardt FM indicated in *obiter* that the comments in *Al Naqi* regarding spousal arrangements did not give rise to any broader principle and were confined to the facts of that case.<sup>27</sup> However, ultimately, the judgments in *Al Naqi* and *Phin* demonstrate that the issue of dependency will be a question of fact for the tribunal to determine having regard to the factual matrix of the particular case at hand.

<sup>21</sup> [2012] FMCA 1037 (Nicholls FM, 15 November 2012).

<sup>22</sup> *Fusi v MIAC* [2012] FMCA 1037, (Nicholls FM, 15 November 2012) at [60]. The Court found it was open for the tribunal to find that in circumstances where the visa applicant was unemployed and was reliant on the income received from her father and resided in his home, nonetheless to reject that she was wholly or substantially reliant on him based on evidence that her income was supplemented by funds from other members of her family. Although the Court's consideration relates to the definition of 'dependent' as it stood prior to November 1999, the reasoning would appear to be equally applicable to the current definition in so far as it considers the terms 'wholly or substantially reliant'.

<sup>23</sup> *Al Naqi v MIAC* [2007] FMCA 874 (Riethmuller FM, 5 June 2007).

<sup>24</sup> *Al Naqi v MIAC* [2007] FMCA 874 (Riethmuller FM, 5 June 2007) at [16].

<sup>25</sup> See generally *Al Naqi v MIAC* [2007] FMCA 874 (Riethmuller FM, 5 June 2007) and *Alimi v MIAC* [2007] FMCA 1520 (Riley FM, 16 October 2007).

<sup>26</sup> [2013] FMCA 60 (Burchardt FM, 13 February 2013).

<sup>27</sup> See *Phin v MIAC* [2013] FMCA 60. In this case, the primary visa applicant for a Remaining Relative visa provided funds to her adult son, which she had in turn received from the Australian sponsor, her brother. The Court found that the Tribunal had erred by moving directly from the issue of the source of funds to a conclusion that the adult son was not dependent upon the primary visa applicant, without making a finding on the factual issue that the Regulations required to be addressed, namely whether he was indeed dependent upon her.



## Incapacitated for work

Regulation 1.05A(1)(b) states that a person may be considered dependent on another person if they are financially reliant on that person *because* they are incapacitated for work due to the total or partial loss of their bodily or mental functions. Importantly, it would be insufficient merely for the applicant to have a disability; rather they must be incapacitated for work as a result of the total or partial loss of the bodily or mental functions.<sup>28</sup>

The term 'incapacitated for work' is not defined in the Act or Regulations, however it was considered in *Cole v MIBP*<sup>29</sup> in the context of r.1.03(b)(ii), which states that a child may be considered a dependent child if they are incapacitated for work due to the total or partial loss of their bodily or mental functions. The Full Federal Court in *Cole* held that the word 'incapacitated', whether for work or otherwise, does not mean totally incapacitated, and is capable of including substantially incapacitated.<sup>30</sup> The Court said:

*...we consider that "incapacitated for work" does not mean exclusively wholly incapacitated, but may extend to substantially incapacitated for work. It would not be appropriate to extend it to trivially or only minimally incapacitated for work because there would not be significant impairment of income earning ability.*<sup>31</sup>

The Court in *Cole* also held that 'work' could only mean 'paid' work; otherwise the regulation would preclude a person who was so incapacitated they could only perform a few hours of voluntary work per week, and would be at odds with the regulatory regime regarding 'dependency', which is focussed on a person's need for financial support.<sup>32</sup>

*Cole* is also authority that the two stage process for assessing incapacity for work, as laid down in *Re Panke and Director-General of Social Security*,<sup>33</sup> and approved in *Annas v Director-General of Social Security*<sup>34</sup> should be adopted. The Court said:

*...the decision-maker should, first, plainly identify what the disabilities of the relevant person are and, in light of that finding (based on medical and related evidence), determine whether there is paid work that the person, with such disabilities, has the capacity to perform.*<sup>35</sup>

However, the Court also found that it would not necessarily be an error if a decision maker does not adopt the two-stage process, where the findings of capacity, based on evidence before the decision-maker, are obvious.<sup>36</sup>

Departmental guidelines in PAM3 state that r.1.05A(1)(b) is intended to apply to persons who are 'not able to work', as distinct from those who choose not to work. Further, it is intended to preclude full, independent functioning adults from otherwise meeting the definition of dependent.<sup>37</sup> PAM3 states that where a person with a disability is, for example, working in a sheltered workshop or undertaking

<sup>28</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.4], reissue date 14 December 2016.

<sup>29</sup> [2018] FCAFC 66 (McKerracher, Barker, and Rangiah JJ, 1 May 2018)

<sup>30</sup> *Cole v MIBP* [2018] FCAFC 66 at [24]. This decision overturned the decision of the lower court in *Cole v MIBP* [2017] FCCA 2234, which had held that 'incapacitated' means totally incapacitated for work.

<sup>31</sup> *Cole v MIBP* [2018] FCAFC 66 at [26].

<sup>32</sup> *Cole v MIBP* [2018] FCAFC 66 at [25].

<sup>33</sup> (1981) 4 ALD 179.

<sup>34</sup> (1985) 8 FCR 49.

<sup>35</sup> *Cole v MIBP* [2018] FCAFC 66 at [67].

<sup>36</sup> *Cole v MIBP* [2018] FCAFC 66 at [69].

<sup>37</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.1], reissue date 14 December 2016.

some other form of 'work', they are not to be excluded on this account. Rather, provided they are unable to work to support themselves financially because of that disability, they should be considered dependent on the person providing them with financial support.<sup>38</sup>

In determining whether a person is incapacitated for work, PAM3 suggests that it may be useful to consider Form 26 (Medical examination for an Australian visa). If the form suggests that there are any physical or mental conditions which may prevent the applicant from attending a mainstream school, gaining full employment, or living independently now or in future, then this could be an indication that they meet r.1.05A(1)(b).<sup>39</sup> However, this evidence, or a lack thereof, may not of itself be determinative of the issue. Ultimately this is a question of fact for decision-makers having regard to all relevant claims and evidence before the tribunal.

### Psychological or physical support – protection and humanitarian cases

In relation to certain specified protection and humanitarian visa classes, dependency is not limited to financial support but extends to psychological or physical support where the first person is wholly or substantially reliant on the other person for that support. There is limited judicial consideration of these factors under the current definition of r.1.05A. However, some guidance may be obtained from case law pertaining to the definition of dependent as it stood prior to 1 November 1999. In particular, in *Chakera v Immigration Review Tribunal*, the Court found that the Tribunal must not substitute a test of emotional dependency for a test of psychological dependency.<sup>40</sup> In *Chakera v Immigration Review Tribunal*,<sup>41</sup> Heerey J gave the following explanation of what is meant by psychological support:

*.... The regulations are not speaking of some kind of clinical phenomena as for example when one speaks of psychological dependency on tobacco. Rather the term is concerned with, to quote one of the meanings given in the Oxford English Dictionary, 'the attitude or outlook of an individual or a group on a particular matter or on life in general' or 'the mental states and processes of a person' (the Macquarie Dictionary). So understood, 'psychological support' directs attention to matters of the mind and spirit as distinct from material support in physical or financial form.*

...

*There may be some overlap between the concepts of psychological support, in the sense explained above, and emotional support but 'emotional' has connotations of 'affected or determined by emotion rather than reason' (the Macquarie Dictionary) corresponding to that dictionary's primary meaning of 'emotion' as 'an affective state of consciousness in which joy, sorrow, fear, hate, or the like is experienced, distinguished from cognitive and volitional states of consciousness'.<sup>42</sup>*

### Dependent Child

The definition of 'dependent child' is contained in r.1.03 and has been amended a number of times.

<sup>38</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.2], reissue date 14 December 2016.

<sup>39</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.5], reissue date 14 December 2016.

<sup>40</sup> *Chakera v IRT* (1993) 42 FCR 525.

<sup>41</sup> (1993) 42 FCR 525.

<sup>42</sup> *Chakera v IRT* (1993) 42 FCR 525 at 530-531 (Heerey J, 9 June 1993). The Court was considering the definition of 'aged dependant relative' in r.2(1) of the Migration Regulations 1989 (Cth) and the meaning of dependent as defined in r.2(1), in particular the meaning of 'financial [and] psychological support'. This was followed in *MIMA v Pires* (1998) FCR 214 at 223.

## Definitions

### Dependent Child-pre 1 July 2009

The definition as it applies in relation to a visa application made prior to 1 July 2009 provides as follows:

**dependent child** means the natural or adopted child, or step-child, of a person (other than a child who has a spouse or is engaged to be married), being a child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
  - (i) is dependent on that person; or
  - (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.

### Dependent Child-post 1 July 2009

For visa applications made on or after 1 July 2009, the definition has been amended to refer to a person not being a dependent child if he or she is 'engaged to be married or has a spouse or *de facto partner*' [emphasis added].<sup>43</sup> The definition states:

**dependent child,**

of a person, means the child or step-child of the person (other than a child who is engaged to be married or has a spouse or *de facto partner*), being a child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
  - (i) is dependent on that person; or
  - (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.

### Dependent Child- post 19 November 2016

For visa applications made on or after 19 November 2016, the definition has been amended to refer to 'step-child' after the words 'a child' wherever it occurs.<sup>44</sup> That is, the definition states:

**dependent child,**

of a person, means the child or step-child of the person (other than a child or step-child who is engaged to be married or has a spouse or *de facto partner*), being a child or step-child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
  - (i) is dependent on that person; or
  - (ii) is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions.

<sup>43</sup> 'Dependent child' was amended by Migration Amendment Regulations 2009 (No. 7) (SLI 2009, No.144) to include reference to 'de facto partner' and applies to visa applications made on or after 1 July 2009. For purposes *other than* visa applications, r.3(15) of SLI 2009, No.144 provides that if immediately before 1 July 2009, a person was a dependent child within the meaning of that term in the Regulations as in force at that time and the person meets the requirements of the definition as in force on 1 July 2009, the person is taken to a dependent child within the meaning of the Regulations as amended. Previously amended by SR 1999, No.259 to replace the earlier definition which required that the child be 'wholly or substantially in the daily care and control of that person', rather than using the concept of dependency.

<sup>44</sup> Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696).

This amended definition clarifies that for the purposes of the definition, reference to a child includes a step child.

### ***Necessary to be 'child'***

In *Nakad v MIAC*,<sup>45</sup> the Court confirmed that for the purposes of the definition of 'dependent child' in r.1.03 of the Regulations, any circumstances suggesting dependency are irrelevant if the definition of 'child' in s.5CA of the Act is not satisfied.<sup>46</sup> For visa applications made on or after 19 November 2016, this extends to satisfying the definition of 'step-child'. For further information, please refer to the discussion on the definition of 'child' in MRD Legal Services Commentary: [Familial Relationships](#).

### ***Dependency***

Whether a child under 18 is dependent within the definition in r.1.03 is established by the fact of the child being a natural, adopted or step-child of the person and satisfying the criteria of age and marital status. There is no further inquiry required, in particular in relation to the question of dependency, in order to establish that they are a dependent child of the person.

Similarly, the Court in *Huynh* held that the fact of incapacity for work due to a total or partial loss of the child's bodily or mental functions is sufficient without further inquiry into dependency for an 18 year or older child to satisfy the definition of dependent child as it is taken as creating dependence on the parent, irrespective of whether the child receives support such as a government benefit or has any dependence in fact on the parent for support.<sup>47</sup> The term 'incapacitated for work' is not further defined in the Act or Regulations. The interpretation of this term is [discussed above](#).

Where a child is over 18 and is not incapacitated, the decision-maker must consider the child's circumstances in relation to the definition of dependent in r.1.05A. Departmental guidelines in PAM3 provide that full-time students completing their first major, undergraduate qualification may be considered 'wholly or substantially reliant' on their parents, even if they are working part time or receiving a scholarship, provided they are otherwise financially reliant on their parents and have been in continuous full time study since high school.<sup>48</sup> The guidelines state that students in other circumstances, such as postgraduate students, should be carefully assessed against the criteria in r.1.05A. While it may be appropriate to have regard to policy for guidance, care should be taken to not apply the guidelines as if they were legal requirements. The decision-maker should always bring the assessment back to the language of the definition in r.1.05A.

In addition to the requirement of being a 'dependent child' within the definition of r.1.03 for Child visas, decision makers should be aware of additional dependency requirements in the particular subclass criteria. For example, the Subclass 101 Child visa requires the applicant to be a 'dependent child' in cl.101.211, but cl.101.213(1)(c) requires an applicant over 18 years must be undertaking a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification. For further information on such requirements, see the MRD Legal Services Commentary material [Child Visas](#).

<sup>45</sup> [2013] FMCA 234 (Emmett FM, 4 April 2013) at [30].

<sup>46</sup> *Nakad v MIAC* [2013] FMCA 234 (Emmett FM, 4 April 2013) at [30]. In this case, the Court found that the children could not be considered the 'child' of their uncle in circumstances where the uncle supported the applicants and their parents with accommodation, financial and health expenses because the definition of child in s.5CA was not met.

<sup>47</sup> *Huynh v MIMIA* (2006) 152 FCR 576 at [26].

<sup>48</sup> PAM3 – POLICY - MIGRATION ACT – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [37.4], reissue date 14 December 2016.

## Meaning of engaged to be married

The meaning of the term 'engaged to be married' was considered by the Court in *Awad v MIBP*<sup>49</sup> in the context of the cancellation of a Subclass 101 visa. The applicant submitted that the correct construction of the term 'engagement' in Australian Law required a voluntary mutual act and contended that her 'betrothal' did not fall within this category as it was the product of an agreement between her father and her husband. The Court observed in *obiter* comments that it doubted that the term 'engaged to be married' was limited to the understanding of that concept by reference to Australian Law and societal norms, though it ultimately declined to resolve this matter.<sup>50</sup> Rather, it held that the evidence established that the applicant had, on her own evidence, in fact entered into a voluntary and mutual relationship with an intention to marry at the time the visa was granted. Further, the Court noted that the involvement of her father in the agreement did not diminish the personal aspect of the formalisation of the relationship.<sup>51</sup>

The findings of the Court in *Awad* support that, in some circumstances, it may not be necessary for the applicant themselves to personally formalise the engagement. The Court found that that once it is accepted that it is possible for an arranged marriage to result in a 'genuine marriage' within the meaning of s.5F of the Act, it is a small step to accept that two people may be engaged to be married in circumstances where the engagement is conditional upon, or even brought about by, the involvement of one or more of the parents of the prospective spouses.<sup>52</sup> Ultimately whether the applicant is engaged to be married is a finding of fact on all the evidence before the Tribunal.

### Relevant Case Law

<a href="#">Al Naqi v MIAC [2007] FMCA 874</a>	<a href="#">Summary</a>
<a href="#">Alimi v MIAC [2007] FMCA 1520</a>	<a href="#">Summary</a>
<a href="#">Awad v MIBP [2015] FCCA 1381</a>	<a href="#">Summary</a>
<a href="#">Chakera v IRT (1993) 42 FCR 525</a>	
<a href="#">Cole v MIBP [2017] FCCA 2234</a>	<a href="#">Summary</a>
<a href="#">Cole v MIBP [2018] FCAFC 66</a>	<a href="#">Summary</a>
<a href="#">Fernandez v MIBP [2015] FCCA 1698</a>	<a href="#">Summary</a>
<a href="#">Fernandez v MIBP [2015] FCA 1265</a>	<a href="#">Summary</a>
<a href="#">Fusi v MIAC [2012] FMCA 1037</a>	<a href="#">Summary</a>
<a href="#">Hinton v MIBP [2015] FCA 408</a>	
<a href="#">Huang v MIMA [2007] FMCA 720</a>	<a href="#">Summary</a>
<a href="#">Huynh v MIMIA (2006) 152 FCR 576</a>	<a href="#">Summary</a>
<a href="#">MIMA v Graovac [1999] FCA 1690</a>	
<a href="#">MIMA v Pires (1998) 90 FCR 214</a>	
<a href="#">Nakad v MIAC [2013] FMCA 234</a>	<a href="#">Summary</a>

<sup>49</sup> [2015] FCCA 1381 (Judge Smith, 28 May 2015).

<sup>50</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [14].

<sup>51</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [15] - [16].

<sup>52</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [16].

<a href="#">Phin v MIAC [2013] FMCA 60</a>	<a href="#">Summary</a>
<a href="#">Thompson v MIAC [2009] FMCA 1043</a> <a href="#">Thompson v MIAC (2010) 114 ALD 86</a>	
<a href="#">Vo v Minister for Home Affairs [2019] FCAFC 108</a>	<a href="#">Summary</a>
<a href="#">Xie v MIMIA (2000) 61 ALD 641</a>	
<a href="#">Zeng v MIMIA [2005] FMCA 546</a>	

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 1999 (No.13)</a>	SR 1999, No.259
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration and Maritime Powers Legislation (Resolving the Asylum Legacy Case Load) Act 2014</a>	No.135, 2014
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696

#### Available Precedents/Templates

There is an optional paragraph available for use where the issue is whether the person is dependent within the meaning of r.1.05A. This paragraph in *Optional Decision Paragraphs for Family Cases* can be viewed in the index and description of available templates which can be accessed via the [Decision Templates/Precedents Index](#).

There is no standard paragraph available for the definition of 'dependent child' or the pre-1 November 1999 definition of dependent in r.1.03.

**Last reviewed / updated: 22 July 2019**

# Familial Relationships

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## Overview

The *Migration Act 1958* (the Act) and the Migration Regulations 1994 (the Regulations) require decision-makers to consider whether two people are in a particular type of familial relationship in a number of circumstances. Some types of relationship are specifically defined under the legislation; others are not. Such relationships may be biological, adoptive or created through marriage or a de facto relationship (in-law).

The contexts in which familial relationships arise include:

- primary criteria for family visa subclasses, where the visa applicant is required to establish that they are related in a particular way to another person (usually an Australian sponsor) in order to be eligible for the visa;
- primary criteria for visa subclasses requiring sponsorship by an Australian person, such as the Sponsored Family Stream under the Subclass 600 (Visitor) visa;
- secondary criteria requiring applicants to establish a certain relationship to the primary visa applicant (usually that they are a member of the primary visa applicant's family unit). A person's relationship to the primary visa applicant may also determine whether he or she can make a combined visa application with the primary visa applicant under Schedule 1 of the Regulations;
- criteria requiring certain relatives of the primary visa applicant to meet health criteria irrespective of whether they are included in the visa application; and
- Public Interest Criteria (Schedule 4 to the Regulations) and conditions on visas (Schedule 8 to the Regulations).

## Types of familial relationships

### Defined relationships

A number of familial relationships are specifically defined for the purposes of the Regulations.

#### ***Aged dependent relative***

'Aged dependent relative' is defined in r.1.03 of the Regulations<sup>1</sup> as a 'relative' who:

- *for visa applications made prior to 1 July 2009*: has never married, or is widowed, divorced or formally separated from his or her 'spouse';
- *for visa applications made on or after 1 July 2009*: does not have a 'spouse' or 'de facto partner'<sup>1,2</sup>;

<sup>1</sup> Note that between 2 June 2014 and 25 September 2014 the definition of 'aged dependent relative' was repealed by Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (SLI 2014, No.65) for primary applications and most secondary applications made from 2 June 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

- has been 'dependent' on that person for a reasonable period, and remains so dependent; and
- is old enough to be granted an age pension under the *Social Security Act 1991*.

This definition incorporates reference to other defined relationships which should be read in conjunction with the relevant definitions in the Act and the Regulations.

A person is required to establish that he or she is an 'aged dependent relative' of an Australian citizen, Australian permanent resident or eligible New Zealand citizen as a primary criterion for the grant of a Subclass 114 (Aged Dependent Relative) or Subclass 838 (Aged Dependent Relative) visa. Outside of these subclasses, the term is not used in any other context in the Regulations. For further discussion see the MRD Legal Services Commentary: [Subclass 114 and 838: Aged Dependent Relative visas](#).

### **Aged parent**

'Aged parent' is defined in r.1.03 of the Regulations as a 'parent' who is old enough to be granted an age pension under the *Social Security Act 1991* (Social Security Act). This definition requires consideration of the term 'parent' which is also a defined term in migration legislation (see [below](#)).

To ascertain whether a person is old enough to be granted an age pension, regard must be had to ss.23(5A) to (5D) of the Social Security Act. Currently, the relevant age varies depending on the year in which the individual was born.

This definition arises in the context of the Subclass 804 (Aged Parent);<sup>3</sup> Subclass 864 (Contributory Aged Parent); Subclass 884 (Contributory Aged Parent (Temporary)) and a range of now redundant visa subclasses.<sup>4</sup> For further information about these subclasses and Parent Visas Issues including 'Balance of Family, see the MRD Legal Services Commentary '[Definition of 'Parent'](#).

### **Child**

#### Visa applications made on or after 1 July 2009

From 1 July 2009, the term 'child' is defined in the Act so excluding other forms of the relationship such as child-in-law forms not otherwise covered. Section 5(1) provides that a 'child' of a person has a meaning affected by s.5CA. The current definition in s.5CA for 'child of a person' applies to visa applications made on or after 1 July 2009.<sup>5</sup> It refers to the concept of 'child' in the sense of a child's familial relationship with another person, rather than the age of the child in terms of being a 'minor' or

<sup>2</sup> As amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) for visa applications made on or after 1 July 2009. 'Spouse' for these purposes is defined in s.5F of the Act (i.e. married relationships), and 'de facto partner' in s.5CB (i.e. same sex or opposite sex partners) of the Act as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009.

<sup>3</sup> Note that between 2 June 2014 and 25 September 2014 the Aged Parent Subclass 804 was closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. The associated definition Aged Parent definition was also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>4</sup> The definition of 'aged parent' also previously applied to Subclass 118 (Designated Parent) and Subclass 859 (Designated Parent) visas. However, these visa subclasses were removed by the Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) for visa applications made on or after 22 March 2014.

<sup>5</sup> As inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. The accompanying Explanatory Memorandum at 8 states that the new section extends the range of persons who can be considered as a child of a person for the purposes of the Act and to facilitate a person having no more than two parents. It states that the definition provides that a child will be considered to be a person's child where the child is the 'product of a relationship' the person has or had as a couple with another person. Essentially, a child cannot be a 'product of a relationship' unless he or she is the biological child of at least one member of the couple (i.e. is conceived utilising the gametes of one party to the relationship), or was born to a woman in the relationship.

in terms of a child's dependency on his or her parents.<sup>6</sup> This definition is supplemented by the concept 'parent and child' in r.1.14A of the Regulations.

Section 5CA provides:

- (1) *Without limiting who is a child of a person for the purposes of this Act, each of the following is the child of a person:*
  - (a) *someone who is a child of the person within the meaning of the Family Law Act 1975 (other than someone who is an adopted child of the person within the meaning of that Act);*
  - (b) *someone who is an adopted child of the person within the meaning of this Act.*
- (2) *The regulations may provide that, for the purposes of this Act, a person specified by the regulations is not a child of another person specified by the regulations in circumstances in which the person would, apart from this subsection, be the child of more than 2 persons for the purposes of this Act.*
- (3) *Subsection (2), and regulations made for the purposes of that subsection, have effect whether the person specified as not being a child of another person would, apart from that subsection and those regulations, be the child of the other person because of subsection (1) or otherwise.*

While s.5CA does not comprehensively describe who can be considered as a 'child' of a person,<sup>7</sup> s.5CA(1)(a) links the meaning of 'child of a person' under the Act to the meaning of 'child of the person' in the *Family Law Act 1975* ('the Family Law Act'). Although the Family Law Act does not precisely define who is a 'child', the relationships that are child-parent relationships, or the concept of a 'child of a person', and although there are biological fathers who are not parents and people who may have the status of parents but are not biologically or through adoption related to a child owing to the operation of s.60H of the Family Law Act, a child-parent relationship under that Act generally refers to the relationships between a child and each of his or her biological parents.<sup>8</sup> Given the link in s.5CA(1)(a) of the Act to the Family Law Act, a 'child of a person' under the migration law would include a biological child of a person.<sup>9</sup>

#### *Parentage presumptions*

The 'child' definition in s.5CA of the Act is also affected by the meaning of 'child' as expanded or modified under the Family Law Act.<sup>10</sup> Relevantly, this means that under s.5CA of the Act, a child born

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<sup>6</sup> In *Nakad v MIAC* [2013] FMCA 234 (Emmett FM, 4 April 2013) at [30], the Court confirmed that for the purposes of the definition of 'dependent child' in r.1.03 of the Regulations, any circumstances suggesting dependency are irrelevant if the definition of 'child' in s.5CA of the Act is not satisfied. In this case, the Court found that the children could not be considered the 'child' of their uncle in circumstances where the uncle supported the applicants and their parents with accommodation, financial and health expenses because the definition of child in s.5CA was not met. Upheld on appeal in *Nakad v MIMAC* [2013] FCA 810 (Rares J, 1 August 2013).

<sup>7</sup> In *Nakad v MIAC* [2013] FMCA 234 (Emmett FM, 4 April 2013), the Court stated in *obiter* comments that given that s.5CA of the Act states that '*Without limiting who is a child of a person for the purposes of this Act*', it is possible that in certain circumstances a niece or nephew may be capable of satisfying the definition of a '*child*'. For example, an uncle may have custody of a niece or nephew. However, this comment was not further discussed or explained, and should be treated with caution.

<sup>8</sup> See also Parkinson P, *Australian Family Law in Context Commentary and Materials*, 5<sup>th</sup> edition (Lawbook co. 2012), at [21.10] p.718.

<sup>9</sup> A biological child of a person would also fall within the meaning of the term 'product of the relationship': Explanatory Memorandum accompanying the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2000 at p.8.

<sup>10</sup> In particular, s.4 of the *Family Law Act* provides that Subdivision D of Division 1 of Part VII of the *Family Law Act* affects the situations in which a child is a child of a person or is a child of a marriage or other relationship. The subdivision contains a number of provisions dealing with issues of child-parent status, e.g. it provides that a reference to a child of a marriage includes ex-nuptial children. It also provides the position of children of de facto partner. Further, with some exceptions, this subdivision deems a child born as a result of an artificial conception procedure or surrogacy arrangements as the child of a particular person, child of a marriage or child of de facto partner, provided that certain requirements are met, though the child is not biologically related to the person(s).

to a couple before their marriage,<sup>11</sup> or a child born to a person or to a couple (including married,<sup>12</sup> or de facto partners whether of the same or opposite sex<sup>13</sup>) as a result of artificial conception procedure,<sup>14</sup> or surrogacy arrangement,<sup>15</sup> could be considered as the child of a particular person, or as a child of a person who is the 'product of a relationship'<sup>16</sup> the person has or had as a couple with another person, provided that certain requirements under the Family Law Act are met, though the child is not biologically related to the person(s).

In addition, for visa applications made on or after 1 July 2009, the Family Law Act parentage presumptions are of relevance because of the definition of 'child' in s.5CA which states that a person is a child for the purposes of the Act if a person is a child of another within the meaning of the Family Law Act (except in relation to an adopted child under that Act).<sup>17</sup> The presumptions include situations where:

- a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband;<sup>18</sup>
- a child is born to a woman and at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, and the woman cohabited with the man, to whom she was not married, that man is presumed to be the father;<sup>19</sup> and
- a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.<sup>20</sup>

Presumptions also exist where a Court has found that a person is the parent of a child,<sup>21</sup> or where a man has executed an instrument acknowledging that he is the father of a specified child.<sup>22</sup> These presumptions are, however, rebuttable and if there was a claim that a person was not in fact the parent of another person, it may be appropriate to seek further evidence.<sup>23</sup> This could include witness evidence or, in appropriate circumstances, DNA evidence.

#### *Children born as a result of artificial insemination*

More specifically, for s.5CA of the Act, if a child was born to a woman as a result of artificial conception procedure while she was married to, or as a de facto partner<sup>24</sup> of another person (the

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<sup>11</sup> s.60F(1)(a) of the *Family Law Act*.

<sup>12</sup> See s.60F of the *Family Law Act* which deems certain children as children of marriage, and s.4 of the *Family Law Act* which defines 'child of a marriage'.

<sup>13</sup> The link in s.5CA(1) of the Act to ss.4(1), 4AA, 60EA and 60HA of the *Family Law Act* allows children of same sex relationships to be considered as 'child of a person' for the purposes of migration law.

<sup>14</sup> s.60H of the *Family Law Act*.

<sup>15</sup> s.60HB of the *Family Law Act*. A surrogacy arrangement is recognized in Australia if a court order under a prescribed law of a State or Territory is made to the effect that the child is the child of one or more persons; or each of one or more persons is a parent of a child.

<sup>16</sup> Explanatory Memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Essentially, a child cannot be a 'product of a relationship' unless he or she is the biological child of at least one member of the couple (i.e. is conceived utilising the gametes of one party to the relationship), or was born to a woman in the relationship.

<sup>17</sup> Following the insertion of the definition of child in s.5CA of the Act by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009, the presumptions set out in the *Family Law Act* in determining a child-parent relationship is clearly of significance.

<sup>18</sup> s.69P of the *Family Law Act*.

<sup>19</sup> s.69Q of the *Family Law Act*.

<sup>20</sup> s.69R of the *Family Law Act*.

<sup>21</sup> s.69S of the *Family Law Act*.

<sup>22</sup> s.69T of the *Family Law Act*.

<sup>23</sup> s.69U of the *Family Law Act*.

<sup>24</sup> This refers to 'de facto partner' and 'de facto relationship' within the meaning of s.4AA, s.60EA and s.60HA of the *Family Law Act*, and not the meaning of 'de facto partner' under the migration law.

couple), and either the couple consented<sup>25</sup> to the carrying out of the procedure and the donor of the genetic material consented to the use of the material, or under a prescribed law<sup>26</sup> the child is a child of the couple, then, under both the Family Law Act<sup>27</sup> and s.5CA(1)(a) of the Act, the child would be considered as the 'child' of the couple unless the child has been adopted (under the Family Law Act) by a third person.<sup>28</sup>

Where a child was born to a woman as a result of the carrying out of an artificial conception procedure and under a prescribed law,<sup>29</sup> the child is a child of the woman, the child would be considered the child of that woman regardless of whether the child is the biological child of the woman<sup>30</sup> for the purposes of both the Family Law Act and s.5CA(1)(a) of the Act.

In circumstances where a child is born under surrogacy arrangements and a court has made orders under a prescribed State/Territory law<sup>31</sup> to the effect that a child is the child of one or more persons; or each of one or more persons is a parent of a child, the child would be considered for the purposes of the family law and migration law to be a child of each of those persons.<sup>32</sup>

Even though the Family Law Act expressly excludes a 'child' from also being the child of a third party donor of biological genetic material if the child was born to a woman as a result of an artificial conception procedure while the woman was married to or as a de facto partner of another person,<sup>33</sup> it does not expressly exclude such third party donor from being the parent of the 'child' where the child is born to a woman who was not in a spousal relationship with another person during the artificial conception procedure.<sup>34</sup> The Family Law Act also does not expressly exclude a third party donor of genetic material from being a parent of a 'child' born under surrogacy arrangements. Thus, the identification of the child-parent relationship under the Family Law Act (and, it follows, in the migration law) may be more complicated, for example, where a child is born as a result of a surrogacy arrangement using donor gametes and therefore there are two sets of parents, being the biological parents and the couple of whose relationship the child is a product. Although a note to r.1.14A provides that a person cannot have more than 2 parents (other than step-parents) unless the child has been adopted under customary adoption arrangements, the circumstances in which artificial conception or surrogacy arrangements are used are not specifically addressed.

#### *Adopted children*

An 'adopted child', as defined under the migration legislation, is a 'child of a person' in s.5CA(1)(b) of the Act. 'Adoption' is defined in r.1.04 of the Regulations. For the purposes of s.5CA(2), r.1.14A

<sup>25</sup> s.60H(5) of the *Family Law Act* provides that a person is presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

<sup>26</sup> The prescribed laws for s.60H(1)(b)(ii) of the *Family Law Act* are set out in s.12C of the Family Law Regulations 1984 (The Family Law Regulations) to include the *Status of Children Act 1996* (NSW); ss.10A, 10B, 10C, 10D, 10E, 13 and 14 of the *Status of Children Act 1974* (Vic); ss.17, 18, 19, 19C, 19D and 19E of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10A, 10B, 10C, 10D and 10E of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); s.11 of the *Parentage Act 2004* (ACT); and ss.5A, 5B, 5C, 5D, 5DA, 5E and 5F the *Status of Children Act* (NT).

<sup>27</sup> s.60H(1) of the *Family Law Act*.

<sup>28</sup> ss.60F(1) and (3), and ss.60HA(1) and (2) of the *Family Law Act*.

<sup>29</sup> The prescribed laws for s.60H(2)(b) of the *Family Law Act* are set out in s.12CA of the Family Law Regulations to include s.14 of the *Status of Children Act 1996* (NSW); ss.15 and 16 of the *Status of Children Act 1974* (Vic); s.23 of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10B and 10C of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); ss.11(2) and 11(3) of the *Parentage Act 2004* (ACT); and ss.5B, 5C and 5E of the *Status of Children Act* (NT).

<sup>30</sup> s.60H(2) of the *Family Law Act*. A similar provision in s.60H(3) of the *Family Law Act* provides that if the child is born to a woman as a result of artificial conception procedures and under a prescribed law, the child is a child of a man, the child is deemed to be the child of the man. However, no law has been prescribed for the purposes of s.60H(3).

<sup>31</sup> The prescribed laws are set out in s.12CAA of the Family Law Regulations to include s.22 of the *Status of Children Act 1974* (Vic); s.22 of the *Surrogacy Act 2010* (Qld); s.21 of the *Surrogacy Act 2008* (WA); s.26 of the *Parentage Act 2004* (ACT); s.10HB of the *Family Relationships Act 1975* (SA) and s.12 of the *Surrogacy Act 2010* (NSW).

<sup>32</sup> s.60HB of the *Family Law Act*.

<sup>33</sup> s.60H(1)(d) of the *Family Law Act*.

<sup>34</sup> See e.g. s.60H(2) and (3) of the *Family Law Act*.

provides that a child that is formally adopted in accordance with r.1.04(1)(a) and (b) is the child of the adoptive parents and that any previous child-parent relationship is no longer recognised. Notably, an 'adopted child' under the Family Law Act is expressly excluded from the s.5CA definition of 'child'.<sup>35</sup>

For further information about whether a person is adopted for the purposes of migration law, see the MRD Legal Services Commentary: [Adoption](#)

### *Step children*

Where 'child' appears in the Regulations, it does not include a 'step-child', because 'step-child' is separately defined in r.1.03 and is limited to a person 'who is not the child' of a parent (see discussion of 'step-child' definition [below](#)). The Regulations specifically include both the terms 'child' and 'step-child' in a number of contexts (e.g. the definitions of 'close relative' and 'dependent child' in r.1.03), indicating the terms are mutually exclusive.

In contrast, where 'child' appears in the Act, it could arguably include a 'step-child', because 'step-child' is not defined in the Act and the ordinary meaning of child can include a person in the position of a son or daughter. The issue of whether a step-child is the child of a person (or a step-parent is the parent of a person) will often arise in the context of determining whether the Tribunal has jurisdiction to review a decision where, to be a reviewable decision under s.338(7) of the Act, the non-citizen be sponsored by a particular person or intends to visit an Australian citizen who is a parent or child. As this is a provision about providing an administrative review right, it could be seen as a beneficial provision that should be interpreted liberally.<sup>36</sup>

However, for the following reasons, the preferable view appears to be that the terms are mutually exclusive and a child in the Act does not include a step-child.

Section 5CA(1) refers to a child as someone who is a child within the meaning of the *Family Law Act 1975* and someone who is an adopted child for the purposes of the *Migration Act 1958*, but it does not restrict the definition of child to these two categories. The phrase 'without limiting who is a child of a person for the purposes of this Act ...' at the start of this section, appears to allow for relationships outside of these two categories to satisfy the definition of child, which might include a step-child. Given that the meaning is ambiguous, you can consider extrinsic materials to determine the scope of relationships which are intended to fall within s.5CA.<sup>37</sup> The Explanatory Memorandum which accompanied the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (which introduced s.5CA) considers 'child' and 'step-child' as being mutually exclusive. The Explanatory Memorandum provides factual examples of where a person would be considered either a child or a step-child for the purposes of the s.5CA definition, and indicates that child does not include step-child.<sup>38</sup>

Changes were also made to the regulations at the same time as s.5CA was inserted into the Act which clearly reflect the separate meanings of 'child' and 'step-child'. As these changes were intended to accompany and ensure consistency with the changes to the Act, it appears the intent of the

<sup>35</sup> The concept of 'adopted' under the *Family Law Act* is narrower than the concept of 'adoption' under the Migration Regulations 1994 (the Regulations). 'Adopted', in relation to a child, is defined in s.4(1) of the *Family Law Act* to mean adopted under the law of any place (whether in or out of Australia) relating to the adoption of children. However, it does not include other adoption arrangements e.g. customary adoptions, which are recognized under r.1.04 of the Regulations.

<sup>36</sup> See D C Pearce, *Statutory Interpretation in Australia*, 8<sup>th</sup> edition at [9.2]-[9.3]

<sup>37</sup> s.15AB(1)(b)(i) of the *Acts Interpretation Act 1901*.

<sup>38</sup> See [20]-[33] and [36]-[39] of [the Explanatory Memorandum](#) to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 for key concepts and definitions of 'child' and 'step-child', and [773]-[778] for discussion of s.5CA. Although the key definition of step-child was not inserted into the Act the *Migration Act 1958*, the discussion of s.5CA suggests an intention that 'child' in the Migration Act should have a meaning consistent with its meaning in other contexts referred to. On a contrary view, because the same-sex changes were intended to address discrimination against same-sex couples, they would not have had the effect of narrowing pre-existing meanings, so if a 'child' in the Act included a step-child before these changes were made, it continued to do so after that time.



legislation, which establishes a scheme for visas under the Act and Regulations, is that the definition of 'child' in s.5CA should not be read to include a step-child.<sup>39</sup>

#### Visa applications made before 1 July 2009

Prior to 1 July 2009, the term 'child' was not specifically defined in the Act or Regulations. For visa applications made prior to 1 July 2009, regard should be had to the ordinary meaning of the word. The definition in the *Macquarie Dictionary* relevantly includes, amongst other things, 'a son or daughter' and, in a 'legal' context, 'a young person within a certain age determined by statute'.<sup>40</sup> The definition here does not, however, include any reference to marriage indicating a child does not include an 'in-law' form of the relationship.

#### **Close relative**

'Close relative' is defined in r.1.03 of the Regulations,<sup>41</sup> in relation to a person, as:

- the partner<sup>42</sup> of the person; or
- a child (including adopted child),<sup>43</sup> 'parent', brother or sister of the person (and their 'step' equivalents).

This definition incorporates several other defined relationships, which should be read in conjunction with the relevant definitions in the Act and Regulations.

The Tribunal may be required to consider whether a person is a 'close relative' of another person when considering whether that person is a 'relative' of the person as that term is defined in r.1.03 (see [below](#)). It also arises as part of the Schedule 2 criteria for Subclass 020 (Bridging B) and Subclass 773 (Border) visas and a range of now redundant parent visas.<sup>44</sup>

#### **De facto partner**

Whether a person is a de facto partner of another person is relevant in a variety of contexts and is in particular a central concept for the grant of the various Partner visas, Partner (Migrant) (Class BC), Partner (Residence) (Class BS), Partner (Temporary) (Class UK), Partner (Provisional)(Class UF).<sup>45</sup> The term 'de facto partner' is also used in the circumstances of determining various familial

<sup>39</sup> See the Explanatory Statement to the Migration Amendment Regulations 2009 (No. 7) (SLI 2009, No.144) at pp.5 and 23.

<sup>40</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017. The definition provides that in Australia, for some purposes in law a young person less than 17 years is a child; for others, under 18 or 21 years.

<sup>41</sup> In *Acosta v MIBP* [2016] FCCA 1276 (Judge Street, 25 May 2016) at [8], the Court held that r.1.03 does not identify an inclusive non-exhaustive meaning but that it clearly defines the persons who are 'relatives' or 'close relatives' and it is not possible to consider relations who are not one of the individuals listed as a 'relative' or 'close relative'. The Court accordingly rejected the applicant's argument that the purpose of the visa should inform who is a 'close relative' and 'relative' such that a great-aunt could not be considered a 'relative'.

<sup>42</sup> The partner reference in this definition varies depending upon when the visa application was made. For visa applications made prior to 1 July 2009 the reference is to 'spouse' as defined in r.1.15A as it was prior to 1 July 2009 (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships of the same or different sex) and in s.5CB (i.e. same sex or opposite sex partners who are not in a married relationship): as amended by SLI 2009, No.144, and No.129 of 2017.

<sup>43</sup> For visa applications made prior to 1 July 2009, the definition of close relative specifically referred to 'adopted child' as defined in r.1.04. For visa applications made on or after 1 July 2009, the definition of child in the Act includes 'adopted child' (s.5CA as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*). Thus, for both pre and post 1 July 2009 visa applications, an adopted child is a close relative.

<sup>44</sup> The reference to 'close' was omitted from Parts 103 (Parent); 143 (Contributory Parent); 173 (Contributory Parent (Temporary)); 804 (Aged Parent); 864 (Contributory Aged Parent); and 884 (Contributory Aged Parent (Temporary)) by Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.38) for visa applications made on or after, or not finally determined before 27 March 2010, the effect being that the reference is to 'relative'. Consideration of whether or not a person was a 'close relative' of another was also previously relevant for a now redundant Subclass 118 (Designated Parent) visa. However, this visa subclass was removed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) for visa applications made on or after 22 March 2014.

<sup>45</sup> These classes of visa were renamed from 'Spouse' to 'Partner' by SLI 2009, No.144.



relationships which may form part of a criterion for a visa for post 1 July 2009 visa applications, including the definition of 'member of the family unit' in r.1.12; the definition of 'member of the immediate family' in r.1.12AA(1); the definition of 'orphan relative' in r.1.14; and the definition of 'remaining relative' in r.1.15.<sup>46</sup> Additionally, in certain cases, a visa applicant's ability to satisfy Schedule 2 criteria may depend on their not or no longer having a de facto partner, for example in order to satisfy the requirements to be considered a 'dependent child' or an 'aged dependent relative' in relation to visa applications made on or after 1 July 2009.<sup>47</sup>

#### De facto partner – post 1 July 2009

For visa applications made on or after 1 July 2009, the terms 'de facto partner' and 'de facto relationship' are defined in s.5CB of the Act and incorporate both same sex and opposite sex de facto relationships.<sup>48</sup> This definition is supplemented by r.1.09A which sets out the factors to be considered in assessing if two persons are in a de facto relationship, and r.2.03A, which sets out additional criteria to be considered if a person claims to be in a de facto relationship for the purposes of a visa application.<sup>49</sup> For applications made on or after 1 July 2009 to meet the definition of 'de facto partner' the couple must have a mutual commitment to a shared life to the exclusion of all others, be in a genuine and continuing relationship, live together or not separately and apart on a permanent basis and not be related by family. Additional requirements for de facto partners are set out in r.2.03A.

For further guidance, see MRD Legal Services Commentary: [Spouse and de facto partner](#).

#### De facto partner – pre 1 July 2009

For visa applications made before 1 July 2009, the term 'de facto partner' was not independently in use in the Act or Regulations, although 'de facto relationship' is referred to in the pre 1 July 2009 definition of 'spouse' (r.1.15A). Persons who were in an opposite sex de facto relationship as described in r.1.15A(2) were considered to be in a spousal relationship<sup>50</sup> and interdependent, or same sex, de facto relationships were separately described in r.1.09A.

For further guidance on the pre 1 July 2009 definition of spouse, see MRD Legal Services Commentary: [Spouse and de facto partner](#) and for guidance on the pre 1 July 2009 version of r.1.09A, which described interdependent relationships, see MRD Legal Services Commentary: [Definition of 'Interdependent Relationship' \(r.1.09A - pre 1 July 2009\)](#).

#### **Dependent child**

The term, 'dependent child', arises in a number of contexts, including in the definition of 'member of family unit' in r.1.12 (see [below](#)), the definition of 'member of the immediate family' in r.1.12AA (see [below](#)); and the Schedule 2 criteria for numerous visa subclasses including Subclass 101 (Child), Subclass 445 (Dependent Child), Subclass 802 (Child) and certain sponsored Skilled visas.

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<sup>46</sup> As amended by SLI 2009, No.144 for visa applications made on or after 1 July 2009. Note the definitions of 'aged dependent relative' and 'orphan relative' were briefly repealed by SLI 2014, No.65 for primary applications and most secondary applications made between 2 June 2014 and 25 September 2014. This Regulation was, however, subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>47</sup> For example, a criterion for the grant of a Subclass 101 visa is that the applicant is a 'dependent child' of an Australian citizen, holder of a permanent visa or an eligible New Zealand citizen: cl.101.211; and a criterion for the grant of a Subclass 838 visa for primary applications and most secondary applications made from 2 June 2014 is that the applicant is an aged dependent relative of an Australian relative: cl.838.212.

<sup>48</sup> As inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* effective from 1 July 2009. References to 'de facto partner' were inserted in the Regulations by SLI 2009, No.144 for visa applications made on or after 1 July 2009 (r.3(2)). However, for the purposes of r.1.20J, where a person was a 'spouse' of another before 1 July 2009 under the old version of r.1.15A, the person is taken to be a spouse within the meaning of the new definition after 1 July 2009: r.3(3).

<sup>49</sup> The amended r.1.09A and new r.2.03A were inserted by SLI 2009, No.144.

<sup>50</sup> r.1.15A(1)(b).

### Dependent Child-pre 1 July 2009

For visa applications made prior to 1 July 2009, the term 'dependent child' is defined in r.1.03 of the Regulations as follows:

*...the natural or adopted child, or step-child, of a person (other than a child who has a spouse or is engaged to be married<sup>51</sup>), being a child who:*

- (a) has not turned 18; or*
- (b) has turned 18 and:
  - (i) is dependent on that person; or*
  - (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.**

### Dependent Child-post 1 July 2009

For visa applications made on or after 1 July 2009, the definition has been amended to refer to a person if s/he 'is engaged to be married or has a spouse or *de facto partner*' [emphasis added].<sup>52</sup> That is, the post 1 July 2009 definition states:

***dependent child,***

*of a person, means the child or step-child of the person (other than a child who is engaged to be married<sup>53</sup> or has a spouse or de facto partner), being a child who:*

- (a) has not turned 18; or*
- (b) has turned 18 and:
  - (i) is dependent on that person; or*
  - (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.**

This amended definition precludes a child in a same-sex relationship from being a 'dependent child'.

### Dependent Child-post 19 November 2016

For visa applications made on or after 19 November 2016, the definition has been amended to refer to 'step-child' after the words 'a child' wherever it occurs.<sup>54</sup> That is, the definition states:

***dependent child,***

*of a person, means the child or step-child of the person (other than a child or step-child who is engaged to be married<sup>55</sup> or has a spouse or de facto partner), being a child or step-child who:*

- (a) has not turned 18; or*
- (b) has turned 18 and:
  - (i) is dependent on that person; or*
  - (ii) is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions.**

This amended definition clarifies that for the purposes of the definition, reference to a child includes a step child.

<sup>51</sup> Note the term 'engaged to be married' in the post 1 July 2009 definition of dependent child- was judicially considered in *Awad v MIBP* [2015] FCCA 1381 but would also appear applicable to this definition.

<sup>52</sup> Amended by SLI 2009, No.144. 'Spouse' for these purposes is defined in s.5F of the Act (i.e. married relationships), and 'de facto partner' in s.5CB of the Act (i.e. same sex or opposite sex partners) as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009.

<sup>53</sup> Note the term 'engaged to be married' was judicially considered in *Awad v MIBP* [2015] FCCA 1381.

<sup>54</sup> Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696).

<sup>55</sup> Note the term 'engaged to be married' was judicially considered in *Awad v MIBP* [2015] FCCA 1381.

### *Engaged to be married*

The term 'engaged to be married' within the definition of dependent child was considered by the Court in *Awad v MIBP*<sup>56</sup> in the context of the cancellation of a Subclass 101 visa. The applicant submitted that the correct construction of the term 'engagement' in Australian Law required a voluntary mutual act and contended that her 'betrothal' did not fall within this category as it was the product of an agreement between her father and her husband.<sup>57</sup> The Court noted that the involvement of her father in the agreement did not diminish the personal aspect of the formalisation of the relationship<sup>58</sup> and determined that in this case, the evidence established that the applicant had, on her own evidence, in fact entered into a voluntary and mutual relationship with an intention to marry at the time the visa was granted. Of interest were the Court's acceptance that two people may be engaged to be married in circumstances where the engagement is conditional upon, or even brought about by, the involvement of one or more of the parents of the prospective spouses.<sup>59</sup> For further discussion on this case see: MRD Legal Services commentary: [Subclass 101 and 802 Child Visas](#).

### Children over 18 pre and post -1 July 2009

In relation to both the pre and post-1 July 2009 definitions of 'dependent child', for persons over 18 years of age, the definition must be read with the definition of 'dependent' which is currently defined in r.1.05A<sup>60</sup>. Relevantly, in *Nakad v MIAC*,<sup>61</sup> the Court confirmed that for the purposes of the definition of 'dependent child' in r.1.03 any circumstances suggesting dependency are irrelevant if the definition of 'child' in s.5CA of the Act is not satisfied.<sup>62</sup>

Detailed consideration of the legal issues relating to this term 'child' can be found in the MRD Legal Services Commentary: [Dependent & Dependent Child](#). Other terms referred to in the definition of 'dependent child' and defined in the Regulations are '[child](#)', '[step-child](#)', '[spouse](#)' and '[de facto partner](#)' which are discussed below in more detail.

### **Guardian**

Regulation 1.03 provides that a 'guardian', in relation to a child, is a person who has:

- responsibility for the long-term welfare of the child; and
- in relation to the child, all the powers, rights and duties that are vested by law or custom in the guardian of a child, other than:
  - the right to have daily care and control of the child; and
  - the right and responsibility to make decisions concerning the daily care and control of the child.

Whether or not a person has in relation to a child the relevant rights and responsibilities will be a question of fact having regard to the relevant laws or customs of the place in which the guardianship arrangement was effected or is in existence. In determining whether a person has the powers, rights

<sup>56</sup> [2015] FCCA 1381 (Judge Smith, 28 May 2015).

<sup>57</sup> The Court observed in *obiter* comments that it doubted that the term 'engaged to be married' was limited to the understanding of that concept by reference to Australian Law and societal norms, though it ultimately declined to resolve this matter at [14].

<sup>58</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [15] - [16].

<sup>59</sup> *Awad v MIBP* [2015] FCCA 1381 (Judge Smith, 28 May 2015) at [16].

<sup>60</sup> Prior to 1 November 1999 the relevant definition was found in r.1.03: note r.1.05A(2)(d) was amended by the *Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Act 2014* No.135 to remove reference to Protection (Class XA) visas for applications made on and after 16 December 2014 and for those applications taken to have been a Temporary Protection Visa (Class XD) visa by operation of r.2.08F(1)(b): item 5000, Schedule 2, Part 4.

<sup>61</sup> [2013] FMCA 234 (Emmett FM, 4 April 2013). Upheld on appeal in *Nakad v MIMAC* [2013] FCA 810 (Rares J, 1 August 2013).

