

OFFICIAL: Sensitive | ~~Legal privilege~~

Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS23-001846
Date of Clearance: 12/12/2023

To Minister for Immigration, Citizenship and Multicultural Affairs
Subject Compensation for Detriment caused by Defective Administration (CDDA) – s. 47F(1)
Timing Not time critical,

Recommendations

That you:

1. **approve** compensation in the amount of AUD **s. 47F(1)** under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) on the basis that the Department of Home Affairs defective administration caused detriment to the Applicant;
2. **do not approve** compensation for AUD **s. 47F(1)**, as this component of the claim is not compensable under the CDDA Scheme; and
3. **sign** the attached Decision Record (**Attachment B**) so that the Applicant may have an adequate explanation of the reasons for your decision (once made) as specified in paragraph 78 of the CDDA guidelines.

compensation approved /
compensation not approved /
please discuss

compensation approved /
compensation not approved /
please discuss

signed / not signed /
please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 17/1/2024

Released by Department of Home Affairs
under the Freedom of Information Act 1982

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Minister's Comments

Purpose

Authority to consider CDDA claims

1. The CDDA Scheme as set out under the CDDA guidelines, issued by the Department of Finance in *Resource Management Guide No. 409*, operates on the basis of the authority provided to individual portfolio ministers under the executive power of sections 61 and 64 of the Constitution.
2. The CDDA Scheme enables Commonwealth agencies to compensate persons who have been adversely affected by defective actions or inactions of such agencies, where the Applicant has no other avenue to seek redress. A payment of compensation is made where it is fair and reasonable in the circumstances, rather than where there is a legal obligation on the part of the Commonwealth to pay the Applicant.
3. On 23 August 2022, the Hon Clare O'Neil MP, Minister of Home Affairs, signed an Instrument of Authorisation (see **Attachment A**) authorising a range of departmental officers to exercise, for and on her behalf, the authority to approve payments for compensation under the CDDA Scheme, subject to specific monetary limits (ADMIN22/084).

4.

s. 47E(d)

5. We seek your decision on whether to pay the Applicant compensation under the CDDA Scheme.

The claim

6. It is claimed that the Department of Home Affairs (the Department) delay from May 2021 to August 2022, in firstly, applying the ratio (reason for decision) of *Minister for Citizenship, Migrant Services and Multicultural Affairs v CBW20[2021] FCAFC 63 (CBW20)* and second, in informing the Applicant that s. 47F has a 'valid visa' constitutes defective administration. The Applicant submits a claim for compensation of AUD\$ s. 47F(1), being for lost wages and money s. 47F loaned from a friend s. 47F(1) alleges was a result of the Department's delay.

Summary and Recommendation

7.

s. 47C(1)

The CDDA Scheme

8. Pursuant to the CDDA guidelines, defective administration can arise where there was:
- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the Applicant's circumstances; or
 - an unreasonable failure to institute appropriate administrative procedures to cover a applicant's circumstances; or
 - advice given that was, in all the circumstances, incorrect or ambiguous; or
 - an unreasonable failure to give to (or for) an Applicant, the proper advice that was within the official's power and knowledge to give (or reasonably capable of being obtained by the official to give).
9. Under the CDDA guidelines, any detriment found to have been suffered by an applicant must have arisen as a direct result of defective administration. "Detriment" is considered to be the amount of quantifiable financial loss, including opportunity costs, that an Applicant can demonstrate was suffered despite having taken reasonable steps to minimise or contain the loss.

