



Domestic Violence in Partner Visa Applications and Visa Cancellations

The Migration Law Perspective

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Part A - Domestic Violence in Partner Visa Applications

- Overview of Partner visas
- The Family Violence Provisions
- Who can use the Family Violence Provisions
- How to use the Family Violence Provisions

Part B - Visa Cancellations under s501

- The mandatory Character Cancellation Powers s501(3A)
- The Character Test

PARTNER VISAS DEFINITIONS AND OVERVIEW

- Partner visas are available to those who are considered:
 - **Spouse** (s5F of Migration Act) or
 - **De facto partner** (s5CB of the Act) of an Australian citizen, permanent resident or Eligible New Zealand Citizen (ENZ Citizen)
- All partner visa applicants must have an eligible sponsor (Australian citizen, permanent resident or ENZ citizen)
- Couple must be in a genuine and continuing relationship for spousal and de facto relationships (reg.1.15A for spousal relationships, 1.09A for de facto)
- The 4 pillars considered for relationships to be assessed as genuine and continuing are: financial aspects, social aspects, nature of the household and nature of the persons' commitment to each other



PARTNER VISAS - OVERVIEW

Visa Type	Description	Eligibility	Application Location	Pathway
Subclass 300 Prospective Marriage Visa	Allows you to come to Australia to marry your prospective spouse.	Must be engaged to an Australian citizen, Australian permanent resident, or eligible New Zealand citizen.	Offshore (outside Australia)	After marriage, apply for Subclass 820/801 Partner Visa
Offshore Partner Visa (Subclass 309)	Temporary visa allowing the partner or spouse of an Australian citizen, Australian permanent resident, or eligible New Zealand citizen to live in Australia temporarily.	Must be in a genuine and continuing relationship.	Offshore (outside Australia)	Leads to Subclass 100 Permanent Partner Visa
Permanent Partner Visa (Subclass 100)	Allows the partner or spouse of an Australian citizen, Australian permanent resident, or eligible New Zealand citizen to live in Australia permanently.	Must have held Subclass 309 visa and meet relationship criteria.	Granted while on Subclass 309	Permanent residency
Onshore Partner Visa (Subclass 820)	Temporary visa allowing the partner or spouse of an Australian citizen, Australian permanent resident, or eligible New Zealand citizen to live in Australia temporarily.	Must be in a genuine and continuing relationship.	Onshore (in Australia)	Leads to Subclass 801 Permanent Partner Visa
Permanent Partner Visa (Subclass 801)	Allows the partner or spouse of an Australian citizen, Australian permanent resident, or eligible New Zealand citizen to live in Australia permanently.	Must have held Subclass 820 visa and meet relationship criteria.	Granted while on Subclass 820	Permanent residency

FAMILY VIOLENCE PROVISIONS

Applicants applying for permanent residence can continue with their visa application after a relationship breakdown if:

- there is a **child of the relationship**;
- the sponsor has **died**; or
- **there is family violence**



WHO CAN USE THE FAMILY VIOLENCE PROVISIONS?

Visa Type	Pathway	Family Violence Provision
Subclass 300 Prospective Marriage Visa	After marriage, apply for Subclass 820/801 Partner Visa	An applicant must be in Australia and hold 300. Allow grant of 820/801 under the <i>family violence provision</i> .
Offshore Partner Visa (Subclass 309)	Leads to Subclass 100 Permanent Partner Visa	Applicants who have entered Australia at any time since lodgement of their visa application and who may be outside Australia at time of decision will be eligible to be granted 309/100 under the <i>family violence provision</i> .
Permanent Partner Visa (Subclass 100)	Permanent residency	Allow grant on the basis of the <i>family violence provision</i>
Onshore Partner Visa (Subclass 820)	Leads to Subclass 801 Permanent Partner Visa	Allow grant on the basis of the <i>family violence provision</i> .
Permanent Partner Visa (Subclass 801)	Permanent residency	Allow grant on the basis of the <i>family violence provision</i>
Distinguished Talent visa (subclass 858)	Permanent residency	A secondary visa applicant for 858 allows grant on the basis of the <i>family violence provision</i> . Must be in Australia at the time of application.
Dependent Child visa (subclass 445)	Leads to Subclass 100 Permanent Partner Visa	Applicant must be the dependant of a visa-holding parent who applied for family violence provisions.



