Migration and Refugee Division Commentary

Family

FAMILIAL RELATIONSHIPS

Overview[1]

The *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (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).

The definitions discussed in this commentary apply to visa applications made on or after 1 July 2009 (and, where indicated, some definitions vary for more recent applications). For guidance about a visa application made before 1 July 2009, please contact MRD Legal Services.

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 reg 1.03 of the Regulations as a 'relative' who:

- does not have a 'spouse' or 'de facto partner';[2]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] 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

- 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* (Cth) (Social Security Act) (see also below in relation to ascertaining whether a person is old enough).

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: Subclass 114 and 838: Aged Dependent Relative visas.

Aged parent

'Aged parent' is defined in reg 1.03 of the Regulations as a 'parent' who is old enough to be granted an age pension under the 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);[3] Subclass 864 (Contributory Aged Parent); Subclass 884 (Contributory Aged Parent (Temporary)) and a range of now redundant visa subclasses.[4] For further information about these subclasses and Parent Visa Issues including 'Balance of Family', see 'Definition of 'Parent''.

Child

Visa applications made on or after 1 July 2009[5]

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

(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* (Cth) (Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act) effective 1 July 2009.

[3] 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 reg 2.08 or 2.08B as a result of *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* (Cth) (SLI 2014, No 65). 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.

[4] 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* (Cth) (SLI 2014, No 30) for visa applications made on or after 22 March 2014.

[5] 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* Online relevantly includes, amongst other things, 'a son or daughter' and, in a 'legal' context, 'a young person within a certain age determined by statute'. The definition here does not, however, include any reference to marriage indicating a child does not include an 'in-law' form of the relationship.

2009.[6] 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 in terms of a child's dependency on his or her parents.[7] This definition is supplemented by the concept 'parent and child' in reg 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,[8] 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* (Cth) (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

[6] As inserted by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 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.

[7] In *Nakad v MIAC* [2013] FMCA 234 at [30], the Court confirmed that for the purposes of the definition of 'dependent child' in reg 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.

[8] In *Nakad v MIAC* [2013] FMCA 234, 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 poss ble 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. The Federal Circuit Court remitted by consent the application in [redacted] (Tribunal reference [redacted]) on the basis that the Tribunal had erred in confining its consideration of whether the applicant was the 'child' of his grandmother only to the circumstances in s 5CA(1)(a) and (b). The Tribunal had evidence of court orders regarding guardianship and sole parental respons bility of the applicant to the grandmother, which it did not consider in determining whether the applicant was the 'child' of his grandmother outside of ss 5CA(1)(a)–(b).

and each of his or her biological parents.[9] 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.[10]

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.[11] Relevantly, this means that under s 5CA of the Act, a child born to a couple outside of their marriage,[12] or a child born to a person or to a couple (including married,[13] or de facto partners whether of the same or opposite sex[14]) as a result of artificial conception procedure,[15] or surrogacy arrangement,[16] could be considered as the child of a particular person, or as a child of a person who is the 'product of a relationship'[17] 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).[18] 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[19]
- 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;[20] and

[9] See also Parkinson P, *Australian Family Law in Context Commentary and Materials,* 5th edition (Lawbook co. 2012), at [21.10] p.718.
[10] 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 effective 1 July 2000 at p.8.
[11] In particular, s 4 of the *Family Law Act 1975* (Cth) (Family Law Act) provides that sub-div D of div 1 of pt 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 children born to a couple outside of their marriage. It also provides for the position of children of de facto partners. 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 partners, provided that certain requirements are met, though the child is not biologically related to the person(s).
[12] Family Law Act s 60F(1)(a).
[13] 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'.
[14] 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.
[15] Family Law Act s 60H.
[16] Family Law Act s 60HB. 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.
[17] Explanatory Memorandum to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 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.
[18] 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 effective 1 July 2009, the presumptions set out in the Family Law Act in determining a child-parent relationship is clearly of significance.
[19] Family Law Act s 69P.
[20] Family Law Act s 69Q.

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.[21]

Presumptions also exist where a Court has found that a person is the parent of a child,[22] or where a man has executed an instrument acknowledging that he is the father of a specified child.[23] 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.[24] This could include witness evidence or, in appropriate circumstances, DNA evidence.[25]

If a DNA test is unable to be obtained, other evidence, as mentioned above, can be provided to prove the existence of a parent-child relationship. Such evidence may be sufficient to show the relationship without DNA evidence to support it; particularly where there is a combination of pieces of evidence, such as a birth certificate, a medicare card and child support payments.[26] Where there is a legitimately issued birth certificate, that is prima facie evidence of parentage of a child.[27]

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[28] of another person (the couple), and either the couple consented[29] 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,[30] the child is a child of the couple, then, under both the Family Law Act[31] and

[21] Family Law Act s 69R.
[22] Family Law Act s 69S.
[23] Family Law Act s 69T.
[24] Family Law Act s 69U.
[25] For a discussion on the use of DNA evidence see *Tadese v MIBP* [2021] FCA 514 where the Court found that it was open to the Tribunal to place significant weight on the report of the DNA testing which, in this case it said, spoke for itself (at [25]). In this case the applicants had claimed that they were not siblings (in order that their marriage would not be deemed invalid). A DNA test found the statistical likelihood of the appellant and the visa applicant being half-s blings compared to unrelated individuals was 66 to 1 which was moderately strong evidence of them being half-siblings. Particularly in the absence of any further DNA testing contradicting that finding, the Tribunal was entitled to rely on those results, and it was not necessary to go beyond them (at [23]).
[26] See *Lieu v MICMSMA* [2022] FCA 758, where the Court found that a decision-maker's rejection of the evidence provided in support of the claimed father/child relationship was unreasonable and the decision-maker had failed to properly understand the evidence by failing to consider the statutory schemes behind the issue of the evidence including a birth certificate, medicare card and child support payments. The decision-maker had therefore not given appropriate weight to all of the material submitted (at [65]). In that case the applicant had been unable to provide a DNA test as she was no longer in contact with her father but had provided the other forms of evidence mentioned. The case involved a question of citizenship but its consideration of evidence to support a parent/child relationship appears equally applicable to the *Migration Act*
[27] See *Lieu v MICMSMA* [2022] FCA 758, where the Court considered the legal effect of a certificate issued by the Registrar under the *Births, Deaths and Marriages Registration Act 1996* (Vic) and found that the delegate considering the certificate for the purposes of establishing citizenship had erred by finding the certificate is not in itself evidence of parentage and gave it little weight (at [27]-[33]).
[28] 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.
[29] 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.
[30] 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* (Cth) (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); pt 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).
[31] Family Law Act s 60H(1).

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.[32]

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,[33] 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[34] 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[35] 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.[36]

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 was a de facto partner of another person,[37] 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.[38] 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 reg 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 reg 1.04 of the Regulations. For the purposes of s 5CA(2), reg 1.14A provides that a child that is formally adopted in accordance with regs 1.04(1)(a) and (b) is the child of the adoptive parents and that any previous child-parent

[32] Family Law Act ss 60F(1), (3), 60HA(1)–(2).
[33] The prescr bed 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 15–16 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–10C of the *Family Relationships Act 1975* (SA); pt 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).
[34] 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).
[35] 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).
[36] Family Law Act s 60HB.
[37] Family Law Act s 60H(1)(d).
[38] See e.g. s 60H(2)–(3) of the Family Law Act.

relationship is no longer recognised. Notably, an 'adopted child' under the Family Law Act is expressly excluded from the s 5CA definition of 'child'.[39]

For further information about whether a person is adopted for the purposes of migration law, see: Definition of Adoption

Step children

Where 'child' appears in the Regulations, it does not include a 'step-child', because 'step-child' is separately defined in reg 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 reg 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.[40]

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 and someone who is an adopted child for the purposes of the Migration Act, 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.[41] The Explanatory Memorandum which accompanied the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (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.[42]

[39] The concept of 'adopted' under the Family Law Act is narrower than the concept of 'adoption' under 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 reg 1.04 of the Regulations.
[40] See D C Pearce, *Statutory Interpretation in Australia*, 8th edition at [9.2]–[9.3].
[41] s 15AB(1)(b)(i) of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act).
[42] 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 (Cth) 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 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.

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 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.[43]

Close relative

'Close relative' is defined in reg 1.03 of the Regulations, [44] in relation to a person, as:

- the partner[45] of the person; or
- a child (including adopted child),[46] '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 reg 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.[47]

De facto partner

Whether a person is a de facto partner of another person is relevant in a variety of contexts and is 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).[48] The term 'de facto partner' is also used in the circumstances of determining various familial 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 reg 1.12; the definition of 'member of the immediate family' in reg 1.12AA(1); the definition of 'orphan relative' in reg 1.14; and the definition of 'remaining relative' in reg 1.15.[49]

[43] See the Explanatory Statement to SLI 2009, No 144 at pp.5 and 23.
[44] In *Acosta v MIBP* [2016] FCCA 1276 at [8], the Court held that reg 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'.
[45] 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.
[46] 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). Thus, for both pre and post 1 July 2009 visa applications, an adopted child is a close relative.
[47] The reference to 'close' was omitted from pts 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)* (Cth) (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 SLI 2014, No 30 for visa applications made on or after 22 March 2014.
[48] These classes of visa were renamed from 'Spouse' to 'Partner' by SLI 2009, No 144.
[49] 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

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.[50]

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.[51] This definition is supplemented by reg 1.09A which sets out the factors to be considered in assessing if two persons are in a de facto relationship, and reg 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.[52] 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 reg 2.03A.

For further guidance, see: Spouse and de facto partner.

Dependent child

The term, 'dependent child', arises in a number of contexts, including in the definition of 'member of family unit' in reg 1.12 (see below), the definition of 'member of the immediate family' in reg 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.

Dependent Child-post 1 July 2009

For visa applications made on or after 1 July 2009, the term 'dependent child' is defined in reg 1.03 as follows[53]:

> ***dependent child,***
>
> *of a person, means the child or step-child of the person (other than a child who is engaged to be married[54] or has a spouse or de facto partner), being a child who:*
>
> *(a) has not turned 18; or*
>
> *(b) has turned 18 and:*

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.

[50] 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.

[51] As inserted by Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 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 (reg 3(2)). However, for the purposes of reg 1.20J, where a person was a 'spouse' of another before 1 July 2009 under the old version of reg 1.15A, the person is taken to be a spouse within the meaning of the new definition after 1 July 2009: reg 3(3).

[52] The amended reg 1.09A and new reg 2.03A were inserted by SLI 2009, No 144.

[53] As 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 effective 1 July 2009. Prior to 1 July 2009, the definition did not refer to 'de facto partner' as an exclusion.

[54] Note the term 'engaged to be married' was judicially considered in *Awad v MIBP* [2015] FCCA 1381.

(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.[55] 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[56] 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.

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*[57] 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.[58] The Court noted that the involvement of her father in the agreement did not diminish the personal aspect of the formalisation of the relationship[59] 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, he involvement of one of more of the parents of the prospective spouses.[60] For further discussion on this case see: Subclass 101 and 802 - Child Visas.

[55] *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696).
[56] Note the term 'engaged to be married' was judicially considered in *Awad v MIBP* [2015] FCCA 1381.
[57] *Awad v MIBP* [2015] FCCA 1381.
[58] 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].
[59] *Awad v MIBP* [2015] FCCA 1381 at [15]–[16].
[60] *Awad v MIBP* [2015] FCCA 1381 at [16].

Children over 18

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 reg 1.05A.[61] Relevantly, in *Nakad v MIAC*,[62] the Court confirmed that for the purposes of the definition of 'dependent child' in reg 1.03 any circumstances suggesting dependency are irrelevant if the definition of 'child' in s 5CA of the Act is not satisfied.[63]

Detailed consideration of the legal issues relating to this term 'child' can be found in: 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 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* (NSW) 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.[64]
- In Victoria, the term 'guardian' is defined in s 3 of the *Guardianship and Administration Act 1986* (Vic) 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* (Qld) and means 'a guardian appointed under the Act.'

[61] Note reg 1.05A(2)(d) was amended by the *Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Act* 2014 (Cth) (No 135, 2014) 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 reg 2.08F(1)(b): item 5000, sch 2, pt 4.
[62] *Nakad v MIAC* [2013] FMCA 234. Upheld on appeal in *Nakad v MIMAC* [2013] FCA 810.
[63] *Nakad v MIAC* [2013] FMCA 234 at [30].
[64] *Guardianship Act 1987* (NSW) s 3.

- In South Australia s 3 of the *Guardianship and Administration Act 1993* (SA) 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* (WA) 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* (Tas) 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* (ACT) 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.

Policy states 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.[65] However, policy 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.[66] Arguably, having regard to the words 'other than' in the reg 1.03 definition of 'guardian', this position in policy 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.[67] However, whether a person is a 'guardian' arises for consideration in the Schedule 2 criteria relating to sponsorship on behalf of a minor for the following visa subclasses: Subclass 103 (Parent);[68] Subclass 143 (Contributory Parent); Subclass 173 (Contributory Parent (Temporary)); Subclass 300 (Prospective Marriage); Subclass 309 (Spouse (Provisional)); Subclass 804 (Aged Parent);[69] Subclass 820 (Spouse); Subclass 864 (Contributory Aged Parent); and Subclass 884 (Contributory Aged Parent (Temporary)).[70]

[65] Policy - Migration Regulations - Divisions - Div 1.2 - Interpretation - Reg 1.03 - Guardian (reissued 27 March 2014) at [2.5]–[2.6].
[66] Policy - Migration Regulations - Divisions - Div 1.2 - Interpretation - Reg 1.03 - Guardian (reissued 27 March 2014) at [2.5]–[2.6].
[67] Rather, cases involving issues of guardianship will normally be subject to PIC 4015–4018.For example, Public Interest Criterion 4012 in sch 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.
[68] 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 reg 2.08 or 2.08B as a result of SLI 2014, No 65. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.
[69] 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 reg 2.08 or 2.08B as a result of SLI 2014, No 65. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.
[70] 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.

Member of the family unit

'Member of the family unit' is defined in reg 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[71] 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:
  - 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.[72]

Post 19 November 2016

For visa applications made on or after 19 November 2016, a new reg 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.[73]

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 de facto 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

[71] 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.
[72] As specified in regs 1.12(2)–(12).
[73] As specified in regs 1.12(3)–(7).

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: 'Member of a Family Unit' (reg 1.12).

Member of the immediate family

The expression 'member of the immediate family' is defined in reg 1.12AA for most purposes as a:

- relevant partner[74] of the person;
- 'dependent child' of the person; or
- 'parent' of the person if that person is not 18 years or more.

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; and Subclass 852 Referred Stay (Permanent) visas.

Orphan relative

A person is an 'orphan relative' of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, in accordance with reg 1.14 if he or she:

- has not turned 18;
- does not have a partner;[75]
- 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: Subclass 117 and 837 – Orphan Relative visas.

[74] 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.
[75] 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.

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.[76] 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.

For visa applications made on or after 1 July 2009, 'parent' is defined in s 5(1) of the Act.[77] 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 reg 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 reg 1.14A[78] 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 reg 1.04(2).[79] Thus, if formal adoption arrangements are entered which meet the requirements of reg 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: 'Definition of 'Parent' and Parent Visas Issues including 'Balance of Family Test'.

Relative

The term 'relative' is defined in reg 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,[80] and in the case of a Subclass 200 (Refugee) visa[81] or a Protection visa, a first or second cousin.[82] 'Close relative'

[76] Note that 'working age parent' is also defined in reg 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.
[77] Inserted by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act effective from 1 July 2009.
[78] As inserted by SLI 2009, No 144 for applications made on or after 1 July 2009.
[79] This would appear to also exclude parents-in-law from meeting the definition of parent in this context.
[80] In *Acosta v MIBP* [2016] FCCA 1276 at [8], the Court held that reg 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'.
[81] Note this is not a Part 5 reviewable decision.

is defined in reg 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'. 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)[83] 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 (Aged Parent); Subclass 864 (Contributory Aged Parent); Subclass 838 (Aged Dependent Relative); Subclass 884 (Contributory Aged Parent (Temporary)); and Subclass 580 (Student Guardian) visas.[84]

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 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 reg 1.15 of the Regulations. It only arises for consideration in the context of a Remaining Relative visa (Subclasses 115 and 835).[85]

The definition of 'remaining relative' has been the subject of numerous legislative amendments. 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[86] (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

[82] Note for applications made prior to 16 December 2014 sub-clause (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 reg 2.08F(1)(b); per item 5000, of sch 2, pt 4 No 135, 2014.
[83] Relevantly to a number of Family visas including Subclasses 837 (Orphan relative) and 838 (Aged dependent relative), an 'Australian relative' is defined in reg 1.03, as a 'relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen': see cls 837.213, 838.212.
[84] 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 reg 2.08 or 2.08B as a result of SLI 2014, No 65. 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.
[85] 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 reg 2.08 or 2.08B as a result of SLI 2014, No 65. The associated definition and limitation on sponsorship for Remaining Relative visas in reg 1.20K were also repealed by the same Regulation. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.
[86] 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.

who are usually resident in Australia. Additional provisions apply if the applicant is an adopted child.

For further discussion see: 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.

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';[87] '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.

'Spouse' is defined in s 5F of the Act and refers to married relationships only.[88] The definition was amended from 9 December 2017 to include same-sex relationships.[89] 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[90]
- the parties must have a mutual commitment to a shared life as a married couple to the exclusion of all others[91]
- the relationship is genuine and continuing;[92] and
- the parties live together or, where they live separately and apart, this is not on a permanent basis.[93]

For the purposes of determining whether the above requirements in s 5F for a 'spouse' relationship exist, reg 1.15A sets out the factors that the Minister (or the Tribunal on review)

[87] 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 reg 2.08 or 2.08B as a result of SLI 2014, No 65. This Regulation was subsequently disallowed by the Senate on 25 September 2014 at 12.00pm.
[88] As inserted by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act effective 1 July 2009.
[89] Section 5F was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) and affects all live applications where it is necessary to determine whether or not two persons are in a spousal relationship.
[90] s 5F(2)(a).
[91] s 5F(2)(b).
[92] s 5F(2)(c).
[93] s 5F(2)(d).

should take into account.[94] 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* (Cth), 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.

'Step-child' is defined in reg 1.03 in relation to a parent as meaning:[95]

> *(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 circumstances in subparagraph (b)(iii) include references to orders and arrangements in force under the Family Law Act. Prior to 27 March 2010, amendments made to the Family Law Act were not reflected in the Migration Regulations.[96] 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'.[97] 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

[94] 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 effective 1 July 2009).
[95] 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.
[96] The amendments made by the *Family Law Reform Act* 1995 (Cth) 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).
[97] By the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

Family Law Act.[98] 'Parenting order' is defined in reg 1.03 as having the meaning given by s 64B(1) of the Family Law Act.[99]

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)".[100] *Mercado v MIAC*[101] 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 reg 1.15(2)(a) of the Regulations, included a 'half-brother'.[102] The Court's reasoning would be equally applicable to the use of the word 'sister' in the Regulations.[103]

Grandparent / grandchild

The term 'grandparent' is defined in the *Macquarie Dictionary* as 'a parent of a parent'.[104] Given that the definition of 'parent' in reg 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 reg 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. The fact that separate terms 'grandparent' and 'step-grandparent' are used in the context of 'relative' in reg 1.03 suggests that the term 'grandparent' was not intended to, and should not be interpreted to include 'step-grandparent'.

[98] 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 as amended (see Explanatory Statement to SLI 2010, No 38.
[99] 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 as amended (see Explanatory Statement to SLI 2010, No 38.
[100] The Macquarie Dictionary Online Sixth Edition © 2013 Macquarie Dictionary Publishers Pty Ltd accessed on 6 July 2022.
[101] *Mercado v MIAC* [2007] FMCA 1216.
[102] The decision in *Mercado* was expressly followed in *Claridge v MIBP* [2013] FCCA 1953 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].
[103] In *Claridge v MIBP* [2013] FCCA 1953 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].
[104] The Macquarie Dictionary Online, www.macquariedictionary.com.au, accessed on 6 July 2022. Note 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'.[105] The primary context in which 'grandchild' arises for consideration is in relation to the definition of 'relative' in reg 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 or aunt'.[106] Similarly, 'uncle' is defined as: '(i) the brother of one's father or mother; or and (ii) the husband of one's aunt or uncle'.[107] 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 reg 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 Schedules 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'[108] or 'second cousins'.[109] The *Macquarie Dictionary* relevantly defines 'cousin' as 'the son or daughter of an uncle or aunt'.[110] 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 Tribunal is 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 the 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 below.

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'.[111] 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'.[112]

Nieces and nephews are included in the definition of 'relative' under reg 1.03. That definition specifically includes 'step' nieces and nephews. Nieces and nephews may also sponsor applicants for certain skilled visas. It is of note that the relevant Schedule 1 requirements

[105] The Macquarie Dictionary Online www.macquariedictionary.com.au, accessed on 6 July 2022.
[106] The Macquarie Dictionary Online, www.macquariedictionary.com.au, accessed on 6 July 2022.
[107] The Macquarie Dictionary Online, www.macquariedictionary.com.au, accessed on 6 July 2022.
[108] See for example cl 139.211A(f).
[109] See for example, definition of 'relative' in reg 1.03 for the purposes of a Subclass 200 (Refugee) visa (not reviewable by the Tribunal under Part 5 or 7 of the Act).
[110] The Macquarie Dictionary Online, www.macquariedictionary.com.au, accessed on 6 July 2022.
[111] The Macquarie Dictionary Online, www.macquariedictionary.com.au, accessed on 6 July 2022.
[112] The Macquarie Dictionary Online, www.macquriedictionary.com.au, accessed on 6 July 2022.

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*[113] 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 sets out a number of 'presumptions of parentage' (see also above) 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.[114]

Non-blood relationships sometimes arise for consideration in assessing whether a particular familial relationship exists.[115] 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.[116] 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 or aunt*.[117] 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

[113] *Re Tracey Ann Hunt v MIEA* [1993] FCA 116.
[114] In *Ortiz v MIAC* [2011] FMCA 432, 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).
[115] 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* (Cth) 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.
[116] The Macquarie Dictionary Online, www.macquriedictionary.com.au, accessed on 6 July 2022 defines 'in-law' as 'noun a relative by marriage'.
[117] The Macquarie Dictionary Online www.macquriedictionary.com.au, accessed on 6 July 2022.

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 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 the 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.[118] 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,*[119] 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 reg 1.15 included or excluded a 'half-brother'. 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.*[120]

Relevantly, in *Claridge v MIBP,*[121] the Court agreed with the reasoning set out in *Mercardo* and found that the term 'brother' included 'half-brother'.[122] 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.*[123] The Court further observed that by inference the same reasoning would apply to the term 'sister'.[124]

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*

[118] See also, albeit in the context of step relationships, Policy - Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships – (reissued 19 November 2016).
[119] *Mercado v MIAC* [2007] FMCA 1216.
[120] *Mercado v MIAC* [2007] FMCA 1216 at [33].
[121] *Claridge v MIBP* [2013] FCCA 1953.
[122] *Claridge v MIBP* [2013] FCCA 1953 at [31]–[36].
[123] *Claridge v MIBP* [2013] FCCA 1953 at [35].
[124] *Claridge v MIBP* [2013] FCCA 1953 at [9].

may be regarded as relevant wherever such relationships fall for consideration under the migration legislation.

'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 reg 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*[125] and *Liang v MIAC*[126] 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 reg 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.[127]

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*,[128] 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 reg 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.[129]

Effect of divorce / separation / death of a spouse

As discussed above, the definition of 'step-child' in reg 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.

[125] *Mercado v MIAC* [2007] FMCA 1216.
[126] *Liang v MIAC* [2007] FMCA 1288.
[127] reg 1.14A was inserted bySLI2009, No 144 for visa applications made on or after 1 July 2009.
[128] *Re Tracey Ann Hunt v MIEA* [1993] FCA 116.
[129] *Re Tracey Ann Hunt v MIEA* [1993] FCA 116 at [26].

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 reg 1.03(a) to mean 'a person…who is the child of the parent's current partner',[130] it appears that for a child who is over 18 years old, 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. 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.[131]

For a child under 18 years old, the step-relationship continues to be recognised under the 'step child' definition in reg 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, 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.[132]

Outside the specified circumstances in reg 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'[133] suggests that a step relationship would cease upon cessation of the spousal relationship that created it.

Adoptive relationships

'Adoption' is defined in reg 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:

[130] 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.
[131] See also Policy - Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships (reissued 19 November 2016).
[132] regs 1.03(b)(iii)(A)–(B); see also Policy - Act – Act defined terms – s5G – Relationships and family members – Child-parent relationships (reissued 19 November 2016).
[133] *Mercado v MIAC* [2007] FMCA 1216 at [33].

- 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 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.[134] For example, the definition of the pre-1 July 2009 version of 'parent' expressly includes an 'adoptive parent'.[135] The Schedule 1 requirements for some Australian-sponsored skilled visas also expressly refer to adoptive relationships.[136] 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, reg 1.14A provides that a formal adoption arrangement severs any child-parent relationship which existed prior to the adoption.[137] However, a customary adoption will not.[138] 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.

[134] Pursuant to s 18A of the Acts Interpretation Act, 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 reg 1.04.
[135] 'Parent' was omitted from reg 1.03 of the Regulations by SLI 2009, No 144 for visa applications made on or after 1 July 2009 (reg 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) and supplemented by reg 1.14A(1) of the Regulations.
[136] See, for example, item 1128BA(3)(l)(iii) which refers to 'adoptive' brother, sister, aunt, uncle, niece and nephew.
[137] As inserted by SLI 2009, No 144 for visa applications made on or after 1 July 2009.
[138] See note 1 of reg 1.14A.

In *Liang v MIAC,*[139] 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).[140] The Court noted that, unlike the other categories of relationship referred to in item 1128BA(3)(l)(iii), the terms 'grandchild' and 'first cousin' did not have after them references to adoptive or step forms of those relationships.[141] 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.[142]

Similarly, the reasoning in *Re Tracey Ann Hunt v MIEA*[143] 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: 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 migration legislation could be construed as encompassing

[139] *Liang v MIAC* [2007] FMCA 1288.
[140] *Liang v MIAC* [2007] FMCA 1288 at [19].
[141] *Liang v MIAC* [2007] FMCA 1288 at [20].
[142] *Liang v MIAC* [2007] FMCA 1288 at [28].
[143] *Re Tracey Ann Hunt v MIEA* [1993] FCA 116.

'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*,[144] 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' 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.[145]

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

Judgment	Judgment Summary
Acosta v MIBP [2016] FCCA 1276	
Awad v MIBP [2015] FCCA 1381	Summary
Claridge v MIBP [2013] FCCA 1953	
Liang v MIAC [2007] FMCA 1288	Summary
Lieu (by her litigation guardian Nguyen) v MICMSMA [2022] FCA 758	
Mercado v MIAC [2007] FMCA 1216	Summary
Nakad v MIAC [2013] FMCA 234	Summary
Nakad v MIMAC [2013] FCA 810	
Ortiz v MIAC [2011] FMCA 432	Summary
Re Tracey Ann Hunt v MIEA [1993] FCA 116; (1993) 41 FCR 380	

[144] *Mercado v MIAC* [2007] FMCA 1216.
[145] The decision in *Mercado* was expressly followed in *Claridge v MIBP* [2013] FCCA 1953 at [31]–[36] where the Court agreed that the term 'brother' included 'half-brother'.

Tadese v MIBP [2021] FCA 514	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2009 (No 7)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2010 (No 1)	SLI 2010, No 38	No 1/2010
Migration Amendment Regulations 2012 (No 2)	SLI 2012, No 82	No 4/2012
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No 30	No 2/2014
Migration and Maritime Powers Legislation (Resolving the Asylum Legacy Case Load) Act 2014	No 135, 2014	No 11/2014
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016	F2016L01696	No 4/2016
Marriage Amendment (Definition and Religious Freedoms) Act 2017	No 129 of 2017	No 6/2017

Last updated/reviewed: 30 January 2023

SUBCLASS 117 AND 837:

ORPHAN RELATIVE VISAS

Relevant legislative amendments

Available Decision templates

Overview[1]

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'.[2]

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.

Merits review

A decision to refuse a Subclass 117 visa is a reviewable decision under Part 5 of the *Migration Act 1958* (Cth) (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.[3] The sponsor has standing to apply for review for the Subclass 117 visa.[4]

A decision to refuse a Subclass 837 visa is a reviewable decision under Part 5 of the *Migration Act 1958* (Cth) (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.[5] The visa applicant had standing for review.[6]

Visa application requirements

Subclass 117 (Orphan relative) visa

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

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] 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).
[3] s 338(5)(b).
[4] s 347(2)(b).
[5] s 338(5)(b).
[6] s.347(2)(a).