<sup>62</sup> *Nakad v MIAC* [2013] FMCA 234 (Emmett FM, 4 April 2013) at [30]. Note this matter pertained to the definition of child in s.5CA which applies to applications made on or after 1 July 2009.

and duties vested by law and therefore is the guardian of another, regard may be had to relevant legislation, including the following State or Territory legislation:

- In New South Wales, the *Guardianship Act 1987* defines 'guardian' as a person who is, whether under that Act or any other Act or law, a guardian of the person of some other person (other than a child who is under the age of 16 years), and includes an enduring guardian.<sup>63</sup>
- In Victoria, the term 'guardian' is defined in s.3 of the *Guardianship and Administration Act 1986* to mean: (except in s.58C(2) of that Act) - the Public Advocate, person or body named as a plenary guardian or limited guardian in a guardianship order; or a person who becomes a guardian under s.35; or a person named as an enduring guardian in an instrument appointing such a guardian.
- In Queensland, the term is defined in schedule 4 of the *Guardianship and Administration Act 2000* and means 'a guardian appointed under the Act.
- In South Australia s.3 of the *Guardianship and Administration Act 1993* provides that guardian means a person appointed as a guardian under a guardianship order under that Act.
- In Western Australia the term is defined in s.3 of the *Guardianship and Administration Act 1990* to include; a person appointed as a guardian (including an alternate guardian) under s.43 of that Act; 2 or more persons appointed as joint guardians under s.43 of the Act; and the Public Advocate acting under s.99 of the Act.
- In Tasmania s.3 of the *Guardianship and Administration Act 1995* defines a guardian as a person named as a guardian in a guardianship order or as an enduring guardian in an instrument of appointment as such.
- In the Australian Capital Territory, the *Guardianship and Management of Property Act 1991* defines guardian as 'someone who is a guardian under ss.7, 7A, 12 and 32 of the Act.
- In the Northern Territory, the term is defined in s.3 of the *Adult Guardianship Act* to mean an adult guardian appointed pursuant to the Act and includes the Public Guardian.

Departmental guidelines (PAM3) state that guardianship rights give responsibility for long term welfare but do *not*, in law, give the guardian the right to decide the home of the child or custody rights.<sup>64</sup> However, PAM3 suggests that the exclusion of custody rights from the definition of guardian does *not* preclude a guardian from having, or being given, custody rights/responsibilities.<sup>65</sup> Arguably, having regard to the words 'other than' in the r.1.03 definition of 'guardian', this position in PAM3 does not appear to reflect the wording of the definition.

'Guardianship' is not a Schedule 2 criterion in and of itself for any visa subclass.<sup>66</sup> However, whether a person is a 'guardian' arises for consideration in the Schedule 2 criteria relating to sponsorship on

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<sup>63</sup> s.3 *Guardianship Act 1987*.

<sup>64</sup> PAM3: Migration Regulations - Divisions > Div 1.2 - Interpretation > Reg 1.03 - Guardian (27/03/2014 compilation) at [2.5]-[2.6].

<sup>65</sup> PAM3: Migration Regulations - Divisions > Div 1.2 - Interpretation > Reg 1.03 - Guardian (27/03/2014 compilation) at [2.5]-[2.6].

<sup>66</sup> Rather, cases involving issues of guardianship will normally be subject to PIC 4015-4018. For example, Public Interest Criterion 4012 in Schedule 4 to the Regulations also contains requirements to be met in order for a visa to be granted to a minor who is not travelling with a parent or guardian.

behalf of a minor for the following visa subclasses: Subclass 103 (Parent);<sup>67</sup> Subclass 143 (Contributory Parent); Subclass 173 (Contributory Parent (Temporary)); Subclass 300 (Prospective Marriage); Subclass 309 (Spouse (Provisional)); Subclass 804 (Aged Parent);<sup>68</sup> Subclass 820 (Spouse); Subclass 864 (Contributory Aged Parent); and Subclass 884 (Contributory Aged Parent (Temporary)).<sup>69</sup>

### ***Interdependent relationship – pre 1 July 2009***

'Interdependent relationship' is defined in r.1.09A, as it stood prior to 1 July 2009. Although repealed on 1 July 2009, the term is still relevant to visa applications made before that date. A person is in an 'interdependent relationship' with another person, in accordance with r.1.09A of Regulations, if:

- they are not within a prohibited degree of relationship;
- they have both turned 18; and
- the Minister is satisfied that:
  - they have a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships;
  - the relationship between them is genuine and continuing; and
  - they live together, or do not live separately and apart on a permanent basis.

Persons are within a prohibited degree of relationship if either of them is the ancestor or descendent of the other or a brother or sister of the other person (whether or not they have both parents in common).

It is a requirement for the grant of a Subclass 110, 310, 814 or 826 Interdependency visa (applied for before 1 July 2009)<sup>70</sup> that the visa applicant is in an interdependent relationship with an Australian citizen, Australian permanent resident or eligible New Zealand citizen. Interdependent partners and children of interdependent partners of a primary visa applicant may also be eligible to be granted a visa as a secondary applicant on the basis of that relationship in relation to certain visa subclasses including 'General Skilled Migration visas'<sup>71</sup> and Subclass 457 visas. Interdependent partners and children of interdependent partners of the primary visa applicant for these subclasses of visa may also be required to meet certain public interest criteria. The points test applicable to General Skilled Migration visas contained in Schedule 6B to the Regulations enables primary applicants to obtain points for an interdependent partner's qualifications.

From 1 July 2009, the term 'interdependent relationship', and the Interdependent visa Subclasses and related definitions have been removed from the Regulations.<sup>72</sup> For visa applications made on or after

<sup>67</sup> Note that between 2 June 2014 and 25 September 2014 Subclass 103 (Parent) visa was closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>68</sup> Note that between 2 June 2014 and 25 September 2014 Subclass 804 (Aged Parent) visa was closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>69</sup> Consideration of whether a person is a 'guardian' was also relevant for a Subclass 118 (Designated Parent) visa. However, this visa subclass was removed by SLI 2014, No.30 for visa applications made on or after 22 March 2014.

<sup>70</sup> These visa subclasses were removed by SLI 2009, No.144 and cannot be applied for after 1 July 2009.

<sup>71</sup> For visa applications made between 1 September 2007 and 30 June 2012, the term 'General Skilled Migration visas' is defined in r.1.03 as: 'a Subclass 175, 176, 475, 476, 485, 487, 885, 886 and 887 visa, granted at any time'. For visa applications made on or after 1 July 2012, the term is defined to mean 'a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time' as amended by Migration Amendment Regulations 2012 (No.2) (SLI 2012, No.82).

<sup>72</sup> Removed by SLI2009, No.144.

1 July 2009, a same-sex de facto relationship is now recognised under the 'de facto partner' definition in s.5CB of the Act<sup>73</sup> and references to interdependent relationships in the criteria for the grant of 'General Skilled Migration visas'<sup>74</sup> and Subclass 457 visas have been replaced with 'de facto partner' (see [above](#)).

For further discussion see the MRD Legal Services Commentary: [Definition of 'Interdependent Relationship' \(r.1.09A – pre 1 July 2009\)](#).

### **Member of the family unit**

'Member of the family unit' is defined in r.1.12 and incorporates a number of other defined relationships which should be read together with it.

#### Pre 19 November 2016

For visa applications made prior to 19 November 2016, for most purposes, a person will be a member of another person's family unit if he or she is a:

- partner<sup>75</sup> of the person; or
- 'dependent child' of the person or the person's partner; or
- 'dependent child' of a 'dependent child' of the person or the person's partner; or
- 'relative' of the person or the person's partner who:
  - for visa applications made prior to 1 July 2009: has never married, or is widowed, divorced or separated
  - for visa applications made on or after 1 July 2009, does not have a spouse or de facto partner;
  - is usually resident in the person's household; and
  - is 'dependent' on the person.

Variations on that definition exist for some visa classes.<sup>76</sup>

#### Post 19 November 2016

For visa applications made on and after 19 November 2016, a new r.1.12 sets out a general rule for the meaning of member of the family unit which applies to most visa applications and visa holders. Variations on that definition apply for specific visas.<sup>77</sup>

<sup>73</sup> As inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Regulation 1.09A as amended by SLI 2009, No.144 sets out the factors to be considered in assessing if two persons are in a 'de facto relationship'.

<sup>74</sup> For visa applications made between 1 September 2007 and 30 June 2012, the term 'General Skilled Migration visas' is defined in r.1.03 as: 'a Subclass 175, 176, 475, 476, 485, 487, 885, 886 and 887 visa, granted at any time'. For visa applications made on or after 1 July 2012, the term is defined to mean 'a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time': as amended by SLI 2012, No.82.

<sup>75</sup> For visa applications made prior to 1 July 2009, the relevant partner reference in r.1.12A is to 'spouse' as defined in the then r.1.15A (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the relevant partner reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB of the Act (i.e. same sex or opposite sex partners): as amended by SLI 2009, No.144.

<sup>76</sup> As specified in r.1.12(2)-(12).

Generally, a person will be a member of another person's family unit if he or she is a:

- is a spouse or de facto partner of the person; or
- is a child or step-child of the person or a spouse or de facto partner of the person (other than a child or step-child who is engaged to be married or has a spouse or defacto partner) and
  - has not turned 18; or has turned 18, but has not turned 23, and is dependent on the person or the spouse or de facto partner of the person; or
  - has turned 23 but is wholly or substantially reliant on the person or the spouse or de facto partner of the person, because they are incapacitated for work due to loss of bodily or mental functions; or
- is a 'dependent child' of a person who meets the above dot point.

The question of whether a person is a member of another person's family unit most commonly arises in relation to the secondary criteria for the grant for a visa in Schedule 2 to the Regulations. For a number of visa subclasses, members of the family unit of the primary visa applicant are required to meet public interest criteria even if they are not applicants for the visa. Membership of a primary visa applicant's family unit may also determine whether that person can make a combined visa application or review application. Other references to 'member of the family unit' are found in Division 1.5 of Part 1 of the Regulations in which conduct directed towards a member of the family unit of a Partner visa holder / applicant or their sponsor may constitute relevant family violence. Consideration of this type of relationship arises in several other contexts, for example, in the Business Skills and General Skilled Migration points tests.

For further discussion, see the MRD Legal Services Commentary: ['Member of a Family Unit' \(r.1.12\)](#).

### ***Member of the immediate family***

The expression 'member of the immediate family' is defined in r.1.12AA for most purposes as a:

- relevant partner<sup>78</sup> of the person;
- 'dependent child' of the person; or
- 'parent' of the person if that person is not 18 years or more.

An additional definition is provided for the purposes of a Witness Protection (Trafficking) (Permanent) (Class DH) visa.

This type of relationship arises for consideration in relation to a number of Refugee and Humanitarian visas (which are not reviewable by the Tribunal under Part 5 or 7 of the Act); Bridging E and F visas;

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<sup>77</sup> As specified in r.1.12(3)-(7).

<sup>78</sup> For visa applications made prior to 1 July 2009, the relevant partner in this context is to 'spouse' as defined in the then r.1.15A (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the relevant partner reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB of the Act (i.e. same sex or opposite sex partners) as amended by SLI 2009, No.144.



Subclass 852 Witness Protection (Trafficking) visas; and other now redundant Resolution of Status visa subclasses.<sup>79</sup>

### **Orphan relative**

A person is an 'orphan relative' of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, in accordance with r.1.14 if he or she:

- has not turned 18;
- does not have a partner;<sup>80</sup>
- is a 'relative' of the Australian citizen, Australian permanent resident or eligible New Zealand citizen;
- cannot be cared for by either 'parent' because each of them is dead, permanently incapacitated or of unknown whereabouts; and
- there is no compelling reason to believe that the grant of a visa would not be in the best interests of the applicant.

The definition of 'orphan relative' incorporates other defined terms and should be read in conjunction with those definitions. The primary context in which this relationship arises for consideration is in relation to a Subclass 117 or 837 Orphan Relative visa. For further discussion see the MRD Legal Services Commentary: [Subclass 117 and 837- Orphan Relative visas](#).

### **Parent**

Consideration of whether a person is a parent of another person arises in a number of contexts in the migration legislation. For example, it is incorporated into other defined relationships such as 'close relative', 'remaining relative', 'orphan relative', 'member of the immediate family' etc.<sup>81</sup> There are also a number of specific 'Parent' visa subclasses.

The term 'parent' is defined differently depending upon the date of the visa application and, for applications made on or after 1 July 2009 is affected by the [parentage presumptions](#) outlined above.

#### Parent pre-1 July 2009

For visa applications made before 1 July 2009, 'parent' is defined briefly in r.1.03 of the Regulations as 'includ[ing] an adoptive parent and a step-parent' (for further discussion about [adoptive](#) and [step](#) relationships, see below). Given that 'parent' is not exhaustively defined, it would appear to also envisage the ordinary meaning of a father or mother,<sup>82</sup> but not a parent-in-law.

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<sup>79</sup> Consideration of whether a person is a 'member of the immediate family' was also relevant for the now redundant Resolution of Status visa subclasses 450 and 850. However, this visa subclass was removed by SLI 2014, No.30 for visa applications made on or after 22 March 2014.

<sup>80</sup> For visa applications made prior to 1 July 2009, the relevant partner in r.1.14 is to 'spouse' as defined in r.1.15A prior to 1 July 2009 (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the relevant partner reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB of the Act (i.e. same sex or opposite sex partners) as amended by SLI 2009, No.144.

<sup>81</sup> Note that 'working age parent' is also defined in r.1.03 of the Regulations as a parent other than an aged parent. This definition requires consideration of the definitions of 'parent' and 'aged parent' (see above for [parent](#) and [aged parent](#)). Consideration of whether a person is a 'working age parent' primarily arose in the context of the now redundant Subclass 118 (Designated Parent) visa.

<sup>82</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

## Parent post-1 July 2009

For visa applications made on or after 1 July 2009, 'parent' is defined in s.5(1) of the Act.<sup>83</sup> The definition is as follows:

*without limiting who is parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in s.5CA.*

This definition is supplemented by the concept 'parent and child' in r.1.14A of the Regulations and recognises a broader class of persons as parents (see above for further discussion about [child](#)). The definition of 'parent and child' in r.1.14A<sup>84</sup> that applies to visa applications made on or after 1 July 2009 provides that a reference in the Regulations to a parent includes a step-parent, and contains a note stating that a child cannot have more than 2 parents (other than step-parents) unless the child has been adopted under customary arrangements entered into outside Australia that meet r.1.04(2).<sup>85</sup> Thus, if formal adoption arrangements are entered which meet the requirements of r.1.04(1)(a) or (b), the child is taken to be the child of the adoptive parent or adoptive parents and not of any other person (i.e. the biological ties are severed for the purposes of the Regulations).

The definition is further supplemented by the parentage presumptions contained in the Family Law Act. See above for further discussion about the [parentage presumptions](#) and more generally see MRD Legal Services Commentary: ['Definition of 'Parent' and Parent Visas Issues including 'Balance of Family Test'](#).

## **Relative**

The term 'relative' is defined in r.1.03 of the Regulations as a 'close relative' or a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-uncle, step-niece or step-nephew,<sup>86</sup> and in the case of a Subclass 200 (Refugee) visa<sup>87</sup> or a Protection visa, a first or second cousin.<sup>88</sup> 'Close relative' is defined in r.1.03 (see [above](#)), and incorporates a number of other relationships which are themselves defined in the Regulations.

Whether a person is a 'relative' of another person usually arises for consideration when considering other defined familial relationships under the Regulations. For example, it appears in the definitions of 'aged dependent relative'; 'member of the family unit'; and 'orphan relative'.<sup>89</sup> The tribunal may also be required to determine whether a visa applicant has a 'relative' (often their sponsor and for certain Family Subclasses an 'Australian relative' as defined)<sup>90</sup> as part of the Schedule 2 criteria, for example, for a Subclass 103 (Parent); Subclass 116/836 (Carer); Subclass 117/837 (Orphan Relative); Subclass 143 (Contributory Parent); Subclass 173 (Contributory Parent (Temporary)); Subclass 804

<sup>83</sup> Inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective from 1 July 2009.

<sup>84</sup> As inserted by SLI 2009, No.144 for applications made on or after 1 July 2009.

<sup>85</sup> This would appear to also exclude parents-in-law from meeting the definition of parent in this context.

<sup>86</sup> In *Acosta v MIBP* [2016] FCCA 1276 (Judge Street, 25 May 2016) at [8], the Court held that r.1.03 does not identify an inclusive non-exhaustive meaning but that it clearly defines the persons who are 'relatives' or 'close relatives' and it is not possible to consider relations who are not one of the individuals listed as a 'relative' or 'close relative'. The Court accordingly rejected the applicant's argument that the purpose of the visa should inform who is a 'close relative' and 'relative' such that a great-aunt could not be considered a 'relative'.

<sup>87</sup> Note this is not a Part 5 reviewable decision.

<sup>88</sup> Note for applications made prior to 16 December 2014 subclause (a) refers to a Protection (Class XA) visa. For applications made on or after that date, and for those applicants who are taken to have made an application for a Temporary Protection (Class XD) visa by operation of r.2.08F(1)(b); per item 5000, of Schedule 2, Part 4 No.135, 2014.

<sup>89</sup> Note that between 2 June 2014 and 25 September 2014 the definitions of 'aged dependent relative' and 'orphan relative' were repealed by SLI 2014, No.65 for primary applications and most secondary applications. This Regulation was however subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>90</sup> Relevantly to a number of Family visas including Subclass 837 (Orphan relative) and 838 (Aged dependent relative), an 'Australian relative' is defined in r.1.03, as a 'relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen': see cl.837.213 and cl.838.212.

(Aged Parent); Subclass 864 (Contributory Aged Parent); Subclass 838 (Aged Dependent Relative); Subclass 884 (Contributory Aged Parent (Temporary)); and Subclass 580 (Student Guardian) visas.<sup>91</sup>

In addition, Public Interest Criterion (PIC) 4012 requires an undertaking to be provided in respect of an applicant who is under the age of 18 if the applicant is not seeking to visit or stay with a person who is not a 'relative' and PIC 4012A requires applicants for student visas who are under the age of 18 to express a genuine intention to reside in Australia with a 'relative' or other specified person. Reference is also made to the term in Schedule 8 condition 8532 (being a corresponding requirement to PIC 4012A).

### **Remaining relative**

'Remaining relative' is a familial relationship defined in r.1.15 of the Regulations. It only arises for consideration in the context of a Remaining Relative visa (Subclasses 115 and 835).<sup>92</sup>

The definition of 'remaining relative' has been the subject of numerous legislative amendments.<sup>93</sup> The current version provides that an applicant is a remaining relative of a person who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen, if that person is a parent, brother, sister, step-parent, step-brother or step-sister of the applicant and is 'usually resident in Australia'. In addition, the applicant, together with his or her partner<sup>94</sup> (if any), must have no 'near relatives' except for those near relatives who are Australian citizens, or Australian permanent residents or eligible New Zealand citizens, and who are usually resident in Australia. Additional provisions apply if the applicant is an adopted child.

For further discussion see MRD Legal Services Commentary: [Remaining relative visas: Subclass 115 and 835](#).

### **School-age dependant**

Regulation 1.03 of the Regulations provides that a 'school-age dependant' means a member of the family unit who has turned 5, but has not turned 18. The main context in which this term appears in the Regulations is when calculating 'school costs' pursuant to Schedule 5A for the purposes of a student visa. The term also appears in the secondary criteria for the grant of a student visa and in condition 8517 in the context of requiring primary student visa holders to maintain adequate arrangements for the education of any school-age dependents in Australia.

<sup>91</sup> Note that between 2 June 2014 and 25 September 2014 the Carer, Aged Dependent Relative, Parent Subclass 103 and Aged Parent Subclass 804 visa classes and subclasses were closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. The associated definitions were also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>92</sup> Note that between 2 June 2014 and 25 September 2014 the Remaining Relative visa classes and subclasses were closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. The associated definition and limitation on sponsorship for remaining relative visas in r.1.20K were also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>93</sup> Note that between 2 June 2014 and 25 September 2014 the Remaining Relative definition and limitation on sponsorship for remaining relative visas in r.1.20K was repealed for primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>94</sup> For visa applications made prior to 1 July 2009, the relevant partner reference in r.1.15 is to spouse as defined in the then r.1.15A (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the relevant partner reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB of the Act (i.e. same sex or opposite sex partners) as amended SLI 2009, No.144.

## Spouse

The term 'spouse' arises in a range of contexts in the Migration Act and Regulations. It is the central concept for the various partner visas. It is also incorporated into a number of other defined familial relationships in the Regulations including, 'aged dependent relative';<sup>95</sup> 'dependent child'; 'step-child'; and 'member of the immediate family'. Whether a person has a 'spouse' may also arise for consideration as part of the Schedule 2 criteria for a number of visas. The definition of 'spouse' differs depending upon the date of the visa application.

### Spouse pre-1 July 2009

For visa applications made prior to 1 July 2009, the term 'spouse' is defined in r.1.15A of the Regulations and encompasses both married and opposite sex de facto relationships. Generally, speaking a person is the 'spouse' of another person if the parties have a genuine and continuing relationship, with a mutual commitment to a shared life as husband and wife to the exclusion of all others and the parties are not living separately and apart on a permanent basis.

In addition, for a married relationship, the parties must be in a marriage that is recognised as valid for the purposes of the *Marriage Act 1961* (the Marriage Act).

For de facto relationships:

- the parties to the relationship are of opposite sexes, are not married to each other and are not in a prohibited degree of relationship as defined by the Marriage Act;
- both parties are 18 years of age where one of them is domiciled in Australia or, if neither of the parties is domiciled in Australia, both of the parties have turned 16; and
- with certain exceptions, where either party is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Business Skills (Provisional) (Class UR), a Business Skills (Provisional) (Class EB) visa, a Partner (Provisional) (Class UF) visa, a Partner (Temporary) (Class UK) visa or a General Skilled Migration visa, the parties' relationship existed for a 12 month period immediately prior to the application for the visa unless the applicant can establish compelling and compassionate circumstances for grant of the visa.<sup>96</sup> This requirement does not apply where:
  - the applicant applies for the visa on the basis of being in a de facto relationship with a person who is or was the holder of a permanent humanitarian visa and before that visa was granted, they were in a de facto relationship and had informed Immigration of the existence of that relationship;<sup>97</sup> or
  - the applicant applies for the visa on the basis of being in a de facto relationship with a person who is an applicant for a permanent humanitarian visa;<sup>98</sup> or

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<sup>95</sup> Note that between 2 June 2014 and 25 September 2014 the definition of Aged Dependent Relative was repealed for primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>96</sup> r.1.15A(2)(d),(e).

<sup>97</sup> r.1.15A(2A).

<sup>98</sup> r.1.15A(2A).

### Spouse post-1 July 2009

For visa applications made on or after 1 July 2009, 'spouse' is defined in s.5F of the Act and refers to married relationships only.<sup>99</sup> The definition was amended from 9 December 2017 to include same-sex relationships.<sup>100</sup> The requirements for spouse relationships contained in s.5F are as follows:

- the parties must be married to each other in a marriage that is recognised as valid under the Migration Act;<sup>101</sup>
- the parties must have a mutual commitment to a shared life as a married couple to the exclusion of all others;<sup>102</sup>
- the relationship is genuine and continuing;<sup>103</sup> and
- the parties live together or, where they live separately and apart, this is not on a permanent basis.<sup>104</sup>

For the purposes of determining whether the above requirements in s.5F for a 'spouse' relationship exist, r.1.15A sets out the factors that the Minister (or the tribunal on review) should take into account.<sup>105</sup> These factors must be considered for an application for a Partner visa and may be considered for other visas.

### **Step-child**

Consideration of whether a person is a 'step-child' commonly arises in the context of considering whether that person is a 'dependent child'. However, reference is made to 'step-child' in the Schedule 2 criteria for some visas including Child visas and sponsored Skilled visas.

The Regulations also refer to 'step' relationships including, 'step-parent', 'step-sister' and 'step-brother' in a number of other contexts. In the absence of a specific definition of those terms and consistently with s.18A of the *Acts Interpretation Act 1901*, it is appropriate to be guided by the definition of 'step-child' in determining whether a different kind of 'step' relationship exists. For further discussion, see [below](#).

The definition of 'step-child' differs depending upon the date of the relevant visa application.

### Step-child pre-1 July 2009

For visa applications made prior to 1 July 2009, 'step-child' is defined in r.1.03 in relation to a parent as meaning:<sup>106</sup>

- a child of the parent who is not the natural or adopted child of the parent but who is the natural or adopted child of the parent's current spouse; or*
- a child of the parent who is not the natural or adopted child of the parent but:*

<sup>99</sup> As inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009.

<sup>100</sup> Section 5F was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* and affects all live applications where it is necessary to determine whether or not two persons are in a spousal relationship.

<sup>101</sup> s.5F(2)(a).

<sup>102</sup> s.5F(2)(b).

<sup>103</sup> s.5F(2)(c).

<sup>104</sup> s.5F(2)(d).

<sup>105</sup> Regulation 1.15A was amended by SLI 2009, No.144 following the insertion of the definitions of spouse and de facto partner in the Act (by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009).

<sup>106</sup> As amended by SLI 2010, No.38 for visa applications made on or after, or not finally determined before 27 March 2010.

- (i) *who is the natural or adopted child of a former spouse of the parent; and*
- (ii) *who has not turned 18; and*
- (iii) *in relation to whom the parent has:*
  - (A) *a parenting order in force under the Family Law Act 1975 under which the parent is the person with whom a child is to live, or who is to be responsible for the child's long-term or day-to-day care, welfare and development; or*
  - (B) *guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.*

#### Step-child post-1 July 2009

For visa applications made on or after 1 July 2009, 'step-child' is defined in r.1.03 in relation to a parent as meaning:<sup>107</sup>

- (a) *a person who is not the child of the parent but who is the child of the parent's current spouse or de facto partner; or*
- (b) *a person who is not the child of the parent but:*
  - (i) *who is child of the parent's former spouse or former de facto partner; and*
  - (ii) *who has not turned 18; and*
  - (iii) *in relation to whom the parent has:*
    - (A) *a parenting order in force under the Family Law Act 1975 under which the parent is the person with whom a child is to live, or who is to be responsible for the child's long-term or day-to-day care, welfare and development; or*
    - (B) *guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.*

The difference between the pre and post 1 July 2009 definitions is that a child of a person's same-sex de facto spouse is now recognised as that person's 'step-child' (previously only the child of a person's married or opposite-sex de facto partner was recognised). Additionally, children of a former partner who are under 18 may in certain specified circumstances be a 'step-child' for the purposes of the Regulations.

The circumstances in subparagraph (b)(iii) include references to orders and arrangements in force under the *Family Law Act 1975* (Family Law Act). Prior to 27 March 2010, amendments made to the Family Law Act were not reflected in the Migration Regulations.<sup>108</sup> Earlier changes to the Family Law Act came into effect on 1 July 2006 which removed references to 'residence' and 'contact' and substituted these with references to whom the 'child lives with' and 'spends time with'.<sup>109</sup> However, from 27 March 2010, the step-child definition has been amended to refer to 'parenting order in force under the *Family Law Act 1975*' to reflect the amendments to the Family Law Act.<sup>110</sup> 'Parenting order' is defined in r.1.03 as having the meaning given by s.64B(1) of the Family Law Act.<sup>111</sup>

<sup>107</sup> As amended by SLI 2009, No.144 for visa applications made on or after 1 July 2009 and SLI 2010, No.38 for visa applications made on or after, or not finally determined before 27 March 2010.

<sup>108</sup> The amendments made by the *Family Law Reform Act 1995* (Act No.167 of 1995) which commenced on 11 June 1996 were in relation to replacing 'custody' and 'access' orders with 'parenting orders'. A 'parenting order' is an order dealing with any aspect of parental responsibility for a child, being a 'residence order' if dealing with a child's residence arrangements; a 'contact order' if dealing with contact between the child and another person(s); and a 'child maintenance order' if dealing with the maintenance of a child (see s.64B).

<sup>109</sup> By the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Act No.46 of 2006).

<sup>110</sup> As amended by SLI 2010, No.38 for visa applications made on or after, or not finally determined before 27 March 2010. The purpose of the amendments is to use consistent terminology in line with the *Family Law Act 1975* as amended (see Explanatory Statement to SLI 2010, No.38).

<sup>111</sup> As inserted by SLI 2010, No.38 for visa applications made on or after, or not finally determined before 27 March 2010. The purpose of the amendments is to use consistent terminology in line with the *Family Law Act 1975* as amended (see Explanatory Statement to SLI 2010, No.38).



## Other relationships

In addition to the defined familial relationships identified above, the migration legislation contains reference to a number of other relationships which are not specifically defined. In the absence of a specific definition, these words should be given their ordinary English meaning. In considering the ordinary meaning of a word, it may be helpful to refer to a dictionary. In Australian courts, the *Macquarie Dictionary* is commonly used. However, it will always be necessary to have regard to the context in which the word appears in the legislation. Some of these 'undefined' familial relationships are discussed below.

### **Sister / Brother**

The terms 'brother' and 'sister' are relevantly defined in the *Macquarie Dictionary* as, respectively, 'a male child of the same parents as another (full brother)', or 'a male child of only one of one's parents (half-brother)'; and 'daughter of the same parents (full sister)' or 'daughter of only one of one's parents (half-sister)'.<sup>112</sup> *Mercado v MIAC*<sup>113</sup> suggests that an expansive approach to the word 'brother', as including a 'half-brother' is appropriate in the context of the Regulations. In that case, the Federal Magistrates Court agreed with the tribunal that 'brother' in the definition of 'overseas near relative' in r.1.15(2)(a) of the Regulations, included a 'half-brother'.<sup>114</sup> The Court's reasoning would be equally applicable to the use of the word 'sister' in the Regulations.<sup>115</sup>

The pre 1 July 2009 version of r.1.09A(3)<sup>116</sup> of the Regulations expressly refers to 'half-siblings' as being in a prohibited degree of relationship for the purposes of an interdependent relationship:

- (3) *For the purposes of this regulation, persons are within a prohibited degree of relationship if either of them is:*
- (a) ...
  - (b) *a brother or sister of the other person (whether or not they have both parents in common).*

### **Grandparent / grandchild**

The term 'grandparent' is defined in the *Macquarie Dictionary* as 'a parent of a parent'.<sup>117</sup> Given that the definition of 'parent' in r.1.03 specifically includes step and adoptive parents, there is a question as to whether the term 'grandparent' should be interpreted as including the same. The term 'grandparents' primarily arises as an issue in the consideration of the definition of 'relative' in r.1.03. That definition specifically includes a 'step-grandparent'. In addition, the Migration Regulations provide for a 'grandparent' to sponsor an applicant for certain skilled visas; and to be an 'acceptable individual' for the purposes of a Subclass 580 (Student Guardian) visa. The fact that separate terms 'grandparent' and 'step-grandparent' are used in the context of 'relative' in r.1.03 suggests that the term 'grandparent' was not intended to, and should not be interpreted to include 'step-grandparent'.

<sup>112</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>113</sup> [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007).

<sup>114</sup> The decision in *Mercado* was expressly followed in *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) at [31]-[36] where the Court agreed that the term 'brother' included 'half-brother'. The Court acknowledged that while the meaning to be ascribed to words may change from time to time, there is judicial authority of some antiquity supporting the reasoning adopted in *Mercado* at [35].

<sup>115</sup> In *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) the Court noted that by inference the same reasoning set out in *Mercado* and in this decision would apply to the term 'sister' at [9].

<sup>116</sup> The definition was amended by SLI 2009, No.144 to describe factors for consideration of 'de facto partner and de facto relationships' (ie same-sex and opposite-sex de facto relationships). For visa applications made on or after 1 July 2009, there is no definition of 'interdependent relationship'.

<sup>117</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017. Not the definition does not contemplate married relationships and therefore would not appear to include grandparents in law forms.



The term 'grandchild' is defined in the *Macquarie Dictionary* as 'a child of one's son or daughter'.<sup>118</sup> The primary context in which 'grandchild' arises for consideration is in relation to the definition of 'relative' in r.1.03 (which expressly incorporates a 'step-grandchild').

### **Aunt / uncle**

The *Macquarie Dictionary* relevantly defines 'aunt' as: '(i) the sister of one's father or mother; or (ii) the wife of one's uncle'.<sup>119</sup> Similarly, 'uncle' is defined as: '(i) the brother of one's father or mother; or and (ii) an aunt's husband'.<sup>120</sup> Accordingly, the ordinary meaning of aunt and uncle appears to contemplate non blood, or 'in-law', forms of the relationship.

Aunts and uncles are included in the definition of 'relative' under r.1.03. That definition specifically includes 'step' aunts and uncles. Aunts and uncles may also sponsor applicants for certain skilled visas. It is of note that the relevant Schedule 1 and 2 criteria for these visas expressly include 'adoptive' and 'step' aunts and uncles.

### **Cousin**

The Regulations occasionally require decision-makers to consider whether persons are 'first cousins'<sup>121</sup> or 'second cousins'.<sup>122</sup> The *Macquarie Dictionary* relevantly defines 'cousin' as 'the son or daughter of an uncle or aunt'.<sup>123</sup> It indicates that the children of brothers and sisters are to each other 'first cousins'. The *Macquarie Dictionary* also indicates that the children of first cousins are 'second cousins' to each other. However, it also refers to the term 'second cousin' being used 'loosely' to refer to the son or daughter of one's first cousin, which is properly a 'first cousin once removed'. The tribunals are only likely to be called upon to consider whether two people are 'first cousins' as the term 'second cousin' is only used in the Regulations in the context of visa subclasses which are not reviewable by either tribunal.

Given that an uncle or aunt may be of that relationship as a result of marriage, it would appear open that a cousin relationship may also be created by marriage. In addition, a cousin relationship may be created through adoption. For further discussion, see [Error! Reference source not found.](#)

### **Niece / nephew**

The *Macquarie Dictionary* relevantly defines a 'niece' as: '(i) a daughter of one's brother or sister; or and (ii) a daughter of one's husband's or wife's brother or sister'.<sup>124</sup> Similarly, a 'nephew' is defined as: '(i) a son of one's brother or sister; or (ii) a son of one's husband's or wife's brother or sister'.<sup>125</sup> Given that an uncle or aunt may be of that relationship as a result of marriage, it would appear open that a cousin relationship may also be created by marriage.

Nieces and nephews are included in the definition of 'relative' under r.1.03. That definition specifically includes 'step' nieces and nephews. Nieces and nephews may also sponsor applicants for certain

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<sup>118</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>119</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>120</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>121</sup> See for example cl.139.211A(f) (which, prior to 1 July 2006 when the visa subclass was closed, was cl.139.211(f)).

<sup>122</sup> See for example, definition of 'relative' in r.1.03 for the purposes of a Subclass 200 (Refugee) visa (not reviewable by the Tribunal under Part 5 or 7 of the *Migration Act 1958*).

<sup>123</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>124</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

<sup>125</sup> The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

skilled visas. It is of note that the relevant Schedule 1 requirements and Schedule 2 criteria for these visas expressly include 'adoptive' and 'step' nieces and nephews.

### Biological & non-blood relationships

The biological forms of relevant familial relationships are likely to be encompassed where reference to particular relationships occurs in the migration legislation unless specifically or otherwise excluded. For example, although 'parent' is defined as 'including' adoptive and step parents, the use of that term would be expected to include biological parents also (see discussion of *Re Tracey Ann Hunt v MIEA*<sup>126</sup> [below](#)). Similarly, other terms, such as 'child' or 'grandparent' would in most, if not all, contexts in the migration legislation be taken to include biological forms of those relationships. Notably, the definition of child for visa applications made on or after 1 July 2009 suggests that a biological relationship may not be recognised if the child is not the 'product of the relationship', such as where surrogacy arrangements took place.

Determining whether two people are in a biological relationship for the purposes of the migration legislation, will be a question of fact for the decision maker having regard to the available evidence. The *Family Law Act 1975* (Family Law Act) sets out a number of 'presumptions of parentage' for the purposes of Family Court proceedings, which, although not binding or directly applicable in tribunal proceedings relating to visa applications made prior to 1 July 2009, may assist the Tribunal in making its own findings of fact on the evidence.<sup>127</sup>

Non-blood relationships sometimes arise for consideration in assessing whether a particular familial relationship exists.<sup>128</sup> A non-blood relationship, some of which are referred to as 'in-law' relationships, arises where two people are related as a result of marriage.<sup>129</sup> For example, the *Macquarie Dictionary* defines an 'aunt' as either the sister of one's father or mother; or *the wife of one's uncle*.<sup>130</sup> Where the meaning of a particular relationship is not provided for in the Act or Regulations, the ordinary meaning of the relationship will inform whether or not it includes a non-blood aspect. As outlined above, in cases where relationships are not specifically defined and the tribunal is seeking to determine their ordinary English meaning, the *Macquarie Dictionary* is commonly used and can often assist in determining if a non-blood aspect of the relationship is contemplated. This assessment should be done on a case by case basis depending on the relationship in question and it will always be necessary to have regard to the context in which the word appears in the legislation.

If the ordinary meaning of a particular relationship envisages situations in which the relationship exists as a result of a partner relationship, consideration should be had to whether or not the relevant parties are married at the relevant time/s. While there is no direct judicial consideration in this context of whether non-blood relationships cease if the married relationship which created the non-blood relationship ceases, it is likely that this would be the case. Accordingly, where the relationship has

<sup>126</sup> [1993] FCA 116 (Gummow J, 25 March 1993).

<sup>127</sup> In *Ortiz v MIAC* [2011] FMCA 432 (Burnett FM, 9 June 2011), the Court held that the Tribunal is not bound to take into account the legal presumption of paternity in s.69Q of the *Family Law Act* in considering whether an applicant for a partner visa meets the child exception requirement in cl.820.221(2)(b)(ii).

<sup>128</sup> Note that no reference is made specifically to 'in-law' relationships in the Act or Regulations. However, this was not always the case with the Class 816 (Special (Permanent)) Entry Permit inserted by the Migration (1993) Regulations (Amendment) (SR No.11 of 1994) and now repealed by the Migration Reform (Transitional Provisions) Regulations on 1 September 1994 contained a requirement in cl.816.821(b)(iv)(A) that the applicant does not have a relative (including spouse, child, parent, brother, sister, aunt, uncle or *relative-in-law* in any degree of that relationship) in Australia who is not dependent on the applicant.

<sup>129</sup> The *Macquarie Dictionary Online Sixth Edition* © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017 defines 'in-law' as 'noun a relative by marriage'.

<sup>130</sup> The *Macquarie Dictionary Online Sixth Edition* © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 9 February 2017.

broken down or one of the parties to the marriage has died, severing the marriage which created the non-blood relationship, it would appear that that the non-blood relationship ties are also severed. This is because that relationship is conditional on the fact that there is a continuing relationship between the married parties. In such circumstances it cannot be said that the persons remain the spouse or de facto partner of each other, as understood under the migration legislation.<sup>131</sup> See [below](#) for further discussion of the effect of divorce, separation and death albeit in the context of step relationships.

### 'Half' relationships

A 'half' relationship arises where two people are related by one parent only. For example, a half-brother and half-sister have one parent in common.

In *Mercado v MIAC*,<sup>132</sup> the Federal Magistrates Court considered whether the reference to 'brother' in the definition of 'overseas near relative' for the purposes of the definition of 'remaining relative' in r.1.15 included or excluded a 'half-brother'.<sup>133</sup> The tribunal relied on the *Macquarie Dictionary* definition of 'brother', which included reference to a 'half-brother', in construing the regulation. The Court noted that the Act and Regulations make no reference to the class of persons defined as 'half-brother', but accepted the Minister's submission that there is no apparent policy reason why a half-brother would be excluded, particularly having regard to the inclusion of 'step-brothers'. In *Mercado v MIAC*, Lloyd-Jones FM commented:

*The denial of the reunion of a blood relative, while permitting a reunion based on marriage which may be dissolved at any time, does not appear compatible with the overall intent of the legislation. In the circumstance, I am satisfied that in the absence of direct reference to the status of 'half-brother' in the Act or Regulations, the approach adopted by the Tribunal was correct.*<sup>134</sup>

Relevantly, in *Claridge v MIBP*<sup>135</sup> the Court agreed with the reasoning set out in *Mercado* and found that the term 'brother' included 'half-brother'.<sup>136</sup> The Court noted that while the meaning to be ascribed to words may change from time to time, there is judicial authority of some antiquity supporting the reasoning adopted in *Mercado*.<sup>137</sup> The Court further observed that by inference the same reasoning would apply to the term 'sister'.<sup>138</sup>

Whether two people are in a 'half' relationship will generally only arise in the context of sibling relationships (i.e. brother or sister) or relationships derived from sibling relationships (i.e. aunts, uncles, nieces, nephews and cousins). The reasoning in *Mercado* and *Claridge* may be regarded as relevant wherever such relationships fall for consideration under the migration legislation.

<sup>131</sup> See also, albeit in the context of step relationships, PAM3: Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships – (27/03/2014 compilation) at [53].

<sup>132</sup> [2007] FMCA 1216 (Lloyd Jones FM, 26 July 2007).

<sup>133</sup> Note the definition of 'remaining relative' in r.1.03 and r.1.15 together with the associated Subclass 115/835 (Remaining Relative) visas were repealed by SLI 2014, No.65 for primary applications and most secondary applications made from 2 June 2014.

<sup>134</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd Jones FM, 26 July 2007) at [33].

<sup>135</sup> [2013] FCCA 1953 (Burchardt J, 6 December 2013)

<sup>136</sup> *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) at [31]-[36].

<sup>137</sup> *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) at [35].

<sup>138</sup> *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) at [9].

## 'Step' relationships

A 'step' relationship results when a couple with children from previous relationships marry or form a de-facto relationship. As discussed above, 'step-child' is specifically defined for the purposes of the Regulations in r.1.03 and differs depending on the date of the visa application. In determining whether two people are in another type of 'step' relationship, it is appropriate to have regard to this definition.

In many contexts in the Regulations specific reference is made to 'step' relationships. As such, it is often unnecessary to grapple with the issue of whether in the absence of a specific reference to the step form, a particular familial relationship referred to in the legislation can be construed as including the 'step' variants. Where there is no specific reference to the 'step' form of a relationship, the *Mercado v MIAC*<sup>139</sup> and *Liang v MIAC*<sup>140</sup> cases suggest that generally, an expansive construction of familial relationships arising under the migration legislation is appropriate.

There is nothing in the Act or Regulations which suggest that the existence of a step-relationship would exclude any pre-existing biological variants of that relationship. A note to r.1.14A, which is relevant to visa applications made on or after 1 July 2009, indicates that a child may have more than two parents where step-parents exist.<sup>141</sup>

For visa applications made before 1 July 2009, the case law appeared to suggest the same. For example, in *Re Tracey Ann Hunt v MIEA*,<sup>142</sup> the applicant had no contact with her biological father since she was a small child and had for approximately 20 years considered her step-father to be her 'father'. The Immigration Review Tribunal was required to consider whether the applicant's biological father was her 'parent'. If so, he was an 'overseas near relative' and the applicant was excluded from meeting the definition of 'remaining relative' as it then appeared in r.9 of the Regulations. Justice Gummow found that the inclusion of adoptive and step parents in the definition of 'parent' expanded the class of parents but not to the exclusion of biological parents and the current state of the social and emotional ties between the biological parent and child was not to the point. His Honour concluded that there may be more than one male parent and it was sufficient to disqualify the applicant that she usually resided in the same country as one male parent, being her biological father.<sup>143</sup>

### Effect of divorce / separation / death of a spouse

As discussed above, the definition of 'step-child' in r.1.03 provides for the continuation of a step relationship where the relevant marriage / de facto relationship has ceased, but only in certain circumstances. By referring to 'current' and 'former' spouse/partner the regulation may be read as contemplating the parental relationship is either current, or (in the case of children under 18), the parental relationship has ceased. This appears to encompass cessation of a partner relationship by means of divorce, separation or death.

There is no direct judicial consideration on whether the child's step-relationship with his or her step-parent ceases if the relationship between the step-parent and the child's parent ceases. However, given that a 'step-child' is defined in r.1.03(a) to mean 'a person...who is the child of the parent's *current* partner',<sup>144</sup> it appears that for a child who is over 18 years old, the child's step-relationship with

<sup>139</sup> [2007] FMCA 1216 (Lloyd Jones FM, 26 July 2007).

<sup>140</sup> [2007] FMCA 1288 (Riethmuller FM, 8 August 2007).

<sup>141</sup> r.1.14A was inserted by SLI2009, No.144 for visa applications made on or after 1 July 2009.

<sup>142</sup> [1993] FCA 116 (Gummow J, 25 March 1993).

<sup>143</sup> [1993] FCA 116 (Gummow J, 25 March 1993) at [26].

<sup>144</sup> The partner reference in this definition varies depending upon when the visa application was made. For visa applications made prior to 1 July 2009 the reference is to 'spouse' as defined in r.1.15A as it was prior to 1 July 2009 (i.e. as including

his or her step-parent ceases if the relationship between the step-parent and the child's parent ceases. The relationship between the step-parent and the child's parent may be severed by divorce or separation or because the parent has died. In each of these circumstances it cannot be said that the persons remain the spouse or de facto partner of each other, as understood under the migration legislation.<sup>145</sup>

For a child under 18 years old, the step-relationship continues to be recognised under the 'step child' definition in r.1.03(b) if the relationship between the step-parent and the child's parent ceases and the step-parent has a parenting order in force under the Family Law Act under which the [step-]parent is the person with whom a child is to live with, or who is responsible for the child's long-term day-to-day care, welfare and development; or guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.<sup>146</sup>

Outside the specified circumstances in r.1.03, the *obiter dicta* of Lloyd-Jones FM, in *Mercado*, that 'a half-brother relationship is permanent because of the genetic link whereas a step relationship is by its nature more transient and certainly not permanent'<sup>147</sup> suggests that a step relationship would cease upon cessation of the spousal relationship that created it.

## Adoptive relationships

'Adoption' is defined in r.1.04, the key requirements of which are as follows for:

### *Formal adoption*

- the adopter must have assumed a parental role in relation to the adoptee;
- this must have occurred before the adoptee attained 18 years of age; and
- the assumption of a parental role occurred under certain arrangements, namely:
  - formal adoption arrangements under Australian (or state) law; or
  - formal adoption arrangements under foreign law, where the adoption results in the legal recognition of the adopter(s) as the parent(s), in place of the previously recognised parents; or
  - certain other arrangements entered into outside Australia that are 'in the nature of adoption' (i.e. customary adoption).

### *Customary adoption:*

- Customary adoption is recognised where:
  - the arrangements were made in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter;

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married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB (i.e. same sex or opposite sex partners) as amended by SLI 2009, No.144.

<sup>145</sup> See also PAM3: Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships (27/03/2014 compilation) at [53].

<sup>146</sup> r.1.03(b)(iii)(A) and (B); see also PAM3: Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships (27/03/2014 compilation) at [53].

<sup>147</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd Jones FM, 26 July 2007) at [33].

- the child-parent relationship between the adoptee and the adopter is significantly closer than any such relationship between the adoptee and any other person or persons;
- formal adoption was not available or not reasonably practicable in the circumstances; and
- the arrangements have not been contrived to circumvent Australian migration requirements.

In some contexts in the Regulations specific reference is made to 'adoptive' relationships.<sup>148</sup> For example, the definition of the pre-1 July 2009 version of 'parent' expressly includes an 'adoptive parent'.<sup>149</sup> The Schedule 1 requirements for some Australian-sponsored skilled visas also expressly refer to adoptive relationships.<sup>150</sup> However, in some contexts, express reference to 'adoptive' relationships is conspicuously absent. For example, although the definition of 'close relative' expressly incorporates an 'adoptive child' and, in light of the definition of 'parent', an 'adoptive parent', it says nothing about 'adoptive' brothers or sisters. This is notwithstanding the express reference to 'step-brothers' and 'step-sisters' and a perhaps unnecessary reference to a 'step-parent'. In a similar vein, the definition of 'relative' separately refers to 'step- grandparents, grandchildren, aunts, uncles, nieces and nephews', yet is silent on whether adoptive forms of the relevant relationships are included.

Under general Australian law, biological and formal adoptive relationships are mutually exclusive. Accordingly, if a formal adoption has occurred, only the current *legal* parent – child relationship would be recognised. The various Australian State/Territory Adoption Acts provide that the effect of a full and formal adoption is that the person who is adopted becomes the legal child of the adopting parents and a legal member of the adopting family. A child who has been fully and formally adopted is no longer, as a matter of law, the child of the natural parents. Additionally, all family relationships with the adopted child's biological family are severed for legal purposes.

However, the situation under migration law appears to differ depending on the date of the relevant visa application. For visa applications made on or after 1 July 2009, r.1.14A provides that a formal adoption arrangement severs any child-parent relationship which existed prior to the adoption.<sup>151</sup> However, a customary adoption will not.<sup>152</sup> For visa applications made prior to 1 July 2009 there was no specific provision dealing with this issue. It was therefore not clear that the reference to a relationship in the migration legislation should be construed as a reference only to the 'legal' form of that relationship.

In *Liang v MIAC*,<sup>153</sup> the Tribunal considered whether an applicant for a Skilled - Australian-sponsored Overseas Student (Residence) (Class DE) visa could be sponsored by a biological 'first cousin' where it appeared that the visa applicant's mother had been adopted. The tribunal proceeded on the basis that the term 'first cousin' referred to a relationship at law, and not to a biological relationship. The Court, however, found that in items 1128BA(3)(l)(iii)(A) to (D), the context of the provisions meant that the relationship first referred to must be a biological relationship, followed by reference to the adoptive relationship, followed by reference to the form of the relationship created by marriage (the step-relationship).<sup>154</sup> The Court noted that, unlike the other categories of relationship referred to in item

<sup>148</sup> Pursuant to s.18A of the *Acts Interpretation Act 1901*, other parts of speech and grammatical forms of that word, such as 'adopted' or 'adoptive' have corresponding meanings to the root word, in this case 'adoption' as defined in r.1.04.

<sup>149</sup> 'Parent' was omitted from r.1.03 of the Regulations by SLI 2009, No.144 for visa applications made on or after 1 July 2009 (r.3(2)). The definition of 'parent' from 1 July 2009 is in s.5(1) of the Act (as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*), and supplemented by r.1.14A(1) of the Regulations.

<sup>150</sup> See, for example, item 1128BA(3)(l)(iii) which refers to 'adoptive' brother, sister, aunt, uncle, niece and nephew.

<sup>151</sup> As inserted by SLI 2009, No.144 for visa applications made on or after 1 July 2009.

<sup>152</sup> See note 1 of r.1.14A.

<sup>153</sup> [2007] FMCA 1288 (Riethmuller FM, 8 August 2007).

<sup>154</sup> *Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007) at [19].



1128BA(3)(l)(iii), the terms 'grandchild' and 'first cousin' did not have after them references to adoptive or step forms of those relationships.<sup>155</sup> Nonetheless, having regard to extrinsic materials and the legislative context, the Court found that the term 'first cousin' was to be read as including first cousins whether by biology, adoption or marriage.<sup>156</sup>

Similarly, the reasoning in *Re Tracey Ann Hunt v MIEA*<sup>157</sup> suggests that the existence of an adoptive relationship may not exclude any biological relationship for the purposes of the migration legislation. Justice Gummow found that the inclusion of adoptive and step-parents in the definition of 'parent' expanded the class of parents but not to the exclusion of biological parents. His Honour concluded that there may be more than one male parent and it was sufficient to disqualify the applicant that she usually resided in the same country as one male parent, being her biological father. The Court was only called upon to consider the co-existence of a biological parent and a step-parent, and arguably adoptive relationships are distinguishable given that adoption, at general law, extinguishes biological relationships. However, in light of the more recent judgment in *Liang*, the better view appears to be that depending on the context in which it appears, a reference in the migration legislation to a particular relationship could be read as a reference to both the biological and adoptive form of that relationship.

For further discussion about 'adoption' see the MRD Legal Services Commentary: [Subclass 102 - Adoption visa](#).

## Foster relationships

A foster relationship arises where a child is cared for by a person who is not their natural or adoptive mother or father. In Australia, foster relationships are governed by State and Territory legislation such as the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Children, Youth and Families Act 2005* (VIC). Generally speaking, a foster parent has responsibility for the residential care and control of a child or young person pursuant to an authorisation. The duration of such an authorisation may vary and, generally speaking, foster parents do not acquire full parental responsibility for a child.

