MRD Procedural Law Guide

Part 4 – Post Hearing and the Decision

23. MAKING A DECISION WITHOUT A HEARING

23. MAKING A DECISION WITHOUT A HEARING[1]

23.1 Introduction

23.1.1 The *Migration Act 1958* (Cth) (the Migration Act) requires the Tribunal, reviewing cases in its Migration and Refugee Division (MRD), to conduct a hearing prior to making its decision.[2] However, the Tribunal may make a decision without inviting an applicant to attend a hearing in three circumstances, which are noted below.

23.1.2 If the Tribunal has invited an applicant to appear before it, but the applicant has not appeared at the scheduled hearing, the Migration Act gives the Tribunal a discretion to proceed to a decision or to dismiss the application without giving the applicant a further opportunity to appear before it.[3] It may also reschedule the hearing to allow the applicant a further opportunity to appear.

23.1.3 This Chapter discusses the procedural considerations when either not inviting an applicant to appear or when proceeding to make a decision without a hearing because the applicant has failed to appear.

23.2 Circumstances in which there is no duty to invite applicant to appear

23.2.1 The three exceptions to the statutory duty to invite an applicant to appear before the Tribunal at a hearing are:

- if the review can be decided in the applicant's favour on the basis of the material before the Tribunal;
- if the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
- if the applicant fails to comply within the prescribed time with a request to provide additional information or to comment on, or respond to, adverse information.[4]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 360(1), 425(1).
[3] ss 362B, 426A. Note that, for Part 5 (migration) reviewable decisions, there is no such discretion where an applicant fails to respond to a s 359(2) or 359A invitation and loses their hearing entitlement.
[4] ss 360(2), 425(2).

These are discussed in detail in Chapter 12 – Review of files and duty to invite applicant to a hearing.

When can the Tribunal proceed to a decision without a hearing

23.2.2 The Tribunal may consider these exceptions, and, where one applies, proceed to make a decision *prior* to an invitation to hearing being issued. If any of these exceptions applies *after* an invitation has been issued, the Tribunal is not precluded from considering and acting on the relevant exception at that point.[5] For example, if the Tribunal invites an applicant to a hearing, and he or she subsequently consents to the Tribunal deciding the review without appearing before it, the obligation to invite the applicant to appear ceases.[6] Similarly, if after inviting an applicant to appear, the Tribunal considers that it can decide the review in the applicant's favour without a hearing, it may proceed to make a decision.

23.2.3 Where the Tribunal decides to cancel a scheduled hearing because one of the exceptions applies, the Tribunal generally communicates this to the applicant at the earliest available opportunity so that the applicant is not misled into thinking they will have an opportunity to appear to give evidence and present arguments on the issues in the review.

Considerations before proceeding to a decision without a hearing

23.2.4 Before proceeding to a decision without inviting an applicant to appear, the Tribunal satisfies itself that an exception in fact applies. This will not usually be an issue where the review can be decided in the applicant's favour.

23.2.5 Where an applicant appears to consent to the Tribunal deciding the review without a hearing, members are to be satisfied that the requisite consent has been given. Where an agent consents on an applicant's behalf, the applicant must have effectively authorised the agent to give that consent. The Tribunal may obtain written consent from the applicant directly if there is an unexplained reversal of the applicant's attitude to attending a hearing[7] or if there is any doubt that the agent holds the requisite authority. If the applicant's consent is conditional, the Tribunal will consider whether the consent is effective in the circumstances. For example, if

[5] *SZIMG v MIAC* [2007] FMCA 1724 at [38]–[39], upheld in *SZIMG v MIAC* [2008] FCA 368 and application for special leave to appeal refused in *SZIMG v MIAC* [2008] HCASL 437. The Federal Court held the Tribunal was entitled to proceed to decide the review on the basis of the applicant's consent to the matter being determined without a hearing, in circumstances where consent was given after the Tribunal had informed him that it could not decide the review in his favour on the available material.
[6] In circumstances where the Tribunal is proceeding without a hearing on the basis of the applicant's consent, it is doing so pursuant to ss 360(2)(b) and 425(2)(b): see *SZIMG v MIAC* [2007] FMCA 1724, upheld in *SZIMG v MIAC* [2008] FCA 368. This is separate and distinct from the power in ss 362B and 426A to proceed where an applicant *fails to appear* at a scheduled hearing. A reference within the Tribunal's decision to the wrong power, e.g. ss 362B or 426A, will not vitiate the Tribunal's decision however, provided the Migration Act nevertheless provided the capacity for the Tribunal to do as it had done: *Nadesan v MIAC* [2013] FMCA 152 at [10]–[12]. See also *K.C. v MIAC* [2013] FCCA 294 at [15] and *Guachan v MIAC* [2013] FCCA 385 at [9]. Likewise, an error in a hearing invitation which has been sent will not give rise to jurisdictional error if the applicant consents to the Tribunal deciding the review without a hearing: *SZMMK v MIAC* [2008] FMCA 1459 at [30]–[31]. See also *SZOXA v MIAC* [2011] FMCA 298 at [38]–[40] where the Court held at [39] that relinquishing the right to attend a hearing meant the obligation for the hearing ceases at that point. Citing *NBHP v MIMIA* [2005] FCA 1857, the Court found no error in the Tribunal proceeding to a decision before the hearing date where the applicant declined an invitation to attend.
[7] *MIMIA v SZFML* (2006) 154 FCR 572 at [71], [72], [74].

the applicant only consents to the Tribunal deciding the matter without a hearing if the issues before the Tribunal are the same as for the delegate, the exception in s 360(2)(b) or 425(2)(b) may not be engaged if the Tribunal intends to decide the matter on a different basis. A failure to respond to a hearing invitation is not taken as consent to the Tribunal making a decision without the applicant appearing.[8]

23.2.6 Where an applicant has failed to comply within the prescribed period to an invitation to provide additional information or to comment on, or respond to, adverse information, then the Tribunal may consider that the last exception listed above applies.[9] For this exception to apply, the relevant invitation must have complied with the applicable statutory requirements. In the case of a failure to respond to a ss 359A or 424A invitation, for example, members consider whether the invitation complied with all of the requirements of those provisions (see Chapter 10 – Statutory duty to disclose adverse information). Additionally, the invitation must comply with the applicable statutory notification requirements (e.g. being sent to each relevant person[10] by a method specified in ss 379A or 441A and giving the prescribed period for response). If the invitation to which the applicant has failed to respond did not meet the relevant statutory requirements, then this exception to the obligation to invite an applicant to appear will not arise.

23.2.7 If any of the exceptions to the duty to invite an applicant to appear apply, the applicant is not 'entitled' to appear before the Tribunal for a hearing.[11] The loss of this entitlement has different consequences for applicants seeking review under Part 5 of the Migration Act, and those seeking review under Part 7 (discussed below). However, in both cases, the loss of entitlement does not affect the Tribunal's other statutory obligations or powers.[12] For example, the Tribunal may still be required to disclose adverse information to an applicant in writing under ss 359A or 424A. The Tribunal may also consider it appropriate to invite the applicant or another person to provide additional information under ss 359 or 424.

Part 7 (protection) reviews

23.2.8 For a review of a protection visa decision under Part 7 of the Migration Act, the power to proceed to a decision without inviting the applicant to a hearing is discretionary if any of the three exceptions apply. The Tribunal may, if it considers it appropriate in the circumstances, invite an applicant to a hearing, although s 425(3) makes it clear that there is no statutory obligation to do so.

[8] *Cabal v MIMA* [2001] FCA 546 at [18].
[9] See, for example, *SZJDT v MIAC* [2007] FMCA 544 at [17] and *Singh v MIMAC* [2013] FCCA 1421 at [49].
[10] ss 379EA and 441EA provide that if two or more persons apply for review of a decision together, then documents given to any of them in connection with the review are taken to be given to each of them. These sections apply to applications for review lodged on or after 27 October 2008 and those made before that date but undecided as at 27 October 2008: *Migration Legislation Amendment Act (No 1)* 2008 (Cth).
[11] ss 360(3), 425(3).
[12] In *Aoun v MIAC* [2011] FMCA 47, the applicant did not reply to a s 359A invitation within time, but subsequently wrote to the Tribunal requesting that it delay making a decision pending a further sponsorship/nomination application. The Court commented at [20] that s 359C(2) did not require the Tribunal to proceed to make a decision but rather it had a discretion to either proceed or to delay taking that step in accordance with the applicant's request. The Court found no error in the exercise of the Tribunal's discretion to decline the applicant's request to delay making the decision.

23.2.9 In considering whether to invite an applicant to appear, the Tribunal takes any relevant circumstances into account. A failure to do so may lead to an unreasonable exercise of the Tribunal's discretion and a potential breach of s 425. What is relevant depends upon the circumstances of the case, but may include any explanation for a late response given by the applicant, or where the applicant did not receive the invitation and the letter is returned unclaimed. There is no statutory obligation to record the Tribunal's reasons for proceeding without a decision. However, a written statement to this effect in the decision record will help demonstrate that the Tribunal appreciated that this power is discretionary and took any relevant considerations into account.

Part 5 (migration) reviews

23.2.10 In contrast, the Tribunal, in reviewing a migration decision under Part 5 of the Migration Act does not retain any discretion or power to enable an applicant to appear before it if any of the three exceptions apply. This is because s 363A provides that if a provision states that a person is not entitled to do something, then the Tribunal does not have power to permit the person to do that thing.

23.2.11 In *M v MIMA*, Tracey J followed the observations of the Full Federal Court in *Sun v MIMA*[13] to hold that s 363A precludes the Tribunal from offering an applicant a hearing in these circumstances.[14]

23.2.12 In circumstances where the Tribunal does not have any discretion to invite the applicant to a hearing, the Tribunal does retain a discretion to take further steps to obtain information (for example, by writing to the applicant under its general power) and that discretion must be exercised reasonably.[15]

[13] *Sun v MIMA* (2005) 146 FCR 498 at [50].
[14] *M v MIMA* (2006) 155 FCR 333 at [46]. *M* was followed in *Lee v MIAC* [2007] FMCA 1802 at [22], although the Court did not refer to *Khergamwala v MIAC* [2007] FMCA 690, *Balineni v MIAC* [2008] FMCA 888, *Singh v MIAC* (2009) 108 ALD 593 and *Xue v MIAC* [2009] FMCA 421.
[15] See for example *Shri Shiva Mandir Ltd v MIBP* [2018] FCCA 383 at [60]–[64] where the Court rejected the applicant's argument that the Tribunal mistakenly thought its 'hands were tied' and had to proceed to a decision without taking any further steps to obtain information from the applicant. The applicant had lost their entitlement to a hearing due to their failure to respond to a s 359A invitation. The Court held that the reference in the same paragraph of the decision record to the loss of hearing entitlement and its decision to make a decision on the review without taking further steps to obtain further information was a reflection of the link between the two sections of the Act (s 360(3) and s 359C), and did not lead to a conclusion that the Tribunal thought it was obliged to proceed to a decision without taking further steps. See also *Sino-Aus Motor Pty Ltd v MICMSMA* [2022] FCA 686 at [63]–[74]. In this case, the Court held that the Tribunal did not err by not sending out a further request for information (where the applicant had not responded to a s 359(2) invitation) as it had considered sending out a further request but decided not to. The Tribunal recorded its reasons for not seeking further information: that it had sent out a request for information which hadn't been responded to; and the appellant had the opportunity to seek professional advice from their representative. The Court rejected the appellant's contention that the Tribunal's discretion to not send out a further request for information miscarried because it had relied on an incorrect assumption that the appellant had the benefit of professional advice. The Court held that the inference (that the appellant had had the opportunity to seek professional advice) was open to the Tribunal given the appellant was represented and transmission of the s 359(2) invitation was effective, and the inference was not a jurisdictional fact. An application for special leave to appeal the judgment to the High Court was refused: *Sino-Aus Motor Pty Ltd v MICMSMA* [2022] HCASL 192.

23.3 Failure of applicant to appear at scheduled hearing

23.3.1 A failure by an applicant to appear at a scheduled hearing does not absolve the Tribunal of its statutory obligation to review the primary decision under s 348(1) or 414(1), although the nature of the review may vary.

23.3.2 Sections 362B [Part 5] and 426A [Part 7]of the Migration Act provide that if an applicant has been invited under s 360 [Part 5] or 425 [Part 7][16] to attend a hearing and does not appear on the day on which, or at the time and place at which, she or he is scheduled to appear, the Tribunal *may* make a decision on the review without taking any further action to allow or enable the applicant to appear before it[17] or alternatively *may* dismiss the application without any further consideration of the application of information before the Tribunal.[18]

23.3.3 The power to make a decision on the review or to dismiss proceedings for non-appearance only arises if the hearing invitation complied with the relevant statutory requirements. This means that the invitation must have been given to each relevant person[19] by one of the methods in ss 379A [Part 5] or 441A [Part 7][20] and that the prescribed period of notice of the relevant day, time and place of the scheduled hearing has been given.[21] A statement as to the effect of ss 362B and 426A must also appear in the invitation to hearing.[22] If the hearing invitation did not comply with the statutory requirements (see further Chapter 12 – Review of files and duty to invite applicant to a hearing), then the power to proceed to a decision pursuant to ss 362B/426A is not engaged.

[16] Prior to 1 June 1999, s 425 required an applicant be given 'an opportunity to appear'. For this period, the Tribunal should have taken 'all reasonable steps' to contact the applicant: *SZDED v MIMIA* [2006] FMCA 96, following *Uddin v MIMIA* (1999) 165 ALR 243. The situation post 1 June 1999 is set out in this Chapter.

[17] In *SZLPN v MIAC* [2008] FMCA 1434 at [30]–[31], the Court expressed the opinion that the Tribunal's authority to proceed under s 426A(1) [s 362B(1)] does not apply in circumstances where an applicant appears at hearing in response to a hearing invitation but does not appear following an adjournment of that same hearing. Although the Court expressed reliance on *MIMIA v SZFML* (2006) 154 FCR 572, the factual circumstances in that case may be distinguished on the basis that the applicant had informed the Tribunal that he did not wish to appear at the rescheduled hearing.

[18] Sections 362B and 426A were amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015) to enable the Tribunal to dismiss an application if the review applicant fails to appear at the time and date of the scheduled hearing.

[19] Sections 379EA and 441EA provide that, if two or more persons apply for review of a decision together, documents given to any of them in connection with the review are taken to be given to each of them. These sections apply to applications for review lodged on or after 27 October 2008 and those made before that date but undecided as at 27 October 2008: *Migration Legislation Amendment Act (No 1) 2008*.

[20] In *MIMIA v SZFHC* (2006) 150 FCR 439, the Full Federal Court confirmed that the Tribunal's duty under s 425 [s 360] to invite an applicant to appear is discharged if the Tribunal complies with one of the methods set out in ss 425A(2)(a)/441A [ss 360A(2)(a)/379A]. The Tribunal can proceed to make a decision and is not obliged to make enquiries to ascertain whether the invitation was in fact received unless compelling evidence that it was not received is readily available: *Perera v MIAC* [2008] FMCA 1526 at [49].

[21] In *SZLJK v MIAC* [2008] FMCA 694 the Court found at [17] that a hearing invitation requiring the applicants to attend a videoconference at Griffith Police Station and advising them to contact the Tribunal if there was a 'preference' to attend in person in Sydney complied with the statutory requirements.

[22] ss 360A(5), 425A(4). In *Nguyen v MIBP* [2018] FCCA 3045 at [122], the Court found the hearing notice was affected by error because, while it included a statement as to the effect of s 362B(1A), it did not outline the effect of other matters in ss 362B(1B)-(1G), such as the right to apply for reinstatement in the event of dismissal. However, there was no denial of procedural fairness because the applicant was subsequently advised of the right to seek reinstatement in the Tribunal's notification of the decision to dismiss the application. Therefore, non-compliance with s 360A(5) or 425A(4) will not automatically result in jurisdictional error unless there has been some practical injustice to the applicant. The hearing invitation template was updated to reflect the full effect of ss 362B and 426A in May 2016 and invitations sent since this time should not be affected.

23.3.4 If the Tribunal exercises its discretion in ss 362B or 426A, to make a decision on the review or to dismiss proceedings for non-appearance, it must exercise that power reasonably. The Tribunal's reasons generally include a justification for the exercise of the discretion to proceed. In *MIBP v SZVFW*, the High Court held that where the justification has regard to the circumstances (such as the applicant's failure to appear without explanation) and is mindful of the requirement to be fair and just but also to be economical and quick, the Tribunal would ordinarily act reasonably in proceeding to make a decision on the merits without any further attempt to make contact with the applicant, and that it will be rare to find that the exercise of the discretion in this manner would be unreasonable.[23] The requirement that the Tribunal act reasonably does not require the decision to be one which is advantageous to the applicant.[24]

Proceeding to make a decision on the review

23.3.5 If a review applicant fails to appear at the time and date of the scheduled hearing, the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it. If the Tribunal exercises the discretion in s 362B(1A)(a) or 426A(1A)(a), the Tribunal considers whether the written materials on the relevant Departmental and Tribunal files support the case the applicant seeks to make. However, in many cases, the absence of an opportunity to clarify the applicant's claims and evidence in person will mean that the Tribunal will not be satisfied that the applicant's case has been made out.[25]

23.3.6 If the applicant fails to appear at hearing and the Tribunal decides to conduct the review on the papers rather than dismissing the application, the Tribunal's other statutory obligations and powers will be unaffected by the applicant's failure to appear at hearing. For example, if the Tribunal exercises the discretion in s 362B(1A)(a) or 426A(1A)(a), any information before it which would be the reason, or a part of the reason, for affirming the decision under review, may need to be given to the applicant for comment under s 359A or 424A.

23.3.7 However, if the applicant fails to appear, the Tribunal is unable to put them on notice at a hearing of issues which would be dispositive of the review, or hear evidence or submissions on such issues. In this instance, the Tribunal will not fall into jurisdictional error of the type in *SZBEL* (that is, not giving the applicant a sufficient opportunity to give evidence or make submissions about determinative issues arising in relation to the decision under review).[26] This is because the

[23] See *MIBP v SZVFW* [2018] HCA 30 at [69], [84]. [123], [141] where the Court held that the Tribunal's exercise of its power pursuant to s 426A(1) was not unreasonable. The Tribunal had exercised the power to make a decision without taking further action to enable the applicants to appear, referring to the fact that the applicants had been unresponsive and had not attended the Department interview and that it was satisfied the invitation had been sent to the last known address.
[24] *MIBP v SZVFW* [2018] HCA 30 at [15]. Her Honour rejected the primary judge's reasoning which appeared to suggest that the Tribunal should have exercised the discretion in the applicant's favour because it could have done so.
[25] See *NAVX v MIMIA* [2004] FCAFC 287, *SZDXC v MIMIA* [2005] FCA 1306 at [16], *SZBKB v MIMIA* [2005] FCA 1811 at [18], *SZNTW v MIAC* [2009] FMCA 1240 at [112], and *SZRBB v MIAC* [2012] FMCA 995 at [41], [52].
[26] See *ANK15 v MIBP* [2017] FCCA 1269 at [70] where the Court held that by reason of the applicant not attending the hearing, the Tribunal did not need to alert the applicant that it would take a different approach to the evidence to that taken by the

applicant must attend the hearing for a *SZBEL* error to occur,[27] and the Tribunal will have given the applicant the opportunity to be heard, as required by ss 360 or 425, by inviting them to a hearing (which they did not attend).

23.3.8 If the Tribunal exercises the discretion in ss 362B(1A)(a) and 426A(1A)(a) and the Tribunal wishes to rely upon an applicant's non-attendance to draw an inference that he or she lacks credibility, it will generally need to ensure that evidence is available to support such an inference beyond the mere fact of non-attendance. The Tribunal may conduct further checks on the reasons for non-attendance in these circumstances.[28] For example, the Tribunal may not be able to draw an adverse inference from non-attendance if the material before it indicated that the applicant may not have received the hearing invitation.

Dismissal of review application for non-appearance

23.3.9 If a review applicant fails to appear at the time and date of the scheduled hearing, the Tribunal may dismiss the application. The application may be re-instated on request of the applicant if the Tribunal considers it appropriate to do so. If it does not consider it appropriate, or if the applicant does not seek re-instatement, the Tribunal must confirm the dismissal decision.

23.3.10 The dismissal power involves a multi-stage decision making process, comprising the initial dismissal decision, and the reinstatement or confirmation of dismissal decision. Each stage requires the Tribunal to produce a written statement – either an 'interim' s 362C or 426B statement (for initial dismissal and re-instatement decisions) or a 'final' s 368 or 430 statement (for confirmation of dismissal, or on the merits following re-instatement). The Tribunal cannot give these decisions orally.[29]

When can the dismissal power be used?

23.3.11 The dismissal power applies to review applications made on or after 18 April 2015, as well as those made prior to that date where the hearing invitation is sent *on or after* 18 April 2015. Prior to 18 April 2015, if an applicant failed to appear at a scheduled hearing, under ss 362B and 426A the Tribunal did not have the power to dismiss proceedings for non-appearance.