For applications made prior to 18 April 2015, the application must be made on the approved form, with the prescribed fee and must be made outside Australia.[7] 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.[8] The prescribed fee must also be paid.[9]

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.[10]

Subclass 837 (Orphan relative) visa

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

For applications made prior to 18 April 2015, the applicant must be in Australia and the application must be made in Australia.[11] The application must be made on the approved form and the prescribed fee must be paid.[12]

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,[13] the prescribed fee paid,[14] and the applicant must be in Australia but not in immigration clearance.[15]

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.[16]

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.[17]

Visa criteria

The visa criteria for Subclass 117 and 837 are very similar. The key differences are 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

[7] Items 1108(1),(2), (3)(a).
[8] Items 1108(1), (3)(a), (3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34).
[9] Item 1108(2).
[10] Item 1108(3)(b).
[11] Items 1108A(3)(a), (b).
[12] Items 1108A(1), (2).
[13] Items 1108A(1), (3)(a) as amended by SLI 2015, No 34.
[14] Item 1108A(2).
[15] Item 1108A(3)(b).
[16] Item 1108A(3)(c).
[17] Item 1108A(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).

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.

Subclass 117 visa criteria

The criteria for a Subclass 117 visa are contained in Part 117 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).[18] 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;[19]
- is sponsored by the eligible Australian relative or the Australian relative's partner.[20]

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;[21]
- the sponsorship must have been approved by the Minister and still be in force;[22]
- any assurance of support requested by the Minister must have been accepted;[23]

the applicant and family members must satisfy certain public interest criteria.[24] 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.

[18] Part 117 was originally inserted on 1 November 1999.
[19] cl 117.211 was introduced in its current form by *Migration Amendment Regulations 2002* (No 2) (Cth) (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 Regulations 2000* (No 2) (Cth) (SR 2000, No 62), and again on 27 February 2001 by *Migration Amendment Regulations 2001* (No 1) (Cth) (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 reg 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 Familial Relationships commentary for further information.
[20] cl 117.212.
[21] cl 117.221.
[22] cl 117.222.
[23] 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) (Cth) (SR 2004, No 93).

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;[25]
- if the applicant is a person to whom s 48 of the *Migration Act 1958* (Cth) (the Act) applies,[26] 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;[27]
- 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;[28]
- the applicant is sponsored by the Australian relative or the Australian relative's partner.[29]

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;[30]
- any assurance of support requested by the Minister must have been accepted;[31]

---

[24] cls 117.223, 117.225, 117.226 and 117.227. Clause 117.223 was amended by *Migration Legislation Amendment Regulation* 2012 (No 5) (Cth) (SLI 2012, No 256), to insert 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) (Cth) (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.
[25] cl 837.212 as substituted by *Migration Amendment Regulations 2000* (Cth) (No 5) (SR2000, No 259) for all visa applications.
[26] Section 48 applies to people who do not hold a substantive visa, and was refused a substantive visa or had a visa cancelled after last entering Australia.
[27] cl 837.211 as amended by SR 2002, No 86 for visa applications made on or after 1 July 2002.
[28] 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 837.111 as a relative of the applicant who is an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen. 'Relative' is defined in reg 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 Familial Relationships for further information.
[29] 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 **Error! Bookmark not defined.**.
[30] cl 837.221.

- the sponsorship must have been approved by the Minister and still be in force;[32]
- the applicant and family members must satisfy certain public interest criteria.[33]

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.

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 reg 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 spouse or de facto partner;[34]
- cannot be cared for by either parent[35] 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.[36] Relative is defined in reg 1.03 to mean:

- a 'close relative' - which is defined by reg 1.03 to mean partner, child,[37] 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.

[31] 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.
[32] cl 837.226 was introduced by SR 2002, No 86. For visa applications made on or after 1 July 2002.
[33] cls 837.223, 837.224, 837.225. Clause 837.223 was amended by SLI 2012, No 256 to insert new PIC 4021. For further discussion, see footnote 23.
[34] 'Spouse' for these purposes is defined in s 5F of the Act (ie married relationships), and 'de facto partner' in s 5CB..
[35] 'Parent' is defined in s 5(1) of the Act. See also reg 1.14A(1) of the Regulations (post 1 July 2009) which specifies that a reference to 'parent' includes 'step-parent'.
[36] reg 1.14(a)(iii).
[37] 'Child' is defined in s 5CA of the Act and reg 1.14A(2) of the Regulations.

Although the definition of relative includes a person's partner, reg 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.[38] 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.[39]

Marital Status

The orphan relative definition in reg 1.14 requires that the applicant does not have a spouse or de facto partner.[40] '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 Spouse and de facto partner commentary 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.[41] 'Parent' is defined in s 5(1) of the Act and supplemented by reg 1.14A(1).[42] 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.[43]

<u>More than two parents</u>

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 reg 1.03 non-exhaustively to *include* an adoptive and a stepparent. The same definition (albeit as it

[38] reg 1.14(a)(i).
[39] cls 117.221(b), 837.221(b).
[40] reg 1.14(a)(ii). For further information see footnote **Error! Bookmark not defined.**.
[41] reg 1.14(b).
[42] Inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (No 144,2008) and omitted from reg 1.03 by SLI 2009, No 144.
[43] 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).

appeared previously in reg 2(1) of the Regulations) was considered by the Federal Court in *Nguyet v MIEA.*[44] In that case, Spender J held that the expansive definition of 'parent' as including adoptive and stepparents 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 reg 2(1), would require the language of the definition of 'orphan' to be 'tortured beyond endurance'.[45] 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 reg 2(1) was defined by reference only to the circumstances of the natural parents of the child.[46]

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 reg 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 applicant and therefore the applicant has a 'parent' (being the adopted adoptive parent) who can care for them.[47]

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).[48] Regulation 1.14A(1) further provides that a reference to a parent in the Regulations includes a step-parent and reg 1.14A(2) provides that where a child is formally adopted under regs 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).[49] Moreover, a note to reg 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 reg 1.04(1)(c)).[50] For further information see the Definition of 'Parent' and Parent visas commentary. 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.

[44] *Nguyet v MIEA* (1997) 74 FCR 422.
[45] *Nguyet v MIEA* (1997) 74 FCR 422 at 429.
[46] *Nguyet v MIEA* (1997) 74 FCR 422 at 429.
[47] Explanatory Statement to SR 2002 No 86.
[48] 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* (Cth) (No 144,2008) 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* (Cth), except that the meaning of adopted child is defined in the Regulations.
[49] '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* (Cth) (No 144,2008) effective 1 July 2009. Regulation 1.14A was inserted by SLI 2009, No 144 for visa applications made on or after 1 July 2009.
[50] Note 1 to reg 1.14A.

Death

One way in which this requirement may be met is if the applicant's 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 parents' death certificates (or Court order as to presumption of death). However, it is open to a decision maker to accept alternative evidence as to this fact.

For information in relation to the common law presumption of death see the Remaining Relative commentary.

Permanent Incapacity

Permanent incapacity for the purposes of reg 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.[51] 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.[52]

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.[53] 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 reg 1.14. However, his Honour clarified that conclusion did not have the consequence that permanent incapacity could not result in a refusal to care, 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.[54]

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 is 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.[55]

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

[51] *Nguyen v MIMA* (1998) 158 ALR 639 at 646.
[52] *Nguyen v MIMA* (1998) 158 ALR 639 at 646. Applied in *Singh v MIMA* [2008] FMCA 587 at [49].
[53] *Singh v MIMA* [2008] FMCA 587 at [70].
[54] *Nguyen v MIMA* (1998) 158 ALR 639 at 645.

or fulfil their parental role.[56] 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 are raised 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.[57]

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 reg 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 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.[58]

Unknown whereabouts

Whether the whereabouts of the applicant's parents is unknown is a question of fact for the decision maker.

---

[55] *Nguyen v MIMA* (1998) 158 ALR 639 at 646.
[56] See *Acosta v MIBP* [2016] FCCA 1276 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'.
[57] In *Hagos v MIAC* [2008] FMCA 1178, 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.
[58] *Singh v MIMIA* [2008] FMCA 587 at [45].

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.[59] Under Department policy, '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.[60]

Existing foreign custody or guardianship orders may be relevant in determining what is in the best interest of the orphan applicant. Departmental policy 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 one parent 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.[61]

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*,[62] 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* (Cth) (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.

[59] cls 117.227, 837.225.
[60] Policy – Migration Regulations – Divisions- [Div1.2] Div1.2 – Interpretation- Div 1.2/reg1.14 – Orphan Relative at [11.1] (reissued 27/3/2010).
[61] Policy – Migration Act - Act-defined terms instructions - s5G - Relationships and family members - Best interests of minor children at [10.3] (reissued 19/11/2016).
[62] *EC v MIMIA* (2004) FCR 438.

Sponsorship – cl 117.212, 117.222, 837.214, 837.226, reg 1.20KB

The sponsorship requirement at time of application and decision is essentially identical for both Subclasses. The requirement at time of application is that the applicant is sponsored by the Australian relative or the Australian relative's partner.[63] The sponsor of an applicant for a visa is defined in reg 1.20(1) of the Regulations to mean a person who undertakes certain specified obligations in relation to the applicant. The giving of the undertaking is all that is required for a person to be a sponsor, and sponsored for the purposes of these criteria. It is not a requirement that the sponsor also have capacity to fulfil the undertaking.[64]

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 reg 1.03 of the Regulations to mean 'lawfully resident in Australia for a reasonable period'. See the Settled commentary 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 (at least for the purposes of the time of application criterion) to require only that the person has made the relevant undertakings by completing the sponsorship application form.[65]

At time of decision, the sponsorship referred to at time of application must have been approved by the Minister and still be in force.[66] On review, the Tribunal can decide whether to approve a sponsorship.[67]

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

[63] cls 117.212, 837.214. For further discussion of the partner definition see footnote **Error! Bookmark not defined.**.
[64] In *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36], the Court held that in assessing the requirement in reg 1.20, no issue arises which involves an assessment of the capacity of the person to fulfil the undertaking if required, and that giving the undertaking simpliciter is sufficient. Although this judgment concerned sponsorship for a partner visa, the orphan relative visas feature the same sponsorship framework.
[65] Sponsorship undertakings are set out in reg 1.20. See *Babar v MICMSMA [2019]* FCCA 2311, where the Court appeared to consider that a person was a 'sponsor' for a similarly worded time of application criterion (cl 820.221(2)(c)) where they had agreed to undertake the obligations in reg 1.20 (at [32]–[38], [46]), but that the Minister or Tribunal on review could determine, for the purposes of a time of decision crierion requiring a sponsorship to be approved (cl 820.221(4)), whether to approve it ([24]–[26]). However, the Court also appeared to suggest the Tribunal's findings about approval would also inform the time of application criterion, and it did not expressly consider the effect of reg 1.20(3), which contemplates not entering into a sponsorship until it has been approved. Ultimately, if the time of decision criterion is not met, this issue will not be determinative.
[66] cls 117.222, 837.226.
[67] *Babar v MICMSMA* [2020] FCAFC 38. However, in exercising this discretion, the Tribunal should not apply the Department's policy (at least the version considered in that judgment) as it is based on an erroneous view of the meaning of reg 1.20 and is not formulated on the basis that it is giving effect to the approval power: at [38]-[40]. As at 7 December 2021 the policy remained unchanged. Care should be taken that if policy is to be referred to it is not the same version as considered in *Babar* and is otherwise not going beyond the legislation.

or otherwise set aside.[68] '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.[69]

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[70] 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.[71]

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.[72] See the Limitation on Sponsorships - Partner Visas commentary for further information.

Relevant Case Law

Judgment	Judgment Summary
Acosta v MIBP [2016] FCCA 1276	
Babar v MICMSMA [2020] FCAFC 38	Summary
Babar v MICMSMA [2019] FCCA 2311	Summary
EC v MIMIA [2004] FCA 978; (2004) 138 FCR 438	Summary
Hagos v MIAC [2008] FMCA 1178	
Haidari v MIAC [2009] FMCA 1178	Summary

[68] Regulation 1.20KB inserted by *Migration Amendment Regulations 2010* (No 2) (Cth) (SLI 2010, No 50) for visa applications made on or after 27 March 2010.
[69] reg 1.20KB(13).
[70] Note reg 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'.
[71] regs 1.20KB(4), (5), (9)–(10).
[72] reg 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.

Nguyet v MIEA (1997) 74 FCR 422	
Nguyen v MIMIA (1998) 88 FCR 206	
Singh v MIMIA [2008] FMCA 587	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2000 (No 2) (Cth)	SR 2000, No 62	
Migration Amendment Regulations 2000 (No 5) (Cth)	SR 2000, No 259	
Migration Amendment Regulations 2001 (No 1) (Cth)	SR 2001, No 27	20010227-1
Migration Amendment Regulations 2002 (No 2) (Cth)	SLI 2002, No 86	20020509-1
Migration Amendment Regulations 2004 (No 2) (Cth)	SR 2004, No 93	20040630-1
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No 2/2010
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015

Available Decision templates

There is one decision template designed specifically for reviews of decisions to refuse a Subclass 117 or 837 visa:

- **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.

Last updated/reviewed: 11 January 2023

DEFINITION OF ADOPTION – REG 1.04

Overview[1]

The issue of adoption arises in various contexts under the *Migration Regulations 1994* (Cth) (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 reg 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 reg 1.04 and the words 'adopt' and 'adopted' have corresponding meanings.[2] The definition of adoption has particular relevance to:

- the post 1 July 2009 definition of 'child';[3]
- the reg 1.03 definition of 'dependent child';[4]
- establishing membership of a family unit for reg 1.12 purposes (by reference to 'dependent child'); and
- the criteria for Subclasses 101 and 802 (Child), Subclass 102 (Adoption), and Subclasses 117 and 837 (Orphan Relative) visas.

Adoption definition requirements

The key requirements contained in reg 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;

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Acts Interpretation Act 1901* (Cth) s 18A.
[3] Inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) 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 Act and the Regulations is relevant.
[4] As amended by *Migration Amendment Regulations 2009* (No 7) (Cth) (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* (Cth) (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

- 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 reg 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.[5]

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.[6] 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 whether 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 reg 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 reg 1.04(1)(b). On this reading, there is no separate factual element to be satisfied, rather reg 1.04(1)(b) is met if arrangements meeting the terms of reg 1.04(1)(b)

[5] 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 at [39].
[6] 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: cls 102.211(2)(a), 102.211(3)(a), 102.211(4)(a), 102.211(5)(a), 802.213(1)(a).

were in place at the relevant time (and were in place before the adoptee attained 18 years of age). Alternatively, reg 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 reg 1.04(1)(b) (and that this occurred before the 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 reg 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.[7] That construction gives effect to the words 'assumes a parental role' in reg 1.04(1), which would on the first construction have no work to do.[8]

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*[9] 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

[7] Note that the Tribunal appears to have taken a different approach in matter of [redacted], where it considered the interpretation of reg 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 Tr bunal 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 reg 1.04 to be satisfied.
[8] 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.
[9] *Liang v MIAC* [2007] FMCA 1288.

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 reg 1.04(1)(b).[10]

The same factual approach applies if considering whether a formal adoption arrangement has been severed. For example, in *Truong v MIBP*,[11] 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 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.[12]

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.[13]

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.[14]

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.[15] 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 reg 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 reg 1.04(2).[16] That is, it is a 'customary adoption'.

[10] *Liang v MIAC* [2007] FMCA 1288 at [9]. Compare this with *Irawan v MIAC* [2009] FMCA 1165 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.
[11] *Truong v MIBP* [2017] FCCA 2713.
[12] *Truong v MIBP* [2017] FCCA 2713 at [42].
[13] reg 1.04(1)(b).
[14] 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).
[15] This currently occurs in Thailand: POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 102 – Adoption: About the Hague Adoption Convention (reissued 1 January 2016).
[16] reg 1.04(1)(c).

To meet the customary adoption requirements in reg 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.[17]

Arrangements made in accordance with the usual practice, or a recognised custom

For customary adoptions, reg 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 reg 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:

[17] 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 at [39].

  - 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.[18]

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 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.[19]

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.[20]

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,

[18] POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > Reg 1.04 – Adoption at [14.3] (reissued 1 July 2011).
[19] In *Hussain v MIAC* [2010] FMCA 729 and *Hussain v MIAC (No 2)* [2010] FMCA 730.
[20] See POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > reg 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.

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)(ii) 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.[21]

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 reg 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 reg 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 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[22] 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.*[23] *This is sometimes known as the 'substitution principle', because in law the adoptive parents are substituted for the birth parents.*

[21] See POLICY – MIGRATION REGULATIONS - DIVISIONS > Div 1.2 - Interpretation > reg 1.04- Adoption at [15.2] (reissued 1 July 2011).
[22] *The Laws of Australia* [17.9.1290]. https://www.westlaw.com.au/maf/wlau/app/document?&src=search&docguid=I1f455201138d11e38f45ebd1ab56cac9&epos=79&snippets=true&nstid=std-anz-highlight&nsds=AUNZ_SEARCHALL&isTocNav=true&tocDs=AUNZ_AU_ENCYCLO_TOC&context=48&extLink=false&fullResult=false&searchFromLinkHome=true, accessed 19 July 2022.
[23] *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).

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. [24]

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.[25] The same is true of the prohibitions under the *Marriage Act 1961* (Cth) on marriage between closely related people.[26] 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.[27]

Further exceptions to the substitution principle acknowledge some legal relations in respect of guardianship, custody and inheritance between birth parents and adopted persons.[28]

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.

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.[29] A child cannot have more than 2 parents (other than step-parents) unless the child was customarily adopted (in accordance with reg 1.04(1)(c)).[30]

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.[31] Additionally, 'relative' is broadly defined

[24] *Re K (an infant)* [1953] 1 QB 117; [1952] 2 All ER 877 at 129.
[25] 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).
[26] *Marriage Act 1961* (Cth) ss 23(2), (3).
[27] See, for example Department of Home Affairs Booklet, Child Migration, https://immi.homeaffairs.gov.au/form-listing/forms/1128.pdf, January 2019, accessed 19 July 2022.
[28] See, e.g. *Adoption Act 2000* (NSW) s 98.
[29] reg 1.14A, as amended by SLI 2009, No 144 for visa applications made on or after 1 July 2009.
[30] Note 1 of reg 1.14A.
[31] s 5G(2).

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.[32] 'Close relative', in turn, is defined to include, among other persons, a brother or sister of the person.[33] Neither definition expressly distinguishes between biological and adoptive relations.

Relevant case law

Judgment	Judgment Summary
Irawan v MIAC [2009] FMCA 1165	
Liang v MIAC [2007] FMCA 1288	Summary
Hussain v MIAC [2010] FMCA 729	
Hussain v MIAC (No 2) [2010] FMCA 730	
MIAC v Ryerson [2008] FMCA 1398	Summary
Truong v MIBP [2017] FCCA 2713	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No.4/2016

Last reviewed/updated: 19 July 2022

[32] See reg 1.03.
[33] See reg 1.03.

MEMBER OF THE FAMILY UNIT (reg 1.12)

Overview[1]

The *Migration Act 1958* (Cth) (the Act) provides that 'member of the family unit' of a person has the meaning given by the *Migration Regulations 1994* (Cth) (the Regulations).[2] Regulation 1.03 provides 'member of the family unit' has the meaning set out in reg 1.12. The definition in reg 1.12 applies for the purposes of both the Act and the Regulations.[3]

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-19 November 2016'); the second applies to visa applications made before 19 November 2016 ('pre-19 November 2016').[4]

The post-19 November 2016 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-19 November 2016 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[5]
- visa criteria for primary applicants (including 'one fails all fail' criteria)[6]
- combining visa and review applications[7]
- family violence provisions.[8]

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 reg 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'

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 5(1).
[3] Before 1 July 2009, reg 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* (Cth) (No 144, 2008).
[4] reg 1.12 was repealed and substituted by the *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696).
[5] 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.
[6] 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.
[7] For many visa classes, sch 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 regs 4.12 and 4.31A for further details.
[8] 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.

operates independently of the definition in reg 1.12. For further information on 'member of the same family unit' see below and for 'member of the immediate family' see the commentary: Familial Relationships.

Key requirements

There are two main versions of reg 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-19 November 2016

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:[9]

- 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[10]
- student visas and holders of student visas[11]
- distinguished talent visas[12]
- certain contributory parent, business and skilled visas on the basis of an earlier status as a member of the family unit.[13]

These rules are discussed further below.

[9] reg 1.12(2).
[10] regs 1.12(3)–(4).
[11] reg 1.12(6).
[12] reg 1.12(7).
[13] reg 1.12(5).

Member of family unit – pre-19 November 2016

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:[14]

- partner – a spouse or de facto partner of the family head[15]
- 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,[16] 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[17]
- distinguished talent visas[18]
- certain contributory parent, business and skilled visas where the person was a member of the family unit in an earlier application.[19]

These rules are discussed further below.

Elements of the general definition of 'member of the family unit'

Both the pre and- post-19 November 2016 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-19 November 2016 version of the definition, the definition of 'relative' may also be relevant.

[14] reg 1.12(1), as in force before F2016L01696.
[15] For visa applications made before 1 July 2009, the relevant partner reference in reg 1.12(1) is to 'spouse' as defined in the then reg 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.
[16] 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.
[17] regs 1.12(2), (2A) as in force before F2016L01696.
[18] regs 1.12(6)–(7) as in force before F2016L01696.
[19] reg 1.12 (3), (4), (5), (5A), (8), (9), (10), (11) and (12) as in force before F2016L01696.

Family head

For the purposes of the general definition, reg 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, reg 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 ss 5F (spouse) and 5CB (de facto) of the Act.[20] For further information on these terms see the commentary: Spouse and de facto partner.

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 reg 1.03, with the definitions generally requiring that the parent-child relationship exists by blood, adoption or through a partner relationship.[21] 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 commentary: Familial Relationships.

'Dependent child' as defined in reg 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 reg 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

[20] Inserted by the SLI 2009, No 144 to apply to visa applications made on or after 1 July 2009 (reg 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 (applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (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 reg 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 reg 1.12 to 'interdependent relationships' as defined in reg 1.09A (as it stood before 1 July 2009).

[21] See the definition of the term 'child' in s 5CA of the Act, the definitions relating to parent and child in reg 1.14A of the Regulations (covering step-parents and adoptive relationships) and the definition of the term 'step-child' in reg 1.03 of the Regulations.

to be married is not a 'dependent child' for the purposes of reg 1.03. For more detailed discussion about these matters see the commentary: Dependent and Dependent Child.

Relative – pre 19 November 2016

For visa applications made before 19 November 2016, reg 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-19 November 2016 version). The word 'relative' is defined in reg 1.03. For more detailed information on this definition see the commentary: Familial Relationships.

Does not have a spouse/de facto partner – reg 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, reg 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 – reg 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 reg 1.12.

Resident in the family head's household – reg 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 commentary: Usually Resident). The term 'household' should also be given its ordinary meaning.[22]

Dependency on the Family Head – reg 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 reg 1.05A and generally only concerns financial support.[23] 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.[24] In some circumstances it may be open to make a factual

[22] See for example *Thompson v MIAC* [2009] FMCA 1210 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.
[23] The concept of dependency in reg 1.05A is limited to financial dependency, except in relation to certain Protection and humanitarian visa classes.
[24] *Alimi v MIAC* [2007] FMCA 1520 at [16].

finding that a person is dependent on the family head, notwithstanding that funds are being provided by the family head's spouse.[25] For further detailed discussion see the 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-19 November 2016 version of reg 1.12 has a special definition for protection, refugee and humanitarian visas, set out in reg 1.12(4). This definition (which is very similar to the pre-19 November 2016 version of the general definition in reg 1.12(1) that previously applied for these visas) applies to all classes of protection, refugee and humanitarian visas listed in reg 1.12(3) instead of the general definition in reg 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'.

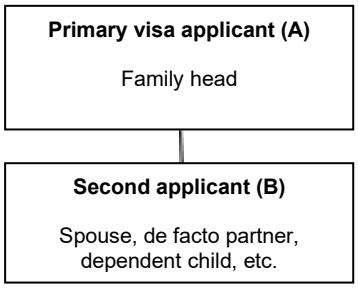
The definition of 'member of the same family unit' is set out in s 5(1) of the Act and states that one person is a member of the same family unit as another if either is a 'member of the family unit' of the other or each is a 'member of the family unit' of a third person. This means that a person ('B') is a 'member of the same family unit' as another person ('A') if:

- '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.

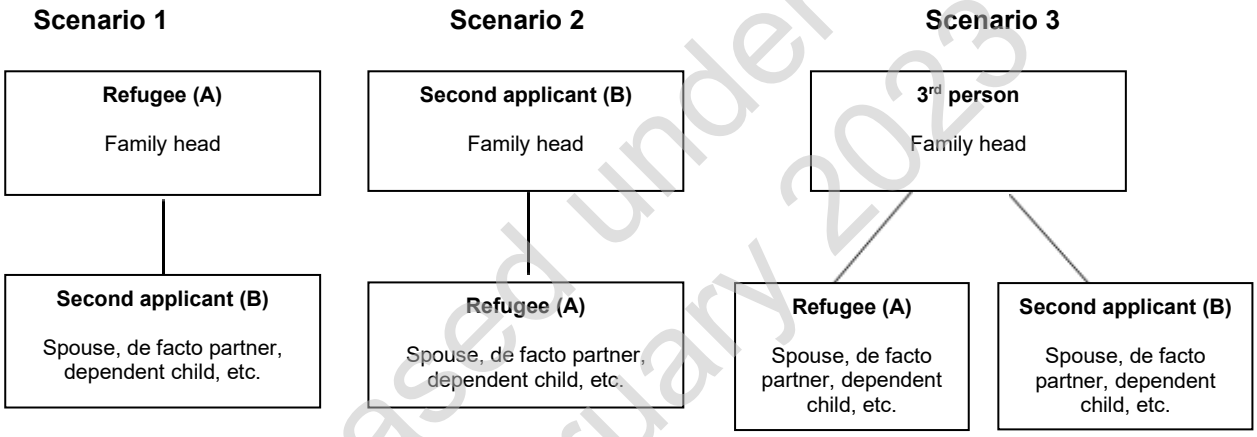
[25] See *Al Naqi v MIAC* [2007] FMCA 874 at [16] where the Court took the view that 'support for a person's relatives, from their spouse, can be considered support by them if their spousal relationship is an essential or substantial part of the reason that the support is provided'.

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 reg 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.[26] The requirement that the dependent child has not turned 18 excludes older dependent children who otherwise come within the meaning of 'dependent child' in reg 1.03: see the commentary: Dependent and Dependent Child.

[26] The definition for this purpose is the same for both the pre- and post-19 November 2016 versions: see reg 1.12(6) for the post-19 November 2016 version and regs 1.12(2) and (2A) for the pre-19 November 2016 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.[27] For further discussion see the 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.[28] 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.[29]

If an applicant relies on the special definition they cannot also rely on the general definition.[30] An applicant can only bring in one family unit under the special definition.[31]

There are minor differences between who is included in the pre- and post-19 November 2016 versions of the definition. The post-19 November 2016 version includes only members of the family unit of the parent under the revised reg 1.12(2), whereas the pre-19 November 2016 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.[32] 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[33]:

[27] 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 reg 1.15A (i.e. married or opposite sex de facto relationships).
[28] 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.
[29] The definition is effectively the same for both the pre- and post-19 November 2016 versions: see reg 1.12(7) for the post-19 November 2016 version and regs 1.12(6) and (7) for the pre-19 November 2016 version. Regulation 1.12(7) as substituted by F2016L01696 continues and simplifies the provisions that were previously in regs 1.12(6) and (7) of the repealed r 1.12: Explanatory Statement to F2016L01696 at p.21.
[30] 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.
[31] 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.
[32] reg 1.12(5) of the post-19 November 2016 version and regs 1.12(3), (4), (5), (5A), (8), (9), (10), (11) and (12) of the pre-19 November 2016 version.
[33] Prior to 1 July 2013, reg 1.12(8) also contained 'member of the family unit' provisions for certain applicants for aEmployer Nomination (Residence) (Class BW), Business Skills (Residence) (Class DF) and Skilled Independent (Migrant) (Class BN) visa, however these were removed for visa applications made on or after that date by SLI 2012, No 82. Similarly, certain applications for an Employer Nomination (Residence) (Class BW), Skilled (Residence) (Class VB) or Skilled (Provisional) (Class VC) made before 1 July 2013 were also included in reg 1.12(9), but this was also repealed by SLI 2012, No 82 for visa

New Visa applied for	**Visa held (old visa) at time of application for new visa**
Contributory Parent (Migrant) (Class CA)[34]	Contributory Parent (Temporary) (Class UT) visa
Contributory Aged Parent (Residence) (Class DG)[35]	Contributory Aged Parent (Temporary) (Class UU) visa
Business Skills (Residence) (Class DF)[36]	Business Skills (Provisional) (Class UR) visa
Business Skills (Permanent) (Class EC)[37]	Business Skills (Provionsal) (Class EB) visa
Skilled (Residence) (Class VB)[38]	Any of the following visas: (a) Skilled – Independent Regional (Provisional) (Class UX) visa; (b) Bridging A (Class WA visa or Bridging B (Class WB) visa granted on the basis of a valid application for certain skilled visas;[39] (c) Skilled – Designated Area-sponsored (Provisional) (Class UZ) visa; (d) Subclass 457 (Skilled -Regional Sponsored) visa; (e) Subclass 482 (Skilled -Regional Sponsored) visa; (f) Skilled – Regional Sponsored

applications made on or after that date. If you are considering a pre 1 July 2013 application for one of these visas please contact MRD Legal Services.