Background

The Facts

10. On s. 47F(1), the Applicant, a citizen of s. 47F(1), entered Australia by sea without a valid visa. s. 47F(1) entered via the seas within the purported "proclaimed port" at the excised offshore place at Ashmore and Cartier Island. At the time of s. 47F(1) entry, s. 47F(1) was considered to meet the definition of "offshore entry person" (OEP) in s 5 of the *Migration Act 1958* (the Act) (from 1 June 2013, this became "unauthorised maritime arrival" (UMA) as prescribed in s 5AA of the Act). The Applicant is a citizen of s. 47F(1).
11. On s. 47F(1), the Minister for Immigration and Citizenship ("the Minister") purported to grant the Applicant a Subclass 449 Humanitarian Stay (Temporary) visa (UJ-499 visa) and a Bridging Visa E (BVE) pursuant to s 195A of the Act.
12. On or around s. 47F(1), the Applicant made an application for a Temporary Protection Visa (XD-785) (TPV Application 1). The application was found to be valid on s. 47F(1).
13. On s. 47F(1), the Applicant was granted a Temporary Protection Visa (XD-785) valid for three years.

14. On 6 August 2018, judgment was given by the Federal Court in *DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447 (**DBB16**). The Federal Court decided that the 2002 declaration purporting to appoint the offshore place at Ashmore and Cartier Island was invalid and persons like the Applicant who entered Australia at that place were not within the meaning of a UMA under the Act.
15. On 8 November 2019, the Minister decided to lift s 91K bar of the Act (pursuant to s 91L) to allow certain persons affected by *DBB16* to make a further application for a Temporary Protection Visa or Safe Haven Enterprise Visa.¹ The Department implemented a procedure to progressively notify those persons of the Minister's decision to lift the s 91K bar as and when they attempted to make a further Temporary Protection Visa or Safe Haven Enterprise Visa.
16. On s. 47F(1), the Applicant made a second application for a Temporary Protection Visa (**TPV Application 2**). The Applicant says in s. 47F(1) CDDA application that s. 47F(1) was assisted by migration agent, s. 47F(1), to apply for a "Subsequent Safe Haven Enterprise Visa" on this date.
17. On s. 47F(1), the Applicant's TPV Application 2 was found to be invalid due to s 91K of the Act. This was because the Applicant was considered to have held a UJ- 499 visa since s. 47F(1) last entered Australia and did not fall within the exception of s 91J of the Act (due to the *DBB16* decision).
18. On s. 47F(1), the Applicant appointed s. 47F(1) as s. 47F(1) agent/authorised recipient.
19. On s. 47F(1), the Applicant was notified through s. 47F(1) that s. 47F(1) TPV Application 2 was invalid. The Department also notified s. 47F(1) that the Minister made a determination under s 91L of the Act to lift the s 91K bar and allow the Applicant to make a further application.
20. On s. 47F(1), the Applicant made an application for a Temporary Protection Visa through s. 47F(1). The application was completed using Form 866, which was the incorrect form for the visa s. 47F(1) applied for.
21. On s. 47F(1), the Temporary Protection Visa (XD-785) granted to the Applicant on s. 47F(1) expired. On the same date, the Department's Protection visa help desk provided advice to the National Allocations and Finalisations Section (NAFS Team 1) that the Applicant's application dated s. 47F(1) was invalid for failing to meet form requirements for Temporary Protection Visa applications. The Protection visa help desk further advised that "cessation provisions for a TPV are dependent on the applicant making a valid application. The notification of the invalid application cannot be delayed, to prevent ICSE ceasing the TPV. Under law, s. 47F(1) will be unlawful from tomorrow as a matter of fact, regardless of whether NAFS make a validity finding now or later".
22. On s. 47F(1), the Department determined that the application dated s. 47F(1) was invalid as the form requirement was not satisfied. The Applicant's case was referred to the International Obligations Section in the Humanitarian Program Operations Branch (HPOB) for s 91L consideration.

¹ Reflected in signed submission MS18-010982.