23.3.12 The power to dismiss the application for non-appearance is discretionary and only arises if the hearing invitation complied with the relevant statutory requirements (see above). The power to dismiss will not arise however if the applicant has consented under s 360(2)(b) or 425(2)(b) to the Tribunal deciding the review without

delegate. The Tribunal was entitled to rely on s 426A [s 362B] to proceed without taking evidence. This decision was upheld on appeal, although the Court did not expressly consider this issue: *ANK15 v MIBP* [2017] FCA 1493.
[27] *ANK15 v MIBP* [2017] FCCA 1269 at [69]–[71].
[28] In *SZKUI v MIAC* [2007] FMCA 1387, the Court commented unfavourably on the Tribunal imputing a motivation to the applicant for choosing not to attend the hearing where the only information to support this was the failure of the applicant to reply to the invitation or to appear.
[29] ss 362B(1G), 426A(1G).

them appearing before it,[30] or where the Tribunal does not have the power to invite the applicant to a hearing because they have lost their entitlement to a hearing (which is applicable for Part 5 reviews only).[31]

23.3.13 It is not clear whether the dismissal power is enlivened if an applicant fails to appear at a resumed hearing (that is, where an applicant attends a hearing, the review is subsequently adjourned and another hearing is scheduled). This is because the dismissal power in ss 362B(1A)(b) and 426A(1A)(b) arises where the applicant does not appear on the day and time they are scheduled to appear, but in such circumstances the applicant will have attended the earlier first scheduled hearing (which presumably will have complied with the hearing invitation requirements in s 360A or 425A). Currently, there is no judicial authority on directly on this point.[32]

[30] The effect of the applicant's consent under s 360(2)(b) or 425(2)(b) is to discharge the Tribunal's duty to invite the applicant to a hearing, in which case the applicant is no longer entitled to appear before the Tribunal: ss 360(3) and 425(3). In circumstances where the applicant is no longer entitled to appear before the Tribunal, it is difficult to see in what circumstances they could still be scheduled to appear as required by ss 362B(1)(b) and 426B(1)(b), which means that the dismissal power does not arise. In [redacted], the Court remitted by consent a judicial review application of a Tribunal decision in which the Tribunal dismissed a review application for non-appearance under s 362B(1A)(b) and confirmed the non-appearance dismissal under s 362B(1E) where the applicant had consented to the Tribunal deciding the review without the applicant appearing before it, pursuant to s 360(2)(b). The Minister conceded that the Tribunal's decisions were affected by jurisdictional error, as the applicant was not entitled to appear before the Tribunal under ss 360(3) and 363A, which meant that the Tribunal should have proceeded to decide the review on the material before it (rather than dismissing the review application). See also [redacted], where the Court remitted by consent a judicial review application of a Tribunal decision where the applicant had responded to hearing invitation indicating that they were not attending the scheduled hearing, and the Tribunal proceeded to dismiss the review application. The Minister conceded that the Tribunal's decision was affected by jurisdictional error, as the applicant had, for the purposes of s 360(2)(b), consented to the Tribunal deciding the review without the applicant appearing before it and the Tribunal was prevented from convening a hearing because it had no power to enable the applicant to appear before it; s 363A. See also [redacted]. In [redacted], the applicant had provided consent to the Tribunal deciding the decision without the applicant appearing before it to a previously constituted Tribunal whose decision was quashed by Court order, and upon reconstitution, the Tribunal then invited the applicant to a hearing, at which the applicant did not appear and the Tribunal dismissed the matter. The Court remitted the matter by consent on the basis that the Tribunal had no power to dismiss the application given the applicant had previously consented to the Tribunal deciding the review without the applicant appearing before it. The applicant's consent given to the first Tribunal had not been withdrawn and was maintained upon reconstitution. While these are not binding authorities, they are regarded as persuasive.

[31] In *Akbar v MICMSMA* [2021] FCCA 82 at [53]–[58] the Court found that in circumstances where the applicant did not respond to a s 359(2) request to provide information within the prescribed period because of a 'glitch' in the Tribunal's online portal, that the dismissal power was not available to the Tribunal because the applicant had lost their entitlement to appear before it and therefore the Tribunal had no power to permit them to attend a hearing (by operation of ss 359C(1), 360(2)(c), and 363A, at [37]). The Court rejected the Minister's argument that s 362B is not subject to the operation of s 360(2) or (3), holding that the dismissal power in s 362B is subject to the operation of those provisions (at [53]–[54]). The Court referred to being aware of matters where the Minister had conceded it would be a jurisdictional error for the Tribunal to dismiss a review application for non-appearance where the applicant had consented to the Tribunal making a decision without them appearing before it (s 360(2)(b)), and concluded that it would result in a strained or compartmentalised construction of s 360(2) if only s 360(2)(b) was subject and not s 360(2)(c). The Court held that the Tribunal had exceeded its jurisdiction in dismissing the application for non-appearance, however the error was not jurisdictional as it was not material to the outcome of the decision and it would be futile to remit the application (at [63]–[74]). This outcome turned on the unusual facts of the case, which the Court acknowledged.

[32] In *ETE17 v MIBP* [2018] FCCA 935 at [2] and [30] the Court did not identify any jurisdictional errors in the Tribunal's dismissal of an application where the applicant failed to appear at the resumption of an adjourned hearing. However, the Court did not expressly consider whether the dismissal power arose; it is not clear whether another Court may have reached the same conclusion. Similarly, in *FGV18 v MICMSMA* [2020] FCCA 733 the Court did not identify any jurisdictional errors in the Tribunal's dismissal of an application for non-appearance at a resumed hearing in circumstances where the applicant notified the Tribunal on the day of the hearing that they would not be able to attend the resumed hearing due to illness, and the Tribunal decided not to adjourn the hearing: at [6]–[7], [33] . However, the Court did not consider whether the dismissal power was enlivened; rather it focussed on whether it was it was unreasonable for the Tribunal to dismiss the application. The Tribunal did not consider that the applicant's notification that they would not attend the resumed hearing due to illness meant that the applicant had consented to a decision on the papers (in which case the dismissal power would not have arisen). In *Patel v MICMSMA* [2020] FCCA 1104, the Court upheld the Tribunal's dismissal decision where the applicants did not attend the second hearing but had attended the first hearing (which took place almost a year prior to the second hearing). No arguments were raised before the Court regarding whether the power to dismiss a review application was enlivened where the first hearing had been attended. The Court proceeded on the basis that the discretion to dismiss was enlivened by the applicants' non-appearance at the second hearing but that the discretion must be exercised reasonably in all of the circumstances: at [37]. The Court noted that the delay between the hearings was not insignificant and there was nothing at the end of the first hearing to indicate a further hearing would be required: at [39]. Ultimately, however, the Court found that it was not unreasonable for the Tribunal to dismiss in circumstances where the second hearing invitation met the statutory requirements, there was no evidence to suggest the applicants intended to attend the second hearing, the applicants had not sought an update from the

Therefore, it may be that the dismissal power does not always arise in such circumstances and may depend upon the applicant's engagement with the review process.[33]

23.3.14 If an applicant provides documents to the Tribunal prior to the hearing in response to the hearing invitation and then does not attend the scheduled hearing, the dismissal power remains available to the Tribunal.[34]

23.3.15 If a hearing invitation was sent prior to 18 April 2015 and the matter was adjourned, unless a new hearing invitation is issued after 18 April 2015 which complies with the relevant statutory requirements (see above), the Tribunal cannot use the dismissal power. This does not apply to a mere rescheduling of a hearing. There are no statutory notification requirements for the rescheduling of a hearing, rather the original hearing invitation is relied on.

The initial dismissal decision

23.3.16 If an applicant fails to appear at the scheduled hearing time and date, the Tribunal may dismiss the application without considering it further. However, it is not obliged to dismiss the application and may alternatively make a decision on the merits and give its decisions and reasons under s 368 or 430. In determining when it may be appropriate to make a decision on the papers as opposed to dismissing the application, relevant considerations may include for example if the Tribunal is aware the applicant did not receive the notice, or has otherwise been very actively participating in the review.[35]

23.3.17 If the Tribunal does dismiss the application, it must make a statement under s 362C or 426B that records the decision (i.e. that the application is dismissed), the reasons for the decision (i.e. that the applicant failed to appear having been properly invited), and the time and date of the decision.[36]

23.3.18 Further, the Tribunal must notify the applicant of the dismissal decision within 14 days after the day on which the decision is taken to have been made by giving a copy of the s 362C or 426B statement and a notice advising that the applicant may

Tribunal in six months and the applicants had an opportunity to seek reinstatement: at [40]–[42]. The applicants did not seek reinstatement.

[33] See for example *Gajjala v MIBP* [2018] FCCA 1145 at [3] where the Tribunal dismissed the application for non-appearance in circumstances where the applicant attended the scheduled hearing, sought an adjournment but did not attend the rescheduled hearing and did not seek reinstatement. The Court proceeded on the basis that the dismissal power was enlivened. However, it was not raised as an issue nor was it considered by the Court.

[34] *Kumar v MICMSMA* [2020] FCCA 2170 at [57]–[58]. The Court held that it would be contrary to the scope and purpose of the dismissal power and unambiguous statutory language if the applicant's provision of documentation to the Tribunal prior to the hearing meant that the dismissal power was not available where the applicant failed to attend the hearing. The Court also rejected the applicant's argument that a request contained within the hearing invitation letter to provide any documents that the applicant sought to rely upon, was an exercise of the power under s 359. The Court reasoned that the Tribunal was entitled to seek and would expect the applicant to provide any additional documentation that they might seek to rely upon in the hearing. The judgment was upheld on appeal in *Kumar v MICMSMA* [2021] FCA 713 and an application for special leave to appeal from the Federal Court judgment was refused in *Kumar v MICMSMA* [2021] HCASL 193.

[35] See, for example, *Kang and MIBP* [2017] FCCA 2785 at [28]–[30] where the Court found that the Tribunal's initial decision to dismiss the application was reasonable in circumstances where the Tribunal provided the applicant with a valid hearing invitation, and attempted to remind the applicant of the hearing twice by way of SMS (although these failed to be delivered).

[36] ss 362C(2), 426B(2).

apply for reinstatement within 14 days of receiving the dismissal statement, the courses of action the Tribunal may take, and the consequences of not applying for re-instatement.[37] The Tribunal generally indicates the date by which a reinstatement request must be made in the notification letter. The information sheet accompanying the initial dismissal decision and notification letter explains that such a request must be made within 14 days after receiving notice of the initial dismissal decision. If there is an error in the date by which the applicant may apply for reinstatement, compliance with the requirement to explain the 14-day period will be met by the information sheet.[38]

23.3.19 The method by which the Tribunal notifies the applicant of the dismissal decision may be subject to the principle of reasonableness. In *CAM17 v MICMSMA*,[39] the Court held that the Tribunal's decision to give the appellant the dismissal decision by sending it to their nominated email address was unreasonable in the circumstances (as the Court found that the applicant did not have access to the nominated email account).[40] This led to the appellant not being given a 'real or meaningful opportunity' to make an application for reinstatement, as the email address was used to provide the appellant with the statement describing the effect of ss 426A(1B) to (1F).[41]

23.3.20 The Tribunal must also notify the Secretary of the dismissal decision within 14 days by giving a copy of the s 362C or 426B statement by the specified method.[42]

23.3.21 Subject to the re-instatement power, the Tribunal has no power to vary or revoke a dismissal decision after the day and time the written statement is made.[43]

[37] ss 362C(5)–(6), 426B(5)–(6). However, in *Rahman v MICMA* [2022] FedCFamC2G 855 at [32], the Court found that there was no error in not giving the dismissal decision to the applicant within the 14 day time period as required by s 362C(5) as the error was not material to the final outcome of the matter and the applicant suffered no practical injustice. The applicant requested reinstatement one day after being given the dismissal decision. The Tribunal considered the request and invited the applicant to provide further evidence in support of the reinstatement request, but ultimately confirmed the dismissal decision.

[38] *CCN17 v MICMSMA* [2022] FedCFamC2G 678 at [64]–[69]. The notification letter stated that a request for reinstatement must be made 1 January 1900. Despite this error, the Court found that the Tribunal had complied with its obligation under s 426B(6). The Court held that the information sheet (which accompanied the initial dismissal decision and notification letter) complied with the requirement in s 426B(6) to provide to the applicant a statement describing the effect of s 426A(1B) that an applicant may within 14 days after receiving notice of the decision, apply for reinstatement. The Court noted that the notification letter did not achieve compliance, but the information sheet did. The Court reasoned that s 426B(6) only required the Tribunal to explain the 14-day period and did not require the Tribunal to 'state' the specific date by which a reinstatement application had to be made (cf. *DFQ17 v MIBP* (2019) 270 FCR 492).

[39] *CAM17 v MICMSMA* [2022] FCA 923 at [77].

[40] *CAM17 v MICMSMA* [2022] FCA 923 at [56]–[78]. Five minutes after the scheduled hearing time, the appellant phoned the Tribunal. In a case note recording that conversation, it is recorded that the appellant said 'he missed his hearing date because he hadn't got the notice, because he had changed his email address recently and had also only just got a new telephone.' The Court found that the only logical inference to draw was that the appellant did not have access to the nominated email address, despite it being a 'remarkable coincidence' that the appellant phoned the Tribunal five minutes after the hearing time. The Court rejected the Minister's contention that the appellant must have received notice of the hearing to make the telephone call which was the subject of the case note. In light of this case note about his email address (and other matters), the Court was satisfied that it was unreasonable to send the dismissal decision to the nominated email address and the Tribunal fell into jurisdictional error as the failure to provide the statement describing the effect of ss 426A(1B) to (1F) was material and an important part of the statutory regime.

[41] *CAM17 v MICMSMA* [2022] FCA 923 at [78].

[42] ss 362C(7), 426B(7).

[43] ss 362C(4), 426B(4).

Reinstatement of the dismissal

23.3.22 The applicant may, within 14 days of receiving the dismissal statement, request that the application be re-instated.[44]

How must the request for re-instatement be made?

23.3.23 There is no particular form the request must take. It could be made in writing or orally. What constitutes a request for reinstatement will depend on the circumstances of the matter. An applicant will ordinarily specify that they wish to make a request. Where it is not clear whether a request has been made, the Tribunal may consider whether there is anything on the face of the correspondence to suggest that such a request for reinstatement was being made and whether the applicant was aware that a dismissal decision had been made.[45]

23.3.24 The request must be made within 14 days after receiving the notification of the initial dismissal. When the notification is taken to be received depends on the method the Tribunal used (see Chapter 8 – Notification by the Tribunal). While the request for instatement must be made within 14 days, any evidence to support the request can be provided within a reasonable period following the 14 day period.[46]

Circumstances in which an application may be re-instated

23.3.25 If the applicant requests re-instatement, the Tribunal may either re-instate the application if it considers 'appropriate to do so' or confirm the dismissal.[47] What is relevant to this determination depends upon the particular circumstances of the case, but includes having regard to reasons given by the applicant, whether the applicant actually received the hearing invite, and the history of the applicant's participation in the review.[48]

[44] ss 362B(1B), 426A(1B).
[45] See *Thanthridge v MIBP* [2018] FCA 1230 at [40]–[41] where the Court considered what constitutes a reinstatement request and held that an email from the applicant attaching a medical certificate could not be considered a constructive application for reinstatement because the appellant was unaware at that time that a decision had been made to dismiss the review application and was belatedly providing the material in support of his request for an adjournment. The Court noted that it would be possible for an application for reinstatement to be made prior to receipt of notice of the Tribunal's dismissal decision under s 362C where, for example, the appellant is told orally that the review application has been dismissed and formal notice of that decision is provided later.
[46] *AKO17 v MIBP* [2018] FCCA 2022 at [36]–[40] where the Court found that the Tribunal erred in circumstances where the applicant requested reinstatement shortly before the 14 day period lapsed and the Tribunal responded by telling her that she had until the end of the 14 day period to provide adequate evidence in support of the request. The Court held that the applicant had to be given a reasonable opportunity to provide the evidence and, in the circumstances, giving a deadline of one day (that is, until the end of the 14 day period) was not reasonable.
[47] ss 362B(1C), 426A(1C).
[48] See, for example, *Li v MIBP* [2017] FCCA 2326 at [36]–[38] in which the Court held that it was reasonable for the Tribunal to not reinstate an application where the applicant was correctly invited to a hearing, the Tribunal attempted to contact the applicant by phone prior to the hearing (as the hearing invitations were not successfully delivered), and medical evidence provided by the applicant after the hearing was insufficient to support a claim that the applicant was too ill to attend. The medical evidence was a referral for a pathology test which was dated five days after the hearing and did not specify what condition he was suffering from on the date of the hearing or indicate that he was incapacitated on that day. See also *Singh v MIBP* [2018] FCCA 1361 at [11] and [15], upheld in *Singh v MIBP* [2018] FCA 1927 and application for special leave to appeal refused in *Singh v MIBP* [2019] HCASL 65. The Court found that it was open to the Tribunal to reject an application for reinstatement on the basis that the medical certificate provided by the applicant did not sufficiently explain the applicant's failure to appear at the hearing. See also *CNU16 v MIBP* [2018] FCCA 864 at [26]–[27], upheld in *CNU16 v MHA* [2018] FCA 1662 and application for special leave to appeal refused in *CNU16 v MIBP* [2019] HCASL 56. The Court upheld the Tribunal's

23.3.26 If an applicant requests re-instatement on the basis that they were unfit or unwell to attend the hearing and provides a medical certificate after the hearing to support the reinstatement request, the Tribunal may have regard to the content of the medical certificate in determining whether it is appropriate to re-instate the matter. For example in *Singh v MHA*,[49] the applicant had provided to the Tribunal a medical certificate to support a request to reinstate his application on the basis he was unfit to attend the hearing. The medical certificate stated that the applicant had been 'examined and received Medical Treatment at [the clinic]... [and] will be unfit to continue [their] usual occupation/study'. The Court considered that the detail contained in the medical certificate was 'bland' in its assessment of the fitness of the applicant, which was enough for the Tribunal to be satisfied that the medical certificate contained an inadequate explanation as to why the applicant could not attend the hearing, and therefore there was no error in the manner in which the Tribunal exercised the power in s 362B. The applicant had claimed that there were privacy concerns between the patient and applicant, as to why the certificate was purposely left vague however the Court reasoned that claims as to the privacy of communications between a patient and a medical practitioner do not explain the absence of any detail in a medical certificate as to why a patient is 'unfit' or the manner in which any such 'unfitness' may impair an ability to participate in an administrative hearing. By way of another example, in *BUV17 v MICMSMA,*[50] the applicant provided general and non-specific medical reports which did not address the question as to whether or not the applicant could have appeared before the Tribunal at the time of the Tribunal hearing. The Court held that there was no error in the Tribunal's decision to confirm the dismissal decision.

23.3.27 If the Tribunal does not engage with all of the reasons put forward by the applicant as to why it is appropriate to re-instate the matter and instead confines its consideration to whether the applicant was validly invited to the hearing, this may lead to a finding that the Tribunal has not performed its statutory task as it will have applied an incorrect legal framework.[51]

confirmation of dismissal decision, finding the decision was made reasonably as it had regard to and set out each element of the explanation provided by the applicant in relation to his non-appearance, set out the steps the Tribunal took to allow the applicant to appear, and gave reasons for doubting the applicant's account of events. Further, the Tribunal gave reasons as to why it had decided not to exercise its discretion to reinstate. See also *Pinchu v MICMSMA* [2022] FedCFamC2G 210 where the Court held at [41] that the sole issue, in considering the decision to confirm the dismissal, was whether it was appropriate to reinstate the applicant's review. In his reinstatement request the applicant provided a medical certificate stating that he 'was suffering from a medical illness'. The applicant also argued that he was suffering from a shoulder injury and did not know he could appear by telephone for the hearing or how much information was required in the medical certificate. The Tribunal was not satisfied that the applicant's condition prevented him from attending the hearing or that it was not possible for him to contact the Tribunal to arrange to appear by telephone for the hearing. At [36] the Court held that the Tribunal was not required to specifically advise the applicant that he could attend the hearing by telephone or to give more detailed information about what was required in a medical certificate.

[49] *Singh v MHA* [2019] FCA 723 at [24].

[50] *BUV17 v MICMSMA* [2022] FedCFamC2G 361 at [24]–[25]. The representative had stated that evidence would be provided which demonstrated that the applicant was unable to appear at the hearing, however no such evidence was provided to the Tribunal and the representative relied on general medical reports (pertaining to the applicant's heart condition months prior to the hearing) which did not address the applicant's state of health at the time of the hearing.

[51] *Singh v MIBP* [2018] FCAFC 184 at [30], [37].

How is the decision re-instated?

23.3.28 If the Tribunal decides to reinstate the application, it must do so by making a statement under s 362C [Part 5] or 426B [Part 7] which records the decision (i.e. that the application has been re-instated), the reasons for the decision (i.e. why it appropriate to re-instate), the findings on material questions of fact, the evidence on which the findings were based and the date and time the statement is made.[52] It may also give any directions it considers 'appropriate in the circumstances'. There is no guidance as to the nature of such directions, nor is there any corresponding consequence for not complying with directions made.

23.3.29 The Tribunal has no power to vary or revoke a reinstatement decision after the day and time the written statement is made.[53]

23.3.30 Both the applicant and the Secretary must be given a copy of the statement within 14 days.[54] If an application is re-instated, the application is taken never to have been dismissed, and the Tribunal must proceed to conduct the review accordingly.

Whether to invite the applicant to a further hearing after reinstatement?