[34] reg 1.12(5) of the post-19 November 2016 version and reg 1.12(3) of the pre-19 November 2016 version.

[35] reg 1.12(5) of the post-19 November 2016 version and reg 1.12(4) of the pre-19 November 2016 version.

[36] reg 1.12(5) for both the post-19 November 2016 and pre-19 November 2016 version.

[37] reg 1.12(5) of the post-19 November 2016 version and reg 1.12(5A) of the pre-19 November 2016 version. Regulation 1.12(5A) of the pre-19 November 2016 version applies only to visa applications made on or after 1 July 2012: *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82).

[38] reg 1.12(5) of the post-19 November 2016 version and reg 1.12(8) of the pre-19 November 2016 version [where the visa applications were made on or after 1 July 2013].

[39] The relevant skilled visas applications are: Skilled – Independent Regional (Provisional) (Class UX) visa; or Skilled (Provisional) (Class VC) visa; or Skilled – Regional Sponsored (Provisional) (Class SP) visa.

	(Provisional) (Class SP) visa
Subclass 189 (Skilled – Independent) visa in the Hong Kong stream;[40] or Subclass 191 (Permanent Residence (Skilled Regional)) visa in the Hong Kong (Regional) stream[41]	Any of the following visas: (a) Subclass 457 (Temporary Work (Skilled)) visa; (b) Subclass 482 (Temporary Skill Shortage) visa; (c) Subclass 485 (Temporary Graduate) visa
Subclass 191 (Permanent Residence (Skilled Regional)) visa in the Regional Provisional Visas Stream[42]	Any of the following visas: (a) Subclass 491 (Skilled Work Regional (Provisional)) visa; or (b) Subclass 494 (Skilled Employer Sponsored Regaional (Provisional)) visa.

Combining review applications – 'Member of the Family Unit'

Where a person (the nominator/sponsor) has nominated or sponsored two or more members of a family unit in relation to primary visa applications of a type covered by s 338(5), and the Minister's decisions to refuse the visas in respect of those applicants are Part 5-reviewable, the nominator/sponsor can make a combined application for review of those decisions under reg 4.12(4).

As set out above, the general definition of 'member of the family unit' requires identification of a family head and requires a person to have a certain relationship to the family head. Where a nominator or sponsor is seeking to combine the reviews of two or more primary visa applicants, it will be necessary to determine who the the family head is, and whether those applicants have (claimed) the required relationship with the family head in order to meet the definition.[43]

[40] The table in reg 1.12(5) was amended to include subclass 189 (Skilled – Independent) visa in the Hong Kong stream by the *Migration Legislation Amendment (Hong Kong) Regulations 2021* (Cth) (F2021L01479). Applications for the Hong Kong stream of the subclass 189 visa opened to applications from 5 March 2022.
[41] The table in reg 1.12(5) was amended to include subclass 191 (Permanent Residence (Skilled Regional)) visa in the Hong Kong (Regional) stream by F2021L01479. This visa is open to applications from 5 March 2022.
[42] The table in reg 1.12(5) was amended to include subclass 191 (Permanent Residence (Skilled Regional)) visa in the Regional Provisional Visas stream by F2021L01479. This visa is open to applications from 5 March 2022 .
[43] To meet the jurisdiction threshold, it appears that the applicant need only claim to be the member of the family unit of another. See generally *MIMIA v Kim* (2004) 141 FCR 315 in which the Court at [20] stated that matters that require subjective consideration are not likely to be considered at the threshold of determining that an application is valid but rather when considering the visa application itself, suggesting a detailed consideration of matters such as the elements of family membership may not be appropriate at the time the review application is made.

If the visa applicants attempting to combine their review applications are (claimed) siblings, finding whether they are members of the family unit in accordance with reg 1.12 may be problematic as the sibling relationship itself does not meet the definition.

In the absence of judicial consideration of the requirement in reg 4.12(4), it appears open to the Tribunal to determine the family head by taking one of the following interpretations:

1. Reading reg 4.12(4) strictly, it is only the primary visa applicants who are to be considered as members of the family unit of each other, while the sponsor is not a member of the family unit. On this interpretation, one of the primary visa applicants would need to be identified as the family head and the other primary visa applicants would then need to be either their child, spouse or de facto partner.[44] On this view, child, adoption or orphan relative primary visa applicants who are claiming a sibling relationship would not meet the definition and therefore could not combine their review applications.

2. Reading reg 4.12(4) more generously, it appears open to identify the sponsor as the family head for the purposes of member of the family unit. When the primary visa applicants are claiming a sibling relationship, and the sponsor is claimed to be their parent, the applicants may then meet the definition of member of the family unit as the 'child' of the sponsor (family head).

3. Alternatively to the above options, it may also be open to find that the family head is neither the sponsor or primary visa applicant, but a third party not included in the visa application. For example, in the case of orphan relative applicants who claim to be siblings, and their parents have passed away, the family head may be identified as being one of the deceased parents. In those circumstances, each of the visa applicants would be the child of the deceased parent and therefore considered to be members of the family unit.

Relevant case law

Judgment	Judgment Summary
Alimi v MIAC [2007] FMCA 1520	Summary
Al Naqi v MIAC [2007] FMCA 874	Summary
Thompson v MIAC [2009] FMCA 1210	

[44] reg 1.12(2)

Relevant amending legislation

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2003 (No 7) (Cth)	SR 2003, No 239	No.1/2003
Migration Amendment Regulations 2003 (No 9) (Cth)	SR 2003, No 296	
Migration Amendment Regulations 2007 (No 7) (Cth)	SLI 2007, No 257	No.11/2007
Migration Amendment Regulations 2009 (No 2) (Cth)	SL 2009, No 42	No.4/2009
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment (Complementary Protection) Act 2011 (Cth)	No 121 of 2011	No.6/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No.4/2012
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No.9/2012
Migration Amendment (Temporary Protection Visas) Regulation 2013 (Cth) [NB: disallowed (and repealed) from 2 December 2013]	SLI 2013, No 234	
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No.4/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No.1/2018
Migration Legislation Amendment (Hong Kong) Regulations 2021 (Cth)	F2021L01479	No.6/2021

Last updated: 06 January 2023

CHILD VISAS - AN OVERVIEW

Overview[1]

There are three classes of visas that may broadly be termed as 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:[2]
  - 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:[3]
  - 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.[4] This visa is intended for the dependent child[5] of a visa-holding parent as defined[6] 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.

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Item 1108(4), sch 1 of the Regulations. 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: cls 101.411, 102.411, 117.411.
[3] Item 1108A(4).
[4] Item 1211.
[5] reg 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.
[6] cl 445.111.

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.

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.[7]

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.[8] Applicants for a Subclass 101 visa must be outside Australia[9] and applicants for a Subclass 802 visa must be in Australia but not in immigration clearance.[10]

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.[11] 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.[12] 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 Subclass 101 and 802 - Child Visas commentary.

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[13] or alternatively a Subclass 802 (Child) visa if applying onshore.[14]

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.

[7] Item 1108(3)(a) requires that an application for a Subclass 101 visa be made outside Australia. Items 1108A(3)(a) and (3)(b) requires that the applicant for a Subclass 802 visa be in Australia and make the application in Australia.
[8] Items 1108(3)(a) and 1108A(3)(a) as amended by *Migration Amendment (2015 Measures No 1) Regulations 2015* (Cth) (SLI 2015, No 34).
[9] Item 1108(3)(aa) as inserted by SLI 2015, No 34.
[10] Item 1108A(3)(b).
[11] cl 802.213.
[12] cl 101.211(1)(c)(ii).
[13] 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.
[14] 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.

'Adoption' is specifically defined under the Regulations.[15] Overseas adoptions must be in accordance with the Hague Adoption Convention or recognised under Australian law[16], unless the adoptive parents are expatriate Australians who have been living overseas for more than 12 months.[17] 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).[18]

For further details see the Subclass 102 - Adoption visa and Adoption (reg 1.04) commentaries.

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 policy instructions, these visas support the 'principle of family unity by enabling family reunion'.[19]

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 reg 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.[20] 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.[21]

For further details see the Subclass 117 and 837: Orphan Relative Visas commentary.

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.[22] It allows the 'dependent child'[23] of certain temporary visa holders to travel or

[15] regs 1.03, 1.04 of the Regulations. 'Adopted', 'adoption' and 'adopt' have corresponding meanings: s 18A of the *Acts Interpretation Act 1901* (Cth).
[16] cl 102.211(4)(d)(ii).
[17] cl 102.211. Under reg 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* (Cth).
[18] cl 102.211.
[19] Policy: Sch2Visa117 – Orphan Relative – at [3.1] About the visa; and PAM3: Sch2Visa837 – Orphan Relative – at [3.1] About the visa (last reissued 29 March 2020).
[20] cls 117.211(b), 837.211(b).
[21] *EC v MIMIA* (2004) 138 FCR 438 at [27].
[22] 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) (Cth) (SR 2002, No 230) for visa applications made from 1 November 2002. With the introduction of the *Migration Amendment (2022 Measures No 1) Regulations 2022* (Cth), changes to Schedule 2 of the regulations now allow subclass 445 applicants' to be granted the visa regardless of their location. As part of these changes, a decision to refuse to grant a Subclass 445 (Dependent Child) visa if the visa was applied for by an applicant who was outside Australia when the application was made, is now a prescribed reviewable decision under s 338(9) and

remain in Australia and apply to be included in their parents' permanent visa application.[24] The applicant must be the '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:[25]

- Subclass 309 - Spouse (Provisional)[26]
- Subclass 309 - Partner (Provisional)[27]
- Subclass 310 - Interdependency (Provisional)[28]
- Subclass 445 - Dependent Child
- Subclass 820 – Spouse[29]
- Subclass 820 - Partner[30]
- Subclass 826 – Interdependency.[31]

For further details, see the Dependent and Dependent Child commentary. There is no Commentary specifically addressing the Subclass 445 visa.

reg 4.02(4)(sa). The sponsor being the person with standing to apply: reg 4.02(5)(ra). For applicants who were not in Australia when the visa was refused the sponsor will retain the normal review right under s 338(5).

[23] 'Dependent child' is defined in reg 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) (Cth) (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* (Cth) (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.

[24] cl 445.211.

[25] For applications made on or after 5 March 2022, it is also a Schedule 1 requirement that the applicant claim to be the dependent child of a person, and that person holds one of the listed visas: item 1211(3)(ab) as repealed and substituted by item 5, of Schedule 2 of the *Migration Amendment (2022 Measures No 1) Regulations 2022* (Cth). The relevant classes have been amended by 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) (Cth) (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.

[26] This visa Subclass was renamed to 'Partner (Provisional)' for visa applications made from 1 July 2009 by SLI 2009, No 144.

[27] This visa Subclass was renamed from 'Spouse (Provisional)' to 'Partner (Provisional)' for visa applications made from 1 July 2009 by SLI 2009, No 144.

[28] This visa Subclass was removed from 1 July 2009 by SLI 2009, No 144.

[29] This visa Subclass was renamed from 'Spouse' for visa applications made from 1 July 2009 by SLI 2009, No 144.

[30] This visa Subclass was renamed from 'Spouse' to 'Partner' for visa applications made from 1 July 2009 by SLI 2009, No 144.

[31] This visa Subclass was removed from 1 July 2009 by SLI 2009, No 144.

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2002 (No 2) (Cth)	SR 2002, No 86	20020509-1
Migration Amendment Regulations 2002 (No 6) (Cth)	SR 2002, No 230	
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (Cth)	SLI 2013, No 118	No.9/2013
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth).	SLI 2015, No 34	No.1/2015
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No.4/2016
Migration Amendment (2022 Measures No 1) Regulations 2022 (Cth)	F2022L00255	

Last updated/reviewed: 17 March 2022

DEPENDENT & DEPENDENT CHILD

Overview[1]

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.[2] What constitutes the relevant period of dependency can differ depending on the context of the visa subclass in which the requirement arises.

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 regs 1.05A and 1.03 respectively.[3] For information relating to the definition of aged dependent relative in reg 1.03 see the Aged Dependent Relative commentary.

The definition of 'dependent child' is contained in reg 1.03 and has been amended a number of times. This commentary discusses the post 1 July 2009 definitions. For any queries regarding the pre 1 July 2009 definition, please contact MRD Legal Services.

Dependent

The concept of dependency in reg 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, reg 1.03 provides that 'dependent' has the meaning given by reg 1.05A.[4] 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***

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] reg 1.12.
[3] The definition of 'dependent' was significantly changed from 1 November 1999. For visa applications made prior to 1 November 1999, the relevant definition of 'dependent' was set out in reg 1.03 as follows: *'dependent 'in relation to a person, means wholly or substantially dependent on another person for financial, psychological or physical support.* Please contact MRD Legal Services if you are considering a pre 1 November 1999 application.
[4] The definition in reg 1.05A was inserted by reg 5(1) of *Migration Amendment Regulations 1999* (No 13) (Cth) (SR 1999 No 259).

(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***

(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;[5] ***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.[6]

A finding that a person is 'dependent' on another person therefore involves considering whether:

- 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.

[5] For applications made prior to 16 December 2014, reg 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* (Cth) (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 reg 2.08F(1)(b): see item 5000, sch 2, pt 4.

[6] Note that reg 1.05A(2)(ea) which referred to a Refuge and Humanitarian (Migration) (Class BA) visa, was removed by the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) with effect from 22 March 2014.

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.[7] It does not involve a numerical assessment, whereby at least half the support required by the dependent person is provided by the other person, nor does it involve a concept of predominance.[8] Substantial reliance does not mean 'predominant or primarily', 'essentially' or 'in the main'.[9]

A person may be substantially reliant on more than one person, however the terms of reg 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.[10]

It is presently unclear whether this requires substantial reliance on the other person to meet *all three* basic needs identified in reg 1.05A(a)(i) (food, clothing or shelter) or whether substantial reliance to meet one or two of those needs will suffice. In *Vo v Minister for Home Affairs*[11] the Court adopted a holistic approach however suggesting that it is the overall position that 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.[12] 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 reg 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,*[13] the Full Federal Court found that the proper construction of 'dependent' under the current definition in reg 1.05A does not carry any implication of the

[7] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [17].
[8] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [15]–[16].
[9] *Vo v Minister for Home Affairs* [2019] FCAFC 108 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 which did rely on a notion of predominance and the judgment in *MIMA v Graovac* [1999] FCA 1690 which considered an earlier version of the definition of 'dependent'.
[10] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [14], [18]. In finding that a person can be substantially reliant (per reg 1.05A(a)(i)) on more than one person, the Court expressly considered the judgments in *Fernandez v MIBP* [2015] FCCA 1698 and (on appeal) *Fernandez v MIBP* [2015] FCA1265, 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 in the meaning of reg 1.05A on one person.
[11] *Vo v Minister for Home Affairs* [2019] FCAFC 108.
[12] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [17].
[13] *Huynh v MIMIA* (2006) 152 FCR 576. Much of the analysis of the relevant provision pertains to the construction of reg 1.05A(1) however, the Court's reasoning appears to extend to reg 1.05A in its entirety, at [35], [36] and [39].

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.[14]

Financial support

Financial support may include, but is not restricted to, monetary support. In *Nguyen v MICMSMA* the court found that 'financial support' simply refers to doing that which relieves the first person from having to pay all or part of the price for the food, clothing and shelter that the first person needs to meet his or her basic needs. Providing economic goods without payment may be considered financial support.[15]

Sometimes, however, it may be necessary to consider the underlying source of the financial support and the reasons for it. This is because, while 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', as a practical matter that may be difficult to determine where that person is part of a couple (e.g. a husband and wife).

In *Al Naqi v MIAC,*[16] the Court 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.'[17] By way of example, in a Partner visa application the primary visa applicant's elderly, widowed father may be a secondary applicant for the visa.[18] 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. In this case, 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.[19]

[14] *Huynh v MIMIA* (2006) 152 FCR 576 considered the construction of 'dependent' in the context of 'dependent child', however, the conclusion as to the proper construction of 'dependent' in reg 1.05A is applicable in all cases where reference is made to the term 'dependent', for example, 'relative' in the reg 1.12(1)(e) 'member of a family unit' definition (pre-19 November 2016) and reg 1.12(2) and (4) (post-19 November 2016) and the definition of 'aged dependent relative' in reg 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.
[15] *Nguyen v MICMSMA* [2020] FCCA 2705 at [42]. The Court found the Tribunal did not err in its finding that the grandmother (of the applicant) allowing the applicant to live in her house rent free was financial support.
[16] *Al Naqi v MIAC* [2007] FMCA 874.
[17] *Al Naqi v MIAC* [2007] FMCA 874 at [16].
[18] While the primary applicant's father may be a member of the family unit in this example under the pre 19 November 2016 definition because it included a relative of the family head who does not have a spouse or de facto partner, is usually resident in the family head's household and is dependent on the family head, he would not be a member of the family unit under the general meaning of the post-19 November 2016 definition because the term 'relative' was removed.
[19] See generally *Al Naqi v MIAC* [2007] FMCA 874 and *Alimi v MIAC* [2007] FMCA 1520.

Importantly, in *Phin v MIAC*,[20] 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.[21] 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.

No greater reliance on any other person or source of support

The visa applicant is not precluded from receiving some support from another person or source of support, but their reliance on any other person or source of support must not be greater than their reliance on the other person. When considering support that comes from elsewhere, it can come from an individual (the 'any other person') or a collective (source of support). The source of financial support relied on by a visa applicant is a question of fact for the Tribunal. [22]

In *Nguyen v MICMSMA*, the Court interpreted 'any other…source of support' in reg 1.05A(1)(a)(ii) as denoting support provided by two or more people acting collectively in providing financial support for food, clothing and shelter to the visa applicant.[23]

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 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 reg 1.05A it has been held that it should be understood to mean a lengthy period.[24]

Departmental policy guidelines interpret a 'substantial period' as usually taken to be at least 12 months.[25] However, while the Tribunal may have regard to Departmental policy, it is not binding on the Tribunal and consideration of the individual circumstances of the case is required to ensure that the Departmental guidelines are not treated as a legislative requirement.

[20] *Phin v MIAC* [2013] FMCA 60.
[21] 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.
[22] *Fusi v MIAC* [2012] FMCA 1037 at [50] – [51].
[23] *Nguyen v MICMSMA* [2020] FCCA 2705 at [34]. The Court found the Tribunal did not make any jurisdictional error to the extent it aggregated the contributions of the visa applicant's grandmother and aunty (with whom he lived) when determining whether the visa applicant's reliance for financial support on the sponsor was greater than her reliance on the support provided by the grandmother and aunty.
[24] *Huang v MIMA* [2007] FMCA 720 at [43]. This finding was made in the context of considering the definition of 'aged dependent relative' in reg 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 reg 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.
[25] Policy – Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [37.2], reissue date 14 December 2016.

In *Zeng v MIMIA*[26] 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.[27]

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.[28] 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.[29]

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 reg 1.05A requires reliance for a 'substantial period', the aged dependent relative definition in reg 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 reg 1.05A should be read as a period not more substantial than a reasonable period.[30] For further discussion of this, see the discussion of 'Dependent for a 'reasonable period' in the Aged Dependent Relative commentary.

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.[31]

The term 'incapacitated for work' is not defined in the *Migration Act 1994* (Cth) (the Act) or Regulations, however it was considered in *Cole v MIBP*[32] in the context of reg 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

[26] [2005] FMCA 546.
[27] *Zeng v MIMIA* [2005] FMCA 546 at [13].
[28] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [37].
[29] *Vo v Minister for Home Affairs* [2019] FCAFC 108 at [36] – [37].
[30] *Huang v MIMA* [2007] FMCA 720 at [47].
[31] Policy - Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.4], reissue date 14 December 2016.
[32] [2018] FCAFC 66.

totally incapacitated, and is capable of including substantially incapacitated.[33] 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.*[34]

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. [35]

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*,[36] and approved in *Annas v Director-General of Social Security*[37] 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.*[38]

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.[39]

Departmental policy guidelines state that reg 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.[40] Departmental policy guidelines state that where a person with a disability is, for example, working in a sheltered workshop or undertaking 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.[41]

In determining whether a person is incapacitated for work, Departmental policy 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 reg 1.05A(1)(b).[42] However, this evidence, or a lack thereof, may not of itself be determinative of the issue. Ultimately this is a

[33] *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.
[34] *Cole v MIBP* [2018] FCAFC 66 at [26].
[35] *Cole v MIBP* [2018] FCAFC 66 at [25].
[36] *Re Panke and Director-General of Social Security* (1981) 4 ALD 179.
[37] *Annas v Director-General of Social Security* (1985) 8 FCR 49.
[38] *Cole v MIBP* [2018] FCAFC 66 at [67].
[39] *Cole v MIBP* [2018] FCAFC 66 at [69].
[40] Policy – Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.1], reissue date 14 December 2016.
[41] Policy – Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.2], reissue date 14 December 2016.
[42] Policy – Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [46.5], reissue date 14 December 2016.

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 reg 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.[43] In *Chakera v Immigration Review Tribunal,*[44] 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'.*[45]

Dependent Child

The definition of 'dependent child' is contained in reg 1.03 and has been amended a number of times.

Definitions

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 partne*r' [emphasis added].[46] The definition states:

[43] *Chakera v IRT* (1993) 42 FCR 525.
[44] *Chakera v IRT* (1993) 42 FCR 525.
[45] *Chakera v IRT* (1993) 42 FCR 525 at 530–531. The Court was considering the definition of 'aged dependant relative' in reg 2(1) of the *Migration Regulations* 1989 (Cth) and the meaning of dependent as defined in reg 2(1), in particular the meaning of 'financial [and] psychological support'. This was followed in *MIMA v Pires* (1998) FCR 214 at 223.
[46] 'Dependent child' was amended by *Migration Amendment Regulations 2009* (No 7) (Cth) (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

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.[47] 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.

Necessary to be a 'child'

In *Nakad v MIAC*,[48] the Court confirmed that for the purposes of the definition of 'dependent child' in reg 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.[49] 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 the Familial Relationships commentary.

applications, reg 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.

[47] *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696).

[48] *Nakad v MIAC* [2013] FMCA 234 at [30].

[49] *Nakad v MIAC* [2013] FMCA 234 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.

Dependency

Whether a child under 18 is dependent within the definition in reg 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. No further inquiry into dependency is necessary 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.[50] 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 reg 1.05A. Departmental policy guidelines 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.[51] The guidelines state that students in other circumstances, such as postgraduate students, should be carefully assessed against the criteria in reg 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 reg 1.05A.

In addition to the requirement of being a 'dependent child' within the definition of reg 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 Child Visas commentary.

Meaning of engaged to be married

The meaning of the term 'engaged to be married' was considered by the Court in *Awad v MIBP* [52] 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

[50] *Huynh v MIMIA* (2006) 152 FCR 576 at [26].
[51] Policy – Migration Act – Act-defined terms instructions – s5G – s5G-Relationships and family members - Dependent family members at [37.4], reissue date 14 December 2016.
[52] *Awad v MIBP* [2015] FCCA 1381.

ultimately declined to resolve this matter.[53] 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.[54]

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 of more of the parents of the prospective spouses.[55] Ultimately whether the applicant is engaged to be married is a finding of fact on all the evidence before the Tribunal.

Relevant Case Law

Judgment	Judgment Summary
Al Nagi v MIAC [2007] FMCA 874	Summary
Alimi v MIAC [2007] FMCA 1520	Summary
Awad v MIBP [2015] FCCA 1381	Summary
Chakera v IRT (1993) 42 FCR 525	
Cole v MIBP [2017] FCCA 2234	Summary
Cole v MIBP [2018] FCAFC 66	Summary
Fernandez v MIBP [2015] FCCA 1698	Summary
Fernandez v MIBP [2015] FCA 1265	Summary
Fusi v MIAC [2012] FMCA 1037	Summary
Huang v MIMA [2007] FMCA 720	Summary
Huynh v MIMIA (2006) 152 FCR 576	Summary
MIMA v Graovac [1999] FCA 1690	
MIMA v Pires (1998) 90 FCR 214	

[53] *Awad v MIBP* [2015] FCCA 1381 at [14].
[54] *Awad v MIBP* [2015] FCCA 1381 at [15]–[16].
[55] *Awad v MIBP* [2015] FCCA 1381 at [16].

Nakad v MIAC [2013] FMCA 234	Summary
Nguyen v MICMSMA [2020] FCCA 2705	Summary
Phin v MIAC [2013] FMCA 60	Summary
Thompson v MIAC [2009] FMCA 1043	
Thompson v MIAC (2010) 114 ALD 86	
Vo v MHA[2019] FCAFC 108	Summary
Xie v MIMIA (2000) 61 ALD 641	
Zeng v MIMIA [2005] FMCA 546	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 1999 (No 13) (Cth)	SR 1999, No 259	
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No.2/2014
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Case Load) Act 2014 (Cth)	No 135, 2014	No.11/2014
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016	F2016L01696	No.4/2016

Available Precedents/Templates

There is an optional paragraph available for use where the issue is whether the person is dependent within the meaning of reg 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' in reg 1.03.

Last reviewed/updated: 18 February 2022

SUBCLASS 101 AND 802 - CHILD VISAS

Additional criteria for applicants over 18 at time of application

Sponsorship – cls 101.212, 101.222, 802.215, 802.226, reg 1.20KB

Relevant Case Law

Relevant legislative amendments

Available Decision Templates/Precedents

Overview[1]

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, stepchild) 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.[2] The Subclass 802 (Child) visa is for onshore applicants and is one of two subclasses of the Child (Residence) (Class BT) visa.[3]

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, and Definition of Adoption commentaries.

Merits review

A decision made on or after 27 February 2021 to refuse to grant a Subclass 101 visa will be reviewable under s 338(7A) of the *Migration Act 1958* (Cth) (the Act) if the visa was applied for before the end of the concession period in reg 1.15N(1),[4] the applicant was outside Australia when the visa application was made but was in Australia at any time during the concession period (which commenced on 1 February 2020) and at the time the decision was made.[5] The visa applicant has standing to apply for review.[6]

Where the circumstances described above do not apply (for example the decision was made before 27 February 2021 and/or the visa applicant is offshore at the time of the refusal decision), the decision to refuse a Subclass 101 visa is reviewable under s 338(5) of the Act provided 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.[7] The sponsor has standing to apply for review in these circumstances.[8]

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.[9]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The other 2 subclasses are: Subclass 102 (Adoption) and Subclass 117 (Orphan relative).
[3] The other subclass is the Subclass 837 (Orphan Relative).
[4] As at the date of publication the Minister has not yet prescribed under reg 1.15N(2) the end date for the concession period.
[5] s 338(7A).
[6] s 347(2)(a).
[7] s 338(5)(b). This is because cl 101.411(2) as inserted by F2021L00136 and which allows for the visa to be granted onshore, does not apply in these circumstances, meaning that the visa can only be granted offshore.
[8] s 347(2)(b).
[9] s 347(2)(a).

Visa application requirements

Subclass 101 (Child) visa

Item 1108 of Schedule 1 to the *Migration Regulations 1994* (Cth) (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.[10] 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.[11]

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.[12]

Subclass 802 (Child) visa

Item 1108A of Schedule 1 to 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.[13] The application must be made on the approved form and the prescribed fee must be paid.[14]

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[15], the prescribed fee paid[16] and the applicant must be in Australia but not in immigration clearance.[17]

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, the applicant has a letter of support,[18] and the applicant is under 18 when the application is made.[19]

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

[10] Items 1108(1), (3)(a).
[11] Items 1108(1), (3)(a), (3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34).
[12] Item 1108(3)(b).
[13] Items 1108A(3)(a), (b).
[14] Items 1108A(1), (2).
[15] Items 1108A(1), (3)(a) as amended by SLI 2015, No 34.
[16] Item 1108A(2).
[17] Item 1108A(3)(b).
[18] Item 1108A(3)(c) as amended by *Migration Amendment Regulations 2008* (No 2) (Cth) (SLI 2008, No 56). The amendments in relation to the letter of support apply to visa applications made on or after 26 April 2008.
[19] 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) (Cth) (SLI 2010, No 38) for visa applications made on or after 27 March 2010. However, the change does not affect the applicable age limit.

