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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-001532

Date of Clearance: 03/01/2024

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Revocation of Ministerial Direction 63 - Bridging E visas -
Cancellation under s116(1)(g) – reg 2.43(1)(p) or (q) and
Code of Behaviour for PIC 4022

Timing 22 January 2024 to allow for commencement of new Ministerial Direction 104
on 1 March 2024.

Recommendations

That you:

S. 47C(1)

Signature.....

Date: 23/1/2024

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under the Freedom of Information Act 1982

Minister's Comments

Key Issues

s. 47C(1)

Character and cancellation related changes to the BVE and BVR framework from 2013

4. In 2013 and 2014 a number of amendments were made to the visa cancellation framework to impose additional conditions on Bridging E Visa (BVE) holders and introduced additional grounds to enable the cancellation of BVEs. These measures were specifically targeted towards unauthorised maritime arrivals (UMAs) who were granted BVEs through the Ministerial Intervention powers under section 195A of the *Migration Act 1958* (the Act).
5. These amendments included the introduction of:
 - a) regulations 2.43(1)(p) and (q) to the *Migration Regulations 1994* (the Regulations), providing additional prescribed grounds for the cancellation of BVEs under section 116(1)(g) of the Act, and
 - b) the associated Ministerial Direction 63— *Bridging E visas - Cancellation under s116(1)(g) – reg 2.43(1)(p) or (q)* (Direction 63) (see **Attachment B**);

- c) amendment to Schedule 2 (criteria for BVE grant) and 4 (Public Interest Criterion (PIC) 4022) to the Regulations to require people who have been granted a BVE through Ministerial Intervention to satisfy PIC 4022, which in turns requires the applicant to sign an expansive Code of Behaviour specified by the Minister in a legislative instrument (IMMI 13/155) (see Attachment C);
- d) a corresponding visa condition (Condition 8566) enabling a BVE to be cancelled for breaches of the Code of Behaviour. The legislative instrument specifying the Code of Behaviour (IMMI 13/155) is due to sunset on 1 April 2024;
- e) a corresponding amendment to Schedule 1 (Item 1305) to prevent a person from being able to lodge a valid application for a BVE if they previously held a BVE that was cancelled for on a ground specified in reg 2.43(1)(p) or (q) or for failure to comply with condition 8566 (breach of the Code of Behaviour); and
- f) subsequent amendment (in 2021) to Schedule 2 (criteria for BVR grant) to allow for the imposition of Condition 8566 on a BVR where a person has previously signed the Code of Behaviour in relation to their BVE.

Direction 63

- 6. Direction 63 requires decision-makers to apply the cancellation grounds under section 116 of the Act on the grounds in Regulations 2.43(1)(p) and (q) rigorously, which can result in some individuals having their BVE cancelled on the basis of being charged with relatively low level offences. In some instances, those former BVE holders are subsequently acquitted of the offence/s, or the charges are dropped.

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Code of Behaviour (IMMI 13/155) and condition 8566 (must not breach code of behaviour)

10. Clause 050.225 of Schedule 2 to the Regulations, with PIC 4022, requires non-citizens who have previously been granted a BVE under section 195A of the Act to sign a Code of Behaviour, which is set out in a legislative instrument (IMMI 13/155) for the grant of a subsequent BVE. The Code of Behaviour contains a list of expectations about how a BVE holder is to behave while in Australia. Breach of the Code of Behaviour could impact the BVE holder's income support or lead to the cancellation of the person's visa and their return to immigration detention.
11. In broad terms, the Code of Behaviour requires the BVE holder to obey all Australian laws, cooperate with lawful instructions by police or government officials (including in relation to visa status resolution) and refrain from anti-social or unacceptable behaviour, including specifically ensuring appropriate consent in any sexual contact with others.
12. The Code of Behaviour was introduced in December 2013 at a time when there were large numbers of UMAs (over 20,000) who had been released into the community on BVEs pending processing of their application for temporary protection visas.