FAMILY VIOLENCE RED FLAGS

- bridging visa, temporary or partner visa, no visa, unsure of their visa status
- spouse/ partner / family arranged the visa for them
- spouse/ partner has engaged the migration lawyer
- spouse / sponsor has threatened to deport them, have their visa cancelled, or take possession of their passport;
- sponsor's/ visa applicant's family has threatened them if they leave the relationship
- visa applicant expresses fears of returning to their home country
- visa applicant says they are thinking of applying for a new visa
- visa applicant doesn't have access to their visa or documents
- visa applicant doesn't have access to Centrelink, Medicare or other supports that citizens or permanent residents can usually access
- visa applicant has received correspondence about their visa
- visa applicant has limited English



DEFINITION OF FAMILY VIOLENCE

MIGRATION REGULATIONS 1994

Division 1.5 – Procedural Instructions

Examples of family violence include (but are not limited to):

- Physical abuse
- Sexual abuse
- Verbal or emotional abuse
- Social abuse
- Financial abuse
- Immigration abuse

REG 1.21 - Interpretation

"relevant family violence" means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator;

or

- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.



PROVING FAMILY VIOLENCE

MIGRATION REGULATIONS 1994 - Regulation 1.23



Non-Judicial evidence

- a joint undertaking made to a court by the alleged victim and the alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- A statutory declaration by the spouse or de facto partner of the alleged perpetrator and at least two prescribed documents such as
 - Medical report, hospital report, record of assault, report from an officer of child welfare and child protection authority, a statutory declaration by social worker, psychologist report etc.

Judicial evidence

- an injunction made under sections 114(1)(a), (b) or (c) of the *Family Law Act 1975* (Cth) (Migration Regulations 1.23(2)); or
- an apprehended domestic violence order made after the court had given the alleged perpetrator an opportunity to be heard, or to make submissions to the court, in relation to the matter (Migration Regulations 1.23(4)); or
- the perpetrator has been convicted or found guilty of a violence offence against the victim (Migration Regulations 1.23(6)).



**VISA CANCELLATION UNDER
SECTION 501
THE CHARACTER TEST**



WHAT HAPPENS IF A PERSON FAILS THE 'CHARACTER TEST'?

- s.501(1) – power to refuse to grant a visa on character grounds
- s.501(2) – power to cancel a visa on character grounds (**discretionary**)
- s.501(3) – Minister's personal power to refuse to grant a visa or cancel a visa on character grounds if in the national interest.
- s.501(3A) – **Mandatory** power to refuse to grant a visa or cancel a visa in specified circumstances
 - Substantial criminal record
 - Sexually based offences
 - Serving a sentence
- s.501A - Minister's personal power to set aside a decision of a delegate of the tribunal

DEFINITION OF CHARACTER TEST

MIGRATION ACT 1958 - Subsection 501(6)

A person does not pass the character test if any of the following apply (this is not the full list):

- Has a **Substantial Criminal Record** - Convicted and sentenced to a term of imprisonment of at least 12 months or more (up to life, or death e.g. if foreign offence)
 - Concurrent sentences** – each sentence is counted cumulatively towards total sentence
 - Suspended sentences** – counts as a sentence of imprisonment
 - Aggregate sentences** – counts as part of sentencing
 - Acquitted due to unsoundness of mind/insanity/unfitness to plead** – court order and sentence counts as imprisonment where court determined nevertheless that the evidence found person committed the offence) and sentenced to be held at psychiatric institute after acquittal
- **reasonable suspicion of criminal association** – Minister reasonably suspects that person is/has been member/associated with a group/organization/person who is involved in criminal conduct
- **reasonable suspicion of certain serious offences** (People smuggling offence, Human trafficking offences, serious international crime)
- **general and criminal conduct** – Minister considers, having regard to person's past/present general/criminal conduct that they are not a person of good character





THE MANDATORY VISA CANCELLATION (s501(3A)) FRAMEWORK

1. Hold a visa
2. Be sentenced to 12 months or more imprisonment **OR** be found guilty / charge proven of a sexually based crime involving a child
3. Be serving a full-time custodial sentence
4. Former holder will be notified of cancellation and invited to seek a revocation
5. If non-revocation decision, apply for review with AAT (**strict time limits**)
6. If decision affirmed, seek judicial review in Federal Court (remitted to AAT if successful)
7. If successful at delegate or AAT, Minister has power to overturn this decision
8. Subject to immigration detention unless and until visa cancellation is revoked
9. If finally determined, removal as soon as reasonably practicable

INTERVENTION ORDERS

Character declaration for visa application forms:

“Has any applicant ever been the subject of a domestic violence or family violence order, or any other order, of a tribunal or court or other similar authority, for the personal protection of another person?”

Direction 110 (MUST be considered) – Family violence as a Primary Consideration

‘b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.’



Key takeaways

- Obtain immigration advice as soon as possible to inform decision making in both matters, e.g.
 - A visa holder may be more compelled to fight charges/intervention order if aware of visa consequences
- Awareness of visa cancellation framework can reduce delays and improve prospects of success:
 - more time to obtain relevant documents (FOIs etc)
 - Establish evidence of rehabilitation through engagement with psychologist/rehab

Thank you