Form 40CH completed by a person claiming to be the parent at the same time and place as the application is made.[20]

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.[21]

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 a 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

In addition to sponsorship and age requirements, the time of application criteria envisages that 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[22] with one of the following child - parent relationships:
  - the applicant must be the natural child or stepchild (within the meaning of paragraph (b) of the definition of stepchild) 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.[23]

[20] 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).
[21] Item 1108A(3)(f), as inserted by pt 1 of sch 1 to the *Migration Legislation Amendment (2015 Measures No 4) Regulation 2015* (Cth) (SLI 2015, No 243). For the relevant legislative instrument, see the 'Schedule 1 Child Visa App' tab in the Register of Instruments - Family Visas.
[22] cl 101.211(1)(a). Note the definition of 'dependent child' was amended by *Migration Amendment Regulations 2009* (No 7) (Cth) (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* (Cth) (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a stepchild.
[23] cl 101.211(1)(c). 'Adoption' is defined at reg 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 (Cth) by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (No 144, 2008) from 1 July

- **age –** the applicant must not have turned 25.[24] Where the applicant has turned 18, he or she must not be engaged to marry or have/had a partner,[25] 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.[26]
- **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.[27]

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

Criteria to be satisfied at time of decision

In addition to containing public interest, assurance of support and passport requirements, the time of decision criteria 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;[28] 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,[29] not be engaged in full-time work and have been undertaking the required full-time course within the relevant period;[30]
- **sponsorship –** the sponsorship must be approved and in force;[31]

2009. The definition of 'step-child' in reg 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.
[24] cls 101.211(1)(b), (2); by reference to the definition of 'dependent child' in reg 1.03 of the Regulations.
[25] cl 101.211(2). For visa applications made prior to 1 July 2009, the partner relationship reference is to a 'spouse' as defined in reg 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* (Cth) (No 129, 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* (Cth) (No 144, 2008) (effective from 1 July 2009) (No 144, 2008). Amendments made by SLI 2009, No 144 in relation to the definition of 'spouse' in reg 1.15A apply to visa applications made on or after 1 July 2009.
[26] cls 101.213, 101.211(1)(b), (2) by reference to the definition of 'dependent child' in reg 1.03 of the Regulations.
[27] 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 22.
[28] cl 101.221(1).
[29] 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 22.
[30] cl 101.221(2).
[31] cl 101.222.

- **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;[32]
- **Assurance of Support –** any requested assurance of support has been accepted;[33]
- **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.[34]

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 several 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 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 a 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.[35] In these circumstances, the letter must be provided by a State or Territory government welfare

[32] cls 101.223, 101.226, 101.227, 101.228, 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], sch 2, of the *Migration Legislation Amendment Regulation* 2012 (No 5) (Cth) (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 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 items [4] and [5] of sch 7 of the *Migration Legislation Amendment Regulation 2013* (No 3) (Cth) (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.

[33] cl 101.225.

[34] 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) (Cth) (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).

[35] 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'.

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.[36]

Applicants not supported by 'letter of support'

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

- **dependent child relationship –** he or she must be the dependent child of an Australian citizen, permanent resident or eligible New Zealand citizen.[37] 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 reg 1.03.[38] 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 compelling and compassionate circumstances, the 12 month residence requirement should not apply; and the residence overseas was not contrived to circumvent the requirements for entry to Australia of children for adoption, and the adoptive parent/s[39] have lawfully acquired full and permanent parental rights;[40]
- **age –** the applicant must not have turned 25.[41] Where the applicant has turned 18, he or she must not be engaged to marry or have/had a partner,[42] must not be engaged in full-time work and, since turning 18, or within 6 months or a reasonable

[36] See cl 802.111.
[37] cl 810.212(1)(a).
[38] cl 802.212(1A). The definition of 'step-child' in reg 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.
[39] 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.
[40] cl 802.213.
[41] cl 802.212(1)(b), (2).
[42] 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 25.

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;[43]

- **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;[44]
- additionally, for applicants to whom s 48 applies they must not have had a visa refused or cancelled under s 501 and, since last applying for a substantive visa, have become the dependent child of an Australian citizen, the holder of a permanent visa or eligible New Zealand citizen.[45]

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 the 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,[46] 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.[47]

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 that criterion, then only because they have since turned 18;[48]

[43] cl 802.214.
[44] 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 25.
[45] cl 802.211 as repealed and substituted by SLI 2014, No 30 with effect from 22 March 2014. If the application was made prior to 22 March 2014 but after 1 November 1995, the requirement to have become a dependent child of an Australian citizen, Australian permanent resident or eligible New Zealand citizen since last applying for an entry permit or substantive visa, also applied to an applicant who was in Australia on 1 September 1994 and was, immediately before 1 September 1994, a person to whom section 37 of the Act applied and had not been granted a substantive visa on or after 1 September 1994. 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 being invalid 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.
[46] 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.
[47] cl 802.226A(2)(b) inserted by SLI 2008 No 56.
[48] cl 802.221(1).

applicants who had 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, only because they have since turned 25, and continue to satisfy the time of application criterion to not be engaged, have/had a partner,[49] not be engaged in full-time work and have been undertaking the required full-time course within the relevant period;[50]

- **Assurance of Support –** any requested assurance of support has been accepted;[51]
- **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;[52]
- **sponsorship –** the sponsorship must be approved and in force;[53] 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.[54]

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

Common Issues

Dependent Child - cls 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.[55] 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 reg 1.03 of the Regulations as follows:

> *…the natural or adopted child, or stepchild, 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*

[49] 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 25.
[50] cl 802.221(2).
[51] cl 802.222.
[52] cls 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 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 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.
[53] cl 802.226.
[54] 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).
[55] cls 101.211, 802.212.

(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 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].[56] That is, the post 1 July 2009 definition states:

dependent child,

of a person, means the child or stepchild 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.[57] That is, the definition states:

dependent child,

of a person, means the child or stepchild of the person (other than a child or stepchild who is engaged to be married or has a spouse or de facto partner), being a child or stepchild 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 stepchild's bodily or mental functions.

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

The meaning of 'dependent' is set out in reg 1.05A of the Regulations. Detailed consideration of the legal issues relating to this term can be found in the Dependent & Dependent Child commentary.

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

[56] 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* (Cth) (No 144,2008) (effective from 1 July 2009). Amendments made by SLI 2009 No 144 in relation to the definition of 'spouse' in reg 1.15A apply to visa applications made on or after 1 July 2009.
[57] F2016L01696.

meaning of reg 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.[58] The issue of whether an applicant is 'dependent' within the meaning of that term in reg 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).[59]

Meaning of engaged to be married

The meaning of the term 'engaged to be married' was considered by the Court in *Awad v MIBP*[60] 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.[61] 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.[62]

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 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.[63] Ultimately whether the applicant is engaged to be married is a finding of fact on all the evidence before the Tribunal.

Additional requirement for Subclass 802 where s 48 applies – cl 802.211

It is a time of application requirement that, if the applicant is a person to whom s 48 of the Act applies,[64] they must not have been refused a visa or had a visa cancelled under s 501 of

[58] See cls 101.221(1)(b), 802.221(1)(b). These clauses were inserted into the Regulations by the *Migration Amendment Regulations 1999* (No 13) (Cth) (SR 1999, No 259). 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" (Items 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 reg 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.
[59] See cls 101.221, 802.221.
[60] *Awad v MIBP* [2015] FCCA 1381.
[61] *Awad v MIBP* [2015] FCCA 1381 at [14].
[62] *Awad v MIBP* [2015] FCCA 1381 at [15]–[16].
[63] *Awad v MIBP* [2015] FCCA 1381 at [16].
[64] Generally speaking, s 48 applies to a person in Australia who does not hold a substantive visa and, after last entering Australia, was refused a visa (other than a bridging visa or a refusal on character grounds) or held a visa that was cancelled on certain cancellation grounds. If s 48 applies, a person may only apply for a visa of a prescribed class.

the Act and, since last applying for a substantive visa, have become a dependent child of an Australian citizen, holder of a permanent visa or eligible New Zealand citizen.[65]

The criterion establishes a window of time in which the applicant needs to have 'become' a dependent child of an Australian citizen, holder of a permanent visa or eligible New Zealand citizen. The window of time starts when they last applied for a substantive visa and ends when they applied for the Subclass 802 visa that is under consideration. An applicant who was already a dependent child of a relevant person prior to applying for their last substantive visa, for example, could not be said to have 'become' a dependent child of that same person during the relevant period. The test though is also a composite one, focused on both the relationship between the applicant and another person (i.e. whether they are dependent child), and on that other person's immigration status (i.e. whether they are an Australian citizen, holder of a permanent visa or eligible New Zealand citizen).

Apart from the circumstances needing to arise within that relevant period, how they became a dependent child of the relevant person do not appear limited. For example, if the biological mother of an applicant married a partner who was not the applicant's biological father, the applicant may become the stepchild of that person. Provided the stepfather was an Australian citizen, holder of a permanent visa or eligible New Zealand citizen, the relevant dependent child relationship would be established. Similarly, a change in a parent's immigration status may also lead to the relationship being established, even if previously it did not. If a parent moved from being a visa holder to being an Australian citizen, for example, then, provided the applicant was a dependent child of that person at the relevant time, the criterion could be met. To note, in both examples, the relevant change in circumstances (either to the applicant's relationship with that person or that person's own immigration status) must have arisen *after* the applicant had last applied for the substantive visa but *before* they had applied for the Subclass 802 visa under consideration.

Step-children - cls 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 stepchild of that person within the meaning of paragraph (b) of the definition of stepchild in reg 1.03 of the Regulations.[66] 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.

[65] 802.211 as repealed and substituted by SLI 2014, No 30 with effect from 22 March 2014. If the application was made prior to 22 March 2014 but after 1 November 1995, the requirement to have become a dependent child of an Australian citizen, Australian permanent resident or eligible New Zealand citizen since last applying for an entry permit or substantive visa, also applied to an applicant who was in Australia on 1 September 1994 and was, immediately before 1 September 1994, a person to whom section 37 of the Act applied and had not been granted a substantive visa on or after 1 September 1994. 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 being invalid 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.

[66] cls 101.211(1)(c)(i), 802.212(1A).

For visa applications made prior to 1 July 2009, paragraph (b) of that definition is as follows:[67]

(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:[68]

(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 (Cth) 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[69] of the other person but that person has legal responsibility for the child granted by a court.

'Parenting order' is defined in reg 1.03 as having the meaning given by s 64B(1) of the *Family Law Act 1975* (Cth) (Family Law Act). Section 64B(1) of the Family Law Act provides

[67] 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* (Cth) (Family Law Act).
[68] 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.
[69] 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 25.

that a parenting order is an order (including an order until further order) dealing with a matter mentioned in section 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.[70]

Stepchildren 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.

Adopted - cls 101.211(1)(c)(ii) and 802.213

Regulation 1.03 of the Regulations provides that the term 'adoption' has the meaning set out in reg 1.04 of the Regulations and includes a note stating that '*adopt* and *adopted* have corresponding meanings.[71]For further discussion on the meaning of adoption, see the Definition of Adoption commentary.

Aside from having to meet the above definition, additional time of application requirements apply in relation to the adoption, with several 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

[70] Family Law Act s 64B(2).
[71] *Acts Interpretation Act 1901* (Cth) s 18A.

children of Australian citizens, Australian permanent residents, or eligible New Zealand citizens.[72] They require that:

- 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).[73]

Similar requirements apply to offshore applicants under Part 102 (Adoption). Refer to the Subclass 102 - Adoption visa commentary for consideration of the relevant issues.

It is a finding of fact for the Tribunal as to whether the adoption meets the requirements set out in the definition in reg 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 – cls 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.

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.[74]

For visa applications made on or after 27 March 2010, applicants who do not hold a substantive visa and are barred by operation of s 48,[75] must not have turned 25 unless the

[72] Refer to the Explanatory Statement to the *Migration Amendment Regulations 1998* (No 7) (Cth) (SR 1998, No 284).
[73] 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) (Cth) (SR 2004, No 390).
[74] 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).
[75] 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 Statement to the amending regulations for details).

applicant claims to be incapacitated for work.[76] 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.[77] 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 cls 101.221(1)(b) and 802.221(1)(b)).[78] That is, they are not required to meet the additional 'test' of financial dependency in reg 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, cls 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;[79]
- 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, 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.

[76] 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).
[77] cls 101.211(1)(b), 802.212(1)(b).
[78] These clauses were inserted into the Regulations by SR 1999, No 259. 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 reg 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.
[79] 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 25.

Applicants who are subject to this time of application requirement must also continue to satisfy the requirement at the time of decision.[80]

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.[81]

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.[82]

In *Sok v MIMIA,*[83] 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, Departmental policy states 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.'[84]

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*[85] 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 Departmental policy 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'.[86] 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.

[80] cls 101.221(2)(b), 802.221(2)(b).
[81] See cls 101.213(1)(c), 802.214(1)(c) (time of application), and cls 101.221(2)(b) and 802.221(2)(b) (time of decision).
[82] *Sok v MIMIA* [2005] FMCA 190 (Riethmuller FM, 4 March 2005).
[83] [2005] FMCA 190 (Riethmuller FM, 4 March 2005).
[84] POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 101 - Child > THE AH-101 MAIN APPLICANT > '17. Acceptable studies' (reissued 19 November 2016), and POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 802 - Child > 'Student status: Acceptable studies' (reissued 1 January 2016).
[85] (2010) 188 FCR 451.
[86] *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.

Relevant period of study

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.[87] 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*.[88] 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.[89]

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.[90] The assessment necessarily depends on all the circumstances of the case.[91] Examples cited by the Court) in *Sok v MIMA*[92] 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.

[87] In *MIAC v Henschel* [2013] FCCA 584, 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].
[88] *Wake v MIAC* [2010] FMCA 272.
[89] *Wake v MIAC* [2010] FMCA 272 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.
[90] *Sok v MIMIA* [2005] FMCA 190 at [19].
[91] *Dai v MIAC* [2007] FMCA 1345 at [47].
[92] *Sok v MIMA* [2005] FMCA 190 at [21].

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 six 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 time to re-commence studies.[93] 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 considered.

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'.[94] 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.[95]

The phrase 'after completing the equivalent of year 12 in the Australian school system' was considered in *Ban v MIMA.*[96] 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*,[97] 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.[98]

Further, in *Reyes v MIAC*,[99] 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.[100]

In *MIAC v Henschel*,[101] 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

[93] POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 101 - Child > THE AH-101 MAIN APPLICANT > '16. If not studying at 18' (reissued 19 November 2016), and POLICY – MIGRATION REGULATIONS – SCHEDULES > Sch2 Visa 802 - Child > 'Student status: If not studying at 18' (reissued 1 January 2016).
[94] *Sok v MIMIA* [2006] FMCA 1393 at [111], [115].
[95] *Sok v MIMIA* [2006] FMCA 1393 at [120]–[121].
[96] *Ban v MIMA* [2006] FMCA 1693 at [59]–[60].
[97] *Dai v MIAC* [2007] FMCA 1345 at [46]–[48].
[98] *Dai v MIAC* [2007] FMCA 1345 at [47].
[99] *Reyes v MIAC* [2007] FMCA 1721 at [14].
[100] *Reyes v MIAC* [2007] FMCA 1721 at [16].
[101] *MIAC v Henschel* [2013] FCCA 584.

12 equivalent.[102] This case emphasises that the Tribunal must ensure it 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 MIMIA*[103] 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 six 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.[104]

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.[105] 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.[106]

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,[107] 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

[102] *MIAC v Henschel* [2013] FCCA 584.
[103] *Sok v MIMIA* [2005] FMCA 190 at [15]. Cited with approval in *Sok v MIMA* [2006] FMCA 1393 at [120] – [121].
[104] cls.101.213 and 802.214.
[105] *Hussain v MIBP* [2017] FCCA 3247 at [111].
[106] *Hussain v MIBP* [2017] FCCA 3247 at [111] and [114].
[107] The Tribunal erred by adopting this construction: *Hussain v MIBP* [2017] FCCA 3247 at [114].

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.[108] 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.[109]

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.

For further information please refer to the 'Continues to Satisfy Criterion' commentary.

Sponsorship – cls 101.212, 101.222, 802.215, 802.226, reg 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 requires only that the person has made the relevant undertakings by completing the sponsorship application form (form 40CH).[110]

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.[111]

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.[112] 'Registrable offences' is defined for the purposes of the limitation provision and includes offences under

[108] *Opoku-Ware v MIBP* [2015] FCCA 1638 at [75]–[78].
[109] *Hussain v MIBP* [2017] FCCA 3247 at [110].
[110] Sponsorship undertakings are set out in reg 1.20. See also *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36] where the Court held that in assessing the requirement in reg 1.20, no issue arises which involves an assessment of the capacity of the person to fulfil the undertaking if required, and that giving the undertaking simpliciter is sufficient. Although this judgment concerned sponsorship for a partner visa, the child visas feature the same sponsorship framework. Part O of Form 40CH contains the undertakings. There is no direct reference to the sponsorship form in the Regulations but the Department requests that the applicant lodge the application form 47CH and the sponsorship Form 40CH together (see the first page of both forms, design date 01/19).
[111] cls 101.222, 802.226. The Tribunal on review can decide whether to approve the sponsorship, *Babar v MICMSMA* [2020] FCAFC 38. However, in exercising this discretion, the Tribunal should not apply the Department's policy (at least the version considered in that judgment) as it is based on an erroneous view of the meaning of reg 1.20 and is not formulated on the basis that it is giving effect to the approval power: at [38]-[40]. As at 1 October 2020 the policy remained unchanged. Care should be taken that if policy is to be referred to it is not the same version as considered in *Babar* and is otherwise not going beyond the legislation.
[112] reg 1.20KB, inserted by *Migration Amendment Regulations 2010* (No 2) (Cth) (SLI 2010, No 50) for visa applications made on or after 27 March 2010.

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.[113]

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;
- has not been charged with a registrable offence since completing the sentence[114] 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.[115]

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.[116] See the Sponsorship Limitations commentary for further information.

Relevant Case Law

Judgment	Judgment Summary
Awad v MIBP [2015] FCCA 1381	Summary
Alblasy v MIBP [2016] FCCA 1514	
Ban v MIMA & Anor [2006] FMCA 1693	
Babar v MICMSMA [2020] FCAFC 38	Summary
Dai v MIAC & Anor [2007] FMCA 1345	
Hussain v MIBP [2017] FCCA 3247	Summary
Lai v MIAC (2010) 188 FCR 451	
MIAC v Henschel & Anor [2013] FCCA 584	Summary
Opoku-Ware v MIBP [2015] FCCA 1638	Summary
Reyes v MIAC & Anor [2007] FMCA 1721	

[113] reg 1.20KB(13).
[114] Note reg 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'.
[115] regs 1.20KB(4)–(5).
[116] reg 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.

Sok v MIAC [2007] FCA 413	Summary
Sok v MIMA [2006] FMCA 1393	
Sok v MIMIA [2005] FMCA 190	Summary
Thompson v MIAC [2009] FMCA 1043	
Wake v MIAC [2010] FMCA 272	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 1998 (No 7) (Cth)	SR 1998, No 284	
Migration Amendment Regulations 1999 (No 13) (Cth)	SR 1999, No 259	
Migration Amendment Regulations 2004 (No 8) (Cth)	SR 2004, No 390	
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No.1/2005
Migration Amendment Regulations 2008 (No 2) (Cth)	SLI 2008, No 56	No.2/2008
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No.1/2010
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No.2/2010
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No.10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No.10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No 30	No.2/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No.1/2015

Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No.4/2016
Migration Amendment (2021 Measures No.1) Regulations 2021	F2021L00136	No.2/2021

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: 19 January 2023

SUBCLASS 102: ADOPTION VISA

Overview[1]

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) visas. 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 the Subclass 101 and 802 - Child visas commentary.

Merits review

A decision made on or after 27 February 2021 to refuse to grant a subclass 102 visa will be reviewable under s 338(7A) of the Act if the visa was applied for before the end of the concession period in reg 1.15N(1),[2] the applicant was outside Australia when the visa application was made but was in Australia at any time during the concession period (which commenced on 1 February 2020) and at the time the decision was made.[3] The visa applicant has standing to apply for review.[4]

Where the above circumstances do not apply (for example the decision was made before 27 February 2021 and/or the visa applicant is offshore at the time of the refusal decision), the decision to refuse a Subclass 102 visa is reviewable under s 338(5) of the Act provided 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.[5] The sponsor has standing to apply for review.[6]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] As at the date of publication the Minister has not yet prescribed under reg 1.15N(2) the end date for the concession period.
[3] s 338(7A).
[4] s 347(2)(a).
[5] s 338(5)(b). This is because cl 102.411(2) as inserted by F2021L00136 and which allows for the visa to be granted onshore, does not apply in these circumstances, meaning that the visa can only be granted offshore.
[6] s 347(2)(b).

Visa application requirements

Item 1108 of Schedule 1 to the *Migration Regulations 1994* (Cth) (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.[7] 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.[8] 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.[9]

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.[10]

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:

[7] Items 1108(1)–(3).
[8] Items 1108(1), (3)(a) and (3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34).
[9] Item 1108(3)(b).
[10] Item 1108(3)(c), as inserted by pt 1 of sch 1 to the *Migration Legislation Amendment (2015 Measures No 4) Regulation 2015* (Cth) (SLI 2015, No 243). For the relevant legislative instrument, see the 'Schedule 1 Child Visa App' tab in the Register of Instruments - Family Visas.

- **age and acceptable adoption arrangements –** he or she must not have turned 18,[11] 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.[12]

  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 a child for adoption* – a prospective adoptive parent of the child; or
  - *for an adopted child* – an adoptive parent of the child;[13] and
- **lawful adoption –** the laws relating to adoption of the country in which the child is normally resident have been complied with.[14]

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 time of application criteria identified above relating to age, acceptable types of adoption and compliance with adoption laws.[15]
- **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;[16]
- **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;[17]

[11] cl 102.211(2)(a), (3)(a), (4)(a) and (5)(a). This requirement also appears in the definition of adoption in reg 1.04(1). For further information on reg 1.04 see the Definition of Adoption commentary.
[12] 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) (Cth) (SLI 2009, No 144) for visa applications made on or after 1 July 2009.
[13] 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.
[14] cl 102.213. In *Rani v MIAC* [2012] FMCA 705, 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.
[15] cl 102.221.
[16] cl 102.227A, as inserted by *Migration Amendment Regulations 2004* (No 8) (Cth) (SR 2004, No 390).
[17] cl 102.228(1), inserted on 1 September 1998 by *Migration Amendment Regulations 1998* (No 7) (Cth) (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* (Cth) (SR 1998, No 2481) or the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth) (*Hague Convention Regulations*): reg 1.03.

- **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;[18]
- **sponsorship –** the sponsorship must be approved and in force;[19]
- **public interest criteria –** the applicant must satisfy certain public interest criteria,[20] and each member of the family unit of the applicant must also satisfy certain public interest criteria;[21]
- **Assurance of Support –** any requested assurance of support must have been accepted;[22] and
- **passport** – *for visa applications made on or after 1 July 2005 and prior to 24 November 2012,* certain passport requirements are met.[23]

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;[24]
- Pre December 1998 and other State/Territory arranged adoptions;[25]
- Hague Adoption Convention or bilateral adoptions;[26] or
- Third country Hague Adoption Convention (overseas) adoptions.[27]

[18] cl 102.228(2), inserted on 1 September 1998 by SR 1998, No 284.
[19] cl 102.222.
[20] cl 102.223. Clause 102.223 was amended by *Migration Legislation Amendment Regulation (2012)* (Cth) (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) (Cth) (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 the Bogus Documents/False or Misleading Information/ PIC4020 commentary.
[21] Clauses 102.226, 102.227 were introduced on 1 September 2004 with cl 102.226 most recently amended by *Migration Amendment Regulations 2003* (No 7) (Cth)(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) 2000* (Cth) *(*SR 2000 No 62) for visa applications made on or after 1 July 2000 (except for additional applicants).
[22] cl 102.225.
[23] For applications made on or after 1 July 2005 and prior to 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).
[24] cl 102.211(2).
[25] cl 102.211(3).
[26] cl 102.211(4).
[27] cl 102.211(5).

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, 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.[28] 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.[29] 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.[30]

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, although there may be special arrangements in place for that circumstance specific to the State/Territory which require consideration.[31] 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.[32] 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, cls 102.211(2)(b)–(d) require 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;[33] and
- the adopting parent/s had been residing overseas for more than 12 months at the time of the application;[34] and
- the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption; and

[28] See for example NSW Department of Communities and Justice, Adoption of a known or relative child who lives in an overseas country Factsheet August 2019, https://www.facs.nsw.gov.au/download?file=327801, accessed 10/01/2023; and the Victorian Department of Justice and Community Safety, Adopt a child from overseas: https://www.justice.vic.gov.au/adopt-a-child-from-overseas-0, accessed 10/01/2023.
[29] See, for example, *Adoption Act 2000* (NSW), s 45(1)(a) and *Adoption Regulation 2015* (NSW), reg 45; *Adoption Act 1984* (Vic), s 15(1)(a) and *Adoption Regulations 2008* (Vic), reg 35.
[30] See, for example, NSW Department of Communities and Justice, Thinking about Adoption, Factsheet April2017https://www.facs.nsw.gov.au/download?file=319617, accessed 10/01/2023.
[31] See, for example, NSW Department of Communities and Justice, Adoption of a known or relative child who lives in an overseas country, August 2019, https://www.facs.nsw.gov.au/download?file=327801, accessed 10/01/2023.
[32] See for example the smartraveller website, 'Going overseas to adopt a child', accessed 10/01/2023.
[33] cl 102.211(2)(b)(i).
[34] cl 102.211(2)(b)(ii). This requirement is replicated for onshore Child visas in cl 802.213(5)(b)(i).

- the adoptive parent has lawfully acquired full and permanent parental rights by the adoption.[35]

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.[36]

The requirement to be a person holding a permanent visa is different from being an Australian permanent resident as defined in reg 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.[37] However, there is no requirement that the residence overseas 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.[38]

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,*[39] 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.[40] 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 policy states 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

[35] cls 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.
[36] cl 102.211(2)(b).
[37] 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).
[38] Policy - Migration Regulations – Schedules - 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 (reissued 01/01/2016).
[39] *Nguyet Huong Phung v MIEA* (1997) 74 FCR 422.
[40] *Nguyet Huong Phung v MIEA* (1997) 74 FCR 422 at 428.

reasons)'.[41] 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.'[42]

Ultimately, however, whether or not the adoptive parent had been residing overseas for more than 12 months at the relevant time will be a factual matter for the decision maker.[43]

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.[44]

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 laws and policies for intercountry adoptions in Australia and the State/Territory in which the adoptive parent will reside.[45]

However, simply going overseas for the purpose of adopting a child would not be enough to find the residence was contrived. Policy 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.'[46]

[41] Policy – Migration Regulations – Schedules - 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 (reissued 01/01/2016).
[42] *Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation* (1941) 64 CLR 241 at 249.
[43] For further discussion of residence, albeit in the context of the broader and inherently more flexible concept of 'usual residence', please see the Usually Resident commentary.
[44] cl 102.211(2)(c). This requirement is replicated for onshore Child visas in cl 802.213(5)(c).
[45] 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).
[46] Policy - Migration Regulations – Schedules - 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 (reissued 01/01/2016).

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.[47] 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 policy notes 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.[48]

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 – cl 102.211(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;[49]
- 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;[50] 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.[51]

See the discussion below on Competent authorities for list of Australian competent authorities.

[47] cl 102.211(2)(d). This requirement is replicated for onshore Child visas in cl 802.213(5)(d).
[48] Policy - Migration Regulations – Schedules - Sch2 Visa 102 - Adoption - Expatriate (Private) Overseas Adoption - 102.211(2) – Other category-specific visa requirements – Full parental rights (reissued 01/01/2016).
[49] cl 102.211(3)(b).
[50] 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 reg 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.
[51] 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 was also 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.

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;[52]
- 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;[53]
- the adoption must either be arranged in accordance with the Hague Adoption Convention or be of a kind that may be accorded recognition under reg 5 of the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (Cth));[54] 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.[55]

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, Departmental policy notes that this would generally 'be evidenced by an approval letter issued to the prospective adoptive parent/s by the relevant Australian authority that identifies the allocated child by name, sex and date of birth.'[56]

[52] cl 102.211(4)(b).
[53] 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 reg 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* (Cth), effective 1 July 2009): SLI 2009, No 144.
[54] 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, arts 4–5, and Ch IV.
[55] 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 reg 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* (Cth), effective 1 July 2009): SLI 2009, No 144. See Competent authorities for list of Australian competent authorities.
[56] Policy - Migration Regulations – Schedules - Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Other category-specific visa requirements – Child allocated for adoption (reissued 01/01/2016).

