

How do you become unlawful?

OPERATION OF LAW

1. Arriving without a visa

- People without a valid visa become unlawful at the point of entry into the migration zone
 - **Effect:** Eligible only for Border visa (temporary) (Class TA) or Protection visa (Class XA)
 - Immigration officials have wide discretion to grant with same conditions as the last visa the person held: *Weir v MIAC*

2. Overstaying

- People who overstay their visas become unlawful on the expiry of their visa unless they are issued with a replacement authority: **MA s82**

3. Unauthorised maritime arrival (UMA)

- UMA by entry: **MA s5AA(1)**
 - The person entered Australia by sea (at an excised offshore place/any other place)
 - The person became an unlawful non-citizen because of that entry; and
 - That person is not an excluded maritime arrival (NZ citizen or ordinary resident on Norfolk Island with passport)
- UMA by birth: **MA s5AA(2)**
 - Born in migration zone; and
 - A parent of the person is, at the time of the person's birth, a UMA; and
 - A parent allows the plural but does not exclude the singular: *Plaintiff B15A*
 - The person is not an Australian citizen at the time of birth.
 - If parent is permanent resident/citizen or person is ordinary resident in Australia for 10 years s12 *Citizenship Act*

LOSS OF LAWFUL STATUS

1. Cancellation before entry

- Offshore cancellation by Minister without notice if satisfied a MA s116 ground exists: **MA s128**
 - Minister can cancel visa while holder outside Australia whether or not they have been present in Australia in the past: *Doukmak v MIMA*
 - Power to cancel is discretionary: *Doukmak v MIMA*

2. Cancellation after entry

- **Character grounds:** **MA s501**
 - **Refusal:** Minister may refuse to grant visa if the person does not satisfy the character test: **(1)**
 - **Cancellation:** Minister may cancel visa if they reasonably suspect the person does not pass the character test; and the person does not satisfy the Minister that they pass the character test: **(2)**
- **Incorrect information:** **MA s109**
 - Minister may cancel visa for incorrect information (after considering response to a notice about the non-compliance under **MA s107(1)(b)**): **MA s109** (read in conjunction with PIC4020)
 - Minister may cancel visa if satisfied incorrect information was given to an officer/authorised system/Minister/Tribunal etc.. and that information was taken into account in making a successful decision for a visa
 - **Even if not cancelled:**
 - Minister may set aside the decision not to cancel the visa if the Minister considers that the ground exists; and the visa holder does not satisfy the Minister that the ground does not exist; and the Minister is satisfied that it would be in the public interest to cancel the visa

- **General power to cancel: MA s116**
 - Non-existence of fact: Minister may cancel a visa if satisfied that the decision to grant the visa was based wholly or partly on a fact that is no longer in existence: (1)(a)
 - Non-compliance with condition: Minister may cancel a visa if satisfied that the holder has not complied with a condition of the visa: (1)(b)-(c)
 - If you engaged in unauthorised work (incl voluntary) you may also be prosecuted under s235 → may preclude subsequent visas by virtue of s501
 - Risk to health and safety: Minister may cancel a visa if satisfied the presence of the holder might be a risk to the health, safety, or good order of the Australian community or individuals: (1)(e)
 - Not genuine student: [only for student visa] Minister may cancel visa if satisfied the holder is not, or is likely not to be a genuine student or is engaged or likely to engage in conduct not contemplated by the visa (1)(fa)
 - Identity: Minister may cancel visa if not satisfied as to the holder's identity: (1)(1AA)
 - Sponsorship fraud: Minister may cancel visa if satisfied a benefit was asked for or received by, or on behalf of the person who holds the visa from another person in return for sponsorship (1)(1AC)
 - **Even if not cancelled:**
 - Minister may set aside the decision not to cancel the visa if the Minister considers that the ground exists; and the visa holder does not satisfy the Minister that the ground does not exist; and the Minister is satisfied that it would be in the public interest to cancel the visa

- **Non-complying students**
 - If notice sent to non-citizen on student visa setting out non-compliance, and the student does not within 28 days comply with the notice or make themselves available for the purpose of making submissions about the breach their visa is automatically cancelled: s137J
 - Can apply for a revocation: s137K if Minister is satisfied that there was no breach, or the breach was due to 'exceptional circumstances beyond the non-citizen's control' s137L

3. Cancellation of visa of member of family unit

- Minister may without notice cancel a persons visa if they only hold a visa because they are the member of a family unit of a person whose visa is cancelled by s109 (incorrect information), s116 (general power to cancel), s128 (when holder outside Australia): MA s140(1)-(2)
 - If the family member whose visa was cancelled has a child, their child's visa is also cancelled: MA s140(3)

If unlawful/detained, how can you regularise your status?

HAS THE PERSON BEEN DETAINED?

- If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person: **MA s189**
 - Until granted a visa or removed from the country: **MA s198**
 - Detention will be valid if the detention they require is limited to what is reasonably capable of being seen as necessary for the purpose of deportation or necessary to enable an application to be made and considered: *Lim's case*. If not so limited they will be punitive and contravene Ch III Constitution
 - However, this does not affect the case where detention prevents unlawful non-citizen from entering Australia **even though deportation is not feasible in the reasonably foreseeable future** (e.g because statelessness): McHugh in *Al-Kateb* cf Kirby J
 - Suspicion doesn't become reasonable because of need to act quickly: *Goldie*

WHAT VISA CAN THEY APPLY FOR?