No specific mention is made in the migration legislation to 'foster' relationships. A question therefore arises as to whether a generic reference to a relationship such as 'parent', 'brother', 'sister' or 'child' in the Act or Regulations could be construed as encompassing 'foster' forms of those relationships. This requires an assessment of the ordinary meaning of the relevant term and the context in which it appears in the legislation.

As indicated above, the dictionary definitions of the various undefined familial relationships referred to in the migration legislation do not specifically incorporate 'foster' relationships. Furthermore, familial relationships usually arise for consideration in the migration legislation in the context of determining a person's eligibility for entry to and stay in Australia based on his or her connection with another person. In *Mercado v MIAC*,<sup>158</sup> the Court was called upon to consider whether the reference to a 'brother' in the definition of 'remaining relative' should be read as including a 'half-brother'. In reasoning to the conclusion that it should, Lloyd-Jones FM referred to the 'permanent genetic link'

<sup>155</sup> *Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007) at [20].

<sup>156</sup> *Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007) at [28].

<sup>157</sup> [1993] FCA 116 (Gummow J, 25 March 1993).

<sup>158</sup> [2007] FMCA 1216 (Lloyd Jones FM, 26 July 2007).



between 'half' siblings and could see no policy reason why in light of the overall intent of the legislation, the reunion of a 'blood relative' should be excluded.<sup>159</sup>

These considerations suggest that the relationships referred to in the migration legislation should not be construed as including 'foster' forms of those relationships. In contrast to biological, adoptive and even step relationships, foster relationships are more transient, and therefore it is less likely that the legislature intended that they form the basis upon which a non-citizen could be eligible to gain entry to or remain in Australia.

#### Relevant case law

<a href="#">Acosta v MIBP [2016] FCCA 1276</a>	
<a href="#">Awad v MIBP [2015] FCCA 1381</a>	<a href="#">Summary</a>
<a href="#">Liang v MIAC [2007] FMCA 1288</a>	<a href="#">Summary</a>
<a href="#">Claridge v MIBP [2013] FCCA 1953</a>	
<a href="#">Mercado v MIAC [2007] FMCA 1216</a>	<a href="#">Summary</a>
<a href="#">Nakad v MIAC [2013] FMCA 234</a>	<a href="#">Summary</a>
<a href="#">Nakad v MIMAC [2013] FCA 810</a>	
<a href="#">Re Tracey Ann Hunt v MIEA [1993] FCA 116; (1993) 41 FCR 380</a>	
<a href="#">Ortiz v MIAC [2011] FMCA 432</a>	<a href="#">Summary</a>

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2010 (No.1)</a>	SLI 2010, No.38
<a href="#">Migration Amendment Regulations 2012 (No.2)</a>	SLI 2012, No.82
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65
<a href="#">Migration and Maritime Powers Legislation (Resolving the Asylum Legacy Case Load) Act 2014</a>	No.135, 2014
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696
<a href="#">Marriage Amendment (Definition and Religious Freedoms) Act 2017</a>	No.129 of 2017

**Last updated/reviewed: 8 October 2018**

<sup>159</sup> The decision in *Mercado* was expressly followed in *Claridge v MIBP* [2013] FCCA 1953 (Burchardt J, 6 December 2013) at [31]-[36] where the Court agreed that the term 'brother' included 'half-brother'.

# Health Criteria – PIC 4005, 4006A and 4007

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## Overview

Health criteria<sup>1</sup> are prescribed in Schedule 2 to the Migration Regulations 1994 ('the Regulations') as criteria for a range of visa subclasses which are required to be met at time of decision. The health criteria are in the form of Public Interest Criteria ('PIC') set out in Schedule 4 of the Regulations. The Schedule 4 PIC are referred to by number in the Schedule 2 criteria for visa subclasses and are therefore effectively criteria under Schedule 2 for the grant of a visa.<sup>2</sup> There are currently 3 different PIC relating to health requirements: PIC 4005, 4006A and 4007. PIC 4006A has been repealed for visa applications made from 18 March 2018 but continues to apply to Subclass 457 (Temporary Work (Skilled)) visa applications made before that date.<sup>3</sup>

Similar to circumstances relating to the determination of certain claims of domestic/family violence, some health criteria requirements are substantively determined by an expert, not by the Minister's delegate or Tribunal. Where the matter arises as an issue, the decision-maker must seek the opinion of a Medical Officer of the Commonwealth (MOC) in relation to whether a person suffers a disease or condition.<sup>4</sup> Where a MOC opinion is properly made, the Tribunal must take that opinion to be correct for the purposes of deciding whether a person meets the requirements or satisfies the criterion for grant of a visa.<sup>5</sup>

There are three main issues arising in cases where meeting the health criteria is the issue in dispute for the visa application. The first is whether a person has undertaken a medical assessment as required by the Regulations or as requested by a MOC. The second issue is, in cases where a MOC opinion has been obtained and identifies that the applicant does not meet the relevant health requirement in the applicable PIC, whether the MOC opinion is properly made and therefore must be taken to be correct. The third issue arises where the PIC provides for waiver of the health requirements in certain circumstances.

There is no provision for waiver in relation to PIC 4005. In these cases, where an adverse MOC opinion has been obtained, the only issue will be the validity of the MOC opinion. The requirements for a valid opinion are discussed [below](#). In PIC 4006A and PIC 4007 there is provision for waiver. The details of the requirements for the waiver are also discussed further [below](#).

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<sup>1</sup> This commentary relates to the legislative provisions of Division 2.5A of the Migration Regulations 1994 (the Regulations) and PIC 4005-4007 of the Regulations current as at time of writing.

<sup>2</sup> Regulation 2.03(2) states that if a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred must be satisfied by an applicant as if it were set out at length in the Schedule 2 criterion.

<sup>3</sup> PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which PIC 4006A applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 & 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.

<sup>4</sup> r.2.25A(1) as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI2014 No. 30), Schedule 1, Part 2, item [11]. For all applications for temporary visas, and for applications for permanent visas made from a specified country, where there is no information known to Immigration to the effect that the person may not meet the health requirements, the decision-maker may determine that the person satisfies health criteria without seeking the opinion of a MOC.

<sup>5</sup> r.2.25A(3), *MIMA v Seligman* (1999) 85 FCR 115.

## Key Requirements

### The Health Criteria 4005-4007

The following requirements are common to all three health criteria, PIC 4005, 4006A and 4007:

- an applicant who is in a class of persons specified in a written instrument, must undertake any medical assessment specified and be assessed by the person specified;<sup>6</sup>
- the applicant must comply with any request by a MOC to undertake a medical assessment;<sup>7</sup>
- the applicant is free from tuberculosis;<sup>8</sup>
- the applicant is free from a disease/condition that is, or may result in the applicant being, a threat to public health or danger to the Australian community;<sup>9</sup>
- the applicant is free from a disease/condition in relation to which a person who has it would be likely to require health care or community services or meet the medical criteria for provision of a community service during the specified period; and provision of the health care or community services relating to the disease/condition (regardless of whether the health care or services will actually be used in connection with the applicant) would be likely to:
  - result in a significant cost to the Australian community in the areas of health care and community services;<sup>10</sup> or
  - prejudice access of an Australian citizen or permanent resident to health care or community services;<sup>11</sup> and
  - If the MOC has requested a signed undertaking that the applicant present himself/herself to health authorities for a follow-up medical assessment in the place of residence in Australia, the applicant has provided such undertaking.<sup>12</sup>

The specified period to be taken into account in determining whether an applicant must be free of the relevant disease or condition which would require health care/community services is:

- for permanent visas and temporary visas specified in a written instrument - the period commencing when the application is made;
- for all other temporary visas - the period for which the Minister intends to grant the visa.<sup>13</sup>

For visa applications made before 5 November 2011, the requirement that the provision of health care/community services must not result in a 'significant cost' to the Australian community does not apply to applicants who would not be eligible for the provision of health care or community services due to the subclass of temporary visa applied for, where that subclass is not specified in the relevant instrument.<sup>14</sup> The temporary visa subclasses specified are those that form a pathway to potentially

<sup>6</sup> PIC 4005(1)(aa), 4006A(1)(aa), 4007(1)(aa) as inserted by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011 No. 105), Schedule 4. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.

<sup>7</sup> PIC 4005(1)(ab), 4006A(1)(ab), 4007(1)(ab) as inserted by (SLI 2011 No. 105). These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6

<sup>8</sup> PIC 4005(1)(a), 4006A(1)(a), 4007(1)(a).

<sup>9</sup> PIC 4005(1)(b), 4006A(1)(b), 4007(1)(b).

<sup>10</sup> r.1.03 defines "community services" as including provision of an Australian social security benefit, allowance or pension.

<sup>11</sup> PIC 4005(1)(c), 4006A(1)(c), 4007(1)(c) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.

<sup>12</sup> PIC 4005(1)(d), 4006A(1)(d), 4007(1)(d) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.

<sup>13</sup> PIC 4005(2), 4006A(1A), 4007(1A). For the relevant instrument, see 'VisaSc' tab of the [Register of Instruments: Health Criteria](#)

<sup>14</sup> PIC 4005(3), 4006A(1B), 4007(1B). These provisions were repealed and substituted for visa applications made on or after 5 November 2011: Migration Legislation Amendment Regulations 2011 (No. 6) (SLI 2011 No. 199). For the relevant instrument, see 'VisaSc' tab of the [Register of Instruments: Health Criteria](#)

obtaining a permanent visa, such as a Subclass 309 (Partner (Provisional) visa). In general terms, those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

For visa applications made on or after 5 November 2011, the requirement that the provision of health care/community services not result in a significant cost to the community, *does* apply to those applicants for a temporary visa not specified by the Minister (generally speaking, this means a temporary visa which is not a provisional visa expected to be a pathway to permanent residence) but only in respect of certain services. That is, the health care and community services to be assessed in the 'no significant cost' requirement does not include those specified by instrument, where the application is for a subclass of temporary visa not specified by instrument.<sup>15</sup>

There are provisions for waiver of the health care/community services requirement in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of this requirement in PIC 4005.

The waiver in PIC 4006A provides that the Minister may waive the requirements of PIC 4006A(1)(c) if the 'relevant nominator' has given the Minister a written undertaking that they will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).<sup>16</sup>

The waiver in PIC 4007 provides that the Minister may waive the requirements of PIC 4007(1)(c) if the applicant satisfies all other criteria for the grant of the visa and the Minister is satisfied the grant of the visa would be unlikely to result in:

- undue cost to the Australian community; or
- undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

For information relating to considering the waiver, see below ['Waiver of the Health Criterion'](#).

### **Special provisions relating to certain health criteria**

Regulation 2.25A requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4005(1)(a), 4005(1)(b), 4005(1)(c), 4007(1)(a), 4007(1)(b), or 4007(1)(c).<sup>17</sup> For visa applications made before 18 March 2018, r.2.25A also requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4006A(1)(a), 4006A(1)(b) or 4006A(1)(c).<sup>18</sup> In deciding whether a person meets one of the above mentioned criteria, the Tribunal is to take the opinion of the MOC to be correct.<sup>19</sup>

<sup>15</sup> PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the [Register of Instruments: Health Criteria](#).

<sup>16</sup> PIC 4006A(2). PIC 4006A only applies to Subclass 457 Temporary Work (Skilled) visas made before 18 March 2018. PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the repeal of Subclass 457 (the only subclass to which it applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.

The term "relevant employer" was replaced with "relevant nominator" by the Migration Amendment Regulations 2009 (No.13) (SLI 2009 No. 289), and applies to visa applications made on or after 9 November 2009, or those made before, but not finally determined by 9 November 2009: r.3; Schedule 1, Item [2]. The amendment reflects similar changes in Subclass 457 criteria affected by Migration Amendment Regulations 2009 (No.9) (SLI 2009 No. 202) applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.

<sup>17</sup> r.2.25A(1).

<sup>18</sup> PIC 4006A was repealed for visa applications made on or after 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of

However, there is no requirement to seek a MOC opinion if:

- the application is for a temporary visa and there is no information indicating that the person may not meet any of those requirements;<sup>20</sup> or
- the application is for a permanent visa that is made from a country specified by Instrument<sup>21</sup> for these purposes and there is no information indicating that the person may not meet any of those requirements.<sup>22</sup>

Where there is evidence that the applicant may not meet any of the health requirements, in particular, may be suffering from some form of disease or medical condition, it will not be open to the decision-maker to find that the applicant meets the relevant health requirement without seeking a MOC opinion.

## Key Issues

### Required and requested medical assessments

Under PIC 4005(1)(aa), 4006A(1)(aa), and 4007(1)(aa), an applicant may be required, if they are a member of a class of persons specified in a written instrument to undertake a medical assessment. An applicant may also be required under PIC 4005(1)(ab), 4006A(1)(ab) and 4007(1)(ab), to undertake any medical assessment if requested by a MOC.

#### **Assessment required by written instrument**

Unless [exempted](#), an applicant who is in a class of persons specified in a written instrument must undertake any medical assessment specified in the instrument and must be assessed by the person specified in the instrument unless a MOC decides otherwise.<sup>23</sup>

The instrument sets out classes of persons based on countries (grouped according to risk) of which the applicant is a citizen, or where an applicant has recently spent time. The instrument also specifies required medical assessments for each class of person, as well as rules for applying it, e.g. where a person is a class of person in more than one group of countries, the relevant group is the higher risk group.<sup>24</sup>

Within a class of persons, different medical assessments may be required depending on factors including the length of intended stay, type of visa applied for, intended work or education, pregnancy, and likelihood of entering a health care facility.

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Schedule 1, Part 1 and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.

<sup>19</sup> r.2.25A(3).

<sup>20</sup> r.2.25A(1)(a).

<sup>21</sup> For the relevant instrument, see the 'Country' tab of the [Register of Instruments: Health Criteria](#).

<sup>22</sup> r.2.25A(1)(b).

<sup>23</sup> PIC 4005(1)(aa), 4006(1A)(aa), 4007(1)(aa), inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6. For the relevant instrument see "HealthAssess" tab in the [Register of Instruments - Health Criteria](#). The relevant instrument appears to be the one in place at the time of decision. See *Sarabia v MIBP* [2017] FCCA 2642 (Judge Dowdy, 31 October 2017), where the Court held the Tribunal had incorrectly identified a revoked instrument as the relevant instrument, rather than the instrument which applied at the time of its decision: at [22].

<sup>24</sup> For the relevant instrument, see "HealthAssess" tab in the [Register of Instruments - Health Criteria](#).

The instrument also specifies who must conduct the assessment, depending on whether it is conducted within or outside Australia.

An applicant must undertake any assessment required. An applicant who undertakes some but not all required assessments does not meet the criterion. As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the required assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

The Explanatory Statement which accompanied the introduction of this requirement explains the intention behind this requirement:

*[the health criteria do] not currently provide for medical assessments, such as a chest x-ray, which an applicant must undertake. Currently, under the Department of Immigration and Citizenship's policy, most applicants undertake medical assessments by reference to their country of citizenship or residence, intended activities, and their intended stay period in Australia. The policy also provides that the individual circumstances of an applicant may be considered when determining the relevant medical assessments.*

*The purpose of new paragraph (aa) is to clearly provide in the Principal Regulations that, if an applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph, then they must:*

- *undertake all medical assessments specified by the Minister in an instrument in writing for this paragraph; and*
- *be assessed by the person specified in the instrument.*

*The effect of this new paragraph is that an applicant must undertake medical assessments by reference to the instrument.*

*The purpose of new paragraph (aa) is also to provide for discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.<sup>25</sup>*

*Another purpose of the amendment is to address the recent decision by the Migration Review Tribunal (MRT) in 0901884 [2010] MRTA 905. Under the Department of Immigration and Citizenship's policy, an applicant was to undertake a chest x-ray to determine whether the applicant had active tuberculosis. In this case, the applicant refused to undertake a chest x-ray and the MRT accepted the applicant's skin test (Mantoux test) for latent tuberculosis as an alternative test. The Department of Immigration and Citizenship's view is that the result of a chest x-ray (as opposed to other tests) should be required as evidence of active tuberculosis status.*

*Therefore, the MRT decision has an implication that if an applicant chooses to undertake a medical assessment other than a chest x-ray regarding their tuberculosis status, then public health in Australia may be exposed to an increased threat of tuberculosis.*

*It is intended that relevant medical assessments such as a chest x-ray would be specified by the Minister in an instrument in writing for new paragraph (aa).*

*More broadly, this same risk applies to all aspects of the health requirement. If it is not addressed through regulation amendments, it could have a serious impact on the operation of the immigration health requirement and, through it, the health of the Australian community.*

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<sup>25</sup> Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.



### Exemption from medical assessment

Even if the applicant is in the specified class of persons, a MOC may decide that a particular applicant is not required to undertake a specified medical assessment by a specified person. The purpose of this exemption is:

*... to provide for a discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.*<sup>26</sup>

Whether a MOC has decided that an applicant is not required to undergo an assessment by a specified person is a question of fact. The Tribunal has no power to review that determination, or to consider whether it is reasonable.

### **Assessment requested by MOC**

Under PIC 4005(1)(ab), PIC 4006A(1)(ab) and 4007(1)(ab), an applicant must comply with any request by a MOC to undertake a medical assessment.<sup>27</sup>

The Explanatory Statement which accompanied the introduction of this requirement states that the purpose of the requirement to undertake a medical assessment is:

*... to require the applicant to comply with the Medical Officer of the Commonwealth's request to undertake a medical assessment. This would help:*

- *protect the Australian community from public health and safety risks;*
- *contain public expenditure on health care and community services; and*
- *safeguard the access of Australian citizens and permanent residents to health care and community services in short supply.*<sup>28</sup>

As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the requested assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

### **Free from a disease or condition**

PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require that *for the relevant period* the applicant "is free from a disease or condition in relation to which" a person who has it would be likely to require health care or community services or meet the medical criteria for the provision of a community service.<sup>29</sup>

### **The relevant period**

The period in which a person must be free from a disease or condition in relation to which a person who has it would require health care or community services or meet the medical criteria for the provision of a community service during the relevant period to meet PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c), varies depending upon the type of visa sought.

<sup>26</sup> Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.

<sup>27</sup> Inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6.

<sup>28</sup> Explanatory Statement to (SLI 2011 No.105).

<sup>29</sup> PIC 4005(1)(c)(i), 4006A(1)(c)(i), 4007(1)(c)(i), as amended by SLI 2011 No. 105. The criteria apply to visa applications made, but not finally determined, before 1 July 2011, and visa applications made after 1 July 2011.

For all permanent visa applicants and applicants for a temporary visa of a subclass specified in a written instrument (generally provisional visas), the relevant period is the period commencing when the application is made.<sup>30</sup> No end date is specified.

For all other temporary visa applicants, the relevant period is the period for which the Minister intends to grant the visa.<sup>31</sup> That is, the duration of the visa, commencing on the date the Minister intends to grant that visa.

### ***Access to health care or community services or significant cost***

Generally speaking, a person must be free from a disease or condition where the provision of health care or community services to a person with that condition would be likely to:

- result in a significant cost to the Australian community in the areas of health care and community services; OR
- prejudice the access of an Australian citizen or permanent resident to health or community services.<sup>32</sup>

Unless the application is for a temporary visa and there is no information known to Immigration to the effect that the person may not meet the health criteria, or is for a permanent visa that is made from a specified country, the decision maker *must* seek an opinion of a MOC on whether a person meets these criteria and must take that opinion to be correct.<sup>33</sup> The decision maker's role is limited to ensuring the MOC opinion is valid.<sup>34</sup>

The Department issues Notes for Guidance for MOC. These provide that a MOC is to consider the information in the Notes and apply these principles and some of the specifics when assessing an applicant against health requirements.<sup>35</sup>

### Exemption to the "no significant cost" requirement

#### *Visa applications made before 5 November 2011*

For visa applications made before 5 November 2011, the "no significant cost" requirement does not apply to applicants:

- who are applying for a temporary visa; AND
- who would not be eligible for the provision of health care or community services due to applying for or holding that temporary visa subclass; AND
- that visa subclass is of a type not specified in a written instrument.<sup>36</sup>

In general terms, the effect is that those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

<sup>30</sup> PIC 4005(1)(c)(i), 4005(2), 4006A(1)(c)(i), 4006A(1A), 4007(1)(c)(i), 4007(1A). For the relevant instrument see "VisaSc" tab in [Register of Instruments - Health Criteria](#).

<sup>31</sup> PIC 4005(2), PIC 4006A(1A), 4007(1A).

<sup>32</sup> PIC 4005(1)(c)(ii), 4006A(1)(c)(ii), 4007(1)(c)(ii).

<sup>33</sup> Regulation 2.25A. See [Assessing the Health Criteria](#).

<sup>34</sup> See [Assessing Validity of a MOC Opinion](#).

<sup>35</sup> PAM3 - Migration Regulations -Schedules - Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - Notes for Guidance for Medical Officers of the Commonwealth of Australia (re-issued 19/11/2016).

<sup>36</sup> PIC 4005(3), 4006A(1B), and 4007(1B) were introduced by SLI 2011 No. 105 and applied to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6. Those provisions were repealed and substituted for visa applications made on or after 5 November 2011: SLI 2011 No. 199: r.5, Schedule 3. For the relevant instrument see "VisaSc" tab in [Health Criteria – Register of Instruments](#).

The exemption appears, in light of its subsequent amendment (discussed below - [Visa applications made on or after 5 November 2011](#)) and the Explanatory Statement accompanying the amendments which introduced it, to be based on the premise that temporary visa holders are not eligible for health care or community services when they are in Australia.

The Explanatory Statement states:

*The purpose of this amendment is to address the Federal Court's decision in Robinson v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1626 (Robinson). The Federal Court relevantly held at paragraph [43] that:*

*A proper construction of Public Interest Criterion 4005 of the [Principal Regulations], requires the MOC [Medical Officer of the Commonwealth] to ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition. It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*

*Therefore, when considering the current paragraph 4005(c) in relation to provision of health care or community services to a person and the potential costs of the disease or condition that person has, the "hypothetical person" test established in the case of Robinson must be applied. An interpretation of this test is that the applicant's individual circumstances must not be taken into account. For example, although certain applicants would not be eligible for a particular service in Australia (due to the type of visa they are applying for and would hold if granted), this could not be taken into account for the purpose of deciding whether the provision of the service would be likely to result in a significant cost to the Australian community in the areas of health care and community services.*

*The Federal Court decision is problematic for temporary visa applicants because in most cases, the applicants (due to the type of visa they are applying for and would hold if granted) would not have access to the same range of publicly-funded services available to an Australian resident such as a permanent visa holder. Hence, despite having a significant medical condition, the costs of this condition would not be passed on to the Australian community, as the person would not be eligible for these services and therefore would be expected to pay for any services required either personally or through a health insurance scheme, for example.*

*It certainly would not seem fair or reasonable, for example, to refuse to grant a temporary visa to an applicant with a disability, or an elderly applicant, on the basis of services they would not be eligible for when in Australia (due to the type of visa they are applying for and would hold if granted).*

*Further, the purpose... is that [the 'no significant cost' requirement] does not apply if an applicant applies for a temporary visa being of a particular subclass that is not specified in the instrument... It is intended that this instrument would specify temporary visas that may lead to a permanent visa, and persons who hold this type of temporary visa would be eligible for health care or community services when they are granted a permanent visa in Australia.*

*Therefore, the effect... is that if an applicant applies for a [temporary] visa subclass that is not specified in that instrument, then [the 'no significant cost' requirement] does not apply because such an applicant would not be eligible for health care or community services when they are in Australia.<sup>37</sup>*

For the exemption to apply to those pre 5 November 2011 applicants who have applied for a visa not specified by the Minister, the applicant must not be eligible for health care or community services when they are in Australia due to the nature of the visa. Whether an applicant would not be eligible for

the provision of health care or community services due to applying for a temporary visa subclass or holding that temporary visa subclass is a question of fact for the decision maker. In determining this, regard may be had, but is not limited, to evidence such as:

- Schedule 2 criteria for the grant of such temporary visas which may require an applicant to arrange for health insurance;<sup>38</sup>
- any conditions imposed on the visa, notably Condition 8501 which provides that if an applicant meets the primary or secondary criteria for the grant of a visa, he or she must maintain adequate arrangements for health insurance while they are in Australia;
- any relevant information available from the Department and on its website indicating whether or not holders of particular temporary visa subclasses are covered by Australia's national health scheme or must hold adequate health insurance cover for the entire time they are in Australia;<sup>39</sup>
- any relevant information on the Australian Government Medicare website;<sup>40</sup>
- the existence and terms of any reciprocal health care agreements between Australia and the country of nationality of the visa applicant;<sup>41</sup> and
- any evidence submitted by the applicant.

#### *Visa applications made on or after 5 November 2011*

For visa applications made on or after 5 November 2011, there is no blanket exemption from the 'no significant cost' requirement for non-specified temporary visa applicants. If a person applies for a temporary visa, the subclass of which is not specified by the Minister in an instrument, then they must still be assessed against the 'no significant cost' requirement, but not in relation to all health care and community services. Instead, the health care and community services assessed will not include health care and community services specified by the Minister.<sup>42</sup> Persons who have applied for a temporary visa of a type specified in the instrument are required to be assessed in relation to the full range of health care and community services.

According to the Explanatory Statement that accompanied the introduction of this requirement, the criterion reflects the position that despite restriction on access to health related services, some temporary visa holders may nevertheless have access to some health care or community services which would result in a cost to the community:

*The purpose of new subclause 4005(3) is to address an unintended consequence of existing subclause 4005(3) that commenced on 1 July 2001 as part of the Migration Legislation Amendment Regulations 2011 (No. 1). The unintended consequence is that, because of existing subclause 4005(3), a MOC is not able to consider the potential cost for the provision of health care and community services that may be used while in Australia but for which the applicant is not technically eligible.*

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<sup>37</sup> Explanatory Statement to F2011L01098, SLI 2011 No.105, p.15.

<sup>38</sup> For example, cl.457.223B, 572.225.

<sup>39</sup> See for example <http://www.border.gov.au/Trav/Stud/More/Health-Insurance> (accessed 30 November 2016).

<sup>40</sup> See for example: [https://www.humanservices.gov.au/customer/services/medicare/medicare-card?utm\\_id=9](https://www.humanservices.gov.au/customer/services/medicare/medicare-card?utm_id=9) (accessed 16 November 2016).

<sup>41</sup> The Australian Government has signed Reciprocal Health Care Agreements (RHCA) with the governments of the United Kingdom, Sweden, the Netherlands, Belgium, Finland, Norway, Slovenia, Malta, Italy, New Zealand and the Republic of Ireland which entitles nationals of these countries to limited subsidised health services for medically necessary treatment while visiting Australia. For further information, see [http://www.humanservices.gov.au/customer/services/medicare/reciprocal-health-care-agreements?utm\\_id=9](http://www.humanservices.gov.au/customer/services/medicare/reciprocal-health-care-agreements?utm_id=9) (accessed 16 November 2016).

<sup>42</sup> PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the [Register of Instruments: Health Criteria](#).

... it is possible that certain temporary visa applicants with diseases or medical conditions could access health care or community services even if they are not eligible for them. This might occur, for example, because a hospital will not refuse to provide medical treatment to people who require it. As these cases would result in a cost to the Australian community, it is reasonable that these costs should be taken into account by a MOC when assessing the applicant against the health criteria.

There are, however, certain health care or community services that cannot be accessed by temporary visa applicants such as social security payments. The effect of new subclause 4005(3) is that a MOC is not required to assess the relevant temporary visa applicant... against the specified health care and community services. The specified health care and community services include those which a temporary visa applicant is unlikely to be able to access.<sup>43</sup>

## Assessing the health criteria - role of the Medical Officer of the Commonwealth and the Tribunal

Where the Minister or Tribunal is required by r.2.25A to seek an opinion from the MOC in determining whether an applicant meets the relevant health criterion, the Tribunal is to take the opinion of the Medical Officer of the Commonwealth (MOC opinion) to be correct.<sup>44</sup> However, this only applies where the MOC opinion is of a kind authorised by the Regulations.<sup>45</sup>

Where a MOC opinion was obtained under r.2.25A, and formed the whole or part of the reason for the refusal of the visa by the delegate and the applicant seeks review, the Tribunal may decide that a further MOC opinion is required.<sup>46</sup> The Regulations provide that in this circumstance a fee of \$520 is payable for the further opinion.<sup>47</sup> There is no prescription as to who must pay the costs of a further MOC opinion although it is the Tribunal's policy to require the applicant to pay the fee.

If the applicant elects not to obtain a further MOC opinion, the Tribunal must consider the MOC opinion that was before the delegate. If that opinion is validly made, it must take that opinion to be correct.

If that opinion does not amount to an assessment of the relevant health criterion in accordance with the Regulations as at the time of the Tribunal's decision, the Tribunal will need to obtain a valid MOC opinion.<sup>48</sup> Whether a fee is payable in these circumstances depends upon whether r.5.41 applies. See [Fees for a further MOC Opinion](#).

While the Tribunal is only required to take as correct a MOC opinion that complies with the Regulations, the Tribunal has no power to set aside a Medical Officer's opinion. Where the MOC opinion before the Tribunal does not comply with the Regulations, the Tribunal cannot determine the requirements of the health criteria for itself. The Tribunal must seek a fresh opinion or make enquiries of the MOC in order to clarify concerns regarding the opinion until it is satisfied it has a valid MOC opinion.

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

<sup>43</sup> Explanatory Statement to SLI 2011, No.199, pp.28-9.

<sup>44</sup> r.2.25A(3).

<sup>45</sup> *MIMA v Seligman* (1999) 85 FCR 115 at [66].

<sup>46</sup> A further MOC opinion in these circumstances has previously been described as a Review MOC opinion or RMOC opinion. However, there is no position provided for in the Regulations called a Review Medical Officer of the Commonwealth.

<sup>47</sup> r.5.41. There are standard letter templates for inviting the applicant to provide a further MOC opinion and advising them of the fee. NB, if the applicant refuses the invitation, the Tribunal may still be obliged to seek a further MOC opinion. See 'Currency of MOC Opinion'.

<sup>48</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115.



Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to what is the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC opinion finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it appears that it is necessary to have a valid MOC opinion before the Tribunal can properly consider the waiver requirements.

### **Fees for a further MOC opinion**

Regulation 5.41 provides for a fee for a further opinion of a MOC in merits review. It only applies where:

- the Minister was required to seek the opinion of a MOC under r.2.25A; and
- the visa refusal occurred because in the opinion of the MOC, the person did not satisfy a health criterion; and
- a further opinion of a MOC is required for the review.

Where an opinion was never validly made, r.5.41 does not apply. For example, an opinion that further medical evidence is required to determine whether a person meets a health criterion (often referred to as a “deferred opinion”) is not an opinion that a person did not satisfy a health criterion. In such circumstances, there is no legislative requirement for payment of a fee to obtain another MOC opinion. The relevant case team may be contacted if assistance is needed in obtaining a valid MOC opinion.

Where a MOC opinion was validly made, but is no longer current, r.5.41 applies, and a fee for a further MOC opinion is payable. The Tribunal’s policy is that the fee is payable by the applicant. The Tribunal may also require the Secretary of the Department to obtain a further MOC and provide the opinion to the Tribunal.<sup>49</sup>

### **Assessing Validity of a MOC opinion**

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it is necessary to have a valid MOC opinion before the decision maker can properly consider the waiver requirements.

In determining whether there is a valid MOC opinion, the decision maker must be satisfied that it has:

- an opinion;<sup>50</sup>

<sup>49</sup> Section 363(1)(d) of the *Migration Act 1958*.

<sup>50</sup> There is a standard form prepared by the Department titled “Medical Opinion of an Officer of the Commonwealth” (form 884) or the opinion may be in a document with a heading of “Medical Opinion”. If the document contains a heading such as “Deferred Opinion”, there may be some question as to whether that amounts to an opinion for the purposes of r.2.25A.

- by a Medical Officer of the Commonwealth (defined in r.1.03 to mean a medical practitioner appointed by the Minister in writing under r.1.16AA to be a Medical Officer of the Commonwealth for the purposes of the Regulations),<sup>51</sup>
- the opinion is on a matter referred to in r.2.25A(1) or (2) (for the purposes of (1) an opinion on whether a person meets certain health requirements); and
- the opinion addresses satisfaction of these requirements at the time of the Minister's decision.<sup>52</sup>

To ensure the MOC opinion addresses the applicable criterion some initial matters to check are:

- whether the opinion refers to the correct criterion. For example, if the opinion refers to PIC 4005 when the applicable criterion is 4007, this should be referred back to the MOC for clarification;
- whether the opinion correctly reflects assessment of costs and access to health care or community services during the [relevant period](#);
- whether the opinion has assessed a temporary visa applicant against the "no significant cost" requirement, where the applicant is exempted from the requirement.

The MOC is entitled to differ in his/her opinion from reports put to him/her and is not obliged to give reasons for why any medical report or opinion was rejected. As a result of this it is difficult to successfully challenge a MOC opinion on the basis of an imputed rejection of expert medical evidence.<sup>53</sup>

The MOC is required to form his or her own opinion about whether the relevant PIC is satisfied after taking into account all material logically probative of that opinion before him or her. In so doing, the MOC is required to act reasonably and there must be a logical basis for the opinion. In *Haque* the Court considered an RMOC opinion for an applicant with learning difficulties.<sup>54</sup> The Court held that the opinion lacked an evidentiary basis and accordingly the Tribunal was not bound to accept it. As the Tribunal considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

The opinion must reflect that the MOC has asked himself or herself the correct question, based on the terms of the requirement in the relevant PIC. Particular issues that have been the subject of judicial consideration in relation to the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) include:

- whether the MOC has considered the relevant characteristics of the person with the disease/condition of the applicant (the hypothetical person test); and

<sup>51</sup> In *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), the Court found that the Tribunal was entitled to presume that the MOC was a MOC without referring to any evidence, until the appointment was challenged (at [127]).

<sup>52</sup> *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [19] citing *MIMA v Seligman* (1999) 85 FCR 115 at [48]-[49].

<sup>53</sup> *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [14], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [32]-[37].

<sup>54</sup> *Haque v MIBP* [2015] FCCA 1765 (Judge Smith, 2 July 2015). In this case, the MOC obtained a specialist paediatrician's report which stated that the applicant 'suffers from autistic spectrum disorder with moderate developmental delay and behavioural problem. She is functioning fairly well and attending to all her personal hygienes and activities of daily living.' Upon review the applicant sought a new opinion, providing the Tribunal with a number of expert medical reports which suggested varying degrees of independence of applicant. The RMOC opinion found the applicant did not satisfy PIC 4005 as she was a person with 'severe cognitive impairment' and was 'totally dependent in all of her activities of daily living'. The RMOC did not personally examine applicant, but rather based the opinion on information including the medical reports. However, none of the reports supported the conclusion the applicant was totally dependent on others in all of her activities of daily life. The Court concluded that as the RMOC opinion was based upon a fact for which there was no evidence or any other logical basis, the opinion was not one formed according to law. That being so, the Tribunal was not bound to accept it and, because it considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.



- what is considered as “health care” in determining whether a person with the applicant’s disease/condition with such requirements would likely result in significant cost to the Australian community; and
- obligations on the MOC in relation to an opinion that provision of health care or community services would result in a significant cost.

In *Traill v MIAC*<sup>55</sup> the Court considered the delegate’s application of PIC 4005(1)(c) and found that the delegate constructively failed to exercise his jurisdiction because he relied upon the MOC’s opinion which did not properly address the visa criterion upon which it bore and failed to meet the minimum standard for such an opinion. The Court noted that the report contained no opinion on whether the applicant had the capacity to function in his daily life without support; and that the MOC failed to properly ascertain the form or level of the condition suffered by the second applicant and then proceeded to make an assessment at a higher level of generality by reference to a generic form of an unidentified condition. The Court was further concerned that the report was simply a template statement drawn from a precedent used by the MOC. Taking these matters into account, the Court concluded that the report was so uninformative so as to be unreliable.<sup>56</sup> However, while it is well settled that for r.2.25A(3) to apply the MOC opinion must be one that is authorised by the regulations, aspects of the Court’s criticism of the opinion in this case may be misleading as to what the regulations require, including, for example, the reference to whether the applicant had the capacity to function in his daily life without support. Nonetheless, to the extent that the opinion in question follows a ‘template’ (as the Court suggested) the Tribunal may need to consider whether an MOC opinion before them is affected. The Tribunal should also be careful to ensure it considers the terms of the relevant regulations.

Importantly, the MOC opinion must address the applicant’s satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal’s decision*.<sup>57</sup> Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that, in order to meet this requirement at time of decision, the Tribunal will need to obtain a further opinion.

Where the MOC opinion relates to PIC 4005(1)(c)(ii)(A), 4006A(1)(c)(ii)(A) or 4007(1)(c)(ii)(A), i.e. that provision of health care of community services relating to the disease or condition would be likely to result in significant cost to the Australian community, the MOC is not obliged to state what the significant costs would be in order for the MOC opinion to be valid.<sup>58</sup> It is for the MOC to determine whether a cost is significant based on his or her medical judgment.<sup>59</sup> Nor is the MOC obliged to explain why a particular cost is considered to be a significant cost.<sup>60</sup>

### ***The 'hypothetical person' test'***

The provisions of PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require the MOC to consider whether or not the relevant disease or condition is such that a hypothetical person with it would be likely to require health care or community services or meet the medical criteria for the provision of a community service; and whether that provision of health care or community services would be likely to

<sup>55</sup> [2013] FCCA 2 (Judge Driver, 14 June 2013).

<sup>56</sup> *Traill v MIAC* [2013] FCCA 2 (Judge Driver, 14 June 2013) [45]-[47].

<sup>57</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115. The Court in *Applicant Y* was considering Item 4007(1)(c).

<sup>58</sup> *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [13], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [46]. The Court in *JP1* was considering a MOC opinion in relation to (then) PIC 4005(c) for an applicant with HIV.

<sup>59</sup> *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [33] referring to *MIMA v Seligman* (1999) 85 FCR 115 at [53].

<sup>60</sup> *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [57].

result in significant cost to the Australian community; or would be likely to prejudice access of Australian residents to health care or community services. The person referred to in these provisions is not the applicant, but a hypothetical person who suffers from the disease or condition which the applicant has.<sup>61</sup> It is not a prediction of whether the particular applicant will in fact require such health care or community services.<sup>62</sup>

The test is for a hypothetical person because the MOC could reasonably be expected to be able to assess the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care. However, one would not necessarily expect a MOC to inquire into the financial circumstances of a particular applicant or any family members or other sources of financial assistance.<sup>63</sup>

The test is for a hypothetical person who suffers from the form or level of condition suffered by the applicant. In *Robinson v MIMIA*<sup>64</sup> Siopis J found that the MOC opinion was not valid and the Tribunal erred in taking it to be correct, as it did not make the assessment based on the relevant level of the condition held by the applicant. In particular his Honour held:

*A proper construction of Public Interest Criterion 4005 of the Regulations, requires the MOC to **ascertain the form or level of condition suffered by the applicant in question and then to apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition.** It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*<sup>65</sup>  
(emphasis added)

The Tribunal should consider the relevant MOC opinion before concluding that it is bound to accept it as correct. If the Tribunal is of the view that the opinion reflects that the MOC has applied the test in PIC 4005(1)(c) or 4007(1)(c) incorrectly by making its assessment by reference to the generic form of the disease or condition, it cannot take it to be correct. The appropriate course of action would be to seek a new opinion from the MOC.

As the legislation requires the MOC to consider a hypothetical person with the form or level of the disease or condition suffered by a particular applicant, there is no requirement to consider other details of a particular applicant's circumstances. The legislation does not require the MOC to examine personal factors of the applicant such as age, degree of compliance with medical regimes or ability to work, pay taxes and contribute to the community in order for the opinion to be valid.<sup>66</sup>

The opinion must be clear on its face as to what is the disease or condition to which the relevant PIC relates.<sup>67</sup> In *Ramlu v MIMIA*<sup>68</sup> the Court found jurisdictional error in the Tribunal decision on the basis that the Tribunal failed to turn its mind to issues relevant to assessing the validity of the further MOC

<sup>61</sup> *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. The Court was considering a challenge to the validity of PIC 4005(c) following amendments made after the decision in *MIMA v Seligman* (1999) 85 FCR 115 which found r.2.25B as it then was to be invalid. The Court in *Imad* found the amended 4005 was valid. Justice Heerey followed his own decision in *Inguanti v MIMA* (2001) FCA 1046 at [10] (Heerey J, 3 August 2001).

<sup>62</sup> *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. See also *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [44] and *Triandafillidou v MIMIA* [2004] FMCA 20 (Bryant CFM, 6 February 2004) at [57]-[58].

<sup>63</sup> *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [14].

<sup>64</sup> *Robinson v MIMIA* (2005) 148 FCR 182.

<sup>65</sup> *Robinson v MIMIA* (2005) 148 FCR 182 at [43]. This case involved a visa application refused on the basis that the primary applicant's son, who had Down's Syndrome, failed to satisfy (then) 4005(c). The child only had a mild version of the condition. The Court, in concluding the MOC opinion was invalid and the Tribunal decision subject to jurisdictional error followed authorities including *Seligman* (where the Full Court at [83] made reference to "his level of impairment"), *Imad* at [14] and *Inguanti*, and expressly declined to follow the views of Finkelstein J at first instance in *X v MIMIA* [2005] FCA 429 on this issue.

<sup>66</sup> *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [41]-[47].

<sup>67</sup> *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [22].

<sup>68</sup> [2005] FMCA 1735 (Driver FM, 14 December 2005).

opinion. The further MOC opinion in question referred to a number of diseases and conditions suffered by the applicant, but was not clear to which one(s) (then) paragraph 4005(c)(ii)(A) applied. The failure to state this clearly in the opinion meant that the Tribunal could not be clear what the relevant disease was, let alone the level of it. The Tribunal did not, therefore, consider issues relevant to whether the MOC opinion was properly made.

In light of this judgment it would be appropriate for the Tribunal, when presented with a MOC opinion which does not clearly identify which of an applicant's diseases or conditions has caused them to fail the health criteria, to seek clarification from the MOC or a revised opinion. Furthermore it would be advisable for the Tribunal to make clear in its decision that it has considered whether the MOC opinion has been properly made.

### **Currency of the MOC opinion**

The MOC opinion being considered by the Tribunal must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.<sup>69</sup> Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that it seek a further opinion. This will be so even where the applicant has refused the invitation to obtain a further MOC opinion, as the primary obligation is upon the Minister or the Tribunal to obtain an opinion which would enable the making of a determination.

Where the Tribunal consults an out of date report, it risks taking into account irrelevant considerations in the form of medical opinions which no longer apply to an applicant.<sup>70</sup> Whether the Tribunal will need to obtain a further MOC opinion will depend on the circumstances of the case. Considerations relevant to whether further investigation is required by the Tribunal include:

- the amount of time that has elapsed between the issue of the MOC's report and the Tribunal's decision;
- any evidence of change (and, in particular, improvements) in the applicant's health; and
- the degree to which any other medical opinions demonstrate a lack of currency and reliability in the MOC opinion.<sup>71</sup>

Evidence of change in the ability to test or establish the level or severity of a condition due to the applicant's age at the time of decision may also indicate that a MOC opinion is no longer valid.<sup>72</sup>

Where the applicant has refused an invitation to obtain a further MOC opinion at review stage and, on the basis of the above considerations, the original MOC opinion is no longer current and cannot be taken to be correct, the Tribunal will need to obtain a further MOC opinion. The Tribunal may require

<sup>69</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115 (French, North and Merkel JJ, 1 March 1999).

<sup>70</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [22].

<sup>71</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [20]. In *Applicant Y* the MOC opinion relied upon by the Tribunal was almost 2 years old as at the time of the Tribunal decision, the applicant having refused the invitation to obtain a further MOC opinion upon review. The applicant had submitted recent reports from the applicant's doctor to the Tribunal indicating an improvement in the applicant's condition since her initial diagnosis as HIV positive and that her prognosis was generally good. The medical evidence indicated that the applicant would not require hospitalisation in the reasonably foreseeable future, while the MOC opinion implied hospitalisation and significant inpatient management as the basis for its assessment of 'significant cost'. In *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) the Court rejected submissions based on *Applicant Y* in circumstances where the MOC opinion was only 4 months old and the applicant was arguing not that the MOC opinion itself was out of date, but rather that it was based on out of date guidelines.

<sup>72</sup> See *Pokharel v MIBP* [2016] FCCA 3295 (Howard J, 19 December 2016). In *Pokharel* the MOC opinions were based on a medical report that had been prepared when the applicant was only 3 months and 16 days old and the medical report noted that the degree of intellectual impairment for the condition was highly variable. The Court held that the Tribunal had asked itself a wrong question by failing to consider whether either of the opinions reflected the level or severity of the condition as at the date of decision (when the applicant was two years old).

the Secretary of the Department to arrange a further MOC opinion in accordance with s.363(1)(d) of the Act.

### ***When must the Tribunal seek a MOC opinion?***

The MOC opinion must address satisfaction of the health criterion requirements *at the time of the Tribunal's decision* upon review.<sup>73</sup> If a MOC opinion was obtained at primary level, depending on the nature of the evidence to the Tribunal, it may no longer be an opinion that the applicant satisfies the requirements at the time of decision.

Where the reason for refusal of the visa was wholly or partly as a result of an opinion of a MOC that a person did not meet a health criterion, the Tribunal may seek a further MOC opinion at review stage. There is a prescribed fee payable in these circumstances. Tribunal policy is that the fee is payable by the applicant. Where the Tribunal is obtaining a MOC opinion for the first time, that is, it is not a request for a further MOC opinion within the meaning of r.5.41, or where a valid MOC opinion was obtained, but was not a reason for the delegate's refusal of the visa, there is no *prescribed* fee.

If a valid MOC opinion was obtained at primary level and the reason for the refusal was wholly or partly the result of an opinion of a MOC, and the applicant refuses to obtain a further MOC opinion, the Tribunal will need to consider whether it can take the original MOC opinion to be correct in relation to satisfaction of the health criterion requirements at time of decision (see [Currency of the MOC Opinion](#) above). If it cannot take the original MOC opinion to be correct, then the Tribunal will still need to obtain a valid MOC opinion.<sup>74</sup> In these circumstances the Tribunal itself would need to obtain a further MOC. The Tribunal has the power to require the Secretary of the Department to arrange for any medical examination that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.<sup>75</sup>

Where the health criterion is the sole issue in dispute before the Tribunal, the Tribunal must address it in reviewing the decision. Failure to do so may constitute jurisdictional error on the grounds of 'failure to exercise jurisdiction', or 'failure to review the decision'. If no MOC opinion has yet been obtained, the Tribunal must seek the opinion of a MOC unless the matter falls within one of the exceptions in r.2.25A(1)(a) or (b). Where the matter does fall within one of the exceptions, the Tribunal may be able to decide the health criteria without a MOC opinion where there is no information known to the Tribunal (either through the application or otherwise) to the effect that the person may not meet any of the health requirements. The Tribunal may request that the Department arrange for the applicant to attend a panel doctor for assessment.<sup>76</sup> The necessary medical information can then be forwarded to the Tribunal who then makes a decision in relation to the health criteria (unless the medical information suggests the person may not meet the health criterion, in which case the Tribunal must seek a MOC opinion).

Regulation 2.25A(1) only requires that the Minister 'seek the opinion' of an MOC. How the opinion is requested or obtained is not provided for in the Regulations. There is no requirement for the Tribunal

<sup>73</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18] citing *MIMA v Seligman* (1999) 85 FCR 115.

<sup>74</sup> *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [28]. The Court noted that the primary obligation under r.2.25A is on the Minister or the Tribunal to obtain a report which would enable the making of a determination.

<sup>75</sup> Section 363(1)(d) of the *Migration Act 1958*.

<sup>76</sup> Section 363(1)(d) of the *Migration Act 1958* authorises the Tribunal to require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. In addition, s.60 provides that the Minister may require the applicant to visit and be examined by a person qualified to determine the applicant's health, physical or mental condition at a reasonable time and place, if the health, physical or mental condition of the applicant is relevant to the grant of a visa. In these circumstances an applicant must make every reasonable effort to attend such examination. Following *obiter dicta* by the High Court in *MIAC v SZKTI* (2009) 238 CLR 489 at [33], it appears that the Tribunal may also have this power.

to specify an individual MOC when seeking an opinion.<sup>77</sup> See the Letter Template Index and National Registry Procedures for procedural information about seeking an opinion from the MOC.

### **Health care**

What is counted as falling within the meaning of 'health care' is relevant to the assessment of whether the cost of that care will be 'significant' for the purposes of PIC 4005(1)(c)(i), 4006A(1)(c)(i) or 4007(1)(c)(i). This issue is relevant to the Tribunal in terms of assessing whether the MOC has given an opinion that is authorised by the Regulations in assessing whether the health care required by a person with the condition/disease of the applicant would be likely to result in significant cost to the Australian community. There has been some consideration as to whether prescription medication which is self-administered comes within the meaning of 'health care' such that it can properly be taken into account in calculating whether the cost of that 'health care' would be 'significant'.

'Health care' in this context involves the provision of care by somebody to the person, but such provision does not necessarily require 'an element of personal attention or activity' by the provider. It has been held that the MOC may take into account the costs of self-administered medication when assessing whether the provision of 'health care' would be likely to result in a significant cost to the Australian community. The Court in *MIMIA v X* stated:

*It is not necessary to mark the outer limit of the concept of the term "health care" in the context of the Regulations or to define exhaustively what kinds of persons might qualify as providers or the means by which provision might be made. The term must at least include, in our opinion, the prescription of medication by a legally qualified medical practitioner and the dispensing of that medication by a pharmacist. The fact that a particular medication is self-administered by the person, even if some considerable time after the prescription or the dispensing, cannot sensibly be isolated from the total process. Moreover, in the present case the prescription and dispensing is linked with the monitoring, which is unarguably health care.*<sup>78</sup>

### **Waiver of the Health criterion**

There is provision for waiver of the requirements in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of the requirement in PIC 4005(1)(c) or for any of the requirements in 4005-4007 in relation to tuberculosis or a disease/condition that would be a threat to public health in Australia or a danger to the Australian community.

#### **PIC 4007**

The waiver in PIC 4007(2) is only available if the applicant satisfies all other criteria for grant of the visa: PIC 4007(2)(a). If other criteria for the visa are in dispute, the Tribunal will not be in a position to consider the waiver until it is satisfied that the applicant meets those other criteria. There is no similar requirement in relation to the waiver in PIC 4006A(2).

Further, the waiver provision in PIC 4007(2) is only available if the Minister is satisfied that the granting of the visa would be unlikely to result in 'undue cost' to the Australian community or 'undue prejudice' to the access to health care or community services of an Australian citizen or permanent

<sup>77</sup> *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), at [63].

<sup>78</sup> *MIMIA v X* (2005) 146 FCR 408 (Black CJ, Heerey and Weinberg JJ, 29 September 2005) at [12]. The Full Court also held at [13] that the term "health care" is used in the same sense in 4005(c)(i)(A) and in the opening words of 4005(c)(ii). The Full Court disagreed with Finkelstein J at first instance who had held that health care necessarily requires an element of personal attention or activity by the provider and that the term 'health care' did not extend to the mere provision of prescription medication that is self administered: *X v MIMIA* [2005] FCA 429 (Finkelstein J, 15 April 2005) at [24].

resident. The consideration of these points relates back to the assessment in the adverse MOC opinion.<sup>79</sup>

There are then, two conditions which must be met before the waiver can be exercised:

1. the applicant must satisfy all other criteria for the grant of the visa: cl.4007(2)(a)
2. the decision maker must be satisfied that grant of the visa would be unlikely to result in:
  - (a) undue cost to the Australian community: cl.4007(2)(b)(i); **or**
  - (b) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident: cl.4007(2)(b)(ii).