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 involves 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 the 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.[57] A 'competent authority' is defined in reg 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* (Cth) (Hague Convention Regulations);[58]

[57] See Adoption Convention, arts 4–5, and Ch IV.
[58] For the current list of the relevant Australian authorities, see: https://www.intercountryadoption.gov.au/key-contacts-and-support/state-territory-support/ and https://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Pages/Commonwealthstateandterritorycentralauthorities.aspx, Accessed 10/01/2023

  - in the case of an adoption to which a bilateral adoption arrangement[59] applies - a competent authority within the meaning of the Family Law (Bilateral Arrangements - 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;[60]
  - in any other case - the child welfare authorities of an Australian State or Territory;[61]

- *for an Adoption Convention country*[62] - 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;[63]
- *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 following website: https://www.intercountryadoption.gov.au/countries-and-considerations/countries/.

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 an 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.[64]

[59] 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* (Cth) : reg 1.03.
[60] *Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998* (Cth) reg 3.
[61] For example, in NSW, the relevant authority is the Department of Communities and Justice; in Victoria it is the Department of Justice and Community Safety.
[62] An 'Adoption Convention country' means a country that is a Convention country under the *Hague Convention Regulations*: reg 1.03.
[63] Prescribed overseas jurisdiction is defined in reg 3 of the *Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998* (Cth) to mean an overseas jurisdiction mentioned in sch 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 reg 3 of those Regulations.
[64] Policy - Migration Regulations – Schedules - Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Documentation requirements – To be submitted at the time of application (reissued 01/01/2016).

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.[65]

An 'adoption compliance certificate' means an adoption compliance certificate within the meaning of the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998 (Cth) or the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth).[66] 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 recognised in Australia and there is no need for the adoptive parents to seek further recognition of the adoption in Australia.

Departmental policy notes 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.[67]

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.[68]

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.'[69]

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

[65] cl 102.228(1), inserted on 1 September 1998 by SR 1998, No 284.
[66] reg 1.03.
[67] Policy - Migration Regulations – Schedules - Sch2 Visa 102 - Adoption - About the AH-102 visa – Terminology – Adoption compliance certificate (reissued 01/01/2016).
[68] cl 102.228(2), inserted on 1 September 1998 by SR 1998, No 284.
[69] Policy - Migration Regulations – Schedules - Sch2 Visa 102 - Adoption - Hague Adoption Convention adoptions – 102.211(4) – Documentation requirements – After adoption (reissued 01/01/2016).

from South Korea and Taiwan under the Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998 (Cth).[70]

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 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.[71]

An 'Adoption Convention country' means a country that is a Convention country under the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth).[72]

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

Meaning of adoption, adopt, and adopted – reg 1.04

Regulation 1.03 states that 'adoption' has the meaning set out in reg 1.04. 'Adopt' and 'adopted' have corresponding meanings.[73] In summary, the key requirements contained in reg 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;

[70] *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (Cth), 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.
[71] 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 reg 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 (Cth) and s 5CB of the *Act*, which was inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), effective 1 July 2009): SLI 2009, No 144.
[72] reg 1.03.
[73] *Acts Interpretation Act 1901* (Cth) s 18A.

- » 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 reg 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.[74] For further guidance on the definition of adoption, see Definition of Adoption - reg 1.04.

Adoption compliance certification and permission to depart - cl 102.228

Clause 102.228 imposes additional time of decision criteria if the applicant meets 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.

Sponsorship – cl 102.212, cl 102.222, reg 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.[75] Regulation 1.20KB 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.[76] See further information below.

For the purpose of adoption visa applications, the sponsor of an applicant for a visa is defined in reg 1.20(1) of the Regulations to mean a person who undertakes certain specified obligations in relation to the applicant, and sponsorship is defined in reg 1.03 to mean an undertaking of the kind referred to in reg 1.20 to sponsor an applicant. A sponsor of a Subclass 102 visa applicant must undertake to assist the applicant, to the extent necessary, financially and in relation to accommodation for two years (either from the date of the visa grant (if the applicant is in Australia) or the date of first entry to Australia.[77] The giving of the undertaking is all that is required for a person to be a sponsor, and sponsored for the purposes of cl 102.212. It is not a requirement that the sponsor also have capacity to fulfil the undertaking.[78]

[74] See for example, guidance provided to decision makers in Policy – Migration Regulations – Schedules – Sch 2 Visa 802 – Child – Adoption Convention cases – Expatriate adoptions – Full parental rights – If a customary adoption (reissued 1 January 2016).
[75] cl 102.212.
[76] *Migration Amendment Regulations 2010* (No 2) (Cth) (SLI 2010, No 50) and Explanatory Statement to SLI 2010, No 50.
[77] reg 1.20(2)(a).
[78] In *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36], the Court held that in assessing the requirement in reg 1.20, no issue arises which involves an assessment of the capacity of the person to fulfil the undertaking if required, and that giving the

Although it would be error to consider whether the sponsor has the capacity to fulfill the undertakings, it is open to consider whether the sponsor has the mental capacity to give the undertaking in determining whether a visa applicant is sponsored.[79]

At the time of decision, the sponsorship referred to at the time of application must have been approved by the Minister and must still be in force.[80]

On review, the Tribunal can decide whether to approve the sponsorship.[81]

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 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.[82] '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.[83]

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,[84] 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.[85]

undertaking simpliciter is sufficient. Although this judgment concerned sponsorship for a partner visa, the adoption visa features the same sponsorship framework.

[79] In *Lo v MICMSMA* [2020] FCA 895 at [27], the Court found no error in the Tribunal's unchallenged finding that it was not satisfied that when the applicant's father, who had a dementia condition, signed the sponsorship form he understood the nature of the sponsorship obligations. Although this judgment concerned sponsorship for a carer visa, the adoption visa features the same sponsorship framework.

[80] cl 102.222.

[81] *Babar v MICMSMA* [2020] FCAFC 38. However, in exercising this discretion, the Tribunal should not apply the Department's policy (at least the version considered in that judgment) as it is based on an erroneous view of the meaning of reg 1.20 and is not formulated on the basis that it is giving effect to the approval power: at [38]-[40]. As at 30 April 2020 the policy remained unchanged. Care should be taken that if policy is to be referred to it is not the same version as considered in *Babar* and is otherwise not going beyond the legislation. Despite this, and although the Court in *Babar* did not refer to any matters which would be relevant to this discretion, the judgment does not appear to exclude from consideration the ability to fulfil undertakings.

[82] Regulation 1.20KB inserted by *Migration Amendment Regulations 2010* (No 2) (Cth) (SLI 2010, No 50) for visa applications made on or after 27 March 2010.

[83] reg 1.20KB(13).

[84] Note reg 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'.

[85] regs 1.20KB(4)–(5).

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.[86] See the Limitation on Sponsorships – Partner and Family Visas commentary for further information.

Relevant Case Law

Judgment	Judgment Summary
Babar v MICMSMA [2020] FCAFC 38	Summary
Babar v MICMSMA [2019] FCCA 2311	Summary
Lo v MICMSMA [2020] FCA 895	Summary
Nguyet Huong Phung v MIEA [1997] 74 FCR 422	
Rani v MIAC [2012] FMCA 705	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 1998 (No 7) (Cth)	SR 1998, No 284	
Migration Amendment Regulations 2003 (No 7) (Cth)	SR 2003, No 239	20030918-1
Migration Amendment Regulations 2004 (No 8) (Cth)	SR 2004, No 390	
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No.2/2010
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No.10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No.10/2013
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015 No 34	No.1/2015
Migration Amendment (2021 Measures No.1)	F2021L00136	No.2/2021

[86] reg 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.

Regulations 2021		

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.

Last reviewed/updated: 11 January 2023

SETTLED

Overview[1]

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). Prior to 23 March 2013, it was also the case for the sponsored family visitor visa (Subclass 679) and sponsored business visitor (short stay) visa (Subclass 459).[2]

For example, an applicant for a contributory parent (Subclass 173) visa must demonstrate that at the time of applying for that visa they are a parent of a person who is a 'settled' Australian citizen, 'settled' Australian permanent resident or 'settled' eligible New Zealand citizen.[3] Similarly, an applicant for an orphan relative visa must demonstrate that at the time of applying for that visa he or she is sponsored by a relative who is a 'settled' Australian citizen, 'settled' Australian permanent resident or 'settled' eligible New Zealand citizen.[4]

The term 'settled' is defined in reg 1.03 of the *Migration Regulations 1994* (Cth) (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'.[5]

Legal Issues

Meaning of 'settled'

The meaning of 'settled' in reg 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*.[6] 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.[7]

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.[8]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] These visa subclasses were repealed by *Migration Amendment Regulations 2013 (No 1)* (Cth) (SLI 2013, No 32).
[3] cl 173.211.
[4] cls 117.212(a)(ii), 837.214(a)(ii).
[5] 'In Australia' is defined in reg 1.03 as 'in the migration zone' which is further defined in s 5 of the Act.
[6] *Naiker v MIMIA* [2002] FCA 888.
[7] *Naiker v MIMIA* [2002] FCA 888 at [28]–[29].
[8] *Naiker v MIMIA* [2002] FCA 888 at [25].

Accordingly, when considering the definition of 'settled' in reg 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* (Cth) (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.[9]

Departmental policy states 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.[10] It should be noted that policy 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 the Application of policy commentary.

'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 reg 1.03 it has been held that it should be interpreted to mean 'ordinarily', 'habitually' or 'usually' resident.[11] 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: 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 reg 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*[12] in the context of the definition of 'aged dependent relative' in reg 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.[13] Although these observations were not made in the context of the definition of 'settled' in reg 1.03, *Huang* may nevertheless provide some guidance as to the meaning of the expression a 'reasonable period'.

[9] 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.
[10] Policy – Migration Regulations – Divisions – [Div 1.4] Form 40 sponsors and sponsorship – Settled – Assessing 'settled' (last reviewed September 2016).
[11] *Naiker v MIMIA* [2002] FCA 888 at [27], citing *Re S* (2000) 142 ACTR 12, 14.
[12] *Huang v MIMIA* [2007] FMCA 720.
[13] *Huang v MIMIA* [2007] FMCA 720 at [44].

Departmental policy states 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 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.[14] However, as noted above, policy 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: 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 policy.

Relevant Case Law

Judgment	Judgment summary
Huang v MIMIA [2007] FMCA 720	Summary
Naiker v MIMIA [2002] FCA 888	Summary

Legislative Amendments

Title	Reference number
Migration Amendment Regulations 2013 (No 1) (Cth)	SLI 2013, No 32

Last updated/reviewed: 2 November 2022

[14] Policy – Migration Regulations – Divisions – [Div 1.4] Form 40 sponsors and sponsorship – Settled – Assessing 'settled' (last reviewed September 2016).

DEFINITION OF 'PARENT' AND PARENT VISA ISSUES

INCLUDING 'BALANCE OF FAMILY TEST'

Overview[1]

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 reg 1.03 of the *Migration Regulations 1994* (Cth) (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* (Cth) (the 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. These requirements do not apply to the Subclass 870 visa nor to applicants applying for permanent residence as the holder of an eligible retirement visa.

Merits review

Subclass 864 and Subclass 884

A decision to refuse a Contributory Aged Parent Subclass 864 (Residence) or a Subclass 884 (Temporary) visa is reviewable under s 338(2) of the Act if the application was made in the migration zone. For certain visa applications made offshore before 24 March 2021, a decision refusing to grant a Subclass 864 visa will also be reviewable regardless of the visa applicant's location at the time the delegate's decision was made.[2] In all cases, it is the visa applicant who has standing to apply for review, and the visa applicant must be inside the migration zone at the time of lodging the review application.[3]

Subclass 143 and Subclass 173

A decision to refuse a Contributory Parent Subclass 173 (Temporary) visa made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[4] is reviewable under s 338(9) of the Act, where the visa application was made before 24 March 2021 (either onshore or offshore), the visa applicant was onshore on 24 March 2021 and on the day of

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] This is because cl 864.411(1) and (2) as inserted by the *Migration Amendment (Parent Visas) Regulations 2021* (Cth) (F2021L00293), allow for offshore applications to be granted onshore where the delegate's decision was made on or after 24 March 2021 but before the end of the concessions period in reg 1.15N (which commenced on 1 February 2020) and the visa application was made offshore before 24 March 2021, the visa applicant was offshore on 24 March 2021 but onshore or offshore at the time of the delegate's decision.
[3] ss 347(2)(a), (3).
[4] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).

the delegate's decision to refuse the visa.[5] The person with standing to apply for review is the sponsor.[6]

A decision to refuse to grant a Subclass 173 visa made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[7] is also reviewable under s 338(2) of the Act, where the application for the visa was made onshore before 24 March 2021 and the visa applicant was onshore on 24 March 2021 and at the time of the delegate's decision to refuse the visa.[8] The person with standing to apply for review is the visa applicant and they must be onshore at the time of lodging the review application.[9]

Where the decision to refuse the Subclass 173 visa was made before 24 March 2021, or any one of the circumstances in relation to the time of applying for the visa and/or the location of the applicant described above do not apply, the decision is reviewable under s 338(5) of the Act if the visa applicant is sponsored in accordance with s 338(5)(b). In these cases, it is the sponsor who has standing to apply for review.[10]

A decision to refuse a Contributory Parent Subclass 143 (Permanent) visa is reviewable under Part 5 of the Act if:

- the visa applicant made the visa application while in the migration zone and was the holder of a Subclass 173 visa at the time of visa application. The review application must be made by the visa applicant and must be onshore at the time of lodgement of the review application;[11] or
- the visa applicant made the visa application while outside the migration zone and was the holder of a Subclass 173 visa at the time of visa application, the visa applicant is required to be in the migration zone at the time of the delegate's decision to refuse the visa and at the time of lodging the review application. It is the visa applicant who has standing to apply for review;[12] or
- the visa applicant was not the holder of a Subclass 173 visa at the time of visa application but is sponsored and it is the sponsor who has standing to apply for review;[13]or
- the delegate's decision to refuse the visa was made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[14], where the application for the visa was made onshore before 24 March 2021 and the visa applicant was onshore on 24 March 2021 and at the time of the delegate's decision to refuse the

[5] Reg 4.02(4)(t) as inserted by F2021L00293.
[6] s 347(2)(d) and reg 4.02(5)(s) as inserted by F2021L00293.
[7] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).
[8] Clause 173.411(1) and (2) as inserted by F2021L00293, which allows for onshore grants of the visa in certain circumstances. Although cl 173.411(2)(c) refers to the applicant being in Australia when 'the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be in Australia when 'the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD.
[9] s 347(2)(a) and (3).
[10] s 347(2)(b).
[11] ss 338(2), 347(2)(a), (3).
[12] ss 338(7A), 347(3A), 347(2)(a).
[13] ss 338(5), 347(2)(b)
[14] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).

visa.[15] The person with standing to apply for review is the visa applicant and they must be onshore at the time of lodging the review application;[16] or

- the delegate's decision to refuse the visa was made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[17], where the application for the visa was made offshore before 24 March 2021 and the visa applicant was onshore on 24 March 2021 and at the time of the delegate's decision to refuse the visa.[18] The visa applicant is required to be in the migration zone at the time of the delegate's decision and at the time of lodging the review application. It is the visa applicant who has standing to apply for review.[19]

Subclass 103

A decision to refuse a Parent Subclass 103 visa is reviewable under Part 5 of the Act if:

- the visa applicant is sponsored.[20] It is the sponsor who has standing to apply for review;[21] or
- the visa applicant held a Subclass 405 (Investor retirement visa) or a Subclass 410 (Retirement) visa and made the visa application while in the migration zone.[22] It is the visa applicant who has standing to apply for review; or[23]
- the delegate's decision to refuse the visa was made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[24], where the application for the visa was made onshore before 24 March 2021 and the visa applicant was onshore on 24 March 2021 and at the time of the delegate's decision to refuse the visa.[25] The person with standing to apply for review is the visa applicant and they must be onshore at the time of lodging the review application;[26] or
- the delegate's decision to refuse the visa was made on or after 24 March 2021 but before the end of the concession period in reg 1.15N(1)[27], where the application for

[15] s 338(2). Clause 143.412 as inserted by F2021L00293, which allows for onshore grants of the visa in certain circumstances. Although cl 143.412(2)(c) refers to the applicant being in Australia when 'the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be in Australia when 'the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD.
[16] s 347(2)(a) and (3).
[17] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).
[18] s 338(7A). Clause 143.412 as inserted by F2021L00293, which allows for onshore grants of the visa in certain circumstances. Although cl 143.412(2)(c) refers to the applicant being in Australia when 'the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be in Australia when 'the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD.
[19] s 347(3A) and (2)(a).
[20] s 338(5).
[21] s 347(2)(b)
[22] s 338(2)
[23] s 347(2)(a).
[24] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).
[25] s 338(2). Clause 103.411(3) as inserted by F2021L00293, which allows for onshore grants of the visa in certain circumstances. Although cl 103.411(3)(c) refers to the applicant being in Australia when 'the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be in Australia when 'the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD.
[26] s 347(2)(a) and (3).
[27] The concession period in reg 1.15N commenced on 1 February 2020 and as at the date of publication the Minister has not yet prescribed an end date under reg 1.15N(2).

the visa was made offshore before 24 March 2021 and the visa applicant was onshore on 24 March 2021 and at the time of the delegate's decision to refuse the visa.[28] The visa applicant is required to be in the migration zone at the time of the delegate's decision and at the time of lodging the review application. It is the visa applicant who has standing to apply for review.[29]

Subclass 804

A decision to refuse an Aged Parent Subclass 804 visa is reviewable under s 338(2) the Act if the visa application was made in the migration zone. For certain visa applications made offshore before 24 March 2021, a decision refusing to grant a Subclass 804 visa will also be reviewable regardless of the visa applicant's location at the time the delegate's decision was made.[30] It is the visa applicant who has standing to apply for review, and the visa applicant must be inside the migration zone at the time of lodging the review application.[31]

Subclass 870

A decision to refuse a Sponsored Parent Subclass 870 (Temporary) visa is reviewable under s 338(2) of the Act if the visa applicant made the application while in the migration zone and at the time of the refusal decision the applicant is sponsored by an approved sponsor or there is a pending review of the sponsorship refusal.[32] The review application must be made by the visa applicant and must be onshore at the time of lodgement of the review application.[33]

The decision will also be reviewable if the visa applicant made the application while outside the migration zone under s 338(9) of the Act, and they were sponsored by a parent sponsor at the time of the delegate's decision to refuse the visa.[34] In that circumstance it is the parent sponsor who has standing to apply for review.[35]

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* (Cth) (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

[28] s 338(7A). Clause 103.411(3) as inserted by F2021L00293, which allows for onshore grants of the visa in certain circumstances. Although cl 103.411(2)(c) refers to the applicant being in Australia when 'the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be in Australia when 'the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD.
[29] s 347(3A) and (2)(a).
[30] This is because cl 804.411(1) and (2), as inserted by F2021L00293, allows for offshore applications to be granted onshore where the delegate's decision was made on or after 24 March 2021 but before the end of the concessions period in reg 1.15N (which commenced on 1 February 2020) and the visa application was made offshore before 24 March 2021, the visa applicant was offshore on 24 March 2021 but onshore or offshore at the time of the delegate's decision.
[31] ss 347(2)(a) and (3).
[32] s 338(2)(d) and reg 4.02(1A)(M) as inserted by *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). An applicant can only make a valid visa application onshore if they have permission from the Minister to do so (see item 1239(3)(e)(ii) of sch 1 to the Regulations).
[33] ss 347(2)(a), (3).
[34] reg 4.02(4)(r) as inserted by *Migration Amendment (Subclass 600 and 870 Visas) Regulations 2019* (Cth) (F2019L01653)
[35] reg 4.02(5) as inserted by F2019L01653.

contributions are imposed in the form of visa application charges, payable at various stages of the process.[36] 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 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 or for applicants who have previously held an eligible retirement visa and are applying onshore. 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[37] or a substituted Subclass 600 visitor visa[38] 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.[39]

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

[36] 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.
[37] For visa applications made prior to 23 March 2013, the term 'Substituted Subclass 676 (Tourist) Visa)' is defined in reg 1.03 of the Regulations as a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under s 345, 351, 391, 417, 454 or 501J of the Act.
[38] For visa applications made on or after 23 March 2013, the term 'Substituted Subclass 600 (Visitor) visa' is defined in reg 1.03 as a Subclass 600 (Visitor) visa that was granted following a decision by the Minister to substitute a more favourable decision under s 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 s 345, 351, 391, 417, 454 or 501J of the Act: reg 1.03 as amended by *Migration Amendment Regulations 2013 (No 1)* (Cth) (SLI 2013, No 32).
[39] Item 1124 for Subclass 103; and item 1123A for Subclass 804.

applicants waiting for limited visas to become available. Applicants for these visas are able to transfer to the contributory stream of visas.

Sponsored Parent (Temporary) (Subclass 870)

The Subclass 870 (Sponsored Parent (Temporary)) visa is for parents of Australian citizens, Australian permanent residents, or eligible New Zealand citizens.[40] The Subclass 870 visa can only be granted where the parent's child or the child's partner has been approved as a parent sponsor in relation to them. It allows a stay for up to five years at a time without departing and provides an alternative to visitor visas which only allow for shorter periods of stay. It provides parents with a pathway to temporarily reunite with their children and grandchildren in Australia while ensuring taxpayers are not required to cover additional costs.

All applicants for a Subclass 870 visa must satisfy the primary criteria at the time of decision.[41] An applicant must:

- be sponsored by a parent sponsor;
- have access to sufficient funds to meet the costs and expenses of the intended stay in Australia;
- if they are outside Australia, have previously held a Subclass 870 visa, and there are no exceptional circumstances - have been outside Australia for at least 90 consecutive days since the relevant departure day as defined in cl 870.223(2);
- have adequate arrangements for health insurance during the period of intended stay;
- have complied substantially with the conditions to which the last of any substantive visa held by the applicant, and any subsequent bridging visa held by the applicant, were subject;
- genuinely intend to stay temporarily;
- either not have an outstanding public health debt[42] or it has been paid in full or appropriate arrangements made for its payment;
- satisfy certain public interest criteria which broadly relate to character, national security, debts to the Commonwealth, ability to become established in Australia on a temporary basis, Australian values, fraudulent information, a valid passport and health requirements; and
- satisfy special return criteria 5001, 5002 and 5010.

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

[40] F2019L00551 created the Subclass 870 visa and commenced on 17 April 2019.
[41] Part 870 of sch 2 to the Regulations as inserted by F2019L00551.
[42] As defined in reg 1.15K as inserted by F2019L00551.

meaning of s 5(1) of the Act if the person was a parent under reg 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.[43]

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.[44] This definition is broader than the pre 1 July 2009 definition of 'parent' in reg 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 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 s 5CA'.[45]

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* (Cth) (Family Law Act), with the exception of an adopted child under the Family Law Act. Instead, s 5CA(1)(b) expressly includes a person who is an adopted child within the meaning of the Act (i.e. in accordance with reg 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 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 Act is also affected by the meaning of 'child' as expanded or modified under the Family Law Act.[46] Relevantly, this means that under s 5CA of the Act, a child born to a couple before their marriage,[47] or a child born to a person or to a

[43] *Migration Amendment Regulations 2009 (No 7)* (Cth) (SLI 2009, No 144).
[44] 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 (Cth).
[45] s 5(1) as inserted by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act), 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').
[46] Section 4 of the *Family Law Act 1975* (Cth) (Family Law Act) provides that sub-div D of div 1 of pt 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).
[47] Family Law Act s 60F(1)(a).

couple (including married,[48] or de facto partners whether of the same or opposite sex[49]) as a result of artificial conception procedure,[50] or surrogacy arrangement,[51] could be considered as the child of a particular person, or as a child of a person who is the 'product of a relationship'[52] 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 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[53] of another person (the couple), and either the couple consented[54] 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[55] the child is a child of the couple, then, under both the Family Law Act[56] 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.[57]

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,[58] 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[59] for the purposes of both the Family Law Act and s 5CA(1)(a) of the Act.

In circumstances where a child born under surrogacy arrangements and a court has made orders under a prescribed State/Territory law[60] 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

[48] 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'.
[49] The link in ss 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.
[50] Family Law Act s 60H.
[51] Family Law Act s 60HB. 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.
[52] Explanatory Memorandum to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 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.
[53] 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.
[54] 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.
[55] The prescribed laws for s 60H(1)(b)(ii) of the Family Law Act are set out in reg 12C of the *Family Law Regulations 1984* (Cth) (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); pt 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).
[56] Family Law Act s 60H(1).
[57] Family Law Act ss 60F(1), (3), 60HA(1)–(2).
[58] 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); pt 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).
[59] Family Law Act s 60H(2). 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).
[60] 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).

considered for the purposes of the family law and migration law to be a child of each of those persons.[61]

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).[62] To ensure that a person cannot have more than two parents for the purposes of the Act,[63] 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).[64]

Adopted children

In addition, reg 1.14A(2)[65] specifies for the purposes of s 5CA(2) that a child that is formally adopted in accordance with reg 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 reg 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 reg 1.04(2). Thus, if formal adoption arrangements are entered into which meet the requirements of reg 1.04(1)(a) or (b), the child's previous child-parent relationship is no longer recognised. The same factual approach applies for considering the requirements of reg 1.04(1)(a) or (b) to determine whether a formal adoption arrangement has been severed.[66] However, despite the note to reg 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: Familial Relationships, Adoption and Subclass 101 and 802: Child visas.

Visa application made prior to 1 July 2009 (reg 1.03)

For visa applications made prior to 1 July 2009, reg 1.03 provides that the term parent 'includes an adoptive parent and a step-parent'.[67]

[61] Family Law Act s 60HB.
[62] Explanatory Memorandum accompanying the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act pp.136–137.
[63] Explanatory Memorandum accompanying the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act p.137.
[64] As inserted by Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008, effective from 1 July 2009.
[65] As inserted by SLI 2009, No 144 for visa applications made on or after 1 July 2009.
[66] In *Truong v MIBP* [2017] FCCA 2713, the issue was whether the visa applicant for a Subclass 143 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 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.
[67] 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.

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.[68] 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*[69] on the meaning of the word 'parent' in the *Australian Citizenship Act 2007* (Cth) 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.*[70]

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 reg 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 reg 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.[71] (For further explanation, see 'The effect of adoption under Australian law generally' in: 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 reg 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

[68] *Hunt v MIEA* (1993) 43 FCR 380.
[69] *H v MIAC* (2010) 188 FCR 393.
[70] *H v MIAC (*2010) 188 FCR 393 at [127]–[130].
[71] *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).

guardianship or custody in respect of the child),[72] 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,[73] but not for the Act and Regulations generally.

Meaning of 'aged parent'

'Aged parent' is defined in reg 1.03 of the Regulations as a 'parent' who is old enough to be granted an age pension under the *Social Security Act 1991* (Cth) (Social Security Act). 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. 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.[74]

Balance of family test – reg 1.05

The 'balance of family test' is a defined term,[75] and a criterion that must be satisfied at time of application for most parent visa subclasses other than where an applicant is applying for one of the permanent contributory visas (Subclass 143 or 864) and at the time of the application[76] was the holder of a temporary contributory (Subclass 173 or 884) visa or a substituted Subclass 676 visa[77] or a substituted Subclass 600 visa.[78] It also does not apply for Subclass 870 visas nor Subclass 103 applications made on the basis of the retirement pathway [79]

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.[80] The details of the test prior to and after 1 July 2011 are set out below.

[72] The definition of step-child was amended by *Migration Amendment Regulations 2010 (No 1)* (Cth) (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 . 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.
[73] cl 102.111.
[74] 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.
[75] reg 1.03, which refers to reg 1.05.
[76] The time of decision requirement for the balance of family test was removed by *Migration Legislation Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 116) for visa applications made on or after 1 July 2009 or not finally determined before that date (reg 9). Note that this remains a time of decision requirement for Designated Parent (Subclass 118 and 859) visas.
[77] For visa applications lodged prior to 23 March 2013, a 'substituted Subclass 676 visa' is defined at reg 1.03 as 'a Subclass 676 (Tourist) visa that was granted following a decision by the Minister to substitute a more favourable decision under s 345, 351, 391, 417, 454 or 501J of the Act'.
[78] For visa applications made on or after 23 March 2013, reg 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 s 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, reg 1.03 as amended by SLI 2013, No 32.
[79] cl 103.213(2).
[80] reg 1.05 as amended by *Migration Legislation Amendment Regulations 2011 (No 1)* (Cth) (SLI 2011, No 105).

Visa applications made before 1 July 2011

For visa applications made before 1 July 2011, the balance of family test set out in reg 1.05 provides that a parent satisfies the balance of family test if the number of his or her children lawfully and 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', 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 reg 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)*[81]

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 indefinitely.[82] For further discussion of the common law concept of 'usual residence' see: 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*[83] 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. [84]

[81] *Hafza v Director-General of Social Security* (1985) 60 ALR 674 at 680.
[82] See *R v Barnet London Borough Council; Ex parte Shah* [1983] 2 AC 309.
[83] *Hafza v Director-General of Social Security* (1985) 60 ALR 674.
[84] reg 1.05(2)(a) amended by SLI 2011, No 105.