23. On s. 47F(1), the Applicant was notified through s. 47F(1) that the application dated s. 47F(1) was invalid. In s. 47F(1) CDDA application, the Applicant says that the Department also advised that s. 47F(1) "would need to await Ministerial Intervention in order to regularise s. 47F(1) status".
24. On s. 47F(1), the Applicants Ministerial referral regarding s 91L will be progressed on a bulk submission.
25. On 4 May 2021, the Full Court of the Federal Court found in *Minister for Citizenship, Migrant Services and Multicultural Affairs v CBW20* [2021] FCAFC 63 (**CBW20**) that the purported decision to grant a Temporary Safe Haven UJ-499 visa to the applicant in that matter (who was not a UMA as a result of the decision in *DBB16*) was invalid. This was because the Minister, in forming his view on what was in the public interest when exercising his power under s 195A, had mistakenly believed/assumed that:
- a. The applicant was a UMA within the meaning of s 5AA of the Act (legal error); and
 - b. The grant of the UJ-449 visa would replace one application bar with another application bar (further legal error as the applicant was never subject to a bar in the first place).
26. The Full Court of the Federal Court found that the above errors were fundamental to the decision to grant the UJ-499 visa to the applicant.
27. The reasoning in the *CBW20* matter applied to the Applicant.
28. On 6 August 2021, the Minister received a referral to consider a bulk submission regarding s 91L, including the Applicants.
29. Between June and November 2021 the Applicant, s. 47F(1) agent and several advocates sent various correspondence to the Department seeking clarification of s. 47F(1) status and requesting that s. 47F(1) matter be brought to the Minister's attention for urgent consideration. This included an email from UNHCR on s. 47F(1) regarding the Applicant as an "individual case of concern to UNHCR".
30. It was not until s. 47F(1) (over 8 months after the Full Court decision in *CBW20*) that a validity assessment of the Applicant's TPV Application 2 was completed and s. 47F(1) application was found valid.
31. On s. 47F(1), the Department's IT system was updated to reflect the Applicant's in-effect visa. The Applicant was not notified that the Department had revisited the validity assessment.
32. The Applicant alleges that on s. 47F(1), the Department informed s. 47F(1) of the s. 47F(1) that the Applicant's immigration status had been reinstated on s. 47F(1). The Department has been unable to locate records corroborating the alleged correspondence.
33. The Applicant alleges that on s. 47F(1), s. 47F(1) contacted the Department and was informed that s. 47F(1) remained "unlawful". The Department has been unable to locate records corroborating this alleged correspondence.

34. On s. 47F(1) (5 months after the Department's system recorded the validity of the Applicant's decision), the Department sent the Applicant an "acknowledgement of valid application" letter advising that s. 47F(1) TPV Application 2 was valid.
35. On s. 47F(1), s. 47F(1) was granted a permanent Resolution of Status (subclass 851) visa.

Was the defective administration?

s. 47C(1)

Detriment

Lost Income

38. s. 47F(1) was unable to lawfully work during the period between 4 May 2021 (date of the Full Court's judgment in CBW20) and s. 47F(1) (date of the Department's "acknowledgement of valid application" letter) due to s. 47F(1) unclear visa status. The Applicant provided previous payslips to substantiate s. 47F(1) had a job and the amount of s. 47F(1) wages.

39. s. 47C(1)

Personal loan

40. The Applicant is seeking further compensation of AUD s. 47F(1). Due to s. 47F(1) inability to work, the Applicant borrowed money from a friend and former colleague s. 47F(1) to cover living expenses. A Statutory declaration has been provided by s. 47F(1). s. 47F(1) has been able to pay back s. 47F(1) of the original loan.

41. s. 47F(1) was not eligible for Centrelink payment because s. 47F no longer held a TPV or SHEV and was not eligible for Status Resolution Support Services payments because s. 47F wasn't an asylum seeker with a protection application under consideration.
42. The purpose of the CDDA scheme is to return the application to the financial position they would have been in had the defective administration not occurred. In this case, it can be argued that if s. 47F(1) received a wage s. 47F would not require a loan to cover s. 47F living expenses. However, if the claimed wages were found to be compensable then compensating for the loan would effectively be providing s. 47F(1) a windfall gain. s. 47F(1) would have used s. 47F wages to cover s. 47F living expenses in any event. As such, compensating s. 47F(1) for the claimed wages will enable s. 47F(1) to repay s. 47F(1) personal loan from s. 47F(1). Therefore this component of the claim is not compensable under the CDDA Scheme.