The circumstances in which the Tribunal has power to actually exercise the waiver, will be rare, if they arise at all. Most often, the Tribunal is restricted to determining the question of satisfaction that grant of the visa would be unlikely to result in undue costs or prejudice to access. If the Tribunal is satisfied that the grant would be unlikely to result in either, it may remit with a direction that the applicant meets PIC 4007(2)(b) for the purpose of the relevant Schedule 2 visa criterion. Once the decision is remitted to the Department, an officer must determine whether the applicant satisfies all other criteria for grant of the visa and if so, must consider the waiver.

Strictly speaking, the task of determining whether costs or prejudice are “undue” is more accurately characterised as one of interpretation and fact-finding than as the exercise of a discretion.<sup>80</sup> Nevertheless, the Tribunal may have regard to any guidance that may be available in relation to legislative provisions containing such terms, such as may be given in Departmental guidelines, but it must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.<sup>81</sup>

Departmental guidelines in relation to the PIC 4007 health waiver tend to conflate the prior question of satisfaction as to the unlikelihood of undue cost and undue prejudice with the exercise of the discretion itself. They state:

### **What does ‘undue’ mean**

*Although ‘undue’ is not defined in migration law:*

- *the dictionary definition of undue is “unwarranted; excessive; too great” and*
- *the courts have indicated that a broad range of discretionary considerations can be taken into account in determining whether costs or prejudice to access are “undue”, which, in a given case, may include mitigation of costs or service, or consideration of compelling and compassionate circumstances.*

### **What to take into account**

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<sup>79</sup> Note that while r.2.25A requires the Tribunal to take a MOC’s opinion to be correct for the purposes of determining whether a person meets PIC 4007(1)(c), a MOC does not need to be taken to be correct for the purposes of determining whether the significant cost or prejudice is ‘undue’.

<sup>80</sup> See MRD Legal Services commentary, [Application of policy](#), “Use of Policy and Guidelines in Exercise of Non-Discretionary Power”

<sup>81</sup> In *Xue Fan v MIAC* [2010] FMCA 490 (Burnett FM, 9 July 2010) at [22], the Court observed that PAMs are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s.15AB *Acts Interpretation Act 1901*, that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that “if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material”. Section 15AB(2) then provides that, “[w]ithout limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes” materials such as explanatory memoranda and relevant reports laid down before either House of Parliament.



*Given the broad range of discretionary considerations that can be taken into account, the individual circumstances of the visa applicant need to be considered in coming to a conclusion about whether the granting of the visa would be unlikely to result in undue cost or undue prejudice to access.*

*Each health waiver case must be considered on its merits – with all relevant factors taken into account, including any compelling and/or compassionate circumstances that warrant a waiver being exercised (for example, close family links to Australia and/or reasons why the family would find it difficult to return to their home country).*

*When making a waiver decision, section 65 delegates should consider the following policy guidelines for the relevant type of visa being processed - as the nature of the individual circumstances involved are likely to vary depending on the type of visa that has been applied for (even though the same PIC applies).<sup>82</sup>*

The guidelines state relevant factors which are afforded significant weight for non-humanitarian visas,<sup>83</sup> and also set out factors to be taken into account and given particular weight in relation to humanitarian visas<sup>84</sup> and Foreign Affairs or Defence Sector students.<sup>85</sup>

Compelling and compassionate circumstances may be relevant to the consideration of the waiver; however, considerations are not restricted to such circumstances. The Full Court of the Federal Court considered the operation of the health waiver in the case of *Bui v MIMA*.<sup>86</sup> The Court held that the evaluation of whether an identified significant cost would be 'undue' may import consideration of compassionate or other circumstances and commented that it 'may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person would make some significant call upon health and community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category, that mandate such an outcome.'<sup>87</sup> For further information please see MRD Legal Services Commentary on '[Compelling and/or Compassionate Circumstances](#)'.

See the [National Registry Procedures NRP 'Investigations'](#) for further information on processing MOC related matters.

#### **PIC 4006A**

PIC 4006A only applies to Subclass 457 (Temporary Work (Skilled)) visas made before 18 March 2018.<sup>88</sup>

<sup>82</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 Overview (re-issued 18/11/2017).

<sup>83</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – Assessing a waiver for a humanitarian visa (re-issued 18/11/2017).

<sup>84</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 waivers for non-humanitarian visas – Factors afforded significant weight under policy (re-issued 18/11/2017).

<sup>85</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4007 waivers for Foreign Affairs or Defence Sector students (re-issued 18/11/2017).

<sup>86</sup> *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999). This case involved judicial review of a decision of a delegate that the applicant did not meet PIC 4007 in the form prior to the amendments of 1 July 1999. The waiver was not exercised. The Full Court held at [49] that a request to the applicant to provide information on "compelling and compassionate circumstances" did not demonstrate an unduly restrictive approach to the exercise of the waiver. The delegate's decision was overturned following *MIMA v Seligman* (1999) 85 FCR 115 and the invalidity of r.2.25B.

<sup>87</sup> *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999) at [47].

<sup>88</sup> PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which it applied) from that date. The amendments do not affect visa applications made before 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation. The Subclass 457 visa was replaced with the Class GK Subclass 482 (Temporary Skills Shortage) visa and applicants for Subclass 482 must satisfy health criterion 4007.



PIC 4006A(2) provides a power to waive part of the health requirement (namely PIC 4006A(1)(c)) 'if the *relevant nominator* has given the Minister a written undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements'.<sup>89</sup>

'Relevant nominator' is defined in PIC 4006A(3) to mean an approved sponsor who:

- has lodged a nomination in relation to a primary applicant, or
- has included an applicant who is a member of the family unit of a primary applicant in a nomination for the primary applicant, or
- has agreed in writing for an applicant who is a member of the family unit of a primary applicant to be a secondary sponsored person in relation to the approved sponsor.

Note that not all Subclass 457 applicants are required to have a nomination lodged in respect of them. Only those applicants applying for the cl.457.223(2) [Labour Agreement] and cl.457.223(4) [Standard Business Sponsor] must be the subject of an approved nomination.

Subclass 457 applicants who applied under the 'service sellers' stream<sup>90</sup> and the 'persons accorded certain privileges and immunities' stream before 24 November 2012<sup>91</sup>, are not required to be the subject of a nomination. For these applicants, the waiver in PIC 4006A cannot be accessed.

Before the requirements of PIC 4006A(1)(c) can be waived, it must first be established that an applicant has a disease or condition that would result in them not being able to satisfy those requirements. Once that is established, the written undertaking must relate to *that* disease or condition.

There is no discretion to waive the requirements in the absence of a written undertaking. The term 'undertaking' is not defined in the Act or the Regulations, nor is the form of the undertaking prescribed. It is only necessary that the undertaking:

- be written
- be given by the relevant nominator
- be given to the Minister
- and be an undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).<sup>92</sup>

In the absence of a statutory definition, the word 'undertaking' is to be given its ordinary meaning. The Macquarie Dictionary Online relevantly defines the word as 'a promise; pledge; guarantee'.<sup>93</sup> Where there is persuasive evidence that a purported undertaking cannot be met, there is some doubt that the term 'undertaking' can meaningfully be applied. As discussed below, consideration of whether a nominator can meet the purported undertaking may also be a relevant factor in considering whether to exercise the waiver.

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<sup>89</sup> The term "relevant employer" in PIC 4006A was replaced with "relevant nominator" by SLI 2009 No. 289 and applies to *visa* applications made on or after 9 November 2009 as well as those made prior to, but not finally determined by that date: r.3(3); Schedule 2, Items [2] and [3]. According to the Explanatory Statement to SLI 2009 No. 289, the amendment "ensures that it is always the approved sponsor who has identified the visa applicant in the nomination, or has agreed in writing to be the approved sponsor of the visa applicant, who gives the written undertaking to meet the costs associated with the visa applicant's health condition, regardless of whether the approved sponsor is also the visa applicant's employer." The amendment reflects similar changes in references from employer to nominator in Subclass 457 criteria affected by SLI 2009 No. 202 applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.

<sup>90</sup> cl.457.223(8).

<sup>91</sup> cl.457.223(9) as in force prior to 24 November 2012. The Privileges and Immunities stream was removed from the Subclass 457 visa by the Migration Legislation Amendment Regulations 2012 (No. 4) (SLI 2012 No. 238), item 228 of Schedule 1.

<sup>92</sup> PIC 4006A(2).

The Tribunal must be satisfied that any written undertaking it has is from the relevant nominator. Departmental guidelines state:

*...if the 'relevant nominator' is a company, the undertaking must have been 'executed' by the company.*

*Under s.127 of the Corporations Act 2001, a company may execute a document:*

- *without using a common seal if the document has been signed by:*
  - *2 directors of the company*
  - *a director and a company secretary of the company or*
  - *for a proprietary company that has a sole director who is also the sole company secretary – that director*
- *using a common seal if the affixing of the seal has been witnessed by:*
  - *2 directors of the company*
  - *a director and a company secretary of the company or*
  - *for a proprietary company that has a sole director who is also the sole company secretary – that director.*<sup>94</sup>

The Tribunal may have regard to these guidelines, but should not treat them as binding evidentiary requirements. It is a matter for the Tribunal to determine what evidence is necessary to satisfy it that the undertaking has been given by the nominator. In the case of a nominator who is a company or unincorporated association, the Tribunal must be satisfied that the individual giving the undertaking has authority to do so on behalf of the nominator.

PIC 4006A(2) is ambiguous as to whether, for the undertaking to have been given to the Minister, it is necessary that it have been addressed to the Minister, or whether it is sufficient that an unaddressed undertaking be provided to the Minister (or Tribunal). On the one hand, it is arguable that the undertaking must be addressed to the Minister (or Tribunal), based on a view of an undertaking as a promise, pledge or guarantee addressed specifically to a person or group of persons, who may act in reliance on that promise. On the other hand, it is arguable that a breach of the undertaking is unenforceable by the Minister, and that there is no clear policy purpose to be served by making the discretion to exercise the power conditional upon an undertaking being specifically addressed to the Minister. On either construction, the relevant nominator must consider and express a commitment to meet the undertaking, and the Minister will have a record of the undertaking and whether it was honoured available when considering applications relating to the nominator in future. The Explanatory Statement which introduced the waiver for PIC 4005A (later renumbered as PIC 4006A in a technical amendment<sup>95</sup>) provides little if any guidance on this point.<sup>96</sup>

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<sup>93</sup> [Macquarie Dictionary Online](#), accessed 16 November 2016.

<sup>94</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers - PIC 4006A (UC-457 Only) (re-issued 18/11/2017). Under ss.128 and 129 of the *Corporations Act 2001*, a person is, broadly speaking, entitled to assume that a document executed in this manner has been executed by someone authorised to act for the company in any dealings with that company.

<sup>95</sup> According to the Explanatory Statement for SLI 1995 No. 117: "In December 1994, public interest criterion 4005A was introduced into Schedule 4. It was intended as a relaxed health criterion for temporary entry classes 413 (Executive), 414 (Specialist) and 418 (Educational) with the relevant employer giving an undertaking to meet certain medical costs if they arose. However, 4005A was inadvertently included in a number of other classes that had criteria listed as 4001 to 4006. This regulation omits item 4005A and reinserts it as item 4006A which overcomes the problem".

<sup>96</sup> According to the Explanatory Statement for SLI 1994 No. 376: "The new public interest criterion 4005A is identical to existing public interest criterion 4005 but with an additional provision that a health objection on the grounds that the applicant's disease or condition would result in undue costs to Australian community resources and public funds may be waived where the proposed employer, or the family head's proposed employer, has provided a written undertaking to meet all costs related to the applicant's disease or condition. The waiver is available only where the applicant's disease or condition is not a public health risk or danger to the Australian community."

As mentioned above, the undertaking must be that the relevant nominator will meet all the costs related to *the specific* disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c). An undertaking stating that the nominator will meet the applicant's health costs without reference to the condition would not appear to meet this description.

The undertaking must be that the relevant nominator will meet *all* the costs related to the relevant disease or condition. Departmental guidelines state:

*The relevant nominator must undertake to meet all of the costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c).*

*The undertaking must therefore, include the assessed estimated costs.*

...

*In most cases, the MOC's opinion that the applicant fails to satisfy the health requirement will be based on the likely cost of health care and community services in Australia....*

*... generally, it would be reasonable to expect that a larger organisation would be able to meet a higher level of costs than a smaller organisation or an employer who is an individual. However, each case must be considered on its own merits.*

*If there is doubt about the capacity of the relevant nominator to be able to meet the potential costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c), s.65 delegates should request suitable documentary evidence (such as a letter from an auditor or accountant) confirming the capacity of the relevant nominator to meet those costs.<sup>97</sup>*

These guidelines should not be elevated to the status of legal requirements. In particular, PIC 4006A(2) contains no express requirement that the nominator must have an estimate of what all the relevant costs are before undertaking to meet all of them. Even if a nominator does have an opinion of a MOC as to health costs, it is not bound to consider that assessment correct. The undertaking is to pay all the relevant costs, regardless of whether they turn out to be more or less than the costs estimated by the MOC or nominator at the time the undertaking is given.

While not an express statutory requirement, the awareness of the nominator as to potential costs, however they are assessed, may be relevant to the decision whether to waive the requirement in PIC 4006A(1)(c).

Once a relevant undertaking has been given, the Tribunal has a discretion whether or not to exercise the waiver. Departmental guidelines state:

*Under policy, before the s.65 delegate makes a decision to exercise a PIC 4006A(2) health waiver, they must assess whether the undertaking must be capable of being honoured.*

*Consideration should be given to:*

- *whether the relevant nominator has dishonoured previous undertakings*
- *whether the relevant nominator has the capacity to meet the estimated costs involved and*
- *if the 'relevant nominator' is a company, the undertaking must have been executed by the company.<sup>98</sup>*

<sup>97</sup> PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement >-Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).

<sup>98</sup> PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).

In exercising a discretion, the Tribunal should have regard to policy, but must not determine an issue simply by resolving whether or not it conforms to policy. In particular, the Tribunal should not decline to exercise the waiver simply because the undertaking does not meet one of these requirements, some of which appear to go beyond the requirements of the Regulations. The Tribunal may, however, consider each of the circumstances referred to, together with any other relevant information before it, and exercise its discretion based on the total circumstances of the case and having regard to the purpose of the provision. See [Application of policy](#) for further details.

Note that there is no provision to waive the requirements of PIC 4006A(1)(a) or (b), i.e. that the applicant be free from tuberculosis and from a disease or condition that could threaten public health in Australia or endanger the Australian community.

### **'One fails all fail' visa criteria**

The so-called 'one fails, all fail' criteria have the effect of including health requirements in primary criteria for visa subclasses which apply to primary visa applicants, secondary visa applicants *and*, in certain circumstances, members of the family unit who are not included in the visa application.

The requirement for members of an applicant's family unit, even where they are not applicants for the visa, to satisfy the health requirement in PIC 4005 or 4007, generally appears in criteria for permanent visas, or temporary visas which provide a basis for grant of a later permanent visa. Typically, the member of the family unit not included in the application must meet the health requirement unless 'the Minister is satisfied that it would be unreasonable to require the person to undergo assessment'. An example of this is the Subclass 801 (Partner) (Residence) visa, where it is a requirement in cl.801.224(2)(b) that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who satisfies PIC 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

In considering this question, the person must first be a member of the family unit of the visa applicant/s. 'Member of the family unit' is defined in r.1.12 of the Regulations<sup>99</sup>.

#### ***The 'unreasonable to require the person to undergo assessment' exception***

In circumstances where the Tribunal is satisfied the person is a member of the family unit of the visa applicant and is not included in the visa application, then the Tribunal can consider whether it would be unreasonable to require the person to undergo assessment.

It is not possible for the Tribunal to be satisfied that it would be unreasonable to require a person to undergo assessment where the person has already undergone assessment. The exempting power does not exist to undo an assessment actually completed.<sup>100</sup> The power does not exist to be

<sup>99</sup> For visa applications made prior to 19 November 2016, a member of the family unit of an applicant includes dependent children ('dependent child' is defined in r.1.03 of the Regulations) and relatives who are dependent upon the relevant visa applicant. 'Dependent' is also defined in r.1.05A of the Regulations. For visa applications made on or after 19 November 2016 or a visa granted as a result of such an application, Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 (F2016L01696) amended the definition to set an upper age limited of 23 years for children or step-children who are dependent unless they are incapacitated for work, and is limited to family members within the nuclear family. These amendments do not apply to refugee, humanitarian and protection visas. For further information see MRD Legal Services commentary '[Member of a Family Unit](#)'.

<sup>100</sup> *MIMA v Ma* (1998) 82 FCR 455 at 460 (Whitlam J, 31 March 1998). The case concerned a Parent visa application. The daughter of the visa applicants was originally included in the visa application, underwent a health examination and was found by the MOC not to meet PIC 4005(c). The parents then withdrew her from the visa application. The Tribunal remitted the matter, finding that it could not see any good reason for requiring the daughter to undergo assessment. The Court set aside

exercised when it is known that a person is unable to satisfy the specified health criteria, even when the applicant has not yet undergone assessment.

What is unreasonable will depend on the individual circumstances of the case. Departmental guidelines indicate that non-migrating family members are not ordinarily required to complete health examinations, but circumstances where it may be reasonable to require an examination include:

- where the non-migrating family member is a young child remaining in their country of origin without parental support;
- where the non-migrating family member is remaining in their country of origin where there is ongoing conflict and stability; or
- where there is evidence that the non-migrating family member will ultimately seek to migrate to Australia.<sup>101</sup>

### **Assessment of non-applicant family members**

Where the decision-maker finds that it would not be 'unreasonable to require the person to undergo assessment', the non-applicant family member will need to satisfy the relevant health criterion. Setting aside the exception, the assessment of whether a non-applicant satisfies the PIC is not materially different from the assessment that would be made for a primary or secondary visa applicant.

One question that may arise in such cases relates to the fact that both PIC 4005 or 4007 refer to an assessment of 'the applicant'. The concern with this terminology is that non-applicant (non-migrating) family members are not 'applicants' in any ordinary sense. While the use of the term may suggest some uncertainty about how the PICs operate with respect to non-applicants, no such ambiguity arises in the Schedule 2 criteria that require non-applicants be assessed against the health criteria.<sup>102</sup> For this reason, non-applicant family members should be assessed against PIC 4005 and 4007, notwithstanding that perceived ambiguity.

To construe the provisions as applying to anyone other than the non-applicant family member would result in a criterion such as cl.801.224(2)(b) having no utility.<sup>103</sup> It would also undermine the clear purpose of such a provision which is to ensure a decision-maker or MOC can properly consider any disease or condition (and any associated costs) that may affect a non-applicant family member, and the impact those matters may have on the potential grant of the visa.

### **Remittal power**

If the Tribunal is satisfied that an applicant meets a discrete part of PIC 4005, 4006A or 4007 then it is permissible to remit with a direction that the applicant satisfies the particular sub criterion for the purpose of the relevant Schedule 2 clause (e.g. remit with direction that applicant meets PIC 4007(2)(b) for the purpose of cl.309.225 of Schedule 2 to the Regulations).<sup>104</sup> See [Chapter 3 of the Procedural Law Guide](#) for more detail about the remittal power.

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the Tribunal decision for legal error as it had no power to exercise the exemption. See also *Satya Nand v MIEA* (1996) 71 FCR 52 (Moore J, 27 November 1996).at 55-56

<sup>101</sup> PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers – Non-migrating family members (re-issued 18/11/2017).

<sup>102</sup> For example cl.801.224(2)(b)) clearly provides that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who, inter alia, satisfies PIC 4007.

<sup>103</sup> If such a criterion is assessed by reference to any one other than the non-applicant family member, the assessment against PIC 4005 or 4007 would become redundant, as any 'applicant' would already have been assessed against the applicable health criteria. For example, in the context of a Subclass 801 (Partner) (Residence) visa, the primary applicant would need to satisfy PIC 4007 under cl.801.223(1)(a), and any secondary applicants would need to satisfy PIC 4007 as part of cl.801.224(1)(a).

<sup>104</sup> s.349(2)(c), r.4.15(1)(b) and r.2.03.

**Relevant case law**

<a href="#">Applicant Y v MIAC [2008] FCA 367</a>	<a href="#">Summary</a>
<a href="#">Blair v MIMA [2001] FCA 1014</a>	<a href="#">Summary</a>
<a href="#">Bui v MIMA [1999] FCA 118</a>	
<a href="#">Haque v MIBP [2015] FCCA 1765</a>	<a href="#">Summary</a>
<a href="#">Imad v MIMA [2001] FCA 1011</a>	<a href="#">Summary</a>
<a href="#">JP1 &amp; Ors v MIAC [2008] FMCA 970</a>	<a href="#">Summary</a>
<a href="#">MIMA v Ma [1998] 82 FCR 455</a>	
<a href="#">Pokharel v MIBP [2016] FCCA 3295</a>	<a href="#">Summary</a>
<a href="#">Sarabia v MIBP [2017] FCCA 2642</a>	
<a href="#">Satya Nand v MIEA [1996] FCA 1057</a>	
<a href="#">Ramlu v MIMIA [2005] FMCA 1735</a>	<a href="#">Summary</a>
<a href="#">Reynolds v MIAC [2010] FMCA 6</a>	<a href="#">Summary</a>
<a href="#">Robinson v MIMIA (2005) 148 FCR 182</a>	<a href="#">Summary</a>
<a href="#">MIMA v Seligman (1999) 85 FCR 115</a>	
<a href="#">Traill v MIAC [2013] FCCA 2</a>	<a href="#">Summary</a>
<a href="#">Triandafillidou v MIMIA [2004] FMCA 20</a>	<a href="#">Summary</a>
<a href="#">MIAC v Wainwright [2010] FMCA 29</a>	<a href="#">Summary</a>
<a href="#">MIMIA v X [2005] FCAFC 209</a>	<a href="#">Summary</a>

**Relevant legislative amendments**

<b>Title</b>	<b>Reference number</b>
<a href="#">Migration Legislation Amendment Regulations 2008 (No.1)</a>	SLI 2008 No.91
<a href="#">Migration Amendment Regulations 2009 (No. 9)</a>	SLI 2009 No. 202
<a href="#">Migration Amendment Regulations 2009 (No. 13)</a>	SLI 2009 No. 289
<a href="#">Migration Amendment Regulations 2011 (No. 6)</a>	SLI 2011 No. 199
<a href="#">Migration Legislation Amendment Regulations 2011 (No. 1)</a>	SLI 2011 No. 105
<a href="#">Migration Legislation Amendment Regulation 2012 (No. 4)</a>	SLI 2012 No. 238
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014 No. 30
<a href="#">Migration Amendment Regulation (2016 Measures No.4) Regulation 2016</a>	F2016L01696
<a href="#">Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018</a>	F2018L00262

## Available Decision Templates/Precedents

There are two decision templates available which are applicable to visa applications made but not finally determined before, or made on or after, 1 July 1999. These are:

- **Health criterion – PIC 4005** - this template is suitable for a review of a visa refusal on the basis of PIC 4005
- **Health criterion – PIC 4007** - this template is suitable for a review of a visa refusal on the basis of PIC 4007

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# Member of the Family Unit (regulation 1.12)

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## Overview

The *Migration Act 1958* (the Act) provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 (the Regulations).<sup>1</sup> Regulation 1.03 provides 'member of the family unit' has the meaning set out in r.1.12. The definition in r.1.12 applies for the purposes of both the Act and the Regulations.<sup>2</sup>

There are two main versions of the definition. The first applies to visa applications made on or after 19 November 2016 and visas granted as a result of those applications ('post-19Nov16'); the second applies to visa applications made before 19 November 2016 ('pre-19Nov16').<sup>3</sup>

The post-19Nov16 version of the definition sets an upper limit of 23 years for children or step children who are dependent (unless they are incapacitated for work) and excludes relatives other than partners, children and grandchildren. The pre-19Nov16 version, in contrast, includes dependent children of any age and dependent relatives of any age who are single and usually resident in a person's household.

Reference to 'member of the family unit' arises in the following contexts in the Regulations:

- visa criteria for secondary applicants<sup>4</sup>
- visa criteria for primary applicants (including 'one fails all fail' criteria)<sup>5</sup>
- combining visa and review applications<sup>6</sup>
- family violence provisions.<sup>7</sup>

As well as the defined term 'member of the family unit', the Regulations also contain the terms 'member of the same family unit' (e.g. in the context of Protection visas) and 'member of the immediate family'. These terms are defined separately from the 'member of the family unit' definition in r.1.12. While the term 'member of the same family unit' itself requires consideration of 'member of the family unit', the definition 'member of the immediate family' operates independently of the definition in r.1.12. For further information on 'member of the same family unit' [see below](#) and for 'member of the immediate family' see the MRD Legal Services commentary: [Familial Relationships](#).

<sup>1</sup> s.5(1).

<sup>2</sup> Before 1 July 2009, r.1.12 only applied to the Regulations, but from 1 July 2009, the term is defined in s.5(1) of the Act as having the meaning given by the Regulations: see *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (No.144 of 2008).

<sup>3</sup> r.1.12 was repealed and substituted by the Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696).

<sup>4</sup> A 'member of the family unit' of an applicant who satisfies the primary criteria is eligible for the grant of the visa if that person satisfies the secondary criteria.

<sup>5</sup> For a number of visa subclasses, members of the family unit of the primary visa applicant are also required to meet public interest criteria (PIC) even if they are not applicants for the visa. This is commonly known as the 'one fails, all fail' visa criteria. If a member of the family unit does not meet the relevant PIC, the primary applicant will not meet the primary criterion which requires this.

<sup>6</sup> For many visa classes, Schedule 1 of the Regulations permits combining visa applications for 'members of a family unit'. The Regulations also permit combined review applications for 'members of a family unit' in certain circumstances: see rr.4.12 and 4.31A for further details.

<sup>7</sup> Under the family violence provisions, conduct directed towards a member of the family unit of a Partner visa holder / applicant or their sponsor may constitute relevant family violence for the purposes of the Regulations.

## Key requirements

There are two main versions of r.1.12. The current version applies to visa applications made on or after 19 November 2016 and visas granted as a result of those applications. The former version applies to visa applications before that time. Each version sets out a general definition for 'member of the family unit', and additional definitions that apply in specific contexts.

### Member of family unit – post-19Nov16

The general rule provides that a person is a member of the family unit of another person (the family head) if the person is what could loosely be described as a partner, child or grandchild of the family head in certain circumstances:<sup>8</sup>

- partner – the person is a spouse or de facto partner of the family head
- child – the person is a child or step-child of the family head, or of the family head's partner, and the person is not engaged or partnered. In addition, the person is either under 18 years old, or aged 18-22 and is dependent on the family head (or partner), or has turned 23 but is wholly or substantially reliant on the family head (or partner) because they are incapacitated for work due to loss of bodily or mental functions
- grandchild – the person is a dependent child of a person who meets the above dot point.

Specific rules apply to applicants for:

- protection, refugee and humanitarian visas<sup>9</sup>
- student visas and holders of student visas<sup>10</sup>
- distinguished talent visas<sup>11</sup>
- certain contributory parent, business and skilled visas on the basis of an earlier status as a member of the family unit.<sup>12</sup>

These rules are discussed further [below](#).

### Member of family unit – pre-19Nov16

For visa applications made before 19 November 2016, for most purposes, a person will be a member of the family head if he or she is a:<sup>13</sup>

- partner – a spouse or de facto partner of the family head<sup>14</sup>

<sup>8</sup> r.1.12(2).

<sup>9</sup> rr.1.12(3) and (4).

<sup>10</sup> r.1.12(6).

<sup>11</sup> r.1.12(7).

<sup>12</sup> r.1.12(5).

<sup>13</sup> r.1.12(1), as in force before F2016L01696.

<sup>14</sup> For visa applications made before 1 July 2009, the relevant partner reference in r.1.12(1) is to 'spouse' as defined in the then r.1.15A (i.e. as including married and opposite sex de facto relationships). For visa applications made on or after 1 July 2009, the relevant partner reference is to 'spouse or de facto partner' which is defined for these purposes in s.5F of the Act (i.e. married relationships), and in s.5CB of the Act: as amended by SLI 2009, No.144.

- child – a dependent child of the family head or their partner
- grandchild – a dependent child of a dependent child of the family head or their partner; or
- dependent single relative in the household – a ‘relative’ of the family head or their partner who does not have a partner,<sup>15</sup> is usually resident in the family head’s household and is dependent on the family head.

Specific rules apply to applicants for:

- student visas and holders of student visas<sup>16</sup>
- distinguished talent visas<sup>17</sup>
- certain contributory parent, business and skilled visas where the person was a member of the family unit in an earlier application.<sup>18</sup>

These rules are discussed further [below](#).

### Elements of the general definition of ‘member of the family unit’

Both the pre-19Nov16 and the post-19Nov16 versions of the general definition of ‘member of the family unit’ refer to the ‘family head’ and also contain several elements that are defined elsewhere in the Regulations or in the Act, including ‘spouse’, ‘de facto partner’, ‘dependent child’ and ‘dependent’. Therefore, when assessing whether a person is a ‘member of the family unit’ it is necessary to also consider those definitions. For the pre-19Nov16 version of the definition, the definition of ‘relative’ may also be relevant.

#### **Family head**

For the purposes of the general definition, r.1.12 states a person is a ‘member of the family unit’ of another person (who is for the purposes of this regulation the ‘family head’) if the person has a certain relationship to the family head. Often the person who is the *family head* is the person seeking to satisfy the primary criteria in the relevant Part of Schedule 2 or the person with whom the visa application is combined with, and the members of their family unit are secondary applicants. However, this is not always the case.

#### **Partner (spouse or de facto partner)**

For the purposes of the general definition, r.1.12 states that a person is a ‘member of the family unit’ of the family head if he/she is the partner of the family head. For visa applications made on or after 1 July 2009, the provision refers to the ‘spouse or de facto partner’ of the family head as those terms are defined in s.5F (spouse) and 5CB (de facto) of the Act.<sup>19</sup> For further information on these terms see the MRD Legal Services commentary: [Spouse and de facto partner](#).

<sup>15</sup> For visa applications made on or after 1 July 2009 the definition referred to a person who does not have a spouse or de facto partner; for applications before that time it referred to a person who has never married, or is widowed, divorced or separated.

<sup>16</sup> rr.1.12(2) and (2A) as in force before F2016L01696.

<sup>17</sup> rr.1.12(6) and (7) as in force before F2016L01696.

<sup>18</sup> rr.1.12 (3), (4), (5), (5A), (8), (9), (10), (11) and (12) as in force before F2016L01696.

<sup>19</sup> Inserted by the SLI 2009, No.144 to apply to visa applications made on or after 1 July 2009 (r.3(2)). The introduction of the term ‘de facto partner’ from that time meant that persons in same-sex relationship or their children can be a ‘member of the family unit’, which was not possible before. Subsequently, ‘spouse’ in s.5F was amended with effect from 9 December 2017

### **Child and dependent child**

For the purposes of the general definition, a person is a 'member of the family unit' of the family head if he/she is what can generally be described as the child, step child or grandchild of the family head in certain circumstances. This requires consideration not only of the terms 'child' and 'step child', but also of the terms 'dependent child' and 'dependent'.

The term 'child' is partly defined in s.5CA of the Act and 'step-child' is defined in r.1.03, with the definitions generally requiring that the parent-child relationship exists by blood, adoption or through a partner relationship.<sup>20</sup> Natural children, adopted children and step-children of the family head or partner of the family head may therefore be included as a 'member of the family unit'. For more detailed discussion about these matters see the MRD Legal Services commentary: [Familial Relationships](#).

'Dependent child' as defined in r.1.03 includes minors under the age of 18 as well as children over the age of 18 who are 'dependent' on their parent(s) or are incapacitated for work due to the total or partial loss of bodily or mental functions. 'Dependent' is defined in r.1.05A and essentially means reliant for financial support to meet basic needs for food, clothing and shelter. A child who has a spouse or de facto partner (as defined) or is engaged to be married is not a 'dependent child' for the purposes of r.1.03. For more detailed discussion about these matters see the MRD Legal Services commentary: [Dependent and Dependent Child](#).

### **Relative – pre 19 November 2016**

For visa applications made before 19 November 2016, r.1.12(1)(e) states that in certain circumstances a person is a member of the family unit if he/she is a 'relative' of the family head or the spouse of the family head (omitted from the post-19Nov16 version). The word 'relative' is defined in r.1.03. For more detailed information on this definition see the MRD Legal Services commentary: [Familial Relationships](#).

### **Does not have a spouse/de facto partner – r.1.12(1)(e)(i) (post 1 July 2009)**

From 1 July 2009, and for visa applications made on or after that date but before 19 November 2016, r.1.12(1)(e)(i) requires that the applicant does not currently have a 'spouse' or 'de facto partner' as defined in ss.5F and 5CB of the Act.

### **Never married or is widowed, divorced or separated – r.1.12(1)(e)(i) (pre 1 July 2009)**

Regulation 1.12(1)(e)(i) as it stood before 1 July 2009, and as it applies to visa applications made before that date, required a 'relative' to have 'never married' or be 'widowed, divorced or separated'. The use of the phrase 'never married' (as opposed to 'never had a spouse', which appears in the context of the definition of 'dependent child') means a person in a de facto relationship would not be precluded from meeting this part of r.1.12.

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(applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (No. 129, 2017) to include same-sex marriages. For visa applications made before 1 July 2009, the reference was to a 'spouse' of the family head as defined in r.1.15A as it stood before 1 July 2009 (i.e. married and opposite sex de facto partners). For these visa applications, a same-sex relationship is not recognised as a 'spouse' relationship for the purposes of migration law, and there is no express reference in the definition of 'member of a family unit' in r.1.12 to 'interdependent relationships' as defined in r.1.09A (as it stood before 1 July 2009).

<sup>20</sup> See the definition of the term 'child' in s.5CA of the Act, the definitions relating to parent and child in r.1.14A of the Regulations (covering step-parents and adoptive relationships) and the definition of the term 'step-child' in r.1.03 of the Regulations.

### Resident in the family head's household – r.1.12(1)(e)(ii)

Regulation 1.12(1)(e)(ii) requires a relative to be usually resident in the family head's household. There is no statutory definition for 'usually resident' and it should be given its common law meaning (see the MRD Legal Services commentary: [Usually Resident](#)). The term 'household' should also be given its ordinary meaning.<sup>21</sup>

### Dependency on the Family Head – r.1.12(1)(e)(iii)

Regulation 1.12(1)(e)(iii) requires the 'relative' to be dependent on the 'family head'. As in the case of 'dependent child' the meaning of the word 'dependent' can be found in r.1.05A and generally only concerns financial support.<sup>22</sup> Regulation 1.12(1)(e)(iii) does not include a person who is dependent on a spouse of the family head and is confined to a person who is dependent on the family head.<sup>23</sup> In some circumstances it may be open to make a factual finding that a person is dependent on the family head, notwithstanding that funds are being provided by the family head's spouse.<sup>24</sup> For further detailed discussion see the MRD Legal Services commentary: [Dependent and Dependent Child](#).

### **Variations on the general definition of 'member of the family unit'**

In addition to the general definition of 'member of the family unit' there are specific definitions that apply in certain contexts.

#### ***Protection, refugee and humanitarian visas***

The post-Nov16 version of r.1.12 has a special definition for protection, refugee and humanitarian visas, set out in r.1.12(4). This definition (which is very similar to the pre-19Nov16 version of the general definition in r.1.12(1) that previously applied for these visas) applies to all classes of protection, refugee and humanitarian visas listed in r.1.12(3) instead of the general definition in r.1.12(2). It includes partners as well as dependent children of any age (without the 23 years age restriction) and single dependent relatives of any age who are usually resident in the family head's household.

#### ***Member of the same family unit***

Protection visa provisions such as ss.36(2)(b) and 36(2)(c) of the Act and Parts 785, 790 and 866 of Schedule 2 to the Regulations, refer to the term 'member of the same family unit' instead of 'member of the family unit'.

The definition of 'member of the same family unit' is set out in s.5(1) of the Act and states that one person is a member of the same family unit as another 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. This means that a person ('B') is a 'member of the same family unit' as another person ('A') if:

<sup>21</sup> See for example *Thompson v MIAC* [2009] FMCA 1210 (Emmett FM, 7 December 2009) at [21]-[24] where the Court held the delegate's finding that the secondary applicants were not usually resident in the primary applicant's household was open on the evidence and material, where the applicant's residence was in the UK and the secondary applicants were residing in Sierra Leone. The Court appeared to accept that a 'household' was distinct from a 'residence', but inferred that the delegate had considered the correct question.

<sup>22</sup> The concept of dependency in r.1.05A is limited to financial dependency, except in relation to certain Protection and humanitarian visa classes.

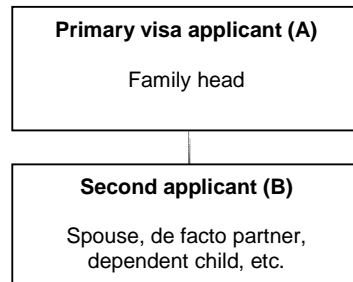
<sup>23</sup> *Alimi v MIAC* [2007] FMCA 1520 (Riley FM, 16 October 2007) at [16].

<sup>24</sup> See *Al Naqi v MIAC* [2007] FMCA 874 (Riethmuller FM, 5 June 2007) at [16] where the Court took the view that 'support for a person's relatives, from their spouse, can be considered support by them if their spousal relationship is an essential or substantial part of the reason that the support is provided'.

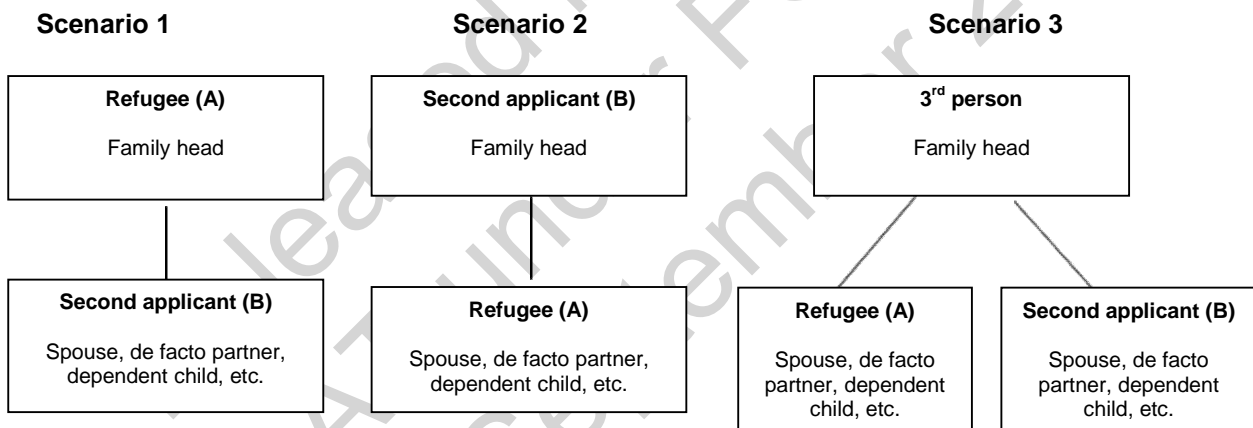
- 'B' is a member of 'A's' family unit; or
- 'A' is a member of 'B's' family unit; or
- 'A' and 'B' are members of the family unit of a third person.

This includes a wider range of relationships between the primary and secondary applicants than 'member of the family unit', as illustrated in the following diagrams:

*Member of the family unit:*



*Member of the same family unit:*



### **Student visas**

The definition of 'member of the family unit' as it applies for the purposes of student visas is narrower than the general definition in r.1.12. A person is *only* a 'member of the family unit' of an applicant for, or of a holder of, a Student (Temporary) (Class TU) visa if the person is a partner of the applicant/holder or an unmarried 'dependent child' of the applicant/holder, or of that partner, who has not turned 18.<sup>25</sup> The requirement that the dependent child has not turned 18 excludes older dependent children who otherwise come within the meaning of 'dependent child' in r.1.03: see the MRD Legal Services commentary: [Dependent and Dependent Child](#).

<sup>25</sup> The definition for this purpose is the same for both the pre-19Nov16 and the post-19Nov16 versions: see r.1.12(6) for the post-19Nov16 version and rr.1.12(2) and (2A) for the pre-19Nov16 version.



For visa applications made on or after 1 July 2009, the reference to the partner relationship is to spouse or de facto partner as defined in ss.5F of the Act (married relationships) and 5CB of the Act.<sup>26</sup> For further discussion see the MRD Legal Services commentary: [Spouse and de facto partner](#).

### ***Distinguished Talent visas***

There are special provisions in the definition of 'member of a family unit' for distinguished talent visas when a primary visa applicant has not turned 18 years of age at the time of application.<sup>27</sup> Essentially, such an applicant can include a parent and the members of that parent's family unit as secondary applicants in their application for a distinguished talent visa.<sup>28</sup>

If an applicant relies on the special definition they cannot also rely on the general definition.<sup>29</sup> An applicant can only bring in one family unit under the special definition.<sup>30</sup>

There are minor differences between who is included in the pre- and post-19Nov16 versions. The post-19Nov16 version includes only members of the family unit of the parent under the revised r.1.12(2), whereas the pre-19Nov16 version includes single relatives of the parent (or their partner) who are dependent on the parent and usually resident in the household.

### ***New visa on basis of earlier status as member of family unit***

There are also special provisions for members of the family unit of applicants for certain visas on the basis of their earlier status as a member of the family unit.<sup>31</sup> The effect of these provisions is that when a person holds a specified provisional visa granted on the basis that the person was a member of the family unit of a primary applicant, the person will continue to be a member of the family unit for the purposes of an application for a corresponding (usually permanent) visa if included in a primary applicant's application for the relevant visa, even though the person may no longer meet the requirements of the general definition of member of the family unit. The relevant visas are:

- Contributory Parent (Migrant) (Class CA)<sup>32</sup>
- Contributory Aged Parent (Residence) (Class DG)<sup>33</sup>
- Business Skills (Residence) (Class DF)<sup>34</sup>
- Business Skills (Permanent) (Class EC)<sup>35</sup>

<sup>26</sup> As amended by SLI 2009, No.144 to apply to visa applications made on or after 1 July 2009. For visa applications made before 1 July 2009 the reference is to 'spouse' as defined in the then r.1.15A (i.e. married or opposite sex de facto relationships).

<sup>27</sup> The provisions only require that the primary visa applicant be under 18 *at the time of application*, and therefore applies to the application even if the minor turns 18 before his/her visa application is finalised.

<sup>28</sup> The definition is effectively the same for both the pre-19Nov16 and the post-19Nov16 versions: see r.1.12(7) for the post-19Nov16 version and rr.1.12(6) and (7) for the pre-19Nov16 version. Regulation 1.12(7) as substituted by F2016L01696 continues and simplifies the provisions that were previously in rr.1.12(6) and (7) of the repealed r.1.12: Explanatory Statement to F2016L01696 at p.21.

<sup>29</sup> This prevents an applicant from including his/her parent and members of that parent's family unit under the special definition/s and then including another person (e.g. the applicant's spouse or child) under the general definition.

<sup>30</sup> This covers circumstances where the applicant's natural parents are no longer together and each 'parent' has his/her own family unit (e.g. through another relationship). The special definition is therefore limited to only one of the applicant's parents and his/her family unit.

<sup>31</sup> r.1.12(5) of the post-19Nov16 version and rr.1.12(3), (4), (5), (5A), (8), (9), (10), (11) and (12) of the pre-19Nov16 version.

<sup>32</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(3) of the pre-19Nov16 version. The relevant provisional visa is the Contributory Parent (Temporary) (Class UT) visa.

<sup>33</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(4) of the pre-19Nov16 version. The relevant provisional visa is the Contributory Aged Parent (Temporary) (Class UU) visa.

<sup>34</sup> r.1.12(5) for both the post-19Nov16 and pre-19Nov16 version. The relevant provisional visa is the Business Skills (Provisional) (Class UR) visa.

- Employer Nomination (Permanent) (Class EN)<sup>36</sup>
- Regional Employer Nomination (Permanent) (Class RN)<sup>37</sup>
- Skilled (Residence) (Class VB)<sup>38</sup>
- Subclass 457 (Temporary Work (Skilled))<sup>39</sup>
- Subclass 482 (Temporary Skill Shortage)<sup>40</sup>
- Employer Nomination (Residence) (Class BW) / Business Skills (Residence) (Class DF) / Skilled Independent (Migrant) (Class BN) [pre-1Jul13]<sup>41</sup>
- Employer Nomination (Residence) (Class BW) / Skilled (Residence) (Class VB) / Skilled (Provisional) (Class VC) [pre-1Jul13].<sup>42</sup>

#### Relevant case law

[Alimi v MIAC \[2007\] FMCA 1520](#)

[Summary](#)

[Al Naqi v MIAC \[2007\] FMCA 874](#)

[Summary](#)

<sup>35</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(5A) of the pre-19Nov16 version. The relevant provisional visa is the Business Skills (Provisional) (Class EB) visa. Subregulation 1.12(5A) of the pre-19Nov16 version applies only to visa applications made on or after 1 July 2012: Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).

<sup>36</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(11) of the pre-19Nov16 version. The relevant provisional visa is the Subclass 457 (Temporary Work (Skilled)) visa (Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238) amended the title of Subclass 457 visas from Temporary Business Entry (Class UC) to Subclass 457 (Temporary Work (Skilled)) for all applications made on or after 24 November 2012).

<sup>37</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(12) of the pre-19Nov16 version. The relevant provisional visa is the Subclass 457 (Temporary Work (Skilled)) visa (SLI 2012, No.238 amended the title of Subclass 457 visas from Temporary Business Entry (Class UC) to Subclass 457 (Temporary Work (Skilled)) for all applications made on or after 24 November 2012).

<sup>38</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(8) of the pre-19Nov16 version [where the visa applications were made on or after 1 July 2013]. The relevant provisional visas are the: Skilled – Independent Regional (Provisional) (Class UX); Skilled Designated Area-sponsored (Provisional) (Class UZ); Subclass 475 (Skilled – Regional Sponsored); Subclass 487 (Skilled – Regional Sponsored); Skilled – Regional Sponsored (Provisional) (Class SP) visas; and certain related Bridging A or B visas.

<sup>39</sup> r.1.12(5) of the post-19Nov16 version and r.1.12(10) of the pre-19Nov16 version. The relevant provisional visa is the Subclass 457 (Temporary Work (Skilled)) visa (SLI 2012, No.238 amended the title of Subclass 457 visas from Temporary Business Entry (Class UC) visa to Subclass 457 (Temporary Work (Skilled)) for all applications made on or after 24 November 2012). For visa applications prior to 19Nov16, secondary applicants who are over the age of 21 or have a partner will not be able to meet the pre-19Nov16 definition: see rr.1.12(10)(e) and (f). Similarly where the relationship with the primary Subclass 457 visa holder and their partner breaks down there will be insufficient nexus between the primary holder and a person who was granted a Subclass 457 visa on the basis of a relationship with the partner of the primary Subclass 457 visa holder, to justify the pre-19Nov16 definition being extended to them. For visa applications on or after 19Nov16, secondary applicants who are over the age of 23 at the time of application for the new visa will not meet the post-19Nov16 version because they will no longer be a person who 'holds' a Subclass 457 visa as it would have ceased by operation of cl.457.511(d)(iv). However, the partner exceptions as set out in the pre-19Nov16 definition do not appear to apply.

<sup>40</sup> The table in r.1.12(5) was amended to include the Subclass 482 (Temporary Skill Shortage) visa by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018. This visa was open to applications from 18 March 2018, while applications for the Subclass 457 (Temporary Work (Skilled)) visa were closed.

<sup>41</sup> r.1.12(8) as in force for visa applications made before 1 July 2013 (when r.1.12(8) was substituted by SLI 2012, No.82). The relevant provisional visa is a Skilled – Independent Regional (Provisional) (Class UX) visa or where the last substantive visa held since entering Australia, and within the period of 28 days before the application, was a Skilled – Independent Regional (Provisional) (Class UX) visa granted on the basis that the person was a 'member of the family unit' of the primary applicant for that visa.

<sup>42</sup> r.1.12(9) which applied in relation to visa applications made on or after 1 September 2007 but before 1 July 2013 (introduced by the Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.257) and repealed by SLI 2012, No.82 for visa applications made on or after 1 July 2013).

[Thompson v MIAC \[2009\] FMCA 1210](#)

**Relevant amending legislation**

<b>Title</b>	<b>Reference number</b>
<a href="#">Migration Amendment Regulations 2003 (No.7)</a>	SR 2003, No.239
<a href="#">Migration Amendment Regulations 2003 (No.9)</a>	SR 2003, No.296
<a href="#">Migration Amendment Regulations 2007 (No.7)</a>	SLI 2007, No.257
<a href="#">Migration Amendment Regulations 2009 (No.2)</a>	SL 2009, No.42
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment (Complementary Protection) Act 2011</a>	No.121 of 2011
<a href="#">Migration Amendment Regulation 2012 (No.2)</a>	SLI 2012, No.82
<a href="#">Migration Legislation Amendment Regulation 2012 (No.4)</a>	SLI 2012, No.238
<a href="#">Migration Amendment (Temporary Protection Visas) Regulation 2013</a>	SLI 2013, No.234
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696
<a href="#">Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018</a>	F2018L00262

**Last updated: 11 July 2019**

# Subclass 117 and 837: Orphan Relative Visas

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## Overview

The Subclass 117 and 837 (Orphan Relative) visas are visas for relatives of Australian citizens, Australian permanent residents and eligible New Zealand citizens who are under 18, single and whose parents are either dead or otherwise unable to care for them. They are intended to reflect 'immigration principles relating to the reunion of relatives in recognition of kinship ties and the bonds of mutual dependency and support within families'.<sup>1</sup>

This commentary focuses on the definitions applying post 1 July 2009. Please contact MRD Legal for information on pre 1 July 2009 applications.

The orphan relative subclasses are included in the Child visa classes, Child (Migrant) (Class AH) and Child (Residence) (Class BT). Subclass 117 is part of the Class AH visa class and is available to offshore applicants. Subclass 837 is part of the Class BT visa class and is available to onshore applicants. Both subclasses enable an orphan relative minor seeking to enter (or remain in) Australia to settle with an Australian relative.

The requirements for making a valid visa application are set out in items 1108 (Subclass 117) and 1108A (Subclass 837).

## Visa criteria

The visa criteria for Subclass 117 and 837 are very similar. The key difference is that the onshore Subclass 837 visa has additional time of application criteria relating to immigration status, and the type of visa required to be held by the applicant. Since 1 July 2002, there has been very little amendment to the relevant criteria for these visa subclasses. The only changes since that time have been the addition of passport requirements for visa applications made on or after 1 July 2005, some minor changes to assurance of support requirements and amendments to the sponsorship requirements in relation to recognition of same-sex partners (for more information see below).

### Subclass 117 visa criteria

The criteria for a Subclass 117 visa are contained in Part 117 of Schedule 2 to the Regulations.<sup>2</sup> There are both time of application and time of decision criteria.

#### **Criteria to be satisfied at time of application**

The primary criteria require that at time of application, the applicant:

- is either an 'orphan relative' of an Australian relative or is not an orphan relative only because he or she has been adopted by an Australian relative.<sup>3</sup>

<sup>1</sup> POLICY – MIGRATION REGULATIONS - SCHEDULES > [Sch2Visa117] Sch2 Visa 117 – Orphan Relative – [1]; and POLICY – MIGRATION REGULATIONS - SCHEDULES > [Sch2Visa837] Sch2 Visa 837 – Orphan Relative – at [1] (reissued 1/7/2013).

<sup>2</sup> Part 117 was originally inserted on 1 November 1999.