Any other child of the parent is an 'ineligible child' who will then count against the number of 'eligible children'.[85] There are changes which allow a clearer determination of which overseas country an ineligible child is taken to reside in,[86] and to change the presumption regarding the child's residence if the whereabouts of the child are unknown.[87]

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.[88] 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
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;[89]

[85] reg 1.05(2)(b) amended by SLI 2011, No 105.
[86] reg 1.05(2B) amended by SLI 2011, No 105.
[87] reg 1.05(1)(b) amended by SLI 2011, No 105. See also the Explanatory Statement to SLI 2011, No 105, p.6.
[88] reg 1.05(1)(a)(ii) amended by SLI 2011, No 105.
[89] For applications made prior to 1 July 2009, 'spouse' is defined in reg 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.

- the former partner[90] 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.[91]

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.

To date there is no specific case law addressing any of the above excluded categories of children.

Removal from the exclusive custody: reg 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 reg 1.05(3)(a).

Departmental policy provides that reg 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).[92]

The term 'exclusive custody' is not further defined in the Act or the Regulations. However, 'custody' in relation to a child is defined in reg 1.03 to mean:

[90] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.
[91] reg 1.05(1)(a)(ii) as amended by SLI 2011, No 105.
[92] Policy – Migration Regulations - Sch2 Parent visas – Balance of family test – regulation 1.05 (reissued 01/07/2016 at [15]. Policy 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].

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.

Policy 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, policy 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.[93]

Policy 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.[94]

Finally, in relation to adoption, policy 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.[95]

However in respect of each of the above scenarios, the policy 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 sense that only they, and not other persons, have custody rights.[96] 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: reg 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 reg 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: reg 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. Policy guidance suggests that verification of the child's location and refugee status can be sought from the Post in the camp's region.[97] If

[93] Policy – Migration Regulations - Sch2 Parent visas– Balance of family test – regulation 1.05 (reissued01/07/2016) at [15].
[94] Policy – Migration Regulations - Sch2 Parent visas– Balance of family test – regulation 1.05 (reissued 01/07/2016) at [15].
[95] Policy – Migration Regulations - Sch2 Parent visas– Balance of family test – regulation 1.05 (reissued 01/07/2016) at [15].
[96] 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.
[97] Policy – Migration Regulations - Sch2 Parent visas– Balance of family test – regulation 1.05 (reissued 01/07/2016) at [15.2]. Policy suggests that any request to the Post should include details such as: full name, date and place of birth, country of last

there is no record available, Policy 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.[98] 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 reg 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.[99] 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. [100] For more detail see: 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.[101]

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: 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

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.

[98] Policy - Migration Regulations - Sch2 Parent visas– Balance of family test – regulation 1.05 (reissued 01/07/2016) at [15.2].

[99] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

[100] See reg 1.03, 'step-child' definition.

[101] Explanatory Statement to SLI 2011, No 105 and reg 1.05(1)(a)(ii) as amended by SLI 2011, No 105. Note that the versions of reg 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 (regs 1.03 and 1.05(3)(d)) from the balance of family test, but do not exclude an adult child of a former partner: reg 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 reg 1.05(1)(a)': Policy –Migration Regulations- 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 reg 1.03 step-child definition.

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: 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 reg 1.05(1)(a). However, children born to a partner's[102] 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 reg 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

Subclass 864 & 884, 143 & 173, 103, 804 visas

Parents must be sponsored by a 'settled' Australian citizen, permanent resident or eligible New Zealand citizen who has turned 18.[103] If the child has turned 18, the child or his or her cohabiting partner[104] 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.[105] 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, unless the visa applicant has applied for the Subclass 103 on the basis of a retirement visa.[106] The 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.[107]

For further information on the 'settled' requirement, see: Settled.

Subclass 870 visa

At the time of application, an applicant must be sponsored by a 'parent sponsor'.[108] A parent sponsor is a person who has been approved as a family sponsor under s 140E(1A) of the

[102] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.
[103] cls 103.212, 173.212, 804.212, 884.212.
[104] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.
[105] cl 103.212(3). For visa applications made prior to SLI 2009, No 144, the term 'spouse' is defined in reg 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.
[106] Sponsorship is not a requirement for the Subclass 103 if the applicant meets the requirements of cl 103.214(2).
[107] 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.
[108] cl 870.221. The *Migration Amendment (Family Violence and other Measures) Act 2018* (Cth) created a family sponsorship framework for the sponsored family visa program. It introduced the concept of a 'family sponsor' and provided for a parent

Act.[109] Regulations 2.60U, 2.60V, 2.60W, 2.60X, 2.60Y and 2.60Z set out the criteria for approval as a parent sponsor.[110]

To make a valid application for a Subclass 870 the application must specify the person who is the parent sponsor of the applicant.[111]

If an issue in relation to approval of a 'parent sponsor' arises please contact MRD Legal Services.

Restrictions on sponsorship of certain 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[112] from a State or Territory government welfare authority with his or her Subclass 802 (Child) visa application.[113] 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.[114]

Regulation 1.20LAA(2) provides that the Minister is precluded from approving the sponsorship of an applicant for parent visa as listed in reg 1.20LAA(1)[115] 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;[116]
- a guardian;
- a guardian of a person who is a cohabiting spouse partner;[117] 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.[118]

sponsor as a prescribed class of sponsor in relation to which a person may be approved as a family sponsor under s 140E(2) of the Act.

[109] reg 1.03.

[110] Inserted by F2019L00551.

[111] Sch 1, item 1239(3)(d).

[112] reg 1.20LAA(4) defines 'letter of support' for the purpose of the Regulation.

[113] This provision applies only to visa applications made on or after 26 April 2008: *Migration Amendment Regulations 2008 (No 2)* (Cth) (SLI 2008, No 56)..

[114] Explanatory Statement to SLI 2008 No 56, p.18.

[115] 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.

[116] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

[117] The definition of spouse was amended for applications made before and after 1 July 2009. For further information see footnote 54.

[118] reg 1.20LAA(3).

Retirement visa pathway

The *Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018* (Cth) amended the Regulations to allow for a Subclass 405 (Investor Retirement) or a Subclass 410 (Retirement) visa holder to apply for a Subclass 103 (Parent) or a Subclass 143 (Contributory Parent) visa without having to meet certain parent visa requirements such as family sponsorship and the requirement to maintain an Assurance of Support. The amendments were to provide a pathway to permanent residency for certain non-citizens (retirees) who are temporary residents of Australia and who did not previously have a suitable visa option to progress to permanent residency.

The visa applicant is required to have held a Subclass 405 or a Subclass 410 visa on 8 May 2018 (when the changes were announced) or for those who did not hold a substantive visa on that date the last substantive visa held was one of those visas.[119] All visa applicants will still need to meet the relevant health, character and other public interest criteria for the grant of a Subclass 103 or Subclass 143 visa and the visa applicants must maintain adequate health insurance in Australia while awaiting the decision on the parent visa[120]. The visa applicant must be in Australia when making the application and can choose to apply for either the Subclass 103 or Subclass 143 visa.[121] Unlike other visa applicants for parent visas, visa applicants using the retirement visa pathway can be in or outside Australia at the time of the grant of the parent visa. Secondary applicants must also meet the same requirements in relation to holding a retirement visa which limits family members to spouses and de facto partners as they were the only eligible secondary applicants for retirement visas.

Relevant case law

Judgment	Judgment Summary
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	
Hunt v MIEA (1993) 41 FCR 380	Summary
Truong v MIBP [2017] FCCA 2713	Summary

[119] In addition, the applicant must not have held a substantive visa other than a Subclass 405 or Subclass 410 visa since 8 May 2018. The Subclass 405 visa was closed to new applicants on 1 June 2018 and the Subclass 410 visa was closed to new applicants with effect from 17 November 2018.
[120] Condition 8501
[121] The difference between the Subclass 103 and Subclass 143 visa is that the latter has a higher visa application charge (VAC) and the waiting time for the grant of a Subclass 143 visa is substantially less than the waiting for the Subclass 103 visa. The higher VAC offsets part of the future cost of health care and other services.

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2008 (No 2) (Cth)	SLI 2008, No 56	No 2/2008
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Legislation Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 116	No 7/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No 3/2011
Migration Amendment Regulations 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103	No 7/2015
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	
Migration Amendment (Pathway to Permanent Residence for Retirees) Regulation 2018 (Cth)	F2018L01472	No 4/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 1/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019
Migration Amendment (Subclass 600 and 870 Visas) Regulations 2019 (Cth)	F2019L01653	
Migration Amendment (Parent Visas) Regulations 2021	F2021L00293	No 3/2021

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: 2 September 2022

SUBCLASS 114 AND 838:

AGED DEPENDENT RELATIVE VISAS

Relevant case law

Relevant legislative amendments

Available decision templates

Overview[1]

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,[2] 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,[3] is one of the subclasses within the Other Family (Residence) (Class BU) visa class and must be applied for in Australia.[4]

For a short period 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.[5]

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* (Cth) (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.[6]

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.[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Amendment Regulations 1998* (No 8) (Cth) (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* (Cth) (Acts Interpretation Act), 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) (Cth) (SR 1999, No 259).
[3] Inserted by SR 1999, No 259.
[4] Items 1123A and 1123B of sch 1 to the Regulations. The other subclasses in those classes are Remaining Relative and Carer.
[5] 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 regs 2.08 or 2.08A. This was because while the *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* (Cth) (SLI 2014, No 65) 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.
[6] s 347(2)(a), (3).
[7] 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.[8]

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.[9] In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.[10]

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.[11]

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.[12]

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* (Cth) (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 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 reg 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[13]

[8] Item 1123A(1)–(3) of sch 1 to the Regulations.
[9] Items 1123B(1)–(3).
[10] Item 1123B(3)(ca) as inserted by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013, No 118).
[11] Items 1123A(1), (3)(a)–(3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth), (SLI 2015, No 34).
[12] Items 1123B(1), (3)(a) as amended by SLI 2015, No 34.
[13] cls 114.211, 838.212. Clause 838.212 as amended by *Migration Amendment Regulations 2002* (No 2) (Cth) (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.'

and at the time of decision,[14] an 'aged dependent relative' of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen (Australian relative);

- ***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.[15]

  At time of decision, the sponsorship mentioned in the relevant time of application criterion must be approved by the Minister and be in force.[16]
- ***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.[17]
- ***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).[18]
- ***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),[19] 4002 (security), 4003 (weapons of mass destruction), 4004 (debt to Commonwealth), 4005 (health),[20] 4009 (intention to reside permanently), 4010 (establishment) and 4020 (fraud/bogus documents)[21]. Depending on the date of visa application, the primary applicant must also satisfy PIC 4021 (valid passport),[22] 4019

[14] cls 114.221, 838.221.
[15] cls 114.212, 838.213. 'Settled' is defined in reg 1.03 to mean lawfully resident in Australia for a reasonable period. Subclauses 838.213(a)(iii) and (b)(iii) also require that the Australian relative or their spouse or de facto partner is usually resident in Australia.
[16] cls 114.222, 838.227.
[17] cl 838.211. 'Substantive visa' is defined in s 5(1) as a visa other than a bridging visa, criminal justice visa or enforcement visa.
[18] cls 114.225, 838.222. This criterion was substituted by *Migration Amendment Regulations 2004* (No 2) (Cth) (SR 2004, No 93) to apply to both applications made on or after 1 July 2004 and applications made, but not finally determined, before that date. 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* (Cth) (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 (see the Acts Interpretation (Substituted References - Section 19B) Order 1997).
[19] See the commentary: Public Interest Criterion 4001.
[20] See the commentary: Health Criteria – PIC 4005 & 4007.
[21] cls 114.223, 114.226(1)(a), 838.223 and 838.224(1)(a) as amended by *Migration Legislation Amendment Regulation 2013* (No 3) (Cth) (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 the commentary: Bogus Documents / False or Misleading Information / PIC 4020.
[22] cls 114.223, 838.223 as amended by *Migration Legislation Amendment Regulation 2012* (No 5) (Cth) (SLI 2012, No 256) for visa applications made on or after 24 November 2012.

(Australian values),[23] and, for a Subclass 838 applicant who has not turned 18, PIC 4017 (lawful removal of child)[24] and 4018 (best interests of child).[25] 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,[26] or otherwise PIC 4015, and 4016.[27]

In addition, it is a primary criterion for both Subclass 114 and 838 that each member of the family unit who is *not* an applicant for the visa must satisfy PIC 4001, 4002, 4003 and 4004 and 4005, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.[28]

- ***Special return criteria*** – for Subclass 114, 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.[29]
- ***Passport requirements*** – for applications made on or after 1 July 2005 and before 24 November 2012, the applicant must satisfy either cls 114.228 or 838.228 (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.[30] This criterion has been replaced by the very similarly termed PIC 4021, inserted into cls 114.223 and 838.223, which applies to visa applications made on or after 24 November 2012.[31]

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 and the Minister has not decided to grant or refuse to grant the visa to that other person (Subclass 838);[32] and
- the sponsorship in relation to the primary applicant includes the secondary applicant.[33]

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 holds a Subclass 114 visa, or a member of the family unit of a person who, having satisfied

[23] cls 114.223, 838.223 as amended by *Migration Amendment Regulations 2007* (No 12) (Cth) (SLI 2007, No 314) for visa applications made on or after 15 October 2007.
[24] cl 838.226 inserted by *Migration Amendment Regulations 2000* (No 2) (Cth) (SR 2000, No 62) for visa applications made on or after 1 July 2000.
[25] cl 838.226 inserted by SR 2000, No 62 for visa applications made on or after 1 July 2000.
[26] cls 114.226(1)(aa), 838.224(1)(b) substituted by SLI 2007, No 314 for visa applications made on or after 15 October 2007.
[27] cls 114.227, 838.225 substituted by SR 2000, No 62 for visa applications made on or after 1 July 2000.
[28] cls 114.226(2), 838.224(2).
[29] cls 114.224, 114.226(1)(b). For further information, see the commentary: Special Return Criteria.
[30] cls 114.228, 838.228, inserted by *Migration Amendment Regulations 2005* (No 4) (Cth) (SLI 2005, No 134) and repealed by SLI 2012, No 256.
[31] Inserted by SLI 2012, No 256.
[32] cls 114.311, 838.311. 'Member of the family unit' is defined in reg 1.12. See the Commentary: Member of the Family Unit.
[33] cls 114.312, 838.312.

the primary criteria, holds a Subclass 838 visa;[34]

- the sponsorship of the primary applicant has been approved, is in force and includes sponsorship of the secondary applicant;[35]
- 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;[36]
- 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 be the holder of a passport;[37] and
- the secondary applicant satisfies certain public interest criteria (and special return criteria for Subclass 114).[38]

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.[39] At time of decision, the sponsorship must be approved by the Minister and be in force.[40]

With limited exceptions, sponsorship provisions are set out in reg 1.20 of the Regulations.[41] 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.[42]

Changing sponsor

The time of decision criteria expressly require that the sponsorship referred to[43] or mentioned[44] at time of application be approved and in force. While it may be open to

[34] cls 114.321, 838.321.
[35] cls 114.322, 838.325, as amended by *Migration Amendment Regulations 2009* (No 7) (Cth) (SLI 2009, No 144). 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.
[36] cls 114.325, 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.
[37] cls 114.327, 838.326 inserted by SLI 2005 No 134 and omitted 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 cls 114.323(a) and 838.322(a), as amended by SLI 2012, No 256.
[38] 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 cls 114.327 and 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.
[39] 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, for a Subclass 838 visa, is usually resident in Australia: cls 114.212, 838.213.
[40] cls 114.222, 838.227.
[41] Regulation 1.20 does not apply to a limited number of visa types – see reg 1.20(4) of the Regulations.
[42] reg 1.20(2).
[43] cl 114.222.

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 the Department's policy which states that there is no provision for applicants to change sponsor.[45] Accordingly, on the 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 reg 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. – 'the applicant is sponsored by *the* Australian relative…' and '*the* sponsorship…has been approved by the Minister and is still in force'),[46] the Court in *Fernandez v MIBP* observed, in *obiter*, that it was not persuaded by the correctness of that view and that it seemed at least possible to read reg 1.20(1) as allowing for a visa applicant to be sponsored by more than one person.[47]

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.[48] 'Aged dependent relative' is defined in reg 1.03 of the Regulations.[49] 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 reg 1.03 of the Regulations to mean:

[44] cl 838.227.
[45] Policy – Migration Regulations – Schedules - [Sch2Visa114] Subclass 114 (Aged Dependent Relative) Visa – 3 Procedural Instruction – 3.4.2 Sponsorship requirements – 3.4.2.3 Change of sponsor, reissued 15 August 2021 and Policy – Migration Regulations – Schedules – [Sch2Visa838] Subclass 838 (Aged Dependent Relative) visa – 3 Procedural Instruction – 3.4.2 Sponsorship requirements – 3.4.2.3 Change in sponsor, reissued 15 August 2021.
[46] cls 838.213, 838.227.
[47] *Fernandez v MIBP* (2015) 238 FCR 251. However the Court was not required to consider this issue and at [84] to [92] expressly declined to do so.
[48] Clauses 114.211, 114.221, 838.212 (see also definition in cl 838.111), 838.221. 'Australian permanent resident' and 'eligible New Zealand citizen' are defined in reg 1.03.
[49] 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. SLI 2014, No 65 was disallowed by the Senate on 25 September 2014.

- a 'close relative' which is defined by reg 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 reg 1.14A(1) of the Regulations;
- 'Child' is defined in s 5CA of the Act and reg 1.14A(2) of the Regulations; and
- 'Step-child' is defined in reg 1.03, and includes reference to a parent's 'spouse or 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 these subclasses.[50] See the Commentary Spouse and de facto partner for further information.

'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 these subclasses.[51] In addition, reg 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.[52] See the 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 reg 1.05A of the Regulations, although the definition differs depending upon the date of visa application. For detailed consideration of 'dependent' see the commentary: Dependent and Dependent Child.

[50] reg 1.15A(4).
[51] reg 1.09A(4).
[52] reg 2.03A(3). The 12 month relationship requirement only applies in relation to applications for permanent, Business Skills (Provisional), Skilled Employer Sponsored Regional (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or GSM visas.

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.*[53] In that case, the Court noted that the clear purpose of the Regulations was to ensure that the sponsor had a genuine responsibility 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.[54] In short, 'substantial period' should be understood to be a lengthy period.[55] 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 reg 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 reg 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.[56]

'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.[57] 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*'.[58] Other 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 reg 1.05A ('dependent') in the context of the definition of 'aged dependent relative' (reg 1.03), but did not expressly consider the meaning of 'reasonable period'.[59] 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 the commentary Dependent and Dependent Child.

[53] *Huang v MIMA* [2007] FMCA 720.
[54] *Huang v MIMA* [2007] FMCA 720 at [37], [43].
[55] *Huang v MIMA* [2007] FMCA 720 at [43].
[56] *Huang v MIMA* [2007] FMCA 720 at [47].
[57] *Huang v MIMA* [2007] FMCA 720 at [44].
[58] *Fernandez v MIBP* [2015] FCCA 1698 at [13]–[15]. Upheld on appeal in *Fernandez v MIBP* (2015) 238 FCR 251.
[59] *Zeng v MIMIA* [2005] FMCA 546. 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 reg 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 nominator, 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 reg 1.05A, such as *Huynh v MIMIA* (2006) 152 FCR 576. See the Commentary Dependent and Dependent Child.

Departmental policy guidelines 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.[60] However, this interpretation is difficult to reconcile with the Departmental guidelines on reg 1.05A, which state that a 'substantial period' for the purpose of assessing reg 1.05A is a period of 'at least 12 months'.[61] This is particularly so in light of the finding in *Huang v MIMIA* that the term 'substantial period' in reg 1.05A is to be read down to mean a period not more substantial than a 'reasonable period'.[62] Accordingly, whilst Departmental policy guidelines 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* (Cth). Different age qualifications apply for men and women, and will depend upon a factual finding of the particular applicant's date of birth.

For men, the relevant pension ages are:

Period during which man was born[63]	Pension age
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

[60] Policy - Migration Regulations - Divisions - [Div1.2] Div 1.2 - Interpretation > Reg 1.03 – [Div1.2/reg1.03] reg1.03 - Aged dependent relative – Procedural Instruction – 3.2 About this definition – 3.2.4 Dependency – 3.2.5.4 Period of dependency, reissued 15 August 2021.
[61] Policy - Migration Act - Act- defined terms instructions - s5G -s5G - Relationships and family members - Dependent family members – Dependent – Dependency assessment factors – 37 The required period of dependency, reissued 14 December 2016.
[62] *Huang v MIMIA* [2007] FMCA 720 at [47].
[63] *Social Security Act 1991* (Cth) (Social Security Act) s 23(5A).

For women, the relevant pension ages are:

Date of Birth		Pension age
	Before 1 July 1935[64]	60 years
Period *within* which woman was born[65]	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
Period *during* which woman was born[66]	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

[64] Social Security Act s 23(5B).
[65] Social Security Act s 23(5C).
[66] Social Security Act s 23(5D).

Relevant case law

Judgment	Judgment Summary
Fernandez v MIBP (2015) 238 FCR 251; [2015] FCA 1265	Summary
Fernandez v MIBP [2015] FCCA 1698	Summary
Huang v MIMA [2007] FMCA 720	Summary
Huynh v MIMIA (2006) 152 FCR 576; [2006] FCAFC 122, corrigendum	Summary
Zeng v MIMIA [2005] FMCA 546	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 1998 (No 8) (Cth)	SR 1998, No 285
Migration Amendment Regulations 1999 (No 13) (Cth)	SR 1999, No 259
Migration Amendment Regulations 2000 (No 2) (Cth)	SR 2000, No 62
Migration Amendment Regulations 2002 (No 2) (Cth)	SLI 2002, No 86
Migration Amendment Regulations 2004 (No 2) (Cth)	SR 2004, No 93
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134
Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (Cth)	SLI 2013, No 118
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth)	SLI 2014, No 65
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34

Available decision templates

There are two decision templates available for Subclasses 114 and 838. 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. It asks the user to nominate the criterion in issue ('sponsorship', 'aged dependent relative' and/or 'other), 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. It asks the user to nominate the criterion in issue ('sponsorship', 'aged dependent relative' and/or 'other'), and will adjust the content accordingly.

Last updated/reviewed: 1 December 2022

REMAINING RELATIVE VISAS:

SUBCLASS 115 AND 835

Overview[1]

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 reg 1.15 of the *Migration Regulations 1994* (Cth) (the Regulations). This Commentary focuses on visa applications lodged on or after 1 July 2009 following changes to definitions in the *Migration Act 1958* (Cth) (the Act) and Regulations from that point onwards. For queries regarding visa applications made prior to 1 July 2009, please contact MRD Legal Services.

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 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.[2]

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 approved form and be accompanied by the prescribed fee.[3] In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.[4]

[1]Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Items 1123A(1)–(2) of sch 1 to the Regulations.
[3] Items 1123B(1)–(3).
[4] Item 1123B(3)(ca) as inserted by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013, No 118).

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.[5]

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.[6]

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.[7]

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.[8]

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 reg 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[9] and at the time of decision,[10] the 'remaining relative' of an 'Australian relative' of the applicant.[11] 'Australian relative' means a relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.[12]

[5] Items 1123A(3)(b), 1123B(3)(c) in sch 1 for subclasses 115 and 835 respectively.
[6] Items 1123A(1), (3)(a), (3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34).
[7] Item 1123B(1), (3)(a) as amended by SLI 2015, No 34.
[8] Items 1123A(3)(b), 1123B(3)(c).
[9] cls 115.211, 835.212.
[10] cls 115.221, 835.221.
[11] 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)* (Cth) (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.
[12] For visa applications made prior to 9 November 2009, 'Australian relative' was defined in cls 115.211(2) and 835.111. For visa applications made on or after 9 November 2009, the definition of 'Australian relative' was added to reg 1.03 by SLI 2009, No 289 and effectively removed from cls 115.211(2) and 835.111. A reference to the definition in divs 115.1 and 835.1 was inserted. The terms 'Relative', 'Australian Permanent Resident' and 'Eligible New Zealand' citizen are defined in reg 1.03. Note that 'relative' includes amongst others, a 'close relative' which is also defined in reg 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 reg 1.14A) and 'child of a person' (s 5CA, reg 1.14A).

- ***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,[13] if the partner has turned 18, cohabits with the relative and is a settled Australian citizen, permanent resident or eligible New Zealand citizen.[14]

  For Subclass 835 applications, the sponsor must also be usually resident in Australia.

  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.[15]
- ***Visa status of Subclass 835 applicants*** – applicants for a Subclass 835 visa must also at the time of application either:
  - hold a substantive visa[16] 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.[17]
- ***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.[18]
- ***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,[19] 4002, 4003, 4004, 4005, 4009, 4010 and 4020.[20] Depending on the date of visa application, the primary applicant must also satisfy PIC 4021,[21] 4019,[22] and, where the applicant has not turned 18, PIC 4017, and 4018.[23] Similarly, depending on the date of visa application, each member of the applicant's family unit who is also a visa

[13] For visa applications made before 1 July 2009, the sponsorship is limited to the relative or the relative's 'spouse' as defined in reg 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.
[14] cls 115.212, 835.213. Regulation 1.20K operates to limit sponsorship in certain situations and is discussed below.
[15] cls 115.222, 835.227, as amended by *Migration Legislation Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 116), items 5 and 17 of sch 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.
[16] reg 1.03 defines 'substantive visa' as a visa other than a bridging visa, criminal justice visa or enforcement visa.
[17] cl 835.211.
[18] For applications made on or after 22 March 2014, cls 115.225 and 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* (Cth) (SLI 2014, No 30).
[19] See Public Interest Criterion 4001.
[20] 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 Bogus Documents / False or Misleading Information / PIC 4020.
[21] cls 115.223(a), 835.223(a) as amended by *Migration Legislation Amendment Regulation (2012) (No 5)* (Cth) (SLI 2012, No 256) and applying to all visa applications made on or after 24 November 2012.
[22] cls 115.223(b), 835.223(b) amended by *Migration Amendment Regulations 2007 (No 7)* (Cth) (SLI 2007, No 314) applying to visa applications made on or after 15 October 2007.
[23] cls 115.229, 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)* (Cth) (SLI 2011, No 105).

applicant must also satisfy PIC 4019 if they have turned 18 at the time of application,[24] or otherwise PIC 4015, and 4016.[25]

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 unless the decision maker is satisfied it would be unreasonable to require the person to undergo a health assessment.[26]

- ***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.[27]
- ***Passport requirements*** – for applications made between 1 July 2005 and 24 November 2012, the applicant must satisfy either cl 115.228 or 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.[28]

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;[29] and
- the sponsorship in relation to the primary applicant has been approved by the Minister, is in force and includes the secondary applicant.[30]

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)[31]

[24] cls 115.226(1)(aa), 835.224(1)(b) amended by SLI 2007 No 314 applying to visa applications made on or after 15 October 2007.
[25] cls 115.227, 835.225 were substituted by *Migration Amendment Regulations 2000 (No 2)* (Cth) (SR 2000, No 62) applying to visa applications made on or after 1 July 2000: reg 4(7).
[26] cls 115.226(2), 835.224(2).
[27] cls 115.224, 115.226. For further information, see Special Reurn Criteria.
[28] cls 115.228, 835.228 were inserted by *Migration Amendment Regulations 2005 (No 4)* (Cth) (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, which inserted PIC 4021 in cls 115.223(a) and 835.223(a).
[29] cls 115.311, 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 (reg 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 reg 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.
[30] cls 115.312, 835.312.
[31] cls 115.321, 835.321.