23.3.31 Once the Tribunal has determined to reinstate the application, the Tribunal's decision to proceed to decide the review on the papers or invite the applicant to a further hearing is discretionary. In considering the exercise of this discretion, the applicant's request for reinstatement and reasons for not attending the first hearing are relevant considerations.[55] If the Tribunal invites the applicant to a further hearing, the period of notice is discretionary, having regard to the circumstances of the matter.[56] The Tribunal provides reasons when exercising its discretion to not invite the applicant to a further hearing to avoid any inference of acting unreasonably.[57]

[52] ss 362B(1D), 426A(1D).
[53] ss 362C(4), 426B(4).
[54] ss 362C(5)–(7), 426B(5)–(7).
[55] See *Prabhakar v MIBP* [2019] FCCA 1243 at [27], [42], [45]–[46].
[56] See *Jassal v MICMSMA* [2020] FCCA 2415 at [21]–[23], in which the Court considered that where a matter has been dismissed and reinstated, the question needing to be asked in respect of the period of notice of the rescheduled hearing is whether the notice period given in relation to the hearing was 'reasonable', not whether it was the prescribed period (as the period of notice had already been given in respect of the initial hearing which the applicant did not attend, and the prescribed period must only be given once: *MIMIA v SZFML* [2006] FCAFC 152). In determining what is reasonable, it applied the Court's reasoning in *Ogawa v MIAC* [2011] FCA 1358, finding that it involves an objective determination by reference to a list of non-exhaustive factors, including the period of notice given in respect of any initial hearing date, the complexity of legal and factual issues, any opportunity previously extended to an applicant to assemble factual materials, the need to obtain further facts, whether there has been a request for an adjournment and any assessment by the Tribunal member as to the adequacy of the notice. In *Jassal*, the Tribunal gave a notice period of two days which the Court noted was short but in the circumstances of the matter (which included that the factual issue was of 'reasonably short compass', and that the applicant had been on notice of the issue for over six months), it was reasonable. See also *Prabhakar v MIBP* [2019] FCCA 1243 at [42] and [52] in which the Court held that having regard to the circumstances of the case and the principles in *SZVFW*, it was reasonable for the Tribunal to provide three days' notice of the reinstated hearing and to proceed to determine the application without granting a further adjournment, in circumstances where the Tribunal had provided the applicant with five weeks' notice of the first hearing date and where the applicant failed to appear at the initial hearing and the adjourned hearing.
[57] For example, it appears open to a court to find in certain circumstances that the Tribunal acted unreasonably where the Tribunal accepts the applicant's reasons to reinstate the application but does not find those same reasons sufficient to invite the applicant to a further hearing.

Confirmation of the dismissal

23.3.32 Alternatively, if the Tribunal considers it is not appropriate to re-instate the application, it must confirm the dismissal. To confirm the dismissal, the Tribunal must give a written statement under s 368 [Part 5] or 430 [Part 7] (i.e. a final decision record).[58] As with a decision on the review, the statement must set out the decision, reasons, findings of fact, evidence and the date and time the statement was made. If the Tribunal confirms the decision to dismiss the application, the decision under review is taken to be affirmed. However, the Tribunal must not confirm the decision to dismiss an application until after the 14 day period for requesting reinstatement has passed.[59]

23.3.33 If the Tribunal decides to confirm the initial dismissal decision, the Tribunal considers all matters put forward by an applicant in support of a reinstatement application and make express findings on those matters in its confirmation of dismissal decision. For example, in *Singh v MIBP* the Full Federal Court found that the Tribunal had erred because it did not engage with all factual matters advanced by the applicant in his application for reinstatement as the Tribunal's reasons for confirming its initial dismissal decision were narrowly confined to whether the applicant was validly notified of the hearing and the applicant had raised other matters in his application for reinstatement, including that he was not aware that he was required to attend the scheduled hearing.[60]

23.3.34 The usual decision notification requirements that apply to a s 368 or 430 decision also apply to a confirmation of dismissal decision (see Chapter 8 – Notification by the Tribunal).

What if the applicant fails to apply for re-instatement?

23.3.35 If an applicant fails to apply for re-instatement within the 14 day period, the Tribunal must confirm the dismissal by giving a written statement under s 368 or 430 and the decision under review is taken to be affirmed.[61]

[58] ss 362B(1C)(b), 426B(1C)(b).
[59] See *Gajjala v MIBP* [2018] FCCA 1145 at [15]–[17], the Court found the Tribunal erred in confirming the decision to dismiss an application within the 14 day prescribed period, but as the confirmation decision was notified to the applicant after the prescribed period lapsed and the applicant did not make an application for reinstatement within the prescribed period, it would be futile to remit the matter to the Tribunal.
[60] *Singh v MIBP* [2018] FCAFC 184 at [35]–[36].
[61] ss 362B(1E), 426A(1E). See *CYB18 v MHA* [2020] FCCA 819 at [84]–[87] where the Court confirmed that s 426A(1E) on its face requires that the Tribunal must confirm the decision to dismiss where the applicant has not applied for reinstatement in the 14 day period, and that the power to confirm a dismissal decision in s 426A(1E) is not required to be read as subject to s 426A(2) which permits the Tribunal to reschedule the hearing or delay its decision on the review in order to enable the applicant's appearance before it. The Court reasoned that s 426A(2) is concerned with the opportunity given to an applicant to appear before the Tribunal, and is a discretionary power to be exercised *before* the Tribunal makes a decision to dismiss pursuant to s 426A(1A). Once the power to dismiss has been exercised, s 426A(2) does not empower the Tribunal where there is no occasion for the applicant to appear.

Rescheduling the hearing

23.3.36 The Tribunal is not prevented by s 362B or 426A from rescheduling a hearing if it considers this course of action appropriate in the circumstances of the case.[62] The decision to proceed to make a decision without a hearing or to dismiss an application is discretionary.[63] In considering how to exercise this discretion, the Tribunal takes any relevant circumstances into account.[64]

Considerations in determining whether to exercise the discretion to proceed to make a decision or dismiss review application (proceeding without rescheduling)

23.3.37 The matters which the Tribunal takes into account in proceeding to make a decision without a hearing or to dismiss an application depends upon the circumstances of the particular case. The discretion must be exercised reasonably.[65] In *Kazhila v MICMSMA*, the Court held that which option the Tribunal selects (i.e. to review the decision or to dismiss the application) is a matter for it, and is at the discretion of the Tribunal.[66]

23.3.38 Particular circumstances may include, for example, where an applicant contacts the Tribunal after failing to appear and requests that the hearing be rescheduled, or offers an explanation for his or her failure to appear. This will be a relevant

[62] ss 362B(2), 426A(2). See *Sran v MICMSMA* [2022] FCA 377 at [124] where the Court found that the Tribunal erred in confirming the dismissal of a review application, in circumstances where the Tribunal failed to consider rescheduling the hearing.
[63] In *ANK15 v MIBP* [2017] FCCA 1269 at [49], the Court found it was open to the Tribunal to exercise its discretion under s 426A(2) narrowly and broadly within the same review. In this instance the Tribunal was entitled to proceed to make a decision without rescheduling the hearing, in circumstances where it had previously exercised its discretion to reschedule an earlier hearing in the review. The Tribunal was not bound by its earlier exercise of the discretion to reschedule the hearing.
[64] See *Hossain v MIMA* [2000] FCA 842. In *SZEUZ v MIMIA* (2005) 193 FLR 88, the Federal Magistrates Court was critical of the Tribunal proceeding to make a decision under s 426A without further action in the circumstances because the Tribunal failed to take into account the explanation for the applicant's failure to attend the scheduled hearing. See *Sran v MICMSMA* [2022] FCA 377 where the Court held at [120] that the Tribunal had acted unreasonably in confirming the dismissal of the applicants' review application and in failing to consider other measures available such as rescheduling the hearing. The night before the hearing, the secondary applicant emailed the Tribunal requesting a postponement as the primary applicant was suffering from a number of medical conditions and had attached a medical certificate. The applicants did not attend the scheduled hearing and the Tribunal dismissed the review application, finding that no satisfactory reason had been provided for the applicants not attending the hearing. The Tribunal also incorrectly relied upon the fact that the postponement request had been received after the commencement of the hearing. The applicants applied for reinstatement providing a further medical certificate, medical reports and requesting a new hearing date. The Tribunal confirmed the dismissal, finding that the further medical certificate did not provide a 'sufficient explanation' of the applicants' inability to attend the scheduled hearing or the degree of mobility of the primary applicant to attend the hearing. At [120]–[124] the Court found that the Tribunal had made an incorrect factual finding about when the postponement request was received and had not engaged with the medical evidence provided by the applicant, focusing primarily on the primary applicant's mobility to attend a hearing. The Court also held that the Tribunal had failed to consider the other measures available under s 362B(2) such as rescheduling the hearing when the applicants did not attend.
[65] *MIBP v SZVFW* [2018] HCA 30.
[66] *Kazhila v MICMSMA* [2021] FCCA 1795 at [21]. The Tribunal made a decision on the review, which the applicant contended was unreasonable and that instead it was open to the Tribunal to dismiss the application under s 362B(1A)(b) which would have allowed them to apply to have the application reinstated under s 362(1B) and address the adverse conclusions that were not put to them. The Court rejected this contention, noting (at [18]) that, assuming the conditions set out in s 362B(1) are satisfied (i.e. the applicant was validly invited to appear before the Tribunal and did not attend), the Tribunal has two choices under s 362B(1A), and that which option the Tribunal selects is 'completely at the discretion of the Tribunal' (at [21]). The Court reasoned that it was not surprising that it was for the Tribunal to exercise its discretion, given the objective of the Tribunal set out in s 2A of the AAT Act, which provides that the Tribunal is to provide a mechanism of review that is fair, just, economical, informal and quick: at [21]. In finding it was reasonable to proceed to make a decision on the review, the Court referred to the fact that the applicant was represented at all times, it was not a matter concerning a protection visa, and the Tribunal had sent two SMS reminders of the hearing: at [26].

consideration for the Tribunal to take into account. Illness or other matters beyond the applicant's control which prevented him or her from attending may in some circumstances persuade the Tribunal to give a further opportunity to appear before it. However, the Tribunal is not obliged to reschedule a hearing for these or any other reasons, provided the explanation or reason is properly considered, and is reasonable.[67] The judgments discussed below provide examples of where the discretion has been exercised reasonably and unreasonably.

Steps taken to ensure attendance of applicant

23.3.39 The Federal Circuit Court in *BSU15 v MICMSMA* found the Tribunal exercised its discretion reasonably when it dismissed the review application in circumstances where the applicant had failed to attend the scheduled hearing and the Tribunal's decision clearly set out the steps taken to ensure the attendance of the applicant.[68] The Court held that the Tribunal had taken reasonable steps to contact both the applicant and her nominated representative. These steps went beyond the requirements of s 425, by taking the additional actions of sending two SMS reminders to the applicant, attempting to resend the invitation letter to the applicant's authorised representative's email address and attempting to telephone both the applicant and her authorised representative on the day of the hearing.

[67] *SZBCS v MIMIA* [2005] FCA 1457 at [29]–[32]. In *SZLBE v MIAC* [2008] FMCA 524, the applicant wrote to the Tribunal after the hearing stating that she had been unable to attend due to illness. The Tribunal considered the letter, was unconvinced, did not reschedule the hearing and proceeded to make a decision. The Court found that the Tribunal correctly exercised its discretion under s 426A at [31]. In *SZLJK v MIAC* [2008] FMCA 694, the Court found the Tribunal was entitled to proceed to make a decision without a hearing in circumstances where the applicant had not informed the Tribunal that he misunderstood whether he was supposed to attend a hearing in Griffith or Sydney. See also *SZKAI v MIAC* [2008] FMCA 1049 where the Court upheld the Tribunal's decision to decline to schedule a further hearing. The applicant explained to the Tribunal that she had received the hearing invitation letter late. The Tribunal considered but did not accept this explanation, noting that the invitation had been sent to three addresses provided by her. In *SZNTW v MIAC* [2009] FMCA 1240 at [112], it was found open to the Tribunal to exercise its discretion in s 426A to not reschedule a further hearing for the applicant's wife in circumstances where she did not attend the scheduled one because she elected to attend work and no medical certificate was provided to explain her absence. See also *SZORQ v MIAC* [2011] FMCA 138 where the Court found no error in the Tribunal proceeding to make a decision without a hearing in circumstances where the applicant did not provide a medical certificate or written submission within the timeframe set by the Tribunal following his non-appearance. See also *Singh v MIBP* [2016] FCCA 2888 in which the Court held that the Tribunal was entitled to dismiss the application under s 362B(1A)(b) in circumstances where the applicant phoned the Tribunal 45 minutes after the scheduled hearing time and informed it that he had been unable to attend the hearing due to 'personal circumstances' and would like the hearing rescheduled. The hearing had previously been rescheduled upon the applicant's request due to illness, and the applicant did not request that the matter be reinstated within the 14 day period despite being clearly informed of this entitlement. However, in *Pojari v MIBP* [2016] FCCA 3047, the Court was critical of the Tribunal's decision to dismiss the applicant's application for review for non-appearance in circumstances where it had sent a hearing invitation four days prior to Christmas for a hearing scheduled for the end of January, and the authorised recipient replied to advise that it was inconvenient for him to deal with the matter as he was on holiday but would nevertheless attempt to locate the applicant and inform him of the hearing. The Tribunal received no further correspondence prior to the hearing. The applicant withdrew his judicial review application conceding the visa application would likely fail, however, the Court refused to issue a costs order against the applicant on the basis that it was arguable he had been denied procedural fairness (presumably through the Tribunal's lack of action to confirm with the representative whether he had been able to locate the applicant, however the Court did not make a finding on whether the applicant received the invitation prior to the hearing).

[68] *BSU15 v MICMSMA* [2020] FCCA at [44]–[47]. See *Pinchu v MICMSMA* [2022] FedCFamC2G 210 at [36] where the Court held that the Tribunal was not required to specifically advise the applicant that he could attend the hearing by telephone or to give more detailed information about what was required in a medical certificate (which the applicant had provided as part of his request to have the matter reinstated following dismissal). The Court considered that the Tribunal's decision to confirm its dismissal decision was not procedurally unfair in the circumstances.

Illness

23.3.40 Where an applicant fails to attend a hearing by way of illness, there may occasionally be a risk for the Tribunal in proceeding to make a decision on the review even in circumstances where the Tribunal is unaware of the applicant's circumstances and where the s 362B(1A)(a) or 426A(1A)(a) discretion has not miscarried. In *MZYZE v MIAC*[69] the Court, applying the principles in *MIMA v SCAR*,[70] accepted that where an applicant's illness prevented his attendance at the hearing, thereby denying him a real chance to be heard, the applicant had been denied procedural fairness. While the Court noted that it would be a 'rare case' where a person was so ill as to prevent their attendance at a hearing, it also found that it made no difference that the Tribunal was unaware of his circumstances or that the denial of procedural fairness in no way flowed from any conduct of the Tribunal.[71] Similarly, the Court in *SZSNO v MIAC*, also applying the principles in *SCAR*, found that, in circumstances where an applicant is unable, through ill health, to attend the Tribunal's hearing, the element of s 425(1) that such hearing as is offered be 'real and meaningful' cannot be satisfied.[72]

23.3.41 Where an applicant provides evidence of their illness to substantiate a request to have the hearing postponed, the question for the Tribunal is whether it goes to the question of whether the applicant could, in the circumstances, attend the hearing.[73] If it does not address this question, or indicates that the Tribunal could attend the attend, it may not be unreasonable for the Tribunal to proceed without rescheduling (and affirm the decision or dismiss the review application).

Non-receipt of hearing invitation

23.3.42 Non-receipt of the hearing invitation will also be a relevant consideration when deciding whether to exercise the discretion to proceed to a decision without a hearing or to dismiss the application without any further consideration of the application or information before the Tribunal.[74] If it is clear that an applicant has not received the hearing invitation (e.g. because it was returned to sender), or claims to have received it after the date of the scheduled hearing, the power to proceed to a decision or to dismiss proceedings still arises, provided the Tribunal has complied with its statutory notification requirements. However, this circumstance is carefully

[69] *MZYZE v MIAC* [2013] FCCA 569.
[70] *MIMA v SCAR* (2003) 128 FCR 553.
[71] *MZYZE v MIAC* [2013] FCCA 569 at [23]–[24].
[72] *SZSNO v MIAC* [2013] FCCA 824 at [17].
[73] See e.g. *BUV17 v MICMSMA* [2022] FedCFamC2G 361 where the Court held at [19]–[21] and [25] it had not been illogical or unreasonable for the Tribunal to dismiss and confirm the dismissal of the applicants' protection visa application, where the evidence provided in support of their re-instatement request related to the first named applicant's health at a point in time prior to the hearing (at [16]). The applicants had sought to rely upon general and non-specific medical reports provided to the Department and that were referred to in the delegate's decision. At [24] the Court held that this evidence did not go to the question of whether or not the first named applicant could have appeared before the Tribunal at the time of the hearing.
[74] For example, in *SZDOG v MIMIA* (2004) 213 ALR 439, the letter to the applicant was returned unclaimed the day after the decision was signed but before the Tribunal sent out the handing down letter and handed down the decision. The Court found that the Tribunal failed to conform to its duty to take into account the most recent information available to it in making its decision which affected the exercise of its discretion to make a decision without a hearing.

considered by the Member in determining whether to exercise the discretion to proceed.[75]

Part 7 reviews and the risk of persecution

23.3.43 For Part 7 reviews, the Federal Court has suggested that the seriousness of the possibility that the persecution feared could be suffered was an appropriate matter to take into account in exercising the discretion under s 426A(1A)(a).[76]

History of contact between applicant and Tribunal prior to hearing

23.3.44 The Tribunal must exercise the power under s 362B or 426A reasonably. In *Kaur v MIBP*[77] the Federal Court applied *MIAC v Li*[78] to find that the Tribunal's exercise of power under s 362B(1A)(a) was legally unreasonable. Given the history of contact between the Tribunal and the appellant, including proactive contact from the Tribunal, the Court found that it was inexplicable why there was no attempt to contact the appellant and was of the view that the Tribunal ought to have realised her non-response to the hearing invitation and failure to attend the hearing was, given her past behaviour, out of character.[79]

Identified deficiencies in the applicant's case

23.3.45 In *MZZSK v MIBP* the Court found that the critical issue identified by the Tribunal was discrepancies in the applicant's central claim and that to take into account those discrepancies as a basis for proceeding to determine the application for

[75] *SZLCG v MIAC* [2008] FMCA 22 at [37]–[39]. See also *Malecaj v MIBP* [2016] FCA 1508 at [14] in which the Court found that the Tribunal erred when it exercised its discretion under s 362B(2) by not rescheduling the hearing where it knew the appellant's reason for not being able to attend was that he was not in Australia, and that his absence from Australia was lawful and temporary. At the time the hearing invitation was sent by post to the address provided for service, the Tribunal was not aware that the appellant was offshore. However, prior to the hearing the Tribunal accessed the appellant's movement records which showed that he was offshore on a Bridging visa which would enable him to return to Australia up to two months after the scheduled hearing date. The Tribunal sent two SMS hearing reminders, however these failed. Therefore, it appeared from the evidence that the appellant was not aware of the hearing. The Tribunal relied upon the appellant's failure to notify the Tribunal he was offshore in exercising its discretion to not reschedule. The Court held that his failure to notify that he was offshore did not relieve the Tribunal of its duty to provide the appellant with a meaningful invitation to hearing, and in the circumstances the Tribunal had not acted in a way that was legally reasonable.

[76] *SZHSQ v MIMA* (2006) 155 FCR 159.

[77] *Kaur v MIBP* [2014] FCA 915.

[78] *MIAC v Li* (2013) 249 CLR 332.

[79] See also *AZAFB v MIBP* [2015] FCA 1383 where the Tribunal erred in not seeking to contact the appellant on the phone number which he had given the Tribunal where the applicant had appeared at the departmental interview and filed a submission to the Tribunal suggesting he intended to pursue the application for a visa and to attend the hearing. Further matters which appear to have influenced the Court were the Tribunal taking some steps to determine whether the applicant may not have received the hearing invitation; the nature of the application which demonstrated that if the claims were established there was a risk of serious harm; and the fact that his mobile phone number was recorded (in advance) on the 'Hearing Record'. This may be contrasted with *CER15 v MIBP* [2016] FCCA 329 which distinguished *AZAFB* on the basis of two SMS hearing messages being sent to the applicant together with the applicant's acknowledgment that he received the hearing invitation by email even though he didn't open or read it. *AZAFB* was also distinguished in *SZOPV v MIBP* [2016] FCCA 182 and in *Kang v MIBP* [2017] FCCA 2785 at [30] on the basis that the applicant's service address had not changed and the applicant had not displayed a high degree of engagement in the review process. The Court also confirmed that the Tribunal was not obligated to take additional steps to ensure the applicant was aware of the hearing in circumstances where the SMS hearing messages failed to be delivered but a valid invitation had been issued. Similarly, *AZAFB* was distinguished in *Kazhila v MICMSMA* [2021] FCCA 1795 at [25]–[26]. The Court found at [24] that there was no pattern of engagement in circumstances where the applicant's engagement consisted only of providing further information to the Tribunal following a request for information and requesting an extension of time to provide information to the Department. The Court also took into

review without taking further action to allow or enable the applicant to appear before it was inconsistent with the purpose of the statute conferring the s 362B(1A)(a) discretion.[80] The Court's reasons suggest that it is not open to the Tribunal to take into account deficiencies in an applicant's case in considering whether to exercise the power under s 362B or 426A. The Court did not indicate what kinds of consideration *would* be relevant but it did confirm that the discretion must not be exercised capriciously or unreasonably, and other cases concerning the exercise of procedural discretions including *MIAC v Li*[81] make it clear that it would always be necessary to take into account any submissions or requests received in relation to that issue before the decision is finalised.

Unaccompanied minors and applicants in detention

23.3.46 In *CYB18 v MHA* the Court applied the established principle in *MIBP v SZVFW* that a statutory discretionary power must be exercised reasonably with regard to the circumstances.[82] The applicant, an unaccompanied minor in community detention at a specified address, did not attend the hearing, and their migration agent had informed the Tribunal prior to the hearing that they hadn't been able to contact the applicant and requested the hearing be rescheduled. In finding that that the Tribunal exercised its discretion unreasonably by dismissing the matter, the Court considered that the Tribunal's language of 'having reviewed the Tribunal file' did not evidence careful consideration of the applicant's situation as an unaccompanied minor or any weighing of competing considerations before it proceeded under s 426A(1A)(b).[83] The judgment indicates that where an applicant is an unaccompanied minor or in some sort of detention, specific regard to the applicant's situation may be required. In this instance, the Court was not prepared to infer that the applicant's particular circumstances were considered in the Tribunal's exercise of its discretion.

Making enquiries of the applicant

23.3.47 The Tribunal is under no statutory obligation to seek to contact an applicant who has failed to appear at a scheduled hearing to enquire as to the reason for the non-attendance.

account that the applicant was represented, the hearing invitation was received but overlooked by his representative, the Tribunal has sent two SMS reminders of the hearing and the case was not an application for protection.