<sup>3</sup> cl.117.211 was introduced in its current form by Migration Amendment Regulations 2002 (No.2) (SR 2002 No. 86) for visa applications made on or after 1 July 2002. An earlier version was substituted on 1 July 2000 by Migration Amendment

- is sponsored by the eligible Australian relative or the Australian relative's partner.<sup>4</sup>

### **Criteria to be satisfied at time of decision**

At the time of decision:

- the applicant must continue to satisfy the criterion in cl.117.211 (orphan relative or adopted), or not continue to satisfy that criterion only because the applicant has turned 18;<sup>5</sup>
- the sponsorship must have been approved by the Minister and still be in force;<sup>6</sup>
- any assurance of support requested by the Minister must have been accepted;<sup>7</sup>
- the applicant and family members must satisfy certain public interest criteria;<sup>8</sup> and
- *in the case of applications made on or after 1 July 2005 and prior to 24 November 2012*, the applicant must satisfy certain passport requirements.<sup>9</sup>

Part 117 also contains secondary criteria that must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

### **Subclass 837 visa criteria**

#### **Criteria to be satisfied at time of application**

The primary criteria require that at the time of application:

- the applicant holds substantive visa other than a Subclass 771 (Transit) visa, or if not the holder of a substantive visa, satisfies the Schedule 3 criterion 3002, and did not immediately prior, hold a Subclass 771 visa;<sup>10</sup>

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Regulations 2000 (No.2) (SR 2000, No.62), and again on 27 February 2001 by Migration Amendment Regulations 2001 (No.1) (SR 2001, No.27). 'Australian relative' is defined in cl.117.111 as a relative of the applicant who is an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen. 'Relative' is defined in r.1.03 of the Regulations as a 'close relative' or a grandparent, grandchild, aunt, uncle, niece or nephew or the equivalent step relationships of these relatives. 'Close relative' is defined as a spouse or de facto partner, child, parent, brother or sister or the equivalent step relationships. See the MRD Legal Services Commentary: [Familial Relationships](#) for further information.

<sup>4</sup> cl.117.212 was introduced in its current form by SR 2002 No.86 for visa applications made on or after 1 July 2002. Part 117 was originally inserted on 1 November 1999, and cl.117.212 was substituted on 1 July 2000 by SR 2000, No.62, and again on 27 February 2001 by SR 2001, No.27. 'Spouse' for these purposes is defined in s.5F of the Act (ie married relationships), and 'de facto partner' in s.5CB (ie same sex or opposite sex partners) of the Act as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Amendments made by SLI 2009, No.144 in relation to the definition of 'spouse' in r.1.15A apply to visa applications made on or after 1 July 2009.

<sup>5</sup> cl.117.221.

<sup>6</sup> cl.117.222.

<sup>7</sup> cl.117.224. Since 1 July 2004, this assurance of support (AOS) requirement has been discretionary. Prior to 1 July 2004, an AOS was mandatory. The amended requirement applies to visa applications made on or after 1 July 2004 as well as those made prior to that date but not finally determined as at 1 July 2004: Migration Amendment Regulations 2004 (No.2) (SR 2004, No.93).

<sup>8</sup> cl.117.223, 117.225, 117.226 and 117.227. Clause 117.223 was amended by Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256), to insert new PIC 4021 which requires for visa applications made from 24 November 2012 either: that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an [instrument in writing for cl.4021\(a\)](#); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.117.228 which was repealed with effect from 24 November 2012, see SLI 2012, No.256. Clauses 117.223 and 117.225(1) were further amended Migration Legislation Amendment Regulation 2013 (No.3), SLI No 146, 2013 to include a requirement to satisfy PIC 4020 (pertaining to the provision of bogus documents or information that is false or misleading in a material particular) for visa applications made but not finally determined before 1 July 2013 and those made on or after that date.

<sup>9</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.117.228. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.117.223 refers: see footnote 8).



- if the applicant is a person to whom s.48 of the Act applies,<sup>11</sup> he or she must not have been refused a visa or had a visa cancelled under s.501 of the Act, and have become an orphan relative of an Australian relative since their last substantive visa application, or is no longer an orphan relative only because the applicant has been adopted by that person;<sup>12</sup>
- the applicant is either an 'orphan relative' of an Australian relative or is not an orphan relative only because he or she has been adopted by the Australian relative;<sup>13</sup>
- the applicant is sponsored by the Australian relative or the Australian relative's partner.<sup>14</sup>

### **Criteria to be satisfied at time of decision**

At the time of decision:

- the applicant must continue to satisfy the criterion in cl.837.213 (orphan relative or adopted), or not continue to satisfy that criterion only because the applicant has turned 18;<sup>15</sup>
- any assurance of support requested by the Minister must have been accepted;<sup>16</sup>
- the sponsorship must have been approved by the Minister and still be in force;<sup>17</sup>
- the applicant and family members must satisfy certain public interest criteria;<sup>18</sup>
- *in the case of applications made on or after 1 July 2005 and prior to 24 November 2012, the applicant must satisfy certain passport requirements.*<sup>19</sup>

Part 837 also contains secondary criteria that must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

<sup>10</sup> cl.837.212. This version of cl.837.212 was substituted on 1 November 2000: Migration Amendment Regulations 2000 (No.5) (SR2000, No.259). Although there are no accompanying transitional provisions, it applied to all visa applications as the amendment was to fix an anomaly regarding Schedule 3 criteria – the earlier version required that a person who held a substantive visa also meet 3002.

<sup>11</sup> i.e. who does not hold a substantive visa, and was refused a substantive visa or had a visa cancelled after last entering Australia.

<sup>12</sup> cl.837.211 as amended by SR 2002, No.86 for visa applications made on or after 1 July 2002.

<sup>13</sup> cl.837.213 as amended by SR 2002, No.86 for visa applications made on or after 1 July 2002. 'Australian relative' is defined in cl.117.111 as a relative of the applicant who is an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen. 'Relative' is defined in r.1.03 of the Regulations as a 'close relative' or a grandparent, grandchild, aunt, uncle, niece or nephew or the equivalent step relationships of these relatives. 'Close relative' is defined as a spouse or de facto partner, child, parent, brother or sister or the equivalent step relationships. See the MRD Legal Services Commentary: [Familial Relationships](#) for further information.

<sup>14</sup> cl.837.214 for visa applications made on or after 1 July 2002. This criterion was introduced by SR 2002, No.86 and is affected by changes made in 2009 in relation to partners. For further information on these changes see footnote 4.

<sup>15</sup> cl.837.221.

<sup>16</sup> cl.837.222. Since 1 July 2004, this assurance of support (AOS) requirement has been discretionary. Prior to 1 July 2004, an AOS was mandatory. The amended requirement applies to visa applications made on or after 1 July 2004 as well as those made prior to that date but not finally determined as at 1 July 2004: SR 2004, No.93.

<sup>17</sup> cl.837.226 was introduced by SR 2002, No.86. For visa applications made on or after 1 July 2002.

<sup>18</sup> cl.837.223, 837.224, and 837.225. Clause 837.223 was amended by SLI 2012, No.256 to insert new PIC 4021. For further discussion, see footnote 8.

<sup>19</sup> For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cl.837.227. However, this clause was repealed with effect from 24 November 2012 by SLI 2012, No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.837.233 refers - see footnote 8 for further information).



## Key Criteria

### Orphan Relative

Both Subclass 117 and 837 require, with limited exception, that at the time of application and decision the applicant is the 'orphan relative' of an Australian relative as defined in r.1.14. An applicant is an orphan relative if he or she:

- is a relative of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- has not turned 18;
- does not have a partner;<sup>20</sup>
- cannot be cared for by either parent<sup>21</sup> because each of them is either dead, permanently incapacitated or of unknown whereabouts; and
- there is no compelling reason to believe that the visa grant would not be in the applicant's best interests.

### Relative

The Australian citizen, Australian permanent resident or eligible New Zealand citizen must be a 'relative' of the applicant.<sup>22</sup> Relative is defined in r.1.03 to mean:

- a 'close relative' - which is defined by r.1.03 to mean partner, child,<sup>23</sup> parent, brother, sister, or a step-child, step-brother or step-sister; or
- a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-uncle, step-niece or step-nephew.

Although the definition of relative includes a person's partner, r.1.14(a)(ii) precludes an applicant from being an orphan relative if the applicant has a partner.

### Applicant's Age – has not turned 18

The orphan relative definition requires that the applicant has not turned 18.<sup>24</sup> However, a person may still be granted a Subclass 117 or 837 visa if he or she has turned 18 at the time of decision. The time of decision criteria require that the applicant either continues to be an 'orphan relative' at the time of decision or would continue to be an 'orphan relative' except that he or she has turned 18.<sup>25</sup>

<sup>20</sup> This regulation is affected by changes made in 2009 in relation to partners. For further information on these changes see footnote 4.

<sup>21</sup> 'Parent' is defined in s.5(1) of the Act. See also r.1.14A(1) of the Regulations (post 1 July 2009) which specifies that a reference to 'parent' includes 'step-parent'.

<sup>22</sup> r.1.14(a)(iii).

<sup>23</sup> 'Child' is defined in s.5CA of the Act and r.1.14A(2) of the Regulations.

<sup>24</sup> r.1.14(a)(i).

<sup>25</sup> cl.117.221(b) and 837.221(b).

## **Marital Status**

The orphan relative definition in r.1.14 requires that the applicant does not have a spouse or de facto partner.<sup>26</sup> 'Spouse' is defined in s.5F of the Act and 'de facto partner' in s.5CB of the Act. Thus an applicant would not meet the definition if he or she was in a married or de facto relationship.

See the MRD Legal Services Commentary: [Spouse and de facto partner](#) for further information.

## **Death, permanent incapacity or unknown whereabouts**

The orphan relative definition requires that the applicant cannot be cared for by either parent because each of them is either dead, permanently incapacitated or of unknown whereabouts.<sup>27</sup> 'Parent' is defined in s.5(1) of the Act and supplemented by r.1.14A(1).<sup>28</sup> The definition recognises persons in same-sex relationships as parents of a child even where there is no biological relationship or through marriage or adoption.

Only the applicant's parents' status is relevant to the assessment. Where custody rights are held by another relative, no regard should be given to whether the child can be cared for by a relative other than their parent(s) or Australian relative.<sup>29</sup>

## **More than 2 parents**

In circumstances where an applicant has more than two parents (e.g. a combination of natural, step or adoptive parents) it is necessary to consider to which parent(s) this requirement applies.

For visa applications made prior to 1 July 2009, 'parent' is defined in r.1.03 non-exhaustively to include an adoptive and a step parent. The same definition (albeit as it appeared previously in r.2(1) of the Regulations) was considered by the Federal Court in *Nguyet v MIEA*.<sup>30</sup> In that case, Spender J held that the expansive definition of 'parent' as including adoptive and step parents, meant, for example, that a child might have four parents, being the child's two natural parents and two adoptive parents. His Honour found that applying that definition to the definition of 'orphan' as it then appeared in the context of r.2(1), would require the language of the definition of 'orphan' to be 'tortured beyond endurance'.<sup>31</sup> The definition of 'orphan' at that time contained reference to 'both parents' being dead or whereabouts unknown or 'one parent' being dead and the whereabouts of 'the other parent' being unknown. As a consequence, his Honour held that 'orphan' in r.2 was defined by reference only to the circumstances of the natural parents of the child.<sup>32</sup>

However, the insertion in 2002 of cl.117.211(b) (and equivalent cl.837.213(b)), which provides for the situation where an applicant is not an orphan relative only because he or she was adopted by the Australian relative, appears to contemplate the expansive definition of 'parent' being applicable to r.1.14 for visa applications made prior to 1 July 2009 (i.e. including natural, step and adoptive parents). The amendment was introduced specifically to address the situation where an applicant cannot satisfy the definition of orphan relative on account of the fact that the relative adopted the

<sup>26</sup> r.1.14(a)(ii). For further information see footnote 4.

<sup>27</sup> r.1.14(b).

<sup>28</sup> Inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* and omitted from r.1.03 by SLI 2009, No.144.

<sup>29</sup> If custody rights are held by any other relative, this may be relevant to the Tribunal's satisfaction of Public Interest Criterion (PIC) 4017 (laws of applicant's home country etc).

<sup>30</sup> (1997) 74 FCR 422.

<sup>31</sup> *Nguyet v MIEA* (1997) 74 FCR 422 at 429.

<sup>32</sup> *Nguyet v MIEA* (1997) 74 FCR 422 (Spender J, 13 May 1997) at 429.

applicant and therefore the applicant has a 'parent' (being the adopted adoptive parent) who can care for them.<sup>33</sup>

For visa applications made on or after 1 July 2009, 'parent' is defined in s.5(1) of the Act and provides that someone is the parent of a person if the person is his or her child (as defined in s.5CA of the Act).<sup>34</sup> Regulation 1.14A(1) further provides that a reference to a parent in the Regulations includes a step-parent, and r.1.14A(2) provides that where a child is formally adopted under r.1.04(1)(a) or (b), the parent(s) of the child is/are the adoptive parent(s) (i.e. a person who was a parent prior to the adoption is no longer recognised as a parent for the purposes of the Regulations).<sup>35</sup> Moreover, a note to r.1.14A provides that a child cannot have more than two parents (other than step-parents) unless the child is adopted under customary arrangements (in accordance with r.1.04(1)(c)).<sup>36</sup> For further information see MRD Legal Services Commentary [Definition of 'Parent' and Parent visas](#). Thus for the purposes of determining whether a child is an orphan relative, consideration should be given to the status of persons who are the natural or step-parents of an applicant (even where customarily adopted). However, where the person has been formally adopted, the status of the natural, step or adoptive parents prior to the adoption are not relevant.

### Death

One way in which an applicant can meet this requirement is if his or her parents are deceased, and thus cannot provide care. Examples of appropriate evidence include the child's full birth certificate (as proof of the relationship) and the parent's death certificate (or Court order as to presumption of death). However, it is open to a decision maker to accept alternative evidence as to this fact.

### Permanent Incapacity

Permanent incapacity for the purposes of r.1.14 refers to an impairment of a parent's power, capacity, ability or possibility to care for his or her child which is indefinite or not temporary.<sup>37</sup> In that context, incapacitation includes, but is not limited to, impairment of the physical and mental faculties required to care for a child. The facts of each case must be considered in the context of the particular circumstances of the relevant parent, including the social or cultural environment within which the incapacitation of that parent was said to be occurring.<sup>38</sup>

A parent's incapacity must be related to their ability to care for the child. It is not a question of incapacity in any abstract or absolute sense.<sup>39</sup> A physical or mental impairment, for example, may render them incapable of caring for the child. A parent should not be considered incapacitated simply because he or she has expressed an unwillingness to provide care for the child. Merkel J in *Nguyen v MIMA* held that a refusal to care, abandonment of care or an unwillingness to care did not amount to 'permanent incapacity' for the purposes of r.1.14. However, his Honour clarified that conclusion did not have the consequence that permanent incapacity could not result in a refusal to care,

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<sup>33</sup> Explanatory Statement to SR 2002 No 86.

<sup>34</sup> The definition of 'child' was inserted in s. 5(1) of the Act by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009 as having the meaning given in s.5CA. Section 5CA provides that child has the same meaning as in the *Family Law Act 1975*, except that the meaning of adopted child is defined in the Migration Regulations.

<sup>35</sup> 'Parent' was inserted in s. 5(1) of the Act by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Regulation 1.14A was inserted by SLI 2009, No.144 for visa applications made on or after 1 July 2009.

<sup>36</sup> Note 1 to r.1.14A.

<sup>37</sup> *Nguyen v MIMA* (1998) 158 ALR 639 at 646.

<sup>38</sup> *Nguyen v MIMA* (1998) 158 ALR 639 at 646. Applied in *Singh v MIMA* [2008] FMCA 587 (Barnes FM, 15 May 2008) at [49].

<sup>39</sup> *Singh v MIMA* [2008] FMCA 587 (Barnes FM, 15 May 2008) at [70].

unwillingness to care, or abandonment of care. The issue involves the consideration and ascertainment of the reason why a parent could not care for his or her child.<sup>40</sup>

Therefore, permanent incapacity is not limited to those circumstances where a parent may have a physical or mental impairment. In *Nguyen*, the Court held that there may be a range of social or cultural circumstances which prevent a parent from exercising their normal parental responsibilities, for example where a parent was forced to relinquish her child after birth or otherwise face severe repercussions from the local community because the child was born out of wedlock or outside of other accepted circumstances. In that situation, the cultural norm of society results in the parent being unable to care for her child.<sup>41</sup>

The requirement is that the parents *cannot*, as distinct from *will* not, care for the child, and only because of the prescribed reasons. Accordingly, an applicant cannot be considered an orphan merely because his or her parents have abrogated their responsibility to provide care or fulfil their parental role.<sup>42</sup> Loss of custody is not necessarily proof that a child cannot be cared for by their parent (although in some circumstances it may be), and where the parent voluntarily relinquishes custody to the sponsor or the actions of the parent(s) were based on a desire to better their child's future it is open to a decision maker to find that the applicant does not meet the requirements of the definition. On the other hand, it may be open to find that as a result of the court orders, the parent no longer has power to care for the child and therefore is permanently incapacitated from doing so.

Where claims that either one or both of the applicant's parents are permanently incapacitated on the basis of physical or mental impairment, they may be supported by a medical report or a background report from the applicant's social worker if appropriate, addressing:

- the nature of the parent's disability and when it was diagnosed;
- the nature and degree, if any, of incapacity caused by the disability;
- whether medical opinion supports a view that the incapacity is permanent and if so, why;
- available treatment (if any) for the disability; and
- prognosis.

However, medical reports may not always be available and caution should be exercised before *requiring* specific documentary evidence to support the applicant's claims that his or her parent(s) are permanently incapacitated.<sup>43</sup>

A decision maker is entitled to have regard to the applicant's age as a factor relevant to whether his or her parent is capable of caring for him for the purposes of r.1.14(b) and in deciding whether he or she is in need of the kind of care that the parent cannot provide to him or her. It is necessary to consider

<sup>40</sup> *Nguyen v MIMA* (1998) 158 ALR 639 at 645.

<sup>41</sup> *Nguyen v MIMA* (1998) 158 ALR 639 at 646.

<sup>42</sup> See *Acosta v MIBP* [2016] FCCA 1276 (Judge Street, 26 May 2016) at [10]. The Court found that an alcoholic parent and a parent who is neglectful in feeding a child do not on their face fall within the ordinary meaning of the concept 'permanently incapacitated'. The Court held that parents may be dysfunctional in their child care or neglectful, but that it is not the same as being 'permanently incapacitated'.

<sup>43</sup> In *Hagos v MIAC* [2008] FMCA 1178 (Riethmuller FM, 25 August 2008), the tribunal had requested additional medical information as the evidence before it was inconsistent. The tribunal requested that an examination be undertaken by a panel doctor but there were some difficulties in making arrangements for the examination to take place. After some time, the tribunal advised that it was no longer prepared to delay finalising the matter. Although the Court accepted that it was possible to make the arrangements, it held at [25] that in the circumstances it was reasonable for the tribunal to conclude that a report was not likely to be reasonably available in a reasonable time frame and to proceed to make a decision.

all factors in the particular circumstances of the parent, including whether the child can be cared for by the parent, notwithstanding his or her impairment.<sup>44</sup>

#### Unknown whereabouts

Whether the whereabouts of the applicant's parents is unknown is a question of fact for the decision maker.

#### **Best Interests of the applicant**

Regulation 1.14(c) requires that there is no compelling reason to believe that the grant of a visa would *not* be in the best interests of the applicant. Note that this mirrors the requirements of Public Interest Criterion 4018 which is a specific requirement in both Subclasses 117 and 837 for applicants who have not turned 18 at time of decision.<sup>45</sup> Under Department guidelines, compelling reason is intended to include strong, obvious information that leads decision makers to believe that granting the visa would clearly not be of benefit to the child to settle in Australia with his or her Australian relative.<sup>46</sup>

Existing foreign custody or guardianship orders may be relevant in determining what is in the best interest of the orphan applicant. Departmental Guidelines state that if there is a foreign court order in force, it should generally be assumed that the best interests of the child have already been considered, and it is only in exceptional cases that this issue would need to be addressed. For example, where overseas law automatically vests custody in the father without any consideration of the best interests of the child; or where there is strong evidence of abuse not considered by the overseas court. The guidelines further state that decision makers should not solicit evidence to establish best interests, as the need for assessment will only arise where the application contains clear evidence that the visa grant may not be in the child's best interests.<sup>47</sup>

#### **Adoption by the Australian relative**

It is a time of application requirement for both a Subclass 117 and 837 visa that the applicant is an orphan relative *or* is not an orphan relative only because he or she has been adopted by the Australian relative.

The scope of this alternative was considered in the case of *EC v MIMIA*,<sup>48</sup> where the applicant sought to argue that the provision applied to an applicant who was adopted, but not by an existing relative. The Court rejected this construction of the provision and held that the Explanatory Statement to Migration Amendment Regulations 2002 (No.2) confirmed that cl.117.211(b) provides for the situation where an adoption *prevents* a person from satisfying the definition of 'orphan relative' and not for the circumstance where an adoption *enables* a person to satisfy the definition of 'relative' but not 'orphan relative'. In other words, the relative relationship must exist outside of, and predate, the adoption relationship in order for applicants to meet the alternative criteria in circumstances where there has been an adoption.

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<sup>44</sup> *Singh v MIMIA* [2008] FMCA 587 (Barnes FM, 15 May 2008) at [45].

<sup>45</sup> cl.117.227 and 837.225.

<sup>46</sup> POLICY – MIGRATION REGULATIONS – DIVISIONS > [Div1.2] Div1.2 – Interpretation > Div 1.2/reg1.14 – Orphan Relative at [11.1] (reissued 27/3/2010).

<sup>47</sup> POLICY – MIGRATION ACT > Act-defined terms instructions > s5G - Relationships and family members - Best interests of minor children at [10.3] (reissued 19/11/2016).

<sup>48</sup> (2004) FCR 438.

## Sponsorship – cl.117.212, 117.222, 837.214, 837.226, r.1.20KB

The sponsorship requirement at time of application and decision for both Subclasses is essentially identical. The requirement at time of application is that the applicant is sponsored by the Australian relative or the Australian relative's partner.<sup>49</sup>

The sponsor must have turned 18, and be a settled Australian citizen, a settled Australian permanent resident or a settled eligible New Zealand citizen. 'Settled' is defined in r.1.03 of the Regulations to mean 'lawfully resident in Australia for a reasonable period'. See the MRD Legal Services Commentary: [Settled](#) for further information.

The partner, if sponsoring, must cohabit with the Australian relative. Whether the applicant is sponsored by a person is a finding of fact and appears to require only that the person has made the relevant undertakings by completing the sponsorship application form (form 40CH).<sup>50</sup>

At time of decision, the sponsorship referred to at time of application must have been approved by the Minister and still be in force.<sup>51</sup>

### **Sponsorship Limitation**

Relevant to the sponsorship criterion is the limitation on approval of sponsorships introduced from 27 March 2010 which applies to Child (Migrant) (Class AH) and Child (Residence) (Class BT) visas if one of the applicants is under 18 at time of application. The effect of the limitation is that the Minister must refuse to approve the sponsorship of an applicant who is under 18 if the sponsor or their spouse or de facto partner has been charged with, or convicted of, a registrable offence unless the charge has been withdrawn, dismissed or otherwise disposed of without recording of a conviction or the conviction has been quashed or otherwise set aside.<sup>52</sup> 'Registrable offences' is defined for the purposes of the limitation provision and includes offences under the relevant State and Territory legislation for registering or reporting on child sex offences or other serious crimes indicating the person may pose a significant risk to a child.<sup>53</sup>

Where the sponsor or their spouse or de facto partner has been convicted of a registrable offence, the sponsorship may be approved if certain circumstances are met. These are that none of the applicants for the visa are under 18 or that the sponsor or their spouse or de facto partner has:

- completed the sentence imposed more than 5 years before the date of the application for approval of the sponsorship; and
- has not been charged with a registrable offence since completing the sentence<sup>54</sup> or, if there was a charge, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; and
- there are compelling circumstances affecting the sponsor or applicant.<sup>55</sup>

<sup>49</sup> cl.117.212 and 837.214. For further discussion of the partner definition see footnote 4.

<sup>50</sup> Sponsorship undertakings are set out in r.1.20. Part O of form 40CH contains the undertakings. There is no direct reference to the sponsorship form in the Regulations but the Department requests the applicant lodge the application form 47CH and the sponsorship form 40CH together (see the first page of form 40CH and the second page of form 47CH, design date 07/17).

<sup>51</sup> cl.117.222 and 837.226.

<sup>52</sup> Regulation 1.20KB inserted by Migration Amendment Regulations 2010 (No. 2) (SLI 2010, No. 50) for visa applications made on or after 27 March 2010.

<sup>53</sup> r.1.20KB(13).

<sup>54</sup> Note r.1.20KB(9)(b) appears to contain a typographical error as it states that the Minister may decide to approve the sponsorship if 'the spouse or de facto partner has not been charged with a registrable offence since the *sponsor* completed that sentence' (emphasis added). It appears that it should refer to 'since the spouse or de facto partner completed that sentence'.

Additionally, where the Minister has requested the sponsor or their spouse or de facto partner to provide a police check and it is not provided within a reasonable time, the Minister may refuse to approve the sponsorship of all applicants for the visa.<sup>56</sup> See MRD Legal Services Commentary: [Limitation on Sponsorships - Partner Visas](#) for further information.

#### Relevant Case Law

<a href="#">Acosta v MIBP [2016] FCCA 1276</a>	
<a href="#">EC v MIMIA [2004] FCA 978; (2004) 138 FCR 438</a>	<a href="#">Summary</a>
<a href="#">Hagos v MIAC [2008] FMCA 1178</a>	
<a href="#">Haidari v MIAC [2009] FMCA 1178</a>	<a href="#">Summary</a>
<a href="#">Nguyet v MIEA (1997) 74 FCR 422</a>	
<a href="#">Nguyen v MIMIA (1998) 88 FCR 206</a>	
<a href="#">Singh v MIMIA [2008] FMCA 587</a>	<a href="#">Summary</a>

#### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulations 2000 (No.2)</a>	SR 2000, No.62
<a href="#">Migration Amendment Regulations 2000 (No.5)</a>	SR 2000, No.259
<a href="#">Migration Amendment Regulations 2001 (No.1)</a>	SR 2001, No.27
<a href="#">Migration Amendment Regulations 2002 (No.2)</a>	SLI 2002, No.86
<a href="#">Migration Amendment Regulations 2004 (No.2)</a>	SR 2004, No.93
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2010 (No. 2)</a>	SLI 2010, No. 50
<a href="#">Migration Legislation Amendment Regulation 2012 (No.5)</a>	SLI 2012, No.256
<a href="#">Migration Legislation Amendment Regulation 2013 (No.3)</a>	SLI 2013, No.146
<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015.</a>	SLI 2015, No.34

#### Available Decision templates

There is one decision template designed specifically for reviews of decisions to refuse a Subclass 117 or 837 visa:

<sup>55</sup> rr.1.20KB(4), (5), (9) and (10).

<sup>56</sup> r.1.20KB(12). Regulation 1.20KB(11) provides that the Minister may request a police check from a jurisdiction in Australia or a country in which the sponsor or their spouse or de facto partner lived for a period of a total period of at least 12 months.



- **Subclass 117/837 Orphan Relative Visa Refusal** - this template is suitable for use in review of a decision to refuse a Subclass 117 (Orphan Relative) or Subclass 837 (Orphan Relative) visa where the visa application was made on or after 1 July 2002.

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# Definition of 'Parent' and Parent Visa Issues Including 'Balance of Family Test'

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## Overview

### Meaning of 'Parent'

Consideration of whether a person is a parent of another person arises in a number of contexts in migration legislation. For visa applications made prior to 1 July 2009, 'parent' is defined in r.1.03 of the Migration Regulations 1994 (the Regulations) to include an adoptive parent and a step parent. For visa applications made on or after 1 July 2009, 'parent' is defined in s.5(1) of the *Migration Act 1958* (Migration Act) by reference to the definition of child in s.5CA of the Act. Both definitions are non-exhaustive although the current definition recognises a broader class of persons as parents (see [below](#)).

### Parent visas

There are several visa subclasses that cater for parent migration. Apart from matters associated with processing times and fees however, the substantive criteria for the grant of a parent visa in any of the contributory or non-contributory categories are identical and include the balance of family test and sponsorship requirements discussed [below](#).

For a short period only during 2014, Subclass 103 (Parent) and Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>1</sup>

## Visa subclasses

### Contributory Parent visas

The Contributory Parent visa subclasses were introduced on 20 March 2003 by the *Migration Legislation Amendment (Contributory Parent Migration Scheme) Act 2003* (No.5 of 2003). These visas require successful applicants to make a significant contribution to the costs that the Government will incur as a result of their presence in the country. The contributions are imposed in the form of visa application charges, payable at various stages of the process.<sup>2</sup> Many more visas were made available in this category compared to the other non-contributory category which was originally intended to enable successful applicants to obtain a visa much more quickly.

### **Contributory Aged Parent (Subclasses 864 and 884) and Contributory Parent (Subclasses 143 and 173)**

The Contributory Aged Parent (Subclasses 864 (Residence) and 884 (Temporary)) visas are for parents whose age is equivalent to a person who is eligible for an Australian age pension and who is

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<sup>1</sup> Between 2 June 2014 to 25 September 2014, Class AX (Parent) (Migrant) Subclass 103 (Parent) and Class BP (Aged Parent) (Residence) Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class AX and Class BP visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

<sup>2</sup> These requirements are set out in item 1130(2) for Subclass 143; Item 1221(2) for Subclass 173; Item 1130A(2) for Subclass 864; and Item 1221A(2) for subclass 884.

willing to pay a higher application fee for priority processing (compared to applicants for an Aged Parent (Subclass 804) visa). These subclasses are for persons who are applying onshore. The Contributory Parent (Subclasses 143 (Migrant) and 173 (Temporary)) visas are similarly for persons who are willing to pay a higher application fee for priority processing (compared to applicants for a Parent (Subclass 103) visa) and are applying offshore.

The contributory parent visa stream includes temporary (Subclasses 884 and 173) and permanent (Subclasses 864 and 143) visas. Temporary visas are designed to give applicants the option of paying the significant contributions associated with a permanent application in two stages. If taking this option, applicants can apply first for a temporary visa, and then have an option to proceed to a permanent visa. Alternatively, applicants may apply for a permanent visa immediately (i.e. without having to hold a temporary visa first).

## **Non contributory visas**

### ***Parent (Subclass 103) and Aged Parent (Subclass 804)***

The Subclass 103 (Parent) visa is a permanent visa for parents who have children living in Australia who are applying offshore. The Subclass 804 (Aged Parent) visa is for parents who are onshore and have children who are living in Australia and is primarily for parents whose age is equivalent to a person who is eligible for an Australian age pension, although it is also possible for a person who holds a substituted Subclass 676 visitor visa<sup>3</sup> or a substituted Subclass 600 visitor visa<sup>4</sup> to apply as a parent to remain in Australia without meeting the age requirement. Requirements for a valid application are set out in Schedule 1 to the Regulations.<sup>5</sup>

These are the original visa subclasses for parent migration. A relatively low cap on the number of visas issued each year in this category resulted in there being a large number of applicants waiting for limited visas to become available. Applicants for these visas are able to transfer to the contributory stream of visas.

For a short period only during 2014, Subclass 103 (Parent) and Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>6</sup>

### ***Designated Parent (Subclass 118 and 859)***

The Subclass 118 (Designated Parent) visa was for offshore applicants whilst the Subclass 859 (Designated Parent) was an onshore visa. These visa subclasses were introduced as a response to the need for transitional provisions arising from the disallowance of the Migration Amendment Regulations 1998 (No.8) (No.285 of 1998) which sought to replace existing criteria for the Parent and

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<sup>3</sup> For visa applications made prior to 23 March 2013, the term 'Substituted Subclass 676 (Tourist) Visa' is defined in r.1.03 of the Migration Regulations 1994 as a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act.

<sup>4</sup> For visa applications made on or after 23 March 2013, the term 'Substituted Subclass 600 (Visitor) visa' is defined in r.1.03 as a Subclass 600 (Visitor) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act; or a Subclass 676 (Tourist) visa that was granted, before 23 March 2013, following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act: r.1.03 as amended by Migration Amendment Regulations 2013 (No.1) (SLI 2013, No.32).

<sup>5</sup> Item 1124 for Subclass 103; and Item 1123A for Subclass 804.

<sup>6</sup> Between 2 June 2014 to 25 September 2014, Class AX (Parent) (Migrant) Subclass 103 (Parent) and Class BP (Aged Parent) (Residence) Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class AX and Class BP visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

Aged Parent visas with more onerous requirements and increase the rate of assurance and bond monies to be paid by the Australian relative.

These visas are only available to applicants who made a valid application for a Parent or Aged Parent visa between 1 November 1998 and 30 March 1999 inclusive. An application could only be made upon invitation by the Minister,<sup>7</sup> and any application must have been made between 1 November 1999 and 28 April 2000 inclusive. These visa subclasses have been removed entirely from the Regulations from 22 March 2014.<sup>8</sup>

## Key issues

### Meaning of 'parent'

Where a visa application or other event has occurred prior to 1 July 2009 which requires the determination of whether a person is a 'parent', a person is taken to be a parent within the meaning of s.5(1) of the Migration Act if the person was a parent under r.1.03 immediately before 1 July 2009 and meets the requirements of s.5(1) of the Act as in force on 1 July 2009.<sup>9</sup>

Where the relevant period is after 1 July 2009, the relevant definition is set out in s.5(1) of the Act.

The 1 July 2009 change to the definition recognises a person as a parent of another where the child is a biological child of the person as well as in circumstances where one or both parties are not biologically related to the child.<sup>10</sup> This definition is broader than the pre 1 July 2009 definition of 'parent' in r.1.03 which recognised a person as a parent of a child only in opposite-sex relationships whether biological, step or adopted. A further difference is that a de facto partner (same-sex or opposite sex) can be a 'step-parent', whereas previously a step-relationship was only recognised when a biological parent married another person.

### **Visa application made on or after 1 July 2009 (s.5(1))**

For visa applications made on or after 1 July 2009, s.5(1) of the Migration Act provides that the term 'parent' is defined by reference to the definition of child in s.5CA of the Act, which provides 'without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in section 5CA'.<sup>11</sup>

### Children generally

'Child' is defined at s.5CA as someone who is a child of the person within the meaning of the *Family Law Act 1975* (Family Law Act), with the exception of an adopted child under the Family Law Act.

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<sup>7</sup> r.2.07AE. Note this regulation has been repealed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) for visa applications made on or after 22 March 2014, consistently with the removal of these subclasses from the Regulations from that date.

<sup>8</sup> Omitted by SLI 2014, No.30 for visa applications made on or after 22 March 2014. The definition of 'working age parent' and Notes 1 and 2 under that definition in r.1.03 were subsequently omitted by Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390) as they became redundant following the repeal of the Designated Parent visas.

<sup>9</sup> Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144).

<sup>10</sup> For example, relationships involving surrogacy or children born to persons in a same-sex relationship. Explanatory Memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.

<sup>11</sup> s.5(1) as inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective from 1 July 2009. The definition in the Act applies to visa applications made on or after 1 July 2009 by reference to the interpretation sections which were amended by SLI 2009, No.144 to refer to the definition in the Act (except for Subclass 804 visas which do not refer to a definition of 'parent').

Instead, s.5CA(1)(b) expressly includes a person who is an adopted child within the meaning of the Migration Act (i.e. in accordance with r.1.04 of the Regulations).

The Family Law Act does not precisely define who is a 'child'. However, a child-parent relationship under the Family Law Act generally refers to the relationships between a child and each of his or her biological parents. Given the link in s.5CA(1)(a) of the Migration Act to the Family Law Act, a 'child of a person' under the migration law would include a biological child of a person.

The 'child' definition in s.5CA of the Migration Act is also affected by the meaning of 'child' as expanded or modified under the Family Law Act.<sup>12</sup> Relevantly, this means that under s.5CA of the Migration Act, a child born to a couple before their marriage,<sup>13</sup> or a child born to a person or to a couple (including married,<sup>14</sup> or de facto partners whether of the same or opposite sex<sup>15</sup>) as a result of artificial conception procedure,<sup>16</sup> or surrogacy arrangement,<sup>17</sup> could be considered as the child of a particular person, or as a child of a person who is the 'product of a relationship'<sup>18</sup> the person has or had as a couple with another person, provided that certain requirements under the Family Law Act are met, though the child is not biologically related to the person(s).

#### Children born as a result of artificial insemination

More specifically, for s.5CA of the Migration Act, if a child was born to a woman as a result of artificial conception procedure while she was married to, or as a de facto partner<sup>19</sup> of another person (the couple), and either the couple consented<sup>20</sup> to the carrying out of the procedure and the donor of the genetic material consented to the use of the material, or under a prescribed law<sup>21</sup> the child is a child of the couple, then, under both the Family Law Act<sup>22</sup> and s.5CA(1)(a) of the Migration Act, the child would be considered as the 'child' of the couple unless the child has been adopted (under the Family Law Act) by a third person.<sup>23</sup>

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<sup>12</sup> Section 4 of the *Family Law Act* provides that Subdivision D of Division 1 of Part VII of the *Family Law Act* affects the situations in which a child is a child of a person or is a child of a marriage or other relationship. The subdivision contains a number of provisions dealing with issues of child-parent status, e.g. it provides that a reference to a child of a marriage includes ex-nuptial children. It also provides the position of children of de facto partner. Further, with some exceptions, this subdivision deems a child born as a result of an artificial conception procedure or surrogacy arrangements as the child of a particular person, child of a marriage or child of de facto partner, provided that certain requirements are met, though the child is not biologically related to the person(s).

<sup>13</sup> s.60F(1)(a) of the Family Law Act.

<sup>14</sup> See s.60F of the Family Law Act which deems certain children as children of marriage, and s.4 of the Family Law Act which defines 'child of a marriage'.

<sup>15</sup> The link in s.5CA(1) of the Act to ss.4(1), 4AA, 60EA and 60HA of the Family Law Act allows children of same sex relationships to be considered as 'child of a person' for the purposes of migration law.

<sup>16</sup> s.60H of the Family Law Act.

<sup>17</sup> s.60HB of the Family Law Act. A surrogacy arrangement is recognized in Australia if a court order under a prescribed law of a State or Territory is made to the effect that the child is the child of one or more persons; or each of one or more persons is a parent of a child.

<sup>18</sup> Explanatory Memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Essentially, a child cannot be a 'product of a relationship' unless he or she is the biological child of at least one member of the couple (i.e. is conceived utilising the gametes of one party to the relationship), or was born to a woman in the relationship.

<sup>19</sup> This refers to 'de facto partner' and 'de facto relationship' within the meaning of ss.4AA, 60EA and 60HA of the Family Law Act, and not the meaning of 'de facto partner' under the migration law.

<sup>20</sup> s.60H(5) of the Family Law Act provides that a person is presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

<sup>21</sup> The prescribed laws for s.60H(1)(b)(ii) of the Family Law Act are set out in s.12C of the Family Law Regulations 1984 (Family Law Regulations) to include the *Status of Children Act 1996* (NSW); ss.10A, 10B, 10C, 10D, 10E, 13 and 14 of the *Status of Children Act 1974* (Vic); ss.17, 18, 19, 19C, 19D and 19E of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10A, 10B, 10C, 10D and 10E of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); s.11 of the *Parentage Act 2004* (ACT); and ss.5A, 5B, 5C, 5D, 5DA, 5E and 5F the *Status of Children Act* (NT).

<sup>22</sup> s.60H(1) of the Family Law Act.

<sup>23</sup> ss.60F(1) and (3), and ss.60HA(1) and (2) of the Family Law Act.

Where a child was born to a woman as a result of the carrying out of an artificial conception procedure and under a prescribed law,<sup>24</sup> the child is a child of the woman, the child would be considered the child of that woman regardless of whether the child is the biological child of the woman<sup>25</sup> for the purposes of both the Family Law Act and s.5CA(1)(a) of the Migration Act.

In circumstances where a child born under surrogacy arrangements and a court has made orders under a prescribed State/Territory law<sup>26</sup> to the effect that a child is the child of one or more persons; or each of one or more persons is a parent of a child, the 'child' would be considered for the purposes of the family law and migration law to be a child of each of those persons.<sup>27</sup>

Given the broad definition of 'child' under s.5CA(1), there may be circumstances where a person might be a child of more than two people as a result of s.5CA(1).<sup>28</sup> To ensure that a person cannot have more than two parents for the purposes of the Migration Act,<sup>29</sup> s.5CA(2) provides that the Regulations may specify that a person is not a child of another person in circumstances in which the person would, apart from s.5CA(2), be the child of more than 2 persons for the purposes of the Act. Section 5CA(3) clarifies that regulations made under s.5CA(2) may specify any person as not being the child of another person whether the child relationship between the two people came within the ordinary meaning of the word 'child' or arose by the operation of s.5CA(1).<sup>30</sup>

#### Adopted children

In addition, r.1.14A(2)<sup>31</sup> specifies for the purposes of s.5CA(2) that a child that is formally adopted in accordance with r.1.04(1)(a) or (b) is the child of the adoptive parents and not the child of any other person (including the child's parent or adoptive parent before the adoption). Regulation 1.14A(1) provides that a reference in the Regulations to a parent includes a step-parent, and r.1.14A contains a note stating that a child cannot have more than 2 parents (other than step-parents) unless the child has been adopted under customary arrangements entered into outside Australia that meet r.1.04(2). Thus, if formal adoption arrangements are entered into which meet the requirements of r.1.04(1)(a) or (b), the child's previous child-parent relationship is no longer recognised. However, despite the note to r.1.14A stating that a person cannot have more than 2 parents (other than step-parents) and unless the child has been adopted under customary adoption arrangements, the circumstances where a person is a child of more than 2 persons as a result of artificial conception or surrogacy arrangements are not specifically addressed.

For further discussion see MRD Legal Services Commentary: [Familial Relationships](#), [Adoption](#) and [Subclass 101 and 802: Child visas](#).

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<sup>24</sup> The prescribed laws for s.60H(2)(b) of the Family Law Act are set out in s.12CA of the Family Law Regulations to include s.14 of the *Status of Children Act 1996* (NSW); ss.15 and 16 of the *Status of Children Act 1974* (Vic); s.23 of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10B and 10C of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); ss.11(2) and 11(3) of the *Parentage Act 2004* (ACT); and ss.5B, 5C and 5E of the *Status of Children Act* (NT).

<sup>25</sup> s.60H(2) of the Family Law Act. A similar provision in s.60H(3) of the Family Law Act provides that if the child is born to a woman as a result of artificial conception procedures and under a prescribed law, the child is a child of a man, the child is deemed to be the child of the man. However, no law has been prescribed for the purposes of s.60H(3).

<sup>26</sup> The prescribed laws are set out in s.12CAA of the Family Law Regulations to include s.22 of the *Status of Children Act 1974* (Vic); s.22 of the *Surrogacy Act 2010* (Qld); s.21 of the *Surrogacy Act 2008* (WA); s.26 of the *Parentage Act 2004* (ACT); s.10HB of the *Family Relationships Act 1975* (SA) and s.12 of the *Surrogacy Act 2010* (NSW).

<sup>27</sup> s.60HB of the Family Law Act.

<sup>28</sup> Explanatory Memorandum accompanying the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* pp.136 - 137.

<sup>29</sup> Explanatory Memorandum accompanying the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* p.137.

<sup>30</sup> As inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective from 1 July 2009.

<sup>31</sup> As inserted by SLI 2009, No.144 for visa applications made on or after 1 July 2009.



### **Visa application made prior to 1 July 2009 (r.1.03)**

For visa applications made prior to 1 July 2009, r.1.03 provides that the term parent 'includes an adoptive parent and a step-parent'.<sup>32</sup>

In *Hunt v MIEA* the Federal Court held that the expanded class of parents contained in the definition was not *to the exclusion* of biological parents.<sup>33</sup> Accordingly, a parent-child relationship may arise biologically, through adoption or a step relationship.

Given that this statutory definition of 'parent' is non-exhaustive, consideration should be given to the ordinary meaning of the term 'parent'. The observations of the Full Federal Court in the case of *H v MIAC*<sup>34</sup> on the meaning of the word 'parent' in the *Australian Citizenship Act 2007* would also appear relevant. The Court stated in that case:

*There is nothing in the legislative object, the legislative text, or the legislative structure of the Citizenship Act that requires the Court to conclude that, in the specific context of s16(2), the word "parent" only can mean biological parent...*

*The word "parent" is an everyday word in the English language, expressive both of status and relationship to another. Today... not all parents become parents in the same way:... This is not to say that parents do not share common characteristics; everyday use of the word indicates that they do.*

*Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological... Typically, parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own.*

*The ordinary meaning of the word "parent" is, however, clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning.*<sup>35</sup>

This indicates that in interpreting the meaning of 'parent' in relation to a visa application made prior to 1 July 2009, consideration should first be given to the legislative object, text, structure and context of the definition in r.1.03, to determine whether it should be given a meaning (either narrower or broader) than its ordinary meaning. In this regard, the fact that the definition in r.1.03 applies for the Regulations generally, and is not differentially defined for different subclasses, supports the view that it is to be given its ordinary meaning, rather than any technical meaning.

The effect of Australian law is that the adopted child becomes in law the child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopters.<sup>36</sup> (For further explanation, see 'The effect of adoption under Australian law generally' in the MRD Legal Services commentary: [Adoption](#) and [Adoption Visa: Subclass 102](#)).

In relation to particular types of parent, such as step-parents and adoptive parents, regard should similarly be had to the legislative context in which those terms appear when construing them. For example, while the Regulations include a specific definition of step-child in r.1.03 (a child is a step-child of a person only while the person is the current spouse of the natural parent, unless the child is under 18 years and the person has a parenting order or guardianship or custody in respect of the

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<sup>32</sup> The definition was omitted by SLI 2009, No.144, with the effect that it applies only to visa applications made prior to 1 July 2009.

<sup>33</sup> (1993) 43 FCR 380.

<sup>34</sup> (2010) 188 FCR 393.

<sup>35</sup> *H v MIAC* (2010) 188 FCR 393, per Moore, Kenny and Tracey JJ, at [127] – [130].

<sup>36</sup> *Adoption Act 1993* (ACT), s.43(1)(a); *Adoption Act 2000* (NSW), s.95(2)(c), *Adoption of Children Act 1994* (NT), s.45(1)(a); *Adoption Act 2009* (Qld), s.214(2); *Adoption Act 1988* (SA), s.9(1); *Adoption Act 1988* (Tas), s.50(1)(a); *Adoption Act 1988* (Vic), s.53(1)(a); *Adoption Act 1994* (WA), s.75(1)(a).

child),<sup>37</sup> in the absence of a specific definition of step-parent in the Regulations, it is arguable that the term 'step-parent' may be broader than simply the inverse of 'step-child', having regard to the ordinary meaning of the term and its usage in other areas. The term 'adoptive parent' is defined for Subclass 102 (Adoption) visas,<sup>38</sup> but not for the Migration Act and Regulations generally.

### Meaning of 'aged parent'

'Aged parent' is defined in r.1.03 of the Regulations as a 'parent' who is old enough to be granted an age pension under the *Social Security Act 1991*. This definition requires consideration of the term 'parent' which is also a defined term in migration legislation (see [above](#)). To ascertain whether a person is old enough to be granted an age pension, regard must be had to ss.23(5A) to (5D) of the *Social Security Act 1991*. Currently, the relevant age varies depending on the year in which the individual was born.

This relationship arises in the context of the Subclass 804 (Aged Parent); Subclass 864 (Contributory Aged Parent); Subclass 884 (Contributory Aged Parent (Temporary)) and two now redundant visa subclasses.<sup>39</sup>

### Balance of family test – r.1.05

The 'balance of family test' is a defined term,<sup>40</sup> and a criterion that must be satisfied at time of application for most parent visa subclasses other than where an applicant is applying for a Designated Parent (Subclass 859) visa<sup>41</sup> or one of the permanent contributory visas (Subclass 143 or 864) and at the time of the application<sup>42</sup> was the holder of a temporary contributory (Subclass 173 or 884) visa or a substituted Subclass 676 visa<sup>43</sup> or a substituted Subclass 600 visa<sup>44</sup>.

The balance of family test is different for visa applications made prior to 1 July 2011 and those made on or after 1 July 2011.<sup>45</sup> The details of the test prior to and after 1 July 2011 are set out below.

#### **Visa applications made before 1 July 2011**

For visa applications made before 1 July 2011, the balance of family test set out in r.1.05 provides that a parent satisfies the balance of family test if the number of his or her children [lawfully and](#)

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<sup>37</sup> The definition of step-child was amended by Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.38) for visa applications made on or after, or not finally determined, before 27 March 2010 to refer to 'parenting order' consistent with the relevant terms in the *Family Law Act 1975* (the *Family Law Act*). The definition of 'parenting order' was inserted at the same time to give it the meaning given by ss.64B(1) of the *Family Law Act*.

<sup>38</sup> cl.102.111.

<sup>39</sup> The definition of 'aged parent' also previously applied to Subclass 118 (Designated Parent) and Subclass 859 (Designated Parent) visas. However, these visa subclasses were removed by SLI 2014, No.30 affecting visa applications made on or after 22 March 2014.

<sup>40</sup> r.1.03, which refers to r.1.05.

<sup>41</sup> The Subclass 859 (Designated Parent) visa subclass was removed by SLI 2014, No.30 for visa applications made on or after 22 March 2014.

<sup>42</sup> The time of decision requirement for the balance of family test was removed by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116) for visa applications made on or after 1 July 2009 or not finally determined before that date (r.9). Note that this remains a time of decision requirement for Designated Parent (Subclass 118 and 859) visas.

<sup>43</sup> For visa applications lodged prior to 23 March 2013, a 'substituted Subclass 676 visa' is defined at r.1.03 as 'a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act'.

<sup>44</sup> For visa applications made on or after 23 March 2013, r.1.03 defines 'Substituted Subclass 600 (Visitor) visa' as a Subclass 600 (Visitor) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act; or a Subclass 676 (Tourist) visa that was granted, before 23 March 2013, following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act, r.1.03 as amended by SLI 2013, No.32.

<sup>45</sup> r.1.05 as amended by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011, No.105).

[permanently resident](#) (or eligible NZ citizens who are usually resident) in Australia is either: greater than or equal to the total number of children who are resident overseas; or, greater than the greatest number of children who are resident in any single overseas country.

The table below illustrates the application of the balance of family test for visa applications made before 1 July 2011.

Total no. of children	In Australia	In Country B	In Country C	In Country D	Test Met
1	1	-	-	-	Yes
2	1	1	-	-	Yes
3	2	1	-	-	Yes
	1	1	1	-	No
	1	2	-	-	No
4	1	1	1	1	No
	2	2	-	-	Yes

#### 'Lawfully and permanently resident in Australia'

The phrase 'lawfully and permanently resident' is not defined in the legislation. The Migration Regulations use several terms in the context of requirements relating to an individual's connection to Australia, for example, 'Australian permanent resident', 'settled Australian permanent resident', 'lawfully and permanently resident in Australia' and 'usually resident' or 'usually residing in Australia'. The use of these different terms, sometimes within the same sub-regulation, suggests that the phrases do not have the same meaning. There would also appear to be a hierarchy of terms in relation to the child's connection to Australia. For example, in the context of parent visas, the sponsor must be a settled Australian permanent resident (or citizen); a child who is counted in the balance of family test must be 'lawfully and permanently resident' in Australia, unless they are on a special category visa in which case they need only be 'usually resident.' The highest category, that of 'settled Australian permanent resident', undeniably requires the sponsoring child to hold a permanent visa *and* to have 'usually resided' in Australia for a reasonable period. This is apparent in the definition of specified terms 'Australian permanent resident' and 'settled' in r.1.03. The phrases 'lawfully and permanently resident' and 'usual residence' or 'usually resides' on the other hand, are not specifically defined in the legislation.