- the sponsorship of the primary applicant has been approved, is in force and includes sponsorship of the secondary applicant[32]
- an assurance of support has been accepted by the Secretary of Social Services in relation to the secondary applicant, or the applicant is included in the assurance of support accepted in relation to the primary applicant[33]
- 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;[34] and
- the applicant satisfies certain public interest criteria (and special return criteria for Subclass 115).[35]

Key issues

Definition of remaining relative

'Remaining relative' is defined in regs 1.03 and 1.15 of the Regulations. Regulation 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,[36] brother,[37] sister, 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),[38] must have no 'near relatives' except for those near relatives who are Australian citizens, Australian

[32] cls 115.322, 835.325, as amended by *Migration Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 42). The amendments apply to applications not finally determined and made on or after 1 July 2009.
[33] cls 115.325, 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.
[34] cls 115.327, 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 applicants are contained in PIC 4021 (see amended cls 115.322(a) and 835.322(a)).
[35] See cls 115.323, 115.324, 115.326, 835.322, 835.324. Clauses 115.323(a) and 835.322(a) were amended by SLI 2012, No 256 to insert new PIC 4021 applying to visa applications made on or after 24 November 2012. Clauses 115.323(a) and 835.322(a) were further amended by SLI 2013 No 146 to include a requirement to satisfy PIC 4020, which concerns provision of bogus documents or false or misleading information, for visa applications made but not finally determined as at 1 July 2013 and those made on or after that date.
[36] From 1 July 2009, the definition of 'parent' was removed from the Regulations by the 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* (Cth). In *Jalloh v MIBP* [2015] FCCA 1154, the Court confirmed that reg 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].
[37] In *Mercado v MIAC* [2007] FMCA 1216, the Federal Magistrates Court found that the reference to 'brother' (albeit in the previous version of reg 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 reg 1.15. These comments suggest that a 'step' relationship may cease upon the cessation of the relevant spouse relationship that gave rise to it.
[38] See *Tran v MIMA* [1998] FCA 290 and *Su v MIMIA* [2005] FCA 1176. While the reg 1.15A definition of 'spouse' (as it was then. The 'spouse' definition is now in s 5F and 'de facto' in s 5CB) requires that the Tribunal be satisfied of the existence of a relationship which is either a married or a de facto relationship, under reg 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 at [30]. When considering the definition of spouse for remaining relative visas the circumstances of the relationship in reg 1.15A(3) are not mandatory considerations: *Nguyen v MIAC* [2010] 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.

permanent residents or eligible New Zealand citizens, and are usually resident in Australia.[39] Additional provisions apply if the applicant is an adopted child. These are discussed below.

Definition of 'near relative'

'Near relative' is defined in reg 1.15(2) to mean, in relation to an applicant:

- a parent, brother,[40] sister, 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 partner.

Children over 18

'Dependent child' has the meaning provided in regs 1.03[41] and 1.05A of the Regulations. The Full Federal Court judgment in *Huynh v MIMIA*[42] sets out the proper approach to the construction of 'dependent child' in regs 1.03 and 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 person is 'wholly or substantially' reliant on the other person for financial support; and
- the person is so reliant at that time and for a substantial period immediately before; and
- the financial support being provided is to meet the person's basic needs for food, clothing and shelter; and
- the person'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 Dependent and Dependent Child.

[39] Regulation 1.15 was repealed and substituted by SLI 2005, No. 221 with the new definition applying to appplications made on or after 1 November 2005. The Explanatory Memorandum to SLI 2005 No.221, noted that the changes to the definition are intended to "address integrity issues surrounding the visa category and to ensure only applicants left in genuinely isolated situations overseas will be eligible" (at page 15).
[40] Reference to 'brother' may include reference to a 'half-brother'. See footnote 38.
[41] 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* (Cth) (F2016L01696). The amendment makes clear that for the purposes of the definition, reference to a child includes a step child.
[42] *Huynh v MIMIA* (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).[43] This requirement is different to the definition of 'dependent child' in regs 1.03 and 1.05A. According to Departmental policy, the term 'care and control' stems from the (pre-1 June 1996) *Family Law Act 1975* (Cth) and is linked to the concept of guardianship and custody.[44] '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 policy suggests 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.[45]

'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,*[46] policy has no legislative effect and does not construe reg 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.[47] In *Mahal v MIBP* 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.[48] 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.[49]

[43] reg 1.15(2)(b)(ii).
[44] Policy –Migration Regulations - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - The near relative at [9.1] (reissued 25/09/2014).
[45] Policy –Migration Regulations - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - The near relative at [9.5] (reissued 25/09/2014).
[46] *Durzi v MIMA* [2006] FCA 1767.
[47] See also *Usman v MIMIA* [2005] FMCA 966.
[48] *Mahal v MIBP* [2015] FCCA 449 at [10].
[49] *Mahal v MIBP* [2015] FCCA 449 at [10].

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 partner.[50] 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.

The leading case on assessing where a person is 'usually resident' is the Full Federal Court's judgment in *Scargill v MIMIA.*[51] 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*[52] 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.* [53]

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,*[54] 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 policy not only reflects, but expands upon the factors identified in the case law 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

[50] Note that the sponsorship criterion for Subclass 835 (cl 835.213) also requires the sponsor, who must be either the Australian relative or their spouse or de facto partner, to be usually resident in Australia.
[51] *Scargill v MIMIA* (2003) 129 FCR 259.
[52] *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241.
[53] *Gauthiez v MIEA* (1994) 53 FCR 512.
[54] *Ignatious v MIMIA* (2004) 139 FCR 254.

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.[55]

However, these factors appear to go beyond what has been suggested in the case law 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 Usually resident.

Near relative who is claimed to be deceased

Under reg 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.[56] As such it would ordinarily be for the applicant to produce evidence of the deaths of any relevant family members.[57] 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".[58]

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.[59] In *Kim v MIAC*, failure to consider the common law presumption of death was found to be a failure to have regard to a relevant consideration in circumstances where the applicant's siblings had been missing for over 20 years since the Pol Pot regime in Cambodia, and where the Tribunal was considering whether the applicant did or did not have at the relevant time an overseas near relative.[60]

[55] Policy –Migration Regulations - Div 1.2 - Interpretation - Reg 1.15 - Remaining relative - Usually resident in Australia at [17.1] (reissued 25/09/2014).
[56] See *Lim v MIAC* [2007] FMCA 1127 at [21] albeit in relation to the previous version of reg 1.15.
[57] 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.
[58] 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 reg 1.15(1)(c) for the Tribunal to make a finding of fact that the visa applicant has an overseas near relative.
[59] *Kim v MIAC* [2007] FMCA 798 at [62].
[60] *Kim v MIAC* [2007] FMCA 798 at [62]–[65].

The common law presumption of death

The Tribunal is not bound by technicalities, legal forms or rules of evidence[61] 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.[62] 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.[63]

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.*[64]

Axon v Axon 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 there could be no presumption of death at the time of the appellant's second marriage, 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.[65]

The rebuttable presumption of death does no more than affect the shifting onus and does not outweigh any acceptable evidence of continued existence. 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.[66] The amount and strength of

[61] s 353(a).
[62] *A v MIMA* (1999) 53 ALD 545 at [41].
[63] *Elaraby v MIBP* [2018] FCCA 1101 at [44].
[64] *Axon v Axon* (1937) 59 CLR 395 at 405.
[65] *Axon v Axon* (1937) 59 CLR 395 at 406.
[66] Heydon JD (2020) *Cross on Evidence: 12th Australian Edition*, LexisNexis Butterworths Australia at [7275].

evidence required to rebut the presumption is unclear.[67] 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.[68]

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.[69]

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.[70] An example of circumstances where the common law presumption of death may not be applicable was in *Goodreau v MIAC*.[71] 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 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 inquires to have been made.[72]

The presumption of death only applies to the fact of death, not the time of death.[73] A court will generally not make an additional finding on time of death unless there is some evidence entitling it to do so.[74] Evidence to indicate the date of death may include the fragility of health or disappearance in perilous circumstances.[75] 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.[76] Thus a question may arise as to the relevance of the presumption to the Tribunal when determining

[67] Heydon JD (2020) *Cross on Evidence: 12th Australian Edition*, LexisNexis Butterworths Australia at [7290].
[68] Heydon JD (2020) *Cross on Evidence: 12th Australian Edition*, LexisNexis Butterworths Australia at [7280].
[69] See *Chard v Chard*, [1955] 3 All ER 721 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.
[70] *Re Carr; Union Trustee Co of Australia Ltd v Carr* [1942] St R Qd 182; *Axon v Axon* (1937) 59 CLR 395.
[71] *Goodreau v MIAC* [2009] FMCA 35.
[72] See *Riggs v Registrar of Births Deaths and Marriages* [2010] QSC 481 at [14]. See also *Doe d France v Andrews* (1859) 15 QB 756
[73] '[T]he presumption authorises no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceedings the man no longer lives': *Axon v Axon* (1937) 59 CLR 395 per Dixon J at 405, citing the Privy Council judgment of *Lal Chand Marwari v Ramrup Gir* (1925) LR 53 IA 24.
[74] *Re Phene's Trusts* (1870) 5 Ch App 139 at 144, cited in *Axon v Axon* (1937) 59 CLR 395 per Dixon J at 405.
[75] *Axon v Axon* (1937) 59 CLR 395.
[76] *White v Zurich Australia Ltd* [2002] VSC 141.

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.[77]

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.[78] In summary, therefore, while the Tribunal cannot 'apply' the presumption of death 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*[79] 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[80] 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 overseas for a period of at least 12 months.[81] This requirement is consistent with the Department's policy on overseas adoptions and the requirements for a Subclass 102 (Adoption) visa.[82]

The term 'adoption' is defined at reg 1.04. For further information, see Definition of Adoption.

Does adoption sever ties between biological relatives for the definition of remaining relative?

There is no specific reference in reg 1.15(1)(a) or in the meaning of 'near relative' at reg 1.15(2) 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

[77] Heydon JD (2020) *Cross on Evidence: 12th Australian Edition*, LexisNexis Butterworths Australia at [41070].
[78] *Estate of Hills* [2009] SASC 176.
[79] *Kim v MIAC* [2007] FMCA 798.
[80] See for example *Akouch v MIBP* [2017] FCCA 673 where the Court found that the common law presumption of death did not apply, but found nonetheless that the Tribunal erred by finding there was no evidence to support the applicant's claim that his parents and brothers were dead. The Court found that the Tribunal did not turn its mind to the indirect evidence that supported the applicant's case including counry information which supported the applicant's contention that there are no records of civilians who went missing in the Sudanese civil war.
[81] reg 1.15(1)(d)(ii).
[82] See: Policy- Migration Regulations - Sch2 Visa 102 – Adoption (reissued 01/01/2016).

this view is taken, and it is noted there is no authority expressly precluding the Tribunal from taking this view, the Tribunal will need to consider the legal relationship between the applicant and sponsor by considering whether the adoption of either the applicant or sponsor is recognised under Australian law

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.[83] For example, the definition of 'parent and child' in reg 1.14A[84] 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 reg 1.04(2). Thus, if formal adoption arrangements are entered into which meet the requirements of reg 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 reg 1.03 as meaning 'lawfully resident in Australia for a reasonable period'.

For discussion of this issue, see the Settled commentary.

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.[85] 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

[83] Section 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.
[84] As inserted by SLI 2009 No 144 and reg 3(2).
[85] Regulation 1.20K was inserted by *Migration Amendment Regulations 2000 (No 2)* (Cth) and amended by *Migration Amendment Regulations 2002 (No 2)* (Cth) (SR 2002, No 86) to include Subclass 835 visas, for 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.[86] 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

Judgment	Judgment Summary
Akouch v MIBP [2017] FCCA 673	Summary
Axon v Axon (1937) 59 CLR 395	
Chard v Chard [1955] 3 All ER 721	
Durzi v MIMA [2006] FCA 1767	
Elaraby v MIBP [2018] FCCA 1101	Summary
Elliott v MIMA [2007] FCAFC 22	Summary
Gauthiez v MIEA (1994) 53 FCR 512	
Goodreau v MIAC [2009] FMCA 35	Summary
Hafza v Director General of Social Security (1985) 6 FCR 444	

[86] 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.

He v MIAC [2009] FMCA 1142	
Jalloh v MIBP [2015] FCCA 1154	
MIMIA v Hidalgo [2005] FCA 437	Summary
MIMIA v Hidalgo [2005] FCAFC 192; (2005) 145 FCR 564	Summary
MIMA v Hughes (1999) 86 FCR 567	
Huynh v MIMIA [2006] FCAFC 122; (2006) 152 FCR 576	Summary
Ignatious v MIMIA [2004] FCA 1395; (2004) 139 FCR 254	Summary
In the Estate of Hills [2009] SASC 176 (2009); 263 LSJS 458	
Kim v MIAC [2007] FMCA 798	Summary
Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241	
Lim v MIAC [2007] FMCA 1127	
Liang v MIAC [2007] FMCA 1288	Summary
Mahal v MIBP [2015] FCCA 449	
Mercado v MIAC [2007] FMCA 1216	Summary
Nguyen v MIAC [2010] FMCA 847	Summary
Prasad v MIAC [2007] FCA 1739	
Rahiman v MIMIA [2006] FMCA 76	
Scargill v MIMIA [2003] FCAFC 116; (2003) 129 FCR 259	Summary
Sherzad v MIAC [2008] FCA 460	Summary
Sherzad v MIAC [2008] FCAFC 145; (2008) 170 FCR 105	Summary
Su v MIMIA [2005] FCA 1176	
Su v MIMIA [2005] FMCA 92	
Tran v MIMA [1998] 290 FCA	
Usman & Anor [2005] FMCA 966	

White v Zurich Australia Ltd [2002] VSC 141	

Relevant amending legislation

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2000 (No 2) (Cth)	SR 2000, No 62	
Migration Amendment Regulations 2002 (No 2) (Cth)	SR 2002, No 86	
Migration Amendment Regulations 2007 (No 7) (Cth)	SLI 2007, No 257	No 9/2007
Migration Amendment Regulations 2005 (No 8) (Cth)	SLI 2005, No 221	No 4/2005
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No 1/2005
Migration Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 42	No 4/2009
Migration Legislation Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 116	No 7/2009
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2009
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No 03/2011
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (Cth)	SLI 2013, No 118	No 09/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 02/2014
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth)	SLI 2014, No 65	No 04/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 01/2015
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No 04/2016
Migration Amendment (Visa Application Charges) Regulations 2022	F2022L00828	

Available decision templates / precedents

There are two templates / precedents designed for use for reviews of Subclass 115 and Subclass 835 visa decisions:

- **Subclass 115 Visa Refusal – Remaining Relative** –for use where the visa application was made on or after 1 November 2005; and
- **Subclass 835 Visa Refusal – Remaining Relative** –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.

Last updated/reviewed: 25 October 2022

CARER VISAS:

SUBCLASS 116 AND 836

Carer relationship diagrams

Relevant case law

Relevant legislative amendments

Available decision templates / precedents

Overview[1]

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.

Merits Review

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

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.[3]

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.[4] If this evidence is lacking, the visa application will be invalid. Other requirements for making a valid visa application are set out in sch 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.[5]

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.[6] In addition, for visa applications made on or after 1 July 2013, the application must be made at a specified address.[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 347(2)(a).
[3] s 347(2)(b).
[4] Items 1123A(3)(c), 1123B(3)(d) of sch 1 to the Regulations.
[5] Items 1123A(1)–(2) of sch 1 to the Regulations.
[6] Items 1123B(1)–(3).
[7] Item 1123B(3)(ca) as inserted by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013 No 118).

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.[8]

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.[9]

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.[10]

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.[11]

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.

Time of application criteria – Subclass 116

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';[12]
- the applicant is sponsored by the Australian relative or by the partner[13] of the Australian relative.[14] 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.

[8] Items 1123A(3)(b)–1123B(3)(c) in sch 1 for subclasses 115 and 835 respectively.
[9] Items 1123A(1), (3)(a)–(3)(aa) as amended by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth), SLI 2015, No 34.
[10] Items 1123B(1), (3)(a) as amended by SLI 2015, No 34. For the relevant instrument see 'Sch 1 Family & NZ Visa Apps' tab of the Register of Instruments: Family Visas.
[11] Items 1123A(3)(b), 1123B(3)(c). For the relevant instrument see 'Sch 1 Family & NZ Visa Apps' tab of the Register of Instruments: Family Visas.
[12] cl 116.211 of sch 2 to the Regulations.
[13] 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 . See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and Migration Amendment Regulations 2009 (No 7) (Cth) (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* (Cth) (No 129, 2017) to include same-sex marriages.
[14] cl 116.212.

Time of application criteria – Subclass 836

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';[15]
- the applicant is sponsored by the Australian relative or by the partner[16] of the Australian relative.[17] The sponsor must:
  - have turned 18;
  - be a *settled* Australian citizen, permanent resident or eligible New Zealand citizen;[18]
  - be usually resident in Australia;[19] 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.[20]

Time of decision criteria – both 116 and 836

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

- the applicant *is* the carer of the 'Australian relative'.[21] The Australian relative must be the same relative that the applicant claimed to be carer of at the time of application.[22]
- the sponsorship has been approved and is in force;[23]
- 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;[24]

[15] cl 836.212.
[16] See footnote 13 for the definition of 'spouse'.
[17] cl 836.213.
[18] 'Settled' is defined in reg 1.03 of the Regulations. See also "Settled".
[19] See below as to the meaning of 'usually resident'.
[20] cl 836.211.
[21] cls 116.221, 836.221.
[22] cls 116.221, 836.221. These clauses specifically refer to the applicant being the carer of the Australian relative mentioned in the time of application clause, i.e. cls 116.211 or 836.211.
[23] cls 116.222, 836.227 as amended by SR 2002, No 86 for visa applications made from 1 July 2002.
[24] cls 116.223, 116.224, 116.226, 116.227, 116.229, 836.223, 836.224, 836.225, 836.226. Cl 116.229, equivalent to cl 836.226 requiring applicants under 18 to satisfy PIC 4017 and 4018, was inserted by the *Migration Legislation Amendment Regulations 2011* (No 1) (Cth) (SLI 2011, No 105). Clauses 116.223(a) and 836.223(a) were amended by *Migration Legislation Amendment Regulation 2012* (No 5) (Cth) (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 PIC4021(a); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cls 116.228/ 836.228 which were repealed with effect from 24 November 2012. This amendment to cls 116.223(a) and 836.223(a) applies to all visa applications made from 24 November 2012. Clauses 116.223(a), 116.226(1)(a), 836.223(a), 836.224(1) were further amended by *Migration Legislation Amendment Regulation 2013* (No 3) (Cth) (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.

- *for applications made on or after 1 July 2005 and prior to 24 November 2012*, the applicant meets certain passport requirements.[25]

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 cls 116.211 and 836.111. The definition of 'carer' is set out in reg 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.[26] 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 (cls 116.221 and 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 reg 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.[27]

'Relative' is relevantly defined in reg 1.03 of the Regulations as a 'close relative;[28] or grandparent, grandchild, aunt, uncle, niece or nephew, or a step grandparent, step grandchild, step aunt, step uncle, step niece or step nephew' (see Familial Relationships).

'Australian permanent resident' is relevantly defined in reg 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: Usually Resident.

'Eligible New Zealand citizen' is also defined in reg 1.03 of the *Migration Regulations 1994* (Cth) (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* (Cth) (Social Security Act). For further information see Eligible New Zealand citizen.

[25] For applications made between 1 July 2005 and 23 November 2012, this requirement is found in cls 116.228/ 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 (cls 116.223(a)/836.223(a) refers – see above).
[26] Schedule 1, items 1123A(3)(c), 1123B(3)(d).
[27] cls 116.211(2), 836.111. The definition of 'Australian relative' is also defined in reg 1.03. That definition was added by the *Migration Amendment Regulations 2009* (No 13) (Cth) (SLI 2009, No 289) to apply to visa applications made from 9 November 2009. It has the same meaning as contained in cls 116.211(2) and 836.111 but it does not specifically apply to these Subclasses.
[28] 'Close relative' is also defined in reg 1.03 of the Regulations (see: Familial Relationships).

Meaning of 'carer'

Regulation 1.15AA defines the term 'carer'. 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');
- the resident (or a member of the resident's family unit) has a certificate from a 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;[29]
- 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;[30]
- the impairment has, under the Impairment Tables,[31] the rating which is specified in the certificate, and which is equal to or exceeds the impairment rating specified in the relevant instrument;[32]
- 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 on or after 9 November 2009, assistance cannot reasonably be *provided* by any other Australian relative of the resident;[33] 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.

[29] Regulation 1.15AA was amended by *Migration Amendment Regulations 2007* (No 1) (Cth) (SLI 2007, No 69) from 1 January 2007 to prescribe that a certificate may be issued by a 'health services provider specified by the Minister in an instrument in writing': See the 'Health Service Provider' tab of the Register of Instrument: Family Visas for the relevant instrument. For further information about these amendments see Legislation Bulletin No 1/2007.
[30] reg 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.
[31] This refers to Impairment Tables within the meaning of s 23(1) of the *Social Security Act 1991* (Cth) (Social Security Act): as inserted by item 7 of sch 5 of *Migration Legislation Amendment (2016 Measures No 3) Regulation 2016* (Cth) (F2016L01390).
[32] As amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30). See the 'Impairment Rating' 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.
[33] Amended by SLI 2009, No 289 for visa applications made from 9 November 2009. Before the amendment the criterion was that the assistance could not reasonably be *obtained from* any other Australian relative. 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'.

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 reg 1.15AA, the visa applicant must meet standard public interest criteria, including health and character requirements.

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*,[34] the Full Federal Court considered 'usual residence' in relation to reg 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*[35] 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.[36]

The Federal Court decision of *Gauthiez v MIMIA*[37] 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 reg 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 of 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.

For a more detailed discussion of the case law underpinning 'usually resident' see: Usually Resident.

Health service provider certificate and impairment tables / rating

In accordance with reg 1.5AA(1)(b), to meet the definition of 'carer' the resident (or a member of the resident's family unit)[38] must have a certificate from a health service provider

[34] *Scargill v MIMIA* (2003) 129 FCR 259 at [17].
[35] *Kotaki Para Rubber Estates Limited v The Federal Commissioner of Taxation* (1941) 64 CLR 241 at 249.
[36] See *Commissioners of Inland Revenue v. Lysaght* (1928) AC 234 at 248 and *Keil v Keil* (1947) VR 383.
[37] *Gauthiez v MIMIA* (1994) 53 FCR 512.
[38] 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 –*

specified in the relevant instrument (currently Bupa Medical Services (Bupa))[39] which specifies that:

- the resident or family unit member of the resident has a medical condition;
- 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*).[40] Note that impairment rating must be equal to or exceed that specified in the relevant Instrument;[41]
- 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.[42]

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 reg 1.15AA(1)(b), to be correct for the purposes of deciding whether the applicant is a 'carer'.[43] 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.[44]

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

General Law Reform) Act 2008 (Cth)). 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: Member of a Family Unit (reg 1.12)).

[39] 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 policy, 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.

[40] As inserted by item 7 of sch 5 of F2016L01390. Prior to 10 September 2016 the term 'impairment tables' was defined in reg 1.15AA(4) as 'the Tables for the Assessment of Work-related Impairment for Disability Support Pension in sch 1B to the Social Security Act . Schedule 1B of the Social Security Act was however repealed with effect from 1 January 2012 (see item [4] sch 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) (Acts Interpretation Act), reg 1.15AA(4) could be read as if it explicitly referred to the new Legislative Instrument (F2011L02716). In *Sefesi v MIBP* [216] FCCA 975, the Court queried whether reg 1.15AA could operate in this manner, following the repeal of sch 1B to the Social Security Act 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 Acts Interpretation Act 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 F2016L01390 which removes the definition of 'Impairment Tables' in reg 1.15AA(4) and includes an updated definition in reg 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.

[41] See the 'Impairment Rating' tab of the Register of Instruments: Family Visas for the relevant instrument. The current impairment rating is 30.

[42] reg 1.15AA(1)(b), (2).

[43] reg 1.15AA(3).

[44] reg 1.15AA(2).

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 2 years old at the time of the decision, Departmental policy suggests that a request be made to ask the person with the medical condition to undertake a fresh assessment. However, as this 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. Policy suggests an alternative is to request an update from the general practitioner/specialist who is treating the person with the medical condition. It also suggests that regardless of the time the applicant spent in the processing queue, it may not be necessary to request a further certificate if the certificate that was provided gave a high rating to the impairment of the person requiring care and the nature of the medical condition or impairment is unlikely to have changed significantly. [45]

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 reg 1.15AA(2), the Tribunal is required to take the certificate as correct.[46] While the Regulations do not expressly state that a certificate is only valid for a specified period, 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 by considering whether the requirements in reg 1.15AA are met at that time.[47] This includes 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 reg 1.15AA(1) suggests that the certification must be in relation to matters that are current as at the time of assessment of reg 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. [48]

Further, the requirement in reg 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.[49] While the certification can clearly cover a longer

[45] Policy: Migration Regulations – Divisions – Div 1.2/reg 1.15AA – Carer Instruction – the Bupa Medical Certificate – After the certificate is given (re-issued 19/11/2016).
[46] reg 1.15AA(3). Note that s 363(1)(d) of the 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.
[47] See cls 115.221, 836.221.
[48] In the context of public interest criterion 4007 (a health requirement) there is authority that it may be error to rely on an opinion of the Medical Officer of the Commonwealth which the Minister is required to take as correct , in circumstances where new evidence indicates that the relevant opinion may no longer be correct. In *Applicant Y v MIAC* [2008] FCA 367, 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 para 4007(1)(c) were satisfied at the time of the Tribunal's decision. See also *Pokharel v MIBP* [2016] FCCA 3295, where the Court held the Tribunal had asked itself a wrong question by failing to consider whether the opinion reflected the level or severity of the condition as at the date of decision in circumstances where the medical report upon which the MOC opinion was based was provided when the applicant was only 3 monhs old (and at the time of decision was 2 years), and where the medical report noted that the degree of intellectual impairment for the condition was highly variable.
[49] reg 1.15AA(1)(b)(iv).

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 reg 1.15AA(1)(b)(iv) as in existence as at the time of the Tribunal's decision.

Should this issue arise please contact 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.[50] However, there may be matters before the Tribunal where the Carer certificate was completed by the previous service provider, Medibank Health Solutions (MHS).[51] As reg 1.15AA is assessed at the time of the Tribunal's decision, a question arises as 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 reg 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 policy that certificates prepared by MHS continue to be able to be used for current Carer visa applications.[52] However, decision-makers may still need to consider whether other concerns arise, including the currency of the certificate; and whether the certificate complies with reg 1.15AA(2)(a)(ii) and (b). These matters are discussed above.

Assistance cannot reasonably be provided by…

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) as opposed to the previous test of 'obtained from'.[53] 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.[54] This change is significant in circumstances where there are other relative(s) of the resident in Australia and this is 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 (reg 1.15AA(1)(b)(iv)).[55] The Tribunal is not required to turn its mind to the 'nature and

[50] Note that policy 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 provided 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.
[51] This also includes certificates provided by Health Services Australia (HSA) while it was trading as Medibank Health Services.
[52] Policy– Migration Regulations – Div 1.20/reg 1.15AA - Carer Instruction - The Bupa Medical assessment process (re-issued 19/11/2016). For further information see the 'HealthServiceProvider' tab of the Register of Instruments: Family Visas.
[53] Amended by SLI 2009, No 289 to apply to visa applications made from 9 November 2009.
[54] Explanatory Statement to SLI 2009, No 289.
[55] *Sefesi v MIBP* [2016] FCCA 975 at [21].

scope' of the assistance required, rather it 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 reg 1.15AA(2); this matter is discussed above).[56]

Meaning of 'provided by relatives'

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.[57] This is discussed further below in the context of assessing 'reasonableness'. Importantly, as reg 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.[58]

Further, it is clear that a consideration of reg 1.15AA(1)(e) is not restricted only to relatives who reside with the person in need of care.[59] 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.[60] However, the physical location of the relatives may be relevant for assessing whether they can 'reasonably' provide the care.[61]

The issue of whether the assistance could reasonably be provided by another relative is focussed on just that question and the length of time that the onshore visa applicant has been providing the care is not the relevant question.[62]

See also further below under the heading 'Meaning of *reasonably*'.

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*.[63] See also further below under the heading 'Meaning of *reasonably*'.

Financial assistance

In considering whether assistance can 'reasonably be provided' by relatives in Australia, the Tribunal is limited to considering assistance that the relatives can provide themselves. Offers of financial contributions provided by a number of relatives to go towards the applicant's care are not 'direct assistance' under reg 1.15AA(1)(e)(i).[64]

[56] *Sefesi v MIBP* [2016] FCCA 975 at [21].
[57] *Anveel v MIBP* [2013] FCCA 2181 at [61]–[62].
[58] *Anveel v MIBP* [2013] FCCA 2181 at [62].
[59] *Yee Joy v MIBP* [2015] FCCA 2537 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.
[60] *Yee Joy v MIBP* [2015] FCCA 2537 at [23].
[61] *Yee Joy v MIBP* [2015] FCCA 2537 at [23]. The Court observed that if the relatives live many hours away from the proposed carer, it may be that the assistance cannot reasonably be provided.
[62] *Yee Joy v MIBP* [2015] FCCA 2537 at [26]. The Court found, in the circumstances of that case, that the length of time the visa applicant had been providing care to his uncle (the sponsor) was irrelevant to the issue of whether the assistance could reasonably be provided by the uncle's other relatives.
[63] *Biyiksiz v MIMIA* [2004] FCA 814. 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, 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]).
[64] *Valencia v MIBP* [2019] FCA 397 at [26].