[80] *MZZSK v MIBP* [2014] FCCA 883.

[81] *MIAC v Li* (2013) 249 CLR 332.

[82] *CYB18 v MHA* [2020] FCCA 819 at [81].

[83] *CYB18 v MHA* [2020] FCCA 819 at [79]–[82]. In reaching the conclusion the Tribunal's exercise of the discretion was unreasonable, the Court also had regard to the fact that the applicant participated in an interview with the delegate, they had been in three detention centres in three states in a short period, the Department had specified the address at which the applicant was to reside in community detention, and the migration agent had informed the Tribunal of its difficulties communicating with the applicant. The hearing invitation had been sent to the migration agent as the applicant's authorised recipient. The inference may be drawn that the Court didn't consider it reasonable to exercise the power to dismiss in these circumstances as it may have been possible for the applicant to be contacted at the specified address, he may not have been aware of the hearing, and he had been engaged in his application.

23.3.48 In *MIMIA v SZFHC*[84] a Full Court of the Federal Court held that where the Tribunal had sent a hearing invitation in accordance with the statutory requirements, the mere fact that the Tribunal received the letter back with a return to sender endorsement did not oblige it to do anything further to search in its files to find other addresses at which the applicant may be contacted.

23.3.49 Where an applicant does not appear at a hearing but has provided a telephone number or some other means of contact, it has been suggested that, as a matter of good administration, it is desirable for the Tribunal to seek to contact the applicant.[85] Although a decision-maker may attempt to make contact with an applicant to see whether some mistake had occurred, in *SZHSQ v MIMA*[86] the Federal Court commented that the Migration Act expressly authorises the Tribunal to proceed without making such enquiries.[87]

23.3.50 Similarly, in *Shah v MIAC,* the Federal Magistrates Court commented that to impose a requirement that the Tribunal take steps to ascertain whether an applicant wishes to have a further opportunity to appear following their non-appearance at a scheduled hearing would undermine the administrative certainty sought to be achieved by the deemed receipt provisions applicable to the sending of hearing invitations.[88]

23.3.51 The conclusion is the same whether the applicant responds to the hearing invitation but fails to appear on the day scheduled, or if there is a failure to respond at all.[89]

23.3.52 Significantly, in finding in *Kaur v MIBP* that the Tribunal's exercise of power under s 362B(1A)(a) was legally unreasonable, the Court accepted that there is no freestanding obligation under s 425 or 425A and s 360 or 360A to attempt to the contact the applicant in every case where there has been a failure to respond to a hearing invitation and a failure to attend the scheduled hearing, stressing that reasonableness is informed by the factual circumstances in which the particular

[84] *MIMIA v SZFHC* (2006) 150 FCR 439 at [39]. In *SZIWV v MIAC* [2007] FCA 1338, the Court considered the Tribunal's practice of following up where an applicant does not respond to the hearing invitation. Lander J, at [7] in *obiter,* noted that these telephone calls are not relevant to determining whether the Tribunal complied with its hearing invitation obligations under the Migration Act. In *SZMDH v MIAC* [2008] FMCA 1013, the hearing invitation was returned to sender and the applicant had not provided the Tribunal with any means of communication apart from that residential address. The Court observed at [7] that there was nothing further the Tribunal could have done to discharge its obligation to invite the applicant to a hearing and accordingly it was entitled to proceed to make a decision notwithstanding that the hearing invitation had been returned. These conclusions were upheld on appeal: *SZMDH v MIAC* [2008] FCA 1852 at [26]–[27].

[85] See e.g. *SZKUI v MIAC* [2008] FMCA 126.

[86] *SZHSQ v MIMA* (2006) 155 FCR 159 at [62]. See also *Kazhila v MICMSMA* [2021] FCCA 1795 at [21] where the Court commented that 'There is nothing in the text of s 362B that requires the Tribunal to adopt a particular course. The decision is completely at the discretion of the Tribunal'. The Court also observed at [23] that there is no requirement on the Tribunal to telephone an applicant who does not appear at a scheduled hearing.

[87] In *MZYZI v MIAC* [2013] FMCA 242 at [13], the Court observed that there is no obligation upon the Tribunal to telephone an applicant to check his or her whereabouts if they failed to attend a scheduled hearing. See also *Perera v MIAC* [2008] FMCA 1526. In *SZLAL v MIAC* [2007] FMCA 1459, the Tribunal incorrectly stated that an applicant had provided it with no other means of contact when he had in fact provided the Tribunal with residential and postal addresses. The Court concluded at [19] that, notwithstanding this error, the Tribunal had complied with ss 425 and 425A and was entitled to proceed to make a decision.

[88] *Shah v MIAC* [2011] FMCA 18 at [110]. In that case, the Court held that the fact that the applicant had previously responded to the Tribunal's correspondence but failed to do so for the hearing invitation did not make it obvious that an inquiry should be made as to whether he wished to attend the hearing, particularly as the invitation had apparently been sent without incident to a professional migration agent.

[89] *NBBL v MIMIA* (2006) 152 FCR 592 at [22].

discretion was exercised in respect of a particular review and the particular applicant.[90]

23.3.53 If the Tribunal does make contact with an applicant after he or she failed to appear, it considers any explanation or response to the Tribunal's enquiries in deciding how to proceed. If an applicant cannot be contacted, fails to respond or does not give a satisfactory explanation, the Tribunal may decide to proceed without scheduling a further hearing (i.e. by making a decision on the review without taking any further action to allow the applicant to appear before it) or exercise is discretion to dismiss the application without any further consideration of the application or information before the Tribunal. For example, in *MIMIA v VSAF*,[91] the applicant failed to appear at the hearing after telephoning the Tribunal on the day prior to the scheduled date to say that he would not attend. The Tribunal gave the applicant an opportunity to provide details of his non-attendance by the day after the scheduled hearing, which he did not do. The Full Federal Court concluded that the Tribunal was not obliged to attempt to reschedule the hearing in these circumstances.[92]

Written reasons if exercising discretion

23.3.54 There is no statutory obligation upon the Tribunal to record its reasons for proceeding to a decision on the papers pursuant to s 362B(1A)(a) or 426A(1A)(a).[93] However, because the power in these sections is a discretionary one which must be exercised reasonably taking all relevant considerations into account, the Tribunal generally includes a brief statement in its reasons for decision as to why the discretion not to reschedule the hearing was exercised, where relevant. If the Tribunal dismisses an application pursuant to s 362B(1A)(b) or 426A(1A)(b), it must set out the decision and the reasons for the decision under s 362C(2) or 426B(2).[94] These sections effectively require the Tribunal to record its reasons as to why it is proceeding to a decision to dismiss the application.

[90] *Kaur v MIBP* [2014] FCA 915.
[91] *MIMIA v VSAF* [2005] FCAFC 73.
[92] The Full Federal Court cited *VNAA v MIMIA* (2004) 136 FCR 407, where it was said the Migration Act expressly authorises the Tribunal to proceed to decide the review in the applicant's absence, even where an applicant does not attend a hearing through no fault of their own. In *Perera v MIAC* [2008] FMCA 1526 at [50], the Court held that the Tribunal was not obliged to reschedule a hearing in circumstances where it sought to confirm the applicant's attendance at the scheduled hearing, was informed that his authorised representative may not return from overseas in time and the representative undertook to advise the Tribunal of any alternative arrangements but no further communication was received.
[93] *SZLCG v MIAC* [2008] FMCA 22 at [40].
[94] See e.g. *CYB18 v MHA* [2020] FCCA 819 at [81] where the Court held that the Tribunal stating in its decision that it had 'regard to the Tribunal file' in determining whether to exercise its discretion in s 426A(1A)(b) did not evidence any weighing of competing considerations or careful consideration of the applicant's particular circumstances. The Tribunal was found to have erred. The degree and length of consideration required in a decision record in relation to the reasonableness of exercising the discretion in ss 362B and 426A will depend on the particular circumstances of each matter. By way of contrast where the Tribunal's reason for dismissing the application was brief and accepted by the Court, see e.g. *Pathirathnage v MICMSMA* [2021] FedCFamC2G 152 at [24]–[31]. The Tribunal dismissed the application by concluding '[n]o satisfactory reason for the non-appearance has been given'. The Court held that, in the circumstances, the reasoning of the Tribunal was 'intelligible and not unreasonable'. The applicant had sought a postponement of the hearing and provided a medical certificate stating they were 'unable to attend work…due to a medical condition'. The Tribunal refused the request and offered a telephone hearing, which was not taken up by the applicant. The Court agreed with the Tribunal that a satisfactory reason had not been given for the applicant's non-attendance given the content of the medical certificate and that the provision (s 362B) expressly deals with the situation confronted by the applicant, such that it was open to the Tribunal to embark upon the course that it did (at [30]).

23.3.55 In *SZLCG v MIAC*,[95] the Court observed that a failure by the Tribunal to recognise that it had a discretion whether or not to reschedule the hearing and a failure to exercise it by proceeding to a determination without reference to the discretion, would amount to jurisdictional error. The Court looked to the Tribunal's reasons for decision to ascertain whether the Tribunal had properly appreciated the discretionary nature of the power in s 426A(1A)(a) [s 362B(1A)(a)]. Although observing that the decision was not as explicit as it might have been, the Court concluded that the relevant passage in the decision demonstrated that the Tribunal knew that it had the power to reschedule the hearing but decided to exercise its discretion not to do so.[96]

Third party fraud

23.3.56 If an applicant's failure to appear before the Tribunal was induced by the fraudulent conduct of a migration agent or other third party, the Tribunal's decision in the absence of a hearing may be affected by jurisdictional error.[97] For example, in *SZFDE v MIAC*,[98] an 'agent' falsely represented himself to the applicants as a solicitor and registered migration agent, and advised them not to attend the hearing. The High Court found that, even though the Tribunal had acted blamelessly, it was disabled from the due discharge of its imperative statutory functions by the fraud of the 'agent' which had been perpetrated on the Tribunal as well as the applicants.[99]

23.3.57 A distinction can be drawn between circumstances where an applicant does not appear because of fraudulent conduct and instances where an applicant does not appear because of poor or negligent, but not fraudulent, advice.[100] A failure by an agent to inform an applicant of the hearing, or to request an adjournment, due to negligence or inadvertence will be insufficient, on its own, to give rise to fraud committed on the Tribunal.[101] Nor will fraud by a migration agent or another person give rise to fraud on the Tribunal if an applicant is complicit in that fraud.[102] See further Chapter 32 – Migration agents and the Tribunal.

23.3.58 It may not be immediately apparent to the Tribunal that an applicant's failure to appear was due to the fraudulent conduct of a third party. Often this only comes to

[95] *SZLCG v MIAC* [2008] FMCA 22.
[96] *SZLCG v MIAC* [2008] FMCA 22 at [39].
[97] *SZFDE v MIAC* (2007) 232 CLR 189 at [49]–[52]; *Kim v MIAC* [2008] FMCA 1553 at [69], [73]. Cf. *MIMIA v SZFML* (2006) 154 FCR 572 at [7], [65].
[98] *SZFDE v MIAC* (2007) 232 CLR 189.
[99] *SZFDE v MIAC* (2007) 232 CLR 29 at [51].
[100] *SZFDE v MIAC* (2007) 232 CLR 29 at [49]–[53]. In *MIAC v SZLIX* (2008) 245 ALR 501, an unqualified person holding himself out to be a migration agent had not forwarded information to an applicant or told him when a rescheduled hearing would be held. The Court held (at [30] and [32]) that there was no substratum of facts which would justify the inference that the agent dishonestly omitted to inform the applicant, and that such a failure could easily be ascribable to oversight or negligence which does not give rise to fraud on the Tribunal.
[101] In *SZIXO v MIAC* [2008] FCA 94, the applicant failed to attend the Tribunal hearing but claimed in his judicial review application that a migration agent had informed him that he could seek an adjournment because he was working outside Sydney at the time. The applicant claimed that he had instructed the agent to request an adjournment from the Tribunal but there was no evidence that this was done. The Federal Court found that, even if the applicant had engaged a migration agent, it is an established principle that negligence by a migration agent does not lead to intervention to overturn a decision made in consequence of that negligence. See also *SZGRH v MIMIA* [2006] FCA 1408, *SZLCI v MIAC* [2008] FCA 135,*SZHVM v MIAC* (2008) 170 FCR 211 and *SZUWM v MIBP* [2016] FCA 92.
[102] See e.g. *SZLHP v MIAC* (2008) 172 FCR 170 and *MIAC v Lu* (2010) 189 FCR 525.

light after the Tribunal's decision is finalised and an applicant pursues judicial review. However, where the Tribunal has any concerns about the conduct of an agent, the Tribunal may make enquiries of the applicant directly (e.g. by contacting the applicant by telephone) to minimise the risk of jurisdictional error.

24. WITHDRAWAL OF REVIEW APPLICATIONS AND CONSEQUENCES OF DEATH OF AN APPLICANT

24.WITHDRAWAL OF REVIEW APPLICATIONS AND CONSEQUENCES OF DEATH OF AN APPLICANT[1]

24.1 Introduction

24.1.1 Although not expressly provided for under the *Migration Act 1958* (Cth) (the Migration Act), an applicant has an implied power to withdraw their application for review.

24.1.2 While the Migration Act does not specify any circumstances or procedures for the withdrawal of review applications, the existence of such a power may be inferred from the absence of any abrogation of the common law right of a person to withdraw from an application in a civil matter to a statutory tribunal.[2] In the case of a Part 5-reviewable decision (migration), the power to withdraw a review application may be implied from the legislative scheme. Regulation 4.14(2) of the *Migration Regulations 1994* (Cth) (the Regulations), which addresses the refund of fees for withdrawn Part 5 review applications, implicitly assumes that an applicant may withdraw such an application. Although there is no corresponding provision for withdrawn Part 7 (protection) review applications, such an inference can be drawn from the common law.

24.2 When can an application be withdrawn?

24.2.1 A valid application for review can be withdrawn at any time prior to the matter being finally determined.[3] Once a review has been finally determined the Tribunal becomes *functus officio* and there is no longer an application for review before it that is capable of being withdrawn.[4] If the Tribunal has made a decision to dismiss an application under ss 362B(1A)(b) or 426A(1A)(b), the application for review cannot be withdrawn (including during the time period prior to the Tribunal's

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] See *Christie v The Honourable A R Neaves* (2001) 113 FCR 279 in which Conti J at [25] held that the absence of any provision in the *Health Insurance Act 1973* (Cth) concerning the withdrawal by a medical practitioner of his review application did not mean that a right to withdraw could not be implied from the construction of the legislation. See further [17]–[19] on the common law right. *SZASD v MIMIA* [2004] FMCA 472 at [10] confirmed that there is nothing in the Migration Act which abrogates the common law right of an applicant to withdraw an application before a decision is given by the Tribunal. See also s 49 of the Migration Act, which allows for the withdrawal of visa applications by written notice given to the Minister.
[3] In relation to an application for review which is not valid, see discussion below.
[4] See Chapter 25 – The decision and statement of reasons for further discussion on when a review is finally determined.

confirmation of the dismissal decision under ss 368 or 430) as the Tribunal has no power to vary or revoke such a decision after it is made.[5]

24.3 Who can withdraw an application?

24.3.1 The review applicant or a person duly authorised by them may withdraw a valid review application. Where a person other than the applicant purports to withdraw a review application, the onus is upon the Tribunal to ensure that the person requesting the withdrawal is acting with the authority of the review applicant(s).

24.3.2 An applicant cannot withdraw a family member's application without their authorisation to do so because the review right is personal to that member. If there is any doubt as to whether authorisation has been given, enquiries should be made with the relevant family member(s).[6]

24.4 What is a valid withdrawal?

24.4.1 The withdrawal of an application for review must be valid to be effective. The question of validity is a finding of fact for the Tribunal.[7] For a withdrawal to be valid:

- it must be in an appropriate form;
- it must be communicated to and received by the party authorised to receive the withdrawal;
- the applicant must have intended to withdraw;
- the applicant must have had the capacity to understand the consequences of their actions.

24.4.2 ***Form:*** Given the serious consequences that may flow from withdrawal, the Tribunal may request each person seeking to withdraw their application to expressly convey that to the Tribunal in written form bearing their signature(s). The Tribunal does not generally consider such matters as failing to respond to Tribunal letters or applying for another visa class as a withdrawal of the review application. Where an applicant advises the Tribunal by telephone of their intention to withdraw, written confirmation is generally sought.

[5] ss 362C(4), 426B(4). However, the application may be reinstated (if the applicant makes a request and the Tribunal makes a decision to reinstate) and the review application could then be withdrawn.
[6] See for example *Aziz v MIBP* [2017] FCCA 2694 at [16]–[18] in which the Court held that the applicant had given his nephew (who was his sponsor for a Carer visa application) unfettered authority to sign his name, and prepare and submit documents on his behalf, which meant the nephew had the appropriate authority to withdraw the applicant's visa application. Therefore, the delegate's acceptance of the withdrawal was not an error. Whether a person has authority to act is a question of fact, having regard to the circumstances.
[7] *Zeini v MIAC* [2010] FMCA 604 at [12]. This case considered withdrawals with respect to visa applications: see further ss 47 and 49 of the Migration Act. However, the central principles are applicable to the withdrawal of review applications. The question whether an applicant has withdrawn an application is a jurisdictional fact because where a withdrawal is made there is nothing to consider and the delegate (or decision-maker) could do nothing further with the application. Where a decision-maker is unclear of his or her jurisdiction to make a decision there must be an obligation upon them to do something to determine it (at [15]).

24.4.3 ***Receipt by Authorised Party:*** It has been held that a visa application will not be regarded as withdrawn unless the delegate or another person authorised to receive a withdrawal has in fact received it.[8] There is no express authority for a Tribunal officer acting in the course of their duties to receive and accept a withdrawal, and the preferable view is that it is for a Member to determine whether the withdrawal is valid.[9] It is likely, therefore, that a withdrawal of a review application would not be effective until received by the Member deciding the review.

24.4.4 It may be, in some instances, possible for an applicant to revoke their withdrawal (so that the review application remains valid). Where the withdrawal has not yet reached a member, who is the authorised person to receive a withdrawal, it is possible for an applicant to revoke their withdrawal.[10] This means that, prior to a matter being constituted to a member, if an applicant seeks to revoke their withdrawal, the revocation may be accepted. If a matter has been constituted to a member and the withdrawal hasn't yet been received by the member, the revocation may be accepted. Once the withdrawal has been received by the Member constituted the review, it will not be possible for it to be revoked.

24.4.5 ***Intention:*** A person must actually intend for their application to be withdrawn and lack of intention may render a purported withdrawal of no legal effect.[11] Matters which may suggest a lack of intention include misunderstanding the effect of withdrawing the application,[12] acting under duress,[13] or where the request was based upon misrepresentation caused by the fraudulent conduct of a third party.[14]

[8] *Raru v MILGEA* (1993) 46 FCR 453. The Court held that, until a withdrawal has reached a person authorised to deal with or process an application, then it cannot be regarded as complete; for until then, the procedure set in place by the statute and regulations will continue to bear the application on to an ultimate determination.

[9] See *Lee v MIMIA* [2002] FCAFC 305 at [34]–[35] where the Court held it is for a Member, rather than a Tribunal officer, to determine whether the Tribunal has jurisdiction by determining the threshold question of whether a valid review application has been made. The Court was not considering a situation where a withdrawal had been requested, however, the same principle would appear to apply as a valid withdrawal results in the Tribunal not having jurisdiction in respect of the review application.

[10] *Raru v MILGEA* (1993) 46 FCR 453. The Court held that it was competent for the applicant to revoke the withdrawal while the withdrawal remained incomplete (i.e. because the withdrawal was not yet before the person determining it).

[11] However, in relation to the withdrawal of visa applications, see *Gillera v MICMSMA* [2021] FCA 1396. In that case the applicant withdrew her visa application with the Department prior to a decision being made, but then sought judicial review of what she contended was the Department's 'decision' to accept her withdrawal. The Court held that it did not have jurisdiction because s 49(1) of the Migration Act operates as a deeming provision, by which visa applications are taken to be disposed of once written notice is given to the Minister to withdraw the application, and so there was no decision of which to seek judicial review (at [31]–[32]). In *obiter*, the Court rejected the applicant's contention that a genuine intention is required for a withdrawal of a visa application to be valid, noting s 49(1) was drafted to provide administrative certainty (for example, by ensuring a withdrawal was not treated as a visa refusal decision). In doing so, it distinguished *Raru v MILGEA* (1993) 46 FCR 453, which predated the insertion of s 49(1) into the Migration Act (at [62]–[78]). An application for special leave to appeal to the High Court was refused: *Gillera v MICMSMA* [2022] HCASL 37. Note, though, that *Gillera* considered the withdrawal of a primary visa application; there is no equivalent to s 49(1) for Part 5 and Part 7 reviews, which means that the judgment does not appear to affect withdrawals of Tribunal reviews and that a person must have the requisite intention to withdraw a review application.

[12] See *Re Faulkner and Repatriation Commission* (1990) 21 ALD 633 where the Tribunal found that the applicant's signing of an agreement by consent clearly showed that the applicant had not abandoned his claim despite the Tribunal's earlier order for dismissal issued after that agreement. The dismissal was to be regarded as a nullity. In *SZASD v MIMIA* [2004] FMCA 472 the applicant claimed a lack of understanding on account of poor English comprehension when she signed the withdrawal request. Driver FM agreed with the Tribunal's finding that it was unlikely that the applicant's authorised recipient, who filled out the form and had her sign it, did not explain the effect of the document to her. Driver FM held the signing of the withdrawal to be a 'conscious and considered act by the applicant' (at [10]–[11]).

[13] The concept of duress as applied in contract law involves a pressure regarded as illegitimate at law exerted by one party in order to coerce another to contract on particular terms: see e.g. *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45–46.