The concept of 'residency' has received judicial consideration in a number of cases, albeit not always in a migration context. Whilst the meaning of residence will depend on the particular statutory context, the courts have generally interpreted the concept of residence to mean where a person lives or resides. In *Hafza v Director-General of Social Security*, Wilcox J explained the concept of residence as follows:

***As a general concept residence includes two elements: physical presence in a particular place and the intention to treat that place as home; at least for the time being, not necessarily for ever. (emphasis added)***<sup>46</sup>

The phrases 'ordinarily resident' or 'usually resident' have also been interpreted to mean the place where a person is currently settled; they do not require an intention to live in a place permanently or

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<sup>46</sup> (1985) 60 ALR 674 at 680.

indefinitely.<sup>47</sup> For further discussion of the common law concept of 'usual residence' see the MRD Legal Services Commentary: [Usually resident](#).

In light of this background, the phrase 'permanently resident in Australia' suggests that a person must intend to live in Australia permanently or indefinitely. However, given the apparent hierarchy of terms, the term may require something less than being an 'Australian permanent resident' (which requires a person to be on a permanent visa as well as usually resident in Australia). On the other hand, holding a permanent visa would not, in itself, establish that a person is either resident, usually resident, or even lawfully and permanently resident in Australia, as physical presence (and arguably, intention) is still required. The Court in *Hafza*<sup>48</sup> found that whether a person resides in Australia is a question of fact and depends on the person's continued connection to Australia.

On this analysis, evidence that a person has resided in Australia on a valid temporary visa, and demonstrates an intention to reside here permanently, may support a conclusion that the person is 'lawfully and permanently resident' in Australia. The intention to reside here permanently can be inferred to have existed, or exist, by the subsequent, or impending, grant of permanent residency. It should be noted, however, that Departmental policy would appear to imply that the term 'lawfully and permanently resident' normally requires a person to hold a permanent visa.

#### **Visa applications made on or after 1 July 2011**

For visa applications made on or after 1 July 2011, the balance of family test requires the number of a parent's 'eligible children' to be greater than or equal to the number of 'ineligible children', or that the greatest number of 'ineligible children' who are usually resident in a particular overseas country is less than the number of 'eligible children'.

'Eligible child' is defined as a child of the parent who is an Australian citizen, an Australian permanent resident [usually resident](#) in Australia or an eligible New Zealand citizen usually resident in Australia. This differs from the pre-1 July 2011 definition which did not include a child who is an Australian citizen.<sup>49</sup>

Any other child of the parent is an 'ineligible child' who will then count against the number of 'eligible children'.<sup>50</sup> There are changes which allow a clearer determination of which overseas country an ineligible child is taken to reside in,<sup>51</sup> and to change the presumption regarding the child's residence if the whereabouts of the child are unknown.<sup>52</sup>

The provision also makes clear that children / step children of former spouses or de facto partners of a parent under the definition will not be considered a 'child' for the purposes of the test.<sup>53</sup> This is a clarification from the pre- 1 July 2011 provisions.

The table below illustrates the application of the balance of family test for visa applications made on or after 1 July 2011.

Total no. of children	In Australia	In Country B	In Country C	In Country D	Test Met
1	1				Yes

<sup>47</sup> see *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309.

<sup>48</sup> (1985) 60 ALR 674.

<sup>49</sup> r.1.05(2)(a) amended by SLI 2011, No.105.

<sup>50</sup> r.1.05(2)(b) amended by SLI 2011, No.105.

<sup>51</sup> r.1.05(2B) amended by SLI 2011, No.105.

<sup>52</sup> r.1.05(1)(b) amended by SLI 2011, No.105. See also the Explanatory Statement to SLI 2011, No.105, p.6.

<sup>53</sup> r.1.05(1)(a)(ii) amended by SLI 2011, No.105.

2	1	1			Yes
3	2	1			Yes
3	1	1	1		No
3	1	2			No
4	1	1	1	1	No
4	2	2			Yes
5	2	1	1	1	Yes

### ***Which children are counted?***

The Regulations specify which children are, and are not, to be counted for the purposes of the balance of family test. There is some difference between the pre and post 1 July 2011 versions of the test.

#### Visa applications made before 1 July 2011

Children counted in the test include all natural, adopted and step-children of either:

- the parent;
- the parent's partner;<sup>54</sup>
- the former partner<sup>55</sup> of the parent, if the child was born, adopted or acquired (as a step-child) before or during that relationship.

However, no account is to be taken of:

- children who have been removed from the 'exclusive custody of the parent' by court order, adoption or operation of law; or
- children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country; or
- children who are residents of refugee camps operated by the UNHCR or the government of Hong Kong and are registered with the UNHCR.

#### Visa applications made on or after 1 July 2011

Children counted towards the test include all natural, adopted and step-children of the parent or the parent's *current* spouse or *current* de facto partner.<sup>56</sup>

However, no account is to be taken of:

- children who have been removed from the 'exclusive custody of the parent' by court order, adoption or operation of law; or
- children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country; or
- children who are residents of refugee camps operated by the UNHCR and are registered with the UNHCR.

<sup>54</sup> For applications made prior to 1 July 2009, 'spouse' is defined in r.1.15A and may include either a married or opposite sex de facto relationship. For visa applications made on or after 1 July 2009, 'spouse' is defined in the Act at s.5F to refer only to married relationships and 'de facto partner' is defined in s.5CB to include both same sex and opposite sex de facto partners.

<sup>55</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>56</sup> r.1.05(1)(a)(ii) as amended by SLI 2011, No.105.

To date there is no specific case law addressing any of the above excluded categories of children.

Removal from the exclusive custody: r.1.05(3)(a)

*Application*

Regulation 1.05(3)(a) specifies that in applying the balance of family test, no account is to be taken of a child of the parent if the child has been removed by court order, adoption or law (other than marriage) from the 'exclusive custody' of the parent. There is some ambiguity as to the proper interpretation of r.1.05(3)(a).

Departmental Policy (PAM3) provides<sup>57</sup> that r.1.05(3)(a) is intended to refer to circumstances where a person, in the first instance, had exclusive custody of the child (for example, as a result of the death of a partner or awarding of sole custody by a court order) and, subsequently, that custody is removed (for example, as a result of the child being adopted out or removed by court order).<sup>58</sup>

The term 'exclusive custody' is not further defined in the Act or the Regulations. However, 'custody' in relation to a child is defined in r.1.03 to mean:

- (a) the right to have the daily care and control of the child; *and*
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.

PAM3 further provides that the person must have the sole legal right to have daily care and control of the child and the *sole legal* right and responsibility to make the relevant decisions. However, PAM3 clarifies that if an applicant parent has divorced and sole custody is granted to the other parent, the applicant is *not* considered to have had that child removed from their exclusive custody.<sup>59</sup>

PAM3 covers custody of children in marriage and de facto relationships and states that it is considered to be shared custody in which both parents have a legal responsibility towards the children.<sup>60</sup>

Finally, in relation to adoption, PAM3 states that the removal of a child from a parent by adoption should be interpreted as removal from exclusive custody as the adoption has the effect in law of severing the legal relationship to the natural parent. The adoption is valid for visa-related purposes only if it occurred when the child was under 18 years old.<sup>61</sup>

However in respect of each of the above scenarios, the PAM3 interpretation is narrow and would appear to only apply in a limited range of cases where the person had exclusive custody of the child as a result of the death of a spouse or the granting of sole custody by a court and has later had that custody removed as a result of adoption or court order.

An alternative approach is that the word 'exclusive' should only be construed as meaning exclusive of the rest of the world. In other words, parents inherently share exclusive custody of their children in the

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<sup>57</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>58</sup> PAM3 notes that in practice, it would be rare for a child to be excluded from the balance of family test on the grounds that they had been removed from the exclusive custody of the parent at [15].

<sup>59</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>60</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>61</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

sense that only they, and not other persons, have custody rights.<sup>62</sup> This alternative construction however appears to be a strained construction of the Regulation that leaves the word 'exclusive' with no real role to play.

#### Human Rights abuses: r.1.05(3)(b)

As noted above children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country are excluded from the balance of family test. There is no case law on r.1.05(3)(b). Whether a person meets this requirement is a finding of fact on all of the claims and evidence before the decision-maker. This may include any relevant country information pertaining to the situation in a particular country.

#### Refugee Child: r.1.05(3)(c)

A child is not counted in the balance of family test if they are registered by the UNHCR as a refugee and living in a camp operated by that organisation. This is a finding of fact for the decision-maker on all the available evidence. PAM3 guidance suggests that verification of the child's location and refugee status can be sought from the Post in the camp's region.<sup>63</sup> If there is no record available, PAM3 guidance states that the child should be regarded as being of unknown whereabouts and resident in the child's last known country of usual residence.<sup>64</sup> However, this appears restrictive and decision-makers should be aware that any such findings would need to be supported by relevant evidence before the tribunal.

#### Step children

With some exceptions step children may be counted for the purposes of the balance of family test.

*Step-child* is defined at r.1.03 as being a person who is not the child of the parent but is the child of the parent's current spouse or de facto partner.<sup>65</sup> Alternatively, a step-child may be a person who is not the child of the parent but is the child of the parent's former spouse or de facto partner, has not turned 18, and the parent has a parenting order or guardianship or custody over the child.<sup>66</sup> For more detail see the MRD Legal Services commentary: [Familial relationships](#).

Therefore, step children of the parent's current spouse or de facto partner will be counted towards the balance of family test, as will children of past partners where there is a parenting order or guardianship or custody over the child. Apart from this exception, step-children of past relationships will not apply towards the test – and this was specifically addressed in the 1 July 2011 changes.<sup>67</sup>

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<sup>62</sup> This construction also appears consistent with the legal position under the family law in Australia that subject to court orders, each of the parents of a child who is not 18 has parental responsibility for the child, see s.61C of the *Family Law Act*.

<sup>63</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15.2]. PAM3 suggests that any request to the Post should include details such as: full name, date and place of birth, country of last residence, camp of current residence, approximate date of arrival in camp, date the child obtained refugee status and details of any known contact with UNHCR.

<sup>64</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15.2].

<sup>65</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>66</sup> See r.1.03, 'step-child' definition.

<sup>67</sup> Explanatory Statement to SLI 2011, No.105 and r.1.05(1)(a)(ii) as amended by SLI 2011, No.105. Note that the versions of r.1.05 applicable to visa applications lodged before 30 June 2011 appear anomalous, in that they exclude an adult step-child of the parent and a former partner (r.1.03 and r.1.05(3)(d)) from the balance of family test, but do not exclude an adult child of a former partner: r.1.05(1). Departmental guidelines published during this period state: 'Children who do not meet the regulation 1.03 definition of step-child are not to be counted in the balance of family test, even if they could otherwise be included in the visa application as a child of a former spouse of the applicant under r.1.05(1)(a)': PAM3 Div 1.2 – Interpretation – Reg 1.05 – Balance of family test – The Children – 5.3 Step-children who do not count. The Guidelines go on to state that cases should be referred to National Office if the visa applicant is disadvantaged as a result of the r.1.03 step-child definition.



### Deceased Children

The balance of family test only counts those children of a parent who are living. Where a child is claimed to be deceased, the tribunal must be satisfied as a question of fact that the child is dead. Such a finding may be based on documentary evidence such as death certificates, statutory declarations, and court declarations of presumption of death. However, there is no requirement that specific forms of documentary evidence be provided. In some cases, the tribunal may be satisfied on the basis of other evidence including oral evidence at hearing. It is also open to the tribunal to make a factual finding that a child is presumed dead on the basis of satisfaction that there are circumstances that would satisfy the common law presumption of death. For further discussion on the common law presumption of death, please see the MRD Legal Services Commentary: [Remaining Relative](#).

### Missing Children

Missing children whose whereabouts have been unknown for 7 years or more may be excluded by the application of the common law presumption of death. For example, where the child has disappeared in circumstances where it is likely that they are dead, evidence of this may enable a conclusion to be made that the child is presumed dead. For further discussion on the common law presumption of death, please see the MRD Legal Services commentary: [Remaining Relative](#).

### Extra Marital Children

Extra-marital children of the parent would generally be counted in the balance of family test as they are children of the applicant as defined by r.1.05(1)(a). However, children born to a partner's<sup>68</sup> concurrent relationship would not come within the definition (unless the child has been adopted by the applicant) because the spouse's ongoing relationship with a third party would generally preclude that relationship being recognised as a spousal or de facto relationship within the meaning of r.1.15A (for visa applications made prior to 1 July 2009), or s.5F or 5CB (for visa applications made on or after 1 July 2009) because of the requirement that there be a 'mutual commitment to a shared life to the exclusion of all others'.

### **Sponsorship**

Parents must be sponsored by a 'settled' Australian citizen, permanent resident or eligible New Zealand citizen who has turned 18.<sup>69</sup> If the child has turned 18, the child or his or her cohabiting partner<sup>70</sup> must sponsor the parent. However, if the child has not turned 18 the sponsor may be the child's cohabiting spouse, a relative or guardian of the child or his or her cohabiting spouse, or a community organisation.<sup>71</sup> A criterion at time of decision for visa applicants who have applied for a Subclass 103 or 804 visa (the non-contributory parent visas) is that the sponsorship is in force. The

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<sup>68</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>69</sup> cl.103.212, 173.212, 804.212 and 884.212.

<sup>70</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>71</sup> cl.103.212(3). For visa applications made prior to SLI 2009, No.144, the term 'spouse' is defined in r.1.15A (i.e. married or opposite sex de facto partner). For applications made on or after 1 July 2009, the definition of 'spouse' in s.5F of the Act (as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*) and amended by SLI 2009, No.144 refers only to married relationships. The effect of the changes is that matters involving a child under 18, would only involve a 'cohabiting spouse' in limited circumstances (because of the age requirements for a valid marriage under the *Family Law Act*). For visa applications made on or after and not finally determined before 27 March 2010, 'close relative' was effectively replaced by 'relative': SLI 2010, No.38.

sponsor does not have to be the same sponsor as at time of application, although the sponsor would need to be of the kind mentioned in the time of application criterion relating to sponsorship.<sup>72</sup>

For further information on the 'settled' requirement, see the MRD Legal Services commentary: [Settled](#).

### **Restrictions on sponsorship of parent visas**

Regulation 1.20LAA operates to preclude a person previously granted a Subclass 802 (Child) visa from sponsoring his or her current or former parents to migrate to Australia, where that person has provided a letter of support<sup>73</sup> from a State or Territory government welfare authority with his or her Subclass 802 (Child) visa application.<sup>74</sup> The intention of the provision is to discourage non-citizen parents from deliberately abandoning their children in Australia with the intention of later being sponsored by them to migrate to Australia.<sup>75</sup>

Regulation 1.20LAA(2) provides that the Minister is precluded from approving the sponsorship of an applicant for parent visa as listed in r.1.20LAA(1)<sup>76</sup> when he or she is satisfied that the applicant for that visa is or was a parent of a holder or former holder of a Subclass 802 (Child) visa whose visa was granted on letter of support grounds and the proposed sponsor for the applicant is:

- a Subclass 802 (Child) visa holder or former holder whose application was supported by a letter of support;
- a cohabiting partner;<sup>77</sup>
- a guardian;
- a guardian of a person who is a cohabiting spouse partner;<sup>78</sup> or
- a community organisation.

The Minister does, however, have a discretion to approve a sponsorship in such circumstances if the Minister is satisfied that there are compelling circumstances affecting the sponsor or the applicant.<sup>79</sup>

#### **Relevant case law**

[R v Barnet London Borough Council; Ex parte Shah \[1983\] 2 AC 309](#)

[H v MIAC \[2010\] FCAFC 119; \(2012\) 188 FCR 393,](#)

[Hafza v Director-General of Social Security \[1985\] FCA 164; \(1985\) 60 ALR 674](#)

<sup>72</sup> The change in sponsorship requirements at time of decision was amended by SLI 2009, No.116, for visa applications made on or after, and not finally determined before, 1 July 2009.

<sup>73</sup> r.1.20LAA(4) defines 'letter of support' for the purpose of the Regulation.

<sup>74</sup> This provision applies only to visa applications made on or after 26 April 2008: Migration Amendment Regulations 2008 (No.2) (SLI 2008, No.56). Together with the repeal of Subclasses 103 and 804, r.1.20LAA(1)(a), (b), (e) and (f) were repealed by SLI 2014, No.65 for primary applications and most secondary applications made from 2 June 2014.

<sup>75</sup> Explanatory Statement to SLI 2008 No.56, p.18.

<sup>76</sup> These are Subclass 103 (Parent) visa, Subclass 114 (Aged Dependent Relative) visa, Subclass 143 (Contributory Parent) visa, Subclass 173 (Contributory Parent (Temporary)) visa, Subclass 804 (Aged Parent) visa, Subclass 838 (Aged Dependent Relative) visa, Subclass 864 (Contributory Aged Parent) visa and Subclass 884 (Contributory Aged Parent (Temporary)) visa.

<sup>77</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>78</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>79</sup> r.1.20LAA(3).

**Relevant legislative amendments**

<b>Title</b>	<b>Reference number</b>
<a href="#">Migration Amendment Regulations 2008 (No.2)</a>	SLI 2008, No.56
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Legislation Amendment Regulations 2009 (No.2)</a>	SLI 2009, No.116
<a href="#">Migration Amendment Regulations 2010 (No.1)</a>	SLI 2010, No.38
<a href="#">Migration Legislation Amendment Regulations 2011 (No.1)</a>	SLI 2011, No.105
<a href="#">Migration Amendment Regulations 2013 (No.1)</a>	SLI 2013, No.32
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65
<a href="#">Migration Legislation Amendment (2015 Measures No.2) Regulation 2015</a>	SLI 2015, No.103
<a href="#">Migration Legislation Amendment (2016 Measures No.3) Regulation 2016</a>	F2016L01390

**Available decision templates**

The following decision templates are designed specifically for parent visa reviews:

- [Subclass 103 – Parent](#) - This template is suitable for use in reviews of a decision to refuse a Subclass 103 parent visa. The template focuses on the issues of parent of settled child, sponsorship and the balance of family test, but can be used where any of the Subclass 103 criteria are in dispute.
- [Subclass 804 – Aged Parent](#) - This template is suitable for use in reviews of a decision to refuse a Subclass 804 aged parent visa. The template focuses on the issues of the parent of a settled child, sponsorship and the balance of family test, but can be used where any of the Subclass 804 criteria are in dispute.

**Last updated / reviewed: 20 October 2017**

# Definition of 'Parent' and Parent Visa Issues Including 'Balance of Family Test'

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## Overview

### Meaning of 'Parent'

Consideration of whether a person is a parent of another person arises in a number of contexts in migration legislation. For visa applications made prior to 1 July 2009, 'parent' is defined in r.1.03 of the Migration Regulations 1994 (the Regulations) to include an adoptive parent and a step parent. For visa applications made on or after 1 July 2009, 'parent' is defined in s.5(1) of the *Migration Act 1958* (Migration Act) by reference to the definition of child in s.5CA of the Act. Both definitions are non-exhaustive although the current definition recognises a broader class of persons as parents (see [below](#)).

### Parent visas

There are several visa subclasses that cater for parent migration. Apart from matters associated with processing times and fees however, the substantive criteria for the grant of a parent visa in any of the contributory or non-contributory categories are identical and include the balance of family test and sponsorship requirements discussed [below](#).

For a short period only during 2014, Subclass 103 (Parent) and Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>1</sup>

## Visa subclasses

### Contributory Parent visas

The Contributory Parent visa subclasses were introduced on 20 March 2003 by the *Migration Legislation Amendment (Contributory Parent Migration Scheme) Act 2003* (No.5 of 2003). These visas require successful applicants to make a significant contribution to the costs that the Government will incur as a result of their presence in the country. The contributions are imposed in the form of visa application charges, payable at various stages of the process.<sup>2</sup> Many more visas were made available in this category compared to the other non-contributory category which was originally intended to enable successful applicants to obtain a visa much more quickly.

### **Contributory Aged Parent (Subclasses 864 and 884) and Contributory Parent (Subclasses 143 and 173)**

The Contributory Aged Parent (Subclasses 864 (Residence) and 884 (Temporary)) visas are for parents whose age is equivalent to a person who is eligible for an Australian age pension and who is

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<sup>1</sup> Between 2 June 2014 to 25 September 2014, Class AX (Parent) (Migrant) Subclass 103 (Parent) and Class BP (Aged Parent) (Residence) Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class AX and Class BP visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

<sup>2</sup> These requirements are set out in item 1130(2) for Subclass 143; Item 1221(2) for Subclass 173; Item 1130A(2) for Subclass 864; and Item 1221A(2) for subclass 884.

willing to pay a higher application fee for priority processing (compared to applicants for an Aged Parent (Subclass 804) visa). These subclasses are for persons who are applying onshore. The Contributory Parent (Subclasses 143 (Migrant) and 173 (Temporary)) visas are similarly for persons who are willing to pay a higher application fee for priority processing (compared to applicants for a Parent (Subclass 103) visa) and are applying offshore.

The contributory parent visa stream includes temporary (Subclasses 884 and 173) and permanent (Subclasses 864 and 143) visas. Temporary visas are designed to give applicants the option of paying the significant contributions associated with a permanent application in two stages. If taking this option, applicants can apply first for a temporary visa, and then have an option to proceed to a permanent visa. Alternatively, applicants may apply for a permanent visa immediately (i.e. without having to hold a temporary visa first).

## **Non contributory visas**

### ***Parent (Subclass 103) and Aged Parent (Subclass 804)***

The Subclass 103 (Parent) visa is a permanent visa for parents who have children living in Australia who are applying offshore. The Subclass 804 (Aged Parent) visa is for parents who are onshore and have children who are living in Australia and is primarily for parents whose age is equivalent to a person who is eligible for an Australian age pension, although it is also possible for a person who holds a substituted Subclass 676 visitor visa<sup>3</sup> or a substituted Subclass 600 visitor visa<sup>4</sup> to apply as a parent to remain in Australia without meeting the age requirement. Requirements for a valid application are set out in Schedule 1 to the Regulations.<sup>5</sup>

These are the original visa subclasses for parent migration. A relatively low cap on the number of visas issued each year in this category resulted in there being a large number of applicants waiting for limited visas to become available. Applicants for these visas are able to transfer to the contributory stream of visas.

For a short period only during 2014, Subclass 103 (Parent) and Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>6</sup>

### ***Designated Parent (Subclass 118 and 859)***

The Subclass 118 (Designated Parent) visa was for offshore applicants whilst the Subclass 859 (Designated Parent) was an onshore visa. These visa subclasses were introduced as a response to the need for transitional provisions arising from the disallowance of the Migration Amendment Regulations 1998 (No.8) (No.285 of 1998) which sought to replace existing criteria for the Parent and

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<sup>3</sup> For visa applications made prior to 23 March 2013, the term 'Substituted Subclass 676 (Tourist) Visa' is defined in r.1.03 of the Migration Regulations 1994 as a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act.

<sup>4</sup> For visa applications made on or after 23 March 2013, the term 'Substituted Subclass 600 (Visitor) visa' is defined in r.1.03 as a Subclass 600 (Visitor) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act; or a Subclass 676 (Tourist) visa that was granted, before 23 March 2013, following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act: r.1.03 as amended by Migration Amendment Regulations 2013 (No.1) (SLI 2013, No.32).

<sup>5</sup> Item 1124 for Subclass 103; and Item 1123A for Subclass 804.

<sup>6</sup> Between 2 June 2014 to 25 September 2014, Class AX (Parent) (Migrant) Subclass 103 (Parent) and Class BP (Aged Parent) (Residence) Subclass 804 (Aged Parent) visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class AX and Class BP visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.



Aged Parent visas with more onerous requirements and increase the rate of assurance and bond monies to be paid by the Australian relative.

These visas are only available to applicants who made a valid application for a Parent or Aged Parent visa between 1 November 1998 and 30 March 1999 inclusive. An application could only be made upon invitation by the Minister,<sup>7</sup> and any application must have been made between 1 November 1999 and 28 April 2000 inclusive. These visa subclasses have been removed entirely from the Regulations from 22 March 2014.<sup>8</sup>

## Key issues

### Meaning of 'parent'

Where a visa application or other event has occurred prior to 1 July 2009 which requires the determination of whether a person is a 'parent', a person is taken to be a parent within the meaning of s.5(1) of the Migration Act if the person was a parent under r.1.03 immediately before 1 July 2009 and meets the requirements of s.5(1) of the Act as in force on 1 July 2009.<sup>9</sup>

Where the relevant period is after 1 July 2009, the relevant definition is set out in s.5(1) of the Act.

The 1 July 2009 change to the definition recognises a person as a parent of another where the child is a biological child of the person as well as in circumstances where one or both parties are not biologically related to the child.<sup>10</sup> This definition is broader than the pre 1 July 2009 definition of 'parent' in r.1.03 which recognised a person as a parent of a child only in opposite-sex relationships whether biological, step or adopted. A further difference is that a de facto partner (same-sex or opposite sex) can be a 'step-parent', whereas previously a step-relationship was only recognised when a biological parent married another person.

### **Visa application made on or after 1 July 2009 (s.5(1))**

For visa applications made on or after 1 July 2009, s.5(1) of the Migration Act provides that the term 'parent' is defined by reference to the definition of child in s.5CA of the Act, which provides 'without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in section 5CA'.<sup>11</sup>

### Children generally

'Child' is defined at s.5CA as someone who is a child of the person within the meaning of the *Family Law Act 1975* (Family Law Act), with the exception of an adopted child under the Family Law Act.

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<sup>7</sup> r.2.07AE. Note this regulation has been repealed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) for visa applications made on or after 22 March 2014, consistently with the removal of these subclasses from the Regulations from that date.

<sup>8</sup> Omitted by SLI 2014, No.30 for visa applications made on or after 22 March 2014. The definition of 'working age parent' and Notes 1 and 2 under that definition in r.1.03 were subsequently omitted by Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390) as they became redundant following the repeal of the Designated Parent visas.

<sup>9</sup> Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144).

<sup>10</sup> For example, relationships involving surrogacy or children born to persons in a same-sex relationship. Explanatory Memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.

<sup>11</sup> s.5(1) as inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective from 1 July 2009. The definition in the Act applies to visa applications made on or after 1 July 2009 by reference to the interpretation sections which were amended by SLI 2009, No.144 to refer to the definition in the Act (except for Subclass 804 visas which do not refer to a definition of 'parent').



Instead, s.5CA(1)(b) expressly includes a person who is an adopted child within the meaning of the Migration Act (i.e. in accordance with r.1.04 of the Regulations).

The Family Law Act does not precisely define who is a 'child'. However, a child-parent relationship under the Family Law Act generally refers to the relationships between a child and each of his or her biological parents. Given the link in s.5CA(1)(a) of the Migration Act to the Family Law Act, a 'child of a person' under the migration law would include a biological child of a person.

The 'child' definition in s.5CA of the Migration Act is also affected by the meaning of 'child' as expanded or modified under the Family Law Act.<sup>12</sup> Relevantly, this means that under s.5CA of the Migration Act, a child born to a couple before their marriage,<sup>13</sup> or a child born to a person or to a couple (including married,<sup>14</sup> or de facto partners whether of the same or opposite sex<sup>15</sup>) as a result of artificial conception procedure,<sup>16</sup> or surrogacy arrangement,<sup>17</sup> could be considered as the child of a particular person, or as a child of a person who is the 'product of a relationship'<sup>18</sup> the person has or had as a couple with another person, provided that certain requirements under the Family Law Act are met, though the child is not biologically related to the person(s).

#### Children born as a result of artificial insemination

More specifically, for s.5CA of the Migration Act, if a child was born to a woman as a result of artificial conception procedure while she was married to, or as a de facto partner<sup>19</sup> of another person (the couple), and either the couple consented<sup>20</sup> to the carrying out of the procedure and the donor of the genetic material consented to the use of the material, or under a prescribed law<sup>21</sup> the child is a child of the couple, then, under both the Family Law Act<sup>22</sup> and s.5CA(1)(a) of the Migration Act, the child would be considered as the 'child' of the couple unless the child has been adopted (under the Family Law Act) by a third person.<sup>23</sup>

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<sup>12</sup> Section 4 of the *Family Law Act* provides that Subdivision D of Division 1 of Part VII of the *Family Law Act* affects the situations in which a child is a child of a person or is a child of a marriage or other relationship. The subdivision contains a number of provisions dealing with issues of child-parent status, e.g. it provides that a reference to a child of a marriage includes ex-nuptial children. It also provides the position of children of de facto partner. Further, with some exceptions, this subdivision deems a child born as a result of an artificial conception procedure or surrogacy arrangements as the child of a particular person, child of a marriage or child of de facto partner, provided that certain requirements are met, though the child is not biologically related to the person(s).

<sup>13</sup> s.60F(1)(a) of the Family Law Act.

<sup>14</sup> See s.60F of the Family Law Act which deems certain children as children of marriage, and s.4 of the Family Law Act which defines 'child of a marriage'.

<sup>15</sup> The link in s.5CA(1) of the Act to ss.4(1), 4AA, 60EA and 60HA of the Family Law Act allows children of same sex relationships to be considered as 'child of a person' for the purposes of migration law.

<sup>16</sup> s.60H of the Family Law Act.

<sup>17</sup> s.60HB of the Family Law Act. A surrogacy arrangement is recognized in Australia if a court order under a prescribed law of a State or Territory is made to the effect that the child is the child of one or more persons; or each of one or more persons is a parent of a child.

<sup>18</sup> Explanatory Memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective 1 July 2009. Essentially, a child cannot be a 'product of a relationship' unless he or she is the biological child of at least one member of the couple (i.e. is conceived utilising the gametes of one party to the relationship), or was born to a woman in the relationship.

<sup>19</sup> This refers to 'de facto partner' and 'de facto relationship' within the meaning of ss.4AA, 60EA and 60HA of the Family Law Act, and not the meaning of 'de facto partner' under the migration law.

<sup>20</sup> s.60H(5) of the Family Law Act provides that a person is presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

<sup>21</sup> The prescribed laws for s.60H(1)(b)(ii) of the Family Law Act are set out in s.12C of the Family Law Regulations 1984 (Family Law Regulations) to include the *Status of Children Act 1996* (NSW); ss.10A, 10B, 10C, 10D, 10E, 13 and 14 of the *Status of Children Act 1974* (Vic); ss.17, 18, 19, 19C, 19D and 19E of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10A, 10B, 10C, 10D and 10E of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); s.11 of the *Parentage Act 2004* (ACT); and ss.5A, 5B, 5C, 5D, 5DA, 5E and 5F the *Status of Children Act* (NT).

<sup>22</sup> s.60H(1) of the Family Law Act.

<sup>23</sup> ss.60F(1) and (3), and ss.60HA(1) and (2) of the Family Law Act.

Where a child was born to a woman as a result of the carrying out of an artificial conception procedure and under a prescribed law,<sup>24</sup> the child is a child of the woman, the child would be considered the child of that woman regardless of whether the child is the biological child of the woman<sup>25</sup> for the purposes of both the Family Law Act and s.5CA(1)(a) of the Migration Act.

In circumstances where a child born under surrogacy arrangements and a court has made orders under a prescribed State/Territory law<sup>26</sup> to the effect that a child is the child of one or more persons; or each of one or more persons is a parent of a child, the 'child' would be considered for the purposes of the family law and migration law to be a child of each of those persons.<sup>27</sup>

Given the broad definition of 'child' under s.5CA(1), there may be circumstances where a person might be a child of more than two people as a result of s.5CA(1).<sup>28</sup> To ensure that a person cannot have more than two parents for the purposes of the Migration Act,<sup>29</sup> s.5CA(2) provides that the Regulations may specify that a person is not a child of another person in circumstances in which the person would, apart from s.5CA(2), be the child of more than 2 persons for the purposes of the Act. Section 5CA(3) clarifies that regulations made under s.5CA(2) may specify any person as not being the child of another person whether the child relationship between the two people came within the ordinary meaning of the word 'child' or arose by the operation of s.5CA(1).<sup>30</sup>

#### Adopted children

In addition, r.1.14A(2)<sup>31</sup> specifies for the purposes of s.5CA(2) that a child that is formally adopted in accordance with r.1.04(1)(a) or (b) is the child of the adoptive parents and not the child of any other person (including the child's parent or adoptive parent before the adoption). Regulation 1.14A(1) provides that a reference in the Regulations to a parent includes a step-parent, and r.1.14A contains a note stating that a child cannot have more than 2 parents (other than step-parents) unless the child has been adopted under customary arrangements entered into outside Australia that meet r.1.04(2). Thus, if formal adoption arrangements are entered into which meet the requirements of r.1.04(1)(a) or (b), the child's previous child-parent relationship is no longer recognised. However, despite the note to r.1.14A stating that a person cannot have more than 2 parents (other than step-parents) and unless the child has been adopted under customary adoption arrangements, the circumstances where a person is a child of more than 2 persons as a result of artificial conception or surrogacy arrangements are not specifically addressed.

For further discussion see MRD Legal Services Commentary: [Familial Relationships](#), [Adoption](#) and [Subclass 101 and 802: Child visas](#).

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<sup>24</sup> The prescribed laws for s.60H(2)(b) of the Family Law Act are set out in s.12CA of the Family Law Regulations to include s.14 of the *Status of Children Act 1996* (NSW); ss.15 and 16 of the *Status of Children Act 1974* (Vic); s.23 of the *Status of Children Act 1978* (Qld); *Artificial Conception Act 1985* (WA); ss.10B and 10C of the *Family Relationships Act 1975* (SA); Part III to the *Status of Children Act 1974* (Tas); ss.11(2) and 11(3) of the *Parentage Act 2004* (ACT); and ss.5B, 5C and 5E of the *Status of Children Act* (NT).

<sup>25</sup> s.60H(2) of the Family Law Act. A similar provision in s.60H(3) of the Family Law Act provides that if the child is born to a woman as a result of artificial conception procedures and under a prescribed law, the child is a child of a man, the child is deemed to be the child of the man. However, no law has been prescribed for the purposes of s.60H(3).

<sup>26</sup> The prescribed laws are set out in s.12CAA of the Family Law Regulations to include s.22 of the *Status of Children Act 1974* (Vic); s.22 of the *Surrogacy Act 2010* (Qld); s.21 of the *Surrogacy Act 2008* (WA); s.26 of the *Parentage Act 2004* (ACT); s.10HB of the *Family Relationships Act 1975* (SA) and s.12 of the *Surrogacy Act 2010* (NSW).

<sup>27</sup> s.60HB of the Family Law Act.

<sup>28</sup> Explanatory Memorandum accompanying the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* pp.136 - 137.

<sup>29</sup> Explanatory Memorandum accompanying the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* p.137.

<sup>30</sup> As inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, effective from 1 July 2009.

<sup>31</sup> As inserted by SLI 2009, No.144 for visa applications made on or after 1 July 2009.

### **Visa application made prior to 1 July 2009 (r.1.03)**

For visa applications made prior to 1 July 2009, r.1.03 provides that the term parent 'includes an adoptive parent and a step-parent'.<sup>32</sup>

In *Hunt v MIEA* the Federal Court held that the expanded class of parents contained in the definition was not *to the exclusion* of biological parents.<sup>33</sup> Accordingly, a parent-child relationship may arise biologically, through adoption or a step relationship.

Given that this statutory definition of 'parent' is non-exhaustive, consideration should be given to the ordinary meaning of the term 'parent'. The observations of the Full Federal Court in the case of *H v MIAC*<sup>34</sup> on the meaning of the word 'parent' in the *Australian Citizenship Act 2007* would also appear relevant. The Court stated in that case:

*There is nothing in the legislative object, the legislative text, or the legislative structure of the Citizenship Act that requires the Court to conclude that, in the specific context of s16(2), the word "parent" only can mean biological parent...*

*The word "parent" is an everyday word in the English language, expressive both of status and relationship to another. Today... not all parents become parents in the same way:... This is not to say that parents do not share common characteristics; everyday use of the word indicates that they do.*

*Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological... Typically, parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own.*

*The ordinary meaning of the word "parent" is, however, clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning.*<sup>35</sup>

This indicates that in interpreting the meaning of 'parent' in relation to a visa application made prior to 1 July 2009, consideration should first be given to the legislative object, text, structure and context of the definition in r.1.03, to determine whether it should be given a meaning (either narrower or broader) than its ordinary meaning. In this regard, the fact that the definition in r.1.03 applies for the Regulations generally, and is not differentially defined for different subclasses, supports the view that it is to be given its ordinary meaning, rather than any technical meaning.

The effect of Australian law is that the adopted child becomes in law the child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopters.<sup>36</sup> (For further explanation, see 'The effect of adoption under Australian law generally' in the MRD Legal Services commentary: [Adoption](#) and [Adoption Visa: Subclass 102](#)).

In relation to particular types of parent, such as step-parents and adoptive parents, regard should similarly be had to the legislative context in which those terms appear when construing them. For example, while the Regulations include a specific definition of step-child in r.1.03 (a child is a step-child of a person only while the person is the current spouse of the natural parent, unless the child is under 18 years and the person has a parenting order or guardianship or custody in respect of the

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<sup>32</sup> The definition was omitted by SLI 2009, No.144, with the effect that it applies only to visa applications made prior to 1 July 2009.

<sup>33</sup> (1993) 43 FCR 380.

<sup>34</sup> (2010) 188 FCR 393.

<sup>35</sup> *H v MIAC* (2010) 188 FCR 393, per Moore, Kenny and Tracey JJ, at [127] – [130].

<sup>36</sup> *Adoption Act 1993* (ACT), s.43(1)(a); *Adoption Act 2000* (NSW), s.95(2)(c), *Adoption of Children Act 1994* (NT), s.45(1)(a); *Adoption Act 2009* (Qld), s.214(2); *Adoption Act 1988* (SA), s.9(1); *Adoption Act 1988* (Tas), s.50(1)(a); *Adoption Act 1988* (Vic), s.53(1)(a); *Adoption Act 1994* (WA), s.75(1)(a).

child),<sup>37</sup> in the absence of a specific definition of step-parent in the Regulations, it is arguable that the term 'step-parent' may be broader than simply the inverse of 'step-child', having regard to the ordinary meaning of the term and its usage in other areas. The term 'adoptive parent' is defined for Subclass 102 (Adoption) visas,<sup>38</sup> but not for the Migration Act and Regulations generally.

### Meaning of 'aged parent'

'Aged parent' is defined in r.1.03 of the Regulations as a 'parent' who is old enough to be granted an age pension under the *Social Security Act 1991*. This definition requires consideration of the term 'parent' which is also a defined term in migration legislation (see [above](#)). To ascertain whether a person is old enough to be granted an age pension, regard must be had to ss.23(5A) to (5D) of the *Social Security Act 1991*. Currently, the relevant age varies depending on the year in which the individual was born.

This relationship arises in the context of the Subclass 804 (Aged Parent); Subclass 864 (Contributory Aged Parent); Subclass 884 (Contributory Aged Parent (Temporary)) and two now redundant visa subclasses.<sup>39</sup>

### Balance of family test – r.1.05

The 'balance of family test' is a defined term,<sup>40</sup> and a criterion that must be satisfied at time of application for most parent visa subclasses other than where an applicant is applying for a Designated Parent (Subclass 859) visa<sup>41</sup> or one of the permanent contributory visas (Subclass 143 or 864) and at the time of the application<sup>42</sup> was the holder of a temporary contributory (Subclass 173 or 884) visa or a substituted Subclass 676 visa<sup>43</sup> or a substituted Subclass 600 visa<sup>44</sup>.

The balance of family test is different for visa applications made prior to 1 July 2011 and those made on or after 1 July 2011.<sup>45</sup> The details of the test prior to and after 1 July 2011 are set out below.

#### **Visa applications made before 1 July 2011**

For visa applications made before 1 July 2011, the balance of family test set out in r.1.05 provides that a parent satisfies the balance of family test if the number of his or her children [lawfully and](#)

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<sup>37</sup> The definition of step-child was amended by Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.38) for visa applications made on or after, or not finally determined, before 27 March 2010 to refer to 'parenting order' consistent with the relevant terms in the *Family Law Act 1975* (the *Family Law Act*). The definition of 'parenting order' was inserted at the same time to give it the meaning given by ss.64B(1) of the *Family Law Act*.

<sup>38</sup> cl.102.111.

<sup>39</sup> The definition of 'aged parent' also previously applied to Subclass 118 (Designated Parent) and Subclass 859 (Designated Parent) visas. However, these visa subclasses were removed by SLI 2014, No.30 affecting visa applications made on or after 22 March 2014.

<sup>40</sup> r.1.03, which refers to r.1.05.

<sup>41</sup> The Subclass 859 (Designated Parent) visa subclass was removed by SLI 2014, No.30 for visa applications made on or after 22 March 2014.

<sup>42</sup> The time of decision requirement for the balance of family test was removed by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116) for visa applications made on or after 1 July 2009 or not finally determined before that date (r.9). Note that this remains a time of decision requirement for Designated Parent (Subclass 118 and 859) visas.

<sup>43</sup> For visa applications lodged prior to 23 March 2013, a 'substituted Subclass 676 visa' is defined at r.1.03 as 'a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act'.

<sup>44</sup> For visa applications made on or after 23 March 2013, r.1.03 defines 'Substituted Subclass 600 (Visitor) visa' as a Subclass 600 (Visitor) visa that was granted following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act; or a Subclass 676 (Tourist) visa that was granted, before 23 March 2013, following a decision by the Minister to substitute a more favourable decision under ss.345, 351, 391, 417, 454 or 501J of the Act, r.1.03 as amended by SLI 2013, No.32.

<sup>45</sup> r.1.05 as amended by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011, No.105).

[permanently resident](#) (or eligible NZ citizens who are usually resident) in Australia is either: greater than or equal to the total number of children who are resident overseas; or, greater than the greatest number of children who are resident in any single overseas country.

The table below illustrates the application of the balance of family test for visa applications made before 1 July 2011.

Total no. of children	In Australia	In Country B	In Country C	In Country D	Test Met
1	1	-	-	-	Yes
2	1	1	-	-	Yes
3	2	1	-	-	Yes
	1	1	1	-	No
	1	2	-	-	No
4	1	1	1	1	No
	2	2	-	-	Yes

#### 'Lawfully and permanently resident in Australia'

The phrase 'lawfully and permanently resident' is not defined in the legislation. The Migration Regulations use several terms in the context of requirements relating to an individual's connection to Australia, for example, 'Australian permanent resident', 'settled Australian permanent resident', 'lawfully and permanently resident in Australia' and 'usually resident' or 'usually residing in Australia'. The use of these different terms, sometimes within the same sub-regulation, suggests that the phrases do not have the same meaning. There would also appear to be a hierarchy of terms in relation to the child's connection to Australia. For example, in the context of parent visas, the sponsor must be a settled Australian permanent resident (or citizen); a child who is counted in the balance of family test must be 'lawfully and permanently resident' in Australia, unless they are on a special category visa in which case they need only be 'usually resident.' The highest category, that of 'settled Australian permanent resident', undeniably requires the sponsoring child to hold a permanent visa *and* to have 'usually resided' in Australia for a reasonable period. This is apparent in the definition of specified terms 'Australian permanent resident' and 'settled' in r.1.03. The phrases 'lawfully and permanently resident' and 'usual residence' or 'usually resides' on the other hand, are not specifically defined in the legislation.

The concept of 'residency' has received judicial consideration in a number of cases, albeit not always in a migration context. Whilst the meaning of residence will depend on the particular statutory context, the courts have generally interpreted the concept of residence to mean where a person lives or resides. In *Hafza v Director-General of Social Security*, Wilcox J explained the concept of residence as follows:

***As a general concept residence includes two elements: physical presence in a particular place and the intention to treat that place as home; at least for the time being, not necessarily for ever. (emphasis added)***<sup>46</sup>

The phrases 'ordinarily resident' or 'usually resident' have also been interpreted to mean the place where a person is currently settled; they do not require an intention to live in a place permanently or

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<sup>46</sup> (1985) 60 ALR 674 at 680.

indefinitely.<sup>47</sup> For further discussion of the common law concept of 'usual residence' see the MRD Legal Services Commentary: [Usually resident](#).

In light of this background, the phrase 'permanently resident in Australia' suggests that a person must intend to live in Australia permanently or indefinitely. However, given the apparent hierarchy of terms, the term may require something less than being an 'Australian permanent resident' (which requires a person to be on a permanent visa as well as usually resident in Australia). On the other hand, holding a permanent visa would not, in itself, establish that a person is either resident, usually resident, or even lawfully and permanently resident in Australia, as physical presence (and arguably, intention) is still required. The Court in *Hafza*<sup>48</sup> found that whether a person resides in Australia is a question of fact and depends on the person's continued connection to Australia.

On this analysis, evidence that a person has resided in Australia on a valid temporary visa, and demonstrates an intention to reside here permanently, may support a conclusion that the person is 'lawfully and permanently resident' in Australia. The intention to reside here permanently can be inferred to have existed, or exist, by the subsequent, or impending, grant of permanent residency. It should be noted, however, that Departmental policy would appear to imply that the term 'lawfully and permanently resident' normally requires a person to hold a permanent visa.

#### **Visa applications made on or after 1 July 2011**

For visa applications made on or after 1 July 2011, the balance of family test requires the number of a parent's 'eligible children' to be greater than or equal to the number of 'ineligible children', or that the greatest number of 'ineligible children' who are usually resident in a particular overseas country is less than the number of 'eligible children'.

'Eligible child' is defined as a child of the parent who is an Australian citizen, an Australian permanent resident [usually resident](#) in Australia or an eligible New Zealand citizen usually resident in Australia. This differs from the pre-1 July 2011 definition which did not include a child who is an Australian citizen.<sup>49</sup>

Any other child of the parent is an 'ineligible child' who will then count against the number of 'eligible children'.<sup>50</sup> There are changes which allow a clearer determination of which overseas country an ineligible child is taken to reside in,<sup>51</sup> and to change the presumption regarding the child's residence if the whereabouts of the child are unknown.<sup>52</sup>

The provision also makes clear that children / step children of former spouses or de facto partners of a parent under the definition will not be considered a 'child' for the purposes of the test.<sup>53</sup> This is a clarification from the pre- 1 July 2011 provisions.

The table below illustrates the application of the balance of family test for visa applications made on or after 1 July 2011.

Total no. of children	In Australia	In Country B	In Country C	In Country D	Test Met
1	1				Yes

<sup>47</sup> see *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309.

<sup>48</sup> (1985) 60 ALR 674.

<sup>49</sup> r.1.05(2)(a) amended by SLI 2011, No.105.

<sup>50</sup> r.1.05(2)(b) amended by SLI 2011, No.105.

<sup>51</sup> r.1.05(2B) amended by SLI 2011, No.105.

<sup>52</sup> r.1.05(1)(b) amended by SLI 2011, No.105. See also the Explanatory Statement to SLI 2011, No.105, p.6.

<sup>53</sup> r.1.05(1)(a)(ii) amended by SLI 2011, No.105.



2	1	1			Yes
3	2	1			Yes
3	1	1	1		No
3	1	2			No
4	1	1	1	1	No
4	2	2			Yes
5	2	1	1	1	Yes

### ***Which children are counted?***

The Regulations specify which children are, and are not, to be counted for the purposes of the balance of family test. There is some difference between the pre and post 1 July 2011 versions of the test.

#### Visa applications made before 1 July 2011

Children counted in the test include all natural, adopted and step-children of either:

- the parent;
- the parent's partner;<sup>54</sup>
- the former partner<sup>55</sup> of the parent, if the child was born, adopted or acquired (as a step-child) before or during that relationship.

However, no account is to be taken of:

- children who have been removed from the 'exclusive custody of the parent' by court order, adoption or operation of law; or
- children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country; or
- children who are residents of refugee camps operated by the UNHCR or the government of Hong Kong and are registered with the UNHCR.

#### Visa applications made on or after 1 July 2011

Children counted towards the test include all natural, adopted and step-children of the parent or the parent's *current* spouse or *current* de facto partner.<sup>56</sup>

However, no account is to be taken of:

- children who have been removed from the 'exclusive custody of the parent' by court order, adoption or operation of law; or
- children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country; or
- children who are residents of refugee camps operated by the UNHCR and are registered with the UNHCR.

<sup>54</sup> For applications made prior to 1 July 2009, 'spouse' is defined in r.1.15A and may include either a married or opposite sex de facto relationship. For visa applications made on or after 1 July 2009, 'spouse' is defined in the Act at s.5F to refer only to married relationships and 'de facto partner' is defined in s.5CB to include both same sex and opposite sex de facto partners.

<sup>55</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>56</sup> r.1.05(1)(a)(ii) as amended by SLI 2011, No.105.



To date there is no specific case law addressing any of the above excluded categories of children.

Removal from the exclusive custody: r.1.05(3)(a)

*Application*

Regulation 1.05(3)(a) specifies that in applying the balance of family test, no account is to be taken of a child of the parent if the child has been removed by court order, adoption or law (other than marriage) from the 'exclusive custody' of the parent. There is some ambiguity as to the proper interpretation of r.1.05(3)(a).

Departmental Policy (PAM3) provides<sup>57</sup> that r.1.05(3)(a) is intended to refer to circumstances where a person, in the first instance, had exclusive custody of the child (for example, as a result of the death of a partner or awarding of sole custody by a court order) and, subsequently, that custody is removed (for example, as a result of the child being adopted out or removed by court order).<sup>58</sup>

The term 'exclusive custody' is not further defined in the Act or the Regulations. However, 'custody' in relation to a child is defined in r.1.03 to mean:

- (a) the right to have the daily care and control of the child; *and*
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.

PAM3 further provides that the person must have the sole legal right to have daily care and control of the child and the *sole legal* right and responsibility to make the relevant decisions. However, PAM3 clarifies that if an applicant parent has divorced and sole custody is granted to the other parent, the applicant is *not* considered to have had that child removed from their exclusive custody.<sup>59</sup>

PAM3 covers custody of children in marriage and de facto relationships and states that it is considered to be shared custody in which both parents have a legal responsibility towards the children.<sup>60</sup>

Finally, in relation to adoption, PAM3 states that the removal of a child from a parent by adoption should be interpreted as removal from exclusive custody as the adoption has the effect in law of severing the legal relationship to the natural parent. The adoption is valid for visa-related purposes only if it occurred when the child was under 18 years old.<sup>61</sup>

However in respect of each of the above scenarios, the PAM3 interpretation is narrow and would appear to only apply in a limited range of cases where the person had exclusive custody of the child as a result of the death of a spouse or the granting of sole custody by a court and has later had that custody removed as a result of adoption or court order.

An alternative approach is that the word 'exclusive' should only be construed as meaning exclusive of the rest of the world. In other words, parents inherently share exclusive custody of their children in the

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<sup>57</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>58</sup> PAM3 notes that in practice, it would be rare for a child to be excluded from the balance of family test on the grounds that they had been removed from the exclusive custody of the parent at [15].

<sup>59</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>60</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

<sup>61</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15].

sense that only they, and not other persons, have custody rights.<sup>62</sup> This alternative construction however appears to be a strained construction of the Regulation that leaves the word 'exclusive' with no real role to play.

#### Human Rights abuses: r.1.05(3)(b)

As noted above children who experience human rights abuse or persecution and it is not possible for the family to be reunited in another country are excluded from the balance of family test. There is no case law on r.1.05(3)(b). Whether a person meets this requirement is a finding of fact on all of the claims and evidence before the decision-maker. This may include any relevant country information pertaining to the situation in a particular country.

