

3. DECISIONS AND PUBLICATION

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3.2 WRITTEN STATEMENT OF DECISION AND REASONS DECISION AND REASONS

3.2.1 When making a decision on a review, the IAA must make a written statement that sets out the decision and the reasons for it, and records the day and time the written statement was made.³ A decision is taken to have been made by the making of the written statement on the day and time that the written statement is made,⁴ and the IAA has no power to vary or revoke a decision after the day and time that the written statement has been made.⁵ This

² s.473EC(1).
³ s.473EA(1).
⁴ s.473EA(2).
⁵ s.473EA(3).

means that there is no power to reopen a decision that has been made, even where it is clear that a jurisdictional error has occurred.⁶

3.2.2 As a number of the provisions relating to the IAA's decision and reasons are similar to equivalent provisions for the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (the Tribunal), some guidance may be drawn from judicial consideration of those provisions. See Chapter 25 of the MRD Procedural Law Guide for further discussion.

3.2.3 Unlike in the Tribunal's MRD, the IAA cannot give or make a decision orally.

Decision

3.2.4 The written statement must set out the IAA's decision on the review.⁷

3.2.5 In determining a review, the IAA has the power either to affirm a fast track reviewable decision or to remit the decision in accordance with the permitted remittal directions.⁸ Affirming the primary decision leaves it intact, while remitting it returns it to the primary decision-maker for reconsideration.

3.2.6 The permissible remittal directions that the IAA may make are set out in r.4.43 of the Migration Regulations 1994 (the Regulations). They are that:

- the referred applicant must be taken to have satisfied the criteria for the visa that are specified in the direction;⁹ or
- the referred applicant is a refugee within the meaning of s.5H(1);¹⁰ or
- s.36(3) does not apply to the referred applicant;¹¹ or
- the referred applicant satisfies each matter, specified in the direction, that relates to establishing whether the referred applicant is a person to whom Australia has protection obligations because the criterion mentioned in s.36(2)(aa) is satisfied in relation to the applicant;¹²
- the grant of the visa is not prevented by ss.91W, 91WA or 91WB of the Migration Act.¹³

3.2.7 The IAA may not, however, remit with certain directions that encompass the exclusion type provisions relating to serious criminality or national security, namely that:

- s.5H(1) applies to the referred applicant;¹⁴ or

⁶ *CLV16 v MIBP* [2017] FCCA 1200 (Judge Street, 5 June 2017) at [5] - [7]. The Court did not accept that the words 'a review under this Part' in s.473EA meant that the decision must be a valid decision, in the sense of being lawful, and found that even if the IAA was of the view it had not complied with a statutory requirement or had denied the applicant procedural fairness it did not have the power to reopen a decision once the steps in s.473EA(2) had been taken. The principles of reopening an administrative decision in *MIMA v Bhardwaj* (2002) 209 CLR were considered under a different statutory scheme and s.473EA made clear that the IAA lacked the power to recall its decision on the basis it had failed to make a decision under Part 7AA of the *Migration Act 1958*.

⁷ s.473EA(1)(a) and (b).

⁸ s.473CC(2) and r.4.43(1).

⁹ r.4.43(2)(a).

¹⁰ r.4.43(2)(b).

¹¹ r.4.43(2)(c).

¹² r.4.43(2)(d).

¹³ r.4.43(4).

¹⁴ r.4.43(3)(a).

- s.5H(1) does not apply to the referred applicant because of s.5H(2);¹⁵ or
- the referred applicant satisfies, or does not satisfy, the criterion in s.36(1C);¹⁶ or
- the referred applicant satisfies a matter that relates to establishing whether:
 - there are serious reasons for considering that the referred applicant has committed certain serious crimes (crimes against peace, war crimes, crimes against humanity, or serious non-political crimes before entering Australia) or is guilty of acts contrary to the purposes and principles of the United Nations;¹⁷ or
 - there are reasonable grounds that the referred applicant is a danger to Australia's security or the Australian community (in circumstances involving a conviction for a particularly serious crime).¹⁸

Reasons

- 3.2.8 In addition to setting out its decision on the review, the IAA's written statement must also set out its reasons.¹⁹ This includes its findings on material questions of fact and the evidence or other material on which those findings were based.²⁰
- 3.2.9 In considering similar provisions about reasons in the MRD context, the courts have made a number of observations about what is required, which would appear equally applicable to the IAA. For example, reasons should flow logically and address each necessary material fact and question systematically.²¹ The obligation to set out the reasons for decision requires the IAA to resolve competing facts where there are conflicting accounts,²² and a failure to address each necessary material fact and question systematically could indicate to a court that a relevant claim, or integer of a claim, has not been considered.
- 3.2.10 While the Courts have held that reasons for administrative decisions should not be scrutinized 'with an eye keenly attuned to the perception of error',²³ it may in some circumstances be inferred from a failure to expressly deal with an issue in the reasons for a decision, particularly in relation to contentious issues, that there has been a failure to consider it.²⁴ In *MIMA v Yusuf*, for example, Gummow and Hayne JJ observed that s.430 'entitles a court to infer that any matter not mentioned in the s.430 statement was not considered to be material. The identification of what the decision maker considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration'.²⁵

¹⁵ r.4.43(3)(b).