[14] In *Uniden Australia Pty Ltd v Collector of Customs* (1997) 144 ALR 107 at 118, Foster J stated that there was a power to determine whether a purported withdrawal of a refund application 'is in substance a true withdrawal or whether it is robbed of effect by reason of some vitiating circumstance such as fraud or innocent misrepresentation'. In *CDS15 v MIBP* [2016] FCCA 813, the Court found no error in the Tribunal having refused to reopen a matter which it had finalised on the basis of withdrawal form signed by the applicant's representative as '…mere negligence, inadvertence or incompetence on the part of an agent

24.4.6 ***Capacity:*** Factors which may show that an applicant lacked the requisite capacity could include unsoundness of mind[15] or infancy.[16] These concepts are recognised in equity and contract law as affecting the legal capacity to conclude a binding contract although there is little jurisprudence on whether they will invalidate a withdrawal in the context of administrative proceedings. Factors such as language difficulties and depression or related stress disorders are more specific to the Tribunal's jurisdiction.

24.4.7 The High Court in *Gibbons v Wright*[17] considered contractual incapacity arising from mental disability which arguably extends to minors because of their age. The High Court stated:

> *The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation… Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out.*[18]

24.4.8 The Court also stated that the level of mental capacity required by the law for any instrument is relative to the particular transaction which is being effected by means of that instrument.[19] In the context of merits review within the MRD of the AAT, this may involve the capacity to understand that by withdrawing their review application, their challenge to the correctness of the primary decision will end and that primary decision will still stand.

24.5 The effect of withdrawal of an application

24.5.1 Once an application has been validly withdrawn it no longer exists and cannot be reinstated. From that point onwards, the Tribunal will have no jurisdiction to review the delegate's decision[20] and no power to make a decision on the merits of the claim.

24.5.2 The withdrawal of a review application may also mean that an applicant will be unable to submit a subsequent application for review of the same decision because the prescribed time limit for lodging an application[21] is likely to have expired.[22]

representing a visa Applicant, will not constitute fraud so as to warrant judicial intervention…' (*cf SZSXT v MIBP* [2014] FCAFC 40 at [52]).
[15] See, for example *Gibbons v Wright* (1954) 91 CLR 423.
[16] See, for example *Bojczuk v Gregorcewicz* [1961] SASR 128.
[17] *Gibbons v Wright* (1954) 91 CLR 423.
[18] *Gibbons v Wright* (1954) 91 CLR 423 at 437–438.
[19] *Gibbons v Wright* (1954) 91 CLR 423 at 438.
[20] *SZASD v MIMIA* [2004] FMCA 472 at [11].
[21] ss 347(1)(b), 412(1)(b).

24.5.3 An applicant seeking review of a Part 7 (protection) reviewable decision who validly withdraws an application for review will not be liable to pay the post-decision fee prescribed by reg 4.31B.[23] Where an applicant seeks judicial review of a Tribunal decision and the matter is remitted to the Tribunal for reconsideration but the applicant then validly withdraws their review application, the applicant appears to remain liable for the post-decision fee prescribed by reg 4.31B (and if they have already paid the fee, they will not be entitled to a refund).[24]

24.5.4 In the case of a Part 5 (migration) reviewable decision, the application fee (paid upon application) may be refunded in certain prescribed circumstances as set out in reg 4.14(2) (see further Chapter 5 – Fees for review). This includes some but not all withdrawal cases. The fee is refundable if the application is withdrawn because:

- the death has occurred, since the visa application was made, of the visa applicant, a member of that applicant's (i.e. the visa applicant's) family unit or the review applicant;[25] or
- the visa applicant has been granted a visa of the class applied for, other than because the Minister has reconsidered the primary application and the applicant's score on the reconsideration was more than or equal to the applicable pass mark;[26] or
- in relation to an application for a parent visa, the applicant applied for another parent visa after lodging the review application and the applicant wants to have a decision made on the application for the other parent visa.[27]

24.5.5 It appears that a withdrawal will only be effective where an applicant had previously made a valid application for review. If the Tribunal considers that the review application was not valid or properly made, and subsequently receives a request to withdraw it, the matter is to be finalised on the basis that the review application did not meet the validity requirements of ss 347 or 412 rather than on the basis of the withdrawal.[28] This is of particular significance in Part 5 cases where a fee was paid,

[22] However, note that following *DFQ17 v MIBP* [2019] FCAFC 64 at [62] and *BMY18 v MHA* [2019] FCAFC 189 at [35]–[38], a number of departmental notifications may be held to be invalid, which means that the time period to seek review will not have commenced. Further information is in Chapter 2 – Notification of primary decisions.

[23] The 'decision' referred to in reg 4.31B, although not expressly stated, appears to be a decision on a review and does not appear to cover a withdrawn application. Limited support for this may also be found in s 49 whereby a withdrawn application for a visa is taken to be disposed of by the Minister but is not taken to be a refusal to grant the visa for the purposes of s 48 and s 48A. Although specifically relating to the withdrawal of a visa application, and there is no equivalent provision in respect of review applications before the MRD, it does suggest there is a distinction between an application which is substantively considered and one which is brought to an end by an applicant's withdrawal.

[24] reg 4.31C(1) provides that a refund is available only where both a court has remitted the matter for reconsideration by the Tribunal and the Tribunal then remits the matter (to the Department) with a permissible direction. This does not include a withdrawal prior to the Tribunal making a new decision. Further, reg 4.31B(2) provides that the fee is payable within 7 days of notification of the decision, and reg 4.31B(3A) provides that if an application is remitted by a court for reconsideration by the Tribunal, no further fee is payable. Neither provision removes the liability to pay the fee that the applicant incurs upon the notification of the original decision.

[25] reg 4.14(2)(a).

[26] reg 4.14(2)(b).

[27] reg 4.14(2)(c). Parent visa means a visa of a class that is specified in Schedule 1 using the word 'parent' in the title of the visa: reg 1.03.

[28] This is because, where the Tribunal does not have jurisdiction, there is no review application which can be withdrawn. In practice, from an administrative perspective, if the Tribunal has not yet decided whether the application has been validly made (i.e. whether it has jurisdiction), the Regulations do not appear to prevent the Tribunal from finalising the matter administratively on the basis that the applicant no longer wishes to pursue the review (and as such a no jurisdiction decision would not be

as it may be that the fee can only be refunded under reg 4.14 if the applicant was not entitled to apply for review or the decision was not subject to review. However, it may be appropriate to note the factual matter of the applicant's request to withdraw the application within the no jurisdiction decision.

24.6 The death of an applicant

24.6.1 Whether a statutory entitlement (such as that to merits review of a decision) survives, lapses or devolves to another person on the death of the claimant depends upon the language of the legislation under which the entitlement arises.[29] Generally speaking, where a statutory entitlement does not devolve upon another person on an applicant's death, death will extinguish both the entitlement and the relevant decision maker's power, including the power of a tribunal upon review.[30] It does not appear possible for a review application to be pursued following the death of a review applicant by another person, such as the executor of the review applicant's estate or, where the review applicant is not the visa applicant, by the visa applicant themselves.

24.6.2 In respect of a review before the Tribunal, the consequences of an applicant's death will vary. Potential scenarios include:

- the death of a review applicant who is also the visa applicant;
- the death of a review applicant who is not the visa applicant; and
- the death of a visa applicant where the review applicant survives.

24.6.3 For additional considerations which arise for combined review applications, see below.

24.6.4 The effect of the death or withdrawal of an applicant on any remaining applicants' ability to meet the substantive criteria for the grant of a visa is distinguished from the issue of the continuation of the review application made by those applicants. For further discussion of the effect of death or withdrawal on the merits of a review application, see below.

The death of a review applicant who is also the visa applicant

24.6.5 For a Part 7 (protection) reviewable decision, in circumstances where the review applicant (who is also the visa applicant) dies, the review application lapses and a decision is made that the Tribunal does not have jurisdiction on the basis that there

made). However, in circumstances where a fee (or part of a fee) has been paid, a no jurisdiction decision appears to be required to enable a refund to be issued: reg 4.14.

[29] *V120/00A v MIMA* (2002) 116 FCR 576 at [53]. For example, reg 9.09 of the *Federal Court Rules 2011* (Cth) provides that a cause of action in the Federal Court does not cease only because of the party's death and that where a party's interest or liability passes to another person during the proceeding by assignment, transmission, devolution or by any other means, the party or the person may apply to the Court for an order for the joinder of the person as a party or for the removal of the party however there is no equivalent provision in the Migration Act or Regulations in respect of Part 5 or Part 7 reviews.

is no valid application for review. This is because the review right was personal to the non-citizen who was the subject of the primary decision.[31]

24.6.6 For a Part 5 (migration) reviewable decision, the principle that the review application ceases to be valid upon the review applicant's death is at odds with reg 4.14(2)(a). The provision of a fee refund upon withdrawal following the death of a visa or review applicant suggests that the review application continues on foot until withdrawn or otherwise disposed of by the Tribunal. Whether or not another person (such as the executor of the deceased's estate or their next of kin) has the authority to withdraw an application on behalf of a deceased review applicant is a matter of fact for the Tribunal to determine. If there is an express withdrawal, the Tribunal should treat the application as withdrawn. If there is no withdrawal, a decision should be made that the Tribunal does not have jurisdiction as there is no valid review application.

24.6.7 Whether the application for review of a Part 5 reviewable decision is withdrawn or treated as not valid is unlikely to make any practical difference to the refund of the fee because the fee could be refunded in either circumstance.[32]

The death of a review applicant who is not the visa applicant

24.6.8 In Part 5 cases where a review applicant dies who is not the visa applicant, the principle that the review application ceases to be valid upon the review applicant's death is at odds with reg 4.14(2)(a)(iii). The provision for an application to be withdrawn after the review applicant's death suggests that the review application continues on foot until withdrawn or otherwise disposed of by the Tribunal. Whether or not another person (such as the executor of the deceased's estate, their next of kin or even the visa applicant) has the authority to withdraw an application on behalf of a deceased review applicant is a matter of fact for the Tribunal to determine. If there is an express withdrawal, the Tribunal may treat the application as withdrawn. If there is no withdrawal, a decision is made that the Tribunal does not have jurisdiction as there is no valid review application.

24.6.9 Whether the application for review of a Part 5 reviewable decision is withdrawn or treated as not valid is unlikely to make any practical difference to the refund of the fee because the fee could be refunded in either circumstance.[33]

[30] *V120/00A v MIMA* (2002) 116 FCR 576 at [53].
[31] *V120/00A v MIMA* (2002) 116 FCR 576 at [54]; *Kamychenko v MIMIA* (2004) 140 FCR 233 at [18]. *Kamychenko* was cited with approval in *ASZ15 v MIBP* [2017] FCA 203 in which the Court dismissed an appeal against the decision of the Federal Circuit Court upholding the Tribunal's decision to affirm the refusal of the visa because the applicant had since died, the judicial review proceedings were seeking a relief that was personal to the applicant and there were no longer any orders that the Court could make that would serve any useful purpose (at [14]–[16]).
[32] In Part 5 cases where a fee was paid and the Tribunal has no jurisdiction, the fee is to be refunded if the applicant is not entitled to apply for review (see the table in reg 4.14(1), item 2) or the decision is not subject to review (reg 4.14(1), item 3).
[33] In Part 5 cases where a fee was paid and the Tribunal has no jurisdiction, the fee is to be refunded if the applicant is not entitled to apply for review (see reg 4.14(1), item 2) or the decision is not subject to review (table in reg 4.14(1), item 3).

The death of a visa applicant where the review applicant survives

24.6.10 In Part 5 cases where the review application is lodged by a person other than the visa applicant, the application will remain on foot following the visa applicant's death because it is the review applicant who has standing to make that application. Unless the review applicant withdraws the review application, the Tribunal must proceed to make a decision on the substantive merits of the visa application. Given that the right to apply for a visa is personal to the deceased visa applicant, if the only visa applicant is deceased then a review will lack a subject matter[34] and the Tribunal is likely to conclude that the visa applicant does not meet the time of decision criteria.

24.7 Combined applications – effect of death/withdrawal/ separation of principal applicant

24.7.1 Where two or more applicants have combined their application for review, the death of one review applicant, or the withdrawal of their review application, will not affect the validity of the remaining applicants' applications for review.[35]

24.7.2 Where there is only one review applicant but a number of visa applicants, the status of the review application following the review applicant's death will be the same as that of the death of a review applicant who is also not the visa applicant (see above).

The substantive merits of a review application following the death of an applicant

24.7.3 The death of one visa or review applicant may adversely impact upon the ability of any remaining applicants to meet the substantive criteria for a visa.

Part 7 (protection) reviews

24.7.4 For Part 7 applications, a review application continues to be valid with respect to any surviving applicants. From 9 November 2009,[36] and regardless of a person's status at the time of visa application (i.e. a claimed family member or putative

[34] *Kamychenko v MIMIA* (2004) 140 FCR 233 at [18].
[35] In *V120/00A v MIMA* (2002) 116 FCR 576, Kenny J at [61] in *obiter* preferred the view that, following the death of a review applicant upon whose claims the other review applicants were dependent, the remaining applicants' entitlement to review would lapse and the Tribunal would have no power to determine the application. However, this view does not appear to recognise that each review applicant has standing to apply for review in their own right, irrespective of the status of any other applications with which theirs has been combined (even if the outcome of those other applications may affect their ability to meet the visa criteria).
[36] This circumstance applies to all protection visa applications current as at 9 November 2009 and those made on or after that date: *Migration Amendment Regulations 2009* (No 13) (Cth) (SLI 2009, No 289). Previously, where a primary visa applicant died or withdrew their review application and their family members had applied for review solely as members of the primary applicant's family unit, the review application would remain valid. However, the family members would not be eligible for protection visas because a member of a family unit who had not made specific protection claims at the time of visa application would be unable to satisfy the then-applicable time of decision criteria. See *V120/00A & Ors v MIMA* (2002) 116 FCR 576; *NAEA of 2002 v MIMIA* [2003] FCA 341.

refugee), such a person can satisfy the time of decision criteria for the grant of the visa if either:

- they are person in respect of whom Australia has protection obligations; or
- they are a member of the same family unit of such person and that person has been granted a protection visa.

There is nothing to prevent persons who at the time of visa application claimed to be members of a family unit of a person to whom Australia owed protection obligations later making their own protection claims following the death or withdrawal of a review applicant. However, if they do not make their own claims for protection, the review application will remain valid but they will ultimately be unable to satisfy the criteria for the grant of the visa.[37] Similar considerations arise for a relationship breakdown between a person to whom Australia has protection obligations and a person claiming to be a member of their family unit.[38]

Part 5 (migration) reviews

24.7.5 For Part 5 applications, the death of a primary visa or review applicant may adversely affect the ability of the remaining applicants to meet the visa criteria.[39] The applicant cannot amend a visa application form to substitute another person as the primary visa applicant or sponsor and the Tribunal cannot read an application form as if it were so amended.[40] However, in some circumstances a secondary visa applicant may meet the criteria for the visa on their own such that a remaining applicant may be successful in their review despite the death of the primary visa applicant.[41]

24.7.6 Similarly, the merits of a case may be affected if the relationship between the applicants changes. If the spouse of a primary visa applicant applies to the Tribunal for review as a member of the family unit, they may no longer be eligible for a visa if they subsequently separate or divorce from the primary visa applicant before the Tribunal makes its decision.

[37] If a person applies for a protection visa solely as the member of the family unit of a person to whom Australia has protection obligations, and the person claiming to be owed protection dies or withdraws the application, then any remaining family members will be unable to satisfy the criteria as a member of the family unit of a person who has been granted a protection visa.
[38] *NAIV v MIMIA* [2004] FCA 457 at [63]–[68]. The husband, wife and children applied for protection visas where the husband and wife lodged separate Forms C as well as substantive claims. The delegate rejected the applicant husband's claims and found that the applicant wife and children were denied protection as members of the husband's family unit. The review application identified the husband as the applicant and listed the wife and children as persons included in the application. After being advised that the husband and wife had separated, the Tribunal regarded their claims as separate and published separate findings. Justice Jacobson held this to be an appropriate approach to take because the Tribunal could, under s 420 of the Migration Act, treat the review applications as amended and separate when it received notification that the parties had separated.
[39] In *Kamychenko v MIMIA* (2004) 140 FCR 233, for example, Cooper J stated at [18] that a visa cannot survive the death of a visa holder due to its inherent character as a personal license. In that case, the primary visa applicant died and the secondary applicants sought judicial review of the Tribunal's decision. However, upon the primary applicant's death they became incapable of satisfying the secondary criteria. The Court considered (at [21]) that it was not open to the wife to amend the form or to read the application as if it were amended.
[40] *Kamychenko v MIMIA* (2004) 140 FCR 233 at [21], citing *V120/00A v MIMA* (2002) 116 FCR 576 at [58]–[59].
[41] For example, as an applicant for a visa may satisfy either the primary or secondary criteria, a person who applied as a secondary applicant for a Student visa may, before the Tribunal, seek to satisfy the primary criteria by enrolling in a course and providing evidence of this to the Tribunal.

24.8 Finalisation of applications – withdrawal and deceased applicants

24.8.1 Whilst there is no legislative requirement for the Tribunal to produce a written record of a decision in relation to a finding of no-jurisdiction on the basis of an application having been withdrawn or an applicant having died, the Tribunal may produce a '*finalisation of application*' letter which relevantly records either the Tribunal's acceptance of a withdrawal or death of an applicant.

25. THE DECISION AND STATEMENT OF REASONS

25.THE DECISION AND STATEMENT OF REASONS[1]

25.1 Introduction

25.1.1 The Tribunal has the power to give either written or oral decisions. The different procedures for each decision type are set out below.

25.1.2 The required content of a decision, other than an oral decision, is set out in ss 368 (1) [Part 5 - migration] and 430(1) [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act). The required content of an oral decision is set out in ss 368D(2) and 430D(2). There are separate content requirements for oral decisions, depending on whether the Tribunal gives an oral decision with oral reasons or only its *decision* orally, but not its reasons (see below).

25.1.3 The Tribunal's statutory obligations under ss 368(1) and 430(1), and ss 368D(2) and 430D(2) serve a variety of purposes. These include promoting public confidence in the integrity of the administrative process, ensuring that the Tribunal's reasoning process is disclosed so that an unsuccessful applicant understands why he or she failed, as well as providing a written record of the decision in the event of judicial review.[2]

25.1.4 The Tribunal reasons for a decision are generally easy to understand, concise and written in a plain English style.

25.2 Oral decisions – procedure

25.2.1 For reviews under Parts 5 and 7 of the Migration Act, the Tribunal may give an oral decision and oral reasons for the decision, with written reasons provided on request or it may give an oral decision without oral reasons.[3] If the Tribunal gives an oral decision without oral reasons, it must produce a written statement of the reasons.[4]

25.2.2 In both cases, the decision is taken to have been made, and notified to the applicant, on the day and at the time the decision is given orally.[5] The Tribunal has no power to vary or revoke the decision after the day and time the decision is given orally.[6] See Chapter 28 – Reopening finalised matters for information on reopening finalised matters.

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *MIMA v Eshetu* (1999) 197 CLR 611 at [117]; *Mr A v MIMA* [1999] FCA 1086; *Xu v MIMA* (1999) 95 FCR 425; *MIMA v Yusuf* (2001) 180 ALR 1.
[3] ss 368D, 430D as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[4] ss 368D(2)(b), 430D(2)(b). These amendments apply to all review applications made on or after 18 April 2015, as well as those made prior to, but not finally determined at that date.
[5] ss 368D(1), 430D(1).
[6] ss 368D(3), 430D(3).

Oral decisions with oral reasons

25.2.3 If the Tribunal gives an oral decision with oral reasons, it must make an oral statement which describes the decision, the reasons and the findings on material questions of fact; refers to the evidence on which the findings were based and identifies the date and time the decision is given orally.[7] Where an applicant has relied on an interpreter for their participation in a hearing, there is no legal requirement that the oral reasons be translated for the benefit of the applicant. While there is no legal requirement, the Tribunal may consider having the interpreter translate its reasons to the applicant, particularly where translating the reasons would assist the applicant understand the outcome of its decision.[8]

25.2.4 If the Tribunal gives oral reasons, it does not have to give a written statement or reasons unless the applicant makes a written request for the statement within 14 days of the date of the oral statement or the Minister makes a written request at any time.

