

## Judicial Review at the Federal Circuit Court

### Who is this Infosheet for?

If the Immigration Assessment Authority (IAA) or the Administrative Appeals Tribunal (AAT) has made a negative decision (i.e they have agreed with the Department of Home Affairs' (Department) decision not to grant you a Protection visa), you have the right to seek review of that decision in the Federal Circuit Court (FCC). This is often called 'judicial review'. This Infosheet is about applying to the FCC to have your IAA or AAT decision reviewed.

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### IMPORTANT

- The deadline to apply to the FCC is 35 days after the date of your AAT or IAA decision.<sup>1</sup> This date may be different to the date of the notification letter about your decision. See '*Locating the date of notification and date of decision*' below.
- Applying to the FCC can be a very expensive process if you don't succeed. You should seek advice from a lawyer about your chances of success as soon as possible.
- To succeed you will need a lawyer to provide ongoing assistance to you. There is limited free legal assistance available and it is only provided by ASRC and other free providers for the strongest cases.
- It is very important that you obtain legal advice from a lawyer with expertise in migration law as soon as you can after receiving your decision from the IAA or the AAT.
- The court process can last for three years or more and during that time you may not be entitled to a Bridging visa, work rights or Medicare.
- If you win at the FCC, you do not get a Protection visa. Your case goes back to the AAT or the IAA to be reconsidered.

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### Locating the date of decision and date of notification

#### *If you received an IAA decision*

Your IAA decision will most likely have been sent to you with a notification letter. The date of the notification letter and the date of decision can sometimes be different and it is important you locate the date of your decision as you have **35 days from the date of decision** to apply to the FCC.

Sometimes the date of notification and the date of decision is the same, but it is very important you check this. The front page of the decision looks like this (the date of decision is circled):



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

[Redacted]

IAA reference: [Redacted]  
Department ICSE Client ID: [Redacted]

Date and time of decision: 17 March 2020 10:05:00

**Decision**

The IAA affirms the decision not to grant the referred applicant a protection visa.

*If you received an AAT decision*

Your AAT decision will most likely have been sent to you with a notification letter. The date of the notification letter and the date of decision can sometimes be different and it is important you locate the date of your decision as you have 35 days from the date of decision to apply to the FCC. The notification letter looks like this (the date is circled at the top of the document):

Sometimes the date of notification and the date of decision is the same, but it is very important you check this. The front page of the decision looks like this (the date of decision is circled):



**Administrative Appeals Tribunal**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**APPLICANT:** [Redacted]

**CASE NUMBER:** [Redacted]

**HOME AFFAIRS REFERENCE(S):** [Redacted]

**COUNTRY OF REFERENCE:** [Redacted]

**MEMBER:** [Redacted]

**DATE:** 6 December 2019

**PLACE OF DECISION:** [Redacted]

**DECISION:** [Redacted]

[Redacted]

## What can the FCC do?

The FCC can only look at whether there was an error of law in the way the AAT or IAA decided your case. An “error of law” could be a mistake in the way the law has been applied to your case or the process they followed.

The FCC can only consider whether the AAT or IAA made a mistake in the way they understood the law or did something they weren’t allowed to do when assessing your case. This means that the FCC cannot consider the facts of your case - they cannot consider any new evidence about your protection claims and cannot make a decision about whether you are owed protection in Australia.

## How do I apply to the FCC?

In order to apply for review to the FCC, you need to complete an application and give it to the FCC at their Registry. You also need to pay the application fee, or complete a form requesting that the application fee be waived on the basis of financial hardship.

Your application to the FCC must include certain documents so that it is accepted by the FCC registry, making it a ‘valid’ application.

The documents you **must** include in your application are:

1. An “Application under Migration Act” form, which can be found here: [http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/migration/migration\\_application](http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/migration/migration_application)
2. An affidavit – this is a statement signed in front of a qualified person (e.g. a lawyer, a Court Registrar or a Justice of the Peace). Your affidavit must confirm that you are the Applicant making an application to the FCC and that you are seeking to have your IAA or AAT decision reviewed.

A template affidavit you can use can be found here:

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/All+Jurisdictions/form-fcc-affidavit>

A copy of your IAA or AAT decision must be attached to your affidavit. There is a coversheet, called an Annexure Sheet, which must be added between the Affidavit and the copy of your AAT or IAA decision. This Annexure sheet is included in the Affidavit template linked above.

3. An application for fee exemption if you cannot afford to pay the lodgement fee (see below for further information and links to the forms).