¹⁶ r.4.43(3)(c).

¹⁷ r.4.43(3)(d).

¹⁸ r.4.43(3)(e).

¹⁹ s.473EA(1)(b).

²⁰ Although not expressly set out in s.473EA(1) itself, the requirement to provide written reasons includes to also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based: s.25D of the *Acts Interpretation Act 1901*. See also *MIBP v AMA16* [2017] FCAFC 136 (Dowsett, Griffiths and Charlesworth JJ, 30 August 2017) at [74] and *CVS16 v MIPB* [2017] FCCA 249 (Driver J, 18 May 2017) at [38].

²¹ See *MZYJN v MIAC* [2011] FCA 548 (North J, 12 May 2011).

²² *SZMIB v MIAC* [2008] FMCA 1433 (Raphael FM, 20 October 2008) at [18].

²³ *WAEE v MIMIA* (2003) 75 ALD 630 at [46].

²⁴ See e.g. *MIAC v Khadgi* (2010) 190 FCR 248 at [64]-[65]; *SZODR v MIAC* [2010] FCA 1362 (Jessup J, 8 December 2010); *MIBP v SZRUT* [2013] 1276 (Rares J, 20 November 2013).

²⁵ *MIMA v Yusuf* (2001) 180 ALR 1 per Gleeson CJ at [10], McHugh, Gummow and Hayne JJ at [69]. In *CVS16 v MIPB* [2017] FCCA 249 (Driver J, 18 May 2017) the Court, citing *Yusuf*, inferred that the IAA did not consider documents to be material that it had not referred to in its decision (at [38]).

3.2.11 To avoid uncertainty, the IAA should be clear about the basis or bases on which a decision has been reached.²⁶ Any alternative reasons for a decision should also be expressly identified as such in within the written statement to avoid uncertainty.²⁷

Addressing claims

3.2.12 As the failure to address a claim will involve jurisdictional error,²⁸ Reviewers need to ensure that they consider not only specific incidents which may be raised by a referred applicant in detail, but also claims of a more generalised nature that arise on the evidence (for example, the general situation of Tamils in Sri Lanka or generalised violence in Afghanistan or Pakistan).²⁹ If a claim is not apparent on the material available to the IAA, the IAA is not required to consider it.³⁰

3.2.13 Where claims presented by a referred applicant are numerous and interrelated, Reviewers must be conscious to address each integer of each claim as raised³¹ and ensure that claims are not mischaracterized or misconstrued³² such that the claim actually being made is not squarely addressed. There is also a duty to consider an applicant's claims cumulatively where this arises on the facts.³³

3.2.14 If a claim is not expressly made by the applicant, the extent of the obligation to consider it may depend on whether or not an applicant is represented. For example, in *MZYPB v MIAC*³⁴ the applicant did not raise a claim until post hearing submissions by his agent and it was submitted the reason for the late claim was because the applicant was not aware of the terms of the statute. The Court found that as the applicant was represented, his agent would have been aware of the terms of the statute.

3.2.15 An applicant can however instruct an agent to make a claim on his or her behalf.³⁵ Accordingly, submissions by an advisor should be considered, however if a submission is not reflected in the applicant's own claims this may be relevant when determining whether to prefer the evidence of an applicant over submissions made by the agent.³⁶

3.2.16 The question of whether a claim has been abandoned such that the IAA is no longer required to consider it must be approached with caution. It should not be assumed that a claim initially made has been abandoned just because it was not articulated on review.³⁷ Whether such a claim needs to be considered will depend on all the circumstances.³⁸

²⁶ See e.g. *MZYLYH v MIAC* [2011] FMCA 888 (Whelan FM, 17 November 2011) at [147] - [148]; *SZPAB v MIAC* [2011] FCA 1253 (Flick J, 4 November 2011) at [28] – [29].

²⁷ See e.g. *AZABC v MIAC* [2011] FCA 1179 (Mansfield J, 20 October 2011) at [19].

²⁸ See e.g. *SZQLV v MIAC* [2012] FMCA 337 (Barnes FM, 24 April 2012); *MZYLYX v MIAC* [2012] FCA 580 (Bromberg J, 5 June 2012); *MZYPA v MIAC* [2012] FCA 581 (Bromberg J, 5 June 2012).

²⁹ See e.g. *NABE v MIMA (No.2)* (2004) 144 FCR 1; *SZQII v MIAC* [2012] FCA 402 (North J, 22 February 2012); *DZADA v MIAC* [2012] FMCA 874 (Reithmuller, FM, 17 August 2012) at [13] and [16].

³⁰ See e.g. *MZYKW v MIAC* [2011] FMCA 630 (Whelan FM, 18 August 2011); *SZTDM v MIBP* [2013] FCCA 2060 (Judge Barnes, 24 October 2013); *SZSGA v MIMAC* [2013] FCA 774 (Robertson J, 6 August 2013): at [43] and [52].