25.2.5 If a request for a written statement is made from either the applicant or the Minister, the Tribunal must reduce the oral statement to writing and within 14 days after the day the request is received, give a copy of the written statement to the applicant and the Secretary by one of the methods specified in ss 379A and 441A or 379B and 441B as relevant.[9] Where the Tribunal provides a written statement of its oral reasons, those written reasons will generally be taken as the operative reasons unless it is shown that they had materially departed from what was said orally.[10] The written statement is intended to accurately reflect the Tribunal's oral reasons provided at the hearing.[11] While the Tribunal may make minor changes from its oral

[7] ss 368D(2)(a), 430D(2)(a).
[8] See e.g. *MICMSMA v AAM17* [2021] HCA 6 at [222], [43], in which the High Court found that as a matter of general fairness, rather than independent legal duty, the applicant ought to have had the benefit of translated *ex tempore* reasons or written reasons of the Federal Circuit Court at an earlier time. While the judgment does not concern whether the Tribunal's oral reasons should be interpreted at the hearing for the applicant, it is indicative of how courts may approach the issue if considering whether the Tribunal has such an obligation; noting however that the Tribunal has 14 days after the day the request for a written statement is received to give it to the applicant and Secretary, which means that the applicant may be disadvantaged by having a short period of time in which to have the written reasons translated into their language for the purpose of determining whether to seek judicial review of the Tribunal decision in the Federal Circuit Court within the time limit to make an application (s 477(1)). The time in which to seek review however can be extended by application (s 477(2)) which, if granted, may mitigate any disadvantage. The High Court held that the fact the *ex tempore* reasons were not translated did not prevent the applicant from formulating his arguments on appeal to the Federal Court nor was he denied the opportunity to investigate any difference in substance between those reasons and the published written reasons. The Federal Court had found that the primary judge's published reasons contained no error, and there was no error in the Tribunal's decision. In that case, the Federal Circuit Court's orders were translated for the benefit of the applicant but the oral reasons for judgment were not and the primary judge delivered written reasons for judgment after the applicant filed his appeal in the Federal Court.
[9] ss 368D(4)–(5), 430D(4)–(5). In *Singh v MICMSMA* [2020] FCCA 748 the Court held that if the Tribunal does not provide the written statement within the timeframe which the Migration Act specifies, there will be no jurisdictional error for this reason alone (i.e. not giving a copy of the written statement of the oral reasons within 14 days of the request will not vitiate the decision): at [32].
[10] In *MICMSMA v AAM17* [2021] HCA 6 at [32], the High Court held that where written reasons of a court are published following the giving of *ex tempore* reasons, those written reasons must be taken to be the authentic expression of the judgment of the court unless it is otherwise shown that those reasons had materially deviated from what had been announced in court. While the judgment is not directly applicable to the Tribunal, as it focused on the Federal Circuit Court, the principles around the treatment of published written reasons following an *ex tempore* judgment may provide guidance for the Tribunal's obligations in the Migration and Refugee Division for making a written reduction of oral reasons under ss 368D(4)–(5) and 430D(4)–(5).
[11] See *Negri v Secretary, Department of Social Services* [2016] FCA 879. This case dealt with a decision of the AAT to review a Social Security Appeals Tribunal (SSAT) decision. The applicant argued that the Tribunal's written reasons were very different from its oral reasons such that it was an 'impermissible departure'. The Court held that the reasoning process disclosed by the written reasons did not substantially depart from that disclosed by the oral reasons, despite the dissimilarities. However, the Court noted that the Tribunal 'flirted dangerously with impermissible alteration to its reasoning' but concluded that the two sets

reasons to improve expression in its written statement, it cannot make substantive changes to its reasons or any other material changes.[12]

25.2.6 Regardless of which party requests the statement, a copy must also be given to the other party. See Chapter 26 – Notification of the decision for further details on the notification requirements.

Oral decisions without oral reasons

25.2.7 If the Tribunal gives an oral decision without oral reasons, it must still produce written reasons for the decision. The written statement must set out the decision, the reasons for the decision and the findings on any material questions of fact; refer to the evidence or any other material on which the findings of fact were based and record the day and the time the decision is given orally.[13]

25.2.8 Unlike the statutory regime in place prior to 18 April 2015, which required the Tribunal to give a copy of the written statement of reasons to the applicant and Secretary within 14 days, the current statutory regime only requires the Tribunal to make the statement. The Migration Act is silent on any obligation to produce the reasons within a specified period or on giving a copy of the decision to the applicant or Secretary.

Validity of an oral decision

25.2.9 The validity of an oral decision will not be affected by a failure to return to the Secretary documents provided in relation to the review or by a failure to give the Secretary a copy of a document containing evidence or material upon which the Tribunal's findings were based.[14] Nor will the validity of an oral decision be affected by a failure to give a written statement of the decision and reasons to the applicant or the Secretary by one of the prescribed methods in ss 379A and 441A, or 379B and 441B, within 14 days after a request is received to reduce an oral statement of decision and reasons to writing.[15]

Relevant Considerations – making an oral decision

25.2.10 When making an oral decision, the Tribunal ensures it is satisfied that all relevant claims and evidence have been considered and any applicable statutory procedures have been followed. For example, the Tribunal considers whether the Tribunal has an obligation under s 359A or 424A to notify the applicant of any relevant adverse information.

of reasons could sit together. While the written reasons do not have to be identical to the oral reasons given in the hearing, the Tribunal should ensure that its reasoning remains consistent.

[12] *MICMSMA v AAM17* [2021] HCA 6 at [31].
[13] ss 368D(2)(b), 430D(2)(b).
[14] ss 368D(7), 430D(7).
[15] ss 368D(7), 430D(7).

25.2.11 The Federal Court has commented that the giving of oral or *ex tempore* decisions is an accepted practice which does not, of itself, suggest that a member is biased or has not paid sufficient attention to the claims of the applicant.[16]

25.2.12 Generally speaking, multi-Member panels adjourn the hearing to allow the Members to consult one another prior to giving an oral decision. Where there is a difference of opinion between the Members constituting the Tribunal, the question will be decided according to the opinion of the majority of Members on a three person panel or according to the Presiding Member's opinion on a two person panel.[17]

25.3 Written decisions – procedure

25.3.1 Where the Tribunal elects not to give an oral decision, the decision is included in the written statement made under s 368(1) or 430(1). The decision on the review is taken to have been made by the making of the written statement on the day and at the time the written statement is made.[18]

25.3.2 The Tribunal must notify the applicant of the decision by giving the applicant a copy of the written statement within 14 days after the date of the written statement by one of the methods in s 379A or 441A.[19] This procedure is the same whether or not the applicant is in immigration detention.[20]

25.3.3 For decisions other than oral decisions, the Tribunal must also give a copy of the written statement to the Secretary within 14 days after the date of the statement by one of the methods in s 379B or 441B.[21]

25.3.4 A failure to comply with the notification requirements above does not affect the validity of the decision.[22]

25.3.5 The procedures and considerations for notifying review applicants of Tribunal decisions are dealt with in more detail in Chapter 26 – Notification of the decision.

[16] *SZANH v MIMIA* [2004] FCA 1280 at [39]. In *Singh v MIAC* [2012] FMCA 253 the Court found in the context of an 8 month period of uncertainty in relation to the applicant's enrolment, involving two separate cancellations of his enrolment, that it could not be said the decision to give an oral decision at the conclusion of the second hearing was irrational or arbitrary: at [44].
[17] *Administrative Appeals Tribunal Act 1975* (Cth) s 42.
[18] ss 368(2) and 430(2). In *SZRPF v MIAC* [2013] FMCA 54 where the Tribunal's decision record contained two separate dates, being an earlier date appearing on the cover page, and a later date, being the date the decision record was certified by the Deputy Registrar, the Court held the 'date of the written statement' for the purposes of the then s 430(2) is the date when the preparation of the written statement by the Tribunal member, to which s 430(1) refers, is completed: at [37]. In that case, this was the earlier date contained on the cover page. The later date recorded by the Deputy Registrar beside the certification was likely to be the date of certification, with the date of the certification not being the date identified in ss 430(1) and (2): at [38].
[19] ss 368A and 430A as amended by *Migration Legislation Amendment Act (No 1) 2008* (Cth). These amendments apply to any Tribunal decision made on or after 27 October 2008 and those decisions made before that date but for which an invitation to a handing down had not been issued as at 27 October 2008. Previously, decisions, other than oral decisions and decisions on reviews involving certain applicants in detention, were required to be handed down and the decision was taken to have been made when it was handed down. For an applicant who attended a handing down, or was represented at a handing down, he or she was taken to have been notified of the decision on the date of the handing down. If the handing down was not attended, the written statement of decision was to be sent by a method in s 379A or 441A within 14 days: see ss 368A–368C and ss 430A–430C.
[20] Note that previously, for refugee applicants in immigration detention and migration applicants in immigration detention because of a decision to refuse to grant or to cancel his or her bridging visa, there was no handing down requirement and the decision record was required to be given to the applicant, and their authorised recipient if they had one, within 14 days of the decision being made: ss 430D(2) and 368D(2). These provisions were repealed by *Migration Legislation Amendment Act (No 1) 2008* (Cth) in respect of decisions made on or after 27 October 2008.
[21] ss 368A(2), 430A(2).
[22] ss 368A(3), 430A(3).

25.4 Oral and written reasons for decision – sections 368(1), 430(1), 368D(2) and 430D(2)

25.4.1 Oral and written decisions require a statement of reasons, whether it be an oral statement or a written statement, to be given under ss 368(1) and 430(1) or ss 368D(2) and 430D(2) of the Migration Act.[23]

25.4.2 Section 368(1) is similar to s 430(1) except that the requirement to provide the written statement is made expressly subject to the operation of ss 375A(2)(b) and 376(3)(b).

25.4.3 In cases where the Tribunal is constituted by a multi-member panel, each member ensures that a written statement of his or her reasons, findings and the relevant evidence is produced in order to comply with s 368. This is generally done in a single, combined statement; however each member may choose to produce his or her own written statement, which together with the written statements of the other Member(s) would constitute the complete decision record for the purposes of s 368.

Non-disclosure certificates/notifications

25.4.4 Section 375A prevents the disclosure of specified information to anyone other than the Tribunal Member where the Minister has issued a certificate under s 375A(1). Section 375A(2)(b) requires the Tribunal to do all things that are necessary to ensure that the document or information subject to the certificate is not disclosed to any person other than the Tribunal Member constituted to the review. This means that the statement of reasons must not include the specific information that is the subject of a valid s 375A certificate even if that information is relied upon in the making of the decision.

25.4.5 Sections 376 and 438 apply to a document or information given to the Tribunal by the Secretary of the Department if the Minister has certified that the disclosure of it would be contrary to public interest, or the information was given in confidence, and s 375A does not apply to the information. Sub-sections 376(3)(b) and 438(3)(b) allow the Tribunal, having regard to any advice given by the Secretary, to disclose the document or information to the applicant or anyone who has given oral or written evidence to the Tribunal. If the Tribunal has decided not to disclose the material, the decision record will not contain the information.

25.4.6 See Chapter 31 – Restrictions on disclosing and publishing information for further discussion about ss 375A, 376 and 438.

[23] In *SZORJ v MIMIA* [2010] FMCA 949 the Court at [11] commented that the reasons given may be either fulsome or they may be brief. The Tribunal's obligation is to give attention to the matters raised by an applicant and to give the reasons that the Tribunal considers relevant. Brevity, clarity and certainty are not jurisdictional errors of themselves however there may be some point where paucity of reasoning may point to a jurisdictional error. Note, *Kocakaya v MIAC* [2012] FMCA 709 where the Court confirmed the Tribunal was not obliged to give reasons for referring a family violence claim to an independent expert under reg 1.23B. The Court rejected the applicant's contention that the Tribunal breached s 368 by failing to articulate an examination of the statutory declaration evidence as required by reg 1.26(f), which required the competent person to set out the evidence on which their opinion was based: at [28] to [30]. Upheld on appeal: *Kocakaya v MIAC* [2013] FCA 55. Application for special leave to appeal to the High Court dismissed: *Kocakaya v MIAC* [2013] HCASL 104.

Setting out the findings and reasons and referring to the evidence

25.4.7 A failure to comply with the requirements of ss 368(1) and 430(1), or ss 368D(2) and 430D(2), is generally not *itself* a jurisdictional error.[24] Nevertheless, such failure may *reveal* a jurisdictional error in the decision making process.[25]

Findings and reasons

25.4.8 In *MIMA v Yusuf*, McHugh, 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 by the Tribunal to be material. The Tribunal's identification of what *it* 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'.[26]

25.4.9 In *SZOYH v MIAC* the Court applied *Yusuf* to find that the Tribunal did not just have information submitted by the applicant's adviser before it but that it also had other information which was extensively set out in its decision record and that there was no specific reference to the applicant's adviser's submission in the Tribunal's decision because it was not material on which the Tribunal's relevant finding of fact was made.[27]

25.4.10 In *Kumar v MIBP,*[28] the Court found that, in considering s 368(1), there was no obligation on the part of the Tribunal to refer in its reasons to immaterial matters about which no submission had been made, and which were not the subject of evidence (and accordingly, there was also no requirement to make express findings about those immaterial matters). However, the Court acknowledged that a failure to make a finding on a matter may constitute jurisdictional error in particular circumstances such as where the applicant establishes that it was necessary for the Tribunal to make the finding to exercise its jurisdiction in the matter contemplated by the statutory scheme and the failure to make the finding was material in the sense of depriving the applicant of the possibility of a successful outcome (for example a failure to make a finding of fact resulted in the Tribunal not completing the review by not considering a claim or ignoring relevant material).[29]

[24] *Xu v MIMA* (1999) 95 FCR 425; [1999] FCA 1741 at [17]. See also *Re MIMA; Ex parte Durairajasingham* (2000) 168 ALR 407 at [70]; *MIAC v SZLSP* [2010] 187 FCR 362 at [54] where Kenny J stated that if the Tribunal has not complied with s 430, the appropriate course for an aggrieved applicant is to seek an order compelling the Tribunal to comply with its obligations under s 430. See also, *SZOJV v MIAC (No 2)* [2012] FMCA 29 where the Court held in the circumstances of the case that it could not be said the Tribunal did not bring an open mind to the proceedings but noted that a decision record which merely records acceptance of some facts positive to an applicant's claims but goes no further, leaves the Tribunal open to criticism. The Court confirmed that any failure arising from s 430, on its own, does not lead to jurisdictional error at [46]. An appeal from the judgment was dismissed: *SZOJV v MIAC* [2012] FCA 459. However, in contrast, see *SZTGS v MIBP* [2014] FCA 908 where the Court found that a failure to comply with s 430 of the Migration Act amounted to jurisdictional error. The judgment appears contrary to the line of authority on the s 430 requirements in relation to the Tribunal's reasons, notably *MIAC v SZLSP* (2010) 187 FCR 362 and *MIMA v Yusuf* (2001) 180 ALR 1.
[25] *MIMA v Yusuf* (2001) 180 ALR 1 at [10], [68], [33]–[35], [69], [36]–[44].
[26] *MIMA v Yusuf* (2001) 180 ALR 1 at [10], [69], emphasis in original.
[27] *SZOYH v MIAC* [2011] FMCA 1001.
[28] *Kumar v MIBP* [2020] FCAFC 16 at [108].
[29] *Kumar v MIBP* [2020] FCAFC 16 at [97]–[99].

25.4.11 While the Courts have held the reasons of the Tribunal should not be scrutinised 'with an eye attuned to error', and nor is the Tribunal expected to provide reasons of a kind that might be expected by a court of law, it may in some circumstances be inferred from a failure to expressly deal with an issue in its reasons for a decision, particularly in relation to contentious issues, the Tribunal has failed to consider it.[30]

25.4.12 In *MIAC v SZLSP,* Rares J applying *Yusuf,* held that where the Tribunal fails to comply with the requirements of s 430(1) and it is not possible to be satisfied that its written statement has a proper basis, the Court can infer that the Tribunal constructively failed to exercise its function of review.[31] Kenny J also applying *Yusuf,* held that where the Tribunal tests an applicant's knowledge, the evidentiary basis for its evaluation of the answers should be apparent, either from the decision statement or otherwise. A failure to do so could lead the court to infer that the Tribunal's decision-making was arbitrary and irrational.[32]

25.4.13 In *MIAC v SZLSP* the Tribunal's decision recorded that the applicant had been unable to correctly answer questions that the Tribunal asked him about Falun Gong, but did not disclose the source or substance of the Tribunal's understanding of Falun Gong, or why it considered the applicant's answers to be deficient, and in the hearing the Tribunal had referred only to 'my text'. Kenny J found that, on the fact of the decision, the conclusion that the applicant's answers were not correct was not grounded in probative material and logical grounds, as the statement did not disclose any material by reference to which a rational decision-maker could have evaluated the applicant's answers.[33] Rares J held that the brevity of the Tribunal's written statement and absence of any identified basis for its findings of material fact about the applicant's knowledge and practice of Falun Gong led to the inference that the Tribunal had no evidence or other material.[34] However, Buchanan J, in dissent, found that the requirements of s 430 were procedural, and relief should only be granted if it were established that departure from it meant that the applicant had been denied natural justice, which in this case, it was not.[35]

25.4.14 The Tribunal generally outlines the basis or bases on which a decision has been reached to avoid ambiguity. If it doesn't do this, a Court may find that the decision is affected by jurisdictional error. See for example, *MZYLH v MIAC* where the Court could not be satisfied the Tribunal's decision was based on logically probative

[30] *WAEE v MIMIA* (2003) 75 ALD 630 at [46] cited in *MIAC v Khadgi* (2010) 190 FCR 248 at [64]-[65]; *SZODR v MIAC* [2010] FCA 1362; *MIBP v SZRUT* [2013] FCA 1276; *SZQLM v MIAC* [2011] FMCA 921; *DZADB v MIAC* [2012] FMCA 679; *SZSBX v MIMAC* [2013] FCCA 1127; and *Jia v MIAC* [2011] FMCA 422.

[31] *MIAC v SZLSP* (2010) 187 FCR 362 at [98]. In contrast, see *Gill v MIBP* [2014] FCCA 2383 where the Court found that the Tribunal's adoption of the delegate's findings as a factual matrix did not demonstrate that the Tribunal had failed to conduct a review. The Court found that, while the Tribunal has a duty of review, that duty does not necessarily extend to each and every finding made by the decision maker under review and if a particular finding is not put in issue, the Tribunal does not have to remake the findings made by the delegate at [19]. See also *MIBP v Nguyen* [2017] FCAFC 149 at [39]–[40] in which the Court held that s 368 requires decision-makers to make express findings on material questions of fact and that it would not be open to the Tribunal to express a mere conclusion on a criterion, without making such findings and referring to relevant material. The absence of relevant findings of fact may lead to inferences being drawn that the Tribunal has not considered the material. In this instance, the Tribunal erred as it itself obtained information centrally relevant to the conclusion it reached and did not disclose that information to the parties, express findings were not made on that material, and such findings of fact were unquestionably 'material' to the conclusion reached.

[32] *MIAC v SZLSP* (2010) 187 FCR 362 at [72].

[33] *MIAC v SZLSP* (2010) 187 FCR 362 at [72].

[34] *MIAC v SZLSP* (2010) 187 FCR 362 at [94].

[35] *MIAC v SZLSP* (2010) 187 FCR 362 at [115]–[116].

material in circumstances where a large part of the findings in the decision was unattributed material and the conclusions on a key issue were copied from an unrelated Tribunal decision.[36] The Court also found the Tribunal's findings in relation to relocation made statements for which no material was cited and failed to address the circumstances of the applicant. Any alternative reasons for decisions are also expressly identified as such in the findings and reasons to avoid uncertainty.[37]

Bridging visas and the imposition of discretionary conditions

25.4.15 In relation to bridging visa conditions, the Federal Court held that there was no error for not giving specific, or detailed, reasons in the decision for why discretionary conditions should be imposed on the grant of the visa where the applicant had accepted the imposition of those conditions.[38] The Court proceeded on the basis that the Tribunal was required to turn its mind to the question of whether any discretionary conditions should be imposed, but that the imposition of those conditions was not material to the outcome of the review in such a circumstance and therefore adequate reasoning had been given.[39] However, the Court in *obiter* noted that if the imposition of conditions was in issue before the Tribunal and the applicant did not accept the imposition of those conditions, the Tribunal would be required to give reasons for imposing those particular conditions if it was material to its decision to affirm the decision to refuse to grant a bridging visa.[40]

Referring to the evidence

25.4.16 While ss 368(1)(a) to (c) and 430(1)(a)–(c), and ss 368D(2)(a)(i), (iii) and 430D(2)(b)(i), (iii), require the Tribunal to set out/describe their decision, reasons and findings;[41] ss 368(1)(d) and 430(1)(d), and ss 368D(2)(a)(iv), (b)(iv) and 430D(2)(a)(iv), (b)(iv) only require the Tribunal to 'refer' to the evidence.

[36] *MZYLH v MIAC* [2011] FMCA 888 at [147]–[148]. See also *SZPAB v MIAC* [2011] FCA 1253, where the Court held that a failure to set out the reasons for a decision or refer to the evidence or other material on which adverse findings as to credibility are based may lead to a Tribunal decision being set aside. The Court found such concerns did not manifest itself in this case as the reasons and findings of fact were both detailed and careful, and the Tribunal had genuinely considered the claim advanced by the applicant in a fair and objective manner: at [28]–[29]. Conversely, in *SZSBX v MIMAC* [2013] FCCA 1127, the Court held that the Tribunal's failure to set out in its reasons for decision its rejection of the matters set out in the applicant's post-hearing submission indicated the Tribunal did not consider the post-hearing submission. The post-hearing submission was 'material' evidence relevant to, and an integer of, the claims for protection.

[37] See e.g., *AZABC v MIAC* [2011] FCA 1179 at [19].

[38] *Nguyen v MICMSMA* [2022] FCA 483 at [104]–[110].

[39] *Nguyen v MICMSMA* [2022] FCA 483 at [110]. In the circumstances of the appellant's concession that seven conditions would be imposed, the Court held that nothing could be inferred from the absence to give reasons for those conditions because adequate reasons were given (i.e. the evident and factual basis, arising from the appellant's concession, was not challenged).

[40] *Nguyen v MICMSMA* [2022] FCA 483 at [123]. For example, the imposition of conditions would be material to the outcome of the review if the Tribunal was not satisfied that the applicant would comply with particular discretionary conditions it was proposing to impose on the grant of a bridging visa.

[41] In *SZQTB v MIAC* [2012] FMCA 32, the Court noted that implicit in, if not explicit, the Tribunal's obligations under s 430, is the obligation to inform the applicant as to the reasons for its decision. The Court commented there is a balance to be achieved in the writing of decision records between a prolix record on the one hand and one of great brevity on the other while the first may lead to greater complexity and confusion, the latter can create the situation where questions are raised as to whether the Tribunal has properly approached the task set for it: at [50], [84].