If you need help completing these documents you can seek assistance from a lawyer. It is important that you try and find a lawyer to assist you as soon as you receive your decision to allow enough time for the lawyer to review your documents and give you advice. Please note that any lawyer acting for you in your application must be satisfied that your case has reasonable prospects.<sup>2</sup> Please refer to the **attached** guides that will show you how to complete an Application under the Migration Act and an affidavit.

## What do I do with the above documents once completed?

When you apply to the FCC, you must take a completed and signed copy of each of the above listed documents to the FCC Registry. The FCC will keep the original copy and give you two stamped copies of the documents. One copy is for you to keep. One copy is for you to provide to the Department of Home Affairs to let them know that you have lodged an application at the FCC.

It is very important that you look after your copy of the stamped FCC application as you will need it when you go to appointments at the Department or 'to apply for work rights or Medicare, or when you speak to lawyers to get legal advice.

After you have lodged your application with the Court, and the Court have 'stamped' your documents and given you back a stamped copy, you must take a copy to the Department of Home Affairs. You must do this within seven days of applying to the FCC. This lets the Minister and the Department know about your application to the FCC.

The address for the Department in Victoria is:  
2 Lonsdale Street  
Melbourne  
Victoria

### **How much will it cost?**

**Application fee:** There is an application fee to apply to the FCC. The fee usually changes each year.<sup>3</sup> As of 6 August 2020 the application fee was \$690 but do check yourself as the fees can change.

You can find the current fee here:

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/>

If you can show you have financial difficulties and cannot pay the fee, or if or are in immigration detention or prison, you can apply not to pay the fee (i.e. a fee exemption).

To apply not to pay the fee, you must fill in a form and give it to the Court at the same time as giving them your FCC application.

To apply not to pay the fee because you don't have enough money (i.e. fee exemption on the basis of financial hardship) you must use the Application for Exemption from Paying Court Fees – Financial Hardship' form, which can be found here: <https://www.fedcourt.gov.au/forms-and-fees/court-fees/exemptions/guide-to-form-financial-hardship>

**If you are in in immigration detention**, you can use a different form to apply to not pay the fee. This is called an 'Application for Exemption from Paying Court Fees – General'. This form is available here: <https://www.fedcourt.gov.au/forms-and-fees/court-fees/exemptions/guide-to-form>

**Other Court fees:** Throughout the FCC process there will be other fees payable to the Court (for example, a fee for your hearing), other than the initial application fee mentioned above. Each time you receive an invoice for a Court fee, you can apply not to pay it using the forms linked above (depending on whether you don't have money to pay the fees or because you are in immigration detention or prison). You have to apply for an exemption for each fee separately using the application forms linked above, following the same process explained above. This means, each time you receive an invoice from the FCC for a Court fee you have to either demonstrate that you cannot pay that fee due to financial hardship or because you are in immigration detention or prison.

**Minister's legal fees, or 'costs':** If you lose your court case, you will be charged for the Minister's legal fees. This can be very expensive. Usually the legal fees are around \$7500 or sometimes more – if you lose your case, this amount will be a debt that you owe the Australian government. This is one of the reasons why it is very important that you get legal advice about the chance of you winning your FCC case (i.e. your prospects of success).

**Your own legal fees:** There are some lawyers who may provide you legal advice and assistance for free, or 'pro-bono' (such as the lawyers at the ASRC), but most lawyers will charge fees for their work. When you speak to a lawyer to get advice or assistance about your FCC application, you

should ask them how much their fees will be and they must give you an estimate. The lawyers must let you know when you will have to pay their fees.

You can apply to Victoria Legal Aid (VLA) for a grant of legal assistance if you cannot afford to pay a lawyer to represent you at the FCC. VLA will talk to you about how much money you and your partner (if you have one) earn and how much money you have saved/your assets (such as any cars or property you own). If you earn too much, or have too much in savings or assets, they will not be able to assist you.

To contact VLA and apply for their assistance visit: <https://www.legalaid.vic.gov.au/get-legal-services-and-advice/get-lawyer-to-run-your-case>

### **Is there a time limit to apply?**

If the IAA or AAT makes a negative decision (i.e. if they agree with the Department's decision to not grant you a Protection visa), you have **35 days** from the date of the IAA or AAT decision to apply to the FCC.

It is important to remember that if you hold a Bridging visa, your Bridging visa might expire sooner (see below, 'What happens to my bridging visa when I apply to the FCC for review?').