³¹ See e.g. *SZQGJ v MIAC* [2012] FCA 434 (McKerracher J, 2 May 2012).

³² See e.g. *SZQGP v MIAC* [2011] FMCA 701 (Smith FM, 23 September 2011).

³³ See e.g. *SZQEP v MIAC* [2011] FMCA 548 (Emmett FM, 18 July 2011).

³⁴ *MZYPB v MIAC* [2012] FMCA 226 (Turner FM, 30 March 2012).

³⁵ See e.g. *DZACP v MIAC* [2012] FMCA 570 (Driver FM, 7 August 2012),

³⁶ See e.g. *Revollo v MIAC* [2013] FCCA 154 (Judge Emmett, 2 May 2013) at [38].

³⁷ See e.g. *SZQHF v MIAC* [2012] FCA 251 (North J, 20 February 2012); *SZRFQ v MIAC* [2021] FMCA 772 (Smith FM, 11 October 2012) at [28] – [29]; *MZZES v MIBP* [2015] FCA 397 (North J, 29 April 2015).

³⁸ See e.g. *SZTOK v MIBP* [2015] FCA 929 (Buchanan J, 27 August 2015).

Form of the decision record and the inclusion of procedural steps

- 3.2.17 When setting out and applying the relevant law, there is no expectation that the decision-maker constantly find new ways to express well-settled legal propositions, or focus on creative and inventive drafting, merely to demonstrate that it has properly engaged with or actively considered the correct test.³⁹ The fact that the IAA may recite a test in a 'boilerplate' fashion does not mean that it has not engaged with the correct test in an active intellectual manner.⁴⁰
- 3.2.18 Even if the IAA has misstated a test, it will only fall into jurisdictional error if it actually misapplies the test. However, using language in the reasons for the decision that is inconsistent with relevant provisions of the Migration Act or Regulations may lead to an inference that the wrong legal question has been asked.⁴¹
- 3.2.19 There is no statutory obligation to set out the procedures that are followed by the IAA in a particular review.⁴² However, in some cases the decision record may be the only evidence available to a court of such matters. It is, therefore, advisable to make reference in the decision record to the IAA's compliance with relevant statutory obligations in the absence of any other evidence of the matter on file.

Recording day and time of decision

- 3.2.20 The IAA's written statement of decision must record the day and time that it is made.⁴³ A failure to record the day and time that the written statement was made does not affect the validity of the decision.⁴⁴ However, the consequence of such a failure will be that, while the decision remains valid, the review will not be finally determined within the meaning of ss.5(9)(c) and 5(9A)(e) of the Act. In which case, the IAA may not be *functus officio*.

Guidance decisions

- 3.2.21 The President or MRD Division Head may direct, in writing, that a decision of the AAT, the IAA or of the former RRT is to be complied with by the IAA in reaching a decision on a specified kind of fast track reviewable decision.⁴⁵
- 3.2.22 Reviewers must comply with guidance decisions when reviewing a case of the specified kind, unless they are satisfied that the facts or circumstances are clearly distinguishable from the facts or circumstances of the guidance decision.⁴⁶ However, non-compliance with a guidance decision does not mean that the IAA's decision is invalid.⁴⁷

³⁹ *SZONB v MIAC* [2011] FMCA 13 (Nicholls FM, 20 January 2011) at [121].

⁴⁰ *SZONB v MIAC* [2011] FMCA 13 (Nicholls FM, 20 January 2011) at [118]-[133].

⁴¹ In *SZQOT v MIAC* [2012] FMCA 84 (Driver FM, 10 February 2012), for example, the Court found it was imperative decision makers dealing with claims of persecution use the same language as employed in the Migration Act.

⁴² *MIAC v SZGUR* (2011) 241 CLR 594 per French CJ and Kiefel J (Heydon and Crennan agreeing) at [32] and Gummow J (Heydon and Crennan agreeing) at [69].

⁴³ s.473EA(1)(c).

⁴⁴ s.473EA(5)(a).

⁴⁵ s.473FC(1), which describes this as a power of the President; however, all functions of the President may also be exercised by the MRD Division Head: s.473JB(1A). The President can also delegate his powers or functions to the Senior Reviewer: s.473JF.

⁴⁶ s.473FC(2).

⁴⁷ s.473FC(3).

Past IAA decisions

3.2.23 The IAA is not obliged to give any weight to another IAA decision⁴⁸ or have regard to evidence or material in other decisions, including recent past decisions by the same decision-maker.⁴⁹

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁸ See e.g. *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012) the Court held in the MRD context that the Tribunal is not a Court operating within the doctrines of binding authority or judicial comity and that it is not obliged, in law, to give any weight to another Tribunal decision that would have, if followed, provided the applicant with the outcome sought.

⁴⁹ See e.g. *DZAAS v MIAC* [2012] FCA 828 (Dowsett J, 7 August 2012).

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