Conclusion

43. s. 47C(1)

44. Please note that payment of compensation by the Department is conditional upon the Applicant executing a Deed of Release and Indemnity.

Consultation – internal/external

45. The Humanitarian and Child Wellbeing Policy and Capability Branch (HCWPC), Protection Caseload Resolution Section (PCRS), have been consulted in relation to this claim.

Consultation – Secretary / A/g Deputy Secretary Immigration / ABF Commissioner

46. The Secretary was not consulted on this submission.
47. The A/g Deputy Secretary Immigration was not consulted on this submission.
48. The ABF Commissioner was not consulted on this submission.

Client service implications

49. The *CBW20* judgement affected approximately 2000 UMAs. By July 2022, PCRS drafted procedural guidance for NAFS to manage incoming TPV/SHEV applications where clients confirmed they are affected by *CBW20*. In addition, PCRS provide options to HPO on managing UMA's impacted by Counsel's advice.

Risks and Sensitivities

50. This claim for compensation under the CDDA Scheme engages the sensitivity protocol, which requires Ministerial approval for the amount of compensation to be paid.
51. We do not consider there to be any immediate risks or further sensitivities at this stage.

Financial/systems/legal/deregulation/media implications

52. The outcome of this claim is not expected to have Financial, systems, legal, deregulation or media implications.

Attachments

Attachment A Signed an Instrument of Authorisation

Attachment B Decision Record

Authorising Officer

Cleared by:

Clare Sharp
Group Manager
Legal Group

Date: 12 December 2023

Mob: s. 22(1)(a)(ii)

Contact Officer Alicia Wright, Position, Deputy General Counsel/Assistant Secretary, Legal Strategy and Services Branch, Ph: s. 22(1)(a)(ii).

Cc Minister for Home Affairs, Minister for Cyber Security
Secretary
ABF Commissioner



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DECISION RECORD

Our reference: DCC22-043240

s. 47F(1)

Dear s. 47F(1),

1. Thank you for applying for compensation under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) on behalf of s. 47F(1) (the Applicant). I am the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
2. The application has been referred to me for a decision as the authorised decision maker.
3. In reaching a decision, I had regard to a submission provided to me by the Department of Home Affairs (the Department). The submission takes into account the following:
 - a) The application for compensation and supporting documents,
 - b) Accounts provided by the responsible business area within the Department; and
 - c) CDDA Scheme *Resource Management Guide 409* (CDDA Guidelines).

Your claim

4. As set out in the application, your claims can be summarised as follows:
 - The Department's delay from s. 47F(1) to s. 47F(1), in firstly, applying the judgment in *Minister for Citizenship, Migrant Services and Multicultural Affairs v CBW20[2021]* FCAFC 63 (CBW20) and second, in informing the Applicant that s. 47F(1) has a 'valid visa' constitutes defective administration.
 - The claimed loss of AUDs. 47F(1)4 is made up of lost wages and a loan. It is claimed that the Applicant was unable to lawfully work during s. 47F(1) to s. 47F(1). As a result of no income being earned the Applicant borrowed money from a friend.

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My decision

5. I approve compensation in the amount of AUDs. 47F(1) under the CDDA Scheme on the basis that the Department's conduct amounted to defective administration and that it directly caused detriment to the Applicant as a result.
6. I do not approve compensation for the loan the Applicant took out from a friend to pay living expenses, being AUDs. 47F(1).