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14. Legislative instrument IMMI 13/155, which sets out the Code of Behaviour is due to automatically repeal ('sunset') on 1 April 2024 in accordance with section 50 of the *Legislation Act 2003*.

s. 47E(d)

s. 47C(1)

Background

Introduction of Regulations 2.43(1)(p) and (q)

18. Regulations 2.43(1)(p) and (q) were introduced in June 2013 in order to address instances where BVE holders (many of whom were UMAs) were charged with offences but released on bail pending court proceedings.
19. The new prescribed grounds in these Regulations gave decision-makers increased scope to cancel the BVE of a person who:
 - a) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or

- b) is the subject of an Interpol notice; or
- c) is of security concern.

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s. 47E(d)

Section 499 of the Act - Ministerial Directions

- 22. Section 499 of the Act provides that the Minister may give written directions to a person or body who has functions or powers under the Act about the performance of those functions or the exercise of those powers. Delegates of the Minister, and AAT members that conduct merits review of reviewable cancellation decisions, must comply with directions made under section 499 of the Act. The Minister is not personally bound by these directions.
- 23. Ministerial Directions can require a decision-maker exercising powers under section 116 of the Act to take into account certain factors when exercising their discretion and generally to give more weight to certain considerations or less weight to other considerations. They cannot, however, direct a decision-maker to make a particular decision.

Direction 63

- 24. Direction 63 commenced on 12 September 2014 and provides guidance to departmental decision-makers who are delegated to perform functions or exercise powers to cancel the BVE of a non-citizen under subsection 116(1)(g) of the Act relying on the prescribed grounds in Regulations 2.43(1)(p) or (q). Direction 63 also applies to AAT members reviewing visa cancellation decisions made under these provisions.
- 25. Direction 63 requires decision-makers to have regard to two primary considerations in relation to a decision to cancel a person's BVE:
 - a) *...that the prescribed grounds for cancellation at Regulation 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and*
 - b) *the best interests of children under the age of 18 in Australia who would be affected by the cancellation.*

26. Where an individual has had a BVE cancelled under section 116(1)(g) on a ground prescribed in regulation 2.43(1)(p) or (q), they are unable to validly apply for a further BVE, unless that cancellation decision is subsequently set aside by a tribunal or court. The individual will also be limited to only a prescribed range of visas they may apply for by a statutory bar under section 48 of the Act (prescribed visas in regulation 2.12). A UMA may also be subject to the visa application bar under section 46A of the Act, which will prevent them from lodging a valid application for a further visa, unless this is lifted. They will remain in immigration detention until they either depart Australia or are granted a further visa through Ministerial Intervention under section 195A of the Act.

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Introduction of and use of the Code of Behaviour

29. The *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* and the *Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155* commenced on 14 December 2013 for BVEs granted to persons who had previously been granted a BVE under section 195A of the Act. On 16 April 2021, the *Migration Amendment (Bridging Visa Conditions) Regulations 2021* expanded the use of the Code by enabling the Minister to impose condition 8566 (must not breach the Code of Behaviour) on a subclass 070 visa (BVR) granted to a person who has previously signed the Code of Behaviour in relation to a BVE.
30. Condition 8566 stipulates that if a visa holder has signed the Code of Behaviour, they are liable for visa cancellation for any breaches of the Code of Behaviour. Condition 8566 is mandatory for BVE granted to a person who has signed the Code of Behaviour and discretionary for BVRs granted to a person who has previously signed the Code of Behaviour in relation to a BVE.
31. The Code of Behaviour seeks to impose a higher level of accountability for persons who are granted a visa under the Minister's personal powers, and the requirement to abide by the Code of Behaviour (condition 8566) replicates legal requirements that apply to everyone in Australia, and overlaps with other visa conditions (for example, condition 8564 - the holder must not engage in criminal conduct). Breaches of Australian laws may already lead to visa cancellation under section 501(character), section 116(1)(b) or regulation 2.43(1)(p) and (q) under section 116(1)(g).