What must be included

25.4.17 The Tribunal is not required to 'refer to' every piece of evidence before it.[42] However, broadly speaking, the Tribunal is obliged to prepare a statement that 'refers to the evidence or any other material on which the findings of fact were based'.[43] For example, in *Singh v MICMSMA*[44] the Federal Court acknowledged that the Tribunal is not bound to refer to every piece of evidence, but drew an inference that the Tribunal forgot to deal with favourable evidence given by witnesses at the hearing about the social aspects of a relationship in circumstances where it had referred to, in some detail, adverse evidence from family about the relationship. The Tribunal's failure to undertake an active intellectual process towards the favourable evidence (as evidenced by the lack of reference or engagement with the material in the decision record) constituted a jurisdictional error.[45] The Court reasoned that the favourable evidence from the witnesses could not be subsumed into the Tribunal's findings about the relationship as it would have been required to reconcile the favourable evidence with the adverse evidence. By way of another example, in *SZODR v MIAC*[46] the Tribunal did not make reference to a psychological report in its reasons and the Federal Court drew a distinction between information which the Tribunal was under 'a statutory obligation' to have regard to and information that was not a matter the consideration of which is an essential condition to the valid exercise of the statutory power. The Tribunal disbelieved much of the evidence given by the applicant and set out its reasons for that disbelief. The Court held that although the report could arguably bear upon the assessment of the appellant's credibility, it was open for the Tribunal to have noted that material and formed the view that it bore little relationship to issue of credibility.[47] The Court held that the Tribunal's silence on the subject of the report is no less consistent with the inference that it read the report but regarded it as of little or no assistance in its fact-finding exercise than with the inference that it overlooked the report or treated it as irrelevant, and as it could not be said that the report had been overlooked, the Court held there was no jurisdictional error.[48]

25.4.18 The Courts have held that there is a distinction between a failure to consider an integer of a claim that the Tribunal was bound to take into account, which would amount to jurisdictional error, and failure to address a piece of evidence, which would not.[49] In *Shah v MIAC*, for example, the Court held the Tribunal's failure to refer to certain evidence submitted by the applicant did not indicate that it had overlooked it, because that evidence had not achieved prominence requiring it to be

[42] *WAEE v MIAC* (2003) 75 ALD 63. See also *MZZIF v MIBP* [2013] FCCA 2091 where the Court found that Tribunal member's failure to recount every possible aspect of the evidence did not establish jurisdictional error as the member had identified the key issues and clearly turned his mind to them: at [30]).
[43] See *Singh v MIAC* [2008] FMCA 587 at [58], *SZKJJ v MIAC* [2008] FMCA 865 at [135] and *SZSUE v MIBP* [2013] FCCA 2133 at [68]–[69], upheld on appeal: *SZSUE v MIBP* [2014] FCA 639.
[44] *Singh v MICMSMA* [2021] FCA 755 at [14]–[17]. The Court referred to and relied on the principle in *WAEE v MIAC* (2003) 75 ALD 63 that an inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons.
[45] *Singh v MICMSMA* [2021] FCA 755 at [17]–[18].
[46] *SZODR v MIAC* [2010] FCA 1362.
[47] *SZODR v MIAC* [2010] FCA 1362 at [11]. See also, *MZZIF v MIBP* [2013] FCCA 2091.
[48] *SZODR v MIAC* [2010] FCA 1362 at [13]–[16].
[49] See *MIAC v MZYHS* [2011] FCA 53 at [32].

separately addressed, other evidence had been expressly preferred over the applicant's, and the Tribunal had indicated that evidence from the Department's and Tribunal's files had been considered.[50] Similarly, in *SZQXV v MIAC* the Federal Court found that the failure of the Tribunal to directly address a factual issue in determining whether the applicant was an adherent to underground Catholicism in China or likely to suffer harm if she were to return to China was not an error as it was a piece of evidence, along with many others that weighed on the decision the Tribunal needed to make.[51]

25.4.19 However, as noted above in *Singh v MICMSMA*[52] a failure to refer to a significant piece of evidence may give rise to an inference that it has been overlooked, which may amount to jurisdictional error in circumstances where the outcome of the review might have been materially affected as a result.[53] An error of fact leading to the Tribunal placing 'no weight' on an important piece of evidence potentially corroborative of an applicant's claim may also lead to a constructive failure of the Tribunal to exercise its jurisdiction.[54] In general, it is the importance of the material to the exercise of the Tribunal's decision-making process, rather than a characterisation of something as a claim or merely evidence, which will be the determining factor.[55]

25.4.20 Mere reference to a submission in a decision will not demonstrate active engagement with it and it is important to demonstrate in the decision that the Tribunal has understood the applicant's case and considered the substance of information put before it.[56] In *MIBP v MZYTS* the Full Federal Court found the

[50] *Shah v MIAC* [2011] FMCA 18 at [92]–[94].
[51] *SZQXV v MIAC* [2013] FCA 124 at [84]. In contrast, however, in *SZSBX v MIMAC* [2013] FCCA 1127, the Court held that the Tribunal's failure to refer to the applicant's post-hearing submission in its reasons for decision meant that the Tribunal did not consider it; and that the post-hearing submission was 'material' evidence relevant to, and an integer of, the claims for protection. By not considering it, the Tribunal committed a jurisdictional error. See also *Kaur v MIBP* [2014] FCA 1046 where the Court found that the Tribunal's failure to address a substantial part of matters put forward by the appellant in a submission amounted to a failure to take account of claims made by her. In contrast, see *SZSWO v MIBP* [2014] FCCA 2492 where the Tribunal accepted evidence from a pastor in Australia that the applicant had attended church and participated in activities but could not give more than 'little weight' to the pastor's evidence in light of the applicant's propensity to fabricate claims. The Court found that in the circumstances the Tribunal did not fail to consider the evidence or make any finding that the pastor's evidence was irrelevant. Upheld on appeal: *SZSWO v MIBP* [2015] FCA 285.
[52] *Singh v MICMSMA* [2021] FCA 755 at [14]–[18].
[53] See e.g. *SZSRS v MIBP* [2013] FCCA 1858 at [18], where the Court held the Tribunal's failure to refer to a supporting letter indicated it was overlooked, and if it had not been, the Tribunal's opinion on whether the applicant's family was Christian might have been different and might have led to a different outcome of the review. Upheld on appeal: *MIBP v SZSRS* (2014) 309 ALR 67. See also*, CZBP v MIBP* [2014] FCCA 659, upheld on appeal: *MIBP v CZBP* [2014] FCAFC 105; *Prajapati v MIBP* [2015] FCCA 231, where the Court held the Tribunal's failure to make findings in relation to critical evidence regarding an education loan, which could potentially satisfy the criterion for visa grant in accordance with sch 5A, meant the Tribunal constructively failed to exercise its jurisdiction in relation to the evidence of the loan; and *BZAFI v MIBP* [2015] FCA 771 at [37].
[54] In *ABT15 v MIBP* [2015] FCCA 1051, the Tribunal afforded 'no weight' to a purported letter from an Iranian government authority in support of the applicant's claim to be stateless, and went on to conclude that the applicant was an Iranian citizen. The Court held that the purported letter was an important document in support of the applicant's claim, which in light of the Minister's concessions was effectively ignored by the Tribunal because of an erroneous understanding of the applicant's evidence. The material was of importance to the exercise of the Tribunal's function and the seriousness of the error resulted in a constructive failure of the Tribunal to exercise its jurisdiction.
[55]*MIBP v SZSRS* (2014) 309 ALR 67. See also *SZSZH v MIBP* [2014] FCCA 357 where the Tribunal's failure to consider corroborative documents was found to be an error. The judgment is not inconsistent with *MIBP v SZSRS*, handed down the same day. However the Court's statement of principle needs to be read in light of the Full Court's comment (disagreeing with the primary judge's broad statement of principle in that case) that jurisdictional error will not necessarily be established just because ignored material is relevant.
[56] See *SZTVA v MIBP* [2014] FCA 1334 where the Court found that, by only making passing reference to the relevant articles and submissions provided by the applicant, the Tribunal failed to sufficiently deal with the applicant's claims. See also *SZSTR v MIBP* [2014] FCCA 2554 where the Court found a failure to address a matter made in a submission (in this case, that the aggregation of incidents of harm to the applicant, their number, and their occurrence over a short period of time, said something relevant about the applicant's profile) gave rise to a failure to consider an integer of a claim.

Tribunal failed to perform the statutory task imposed by the Migration Act in circumstances where evidence mentioned in the Tribunal's decision, namely updated country information provided by the applicant's representative after the hearing, had not been considered.[57] The Court found that the Tribunal's reasons disclosed that it did not assess the evidence in any real or active way.

25.4.21 This judgment was applied in *Manage v MIBP,*[58] where the Court held that the Tribunal's reasons did not disclose the necessary conscious process of considering and weighing the evidence in respect of a 'hardship' argument raised by the applicant, which was a material issue for consideration by the Tribunal in determining whether the applicant's visa should be cancelled.

25.4.22 The importance of a matter to the assessment of an applicant's case will be determinative of when a failure to address a matter made in a submission may give rise to jurisdictional error. In *SZVGA v MIBP*[59] the Court found that the Tribunal did not assess in any real or active way, a post hearing explanation for delay, or disclose in its reasons any evaluation, or undertake any process of weighing the post hearing submission. The Court was of the view that the submission was substantial and consequential and, by not considering it, the Tribunal erred.

25.4.23 In *SZHHU v MIAC*,[60] the Tribunal's reference to a matter being 'on the public record' was found to sufficiently comply with the requirement in s 430(1)(d). The Court commented that this should be read as a reference to the accumulation of knowledge before the Tribunal of the particular matter, which was a proper matter to have regard to.[61]

25.4.24 Further, adverting to evidence earlier in the reasons and even taking it into account for the purpose of fact-finding does not necessarily mean the Tribunal has regard to it; the evidence must be given proper, genuine and realistic consideration.[62]

Structure of the decision

25.4.25 There is no error, as a matter of structure, in putting the conclusion first, as long as the reasons are then set out.[63] However, clear findings of fact on the claims and evidence are made before the relevant law or criteria are applied.

[57] *MIBP v MZYTS* [2013] FCAFC 114.
[58] *Manage v MIBP* [2014] FCCA 1089.
[59] *SZVGA v MIBP* [2015] FCCA 3269.
[60] *SZHHU v MIAC* [2008] FMCA 679 at [70].
[61] See Gleeson CJ in *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 76 ALJR 966 at [7]. Similarly in *SZLUF v MIAC* [2008] FMCA 919 the Tribunal found that the applicant lacked knowledge of a political party to which he claimed membership. The applicant contended that s 430(1)(d) required the evidence known to the Tribunal against which it tested the applicant's statements to have been set out or sourced in its decision. The Court rejected this contention observing that the evidence upon which the relevant findings were based was the applicant's oral evidence at the hearing and the evidence against which his answers were tested. It was not necessary under s 430(1) for the Tribunal to go further and source its knowledge.
[62] *SZOVB v MIAC* [2011] FCA 1462. See also *Manage v MIBP* [2014] FCCA 1089, where the Court held that the Tribunal's 'simple statements of fact' did not have a sufficient nexus with its conclusions to demonstrate conscious engagement by the Tribunal in respect of a 'hardship' argument raised by the applicant, which was a material issue for consideration in determining whether the applicant's visa should be cancelled.
[63] *Chen v MIAC* [2011] FCAFC 56 at [33].

Addressing claims

25.4.26 A failure to address a claim will involve jurisdictional error.[64] The Tribunal in practice considers claims relating to specific incidents which may be raised by an applicant in detail, as well as claims of a more generalised nature (for example, in reviews of Protection visa refusals, the general situation of Tamils in Sri Lanka or generalised violence in Afghanistan or Pakistan).[65]

25.4.27 In instances where the claims put forward by an applicant are numerous and interrelated, the Tribunal is conscious of the need to address and deal with each integer of each claim as presented.[66]

Examples of failing to consider the integer of a claim

25.4.28 The following cases are illustrations of where the courts have found that the decision maker erred by failing to consider integers of the applicants' claim:

- *MIAC v MZYLE (No 2)* - the Independent Merits Reviewer (IMR) failed to consider whether the applicant had a well-found fear of persecution because he had departed Sri Lanka illegally. The IMR's reasons instead dealt with the risk posed to returning failed asylum seekers.[67]
- *MZYQA v MIAC* - the applicant had expressly made a claim that he was a member of a particular social group of 'young Tamil males from the North of Sri Lanka', and that claim did not evaporate nor disappear as a result of the IMR's rejection of his claims relating to his imputed political opinion.[68]
- *SZQMT v MIAC* - the Tribunal erred by 'sidestepping' proper consideration of the ability of the applicant to relocate in India. The Tribunal erred by failing to resolve the claim made and its failure to consider that claim went to the 'reasonableness' of the applicant's ability to relocate.[69]
- *SZORE v MIAC* - the Tribunal erred by considering the applicants' involvement with a family group only in the context of the Convention ground of political opinion or imputed political opinion, which meant that it failed to give proper consideration to the applicants' claim against the Convention ground of membership particular social group or assess the applicants' risks in this respect.[70]

[64] See for example, *SZQLV v MIAC* [2012] FMCA 337; *MZYLX v MIAC* [2012] FCA 580; *MZYPA v MIAC* [2012] FCA 581.
[65] In *SZQII v MIAC* [2012] FCA 402 the Federal Court found the IMR fell into jurisdictional error by failing to consider the generic claim of the general situation of Tamils in Sri Lanka. In *DZADA v MIAC* [2012] FMCA 874 the Court at [13] and [16] found that the IMR confined its findings to two specific incidents of claimed harm and did not deal with the more generalised claim of imputed political opinion.
[66] See, for example, *MZYPG v MIAC* [2011] FMCA 1025; *MZYMX v MIAC* [2011] FMCA 814; *MZYQJ v MIAC* [2012] FMCA 13; *MZYPJ v MIAC* [2012] FMCA 98; *MZYNJ v MIAC* [2012] FMCA 254; *SZQZT v MIAC* [2012] FMCA 640; *SZQYX v MIAC* [2012] FMCA 650; *DZAAA v MIAC* [2012] FMCA 699; *DZAAJ v MIAC* [2012] FMCA 706; *SZQGJ v MIAC* [2012] FCA 434.
[67] *MIAC v MZYLE* (No 2) [2011] FCA 1467.
[68] *MZYQA v MIAC* [2012] FMCA 374. The Court was not willing to draw an inference that the IMR had considered the claim in the absence of express findings separately addressing the issue.
[69] *SZQMT v MIAC* [2012] FCA 840. The Court commented that in order for the Tribunal to address the claims being made, an essential starting point was for it to consider at the outset whether the applicant was in fact a lesbian – instead the course adopted by the Tribunal was to explicitly '*not make a finding*' in this regard.
[70] *SZORE v MIAC* [2011] FMCA 586.

- *MZYPW v MIAC* - the IMR erred by failing to consider the difficulties that would arise from the applicant's children's Pakistani Hazaragi dialect. The Court found that even though the relevant claims were identified, this was not sufficient to demonstrate that the substance of those claims had been dealt with.[71]
- *WZAQU v MIAC* - the applicant claimed to fear persecution by reason of his membership of a particular entity and provided materials to the IMR in support of his claim. Although the materials were referred to in the IMR's reasons, the Federal Court found that the IMR failed to engage in 'an active intellectual process' in resolving the issues raised by those materials and the claims made.[72]
- *MZZNN v MIBP* - the applicants claimed their religious conduct in Australia would result in significant harm in Iran. The Tribunal made no findings about the applicants' religious conduct in Australia and the Court found that, in failing to consider the conduct in Australia, the Tribunal had failed to consider an integer of the applicants' claims.[73]
- *SZSKH v MIBP* - the Tribunal failed to consider a clearly articulated claim which arose from country information in the applicant's submissions that the applicant was at risk of harm resulting from criminal activity at the hands of paramilitary groups. The Court found it was difficult to infer from the Tribunal's consideration of the risk of harm from paramilitary groups due to the applicant's past activities that the Tribunal had considered the risk resulting from paramilitary groups acting criminally because the discussion of both issues was 'so closely intertwined'.[74]

25.4.29 The Tribunal also has a duty to consider an applicant's claims cumulatively where this arises on the facts.[75]

A systematic approach

25.4.30 In practice, the Tribunal intends for its reasons and findings to flow logically, be supported by evidence, and to address each necessary material fact and question systematically to show that it has sufficiently engaged with the material.[76] The obligation in s 430(1)(b) to set out the reasons for decision requires the Tribunal to

[71] *MZYPW v MIAC* (2012) 289 ALR 541.
[72] *WZAQU v MIAC* [2013] FCA 327 at [32].
[73] *MZZNN v MIBP* [2014] FCCA 74.
[74] *SZSKH v MIBP* [2014] FCCA 135.
[75] See *SZQEP v MIAC* [2011] FMCA 548 where the Court found the Tribunal did not fail to comply with its duty to consider the applicant's claims cumulatively. The Court further noted the distinction between a claim and historical background, indicating that historical incidents recited in an application will not necessarily form part of a claim and, as such, will not necessarily need to be addressed. Whether that is the case will however depend on the circumstances and in particular on how the claims are put.
[76] See *MZYJN v MIAC* [2011] FCA 548 where an issue arose as to whether the manner in which the Tribunal dealt with a police report, in giving some but reduced weight to the report and yet rejecting the point to which the report was directed, indicated error on the part of the Tribunal. The Court found the Tribunal probably intended that in balancing and assessing all of the evidence, the police report was not sufficient to overcome the impression gained by the Tribunal from the applicant's evidence. However the Court commented the Tribunal could have more clearly expressed this in its findings and reasons to demonstrate it was engaged in a balancing exercise. Special leave to appeal to the High Court was dismissed on the basis the application did not advance any questions of law: *MZYJN v MIAC* [2011] HCASL 140.

resolve competing facts where there are conflicting accounts.[77] A failure to address each necessary material fact and question systematically could indicate to a court that relevant claims or integers of claims have not been considered.[78]

25.4.31 For example, in *SZOYH v MIAC*[79], the Federal Court found the Tribunal erred by failing to consider an incident that the applicant claimed occurred in 2008. The Court found that the incident constituted a separate component integer of the applicant's claims such that it should have been expressly considered by the Tribunal. In *SZOJV v MIAC* for example the Court inferred, from the absence of any discussion of the evidence as to whether the third applicant was entitled to the protection visa applied for, that the Tribunal had failed to consider or make relevant findings in relation to the position of the third applicant.[80]

25.4.32 The relevant obligation is to consider material matters, not to cite them. For example, in *SZSUV v MIBP*, the Court found that the Tribunal's brief consideration of the issue of complementary protection did not amount to a jurisdictional error in circumstances where the applicant did not advance allegations which were capable of supporting an entitlement for complementary protection.[81]

25.4.33 In terms of findings not being logically supported, in *AXR16 v MIBP*, the Federal Court held the Tribunal erred because its reasons did not support the credibility findings it relied on to reject the applicant's protection claims.[82] In relation to the Tribunal's treatment of country information, the Court drew a distinction between evidence which positively contradicts an applicant's claim and evidence which fails to support a claim, finding the Tribunal had not engaged in sufficient evaluation of the material or why that material provided a basis for disbelieving the applicant.[83] A lack of support for a claim is not equivalent to a direct contradiction of that claim.[84] The Court also criticised the Tribunal's reasoning that it would have expected the applicant to apply for the protection visa at an earlier date, finding that the Tribunal had reached that conclusion without engaging with facts that were obvious on the material and without explaining why those facts were not material to the logic of the applicant's claim.[85]

25.4.34 The Tribunal can invite allegations of irrationality if it does not explain conclusions or make relevant factual findings.[86] Generally speaking, if the Tribunal makes an error of fact based on a misunderstanding of evidence, or even overlooks an item of

[77] *SZMIB v MIAC* [2008] FMCA 1433 at [18].
[78] See for example *SZQJH v MIAC* [2011] FCA 297 where the Federal Court overturned the Federal Magistrates Court finding that the IMR did not err by failing to assess the applicant's claims against his membership of the particular social group being 'a young Tamil from North East or a 'young wealthy Hindu Sri Lankan of Tamil ethnicity from North East'. See in contrast *MZYPL v MIAC* [2012] FMCA 563 where the Court found the Tribunal gave full regard to the applicant's claims. The Court held the fact that the Tribunal did not to refer to specific elements of the applicant's story in its findings should not give rise to the conclusion the Tribunal accepted them or did not consider them.
[79] *SZOYH v MIAC* [2012] FCA 713.
[80] *SZOJV v MIAC* [2011] FMCA 91.
[81] *SZSUV v MIBP* [2013] FCCA 2185 at [20]–[25].
[82] *AXR16 v MIBP* [2019] FCA 42 at [69], [102].
[83] *AXR16 v MIBP* [2019] FCA 42 at [49], [75].
[84] *AXR16 v MIBP* [2019] FCA 42 at [75].
[85] *AXR16 v MIBP* [2019] FCA 42 at [101].
[86] In *SZQWM v MIAC* [2012] FMCA 310 the Court held that where the Tribunal does not specify in its reasoning relevant factual findings and explanations for its conclusions, the court is left to engage in speculation, and there is a risk that the Tribunal might expose itself to allegations of absurdity and irrationality.

evidence, it will not amount to jurisdictional error so long as it does not result in the Tribunal having failed to consider the applicant's claim.[87] However, if the Tribunal overlooks an important piece of evidence potentially corroborative of an applicant's claim or makes an error of fact resulting in such a piece of evidence being effectively ignored (e.g. by placing 'no weight' on it), then this can result in a constructive failure of the Tribunal to exercise its jurisdiction.[88]

Claims that are not expressly made, apparent or abandoned

25.4.35 If a claim is not expressly made by the applicant, the Tribunal is not required to consider it. See for example, *SZRFZ v MIAC* where the Federal Court found the IMR was under no obligation to consider whether the applicant was a member of a particular social group consisting of 'young Tamil males from Jaffna who were thought to be connected with the LTTE' as no such discrete claim was made.[89] The Court held that where a claim to fear persecution relates to membership of a particular social group, it is essential that the particular social group be identified with accuracy, with a decision maker only required to consider the claims that are sufficiently raised on the material before them and not those that depend for their exposure upon constructive or creative activity by the decision maker.