1. If you are a unlawful non-citizen

- An unlawful non-citizen (whether by refusal/cancellation/overstay [OTHER THAN REFUSE/CANCELLATION UNDER S501) in the migration zone may only apply for: **MA s48**
 - **Partner (temporary/residence):** **MR r2.12(1)(a)-(b)**
 - **Protection visas:** **MR r2.12(1)(c)**
 - If you apply for a **protection visa**, and that visa has been refused:
 - You may not make further applications for a protection visa in the migration zone: **MA s48A**
 - Unless non-compellable, non-reviewable discretion of Minister exercised to allow further applications if in the public interest to do so **MA s48B**
 - Medical treatment: **MR r2.12(1)(ca)**
 - Territorial Asylum: **MR r2.12(1)(e)**
 - Border (Temporary): **MR r2.12(1)(f)**
 - Bridging (A-F, R): **MR r2.12(1)(h)-(mb)**
 - **Child (Residence):** **MR r2.12(1)(p)**

In order to avoid immigration detention you must apply for a Bridging Visa immediately, which will put you immigration status on hold for the purpose of ascertaining entitlement to a substantive visa.

- **Must meet Schedule 3 criteria:** 3001-3005
 - 1. Application made within 28 days of unlawful status
 - Exceptions below
 - 2. The Minister is satisfied they became unlawful because of factors beyond the applicant's control
 - E.g serious illness (*Ramos*), injury, fear and psychological trauma (*Re Seneca-Pinchon*) or other event impeding renewal of expiring visa
 - Ignorance of the law does not constitute factors beyond control
 - 3. There are compelling reasons for the grant of a visa
 - Something to 'drive' Minister: *Babicci*
 - Compelling circumstances can be considered without regard to when they occurred: *Waensila*
 - 4. The applicant has complied substantially with any condition subject to which the last visa or entry permit was granted: *Myeong Il Kim*
 - 5. Would have been eligible for the visa had they applied immediately before becoming unlawful
 - 6. Applicant intends to comply with any conditions
- **Must meet Schedule 4 criteria:**

2. If you are a detainee

If you are a detainee within the time-limit

- Detainee may apply for a visa within 2 working days after detention (and told of consequences of detention), or within 5 working days if they inform an officer in writing of intention to apply within 2 days: **MA s195(1)**

If you are a detainee who does not apply for a visa within 2/5 days

- A detainee who does not apply for a visa within the time allowed may only apply for: **MA s195(2)**
 - Bridging visa
 - Protection visa

If you are a detainee [last ditch attempt]

- Minister may exercise non-compellable, non-reviewable discretion to grant visa if Minister thinks it is in the public interest to do so: **MA s195A**
 - Note: s195A does not empower Minister to grant a visa which precludes person from making a valid application for a protection visa (i.e a TSH visa): *Plaintiff S4/2014*

If your visa was cancelled/refused on s501 (character grounds)

- Can only apply for protection visa: **MA s501E**, or Bridging (Removal Pending) visa

3. If you are an unauthorized maritime arrival

IF YOU LEFT THE COUNTRY AS AN UNLAWFUL NON-CITIZEN

- Special return criteria may apply restricting the person's ability to re-enter Australia: **MR Schedule 5**
 - Can't have left subject to a deportation order **Sch5 5001**
 - Can't have had your visa cancelled under s501 **Sch5 5001**
 - If you were removed from Australia under s198 the application must be made more than 12 months after removal **Sch5 5002**
 - Or minister is satisfied of compelling circumstances **Sch5 5002**
- If your visa was cancelled under **s501** you will be banned from returning to Australia

CAN YOU BE REMOVED FROM THE COUNTRY?

[198(2A)]

HOW LONG HAS THE PERSON BEEN UNLAWFUL?

SINCE 2 APRIL 1984

- Possibly an 'absorbed person' **MA s34**
 - Can be cancelled if holder is found to be of bad character (s501): *MIMIA v Nystrom*

MORE THAN 12 MONTHS

You may only apply for:

- **Protection Visa** (Subclass 866) – available to non-citizens irrespective of the length of time they may have spent in Australia unlawfully
- **Partner Visa** (Subclass 820) – available if the applicant can show compelling reasons for not applying the Sch 3 criteria (time limits) **Sch2, r820.211(2)(d)(ii)**
 - E.g Children in the relationship, or evidence the relationship has endured > 2 years
- **Child Visa** (Subclass 802) – available so long as applicant has not had visa refused/cancelled under s501 and has become a dependent child of an Australian citizen **Sch2, r802.211(a)**

LESS THAN 12 MONTHS

Concessions made for persons apply for:

- **Partner Visa** (Subclass 820) – if came to Australia as diplomats or in similar roles, or as serving members of visiting armed forces Sch2 r820.211(2)(d)(i) and (2A)
- **Parent** (subclass 103) aged who satisfied the Balance of Family Test (**r1.05**)
- **Remaining Relative** (Subclass 835)
- **Carer** (subclass 836)
- **Orphan Relative** (Subclass 837)
- **Aged Dependent Relative** (Subclass 838)

LESS THAN 28 DAYS

- Regs permit non-citizens who have come to Aus on tourist and other temporary visas to seek permanent residency on the basis of their skills, provided **Sch 3 3004** can be met