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s. 47E(d)

s. 47C(1)

Legislative changes to repeal, re-issue or amend the Code

37. PIC 4022 requires the Minister to approve one or more written Codes of Behaviour by legislative instrument for the subclasses of visas specified in the instrument.

38. The current legislative instrument specifying the Code of Behaviour (IMMI 13/155) is due to sunset on 1 April 2024. Because PIC 4022 requires a Code of Behaviour to be specified, the Department advises against allowing the current Code of Behaviour to sunset without replacing the existing legislative instrument or making complementary amendments to the Regulations.

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Consultation – internal/external

42. Immigration Compliance Division, Australian Border Force (ABF) Workforce Division, Legal Group and statistical coordination were consulted on this submission.

Consultation – Secretary / Acting Deputy Secretary / ABF Commissioner

43. The Secretary was not consulted on this submission.

44. The Acting Deputy Secretary Immigration was not consulted on the approach in the submission.

45. The ABF Commissioner was not consulted on the approach in the submission.

Client service implications

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s. 47C(1)

48. On the date of Direction 104's commencement, the Department will publish the signed Direction on LEGEND.com, an electronic database of migration and citizenship legislation and policy documents, available to the public.

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Risks and Sensitivities

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Financial/systems/legal/deregulation/media implications

54. Nil systems or financial implications.
55. Amendments to visa cancellation legislation or policy settings may receive media attention. The Department will work with your office to prepare communications (including talking points) to support the revocation of Direction 63 and any changes to the Code of Behaviour.

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Attachments

Attachment A Ministerial Direction 104 – *Revocation of Direction 63*

Attachment B Ministerial Direction 63 - *Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)*

Attachment C *Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155*

Authorising Officer

Cleared by:

Kirrily Cunningham
A/g Assistant Secretary
Compliance and Community Protection Branch

Date: 03/01/2024

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

Contact Officer s. 22(1)(a)(ii), Director, Character, Integrity and Identity Policy Section, s. 22(1)(a)(ii)

CC

Minister for Home Affairs and Minister for Cyber Security
Secretary
A/g Deputy Secretary Immigration
GM Immigration Policy
GM Legal/General Counsel
FAS Immigration Compliance
AS Legislation Branch
AS Migration and Citizenship Law
AS Character and Cancellation Branch
AS Status Resolution
SD Status Resolution Network
ABF Commissioner

Direction No. 104 - Migration Act 1958 - Direction under section 499
Revocation of Direction No. 63

DIRECTION NO. 104

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Revocation of Direction No. 63

I, Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs, give this Direction under section 499 of the *Migration Act 1958*.

Dated 23 January 2024



Minister for Immigration, Citizenship and Multicultural Affairs

Section 1 Preliminary

1. Name of Direction

This Direction is 'Direction no. 104 – Revocation of Direction No. 63'.

It may be cited as Direction no. 104.

2. Commencement

This Direction commences on 1 March 2024.

3. Revocation

Direction no. 63, given under section 499 of the *Migration Act 1958* (the Act) and dated 12 September 2014, is revoked with effect from the date this Direction commences.

DIRECTION NO. 63

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Bridging E visas

Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)

I, Scott Morrison, Minister for Immigration and Border Protection give this Direction under section 499 of the Migration Act 1958.

Dated 4-9-2014

Scott Morrison

Minister for Immigration and Border Protection

Part 1 Preliminary

1. Name of Direction

This Direction is Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q).

It may be cited as Direction 63.

2. Commencement

This Direction commences on the 12th day of September 2014.

3 Contents

This Direction comprises a number of Parts:

Part one Contains the Objectives of this Direction, General Guidance for decision-makers and the Principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to cancel a non-citizen's visa under either:

- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(p); or
- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(q).

Part two Identifies considerations relevant to Bridging E visa holders in determining whether to exercise the discretion to cancel a non-citizen's visa under 116(1)(g) and regulation 2.43(1)(p) or (q).