#### Refugee Child: r.1.05(3)(c)

A child is not counted in the balance of family test if they are registered by the UNHCR as a refugee and living in a camp operated by that organisation. This is a finding of fact for the decision-maker on all the available evidence. PAM3 guidance suggests that verification of the child's location and refugee status can be sought from the Post in the camp's region.<sup>63</sup> If there is no record available, PAM3 guidance states that the child should be regarded as being of unknown whereabouts and resident in the child's last known country of usual residence.<sup>64</sup> However, this appears restrictive and decision-makers should be aware that any such findings would need to be supported by relevant evidence before the tribunal.

#### Step children

With some exceptions step children may be counted for the purposes of the balance of family test.

*Step-child* is defined at r.1.03 as being a person who is not the child of the parent but is the child of the parent's current spouse or de facto partner.<sup>65</sup> Alternatively, a step-child may be a person who is not the child of the parent but is the child of the parent's former spouse or de facto partner, has not turned 18, and the parent has a parenting order or guardianship or custody over the child.<sup>66</sup> For more detail see the MRD Legal Services commentary: [Familial relationships](#).

Therefore, step children of the parent's current spouse or de facto partner will be counted towards the balance of family test, as will children of past partners where there is a parenting order or guardianship or custody over the child. Apart from this exception, step-children of past relationships will not apply towards the test – and this was specifically addressed in the 1 July 2011 changes.<sup>67</sup>

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<sup>62</sup> This construction also appears consistent with the legal position under the family law in Australia that subject to court orders, each of the parents of a child who is not 18 has parental responsibility for the child, see s.61C of the *Family Law Act*.

<sup>63</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15.2]. PAM3 suggests that any request to the Post should include details such as: full name, date and place of birth, country of last residence, camp of current residence, approximate date of arrival in camp, date the child obtained refugee status and details of any known contact with UNHCR.

<sup>64</sup> PAM3: Sch2 Parent visas– Balance of family test – regulation 1.05 (compilation 01/07/2016) at [15.2].

<sup>65</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>66</sup> See r.1.03, 'step-child' definition.

<sup>67</sup> Explanatory Statement to SLI 2011, No.105 and r.1.05(1)(a)(ii) as amended by SLI 2011, No.105. Note that the versions of r.1.05 applicable to visa applications lodged before 30 June 2011 appear anomalous, in that they exclude an adult step-child of the parent and a former partner (r.1.03 and r.1.05(3)(d)) from the balance of family test, but do not exclude an adult child of a former partner: r.1.05(1). Departmental guidelines published during this period state: 'Children who do not meet the regulation 1.03 definition of step-child are not to be counted in the balance of family test, even if they could otherwise be included in the visa application as a child of a former spouse of the applicant under r.1.05(1)(a)': PAM3 Div 1.2 – Interpretation – Reg 1.05 – Balance of family test – The Children – 5.3 Step-children who do not count. The Guidelines go on to state that cases should be referred to National Office if the visa applicant is disadvantaged as a result of the r.1.03 step-child definition.

### Deceased Children

The balance of family test only counts those children of a parent who are living. Where a child is claimed to be deceased, the tribunal must be satisfied as a question of fact that the child is dead. Such a finding may be based on documentary evidence such as death certificates, statutory declarations, and court declarations of presumption of death. However, there is no requirement that specific forms of documentary evidence be provided. In some cases, the tribunal may be satisfied on the basis of other evidence including oral evidence at hearing. It is also open to the tribunal to make a factual finding that a child is presumed dead on the basis of satisfaction that there are circumstances that would satisfy the common law presumption of death. For further discussion on the common law presumption of death, please see the MRD Legal Services Commentary: [Remaining Relative](#).

### Missing Children

Missing children whose whereabouts have been unknown for 7 years or more may be excluded by the application of the common law presumption of death. For example, where the child has disappeared in circumstances where it is likely that they are dead, evidence of this may enable a conclusion to be made that the child is presumed dead. For further discussion on the common law presumption of death, please see the MRD Legal Services commentary: [Remaining Relative](#).

### Extra Marital Children

Extra-marital children of the parent would generally be counted in the balance of family test as they are children of the applicant as defined by r.1.05(1)(a). However, children born to a partner's<sup>68</sup> concurrent relationship would not come within the definition (unless the child has been adopted by the applicant) because the spouse's ongoing relationship with a third party would generally preclude that relationship being recognised as a spousal or de facto relationship within the meaning of r.1.15A (for visa applications made prior to 1 July 2009), or s.5F or 5CB (for visa applications made on or after 1 July 2009) because of the requirement that there be a 'mutual commitment to a shared life to the exclusion of all others'.

### **Sponsorship**

Parents must be sponsored by a 'settled' Australian citizen, permanent resident or eligible New Zealand citizen who has turned 18.<sup>69</sup> If the child has turned 18, the child or his or her cohabiting partner<sup>70</sup> must sponsor the parent. However, if the child has not turned 18 the sponsor may be the child's cohabiting spouse, a relative or guardian of the child or his or her cohabiting spouse, or a community organisation.<sup>71</sup> A criterion at time of decision for visa applicants who have applied for a Subclass 103 or 804 visa (the non-contributory parent visas) is that the sponsorship is in force. The

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<sup>68</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>69</sup> cl.103.212, 173.212, 804.212 and 884.212.

<sup>70</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>71</sup> cl.103.212(3). For visa applications made prior to SLI 2009, No.144, the term 'spouse' is defined in r.1.15A (i.e. married or opposite sex de facto partner). For applications made on or after 1 July 2009, the definition of 'spouse' in s.5F of the Act (as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*) and amended by SLI 2009, No.144 refers only to married relationships. The effect of the changes is that matters involving a child under 18, would only involve a 'cohabiting spouse' in limited circumstances (because of the age requirements for a valid marriage under the *Family Law Act*). For visa applications made on or after and not finally determined before 27 March 2010, 'close relative' was effectively replaced by 'relative': SLI 2010, No.38.

sponsor does not have to be the same sponsor as at time of application, although the sponsor would need to be of the kind mentioned in the time of application criterion relating to sponsorship.<sup>72</sup>

For further information on the 'settled' requirement, see the MRD Legal Services commentary: [Settled](#).

### **Restrictions on sponsorship of parent visas**

Regulation 1.20LAA operates to preclude a person previously granted a Subclass 802 (Child) visa from sponsoring his or her current or former parents to migrate to Australia, where that person has provided a letter of support<sup>73</sup> from a State or Territory government welfare authority with his or her Subclass 802 (Child) visa application.<sup>74</sup> The intention of the provision is to discourage non-citizen parents from deliberately abandoning their children in Australia with the intention of later being sponsored by them to migrate to Australia.<sup>75</sup>

Regulation 1.20LAA(2) provides that the Minister is precluded from approving the sponsorship of an applicant for parent visa as listed in r.1.20LAA(1)<sup>76</sup> when he or she is satisfied that the applicant for that visa is or was a parent of a holder or former holder of a Subclass 802 (Child) visa whose visa was granted on letter of support grounds and the proposed sponsor for the applicant is:

- a Subclass 802 (Child) visa holder or former holder whose application was supported by a letter of support;
- a cohabiting partner;<sup>77</sup>
- a guardian;
- a guardian of a person who is a cohabiting spouse partner;<sup>78</sup> or
- a community organisation.

The Minister does, however, have a discretion to approve a sponsorship in such circumstances if the Minister is satisfied that there are compelling circumstances affecting the sponsor or the applicant.<sup>79</sup>

### **Relevant case law**

[R v Barnet London Borough Council; Ex parte Shah \[1983\] 2 AC 309](#)

[H v MIAC \[2010\] FCAFC 119; \(2012\) 188 FCR 393,](#)

[Hafza v Director-General of Social Security \[1985\] FCA 164; \(1985\) 60 ALR 674](#)

<sup>72</sup> The change in sponsorship requirements at time of decision was amended by SLI 2009, No.116, for visa applications made on or after, and not finally determined before, 1 July 2009.

<sup>73</sup> r.1.20LAA(4) defines 'letter of support' for the purpose of the Regulation.

<sup>74</sup> This provision applies only to visa applications made on or after 26 April 2008: Migration Amendment Regulations 2008 (No.2) (SLI 2008, No.56). Together with the repeal of Subclasses 103 and 804, r.1.20LAA(1)(a), (b), (e) and (f) were repealed by SLI 2014, No.65 for primary applications and most secondary applications made from 2 June 2014.

<sup>75</sup> Explanatory Statement to SLI 2008 No.56, p.18.

<sup>76</sup> These are Subclass 103 (Parent) visa, Subclass 114 (Aged Dependent Relative) visa, Subclass 143 (Contributory Parent) visa, Subclass 173 (Contributory Parent (Temporary)) visa, Subclass 804 (Aged Parent) visa, Subclass 838 (Aged Dependent Relative) visa, Subclass 864 (Contributory Aged Parent) visa and Subclass 884 (Contributory Aged Parent (Temporary)) visa.

<sup>77</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>78</sup> The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

<sup>79</sup> r.1.20LAA(3).

**Relevant legislative amendments**

Title	Reference number
<a href="#">Migration Amendment Regulations 2008 (No.2)</a>	SLI 2008, No.56
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Legislation Amendment Regulations 2009 (No.2)</a>	SLI 2009, No.116
<a href="#">Migration Amendment Regulations 2010 (No.1)</a>	SLI 2010, No.38
<a href="#">Migration Legislation Amendment Regulations 2011 (No.1)</a>	SLI 2011, No.105
<a href="#">Migration Amendment Regulations 2013 (No.1)</a>	SLI 2013, No.32
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65
<a href="#">Migration Legislation Amendment (2015 Measures No.2) Regulation 2015</a>	SLI 2015, No.103
<a href="#">Migration Legislation Amendment (2016 Measures No.3) Regulation 2016</a>	F2016L01390

**Available decision templates**

The following decision templates are designed specifically for parent visa reviews:

- [Subclass 103 – Parent](#) - This template is suitable for use in reviews of a decision to refuse a Subclass 103 parent visa. The template focuses on the issues of parent of settled child, sponsorship and the balance of family test, but can be used where any of the Subclass 103 criteria are in dispute.
- [Subclass 804 – Aged Parent](#) - This template is suitable for use in reviews of a decision to refuse a Subclass 804 aged parent visa. The template focuses on the issues of the parent of a settled child, sponsorship and the balance of family test, but can be used where any of the Subclass 804 criteria are in dispute.

**Last updated / reviewed: 20 October 2017**

**FAMILY VISAS - REGISTER OF GAZETTE NOTICES / WRITTEN INSTRUMENTS**

No.	Tab name	Instrument type
1	Index	
2	HealthServiceProvider	<a href="#">Health Service Provider for the purposes of r.1.15AA(2)</a>
3	ImpairmentRating	<a href="#">Impairment rating for the purposes of r.1.15AA(1)(c)</a>
4	Schedule 1 Child Visa Applications	<a href="#">Arrangements for Child Visa Applications r.2.07(5)</a>
5	Schedule 1 Family Visa Applications	<a href="#">Arrangements for Other Family and New Zealand (Family Relationship) Visa Applications r.2.07(5)</a>
6	Parent & Other Family Visa Caps	<a href="#">Limit of Parent, Aged Parent and Other Family visas per financial year for the purposes of s.85</a>
7	Schedule 1 Parent Visa Applications	<a href="#">Arrangements for Parent Visa Applications r.2.07(5)</a>
8	Temporary Sponsored Parent Visa - Income T	<a href="#">Income Test for Sponsorship for Temporary Sponsored Parent Visa</a>
9	Temporary Sponsored Parent Visa - Form & F	<a href="#">Arrangements for Sponsorship for Temporary Sponsored Parent Visa</a>
10	Temporary Sponsored Parent Visa - Manner t	<a href="#">Manner for Providing Details of a Change in Certain Events for an approved Sponsor of a Temporary Sponsored Parent Visa</a>
11	Temporary Sponsored Parent Visa - Applicati	<a href="#">Arrangements for Temporary Sponsored Parent Visa Applications r.2.07(5)</a>

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## Health Service Provider for the purposes of r.1.15AA(2)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Health Services Provider (Subregulation 1.15AA(2))	<a href="#">14/085</a>	F2014L01278	12noon on 25/09/2014	-	14/041	<a href="#">yes</a>	Dated 25/09/14; Registered 25/09/14; Commences 12noon on 25/09/14
Health Services Provider (Subregulation 1.15AA(2))	<a href="#">14/041</a>	F2014L00980	21/07/14	11:59am on 25/09/2014	-	<a href="#">yes</a>	Dated 02/07/14; Registered 11/07/14; Commences 21/07/2014
Specification of health service provider for the purposes of r.1.15AA(2)	<a href="#">07/013</a>	F2007L01082	23/04/07	25/07/14	-	<a href="#">yes</a>	Dated 16/4/07; Commences 23/4/07; revoked by MMI14/063

### Notes

1. Regulation 1.15AA(2) provides that a certificate meets the requirements of this subregulation if (a) it is a certificate: (i) in relation to a medical assessment carried out on behalf of a health service provider specified by the Minister in an instrument in writing; and (ii) signed by the medical adviser who it carried out; or (b) it is a certificate issued by a health service provider specified by the Minister in an instrument in writing in relation to a review of an opinion in a certificate mentioned in paragraph (a), that was carried out by the health services provider in accordance with its procedures.

2. While not free from doubt, as IMMI 14/041 does not purport to revoke IMMI07/013 (which appears to be subsequently achieved through IMMI14/063), both appear to be in effect between 21 and 25 July 2014 and so an applicant may attend either Bupa or Health Services Australia for the purpose of a relevant health assessment in that period. This view is supported in the use of the indefinite article in paragraph 3 of the explanatory statement, which provides the "Instrument operates to specify Bupa as a health service provider for the purposes of the carer definition in regulation 1.15AA kept in force by Part 30 of Schedule 13 to the Regulations" and the subsequent revocation by IMMI14/063. However, given that that HSA no longer exists (it has been merged with Medibank to form Medibank Health Solutions) assessments cannot be undertaken at HSA any more, with the practical effect that applicants can only attend Bupa from this date.

3. IMMI 14/085 commences immediately after the disallowance of the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 which was disallowed by the Senate at 12noon on 25 September 2014.



### Impairment rating for the purposes of r.1.15AA(1)(c)

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Specification of impairment rating for the purposes of r.1.15AA(1)(c)	<a href="#">17/126</a>	-	F2017L01345	14/10/2017	-	07/012	<a href="#">yes</a>	Dated 10/10/17, commences 14/10/17 (maintained 07/012 which ceased after 10 year sunseting provisions)
Specification of impairment rating for the purposes of r.1.15AA(1)(c)	<a href="#">07/012</a>	-	F2007L01081	23/04/07	13/10/17	GN 47	<a href="#">yes</a>	Dated 16/04/07; Commences 23/04/07
Specification of impairment rating for the purposes of r.1.15AA(1)(c)	-	<a href="#">GN 47</a>	F2006B00541	01/12/98	22/04/07	-	No	Dated 16/11/98; Has effect on and from 1/12/98

**Notes**

1. Regulation 1.15AA(1)(c) provides that the rating mentioned in r.1.15AA(1)(b)(iii) must be equal to, or exceed, the impairment rating specified by Gazette Notice for r.1.15AA(1)(c).
2. Regulation 1.15AA(1)(b)(iii) provides that according to a certificate that meets the requirements of r.1.15AA(2), the impairment has, under the Impairment Tables, the rating that is specified in the certificate.

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**Arrangements for Child Visa Applications r.2.07(5)**

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Arrangements for Child Visa Applications 2016/051 (Items 1108, 1108A and 1211)	<a href="#">16/051</a>	-	F2016L01389	6/09/16	-	15/136	<a href="#">yes</a>	Dated 1 September 2016. Commences 6 September 2016.
Arrangements for Child Visa Applications 2015 (Items 1108, 1108A and 1211)	<a href="#">15/136</a>	-	F2015L01963	14/12/15	5/09/16	15/030	<a href="#">yes</a>	Dated 10 December 2015. Commences immediately after the commencement of <i>Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015</i> .
Arrangements for Child Visa Applications (Item 1108, 1108A and 1211)	<a href="#">15/030</a>	-	F2015L00547	18/04/15	13/12/15		<a href="#">yes</a>	Dated 16/04/2015. Commences 18/04/2015. Applies to visa applications lodged on or after 18/04/2015.

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**Arrangements for Other Family and New Zealand (Family Relationship) Visa Applications r.2.07(5)**

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Arrangements for Family Visa Applications and New Zealand (Family Relationship) Visa Applications (items 1123A, 1123B and 1214BA)	<a href="#">18/076</a>	-	F208L00772	1/07/2018	-	17/016	yes	Dated 7/06/2018, commences on 1/07/2018. Applies to visa applications made on or after 1/07/2018.
Arrangements for Family Visa Applications and New Zealand (Family Relationship) Visa Applications (items 1123A, 1123B and 1214BA)	<a href="#">17/016</a>	-	F2017L00123	20/02/17	30/06/2018	15/046, 15/034	yes	Dated 13/02/17, commences 20/02/17. Applies to visa applications made on or after 20/02/17.
Arrangements for New Zealand (Family Relationship) Visa Applications (item 1214BA)	<a href="#">15/046</a>	-	F2015L00568	18/04/15	19/02/17		yes	Dated 16/04/2015, commences 18/04/2015. Applies to visa applications made on or after 18/04/2015.
Arrangements for Other Family Visa Applications (items 1123A and 1123B)	<a href="#">15/034</a>	-	F2015L00553	18/04/15	19/02/17		yes	Dated 16/04/2015, commences 18/04/2015. Applies to visa applications made on or after 18/04/2015.

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**Limit of Parent, Aged Parent and Other Family visas per financial year for purposes of s.85**

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (LIN 19/087: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2018/2019 Financial Year) Instrument 2019	<a href="#">19/087</a>	F2019L00065	30/01/2019	current	IMMI 18/054	yes	Dated 22/01/19, commences 30/01/19, applies to Contributory Parent (Migrant) (Class CA), Contributory Aged Parent (Residence) (Class DG), Contributory Parent (Temporary) (Class UT), Contributory Aged Parent (Temporary) (Class UU), Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Migration (IMMI 18/054: Granting of Contributory Parent, Parent and Other Family Visas in the 2017/2018 Financial Year) Instrument 2018	<a href="#">18/054</a>	F2018L00683	1/06/2018	29/01/2019	IMMI 16/092	yes	Dated 06/05/18, commences 01/06/18, applies to Contributory Parent (Migrant) (Class CA), Contributory Aged Parent (Residence) (Class DG), Contributory Parent (Temporary) (Class UT), Contributory Aged Parent (Temporary) (Class UU), Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Granting of Parent and Other Family Visas in the 2016/2017 Financial Year Determination 2016/055	<a href="#">16/092</a>	F2016L01634	21/10/2016	31/05/2018	IMMI 16/055	yes	Dated 13/10/2016, commences 21/10/2016, applies to Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Granting of Parent and Other Family Visas in the 2016/2017 Financial Year Determination 2016/055	<a href="#">16/055</a>	F2016L01398	7/09/2016	20/10/2016	IMMI 15/111, IMMI 13/071	yes	Dated 02/09/2016, commences 07/09/2016, applies to Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Granting of Parent and Other Family Visas in the 2015/2016 Financial Year Determination 2015	<a href="#">15/111</a>	F2015L01846	27/11/2015	6/09/2016	IMMI 14/050	yes	Dated 19/11/2015, commences 27/11/2015, applies to Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Granting of Parent and Other Family Visas in 2014/2015 Financial Year	<a href="#">14/050</a>	F2014L00888	1/07/2014	26/11/2015		yes	Dated 26/06/2014, commences 01/07/2014, applies to Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.
Granting of Parent and Other Family Visas in 2013/2014 Financial Year	<a href="#">13/071</a>	F2013L01168	1/07/2014	6/09/2016		yes	Dated 21/06/2013, commences 01/07/2013, applies to Parent (Migrant) (Class AX), Aged Parent (Residence) (Class BP), Other Family (Migrant) (Class BO) and Other Family (Residence) (Class BU) visas.

**Notes**

1. Section 85 allows the Minister to determine by instrument the maximum number of visas of a specified class or classes that may be granted in a specified financial year.

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Arrangements for Parent Visa Applications r.2.07(5)

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Arrangements for Parent Visa Applications	<a href="#">18/079</a>	-	F2018L00792	1/07/2018	-	18/014	<a href="#">yes</a>	Dated 14 June 2018. Commenced 1 July 2018.
Addresses for Applications for Parent Visas	<a href="#">18/014</a>	-	F2018L00023	6/01/18	30/06/2018	17/100	<a href="#">yes</a>	Dated 5 January 2018. Commenced 6 January 2018.
Arrangements for Parent Visa Applications 2017	<a href="#">17/100</a>	-	F2017L01495	18/11/17	5/12/2017	09/046	<a href="#">yes</a>	Dated 16 November 2017. Commenced 18 November 2017. Disallowed 5 December 2017.

Notes

1. The amending regulation (Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (F2017L01425)) which provided for this Instrument (Immi 17/100) was disallowed by a motion of the Senate on 5 December 2017. This had the effect of repealing the amending regulation from that tin

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Income Test for Sponsorship for Temporary Sponsored Parent Visa

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Income Test for Sponsorship for Temporary Sponsored Parent Visa	<a href="#">19/146</a>	-	F2019L00542	17/04/2019	-	-	<a href="#">yes</a>	Dated 4 April 2019. Commenced 17 April 2019.

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Arrangements for Sponsorship for Temporary Sponsored Parent Visa

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Arrangement for Approval and Variation of Approval for a Temporary Parent Sponsor	<a href="#">19/188</a>	-	F2019L01015	30/07/2019	-	19/147	<a href="#">yes</a>	Dated 23 July 2019. Commenced 30 July 2019. Repeals 19/147.
Arrangements for Sponsorship for Temporary Sponsored Parent Visa	<a href="#">19/147</a>	-	F2019L00596	17/04/19	29/07/2019	-	<a href="#">yes</a>	Dated 4 April 2019. Commenced 17 April 2019.

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Manner for Providing Details of a Change in Certain Events for an Approved Sponsor of a Temporary Sponsored Parent Visa

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Manner for Providing Details of a Change in Certain Events for an Approved Sponsor of a Temporary Sponsored Parent Visa	<a href="#">19/149</a>	-	F2019L00545	17/04/19	-	-	<a href="#">yes</a>	Dated 4 April 2019. Commenced 17 April 2019.

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Applications for Family (Temporary) (Class GH) Visa

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Arrangements for Family (Temporary) (Class GH) Visa	<a href="#">19/185</a>	-	F2019L00887	1/07/19	-	-	<a href="#">yes</a>	Dated 25 June 2019. Commenced 1 July 2019.

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# Settled

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## Overview

An individual, typically a sponsor, is required to be 'settled' as a requirement for a number of visa subclasses. These include the various different forms of parent visa (Subclasses 103, 143, 173, 804, 864 and 884), the remaining relative visa (Subclasses 115 and 835), the orphan relative visa (Subclasses 117 and 837), the aged dependent relative visa (Subclasses 114 and 838) and the visitor visa (Subclass 600).<sup>1</sup> Prior to 23 March 2013, it was also the case for the sponsored family visitor visa (Subclass 679) and sponsored business visitor visa (Subclass 459).<sup>2</sup>

For example, an applicant for a contributory parent (Subclass 173) visa must demonstrate at the time of applying for that visa that they are a parent of a person who is a 'settled' Australian citizen, 'settled' Australian permanent resident or 'settled' eligible New Zealand citizen.<sup>3</sup> Similarly, an applicant for an orphan relative visa must demonstrate at the time of applying for that visa that he or she is sponsored by a relative who is a 'settled' Australian citizen or a 'settled' Australian permanent resident or 'settled' eligible New Zealand citizen.<sup>4</sup>

The term 'settled' is defined in r.1.03 of the Migration Regulations 1994 (the Regulations). In relation to an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, 'settled' means 'lawfully resident in Australia for a reasonable period'.<sup>5</sup>

## Legal Issues

### Meaning of 'settled'

The meaning of 'settled' in r.1.03 is 'lawfully resident in Australia for a reasonable period'. Although there has been little judicial consideration of the term to date, the meaning of 'settled' was considered in *Naiker v MIMIA*.<sup>6</sup> The question in that case was whether a three month old infant could be a 'settled' eligible New Zealand citizen on the basis of 'residing in Australia for a reasonable period'. Justice Hely held that factors other than the mere length of stay may be relevant in determining whether a person has been resident in Australia for a reasonable time. Given the age of the nominator, the Tribunal was entitled to have regard to the position of her parents. However, the Court held that the Tribunal was not required to confine its consideration to whether the *parents* were 'lawfully resident in Australia for a reasonable period in October 1998' as this was not the question that the Tribunal had to determine.<sup>7</sup>

<sup>1</sup> Note that between 2 June 2014 and 25 September 2014 the Remaining Relative, Aged Dependent Relative, Parent Subclass 103 and Aged Parent Subclass 804 visa classes and subclasses were closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner/ dependent or newborn child under r.2.08 or 2.08B, as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. The associated definitions and limitation on sponsorship for remaining relative visas in r.1.20K were also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>2</sup> These visa subclasses were repealed by Migration Amendment Regulations 2013 (No.1) SLI No.32 2013.

<sup>3</sup> cl.173.211.

<sup>4</sup> cl.117.212(a)(ii).

<sup>5</sup> 'In Australia' is defined in r.1.03 as 'in the migration zone' which is further defined in s.5 of the *Migration Act 1958* (the Act).

<sup>6</sup> [2002] FCA 888 (Hely J, 18 July 2002).

<sup>7</sup> *Naiker v MIMIA* [2002] FCA 888 (Hely J, 18 July 2002) at [28]-[29].

In *Naiker*, the Court also confirmed that the term 'settled' is given a particular meaning by the Regulations, whether or not it accords with the ordinary meaning of that expression.<sup>8</sup> Accordingly, when considering the definition of 'settled' in r.1.03, there are two legal issues arising for consideration: whether the individual is 'lawfully resident in Australia' and whether this has been 'for a reasonable period'.

### **Lawfully Resident**

The expression 'lawfully resident' is not defined in the *Migration Act 1958* (the Act) or the Regulations. An individual's residence in Australia must not be unlawful in order for him or her to be 'settled'. Section 13(1) of the Act defines a 'lawful non-citizen' as a non-citizen in the migration zone who holds a visa that is in effect.<sup>9</sup>

Departmental guidelines (PAM3) state that 'lawfully resident' includes periods of lawful temporary residence, including periods on bridging visas that are related to events such as making a substantive visa application or a tribunal/judicial review, but not periods when the applicant is on a bridging visa related to rectifying an unlawful status or organising departure arrangements.<sup>10</sup> It should be noted that PAM3 is not binding and the Tribunal must ensure that it applies the test in the Regulations having regard to all the evidence and circumstances in a particular case. For further information see MRD Legal Services Commentary: [Application of policy](#).

'Resident' is also not defined in the legislation. The meaning of the term 'resident' can depend very much on the context in which the term appears. In the context of the definition of 'settled' in r.1.03 it has been held that it should be interpreted to mean 'ordinarily', 'habitually' or 'usually' resident.<sup>11</sup> This is a concept which has received considerable attention by the Courts, most commonly in the context of tax or social security decisions. Generally speaking, the term has been interpreted as incorporating two elements, namely: physical presence in a particular place; and the intention to treat that place as home, at least for the time being, not necessarily for ever. For further discussion see MRD Legal Services commentary: [Usually Resident](#).

### **Reasonable Period**

'Reasonable period' is also not defined in the Act or Regulations. There has been little judicial consideration to date of what is a 'reasonable period' for the purposes of the term 'settled' as defined in r.1.03.

The question of what is a 'reasonable period' will depend on the particular circumstances and may vary from case to case. The term 'reasonable period' was considered in *Huang v MIMIA*<sup>12</sup> in the context of the definition of 'aged dependent relative' in r.1.03. In that case the Court indicated that a 'reasonable period' need not be a lengthy period, and that individual circumstances will affect what amounts to a reasonable period.<sup>13</sup> Although these observations were not made in the context of the definition of 'settled' in r.1.03, *Huang* may nevertheless provide some guidance as to the meaning of the expression a 'reasonable period'.

Departmental guidelines (PAM3) state that two years is generally considered to be a 'reasonable period', although when assessing whether or not a person is 'settled', policy is that each case is to be

<sup>8</sup> *Naiker v MIMIA* [2002] FCA 888 (Hely J, 18 July 2002) at [25].

<sup>9</sup> A non-citizen is a person who is not an Australian citizen: s.5. Section 68 addresses when a visa is in effect and s.82 addresses when visas cease to be in effect.

<sup>10</sup> PAM3, POLICY – MIGRATION REGULATIONS – DIVISIONS > [Div 1.4] - Form 40 sponsors and sponsorship (27/07/2017 compilation).

<sup>11</sup> *Naiker v MIMIA* [2002] FCA 888 (Hely J, 18 July 2002) at [27], citing *Re S* (2000) 142 ACTR 12, 14.

<sup>12</sup> *Huang v MIMIA* [2007] FMCA 720 (Cameron FM, 16 May 2007).

<sup>13</sup> *Huang v MIMIA* [2007] FMCA 720 (Cameron FM, 16 May 2007) at [44].

considered on an individual basis according to the facts of the case such as extended periods of temporary residence. A shorter period of lawful residence may be considered for Australian citizens where there are compassionate and compelling circumstances or the Australian citizen, having resided overseas for a lengthy period, has returned to Australia and wishes to sponsor family members, but may be precluded from doing so due to the 'two year' policy requirement. That shorter period should be at least three months' residence as at the time of application.<sup>14</sup> However, as noted above, PAM3 is not binding and the Tribunal must ensure that it applies the test in the Regulations having regard to all the evidence and circumstances in a particular case. For further information see MRD Legal Services Commentary: [Application of policy](#).

What constitutes a 'reasonable period' for the purpose of the definition of 'settled' may also depend on the steps the person in question has taken to establish his or her residence in Australia. A relatively short period of residence may be sufficient if those steps are unequivocal. On the other hand, a person may spend lengthy periods in Australia but always with a residence elsewhere and no intention of adopting Australia as his or her place of residence. In these circumstances such a person may not be regarded as 'settled' even though his or her period of presence in Australia might exceed the two year period suggested by departmental guidelines.

**Relevant Case Law**

<a href="#">Huang v MIMIA [2007] FMCA 720</a>	<a href="#">Summary</a>
<a href="#">Naiker v MIMIA [2002] FCA 888</a>	<a href="#">Summary</a>

**Legislative amendments**

Title	Reference number
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a> Disallowed on 25 September 2014	SLI 2014 No.65

**Last updated/reviewed: 14 August 2018**

<sup>14</sup> PAM3, POLICY – MIGRATION REGULATIONS – DIVISIONS > [Div 1.4] - Form 40 sponsors and sponsorship (27/07/2017 compilation).

# 'Usually resident'

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Released by the  
AAT under FOI on  
19 September 2019



## Legislative Context

The expression, 'usually resident', arises in a number of contexts in the Migration Regulations 1994 (the Regulations), including:

- r.1.03 - definition of 'Australian permanent resident'
- r.1.05 - balance of family test<sup>1</sup>
- r.1.12 - definition of 'member of the family unit'<sup>2</sup>
- r.1.15 - definition of 'remaining relative'<sup>3</sup>
- r.1.15AA - definition of 'carer'.<sup>4</sup>

It also appears in some Schedule 1 requirements<sup>5</sup> and Schedule 2 criteria for a number of visa subclasses.<sup>6</sup>

The expression 'usually resident' is not defined in the *Migration Act* 1954 or the Regulations and accordingly should be given its natural meaning (unless the statute requires otherwise, either expressly or by implication).<sup>7</sup> The notion conveyed by the expression 'usually resident' (and by cognate ones such as 'usual place of residence', or 'ordinarily resident') is of a place where, in the ordinary course of a person's life, he or she regularly or customarily lives. Whether a person is usually resident in a given country is a question of fact and degree and the key considerations relate to physical residency and intention as outlined below.<sup>8</sup>

However, while the expression 'usually resident' is not defined in the legislation, the term 'usual residence' and variations of that expression have been considered by the Courts and provide some guidance. While the caselaw makes clear that the question of where a person is usually resident is a question of fact for the tribunal, a number of propositions have emerged to assist in determining where, if anywhere, a person is usually resident. Relevant factors for determining whether a person is usually resident in a place include maintaining a home in that place, going to work there, owning property, business or other interests there, family or other ties and the person's views about the place they consider and intend to be 'home'. A number of propositions emerge from the caselaw which can be summarised as follows:

- usual residence should be determined by reference to where the person eats and sleeps and has his or her settled or usual abode;

<sup>1</sup> rr.1.05(1)(b), (2)(a)(ii)-(iii), (2B)(a)-(b) and (2D)(b) of the Regulations.

<sup>2</sup> rr.1.12(1)(e)(ii); (6)(b)(ix)(B); (6)(b)(x)(B); (7)(b)(ix)(B) and (7)(b)(x)(B) of the Regulations.

<sup>3</sup> rr.1.15(1)(b) and (c)(i) of the Regulations. Note that between 2 June 2014 and 25 September 2014 the Remaining Relative visa classes and subclasses, the associated definition in r.1.15 and limitation on sponsorship in r.1.20K were closed for primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>4</sup> r.1.15AA(1) of the Regulations. Note that between 2 June 2014 and 25 September 2014 the Carer visa classes and subclasses were closed to primary visa applications and only open to secondary visa applications where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B as a result of Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014. The associated definition of carer was also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.

<sup>5</sup> For example item 1230(4) and item 1135(3B)(b)(i) which was removed on 1 July 2013 by *Migration Amendment Regulation 2012 (No.2)* (SLI No.82 of 2012).

<sup>6</sup> See, for example, cll.835.213, 836.213 and 838.213.

<sup>7</sup> *Gauthiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512 at 519-521.

<sup>8</sup> *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at 265.

- this requires consideration of the person's physical presence in a particular place and their intention to treat that place as home;
- usual residence can be temporary or permanent;
- a person may simultaneously be usually resident in more than one place;
- a person cannot rely on unlawful residence in a particular place to establish a 'usual residence' there;
- citizenship is relevant in considering 'usual residence' but not determinative;
- a person can be 'usually resident' in a place while holding a temporary visa permitting them to remain there; and
- it is possible that a person might not be 'usually resident' in any country.

These matters are discussed in greater detail below.

## Legal Issues

### Residence

The concept of 'residence' has received considerable attention in common law, usually in the context of taxation or social security legislation. It was considered by the High Court in the taxation case of *Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation* (Koitaki's case).<sup>9</sup> Justice Williams, with whose reasons Rich ACJ and McTiernan J expressed agreement, made the following observation regarding residence:

The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode.<sup>10</sup>

*Hafza v Director General of Social Security*<sup>11</sup> concerned an Administrative Appeals Tribunal decision affirming a decision of the Director-General of Social Security, in regard to the cancellation of payment of child endowment. The relevant legislation provided that the endowment ceased to be payable if the endowee ceased to have his 'usual place of residence' in Australia. The appellants had departed Australia initially intending to be absent for a period of three months, but remained outside the country for a period of approximately four years. Justice Wilcox held that the concept of residence includes two elements: 'physical presence in a particular place and the intention to treat that place as home; at least for the time being, not necessarily for ever.' His Honour then extracted the statement from Koitaki's case above and went on to make the following observations:

Physical presence and intention will coincide for most of the time. But few people are always at home. Once a person has established a home in a particular place, even involuntarily (see *Inland Revenue Commissioners v Lysaght* [1928] AC 234 at 248 and *Keil v Keil* [1947] VLR 383) a person does not necessarily cease to be resident there because he or she is physically absent. The test is whether the person has retained a continuity of association with the place - *Levene v Inland Revenue Commissioners* [1928] AC 217 at 225 and *Judd v Judd* (1957) 75

<sup>9</sup> (1941) 64 CLR 241.

<sup>10</sup> (1941) 64 CLR 241 at 249.

<sup>11</sup> (1985) 6 FCR 444; [1985] FCA 164.

WN (NSW) 147 at 149 - together with an intention to return to that place and an attitude that that place remains 'home' (see *Norman v Norman* (1969) 16 FLR 231 at 236). It is important to observe, firstly, that a person may simultaneously be a resident in more than one place — see the facts of *Lysaght* and the reference by Williams J to 'a home or homes' — and, secondly, that the application of the general concept of residence to any particular case must depend upon the wording, and underlying purposes, of the particular statute in relation to which the question arises. But, where the general concept is applicable, it is obvious that, as residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as 'home', a change of intention may be decisive of the question whether residence in a particular place has been maintained.<sup>12</sup>

Justice Wilcox then considered whether in the particular statutory context, the phrase 'usual place of residence' should be construed as synonymous with 'resident', finding that 'usual place of residence' in that statutory context suggested that there is only one such place in relation to each endowee. His Honour went on to state that:

The matter is not free from difficulty, but the considerations to which I have referred lead me to the conclusion that 'usual place of residence' should be accorded a narrower construction than would be provided by answering the question whether the endowee remained a 'resident' of Australia, in the general law sense.<sup>13</sup>

### 'Usually resident'

Where a person usually resides or is usually resident is a finding of fact for the tribunal which requires a broad factual inquiry.<sup>14</sup> In *Tahiri v MIAC*<sup>15</sup> the High Court considered this question in the context of a Refugee and Humanitarian Class (XB) visa and found that relevant factors in such an inquiry included: the actual and intended length of stay in a State; the purpose of any stay in a State; the strength of ties to the State and to any other State in the past and in the present; and the degree of assimilation into the State.<sup>16</sup>

The expression, 'usually resident' was considered in the context of a now superseded version of r.1.15 in *Gauthiez v MIEA*.<sup>17</sup> In that case, Gummow J found that where a person usually resides is a question of fact that the tribunal must reach having regard to all of the information before it. Further, the meaning of 'usually resides' would depend upon the particular legislative context in which the phrase appears. His Honour approved of English authority on the issue of 'ordinary residence' which held that the term refers to 'a man or woman's abode in a particular place or country which he or she has adopted, voluntarily and for settled purposes as part of the regular order of his or her life for the time being, whether of short or of long duration'.<sup>18</sup>

The Federal Court also considered the cognate expression 'ordinarily resident' in *Re Taylor; Ex parte Natwest Australia Bank Ltd*<sup>19</sup> (Re Taylor). In that case, when considering the distinction between the concept of residence and ordinary residence for the purpose of the *Bankruptcy Act 1966*, the Court observed:

<sup>12</sup> (1985) 6 FCR 444 at [449]-[450].

<sup>13</sup> (1985) 6 FCR 444 at [451].

<sup>14</sup> *Tahiri v MIAC* [2012] HCA 61 (French CJ, Bell and Gageler JJ, 13 December 2012) at [16].

<sup>15</sup> [2012] HCA 61 61 (French CJ, Bell and Gageler JJ, 13 December 2012).

<sup>16</sup> *Tahiri v MIAC* [2012] HCA 61 (French CJ, Bell and Gageler JJ, 13 December 2012) at [16]. In this case, the applicant argued they were usually resident in Pakistan. The Court held the circumstances of their arrival into that country; their illegal status in Pakistan and the fact they recently visited Afghanistan were capable of being considered countervailing factors against the applicant's proposition at [17].

<sup>17</sup> (1994) 53 FCR 512. The term 'usually resides' was considered in the context of 'usually resides in the same country'.

<sup>18</sup> See *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309 at 343-4.

<sup>19</sup> (1992) 37 FCR 194.

The word 'ordinarily' connotes a place where in the ordinary course of a person's life he regularly or customarily lives. There must be some element of permanence, to be contrasted with a place where he stays only casually or intermittently. The expression 'ordinarily resident in' connotes some habit of life, and is to be contrasted with temporary or occasional residence.

In *Scargill v MIMIA*,<sup>20</sup> the Full Court of the Federal Court considered the concept of usual residence in the context of a previous version of r.1.15. The Court endorsed the application of the test in *Koitaki's* case but found that the tribunal had failed to correctly apply that test by failing to consider the factors of physical residency and intention which were described as 'essential elements' in the notion of usually resides.<sup>21</sup>

In another remaining relative case, *Ignatious v MIMIA*,<sup>22</sup> the Federal Court held the tribunal erred when it followed Departmental policy and took into account irrelevant considerations when determining whether the primary applicant's spouse's parents were usually resident in Sri Lanka at the time of application. The Court pointed out that the authorities confirm that neither the fact that they had lived in that country for many years, nor the fact that they continued to own property there, was capable, without more, of establishing that they were usually resident outside Australia. The Court referred to the usual residence test outlined by the Full Federal Court in *Scargill* that physical residence and intention were essential elements and concluded that the tribunal's reasons for decision in respect of the residence issue could not be reconciled with the approach authoritatively adopted in *Scargill*.<sup>23</sup>

The test in *Scargill* was also considered in the matter of *Rahiman v MIMIA*,<sup>24</sup> where the Court found that the tribunal was entitled to adopt a common sense approach in considering the applicant's residence in the USA for 16 years over the 3 months residing in Australia before lodging his visa application. The Court held that it would be contrary to the ordinary meaning of the expression 'usually resides' to ignore the period of residence in the USA when making an assessment of usual residence at the time of application and accepted that it was not relevant to have regard to whether or not the applicant may or may not have difficulty getting back into the USA.<sup>25</sup>

Applying case law in relation to ordinary residence, it would appear that absence from a place at a particular time or a set of such absences does not automatically mean it is not a person's usual residence if the person has established usual residence there and the absence is not inconsistent with the person still being usually resident there. In *Mathai v Kwee*,<sup>26</sup> the Federal Court found that, notwithstanding that he held a Malaysian passport, driving licence and identity card and spent much of each year living in Kuala Lumpur, the respondent was 'ordinarily resident' in Australia as he still considered Australia to be his 'home', as evidenced by entries on his incoming and outgoing passenger cards. The Court made the following observation:

In the era of wide bodied jet aircraft it is not quite so unusual for people to be ordinarily resident in more than one country. One only has to contemplate the position of tennis and golf professionals who travel away from the place or places where they are ordinarily resident so as to pursue their livelihoods and earn their incomes. Much the same can be said in respect of (say) concert pianists on the world stage who may ordinarily reside in Australia but travel extensively overseas to earn their incomes. Much the same could be said in relation to a taxation consultant ordinarily resident

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<sup>20</sup> (2003) 129 FCR 259.

<sup>21</sup> (2003) 129 FCR 259 at [17] and [21].

<sup>22</sup> (2004) 139 FCR 254.

<sup>23</sup> (2004) 139 FCR 254 at [56]-[58].

<sup>24</sup> [2006] FMCA 76 (McInnis FM, 31 January 2006).

<sup>25</sup> [2006] FMCA 76 (McInnis FM, 31 January 2006) at [76]-[78].

<sup>26</sup> [2005] FCA 932.

in Australia whose business or employment takes him to places such as Hong Kong, Singapore, Kuala Lumpur, India and England so that he may exploit his expertise. One might say of them that they 'still call Australia home'.<sup>27</sup>

In considering a person's intention, their subjective view about their place of usual residence would also appear to be a relevant consideration in determining their place of usual residence. In *Re Taylor*,<sup>28</sup> the Federal Court placed significant emphasis on the subjective element of the notion of 'ordinarily reside' finding the entries on the respondent's outgoing and incoming passenger cards that he was an Australian resident departing Australia temporarily persuasive of him ordinarily residing in Australia.<sup>29</sup>

### Relevance of citizenship

In *Gauthiez v MIEA*,<sup>30</sup> Gummow J drew an important distinction between citizenship and residence. The Immigration Review Tribunal had found that the applicant usually resided in France, based on the fact that he was born there, grew up there and was a French citizen. Justice Gummow considering the Tribunal's reasoning commented:

His citizenship was an enduring link with France. But citizenship and residence are distinct concepts although, of course, in common experience most people usually reside in the country of which they have citizenship. Nevertheless, in my view, and as a matter of law, the mere circumstance that the applicant retained his French citizenship could not, without more, indicate that he was resident in France.

Justice Gummow's reasoning was applied by the Full Federal Court in *Scargill*.<sup>31</sup> It suggests that while it would be appropriate to have regard to an applicant's citizenship, it should not of itself be a determining factor in deciding usual residence. The Tribunal must also have regard to the factors referred to in the case law discussed above, including the person's physical location and intentions.

### Can the holder of a temporary visa or no visa be 'usually resident' in Australia?

In *Scargill*, the applicant entered Australia on a temporary permit as a visitor. The Court observed that this suggested that he may not have had a firm intention to reside in the future in Australia at that point. However, he later applied for a permanent visa on the basis that he was a remaining relative of his mother and thereafter lived in Australia with his mother. The Court held that the tribunal was obliged to consider the applicant's presence in Australia, at least from the time when he made his application for the permanent visa.<sup>32</sup>

A person's immigration status may be relevant to considering whether they have an intention to reside in or treat a place as his or her home. However, following *Scargill*, it would be erroneous to regard holding a temporary visa as precluding a finding that a person usually resides in Australia.

However, while physical residence in a particular location is an important consideration in determining the usual residence of a person, it would appear this residence would have to be lawful. In *Gauthiez v MIEA*<sup>33</sup> it was accepted in argument before the Court that if a person's presence in a particular place

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<sup>27</sup> [2005] FCA 932 at [125].

<sup>28</sup> See also *Mathai v Kwee* (1992) 37 FCR 194.

<sup>29</sup> [2005] FCA 932.

<sup>30</sup> (1994) 53 FCR 512.

<sup>31</sup> (2003) 129 FCR 259 at [24]-[25].

<sup>32</sup> (2003) 129 FCR 259 at [30]-[31].

<sup>33</sup> (1994) 53 FCR 512. The term 'usually resides' was considered in the context of 'usually resides in the same country'.

or country is unlawful, for example by being in breach of the immigration laws, he or she cannot rely on his unlawful residence as constituting ordinary residence.<sup>34</sup>

### Can a person not 'usually reside' in any country?

In *Gauthiez v MIEA*,<sup>35</sup> the applicant sought to satisfy the definition of remaining relative as it then stood. He would have been ineligible for the visa if he was found to 'usually reside' in the same country, not being Australia, as an overseas near relative. The applicant was born in France, grew up partly in France and partly in French Guinea. He lived in Belgium for a number of years before coming to Australia in 1986. He lodged his visa application in 1990 after remaining unlawfully in Australia for several years. As mentioned above, Gummow J took the view that the applicant's illegal presence in Australia could not be relied upon to establish that he usually resided in Australia. Putting Australia aside, his Honour held that the Tribunal was required to consider whether the applicant did not usually reside in any country. The Tribunal was found to have erred by approaching its task as if the legislation required a choice to be made between France and Belgium.

This reasoning leaves open the possibility that an applicant may not 'usually reside' in any country. However, as a practical matter it may not be necessary in every case to reach a positive conclusion in this regard. The legislative criteria are commonly expressed in a way which requires the decision-maker to simply determine whether an applicant is usually resident in a particular country (e.g. Australia). In such cases it may be enough to consider the person's intentions and presence in relation to the particular country.

### Can a person 'usually reside' in two countries?

In *Hafza*<sup>36</sup> Justice Wilcox observed that a person may be simultaneously resident in one or more place. Similarly, in *Re Taylor*<sup>37</sup> the Federal Court observed that, while a person may not be physically present in two places, a person may have more than one place of ordinary residence. In that case, which dealt with the cognate concept of 'ordinary residence', in finding that the respondent did not immediately cease to be ordinarily resident in Australia on the date of his departure from Australia, Lockhart J observed:

A person may have two places of residence; for example, a city flat and a country house. He may regularly live in each. He cannot be physically present in both at the same time, but he may be resident (or ordinarily resident) in each at the same time. People may come and go from the place in which they are ordinarily resident in a large variety of circumstances and on various occasions. It is always a question of fact and degree.

At first blush it may seem strange to say that a person can be ordinarily resident in more than one country at the same time; but on closer analysis it is not. Plainly you cannot be physically present in more than one place at the same time. But the lifestyles of people vary greatly. Some people in the ordinary pursuit of their lives regularly or customarily live in more than one place, each of which has an element of permanence about it and is not merely a place of casual or intermittent resort.

<sup>34</sup> (1994) 53 FCR 512. The term 'usually resides' was considered in the context of 'usually resides in the same country'.

<sup>35</sup> (1994) 53 FCR 512. The term 'usually resides' was considered in the context of 'usually resides in the same country'.

<sup>36</sup> (1985) 6 FCR 444; [1985] FCA 164.

<sup>37</sup> (1992) 37 FCR 194.

### Relevant legislative amendments

Title	Reference number
<a href="#">Migration Amendment Regulation 2012 (No. 2)</a>	SLI 2012, No.82
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a> Disallowed on 25/09/2014	SLI 2014, No.65

### Relevant Case Law

<a href="#">Ignatious v MIMIA [2004] FCA 1395; (2004) 139 FCR 254</a>	<a href="#">Summary</a>
<a href="#">Tahiri v MIAC [2012] HCA 61</a>	
<a href="#">Gauthiez v MIEA (1994) 53 FCR 512</a>	<a href="#">Summary</a>
<a href="#">Rahiman v MIMA [2006] FMCA 76</a>	
<a href="#">Re: Maha Hafza And: Director-General Of Social Security (1985) 6 FCR 444</a>	
<a href="#">Mathai v Kwee [2005] FCA 932</a>	
<a href="#">Scargill v MIMIA [2003] FCAFC 116; (2003) 129 FCR 259</a>	<a href="#">Summary</a>

Last updated / reviewed: 29 May 2018



# Remaining Relative visas: Subclass 115 and 835

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## Overview

The Remaining Relative visa subclasses enable close family relatives, and their immediate family members, who would otherwise be left on their own overseas to join their family in Australia.

There are two subclasses of Remaining Relative visa:

- the Subclass 115 (Remaining Relative) visa is one of three subclasses of the Other Family (Migrant) (Class BO) visa class and must be applied for outside Australia;
- the Subclass 835 (Remaining Relative) visa is part of the Other Family (Residence) (Class BU) visa class and must be applied for in Australia.

One of the key requirements for a Remaining Relative visa is that the applicant meets the definition of 'remaining relative' in r.1.15 of the Migration Regulations 1994 (the Regulations). This definition was significantly amended in 2005 for visa applications lodged on or after 1 November 2005 and this Commentary focuses on r.1.15 as amended from that point onwards. For queries regarding visa applications made prior to 1 November 2005, please contact MRD Legal Services.

For a short period only during 2014, the Subclass 115 (Remaining Relative) and Subclass 835 (Remaining Relative) visas were closed to primary visa applicants and only open to secondary visa applicants in limited circumstances.<sup>1</sup>

## Merits Review

A decision to refuse the grant of an onshore visa application (Subclass 835) is a reviewable decision under s.338(2), Part 5 of the *Migration Act 1958* (the Act). The onshore visa applicant has standing to apply for review.

The refusal of an offshore application (Subclass 115) is a decision reviewable under s.338(5), Part 5 of the Act. The visa applicant's sponsor has standing to apply for review.

## Visa Application Requirements

### Applications lodged prior to 18 April 2015

An application for a Subclass 115 (Remaining Relative) (Migrant) (Class BO) visa must be made outside Australia on the approved form and be accompanied by the prescribed fee.<sup>2</sup>

An application for a Subclass 835 (Remaining Relative) (Residence) (Class BU) visa must be made inside Australia while the applicant is inside Australia (but not in immigration clearance) on the

<sup>1</sup> Between 2 June 2014 to 25 September 2014 all Class BO and Class BU visas were closed to primary visa applicants and only open to secondary visa applicants where the application was taken to have been made by a spouse / de facto partner / dependent or newborn child under rr.2.08 or 2.08B. This was because while the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 repealed Class BO and Class BU visas with effect from 2 June 2014, this Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12:00pm.