Reasons for my decision

7. There was a delay in applying the Full Court's decision in CBW20 consequently also delaying the Department from revisiting the Applicant's Temporary Protection visa application of 2 August 2020 and determining that it was valid in accordance with the Court's reasons.
8. There was also a delay in informing the Applicant of s. 47F(1) valid visa status, thereby depriving the Applicant of clarity regarding s. 47F(1) visa status.
9. Both these delays amounted to defective administration and prevented the Applicant from earning income thereby directly causing the Applicant s. 47F(1) claimed lost wages.
10. The loan given to the Applicant by s. 47F(1) friend and former colleague, s. 47F(1), is not compensable under the CDDA Guidelines. The purpose of the CDDA scheme is to return the application to the financial position they would have been in had the defective administration not occurred. The Applicant's loan arrangement with s. 47F(1) friend and former colleague was not the direct result of the Department's defective administration but rather an indirect one. The Applicant would have incurred living expenses in any event and would have covered those expenses using s. 47F(1) wages. Compensating s. 47F(1) for the claimed wages will enable s. 47F(1) to repay his personal loan to cover the said living expenses.
11. If my offer of compensation is agreeable to the Applicant, my Department will be in contact to arrange payment. Please note that payment is conditional upon the Applicant executing a Deed of Release and Indemnity.

Review of decision

12. There are no review options available for personal decision made by Ministers. However, the Applicant may approach the Commonwealth Ombudsman if they have concerns relating to the process leading up to my personal decision.
13. You can find more information about how to lodge a complaint on the Commonwealth Ombudsman's website at www.ombudsman.gov.au.

Yours sincerely



Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

17 January 2024

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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS22-001162

Date of Clearance: 08/07/2022

To Minister for Home Affairs
Minister for Cyber Security

Subject Authorisation of officers to decide applications under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA)

Timing At your convenience.

Recommendations

That you:

1. authorise those officials listed in the Instrument of Authorisation (ADMIN 22/084) at **Attachment A** to consider and decide applications made under the CDDA Scheme up to the amount specified in the instrument by signing said instrument; and
2. note the sensitivity protocol at paragraph 16 which sets out the categories of applications made under the CDDA Scheme which will be raised with your office.

agreed / not agreed

noted / please discuss

Minister for Home Affairs
Minister for Cyber Security

Signature.....

Date: 29/7/2022

RECEIVED

14 JUL 2022

Minister for Home Affairs

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Minister's Comments				
Rejected Yes/No	Timely Yes/No	Relevance ☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	Length ☐ Too long ☐ Right length ☐ Too brief	Quality Poor 1.....2.....3.....4.....5 Excellent Comments:

Background

CDDA Scheme

1. The CDDA Scheme enables Commonwealth agencies to compensate persons who have been adversely affected by defective actions or inactions of such agencies, where the applicant has no other avenue to seek redress. A payment of compensation is made where it is fair and reasonable in the circumstances. Payments cannot be made under the CDDA Scheme where there is a legal obligation on the part of the Commonwealth to pay the applicant as applications of this kind must be managed in accordance with the *Legal Services Directions* (LSDs).
2. The CDDA Scheme was established on 23 October 1995 and operates on the basis of the authority provided to individual portfolio Ministers under the executive power of Sections 61 and 64 of the Constitution.
3. Portfolio ministers decide applications made under the CDDA Scheme. A portfolio minister may authorise an official in a portfolio entity to consider and decide applications made under the CDDA Scheme. Within Home Affairs, applications are managed in Legal Group, and more specifically, within a branch that reports to Deputy General Counsel.
4. The former Minister for Home Affairs, the Hon Karen Andrews MP, signed an Instrument of Authorisation on 18 May 2021 (ADMIN 21-044) authorising officers of the Department of Home Affairs (the Department) to decide applications under the CDDA Scheme.
5. This instrument expired on 23 May 2022 when the Hon Anthony Albanese MP was sworn in as the 31st Prime Minister of Australia. With your appointment as the Minister for Home Affairs you are currently the only public office holder who can make decisions on CDDA applications raised against the Department.