4 Part one

4.1 Objectives

- (1) The Object of the *Migration Act 1958* (the Act) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
- (2) Under section 116(1)(g) of the Act, a decision-maker may cancel a visa if they are satisfied that a prescribed ground for cancelling a visa applies to the visa holder.
The prescribed grounds are set out in regulation 2.43 of the *Migration Regulations 1994*.
For the purpose of this Direction, only regulations 2.43(1)(p) and (q) are relevant.
- (3) The purpose of this Direction is to guide decision-makers who are delegated to perform functions or exercise powers under the Act to cancel the visa of a non-citizen under section 116(1)(g) and regulation 2.43(1)(p) or (q). Under section 499(2A) of the Act such decision-makers must comply with a Direction made under section 499. This Direction also applies to Tribunal members reviewing visa cancellation decisions made under section 116(1)(g) and regulation 2.43(1)(p) or (q).

4.2 General Guidance

- (1) The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on Bridging E visas behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. The principles below are of critical importance in furthering that objective.
- (2) The Principles in this Direction provide a framework within which decision-makers should approach their task of deciding whether to cancel a non-citizen's Bridging E visa under section 116(1)(g) because a prescribed ground at regulation 2.43(1)(p) or (q) applies to the holder. The relevant factors that must be considered in making such decisions are identified in Part two of this Direction.

4.3 Principles

- (1) Mandatory detention applies to any non-citizen who arrives and/or remains in Australia and who does not hold a visa that is in effect.
- (2) All non-citizens residing in the community are expected to abide by the law. This is particularly relevant where the Minister for Immigration and Border Protection has used his personal non-delegable power to grant a non-citizen in immigration detention a visa in the public interest.
- (3) The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.
- (4) In order to effectively protect the Australian community and to maintain integrity and public confidence in the migration system, the Government has introduced measures that support the education of Bridging E visa holders about community expectations and acceptable behaviour. These measures encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where Bridging E Visa holders do not abide by the law.
- (5) Bridging E visa holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behavior or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing.
- (6) The person's individual circumstances, including the seriousness of their actual or alleged behaviour, and any mitigating circumstances are considerations in the context of determining whether a Bridging E visa should be cancelled.

Part two - Section 116(1)(g) and regulation 2.43(1)(p)

5. Prescribed grounds under regulation 2.43(1)(p)

- (1) Where more than one ground for cancellation under section 116(1) is relevant to the facts of the case, the decision-maker should consider cancellation under the most appropriate ground based on the evidence before the decision-maker. For instance, where there may appear to be non-compliance with condition 8564 because a visa holder has been charged with an offence against a State or Territory law, the ground at section 116(1)(g) and regulation 2.43(1)(p) would generally be the more appropriate cancellation ground, rather than the ground at section 116(1)(b), namely, non-compliance with a condition of the visa.
- (2) The grounds for cancellation at regulation 2.43(1)(p)(i) and (ii) are enlivened when a visa holder is convicted of, or charged with, any offence, irrespective of the seriousness of the offence. However, the seriousness of the offence may be considered as a secondary consideration in the exercise of discretion under section 116(1).
- (3) Where a Bridging E visa holder has been charged with an offence(s), but the charge(s) is/are dismissed, cancellation is not appropriate. Similarly, where a Bridging E visa holder has been charged with an offence but has been found by a court to be not guilty or the charge is otherwise dismissed, cancellation is also not appropriate.

5.1 How to exercise the discretion

- (1) Informed by the Principles in paragraph 4.3, a decision-maker must take into account the primary and secondary considerations in Part two of this Direction, where relevant, in order to determine whether a Bridging E visa holder should have their visa cancelled.
- (2) Both primary and secondary considerations may weigh in favor of, or against, cancellation of a Bridging E visa.
- (3) The primary considerations should generally be given greater weight than any secondary considerations.
- (4) One primary consideration may outweigh the other primary consideration.
- (5) In applying the considerations (both primary and secondary), information and evidence from independent and authoritative sources should be given greater weight than information from other sources.