In regard to whether financial assistance might be relevant to the consideration under reg 1.15AA(1)(e)(ii), the focus is to be on what the person who requires the care can reasonably obtain from welfare, hospital, nursing or community services and not what other people might be able to obtain for them.[65] In that context it is not relevant what other relatives might be able to afford, but if a third party or relative has actually offered to financially contribute to obtaining care services, such offers would then form part of an assessment of what might be reasonably obtained.[66]

Meaning of 'reasonably'

Regulation 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.[67] While it is not necessary for a decision maker to also consider what care is actually required by the person needing the care when making this assessment,[68] the reasonable capacity of another relative to provide 'the assistance' referred to in reg 1.15AA(1)(e)(i) is to be assessed by reference to the period that the assistance is required under the certificate (being at least two years to meet the requirement of reg 1.15AA(1)(b)). In *Nguyen v MICMA,* the Federal Court held that to construe 'the assistance' referred to in reg 1.15AA(1)(e) as referring only to a person's medical condition as divorced from the period of time for which direct assistance has been certified by a medical practitioner to be needed would be inconsistent with the purpose of the regulation. The Court found that the sponsor's son's recent marriage, his expecting a child, and his sponsorship of his wife to live with him in Australia were, combined, significant factors. This obliged the Tribunal to make findings as to whether those factors would, over the relevant time period, impact on his capacity to resume and continue providing the overnight care he had previously provided his mother before the appellant had taken over that role.[69]

In assessing whether claims a relative in Australia cannot provide assistance are reasonable, Departmental policy suggests looking at issues such as the following:[70]

- the number of relatives already in Australia
- the nature and extent of the assistance required
- where the person requiring assistance lives
- where any relatives in Australia live
- any evidence of ongoing close family relationships
- the reasons given as to why relatives in Australia claim to be unwilling or unable to provide assistance.

[65] *Valencia v MIBP* [2019] FCA 397 at [21].
[66] *Valencia v MIBP* [2019] FCA 397 at [22]
[67] *Anveel v MIBP* [2013] FCCA 2181 at [60]–[61] and [69] relying on the authoritative statement on the meaning of 'provided' set out in *Naidu v MIMIA* (2004) 140 FCR 284 at [22]. While the circumstances of the Australian relative have always been a relevant factor in the assessment of whether the assistance cannot 'reasonably' be provided by the Australian relatives, this judgment emphasises the importance of this consideration to reg 1.15AA(1)(e)(i). See also *El Achkar v MIBP* [2015] FCCA 2165 at [11], *Jung v MIBP* [2016] FCCA 1026 and *Le v MIBP* [2017] FCA 1053.
[68] *Anveel v MIBP* [2013] FCCA 2181 at [61].
[69] *Nguyen v MICMA* [2019] FCA 934 at [59]–[65].
[70] Policy: Div 1.2/reg 1.15AA – Carer Instruction - Assessing whether assistance can be reasonably provided by another relative (re-issued 19/11/2016).

The physical residence of a particular relative may be a relevant consideration.[71] 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.

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.[72] However, there may be circumstances in which it may be necessary to do so, to reflect that the Tribunal has taken account of particular assistance requirements in considering whether the assistance could 'reasonably be provided'.[73]

In terms of assessing whether assistance can be reasonably obtained from services in Australia, Departmental policy states that 'reasonable' should be given its ordinary dictionary meaning, and states 'this may be described as using common sense, being practical or sensible, using logic, being judicious or prudent.'[74]

Previous Departmental policy suggested relevant factors to consider may include[75]:

- 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 (for example see *Yee Joy v MIBP*);[76]
  - cultural factors (for example the ability to provide a specific cultural diet as in *Lin v MIMIA*[77] or appropriate ethnic and linguistic services as in *Biyiksiz v MIMIA*);[78] and
  - financial cost of community services as against the financial means of the person requiring the care.

Cultural factors can be relevant to the determination of whether the relevant care is reasonably obtainable.[79] However, an applicant's mere preference for a particular service is to be distinguished from a cultural reason[80]. In *Hon Anh Vuong v MIAC* the Court found that applicant's 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 reg 1.15AA.[81] By contrast, in *Nguyen*

[71] Yee Joy v MIBP [2015] FCCA 2537 at [23].
[72] *Nguyen v MIBP* [2016] FCA 688.
[73] See *Kheir v MIBP* [2016] FCCA 1577 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.
[74] Policy: Div 1.2/reg 1.15AA – Carer Instruction – Assessing whether assistance can be obtained from services in Australia (re-issued 19/11/2016).
[75] Although no longer expressed in policy these still appear to be relevant examples.
[76] Yee Joy v MIBP [2015] FCCA 2537.
[77] *Lin v MIMIA* [2004] FCA 606.
[78] *Biyiksiz v MIMIA* [2004] FCA 814.
[79] *Hon Anh Vuong v MIAC* [2013] FCCA 274 citing *Biyiksiz v MIMIA* [2004] FCA 814 and distinguishing *Lin v MIMIA* FCA 606.
[80] *Hon Anh Vuong v MIAC* [2013] FCCA 274 at [33]–[34].
[81] *Hon Anh Vuong v MIAC* [2013] FCCA 274 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

v MIBP[82] 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* the Court confirmed it is for the applicant to satisfy the Tribunal that the relevant services are not reasonably obtainable.[83]

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* 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.[84] In *MIBP v Nguyen* the Tribunal obtained information for itself relating to residential care facilities for the applicant's mother. [85] 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.[86] 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.[87] Accordingly, decision-makers should demonstrate they have had regard to all of the relevant circumstances and evidence when making findings on reg 1.15AA(1)(e).

Where there is limited evidence provided to the Tribunal as to the investigations undertaken to ascertain whether assistance cannot be reasonably obtained from welfare, hospital, nursing, or community services in Australia,[88] the Tribunal may be unable to assess whether or not the assistance required by the caree is able to be met in an alternative way that is reasonably obtainable and therefore find it is not satisfied that reg 1.15AA(1)(e)(ii) is met.[89]

cultural preference, the availability of Chinese food was an issue of apparent significance which the tribunal was required to address.

[82] *Nguyen v MIBP* [2017] FCCA 339 and not disturbed on appeal MIBP v Nguyen [2017] FCAFC 149.

[83] *Lam v MIBP* [2013] FCCA 1263 at [50]. See also *Vu v MIBP* [2015] FCCA 3378 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]).

[84] *Anveel v MIBP* [2013] FCCA 2181 at [69], [71].

[85] *MIBP v Nguyen* [2017] FCAFC 149.

[86] *MIBP v Nguyen* [2017] FCAFC 149 at [33].

[87] *MIBP v Nguyen* [2017] FCAFC 149 at [39]. See also *Ali v MIBP* [2016] FCCA 2314 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 reg 1.15AA(1)(e)

[88] Reg 1.15AA(1)(e)(ii).

[89] *Mariam v MICMA* [2022] FedCFamC2G 436. In that case the sponsor's wife had contacted a number of organisations in Australia by telephone and was advised no help was available for the sponsor. On review, the Tribunal was not satisfied that the evidence demonstrated that the availability of residential facilities or a combination of family support and in-home assistance had been "fully investigated" and thus was not satisfied reg 1.15AA(1)(e)(ii) was met. On application for judicial review, the Court found no error in the Tribunal's approach, rejecting that the Tribunal had elevated the duty to 'fully investigate' to a statutory requirement, but rather the limited evidence provided in relation to the investigations undertaken was relevant to not being satisfied that the assistance could not be reasonably obtained. The Court distinguished this reasoning from the reasoning that gave rise to the errors found in *Biyiksiz v MIMIA* [2004] FCA 814, *El-Chahini v MIBP* [2018] FCA 202 and *MIBP v Nguyen* [2017] FCAFC 149, as the Tribunal's reasoning did not involve a finding that some potential option was available to, or reasonably obtainable by, the sponsor, where that finding involved a failure to have regard to the sponsor's care needs or circumstances that affected whether the particular care option was reasonably obtainable.

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

Although reg 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*,[90] the Court saw nothing in the language or construction of reg 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 reg 1.15AA(1)(e)(i) was not satisfied because the review applicant's family, as a collective, could reasonably provide the assistance required.[91] 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.[92] 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.[93] However, a relevant consideration may be whether assistance provided subject to a collective arrangement is 'reasonable'.[94]

Depending on the circumstances of the case, it is 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 reg 1.15AA(1)(e). In *Nguyen v MIBP*, the Court commented that the word 'or' in reg 1.15AA(1)(e) is not necessarily disjunctive and can mean 'or, or as well'. [95] It found that both alternatives in reg 1.15AA(1)(e) relate to the same subject matter and, in the circumstances, 'or' should be read as conjunctive.[96] 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.[97] 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 reg 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.[98]

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 reg 1.15AA(1)(e)(ii).

[90] *Jajo v MIBP* [2013] FCCA 1554 at [55]. The Court found *Azzi v MIMIA* (2002) 120 FCR 48 to be of 'significant persuasive value' in construing reg 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.

[91] 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 reg 1.03(b)(i) 'definition of special need relative': this reasoning was followed in *El Achkar v MIBP* [2015] FCCA 2165 at [11].

[92] *El Achkar v MIBP* [2015] FCCA 2165 at [11]. See also *Nguyen v MIBP* [2015] FCCA 3254 where the Court found that, on a proper construction of reg 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 reg 1.15AA, the singular includes the plural.

[93] Departmental policy also supports such an approach, see policy- Migration Regulations - Divisions – Div 1.2/reg 1.15AA – reg 1.15AA – Carer Instruction – Assessing whether assistance can reasonably be provided by another relative (re-issued 16/11/2016).

[94] See for example, *Azzi v MIMIA* (2002) 120 FCR 48.

[95] *Nguyen v MIBP* [2015] FCCA 3254 at [42].

[96] *Nguyen v MIBP* [2015] FCCA 3254 at [44].

[97] See also *Lam v MIBP* [2013] FCCA 1263 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.

[98] *Nguyen v MIBP* [2016] FCA 688. See also *Nguyen v MIBP* [2016] FCA 1460 at [69] and *Valencia v MIBP* [2019] FCA 397 at [22]. In *Valencia* the Court found that the inquiry under reg 1.15AA(1)(e)(ii) would permit a consideration of the willingness of relatives (or other third parties) to provide financial assistance for services such as nursing services, but noted that the evidence must support that an actual offer of financial contribution to services had been made.

However, on the basis of the above authority that the assistance can be from a plurality of sources, it would appear 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.

The plurality of sources required to provide the assistance may, in certain circumstances, go towards whether the assistance could still reasonably be obtained.[99] However, care should be taken when considering the plurality of sources not to conflate the tests of each of reg 1.15AA(1)(e)(i) and (ii). The inquiry under reg 1.15AA(1)(e)(ii), whether the assistance cannot be reasonably obtained from welfare, hospital, nursing or community services in Australia, is directed at what the person requiring care cannot reasonably obtain. Allowing reg 1.15A(1)(e)(ii) to be read as if it allows consideration of what could be obtained from assistance agencies by the relatives of the person requiring care subverts the careful delineation between reg 1.15AA(1)(e)(i) and (ii).[100]

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* confirmed that the phrase 'substantial and continuing' assistance is a composite phrase, in the sense that its two elements are cumulative.[101] 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*, 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.*[102]

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.[103]

Substantial and continuing assistance can be provided by more than one person. In *Bader v MIBP* 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.[104] Similarly, in *Gorgees v MIBP* the Court held that an applicant could provide substantial and continuing assistance in conjunction with assistance from community care providers. Further, the Court

[99] *Azzi v MIMIA* (2002) 120 FCR 48 at [90].
[100] *Valencia v MIBP* [2019] FCA 397 at [19].
[101] *Perera v MIMIA* [2005] FCA 1120 at [16]. This case considered the (now repealed) definition of Special Needs Relative which also used the phrase 'substantial and continuing assistance'.
[102] *Chow v MMIA* [2003] FCAFC 88 at [28]. This case was also considering the definition of Special Needs Relative.
[103] See for example, *Jackson v MIMIA* [2003] FCAFC 203 at [21].
[104] *Bader v MIBP* [2018] FCCA 485 at [40].

made it clear that the applicant does not need to be the sole carer that must provide all of the 'constant care' said to be required.[105] 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.[106] 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.*[107]

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;[108]
- 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* 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.[109] In *Yee Joy v MIBP* the Court considered that when read in the context of reg 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.[110] In these circumstances,

[105] *Gorgees v MIBP* [2018] FCCA 2787 at [49].
[106] *Xiang v MIMIA* [2004] FCAFC 64; *Hettiarchchige v MIMIA* [2005] FCA 37.
[107] *Xiang v MIMIA* [2004] FCAFC 64 at [7].
[108] 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, 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.
[109] *Pham v MIAC* [2013] FMCA 29 at [45].
[110] *Yee Joy v MIBP* [2015] FCCA 2537 at [30].

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.[111]

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.*[112]

Departmental policy provides a more extensive list of assessment factors that the Tribunal may have regard to in relation to this matter.[113]

Sponsorship by Australian relative

Both Subclasses 836 and 116 require the visa applicant, at the time of application, to be sponsored by an Australian relative or a partner[114] of the Australian relative who has turned 18.[115] The meaning of 'Australian relative' is discussed above: Meaning of Australian relative.

Regulation 1.20 provides that a sponsor is a person who undertakes to support the visa applicant to the extent necessary, financially and in relation to accommodation for two years.[116] The giving of the undertaking is all that is required for a person to be a sponsor, and sponsored for the purposes of these criteria. It is not a requirement that the sponsor also have capacity to fulfil the undertaking.[117]

Although it would be error to consider whether the sponsor has the capacity to fulfil the undertakings, it is open to consider whether the sponsor has the mental capacity to give the undertaking in determining whether a visa applicant is sponsored.[118]

[111] *Yee Joy v MIBP* [2015] FCCA 2537 at [30], [34]. See also *Vu v MIBP* [2015] FCCA 3378, 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]).
[112] *Tenorio v MIMIA* [2001] FCA 917 at [19].
[113] Policy- Migration Regulations – Divisions - Div 1.2/reg 1.15AA - Carer Instruction – The visa applicant must be able to provide the assistance needed (re-issued 19/11/2016).
[114] For visa applications made before 1 July 2009, the sponsorship is limited to the relative or the relative's 'spouse' as defined in reg 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* (Cth) and SLI 2009, No 144.
[115] cls 116.212 and 836.213.
[116] Reg 1.20(1),(2).
[117] In *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36], the Court held that in assessing the requirement in reg 1.20, no issue arises which involves an assessment of the capacity of the person to fulfil the undertaking if required, and that giving the undertaking simpliciter is sufficient. Although this judgment concerned sponsorship for a partner visa, carer visas feature the same sponsorship framework.
[118] In *Lo v MICMSMA* [2020] FCA 895 at [27], the Court found no error in the Tribunal's unchallenged finding that it was not satisfied that when the applicant's father, who had a dementia condition, signed the sponsorship form he understood the nature

In addition, at the time of decision the sponsorship referred to at time of application must have been approved by the Minister and still be in force.[119] The Tribunal can decide whether to approve a sponsorship.[120]

For diagrams representing the various visa applicant/sponsor/person requiring care relationships which might arise, please see below.

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 on or after 1 July 2009, *partner* is a 'spouse' as defined in s 5F[121] of the Act (i.e. married) or 'de facto partner' as defined in s 5CB. (i.e. same sex or opposite sex partners). See Spouse and de facto partner for further guidance.

'Cohabits' is not defined in the Regulations. *The Macquarie Dictionary* (3rd 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 policy 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.[122]

Additional requirements for Subclass 836

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

Must the sponsor also be the person requiring care (or their partner)?

Whether the sponsor and the person requiring care (or their partner) must be the same person depends upon the subclass.

---

of the sponsorship obligations. See also *Chand v MICMSMA* [2021] FCCA 872 at [30]- [35] where the Court found no error in the Tribunal's finding that the sponsor lacked the capacity to understand the sponsorship obligations at the time of signing the sponsorship form.

[119] cls 116.222, 836.227. The Federal Court in *Lo v MICMSMA* [2020] FCA 895 confirmed that cl 836.213 requires that an applicant is sponsored at time of application and cl 836.227 requires that the sponsorship put forward at the time of application has been approved and is still in force at time of decision. The Federal Court held that cl 836.213 does not allow the sponsor to be identified after the time of visa application.

[120] *Babar v MICMSMA* [2020] FCAFC 38, where the Federal Court confirmed that determining whether the sponsorship should be approved is an exercise of discretion. However, in exercising this discretion, the Tribunal should not apply the Department's policy (at least the version considered in that judgment) as it is based on an erroneous view of the meaning of reg 1.20 and is not formulated on the basis that it is giving effect to the approval power: at [38]-[40]. As at 30 April 2020 the policy remained unchanged. Care should be taken that if policy is to be referred to it is not the same version as considered in *Babar* and is otherwise not going beyond the legislation. Despite this, and although the Court in *Babar* did not refer to any matters which would be relevant to this direction, the judgment does not appear to exclude from consideration the ability to fulfill the undertakings.

[121] 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* (Cth) (No 129, 2017) to include same-sex marriages.

[122] Policy: Migration Regulations – Div 1.4 – Form 40 Sponsors & sponsorship – As a sponsorship requirement – 116 Carer (compilation 01/07/2016).

For a Subclass 836 visa, cl 836.212 requires that the applicant claims to be the carer of an Australian relative and cl 836.213 requires the applicant to be sponsored by the Australian relative or by the spouse or de facto partner of the Australian relative. In *Nguyen v MICMSMA,*[123] the Federal Court found that the definite article 'the' in cl 836.213 referred to the Australian relative definition in cl 836.111 and not to the 'Australian relative' referred to in cl 836.212. Accordingly, the sponsor and the Australian relative requiring the care do not need to be the same person and, provided the sponsor is an Australian relative (or the partner of an Australian relative), has turned 18 years of age and is settled and usually resident in Australia they could meet cl 836.213.

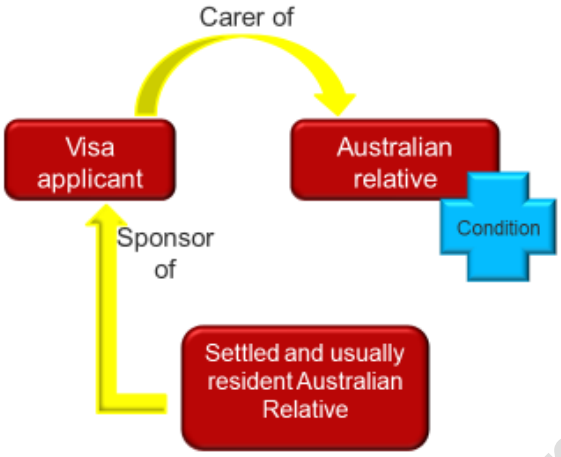
The equivalent provisions for a Subclass 116 visa are slightly different however and it is unclear whether they should be interpreted in the same way. On one view, cl 116.211(1) requires the applicant to claim to be the carer of an Australian relative and cl 116.211(2) sets out the meaning of Australian relative for that clause. Clause 116.212 requires the applicant be sponsored by *the* Australian relative mentioned *in* clause 116.211, strongly suggesting the sponsor and the Australian relative (or their relative's partner) are intended to be the same person. On another view, the reference in cl 116.212 to "the Australian relative mentioned in cl 116.211" could also be a reference to the meaning of Australian relative in cl 116.211(2), and not the specific relative in cl 116.211(1). There is limited support for this view in *Nguyen v MICMSMA* where the Federal Court found that the Australian relative sponsor for a Subclass 836 visa did not need to be the same Australian relative requiring the care, and that there was not intended to be a distinction in the sponsorship requirements between a Subclass 116 and 836 visa.[124]

Carer relationship diagrams

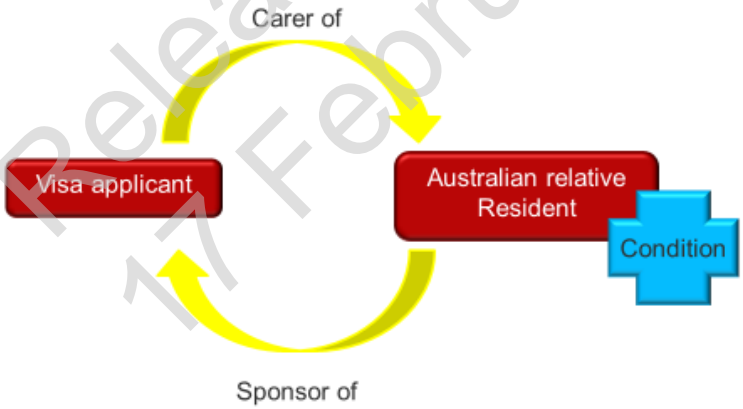
The diagrams below demonstrate the various relationships that might arise between visa applicant, the sponsor and the Australian relative requiring the care.[125] The first diagram (situation A) may only apply to a Subclass 836 visa depending on the interpretation taken for similar provisions for the Subclass 116 following *Nguyen v MICMSMA* (see discussion above) .

[123] *Nguyen v MICMSMA* [2020] FCA 1732.
[124] *Nguyen v MICMSMA* [2020] FCA 1732 at [28].
[125] The references to MFU in the diagrams are to the definition of 'member of the family unit' in reg 1.12.

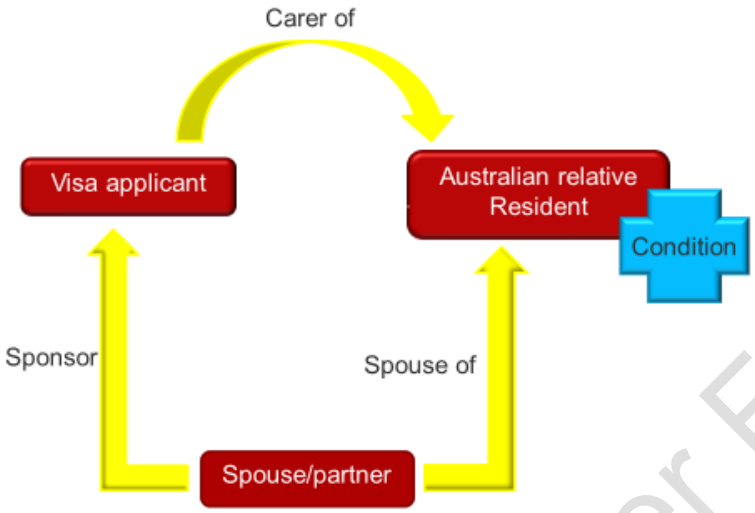
Situation A



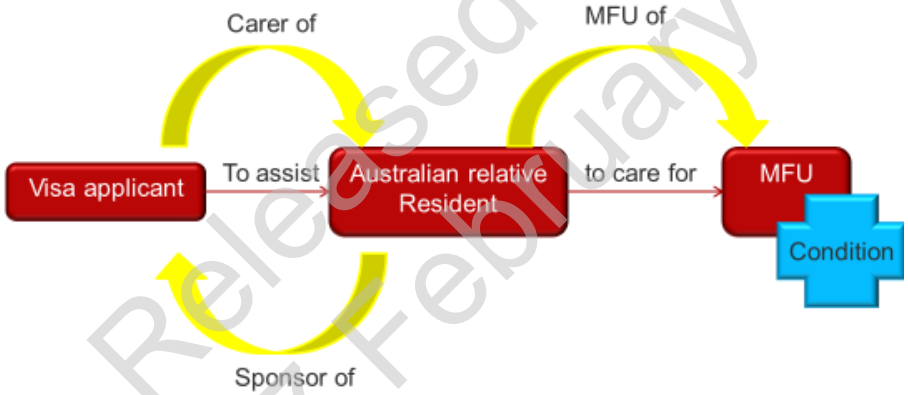
Situation B



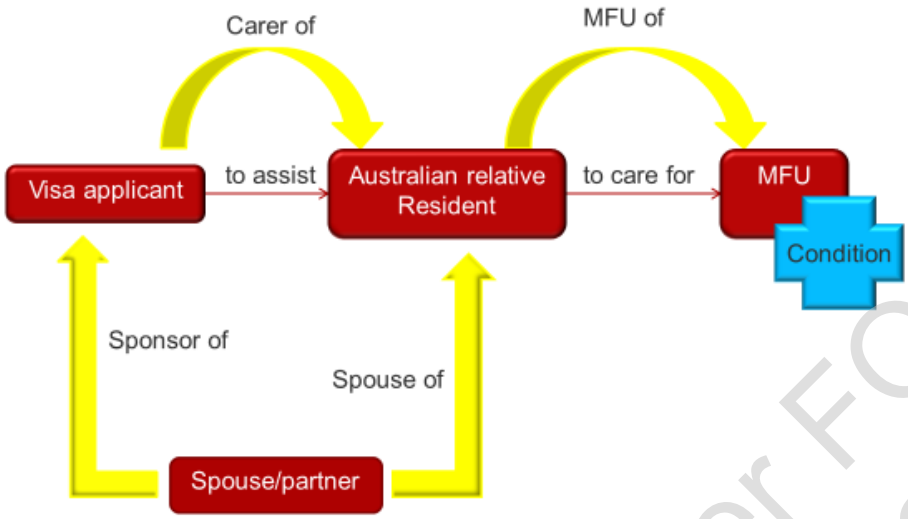
Situation C



Situation D



Situation E



Relevant case law

Judgment	Judgment Summary
Ali v MIBP [2016] FCCA 2314	Summary
Anveel v MIBP [2013] FCCA 2181	Summary
Applicant Y v MIAC [2008] FCA 367	Summary
Azzi v MIMIA [2002] FCA 24; (2002) 120 FCR 48	Summary
Babar v MICMSMA [2020] FCAFC 38	Summary
Babar v MICMSMA [2019] FCCA 231	Summary
Bader v MIBP [2018] FCCA 485	Summary
Biyiksiz v MIMIA [2004] FCA 814	Summary
Chand v MICMSMA [2021] FCCA 872	
Chow v MIMIA [2003] FCAFC 88	Summary
El Achkar v MIBP [2015] FCCA 2165	
Gauthiez v MIMIA (1994) 53 FCR 512	Summary
Gorgees v MIBP [2018] FCCA 2787	Summary
Hettiarchchige v MIMIA [2005] FCA 37	Summary
Hon Anh Vuong [2013] FCCA 274	Summary
Jackson v MIMIA [2003] FCAFC 203; (2003) 75 ALD 643	Summary
Jajo v MIBP [2013] FCCA 1554	Summary
Kheir v MIBP [2016] FCCA 1577	Summary
Kotaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241	
Lam v MIBP [2013] FCCA 1263	Summary
Le v MIBP [2017] FCA 1053	

Lin v MIMIA [2004] FCA 606; (2004) 136 FCR 556	
Lo v MICMSMA [2020] FCA 895	Summary
Naidu v MIMIA [2004] FCA 1692; (2004) 140 FCR 284	Summary
Nawagaliva v MIBP [2016] FCCA 2080	Summary
Nguyen v MIBP [2016] FCA 688	Summary
Nguyen v MIBP [2017] FCCA 339	Summary
Nguyen v MICMA [2019] FCA 934	Summary
Nguyen v MICMSMA [2020] FCA 1732	Summary
Mariam v MICMA [2022] FedCFamC2G 436	Summary
MIBP v Nguyen [2017] FCAFC 149	Summary
Perera v MIMIA [2005] FCA 1120	Summary
Pham v MIAC [2013] FMCA 29	
Pokharel v MIBP [2016] FCCA 3295	Summary
Rafiq v MIMIA [2004] FCA 564	Summary
Scargill v MIMIA [2003] FCAFC 116; (2003) 129 FCR 259	Summary
Sefesi v MIBP [2016] FCCA 975	
Tenorio v MIMIA [2001] FCA 917	
Truong v MIBP [2014] FCCA 1289	Summary
Vu v MIBP [2015] FCCA 3378	
Xiang v MIMIA [2004] FCAFC 64; (2004) 81 ALD 301	Summary
Yee Joy v MIBP [2015] FCCA 2537	
Valencia v MIBP [2019] FCA 397	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin

Migration Amendment Regulations 2000 (No 2) (Cth)	SR 2000, No 62	
Migration Amendment Regulations 2000 (No 5) (Cth)	SR 2000, No 259	
Migration Amendment Regulations 2002 (No 2) (Cth)	SLI 2002, No 86	20020509-1
Migration Amendment Regulations 2004 (No 2) (Cth)	SR 2004, No 93	20040630-2
Migration Amendment Regulations 2007 (No 1) (Cth)	SLI 2007, No 69	No 1/2007
Migration Amendment Regulations 2007 (No 14) (Cth)	SLI 2007, No 356	No 16/2007
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2009
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No 3/2011
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth).	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)	No 129, 2017	No 6/2017

Available decision templates / precedents

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

- **Subclass 116 visa refusal - Carer**: 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: for use in review of a decision to refuse a Subclass 836 (Carer) visa application made on or after 1 July 2002.

Last updated/reviewed: 01 September 2022.