6. In order to redistribute CDDA decisions within the Department, you may authorise officials within the Legal Group to consider and decide applications made under the CDDA Scheme. However, your authority must be conferred expressly by an Instrument of Authorisation (**Attachment A**).
7. Where a decision-maker is a person other than yourself, the decision-maker acts for and on behalf of you, that is, the decision-maker is an agent of the minister and not a delegate.
8. The appropriate level of authorisation is based on the application amount, not the amount found compensable under the CDDA Scheme. The authorisation required to make a decision not to pay compensation is the same as required to make a decision to pay compensation.
9. Decision-makers must consider an application under the CDDA Scheme in accordance with the Department of Finance *Scheme for Compensation Caused by Defective Administration - Resource Management Guide 409* to either approve or not approve payment of an application.
10. Decisions may be subject to external review, including for example the Commonwealth Ombudsman and more recently, judicial review. **s. 42(1)**

s. 42(1)

CDDA applications within Home Affairs

11. In the financial year 1 July 2020 to 30 June 2021, 106 CDDA applications were received. There was a noticeable reduction in applications received during this period due to the pandemic, specifically as a result of the closure of Australia's borders to a majority of travellers. It is expected that the number of applications received will increase as travelling returns to pre-pandemic levels.

12.

s. 47E(d)

13. The table below shows the:
 - sum of compensation claimed;
 - number of compensation applications paid; and
 - sum of compensation paid by the Department under the CDDA Scheme over the past five financial years.
14. You will see that when a decision is made to compensate under the CDDA Scheme, it is usually significantly less than what has been claimed.
15. The Department regularly reviews claims to see if they highlight recurring problems that need to be addressed. Most claims relate to one-off instances of defective administration (actual or perceived) with the exception of:
 - claims for wharf storage costs associated with (either perceived or actual) delays in processing incoming containerised sea cargo; and
 - claims for loss incurred from (perceived or actual) from incorrect advice given in the context of visa applications (no specific visa category).

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CDDA compensation payments financial year 2018-21:

Historical compensation claimed and paid in AUD under the CDDA Scheme by financial year				
EFY	2018	2019	2020	2021
Sum of compensation claimed	6,120,2787	4,414,339	6,093,222	6,479,718
Number of applications paid	90	48	82	35
Sum of compensation paid	372,918	103,774	176,589	111,306

Sensitivity protocol

s. 47E(d)

Consultation – internal/external

19. Nil consultation required.

Consultation – Secretary

20. The Secretary was not consulted on the Instrument of Authorisation at Attachment A.

Client service implications

21. Your authorisation will enable decision makers within Legal Group to make timely decisions on claims for compensation under the Scheme.

Sensitivities

22. Nil sensitivities.

Financial/systems/legislation/deregulation/media implications

23. The authorisations are not expected to have any financial, systems, legislative, deregulation or media implications.

Attachments

Attachment A Instrument of Authorisation (ADMIN 22/084)

Authorising Officer

Cleared by:

Pip de Veau
General Counsel/Group Manager Legal
Legal Group

Date: 08/07/ 2022

Phone: s. 22(1)(a)(ii)

Contact Officer Alicia Wright, Deputy General Counsel/Assistant Secretary, Legal Strategy and Services Branch,
Ph: s. 22(1)(a)(ii) and mobile: s. 22(1)(a)(ii)

Through

CC Secretary
ABF Commissioner



ADMIN 22/084

Compensation for detriment caused by defective administration (Home Affairs) Authorisation 2022

I, Clare O'Neil, Minister for Home Affairs:

- (a) authorise each officer mentioned in the following table to approve payments, up to and including the monetary limit mentioned in the table for the officer, for compensation for detriment caused by defective administration in accordance with the *Scheme for Compensation for Detriment caused by Defective Administration* (Resource Management Guide 409); and

Note Terms used in the table are used consistently with the *Public Service Classification Rules 2000*.

Item	Position	Monetary limit
1	Secretary	Unlimited
2	Senior Executive Band 3, Chief Operating Officer	Unlimited
3	Senior Executive Band 2, Legal	Unlimited
4	Senior Executive Band 1, Legal Strategy and Services Branch	\$200,000
5	Executive Level 2, Legal Strategy and Services Branch	\$30,000
6	Executive Level 1, Legal Strategy and Services Branch	\$5,000

- (b) repeal *Compensation for Detriment Caused by Defective Administration (Home Affairs) Authorisation 2021* (ADMIN 21/044).

This instrument commences the day after it is signed.

Dated 23 / 8 / 2022

Minister for Home Affairs