6. Primary considerations

(1) In deciding whether to cancel a non-citizen's Bridging E visa under the prescribed grounds in regulation 2.43(1)(p) or (q), the following are primary considerations:

- a. the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and
- b. the best interests of children under the age of 18 in Australia who would be affected by the cancellation.

6.1 The Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously

(1) In weighing the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously, decision-makers should have regard to the principle that the Australian Government has a low tolerance for criminal behaviour, of any nature, by non-citizens who are in the Australian community on a temporary basis, and who do not hold a substantive visa. This is particularly the case for non-citizens who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention while their immigration status is being resolved.

6.2 The best interests of any children under the age of 18 in Australia who would be affected by the cancellation.

- (2) Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of any children under 18, who would be affected by the decision.
 - a. in considering the best interests of the child, decision-makers should have regard to the fact that the cancellation of a Bridging E Visa under the prescribed grounds in regulation 2.43(1)(p) or (q) does not necessarily represent final resolution of a person's immigration status in Australia.

7. Secondary considerations

- (1) In deciding whether to cancel a non-citizen's Bridging E visa, the following secondary considerations must be taken into account:
- a. the impact of a decision to cancel the visa on the family unit (such as whether the cancellation will result in the temporary separation of a family unit);
 - b. the degree of hardship that may be experienced by the visa holder if their visa is cancelled;
 - c. the circumstances in which the ground for cancellation arose (such as whether there are mitigating factors that may be relevant, as well as the seriousness of the offence, the reason for the person being the subject of a notice (however described) issued by Interpol, or the reason for the person being under investigation by an agency responsible for the regulation of law enforcement);
 - d. the possible consequences of cancellation, including but not limited to, whether cancellation could result in indefinite detention, or removal in breach of Australia's non-refoulement obligations, noting that a decision to cancel a Bridging E visa does not necessarily represent a final resolution of a person's immigration status;
 - e. delegates may also consider any other matter they consider relevant.

IMMI 13/155

**Commonwealth of Australia***Migration Regulations 1994***CODE OF BEHAVIOUR FOR PUBLIC INTEREST CRITERION 4022**

(Schedule 4, Part 4, Clause 4.1)

I, *SCOTT MORRISON*, Minister for Immigration and Border Protection, acting under clause 4.1 of Schedule 4 to the *Migration Regulations 1994* ('the Regulations'), approve the code of behaviour specified in the Schedule to this instrument for the purpose of applicants seeking to satisfy the criteria for the grant of a Subclass 050 Bridging (General) visa.

This Instrument, IMMI 13/155 commences on 14 December 2013, immediately after the commencement of *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013*.

Dated 12.12.2013

Scott Morrison

Minister for Immigration and Border Protection

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

Schedule

Code of Behaviour

This Code of Behaviour contains a list of expectations about how you will behave at all times while in Australia. It does not contain all your rights and duties under Australian law. If you are found to have breached the Code of Behaviour, you could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you will be returned to immigration detention and may be transferred to an offshore processing centre.

While you are living in the Australian community:

- You **must not** disobey any Australian laws including Australian road laws; you **must** cooperate with all lawful instructions given to you by police and other government officials;
- You **must not** make sexual contact with another person without that person's consent, regardless of their age; you must never make sexual contact with someone under the age of consent;
- You **must not** take part in, or get involved in any kind of criminal behaviour in Australia, including violence against any person, including your family or government officials; deliberately damage property; give false identity documents or lie to a government official;
- You **must not** harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- You **must not** refuse to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes;
- You **must** co-operate with all reasonable requests from the department or its agents in regard to the resolution of your status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

I, _____ [name to be written] _____ agree to abide by this Code of Behaviour while I am living in Australia on a Bridging E visa. I understand that if I do not abide by the Code of Behaviour my income support may be reduced or ceased, or my visa may be cancelled and I will be returned to immigration detention.

Signature: _____

Date: _____