<sup>2</sup> Item 1123A(1) and (2) of Schedule 1 to the Regulations.

approved form and be accompanied by the prescribed fee.<sup>3</sup> In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.<sup>4</sup>

An application by a person claiming to be a member of the family unit of a primary applicant both a Class BO and BU visa may be made at the same time and place as, and combined with, the application by that person.<sup>5</sup>

### Applications lodged on or after 18 April 2015

For applications lodged on or after 18 April 2015, an application for a Subclass 115 (Remaining Relative) (Migrant) (Class BO) visa must be made on the form, at the place, and in the manner specified by the Minister in a legislative instrument and the applicant must be outside Australia.<sup>6</sup>

An application for a Subclass 835 (Remaining Relative) (Residence) (Class BU) visa must be made while the applicant is inside Australia (but not in immigration clearance) on the form, at the place, and in the manner specified by the Minister in a legislative instrument.<sup>7</sup>

For both a Class BO and BU visa, an application by a person claiming to be a member of the family unit of a primary applicant for the visa may be made at the same time and place as, and combined with, the application by that person.<sup>8</sup>

## Visa Criteria

The criteria for Subclass 115 and 835 are set out in Parts 115 and 835 of Schedule 2 to the Regulations. They comprise primary and secondary criteria which are divided between time of application and time of decision requirements. At least one person included in the application must meet the primary criteria. Both Subclass 115 and 835 contain similar criteria including whether or not the applicant meets the definition of 'remaining relative' in r.1.15 of the Regulations.

### Primary criteria

The requirements that must be satisfied by primary applicants are:

- **Remaining relative** - the applicant must be, both at the time of application<sup>9</sup> and at the time of decision,<sup>10</sup> the 'remaining relative' of an 'Australian relative' of the applicant.<sup>11</sup> 'Australian relative' means a relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.<sup>12</sup>

<sup>3</sup> Item 1123B(1), (2) and (3).

<sup>4</sup> Item 1123B(3)(ca) as inserted by Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (SLI 2013 No.118).

<sup>5</sup> Items 1123A(3)(b) and 1123B(3)(c) in Schedule 1 for subclasses 115 and 835 respectively.

<sup>6</sup> Items 1123A(1), (3)(a) and (3)(aa) as amended by the Migration Amendment (2015 Measures No.1) Regulation 2015, SLI 2015, No.34.

<sup>7</sup> Item 1123B(1) and (3)(a) as amended by SLI 2015, No.34.

<sup>8</sup> Items 1123A(3)(b) and 1123B(3)(c).

<sup>9</sup> cl.115.211 and cl.835.212.

<sup>10</sup> cl.115.221 and cl.835.221.

<sup>11</sup> For Subclass 115 visa applications made on or after 9 November 2009, the requirement is that '[t]he applicant is a remaining relative of an Australian relative for the applicant' (emphasis added). The amendment was as a result of Migration Amendment Regulations 2009 (No.13) (SLI 2009 No.289) for visa applications made on or after 9 November 2009, but there is no indication in the Explanatory Statement accompanying these amending Regulations that there is a conceptual difference.

<sup>12</sup> For visa applications made prior to 9 November 2009, 'Australian relative' was defined in cl.115.211(2) and cl.835.111. For visa applications made on or after 9 November 2009, the definition of 'Australian relative' was added to r.1.03 by SLI 2009 No.289) and effectively removed from cl.115.211(2) and cl.835.111. A reference to the definition in Divisions 115.1 and 835.1

- **Sponsorship** - at time of application, the applicant must be sponsored either by:
  - the Australian relative if the relative has turned 18 and is a settled Australian citizen, permanent resident or eligible New Zealand citizen; or
  - by the relative's partner,<sup>13</sup> if the partner has turned 18, cohabits with the relative and is a settled Australian citizen, permanent resident or eligible New Zealand citizen.<sup>14</sup>

At time of decision, the sponsorship must be approved by the Minister and be in force, although the sponsor need not be the same sponsor as at time of application.<sup>15</sup>

- **Visa status of Subclass 835 applicants** - applicants for a Subclass 835 visa must also at the time of application either:
  - hold a substantive visa<sup>16</sup> other than a Subclass 771 (Transit) visa; or
  - if they do not hold a substantive visa, their last substantive visa must not have been a Subclass 771 (Transit) visa and they must satisfy Schedule 3 criterion 3002.<sup>17</sup>
- **Assurance of support** - at the time of decision, an assurance of support in relation to the applicant must have been accepted by the Secretary of Social Services (formerly the Secretary of the Department of Family and Community Services).<sup>18</sup>
- **Public interest criteria** - the applicant and each member of the family unit of the applicant who is an applicant for the visa must satisfy public interest criteria 4001,<sup>19</sup> 4002, 4003, 4004, 4005, 4009, 4010 and 4020.<sup>20</sup> Depending on the date of visa application, the primary applicant must also satisfy PIC 4021,<sup>21</sup> 4019,<sup>22</sup> and, where the applicant has not turned 18, PIC 4017, and 4018.<sup>23</sup> Similarly, depending on the date of visa application, each member of the applicant's family unit who is also a visa applicant must also satisfy PIC 4019 if they have turned 18 at the time of application,<sup>24</sup> or otherwise PIC 4015, and 4016.<sup>25</sup>

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was inserted. The terms 'Relative', 'Australian Permanent Resident' and 'Eligible New Zealand' citizen are defined in r.1.03. Note that 'relative' includes amongst others, a 'close relative' which is also defined in r.1.03. Note the definition of 'close relative' was amended by SLI 2009 No.144 for visa applications made on or after 1 July 2009. The post 1 July 2009 definition includes 'de facto partners' as defined in s.5CB of the Act. The specific reference to 'adopted child' and 'step-parent' was removed as these now fall within the definition of 'parent' (s.5(1) and r.1.14A) and 'child of a person' (s.5CA, r.1.14A).

<sup>13</sup> For visa applications made before 1 July 2009, the sponsorship is limited to the relative or the relative's 'spouse' as defined in r.1.15A and may include either a married or opposite sex de facto relationship. For visa applications made on or after 1 July 2009, the applicant could be sponsored by their 'spouse' as defined in the Act at s.5F (i.e. married relationships) or their 'de facto partner' as defined in s.5CB.

<sup>14</sup> cl.115.212 and cl.835.213. Regulation 1.20K operates to limit sponsorship in certain situations and is discussed below.

<sup>15</sup> cl.115.222 and cl.835.227, as amended by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009 No.116), items [5] and [17] of Schedule 7. The amendments that allow for a change of sponsor apply to applications made on or after 1 July 2009 and to matters not finally determined before that date.

<sup>16</sup> r.1.03 defines 'substantive visa' as a visa other than a bridging visa, criminal justice visa or enforcement visa.

<sup>17</sup> cl.835.211 as amended by Migration Amendment Regulations 2000 (No.5) (SR 2000, No.259). The amended version commenced on 1 November 2000. While it is uncertain if the amended version was intended to have retrospective effect as there were no transitional provisions specified, it is unlikely to make any practical difference.

<sup>18</sup> For applications made on or after 22 March 2014, cl.115.225 and cl.835.222 were amended to replace reference to the 'Department of Family and Community Services' with 'Social Services' in relation to the body whose Secretary accepts assurances of support: Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No.30).

<sup>19</sup> See MRD Legal Services commentary: [Public Interest Criterion 4001](#).

<sup>20</sup> Clauses 115.223(a), 115.226(1)(a), 835.223(a) and 835.224(1)(a) were amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146) to include a requirement to satisfy PIC 4020 (provision of bogus documents or false or misleading information). These changes applied to visa applications made prior to, but not finally determined as at 1 July 2013 and those made on or after that date. For further information, see MRD Legal Services commentary: [Bogus Documents / False or Misleading Information / PIC 4020](#).

<sup>21</sup> cl.115.223(a) and cl.835.223(a) as amended by Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012 No.256) and applying to all visa applications made on or after 24 November 2012.

<sup>22</sup> cl.115.223(b) and cl.835.223(b) amended by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.314) applying to visa applications made on or after 15 October 2007.

<sup>23</sup> cl.115.229 and cl.835.226. Clause 115.229 was inserted for visa applications made on or after 1 July 2011 by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011 No.105).

<sup>24</sup> cl.115.226(1)(aa) and cl.835.224(1)(b) amended by SLI 2007 No.314 applying to visa applications made on or after 15 October 2007.

In addition, it is a primary criterion that each member of the family unit who is *not* an applicant for a Subclass 115 or 835 visa must satisfy PIC 4001, 4002, 4003, 4004 and 4005.<sup>26</sup>

- **Special return criteria** - for Subclass 115 applications, the applicant and each member of the family unit of the applicant who is an applicant for the visa must satisfy special return criteria 5001 and 5002.<sup>27</sup>
- **Passport requirements** - for applications made between 1 July 2005 and 24 November 2012, the applicant must satisfy either cl.115.228 or cl.835.228, depending on the subclass applied for – that is, he or she must hold a valid passport that was issued to the applicant by an official source, and is in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport. This criterion has been replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.<sup>28</sup>

## Secondary criteria

For secondary applicants the time of application criteria require:

- that he or she is a member of the family unit of, and has made a combined application with, a person who satisfies (Subclass 115) or appears to satisfy (Subclass 835) the primary time of application criteria;<sup>29</sup> and
- the sponsorship in relation to the primary applicant has been approved by the Minister, is in force and includes the secondary applicant.<sup>30</sup>

In addition, secondary applicants must satisfy the following criteria at time of decision:

- he or she continues to be a member of the family unit of a person who is the holder of a Subclass 115 visa (for a Subclass 115 visa), or a member of the family unit of a person who having satisfied the primary criteria, holds a Subclass 835 visa (for a Subclass 835 visa),<sup>31</sup>
- the sponsorship of the primary applicant has been approved, is in force and includes sponsorship of the secondary applicant;<sup>32</sup>
- an assurance of support has been accepted by the Secretary of Social Services (formerly the Secretary of the Department of Family and Community Services) in relation to the secondary

<sup>25</sup> cl.115.227 and cl.835.225 were substituted by Migration Amendment Regulations 2000 (No.2) (SR 2000 No.62) applying to visa applications made on or after 1 July 2000: r.4(7).

<sup>26</sup> cl.115.226(2) and cl.835.224(2).

<sup>27</sup> cl.115.224 and cl.115.226. For further information, see MRD Legal Services commentary: [Special Return Criteria](#).

<sup>28</sup> cl.115.228 and cl.835.228 were inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005 No.134). These provisions were repealed with effect from 24 November 2012 (for applications made on or after that date) by SLI 2012 No.256. For visa applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.115.223(a) and 835.223(a)) which requires either the applicant hold a valid passport issued by an official source in the form issued by that source and not in a class of passports specified by the Minister; or that it would be unreasonable to require the applicant to hold a passport.

<sup>29</sup> cl.115.311 and cl.835.311. From 1 July 2009, the phrase 'members of the family unit' was incorporated in the Act at s.5(1) and defined as having the meaning given in the Regulations (r.1.12): SLI 2009 No.144. For visa applications made on or after 19 November 2016, a new definition of 'member of a family unit' under r.1.12 applies. For most visas, the new definition is limited to the spouse or de facto partner of a primary applicant, and children of the primary applicant or their partner, who are dependent and it provides an age limit for eligible children of 23 years, or of any age if that child is incapacitated to work. The new definition also simplifies and clarifies special provisions relating to other visas.

<sup>30</sup> cl.115.312 and cl.835.312.

<sup>31</sup> cl.115.321 and cl.835.321.

<sup>32</sup> cl.115.322 and cl.835.325, as amended by Migration Amendment Regulations 2009 (No.2) (SLI 2009, No.42). The amendments apply to applications not finally determined and made on or after 1 July 2009.

applicant, or the applicant is included in the assurance of support accepted in relation to the primary applicant,<sup>33</sup>

- for visa applications made on or after 1 July 2005 and prior to 24 November 2012, the applicant holds a valid passport or, it would be unreasonable to require the applicant to be the holder of a passport;<sup>34</sup> and
- the applicant satisfies certain public interest criteria (and special return criteria for Subclass 115).<sup>35</sup>

## Key Issues

### Definition of Remaining Relative

'Remaining relative' is defined in r.1.03 and r.1.15 of the Regulations. With some minor differences for visa applications made on or after 1 July 2009,<sup>36</sup> the current definition of 'remaining relative' applies to applications lodged on or after 1 November 2005.<sup>37</sup>

Subregulation 1.15(1) provides that an applicant is a remaining relative of a person who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen, if that person is a parent,<sup>38</sup> brother,<sup>39</sup> sister, step-parent (for applications made prior to 1 July 2009),<sup>40</sup> step-brother or step-sister of the applicant and is 'usually resident in Australia'. In addition, the applicant, together with his or her partner (if any),<sup>41</sup> must have no 'near relatives' except for those near relatives who are

<sup>33</sup> cl.115.325 and cl.835.323 were amended by SLI 2014 No.30 to replace reference to the 'Department of Family and Community Services' with 'Social Services' for visa applications made on or after 22 March 2014.

<sup>34</sup> cl.115.327 and cl.835.326 were inserted by SLI 2005 No.134 to apply to visa applications made on or after 1 July 2005. These provisions were repealed with effect from 24 November 2012 (for visa applications made on or after that date) by SLI 2012 No.256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (see amended cl.115.322(a) and 835.322(a) – see below).

<sup>35</sup> See cl.115.323, 115.324, 115.326, 835.322 and 835.324. Clauses 115.323(a) and 835.322(a) were amended by SLI 2012 No.256 to insert new PIC 4021, which mandates that the applicant meet certain passport requirements and applies to all visa applications made on or after 24 November 2012. Prior to 24 November 2012, this requirement was previously contained in cl.115.327 and 835.326. Clauses 115.323(a) and 835.322(a) were further amended by SLI 2013 No.146 to include a requirement to satisfy PIC 4020 for visa applications made but not finally determined as at 1 July 2013 and those made on or after that date.

<sup>36</sup> Specifically, the removal of reference to 'step-parent' and insertion of references to 'de-facto partner': SLI 2009 No.144. The amendments are technical in nature and did not alter the scope of the provision.

<sup>37</sup> Inserted by Migration Amendment Regulations 2005 (No.8) (SLI 2005, No. 221). For information about the previous definition of remaining relative, please contact Legal Services.

<sup>38</sup> From 1 July 2009, the definition of 'parent' was removed from the regulations by the Migration Amendment Regulations 2009 (No.2) (SLI 2009 No.42) and defined in s.5(1) of the Act by reference to the definition of child in s.5CA as inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*. In *Jalloh v MIBP* [2015] FCCA 1154 (Judge Lucev, 29 April 2015), the Court confirmed that r.1.15(1) does not permit the grant of the visa on the basis that the applicant is the parent of the Australian relative (rather the applicant has to be the remaining relative of a person who is a parent). For this reason, it was insufficient for the visa applicant to have customarily adopted his niece and nephew who were the purported Australian relatives: at [14].

<sup>39</sup> In *Mercado v MIAC* [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007), the Federal Magistrates Court found that the reference to 'brother' (albeit in the previous version of r.1.15) included a reference to a 'half-brother'. By inference, the reference to 'sister' may also be taken to include a reference to a 'half-sister'. In the same case, his Honour made *obiter* comments contrasting the blood relationship with the more 'transient' 'step' relationship recognised in r.1.15. These comments suggest that a 'step' relationship may cease upon the cessation of the relevant spouse relationship that gave rise to it.

<sup>40</sup> 'Step parent' was removed from the definition by SLI 2009 No.144, Schedule 1, item [27] following the insertion of the definition of 'parent' in s.5(1) of the Act by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* effective from 1 July 2009 (r.9). This new definition of parent includes 'step parent'.

<sup>41</sup> See *Tran v MIMA* [1998] FCA 290 (Carr J, 20 March 1998) and *Su v MIMIA* [2005] FCA 1176 (Moore J, 30 August 2005). While the r.1.15A definition of 'spouse' requires that the Tribunal be satisfied of the existence of a relationship which is either a married or a de facto relationship, under r.1.15 it is for the applicant to make her case, by providing evidence in support of any claim that she no longer has a spouse, for example because she is divorced and also has no mutual commitment, no genuine and continuing relationship and that she and her ex-husband did not live together at the time of the application and decision: *Su v MIMIA* [2005] FMCA 92 (Barnes FM, 24 February 2005) at [30]. When considering the definition of spouse for remaining relative visas the circumstances of the relationship in r.1.15A(3) are not mandatory considerations: *Nguyen v MIAC* [2010]

Australian citizens, Australian permanent residents or eligible New Zealand citizens, and are usually resident in Australia. Additional provisions apply if the applicant is an adopted child. These are discussed below.

#### **Definition of 'near relative'**

'Near relative' is defined in the r.1.15(2) to mean, in relation to an applicant:

- a parent, brother,<sup>42</sup> sister, step-parent (for applications made prior to 1 July 2009),<sup>43</sup> step-brother or step-sister of the applicant or their partner; or
- a child (including step-child) of the applicant or their partner who has:
  - turned 18 and is not a 'dependent child' of the applicant or their partner, or
  - not turned 18 and is not wholly or substantially in the daily care and control of the applicant or their partner.

#### Children as near relatives

Adult children are considered near relatives unless they are found to be a dependent child of the applicant or their spouse.

#### *Children over 18*

'Dependent child' has the meaning provided in r.1.03<sup>44</sup> and r.1.05A of the Regulations. The Full Federal Court judgment in *Huynh v MIMIA*<sup>45</sup> sets out the proper approach to the construction of 'dependent child' in r.1.03 and r.1.05A. The Court held that the proper question in respect of the definition of dependent is simply whether the child is, as a matter of fact, relying on the other person for support, rather than *needing* to rely for support on that other person. This is subject to the other requirements of the Regulations that:

- the applicant is 'wholly or substantially' reliant on the other person for financial support; and
- the applicant is so reliant at that time and for a substantial period immediately before; and
- the financial support being provided is to meet the applicant's basic needs for food, clothing and shelter; and
- the applicant's reliance on the other person is greater than his or her reliance on any other person or source of support.

For further discussion and commentary on dependency, see the MRD Legal Services Commentary: [Dependent and Dependent Child](#).

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FMCA 847. Although the Court only considered the pre-1 July 2009 definition of spouse this appears to be equally applicable to the post 1 July 2009 definition of spouse in s.5F and de facto partner in s.5CB.

<sup>42</sup> Reference to 'brother' may include reference to a 'half-brother'. See footnote 42.

<sup>43</sup> 'Step parent' was consequentially removed by SLI 2009 No.42 following the insertion of the definition of parent in s.5(1) of the Act as amended by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

<sup>44</sup> The definition was amended by SLI 2009 No.144 for visa applications made from 1 July 2009 such that a person cannot be a 'dependent child' if she or he is married, or has a same sex or opposite sex de facto relationship. For visa applications made on or after 19 November 2016, the definition refers to 'step-child' after the words 'a child' wherever it occurs: see Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

<sup>45</sup> (2006) 152 FCR 576.



### Children under 18

Children under 18 will be considered a 'near relative' if the child is 'not wholly or substantially in the daily care and control of' the applicant or the applicant's partner (if any).<sup>46</sup> This requirement is different to the definition of 'dependent child' in r.1.03 and 1.05A. According to Departmental guidelines (PAM3), the term 'care and control' stems from the (pre-1 June 1996) *Family Law Act 1975* and is linked to the concept of guardianship and custody.<sup>47</sup> 'Care and control' itself relates to those rights and powers concerning the day-to-day upbringing of a child. A parent with the care and control of a child has the power to make ordinary decisions concerning, for example, how the child shall go to school, the food the child shall eat, the time the child shall go to bed, discipline, the clubs to join and the sports to play.

Departmental guidelines (PAM3) suggest the following as relevant to the issue of the degree of a parent's 'care and control' of a child:

- whether money has been provided to assist in maintaining the child;
- whether there is regular contact between child and parent;
- whether they visit each other;
- whether there is any consultation in daily matters affecting the child (health, discipline, school etc.);
- whether the parent gives advice on education, religion and other longer-term issues.<sup>48</sup>

'Daily care and control' can be delegated by (a) parent/s without necessarily compromising the rights of that parent. It is not necessary for children to reside with their parents in order to be under the parents' daily care and control.

However, as noted by Lander J in *Durzi v MIMA*,<sup>49</sup> PAM3 has no legislative effect and does not construe r.1.15. Ultimately, whether a child is wholly or substantially in the daily care and control of a parent is a question of fact for the Tribunal to determine and the Tribunal must ensure it has regard to all relevant circumstances in this consideration.<sup>50</sup> In *Mahal v MIBP*<sup>51</sup> the Court found no error in the Tribunal's finding that the visa applicant's child was not wholly or substantially in his daily care and control where the child resided with his mother and the visa applicant provided financial support, communicated with the child and facilitated the child's attendance at group classes.<sup>52</sup> The Court found the Tribunal's reasons demonstrated that it had carefully identified the extent to which the visa applicant had engaged in contact with the child and participated in supporting and assisting the welfare of the child in making its assessment.<sup>53</sup>

### Usual residence

The definition of 'remaining relative' requires the decision maker to make an assessment of the usual place of residence of the 'Australian relative' of the applicant and of any other 'near relatives' of the applicant and his or her spouse. If the Australian relative or any near relatives are not found to be usually resident in Australia, the applicant will fail to meet the definition of remaining relative.

<sup>46</sup> r.1.15(2)(b)(ii).

<sup>47</sup> PAM3 - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - The near relative at [9.1] (reissued 24/09/2014).

<sup>48</sup> PAM3 - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - The near relative at [9.5] (reissued 24/09/2014).

<sup>49</sup> [2006] FCA 1767 (Lander J, 19 December 2006).

<sup>50</sup> See also *Usman v MIMA* [2005] FMCA 966 (Pascoe CFM, 5 August 2005).

<sup>51</sup> [2015] FCCA 449 (Judge Street, 26 February 2015).

<sup>52</sup> *Mahal v MIBP* [2015] FCCA 449 (Judge Street, 26 February 2015) at [10].

<sup>53</sup> *Mahal v MIBP* [2015] FCCA 449 (Judge Street, 26 February 2015) at [10].

The leading case on assessing where a person is 'usually resident' is the Full Federal Court's judgment in *Scargill v MIMIA*.<sup>54</sup> The Court in that case approved the Tribunal's reference to the test articulated in *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation*<sup>55</sup> by Williams J (with whom Rich ACJ and McTiernan J agreed):

*The place of usual residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives, even if this is in hotels or on a yacht or some other place of abode.*

However, the Court found that the Tribunal failed to *apply* the correct test. The Tribunal in that case found the applicant usually resided in the United Kingdom based on the fact that he was born there, remained a citizen of the United Kingdom and had a maternal grandmother and uncle there. The Court found that the Tribunal erred by failing to consider the factors of physical residency and intention which are essential elements in the notion of 'usually resides'. The Court also found the judgment in *Gauthiez v MIEA* relevant, where Gummow J said:

*... citizenship and residence are distinct concepts although, of course in common experience, most people usually reside in a country of which they have citizenship. Nevertheless ... the mere circumstance that the applicant retained his French citizenship could not, without more, indicate that he was a resident in France.*<sup>56</sup>

The Court in *Scargill* further indicated that the applicant could be usually resident in Australia notwithstanding that he initially entered on a temporary permit as a visitor.

In *Ignatious v MIMIA*,<sup>57</sup> the Tribunal was found to have taken into account irrelevant considerations in assessing usual residence. Justice Weinberg held that the authorities established that neither the fact that the applicant's parents had lived in Sri Lanka for many years, nor the fact that they continued to own property there, was capable, without more, of establishing that they were usually resident outside Australia.

Departmental guidelines (PAM3) not only reflects, but expands upon the factors identified in the caselaw above, advising Departmental decision makers that a person's usual residence is *not* to be determined by a test relying on that person's historic ties and citizenship, nor by whether or not that person holds a permanent visa for that country. Instead, it suggests the following as relevant to the issue of usual residence:

- the person's physical presence in a country
- the length of that residence
- where they eat and sleep and have a settled home
- whether that residence is lawful or unlawful
- whether the person has retained or sought a right to re-enter a country in which they were formerly resident and
- the person's intention to make or not make a particular country their usual home.<sup>58</sup>

<sup>54</sup> (2003) 129 FCR 259.

<sup>55</sup> *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241.

<sup>56</sup> *Gauthiez v MIEA* (1994) 53 FCR 512.

<sup>57</sup> *Ignatious v MIMIA* (2004) 139 FCR 254.

<sup>58</sup> PAM3 - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - Usually resident in Australia at [17.1] (reissued 24/09/2014).

However, these factors appear to go beyond what has been suggested in the caselaw outlined above and decision makers should be careful not to elevate these factors to a legislative requirement. For further commentary on the correct approach to usual residence, see MRD Legal Services Commentary: [Usually resident](#).

#### **Near relative who is claimed to be deceased**

Under r.1.15(1) it is for the applicant to satisfy the decision-maker that the applicant and his or her spouse have no near relatives other than Australian near relatives who are usually resident in Australia.<sup>59</sup> As such it would ordinarily be for the applicant to produce evidence of the deaths of any relevant family members. The Tribunal must assess whether, on the available evidence, it is satisfied that the near relative is in fact deceased. The decision-maker is not however required to make a positive finding of fact that a person has an overseas near relative in order to not be satisfied that the person has “no near relatives”.<sup>60</sup>

In certain situations (such as significant civil unrest in the source country) an applicant may genuinely be unable to provide supporting documentation verifying their claims. In clearly difficult circumstances such as these, the Tribunal must use its judgment in deciding whether to insist on supporting documentation.

The applicant may, to support his or her claims that a relative is deceased, include evidence that a Court has applied the common law ‘presumption of death’ – i.e. a legal presumption that a person is dead although the death of the person cannot be proven as a matter of fact. Even if a Court has not applied the presumption, there is authority to suggest that such a presumption must still be taken into account by the Tribunal where a person has been missing for 7 years or more.<sup>61</sup> Failure to consider the common law presumption of death was found to be a failure to have regard to a relevant consideration in a case where the siblings were missing for over 20 years in the Pol Pot regime in Cambodia, where in that case the Tribunal was considering whether the applicant did or did not have at the relevant time an overseas near relative.<sup>62</sup> The common law presumption of death

The Tribunal is not bound by technicalities, legal forms or rules of evidence<sup>63</sup> and has to make its own finding. It is therefore not appropriate for decision-makers to draw too closely upon the rules of evidence applied in civil proceedings and it is inappropriate for the Tribunal to apply curial devices such as presumptions of law or fact.<sup>64</sup> In cases before the Tribunal, the common law presumption of death from unexplained absence may be a relevant consideration in the circumstances, but should not be strictly applied, and indeed the Tribunal may fall into jurisdictional error if it determines whether a person is alive or dead solely by reference to the common law presumption of death.<sup>65</sup>

The common law presumption of death is commonly expressed as follows:

*If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of, by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him or have learned of his whereabouts, were he living then, in the absence of evidence to the contrary, it should be found that he is dead.*<sup>66</sup>

<sup>59</sup> See *Lim v MIAC* [2007] FMCA 1127 (Mowbray FM, 27 July 2007) at [21] albeit in relation to the previous version of r.1.15.

<sup>60</sup> See *Elaraby v MIBP* [2018] FCCA 1101 in which Judge Manousaridis found that the court in *Kim v MIAC* [2007] FMCA 798 was clearly wrong in finding that it is essential for the operation of r.1.15(1)(c) for the Tribunal to make a finding of fact that the visa applicant has an overseas near relative.

<sup>61</sup> *Kim v MIAC* [2007] FMCA 798 (McInnis FM, 29 May 2007) at [62].

<sup>62</sup> *Kim v MIAC* [2007] FMCA 798 (McInnis FM, 29 May 2007) at [62]-[65].

<sup>63</sup> *Migration Act 1958*, s.353(a).

<sup>64</sup> *A v MIMA* (1999) 53 ALD 545 at [41].

<sup>65</sup> *Elaraby v MIBP* [2018] FCCA 1101 at [44].

<sup>66</sup> *Axon v Axon* (1937) 59 CLR 395 at [404-5].

*Axon v Axon*<sup>67</sup> concerned an application for maintenance in which the marriage of the appellant to her husband was in question owing to her previous marriage to another man against whom she had earlier obtained a different order for maintenance. However, no payment was ever made, and she did not see her first husband since that order was made. She heard that he was dead. Before her subsequent marriage, she inserted advertisements in several newspapers and made inquiries from the police at Broken Hill, but without result. Her later husband claimed that his marriage to her was not valid and called evidence to show that her former husband had been alive at the time of her second marriage. While concerned with establishing the invalidity of the appellant's second marriage on the basis of the continuance of the first husband's life, the Court's comments on the presumption of death are of some interest. In concluding the presumption of death did not apply in those circumstances, Dixon J held the conditions were not fulfilled for presuming his death as in the circumstances in which the first husband left his wife, she was not a person with whom he would be likely to communicate or who would be likely to hear of his whereabouts.

The rebuttable presumption of death does no more than affect the shifting onus and does not outweigh any acceptable evidence of continued existence.<sup>68</sup> However, the presumption does increase the probative value of the basic fact of a person being missing for seven years where there is no evidence contradicting such inferences as might be drawn from it. While a person who has been missing for six and a half years may be as likely to be dead as someone missing in the same circumstances for seven years, seven years absence gives rise to a rebuttable presumption of law while a period less than this may give rise to a cogent presumption of fact that the person in question is dead.<sup>69</sup> The amount and strength of evidence required to rebut the presumption is unclear.<sup>70</sup> Once evidence is called the presumption has no inherent superadded weight and the presumption cannot be weighed against evidence, but the evidence should be weighed against any other evidence which counterbalances it. The presumption only becomes relevant if the evidence is so evenly balanced that the Court is unable to reach a decision on it.<sup>71</sup>

In circumstances where a person has been missing for seven years or more, consideration should be given to the whole circumstances of the case and the respective probabilities of life continuing and having ceased need to be balanced. This would include whether other persons were likely to have received contact from the person presumed dead, what inquiries were made, the circumstances in which the person in question was last known to be alive and any other relevant (and reasonable) factors.<sup>72</sup>

Those who would be likely to have heard of the person whose death is in question will vary in the circumstances and while this will usually include close relations, there are some circumstances (such as bad feeling between spouses) where there would not be an inference that communication would be likely to occur.<sup>73</sup> An example of circumstances where the common law presumption of death may not be applicable was in *Goodreau v MIAC*.<sup>74</sup> In that case, the Court made obiter comments that the presumption would have been difficult to apply as the circumstances in which the applicant last saw

<sup>67</sup> *Axon v Axon* (1937) 59 CLR 395 at [404-5].

<sup>68</sup> *Axon v Axon* (1937) 59 CLR 395 at [404-5].

<sup>69</sup> Heydon JD (2013) *Cross on Evidence: Ninth Australian Edition*, LexisNexis Butterworths Australia at [7275].

<sup>70</sup> Heydon JD (2013) *Cross on Evidence: Ninth Australian Edition*, LexisNexis Butterworths Australia at [7290].

<sup>71</sup> Heydon JD (2013) *Cross on Evidence: Ninth Australian Edition*, LexisNexis Butterworths Australia at [7280].

<sup>72</sup> See *Chard v Chard*, [1955] 3 All ER 721 (Sachs J, 18 November 1955) in which Sachs J outlined the factors leading to a person being presumed to have died as 'where there is no acceptable affirmative evidence that the person was alive at some time during a continuous period of seven years or more; there are persons who would be likely to have heard of him over that period, who have not heard of him; and all due inquiries have been made appropriate to the circumstances.' The judgment of *Chard v Chard* is not binding on the Australian courts and while various Australian courts have adopted the same approach, the High Court in *Axon v Axon* (1937) 59 CLR 395 did not include a duty to inquire in its approach.

<sup>73</sup> *Re Carr; Union Trustee Co of Australia Ltd v Carr* [1942] St R Qd 182; *Axon v Axon* (1937) 59 CLR 395.

<sup>74</sup> [2009] FMCA 35 (Lindsay FM, 28 January 2009).

her father, involving verbal and physical altercation, led to the conclusion that there would be no expectation that she would 'naturally hear' from him.

The question of appropriate enquiries also depends on the circumstances and overlaps with the question of persons likely to have heard of the person in question. This is because someone who makes prolonged and persistent enquiries about another person would be likely to have heard from them if they had been alive and, conversely, to demonstrate who might have heard from them will require appropriate inquiries to have been made.<sup>75</sup>

The presumption of death only applies to the fact of death, not the time of death.<sup>76</sup> A court will generally not make an additional finding on time of death unless there is some evidence entitling it to do so.<sup>77</sup> Evidence to indicate the date of death may include the fragility of health or disappearance in perilous circumstances.<sup>78</sup> For example, in *White v Zurich Australia Ltd*, the Supreme Court of Victoria, applying *Axon v Axon*, inferred from the suicide note left by the deceased that the time of death was the date on the note or shortly thereafter.<sup>79</sup> Thus a question may arise as to the relevance of the presumption to the Tribunal when determining whether a person was dead as at the time of application or some other specific point in the past. As the strict parameters of the judicial presumption do not apply to the Tribunal, the presumption can be taken into account in determining whether death had occurred at some previous point. Further, the Tribunal is not prevented from inferring death from a protracted period of absence even where the presumption is inapplicable.<sup>80</sup>

The health of the person and circumstances of their disappearance are also relevant in determining whether the presumption of life is rebutted and, as a result, the presumption of death arises. In *Axon v Axon*, Dixon J held *in obiter* that the presumption of continuance of life would be rebutted in circumstances including a danger to the life in question, such as illness, enlistment for active service or participation in a perilous enterprise when reasonable inquiries are made to no avail. For example, *In the Estate of Hills*, the Supreme Court of South Australia held that the evidence, which included that the alleged deceased could not function and was likely to have been suicidal without his medication for schizophrenia and that his car was found abandoned, displaced the presumption of continuance of life and gave rise to a presumption of death.<sup>81</sup> In summary, therefore, while the Tribunal cannot 'apply' the presumption as it is a matter of judicial interpretation, it is not prevented from making a finding of fact that a person is dead in circumstances where the presumption would arise. Following the Court's decision in *Kim v MIAC*<sup>82</sup> the Tribunal should take into account the rebuttable presumption where a person has been missing for seven years or more, and having done so, make its own finding of fact. However, the common law presumption is not the only means of determining whether a person is dead and it could amount to jurisdictional error if the Tribunal determines whether a person is alive or dead solely by reference to the common law presumption.

### **Adopted children**

If the applicant is a child who has not turned 18 and has been adopted by an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (the adoptive parent) while overseas, at the time of making the application, the adoptive parent must have been residing

<sup>75</sup> See *Riggs v Registrar of Births Deaths and Marriages* [2010] QSC 481 (Martin J, 24 December 2010) at [14]. See also *Doe d France v Andrews* (1859) 15 QB 756

<sup>76</sup> The presumption authorises no finding that he died at or before a given date. It is limited to a presumptive conclusion that the man no longer lives': *Axon v Axon* (1937) 59 CLR 395 per Dixon J. See also the Privy Council judgment of *Lal Chand Marwari v Ramrup Gir* (1925) LR 53 IA 24 (Blanesburgh LJ, 5 December 1925).

<sup>77</sup> *Re Phene's Trusts* (1870) 5 Ch App 139 at 144.

<sup>78</sup> *Axon v Axon* (1937) 59 CLR 395.

<sup>79</sup> [2002] VSC 141 (Beach J, 2 May 2002).

<sup>80</sup> Heydon JD (2013) *Cross on Evidence: Ninth Australian Edition*, LexisNexis Butterworths Australia at [41070].

<sup>81</sup> [2009] SASC 176 (Gray J, 16 June 2009).

<sup>82</sup> [2007] FMCA 798 (McInnis FM, 29 May 2007).

overseas for a period of at least 12 months.<sup>83</sup> This requirement is consistent with the Department's policy on overseas adoptions and the requirements for a Subclass 102 (Adoption) visa.<sup>84</sup>

The term 'adoption' is defined at r.1.04. For further information, see the MRD Legal Services Commentary: [Definition of Adoption](#).

Does adoption sever ties between biological relatives for the definition of remaining relative?

While there does not appear to be any case law directly on point, the cases of *Mercado v MIAC*<sup>85</sup> and *Hong Liang v MIAC*<sup>86</sup> suggest that an expansive approach to the sibling relationships of 'sister' and 'brother' in that provision is appropriate. Such an approach suggests that the terms 'sister' and 'brother' should be taken as including biological, adoptive, 'step' and 'half' forms of that relationship. On this view, although the legal relationship between the applicant and sponsor may be severed for the purposes of Australian law generally, r.1.15(1)(a) does not require the Tribunal to consider only their relationship at law.

In *Mercado v MIAC*, the Court was called upon to consider the proper construction of a superseded version of r.1.15 and in particular whether the word 'brother' in r.1.15(2)(a), as it then stood, included or excluded a 'half-brother'. The applicant in that case had a six-year old 'half brother' who was born to her (now deceased) father and another woman. If that child was the applicant's 'brother' for the purposes of r.1.15(2)(a), the applicant would fail to meet the definition of remaining relative. The Tribunal referred to the Macquarie Dictionary definition of 'brother' and found that the child was the 'brother' of the applicant. The Court found no error in this approach, stating:

*The half-brother relationship is permanent because of the genetic link whereas a step relationship is by its nature more transient and certainly not permanent. Further, I accept the submission made by Mr Lloyd that there is no apparent policy reason why a half-brother would be excluded from the definition while a step-brother would be treated more favourably. The denial of the reunion of a blood relative, while permitting a reunion based on marriage which may be dissolved at any time, does not appear compatible with the overall intent of the legislation. In the circumstance, I am satisfied that in the absence of direct reference to the status of 'half-brother' in the Act or Regulations, the approach adopted by the Tribunal was correct. Consequently, the application should be dismissed.<sup>87</sup>*

Although the Court in *Mercado* was considering the meaning of the word 'brother' in a different legislative context to that presently under consideration, there are sufficient similarities between the two to suggest that the Court's reasoning should be applied such that the word 'brother' in the current version of r.1.15(1)(a) should be construed as including a 'half-brother'.

In *Hong Liang*, the issue was whether the sponsor was the 'first cousin' of the visa applicant for a Skilled-Australian-sponsored Overseas Student (Residence) (Class DE) visa. The Tribunal in that case proceeded on the basis that the term 'first cousin' referred to a relationship at law and not just to a biological relationship. The Tribunal found that the visa applicant's mother was adopted as an infant and, having regard to Australian adoption law, irrespective of whether a biological relationship existed between the applicant and sponsor, found that a legal relationship did not. Upon judicial review, the Court undertook a textual analysis of subparagraph 1128BA(3)(l)(iii) in Schedule 1 to the Regulations which contained the relevant categories of relationship between an applicant and sponsor for the purposes of the visa. The Court concluded that the term 'first cousin' is to be given a broad reading

<sup>83</sup> r.1.15(1)(d)(ii).

<sup>84</sup> See: PAM3 - Sch2 Visa 102 – Adoption (reissued 01/01/2016).

<sup>85</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007).

<sup>86</sup> *Hong Liang v MIAC* [2007] FMCA 1288 (Riethmuller FM, 8 August 2007).

<sup>87</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007) at [33].

such that it includes first cousins whether by 'biology, adoption, or marriage'. The Court also noted the broad reading of the terms relating to familial relationships adopted in *Mercado*.

Subparagraph 1128BA(3)(l)(iii) relevantly required that the applicant's sponsor:

- (iii) *is a person in respect of whom the applicant seeking to satisfy the primary criteria, or the spouse of the applicant seeking to satisfy the primary criteria, if the applicant's spouse is an applicant for a Skilled — Australian-sponsored Overseas Student (Residence) (Class DE) visa, has one of the following relationships:*
  - (A) *a parent;*
  - (B) *a child, or adoptive child, or step-child who is not a dependent child of the sponsor;*
  - (C) *a brother or sister, an adoptive brother or sister or a step-brother or step-sister;*
  - (CA) *an aunt or uncle, an adoptive aunt or uncle, or a step-aunt or step-uncle;*
  - (D) *a nephew or niece, an adoptive nephew or niece or a step-nephew or step-niece;*
  - (E) *if the applicant is seeking to satisfy the primary criteria for the grant of a Subclass 882 (Skilled — Designated Area-sponsored Overseas Student) visa — a grandchild or first cousin.*

The Court in *Hong Liang* found that each of sub-subparagraphs 1128BA(3)(l)(iii)(B) to (D) referred to a biological relationship, the adoptive version of the relationship and then the relationship generated by a marriage.<sup>88</sup> It further noted that, if the regulation were to be interpreted such that 'child' in sub-subparagraph 1128AB(3)(l)(iii)(B), for example, was to refer only to a child at law, then the addition of the term 'adoptive child' would be 'mere surplusage'.<sup>89</sup> The Court observed that in the last category the term 'first cousin' does not have after it references to the adoptive and step-relationships. However, having regard to the preceding categories, the Court took the view that the drafter intended a fulsome definition to be given to the relationship, encompassing the relationship biologically, as a result of adoptions and as a result of marriages.

There are significant differences in the way r.1.15(1)(a) and subparagraph 1128BA(3)(l)(iii) have been drafted. There is no specific reference in r.1.15(1)(a) to the adoptive versions of the relevant relationships. This could be taken as indicating that only the legal forms of the relationships and 'step' relationships are covered. If this view is taken, and it is noted there is no authority expressly precluding the Tribunal from taking this view of r.1.15(1)(a), the Tribunal will need to consider the legal relationship between the applicant and sponsor by considering whether the adoption of the sponsor is recognised under Australian law.

However, notably the pre-1 July 2009 definition of 'parent' under r.1.03 'includes an adoptive parent and a step-parent'.<sup>90</sup> Consistently with *Hong Liang*, this suggests that biological, adoptive and step relationships are covered by the term 'parent'. If this were not the case, and the term were intended to refer to only the relationship at law, then the reference to parent including an adoptive parent would appear to be 'mere surplusage'. Further, there would not appear to be any policy reason why the

<sup>88</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007) at [18].

<sup>89</sup> *Mercado v MIAC* [2007] FMCA 1216 (Lloyd-Jones FM, 26 July 2007) at [19].

<sup>90</sup> From 1 July 2009, the definition of 'parent' was removed from the Regulations by SLI 2009 No.144 and inserted in s.5(1) of the Act by reference to the definition of child in s.5CA: *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.



legislature would intend to distinguish between the situation of parents as compared to brothers and sisters for the purposes of a remaining relative application.

Taking these considerations into account, and having regard to the expansive approach to the construction of familial relationships under the Migration Regulations taken in *Mercado* and *Hong Liang*, the better view for visa applications made prior to 1 July 2009 appears to be that, irrespective of the relationship between the applicant and sponsor under Australian law generally, a biological relationship (even where 'severed' by law) should be taken into account for the purposes of r.1.15(1)(a).

Following changes to definitions in the Act and Regulations from 1 July 2009, a biological relationship may effectively be severed for visa applications made on or after 1 July 2009 for the purposes of migration law. The changes specify a limit on the number of parents a child has depending on the circumstances.<sup>91</sup> For example, the definition of 'parent and child' in r.1.14A<sup>92</sup> effective from 1 July 2009, and applicable to visa applications made on or after that date, provides that a reference in the Regulations to a parent includes a step-parent, and a note stating that a child cannot have more than 2 parents (other than step-parents) unless the child has been adopted under customary arrangements entered into outside Australia that meet r.1.04(2). Thus, if formal adoption arrangements are entered which meet the requirements of r.1.04(1)(a) or (b), the child is taken to be the child of the adoptive parent or adoptive parents and not of any other person (i.e. the biological ties are severed for the purposes of the Regulations).

#### 'Settled'

The Schedule 2 criteria for a Remaining Relative visa require that the applicant be sponsored by a 'settled' Australian citizen, permanent resident or eligible New Zealand citizen. The term 'settled' is defined in r.1.03 as meaning 'lawfully resident in Australia for a reasonable period'.

For discussion of this issue, see MRD Legal Services Commentary [Settled](#).

#### Regulation 1.20K – Sponsorship Limitation

Regulation 1.20K imposes a sponsorship limitation and applies to all Subclass 115/835 visa applications made on or after 1 July 2000.<sup>93</sup> Regulation 1.20K operates to ensure that a person can only sponsor/nominate one person as a remaining relative and anyone granted a visa on the basis of being a remaining relative cannot sponsor/nominate any other person as a remaining relative. Specifically it provides:

- a person who has previously been granted a Subclass 104 (Preferential Family) visa, Subclass 115 (Remaining Relative) visa, Subclass 806 (Family) visa or Subclass 835 (Remaining Relative) visa cannot sponsor an applicant for a Remaining Relative visa;
- a person who has previously sponsored or nominated a successful applicant for a Subclass 104, 115, 806 or 835 visa cannot sponsor another person for a Remaining Relative visa if they were still the sponsor at the time of decision;

<sup>91</sup> Subsection 5CA(2) provides that the regulations may provide that a person is not a child of another person in circumstances in which the person would, apart from s.5CA(2), be the child of more than 2 persons for the purposes of the Act.

<sup>92</sup> As inserted by SLI 2009 No.144 and r.3(2).

<sup>93</sup> Regulation 1.20K was inserted by Migration Amendment Regulations 2000 (No. 2) and amended by Migration Amendment Regulations 2002 (No.2) (SR 2002 No.86) to include Subclass 835 visas, to applications made on or after 1 July 2002. The regulation was further amended as part of changes to allow a change of sponsorship at time of decision by SLI 2009 No.42, to limit sponsorship by a person only where he/she was a sponsor at time of decision of another person and applies to applications made on or after 1 July 2009, or not finally determined before that date.

For visa applications made on or after 9 November 2009, this limitation was extended to the partner of an Australian relative, so that the partner was also prevented from sponsoring a Subclass 115/835 visa applicant if the Australian relative had previously been granted a remaining relative visa. The limitation also applies if either the partner or Australian relative had previously sponsored a person for a remaining relative visa that had been granted.<sup>94</sup> In particular, it provides:

- the partner of the applicant's Australian relative cannot act as the sponsor if the Australian relative has previously been granted a Subclass 104 (Preferential Family) visa, Subclass 115 (Remaining Relative) visa, Subclass 806 (Family) visa or Subclass 835 (Remaining Relative) visa;
- the partner of the applicant's Australian relative cannot act as the sponsor if the Australian relative has previously sponsored or nominated a successful applicant for a Subclass 104, 115, 806, or 835 visa; and
- the partner of the applicant's Australian relative cannot act as the sponsor if the partner has previously sponsored or nominated a successful applicant for a Subclass 104, 115, 806 or 835 visa on behalf of the Australian relative.

There is no provision for exemption or waiver for this regulation.

Relevant Case Law	
<a href="#">Axon v Axon (1937) 59 CLR 395</a>	
<a href="#">Chard v Chard [1955] 3 All ER 721</a>	
<a href="#">Durzi v MIMA [2006] FCA 1767</a>	
<a href="#">Elaraby v MIBP [2018] FCCA 1101</a>	<a href="#">Summary</a>
<a href="#">Elliott v MIMA [2007] FCAFC 22</a>	<a href="#">Summary</a>
<a href="#">Gauthiez v MIEA (1994) 53 FCR 512</a>	
<a href="#">Goodreau v MIAC [2009] FMCA 35</a>	<a href="#">Summary</a>
<a href="#">Hafza v Director General of Social Security (1985) 6 FCR 444</a>	
<a href="#">He v MIAC [2009] FMCA 1142</a>	
<a href="#">Jalloh v MIBP [2015] FCCA 1154</a>	
<a href="#">MIMIA v Hidalgo [2005] FCA 437</a>	<a href="#">Summary</a>
<a href="#">MIMIA v Hidalgo [2005] FCAFC 192</a> ; (2005) 145 FCR 564	<a href="#">Summary</a>
<a href="#">MIMA v Hughes (1999) 86 FCR 567</a>	
<a href="#">Huyh v MIMIA [2006] FCAFC 122</a> ; (2006) 152 FCR 576	<a href="#">Summary</a>
<a href="#">Ignatious v MIMIA [2004] FCA 1395</a> ; (2004) 139 FCR 254	<a href="#">Summary</a>

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<sup>94</sup> As amended by SLI 2009 No.289 to apply to visa applications made on or after 9 November 2009. The Explanatory Statement accompanying the amending regulations states that the purpose of the amendment is to give full effect to the policy intention of the regulation – that is, that the remaining relative visa should not be granted to more than one person in the same family. Under the pre-9 November 2009 version, it was possible for one couple to sponsor two remaining relatives of one member of the couple contrary to the policy intention.

<a href="#">In the Estate of Hills [2009] SASC 176 (2009); 263 LSJS 458</a>	
<a href="#">Kim v MIAC [2007] FMCA 798</a>	<a href="#">Summary</a>
<a href="#">Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241</a>	
<a href="#">Lim v MIAC [2007] FMCA 1127</a>	
<a href="#">Mahal v MIBP [2015] FCCA 449</a>	
<a href="#">Mercado v MIAC [2007] FMCA 1216</a>	<a href="#">Summary</a>
<a href="#">Nguyen v MIAC [2010] FMCA 847</a>	<a href="#">Summary</a>
<a href="#">Prasad v MIAC [2007] FCA 1739</a>	
<a href="#">Rahiman v MIMIA [2006] FMCA 76</a>	
<a href="#">Scargill v MIMIA [2003] FCAFC 116; (2003) 129 FCR 259</a>	<a href="#">Summary</a>
<a href="#">Sherzad v MIAC [2008] FCA 460</a>	<a href="#">Summary</a>
<a href="#">Sherzad v MIAC [2008] FCAFC 145; (2008) 170 FCR 105</a>	<a href="#">Summary</a>
<a href="#">Su v MIMIA [2005] FCA 1176</a>	
<a href="#">Su v MIMIA [2005] FMCA 92</a>	
<a href="#">Tran v MIMA [1998] 290 FCA</a>	
<a href="#">Usman &amp; Anor [2005] FMCA 966</a>	
<a href="#">White v Zurich Australia Ltd [2002] VSC 141</a>	

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#### Relevant amending legislation

Title	Reference number
<a href="#">Migration Amendment Regulations 2000 (No.2)</a>	SR 2000, No.62
<a href="#">Migration Amendment Regulations 2002 (No.2)</a>	SR 2002, No.86
<a href="#">Migration Amendment Regulations 2007 (No.7)</a>	SLI 2007, No.314
<a href="#">Migration Amendment Regulations 2005 (No.8)</a>	SLI 2005, No.221
<a href="#">Migration Amendment Regulations 2005 (No.4)</a>	SLI 2005, No.134
<a href="#">Migration Amendment Regulations 2009 (No.2)</a>	SLI 2009, No.42
<a href="#">Migration Legislation Amendment Regulations 2009 (No.2)</a>	SLI 2009, No.116
<a href="#">Migration Amendment Regulations 2009 (No.7)</a>	SLI 2009, No.144
<a href="#">Migration Amendment Regulations 2009 (No.13)</a>	SLI 2009, No.289
<a href="#">Migration Legislation Amendment Regulations 2011 (No.1)</a>	SLI 2011, No.105
<a href="#">Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013</a>	SLI 2013, No.118
<a href="#">Migration Amendment (Redundant and Other Provisions) Regulation 2014</a>	SLI 2014, No.30
<a href="#">Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014</a>	SLI 2014, No.65

<a href="#">Migration Amendment (2015 Measures No.1) Regulation 2015</a>	SLI 2015, No.34
<a href="#">Migration Legislation Amendment (2016 Measures No.4) Regulation 2016</a>	F2016L01696

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#### Available Decision Templates

There are two templates designed for use for reviews of Subclass 115 and Subclass 835 visa decisions:

- **Subclass 115 Visa Refusal – Remaining Relative** – this template is suitable for use where the visa application was made on or after 1 November 2005; and
- **Subclass 835 Visa Refusal – Remaining Relative** – this template is suitable for use where the visa application was made on or after 1 November 2005.

For applications made prior to 1 November 2005, please contact MRD Legal Services for advice.

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