If you miss the deadline to apply to the FCC, you can ask the FCC to give you an extension of time to file your FCC application. You must ask for an extension at the same time as giving the Court your application for review and give reasons why you need the extension.

The reasons why you are asking for an extension of time to apply to the FCC must be included in the Application form and the Affidavit (see 'How do I apply to the FCC?' above). You must have very good reasons for missing your initial deadline otherwise the FCC will not grant you an extension of time.

The Court will usually decide whether to give you an extension of time when they make a decision on your entire application. This can sometimes be after you have your final hearing (see 'What happens after I apply?' below).

### **What happens to my bridging visa when I apply to the FCC?**

If you are on a Bridging visa, then that Bridging visa may expire after you have been notified of a negative decision by the AAT or IAA. You might be able to check your Bridging visa expiry date using the Visa Entitlements Verification Online (VEVO) system on the Department's website. You can access VEVO here: <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online>

If you hold a Bridging visa A, B or C it will most likely expire either 28 or 35 days after the date of your AAT/IAA decision. You should seek legal advice about your visa expiry date. You can also check the documents from the Department when your Bridging visa was first granted, or when you received your Department decision as these documents might explain when your Bridging visa expires.

If you hold a Bridging visa E it will most likely expire 28 or 35 days after the date of your IAA or AAT decision, or it might have an entirely different expiry date

It is very important to remember that your Bridging visa might expire BEFORE the deadline to apply to the FCC. In this situation, you should try to lodge your FCC application before your Bridging visa expires. If you do not lodge an application to the FCC before your Bridging visa expires, you will become unlawful.

Once you have applied to the FCC for judicial review, you should apply to the Department for a new Bridging visa using the Form 1005 – Application for a Bridging visa. This form is available

online here: <https://immi.homeaffairs.gov.au/form-listing/forms/1005.pdf>. You can get advice and assistance from a migration agent or lawyer if you need help with this form.

Once you have completed this form, you should attach a copy of your stamped FCC application to it and post it to the DHA office in your state.

It is important to note that not all people who apply for judicial review to the FCC will be granted a Bridging visa while they wait for the outcome of the FCC application. And those who are granted a Bridging visa will often not have the right to work or access to Medicare.

### **Do I need a lawyer to apply to the FCC?**

It is a good idea to have a lawyer review your IAA or AAT decision and help you prepare your FCC application and other court documents, and represent you at your FCC hearing. The Court will only look at the way the IAA or AAT used the law when they made their decision. The Court will not reconsider your refugee claims. This process can involve technical legal arguments, which can be very difficult to understand if you are not a lawyer. Most people do not succeed at the FCC if they do not have a lawyer representing them. You should obtain legal advice and assistance as soon as possible after you receive your decision.

If you do get legal advice, your lawyer should give you advice about whether your case has a chance of success at the FCC. It is important that you talk to your lawyer about this because it can be very expensive to run a court case if there is no chance of success.

A lawyer is not allowed to represent you at the FCC unless they think that your case has a chance of succeeding in Court. Lawyers must also provide you clear advice about their opinion of your chances of winning.

If a lawyer agrees that you have an arguable case in Court and agrees to represent you, they should let the Court know that they are representing you and the Court and Minister's lawyers will send all of the letters and documents about your case to your lawyer directly. If a lawyer agrees to represent you at Court, it is called going 'on the record'.

Usually your lawyer will organise a barrister to argue your case at your court hearing. A barrister is a special lawyer who is an expert in arguing cases in Court.

### **Can my migration agent help me with my FCC hearing?**

If your migration agent is also a lawyer then they might be able to help you with your Court documents and your court hearing.

If your migration agent is not a lawyer, they cannot represent you in Court because only lawyers are allowed to represent people in Court.

### **What happens after I apply to the FCC?**

#### ***Directions hearing***

When you apply to the FCC, you will be given you a date for your first court hearing. This is called a Directions Hearing. This hearing might not happen until 1-2 years after you lodge your FCC application.

This first hearing in the Court is in front of the judge and they will set a timetable of all the important dates for your case. None of the legal arguments about your case will be discussed at this hearing. The judge will usually deal with administrative matters about your application.

You must go to your Directions Hearing at Court or your application will be dismissed. If you are very unwell or unable to go because of an emergency situation, you must let the Court know as

soon as possible that you can't attend and you should try to provide any documents you have that support your reasons for non-attendance.

If you miss your Directions Hearing and your case is dismissed, you should get legal advice as soon as possible. Unless you have a very good reason for missing the Directions Hearing, it is unlikely that you will be able to have your case re-opened by the Court.

### **Next steps in the Court process**

After the directions hearing, you will receive a book of documents with all the information about your case called a "Court Book".

After receiving the Court Book you (or your lawyer) need to make a written argument to the Court about why the IAA or AAT made an 'error of law' in your case. This argument must be sent to the FCC and to the lawyers representing the Minister.

You will receive important letters and documents from the lawyers representing the Minister. You should read these carefully and provide copies of them to the lawyer you are getting help from, if they are still deciding whether they can assist you and are not 'on the record' for your application yet.

You will also receive a written argument in response from the Minister's lawyers.

### **Final hearing**

Once the Court has allocated your case to a Judge, you will be given a 'final hearing' date.

You or your lawyer must attend the final hearing for your case. At the final hearing the Judge will hear your arguments and the Minister's lawyers' arguments in person. The Judge may ask questions about your case. If you have a lawyer representing you, you do not need to speak at the hearing. If you are representing yourself, the Judge will ask you questions about your case.

### **Can I stop my FCC application?**

If you decide that you do not want to continue with your application, you can ask the Court to discontinue your case by filling a form called a Notice of Discontinuance with the FCC Registry.

If you discontinue, you will still have to pay the Minister's legal fees, known as 'costs'. The amount you have to pay will depend on when you discontinue your case.

Normally, you will be required to pay costs according a standard amount set by law. This is referred to as 'scale' costs. The current scale costs for FCC matters is as follows:

<b>Stage your case is at when you discontinue</b>	<b>Costs you will likely owe, 'scale costs'<sup>4</sup></b>
Before or at the the first court date/ hearing (Directions Hearing)	\$1443
After the first hearing but before the final hearing	\$3,606
After the final hearing	\$7,206

The costs you owe if your FCC application is unsuccessful might be more than these 'scale' amounts.

<sup>4</sup> **Federal Circuit Court Rules 2001, Schedule 1 Costs, 'Part 3 – Migration proceedings'.**

## When will I get a decision about my case?

A decision will not usually be given on the day of your final hearing. It generally takes 3 – 12 months to receive a decision but it can also be longer or shorter. If you are in immigration detention, the FCC will try to make a decision on your case as quickly as possible.

## What happens if I win at the FCC?

If you win at the FCC, this does not mean you will be granted a Protection visa. Your case will be sent back to the AAT or the IAA and they will make a new decision based on whether or not you meet the definition of a refugee or are owed protection according to Australia's complementary protection laws.

If your case is sent back to the AAT, you will most likely be invited to a hearing at the AAT. You will have to present all of your claims to the AAT. If there is new information about your case, you can let the AAT know. The AAT Member will decide your case and will have to consider all of the information you give them. You should get legal advice as soon as possible about what to do if your case is sent back to the AAT.

If your case is sent back to the IAA, you will almost certainly not be interviewed. You can give new information to the IAA, but you should provide it to the IAA as quickly as possible as they can make a new decision at any time and usually make decisions within one month. The IAA may not necessarily consider the new information when making a new decision about your case. You should get legal advice as soon as possible about what to do if your case is sent back to the IAA.

## What happens if my case is unsuccessful at the FCC?

If your case is unsuccessful at the FCC, you have 3 options:

1. You can appeal your case to a higher court, known as the Federal Court of Australia (Federal Court); or
2. You can request the Minister to grant you a visa or allow you to apply for a protection visa again (this is called applying for Ministerial intervention). This is very unlikely to succeed and legal assistance is usually not available to assist with this.
3. You can return to your country of origin.

You can appeal to the Federal Court within 28 days of your FCC decision. It is very important that you get legal advice about whether your case will succeed at the Federal Court before you appeal. If you decide to appeal, and you do not win the appeal, you will have to pay the Minister's legal fees – this can be thousands of dollars and will be a debt that you owe the Australian government.

Also, your Bridging visa is likely to expire after the FCC makes a decision to dismiss your case.

**Disclaimer:** This fact sheet provides general information to people seeking asylum in Australia through the onshore protection visa application process according to the law in June 2020. This fact sheet is not legal advice. You should not rely on this fact sheet to make decisions about your immigration matter. We strongly recommend that you get independent legal advice from a registered migration agent. For information about registered migration agents please visit: <https://www.mara.gov.au>. **Last Updated: August 2020**