25.4.36 If a claim is not apparent on the material available to the Tribunal, the Tribunal is not required to consider it.[90] See for example, *SZSGA v MIMAC* where the Federal Court found the claim before the court, namely that evidence before the Tribunal which indicated that the police used specific incidents of crime as a pretext to arrest and detain people raised a complementary protection claim, was not apparent on the face of the material before the Tribunal or squarely or sufficiently raised.[91] The Court found that the applicant's claim as articulated was always linked to the actual or perceived fraud arising from alleged debts owed by the applicant and that the claim as raised before the Court was taken out of its original context both in the representative's submission and the Tribunal's decision.

25.4.37 The question of whether a claim has been abandoned, such that the Tribunal is no longer required to consider it, is approached with caution.[92] The Tribunal will not

[87] *MIAC v SZNPG* (2010) 115 ALD at [28] applied in *MIAC v SZNCR* [2011] FCA 369 at [54].
[88] See *SZSRS v MIBP* [2013] FCCA 1858 and *ABT15 v MIBP* [2015] FCCA 1051. In *ABT15*, the Court accepted that an erroneous finding of fact did not result in the Tribunal failing to consider a claim (at [14]), but nonetheless went on to find that the seriousness of the error resulted in a constructive failure of the Tribunal to exercise its jurisdiction.
[89] *SZRFZ v MIAC* [2012] FCA 1450.
[90] See for example, *MZYKW v MIAC* [2011] FMCA 630 where the applicant had referred to his activities as a teacher and the Tribunal had considered his claims for protection on the ground of political opinion, but had not addressed whether he would be persecuted on the basis of his membership of a particular social group of 'English teachers'. The Court found that, while the applicant's claim may not have been expressly articulated as such, it clearly arose from the material before the Tribunal, and the Tribunal fell into jurisdictional error by not considering it. See also *SZTDM v MIBP* [2013] FCCA 2060, where the Court found that the material and evidence before the Tribunal did not clearly and/or sufficiently raise a claim to fear harm as a 'perceived Christian who had sought asylum in Australia'. See also *SZTAD v MIBP* [2014] FCA 1256 where the Court found the Tribunal was not obliged to consider an unarticulated claim that the applicant was dependent on her mother for the purposes of considering the family unit criterion in s 36(2)(b) of the Migration Act. However note that the Court's opinion that the Tribunal cannot enlarge its statutory task by identifying and dealing with claims that were never made goes beyond previous case law.
[91] *SZSGA v MIMAC* [2013] FCA 774: at [43], [52].
[92] In *MZYQZ v MIAC* [2012] FCA 948 the Court held the applicant's conscription claim was not abandoned before the IMR, rather, it was incorporated by the reference of both the applicant and the IMR to the previously provided information. Similarly, in *DZACT v MIAC* [2012] FCA 1001 the Federal Court held that in the absence of an express finding on a particular claim, it had not been considered, at [30]. In *DZAAN v MIAC* [2012] FMCA 37 the Court held the IMR did not fail to consider an essential integer of the applicant's case given that at the RSA and IMR stage there had been a significant change in focus in

generally assume that a claim initially made has been abandoned just because it was not articulated on review.[93] Whether such a claim needs to be considered will depend on all the circumstances.[94]

25.4.38 An applicant can instruct their agent/representative to make a claim on his or her behalf.[95] While the Tribunal considers submissions by a representative, if a submission is not reflected in the applicant's own claims this may be a relevant consideration for the Tribunal. In *Revollo v MIAC* the Court found the Tribunal was not obliged to accept the representative's evidence of what the applicant's reasons were for not wishing to return to Bolivia and it was entitled to prefer the evidence of the applicant in circumstances where the Tribunal had found that he had not relied on any such claim and had found that claim to be a fabrication.[96]

25.4.39 The extent of the Tribunal's obligation to consider a claim may also depend on whether or not an applicant is represented.[97]

Weight to be given to matters

25.4.40 The Tribunal is entitled to be brief in its consideration of a matter which has little or no relevance to the circumstances of a case.[98] However, if the Tribunal is obliged to have regard to prescribed mandatory considerations, it genuinely has regard to those considerations and engages in an active intellectual process which is reflected in the reasons for the decision.[99] In some circumstances it may be open to lawfully conclude that there is insufficient information to make a determination on a mandatory consideration.[100]

25.4.41 Although the weight to be given to any factor is a matter for the Tribunal in the absence of any statutory indication, a failure to give any weight to a factor to which

his case. See in contrast, *SZQOT v MIAC* [2012] FMCA 84 where the Court found a claim of psychological harm was not abandoned. Undisturbed on appeal: *MIAC v SZQOT* (2012) 206 FCR 145.

[93] See for example *SZQHF v MIAC* [2012] FCA 251 The judgment illustrates that the fact that a claim previously made is not referred to in written submissions or at the interview/hearing does not necessarily mean that the claim has been abandoned. A similar approach was taken in *SZRFQ v MIAC* [2021] FMCA 772 where the Court held that it was not open for the Tribunal to infer the applicants' claim regarding China's one child policy had been abandoned because it was not raised during the review in circumstances where the Tribunal did not openly and fairly focus the applicants' attention on the presence of their claimed fear of harm in their visa applications and clarify with them whether such a concern was still maintained: at [28]–[29]. See also *MZZES v MIBP* [2015] FCA 397.

[94] See, for example, *SZTOK v MIBP* [2015] FCA 929 where the Court found that by the time the applicant was interviewed by the delegate she no longer claimed to fear being killed, as per her protection visa application, and that her exchange with the Tribunal at hearing later confirmed this. The Tribunal therefore did not fail to consider it.

[95] In *DZACP v MIAC* [2012] FMCA 570, the Court found the IMR erred by failing to consider a claim expressly made by the applicant's solicitors on his behalf. The IMR could not simply brush it aside as not having been made personally by the applicant and there was no evidence that it had been abandoned. See in contrast, *SZTQM v MIBP* [2015] FCCA 996 where the applicant expressly confirmed to the Tribunal that she did not wish to rely upon certain claims as they were made by a migration agent without her knowledge.

[96] *Revollo v MIAC* [2013] FCCA 154 at [38].

[97] *SZRPA v MIAC* [2012] FMCA 91. In *MZYPB v MIAC* [2012] FMCA 226 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 referred to *SZRPA v MIAC* with approval and found as the applicant was represented, the agent would have been aware of the terms of the statute at [24]–[25].

[98] *MIAC v Khadgi* (2010) 190 FCR 248 at [60].

[99] See, for example *Lafu v MIAC* (2009) 112 ALD 1 at [47]–[54], cited with approval in *MIAC v Khadgi* (2010) 190 FCR 248 at [63]. See also *MZYPZ v MIAC* [2012] FCA 478. In this case, the Court found that the MRT failed to consider and evaluate for itself the evidence before it as to the risk to the applicant's safety should he return to Sri Lanka, in circumstances where the Tribunal had relied upon findings made by the RRT some two years earlier. The Court held that this resulted in the Tribunal's failure to consider whether 'compelling' reasons existed for the purposes of cl.820.211(2)(d)(ii), and commented that a cursory consideration will not suffice where there exists, as in this case, a mandatory consideration which the Tribunal was bound to take into account.

[100] See for example, *Paerau v MIBP* (2014) 219 FCR 504.

the Tribunal is bound to have regard, in circumstances where that factor is of great importance in a particular case, may support an inference that the Tribunal did not have regard to that factor at all.[101]

The form of the decision record and the inclusion of procedural steps

25.4.42 When setting out and applying the relevant law, there is no expectation that the Tribunal 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.[102]

25.4.43 The fact that the Tribunal may recite a test in a 'boilerplate' fashion does not mean that it has not actively intellectually engaged with the correct test.[103] The Court in *SZONB v MIAC* commented that to impose such an expectation would be impractical and an unnecessary burden on the Tribunal and that even if the Tribunal had misstated a test, it would only fall into jurisdictional error if it had actually misapplied the test.

25.4.44 However, using language in the reasons for the decision that is inconsistent with relevant provisions of the Migration Act or *Migration Regulations 1994* (Cth) (the Regulations) may lead to an inference that the wrong legal question has been asked.[104]

25.4.45 The principle in *Yusuf* (see above) applies to 'matters of fact' and 'findings of fact' and not to matters generally.[105] There is no statutory obligation to set out the *procedures* followed by the Tribunal in a particular review.[106]

25.4.46 For example, there is no statutory obligation to record that the Tribunal gave the applicant an opportunity to present evidence and arguments on an issue in the review pursuant to s 360 or 425,[107] that the Tribunal properly considered a request

[101] *MIAC v Khadgi* (2010) 190 FCR 248 at [58].The Court made clear that where the Tribunal is required to 'have regard to' certain factors, it is not obliged to specify in its reasons the weight which it accords to the relevant factors under consideration (in this case, the mandatory discretionary factors prescribed in reg 2.41 for the purposes of s 109), nor was it obliged to explain in detail why it gave those factors the weight that it did. See in contrast, *Revollo v MIAC* [2011] FMCA 899 where the Court found the Tribunal failed to deal with the applicant's psychological state, which was relevant to the criteria of the visa holder's present circumstances. See also, *Schuster-McFadyen v MIAC* [2011] FCA 1303 where the Court found the Tribunal had misdirected itself in weighing up relevant considerations going to the exercise of its discretion. The Tribunal had considered it was bound to give less weight to 'other considerations' than it was required to give to 'primary considerations' set out in a Ministerial Direction. The correct position, consistently with the Ministerial Direction, was that 'other considerations' should generally be given less weight than that given to 'primary considerations'.

[102] *SZONB v MIAC* [2011] FMCA 13 at [121].

[103] *SZONB v MIAC* [2011] FMCA 13 at [118]–[133]. See in contrast, *SZQHF v MIAC* [2011] FMCA 774 where the Court's reasons indicated that IMRs should take care that the language used to make findings reflects the correct legal tests, and should be cautious in adopting another reviewer's findings and reasons. This was undisturbed on appeal: *SZQHF v MIAC* [2012] FCA 251. However, in *SZQXC v MIAC* [2012] FMCA 302 the Court held that failure to follow a formulaic form of reasoning, in that case use of the words 'reasonably foreseeable future', did not indicate a failure to make the necessary assessment.

[104] In *SZQOT v MIAC* [2012] FMCA 84 the Court found that it was imperative decision makers dealing with claims of persecution use the same language as is employed in the Refugees Convention and in the Migration Act. In that case the IMR did not accept the applicant 'would be at risk of severe harm' and the Court held that departure from the language of the then s 91R was so problematic that it was likely to point to jurisdictional error unless a Court was able to conclude that the facts as found by the decision-maker could not constitute a finding of persecution.

[105] *MIAC v SZGUR* (2011) 241 CLR 594 at [70]. Gummow J stated that this is clear from the surrounding context and authorities in the conclusion of the judgment of McHugh, Gummow and Hayne JJ in *Yusuf*.

[106] *MIAC v SZGUR* (2011) 241 CLR 594 at [32], [69].

[107] See, for example, *SZMUW v MIAC* [2009] FMCA 753.

to take witness evidence but decided not to,[108] or that the Tribunal had considered a request to obtain a medical assessment of the applicant under s 427(1)(d).[109]

25.4.47 However, in some cases the decision record may be the only evidence available to a court of evidence of procedural steps being taken (for example where there is no other evidence on file), and therefore the Tribunal considers whether to make reference in the decision record to its compliance with its relevant statutory obligations.[110] For example, in *SAAD v MIMA* the Court commented that as a matter of practice, it is desirable for the Tribunal, when provided with a request to take witness evidence, to indicate in its reasons the consideration that it has given to the request.[111]

25.4.48 While there is no statutory obligation to record the Tribunal's reasons for not granting a postponement, the Tribunal generally does this either on a file note, in a letter to the applicant or in the decision-record. This step is to demonstrate that proper consideration was given to the request and all relevant circumstances were taken into account. In *MIAC v Li*,[112] for example, the outcome turned heavily on the lack of express consideration by the Tribunal in its decision of the reasons for the adjournment request in circumstances where there appeared good reason to accede to it.

25.5 Recording day and time of the decision

25.5.1 The Tribunal's oral statement of decision and reasons must identify the day and time the decision is given orally.[113] Similarly the Tribunal's written statement of decision and reasons must record the day and time the statement is made or given orally as the case requires.[114] The validity of a Tribunal decision is not affected by a failure to record the day and time when the written statement was made or the decision was given orally.[115]

25.5.2 However, the consequences of not marking the date and time on the record will be that while the Tribunal decision remains valid, the application will not be *finally*

[108] Although if it is a request made in accordance with s 426 (2) or 361(2), then the Tribunal must, in fact, consider the request.
[109] The High Court in *MIAC v SZGUR* (2011) 241 CLR 594 held that the Tribunal's failure to refer to a request made by the respondent's agent that the Tribunal arrange for a medical examination of the respondent in accordance with s 427(1)(d) did not lead to an inference that the Tribunal had failed to consider that request, in circumstances where the Tribunal had demonstrated consideration of the letter in which the request was contained: per French CJ and Kiefel J (Heydon and Crennan agreeing) at [33] and Gummow J (Heydon and Crennan agreeing) at [73]. French CJ and Kiefel J (Heydon and Crennan JJ agreeing) at [32] and Gummow J (Heydon and Crennan agreeing) at [69] held that s 430 did not require the Tribunal to set out the request for an examination in its decision record.
[110] See *SZJYA v MIAC (No 2)* [2008] FCA 911 where the Federal Court found, based on the absence of any mention of it in the Tribunal's decision, that the Tribunal did not give the applicant an opportunity to address her motivation for engaging in certain conduct in Australia pursuant to s 91R(3) or 5J(6), resulting in a breach of s 425.
[111] *SAAD v MIMA* [2002] FCA 206.
[112] *MIAC v Li* (2013) 249 CLR 332.
[113] ss 368D(2)(a)(v), 430D(2)(a)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (No 35 of 2015).
[114] ss 368(1)(f), 430(1)(f) and ss 368D(2)(b)(v), 430D(2)(b)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[115] ss 368(4)(a), 430(4)(a) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 368D(7), 430D(7) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).

determined within the meaning of ss 5(9)(a) and 5(9A) of the Migration Act. In which case, the Tribunal may not be taken to be *functus officio.*[116]

25.6 'No jurisdiction' decisions

25.6.1 The requirement to provide a statement of reasons under ss 368(1) and 430(1), and ss 368D(2) and 430D(2), only applies to decisions on a review where a valid application for review has been made.

25.6.2 A decision that the Tribunal has no jurisdiction to conduct a review, for example because it was not made within time, does not, strictly speaking, require a statement of reasons.[117] The Tribunal does however, as a matter of good practice, provide a statement of reasons in these cases as it gives the applicant an understanding of the basis for the decision and provides reasons to the court should the decision be subject to judicial review.

25.7 Guidance decisions

25.7.1 The President or the MRD Division Head may, in writing, direct that a decision (the guidance decision) of the Tribunal specified in the direction is to be complied with by the Tribunal in reaching a decision on a review of a Part 5 or Part 7 reviewable decision of a kind specified in the direction.[118]

25.7.2 In reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.[119] However, non-compliance by the Tribunal with a guidance decision does not mean that the decision on a review is an invalid decision.[120]

25.8 New claims or evidence – Part 7 reviewable decisions

25.8.1 For protection visa applications made on or after 14 April 2015, the Tribunal is required to draw an adverse inference on the credibility of a new claim or evidence if it was not put forward before the primary decision maker and the Tribunal is satisfied that the applicant does not have a reasonable explanation why.[121] While on one view the structure of s 423A suggests the Tribunal must always consider whether an explanation is reasonable if the pre-conditions of a new claim being

[116] This is because s 5(9A) provides that an application is 'finally determined' when a decision on the review is taken to have been made as provided by, for written decisions, s 368(2) or 430(2) , which themselves provide that a decision is taken to have been made by the making of the written statement including the requirement to record the day and time the statement is made. The consequence of the decision being valid, but the application not being finally determined has not been the subject of judicial consideration.
[117] *Song v MIMIA* [2005] FMCA 685; *SZDKI v MIMIA* [2005] FMCA 1573.
[118] ss 353B, 420B as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015) and amended by the *Tribunals Amalgamation Act 2015* (Cth).
[119] ss 353B(2), 420B(2).
[120] ss 353B(3), 420B(3).
[121] s 423A as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015). The reference in s 423A(1) to an 'RRT reviewable decision' instead of a Part 7 reviewable decision also appears to be a drafting oversight as it appears in Part 7 of the Act which only applies in respect of Part 7 reviewable decisions and would otherwise have practically no work to do following the RRT's abolishment from 1 July 2015.

raised or new evidence being presented are met, an alternative view is that s 423A is only a discretionary consideration that the Tribunal is not always obliged to consider.[122] This is because the need to draw an adverse inference only arises if the explanation for the late claim or evidence is not considered reasonable. If the new claim or evidence were dealt with otherwise than by considering the reasonableness of the explanation, the obligation to draw an adverse inference would not arise. This has been the subject of limited judicial consideration and, because the credibility of a new claim or evidence will generally need to be tested and considered regardless, there appears little practical difference between the alternative views.[123]

25.8.2 There is no formal method or process for putting the applicant on notice of s 423A or for obtaining an explanation from an applicant for a claim that would fall under s 423A.[124]

25.8.3 Whether an explanation for a new claim or evidence is 'reasonable' will depend upon the circumstances of each case. While the term itself is not defined, the Addendum to the accompanying Explanatory Memorandum states that a reasonable explanation may include:

- no reasonable opportunity to present the claim, e.g. interpreting or translating error made in the primary stage of the application;
- a change in the country situation affecting human rights occurred after the primary decision was made;
- new information relevant to the application became available, e.g. new documentary evidence of identity was forthcoming from the authorities in the home country;
- a change in personal circumstances allowing presentation of new claims, e.g. a new relationship (spouse or child) with a person who has protection claims in their own right; or
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate persecution claims.[125]

[122] However, in *EJN20 v MICMSMA* [2022] FedCFamC2G 348 at [88]–[93] the Court noted that the application of s 423A is not discretionary, and that the Tribunal was required to draw an adverse inference in relation to EJN20's new evidence unless they had a reasonable explanation for not providing it to the delegate. The Court held that no error arose in respect of the way the Tribunal dealt with s 423A i.e. by giving the applicant an opportunity to consider the issue and provide an explanation as to why the evidence was not provided to the delegate. The Court rejected the applicant's argument that the Tribunal had failed to warn them of the serious consequences under s 423A before asking whether they wanted to add to their claim.

[123] See e.g. *EQU19 v MICMSMA* [2022] FedCFamC2G 609 at [97]–[100] where the Court held that it was open to infer that having reflected the language of s 423A(2), the Tribunal was implicitly finding that the explanation was not reasonable. The Tribunal did not refer to s 423A and the Court reasoned that there was nothing about the manner in which the Tribunal discussed the new claim or adduced the explanation about its late provision from the applicant at the hearing which gave rise to a jurisdictional error. The Tribunal found that the applicant's explanation for the delay in raising the claim undermined the credibility of the claim.

[124] See *EQU19 v MICMSMA* [2022] FedCFamC2G 609 at [100]. The Court reasoned that unlike sections such as s 424AA, s 423A does not impose on the Tribunal a method by which it is to obtain the explanation, nor prescribe any preconditions to its operation.

[125] Addendum to the Explanatory Memorandum to the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) at p.4.

25.9 Past tribunal decisions

25.9.1 The Tribunal is not obliged in law to give any weight to another Tribunal decision[126] or have regard to evidence or material in other decisions, including recent past decisions by the same decision-maker.[127] Conversely, the Tribunal is entitled to take into account the findings of another Tribunal in the exercise of its review powers.[128] Where the Tribunal, in a decision, refers to a decision on another review (for example, because an adviser has referred to relevant legal or factual findings in such a decision), this is generally done by reference to the decision/case number (e.g. N04/54321) and not by reference to the name of the applicant or the Member. The reference to a previous Tribunal decision may in some instances give rise to ss 359A and 424A obligations if it forms the reason or part of the reason for affirming the decision (see Chapter 10 – Statutory duty to disclose adverse information).[129]

25.9.2 A Tribunal is not bound by the findings of the earlier constituted Tribunal.[130] However, the courts have occasionally commented that if a matter has been previously decided by the Tribunal and remitted for reconsideration it is desirable for the Tribunal to explain in the decision record why the Tribunal departs from any material findings of fact made in the previous Tribunal decision.[131] In some circumstances, an obligation to do so may be imposed by the requirement in the legislation for a Tribunal to prepare a written statement that '*sets out the reasons for the decision*' and its '*findings on any material questions of fact*'.[132]

[126] In *Bhatt v MIAC* [2012] FMCA 317 the Court held 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.
[127] See *DZAAS v MIAC* [2012] FCA 828.
[128] See *SZJDS v MIAC* [2013] FCCA 1383 at [18]–[21]. Undisturbed on appeal: *SZJDS v MIBP* [2014] FCA 51; *SZRLB v MIBP* [2014] FCCA 2851where the Court rejected the applicant's allegation that the reconstituted Tribunal, following a Court remittal, demonstrated bias by adopting findings of the earlier Tribunal's decision, in circumstances where it was clear that the Tribunal had turned its mind to the claims and evidence and did not simply repeat the findings of the earlier Tribunal; and *SZTQL v MIBP (No 2)* [2015] FCA 548 at [20]–[21].
[129] Note that if the Tribunal relied upon the reasons of a previous Tribunal decision, it may in some circumstances give rise to a jurisdictional error for not properly conducting a review.
[130] See *SZNHJ v MIAC (No 2)* [2012] FMCA 809 in which the Court held that each member constituted for the purpose of the review must bring their own assessment to the matters before them as to do otherwise would lay open charges of having been unduly influenced in the conduct of the review: at [62].
[131] *SZNHJ v MIAC (No 2)* [2012] FMCA 809: at [62], [64].
[132] See *SZFYW v MIAC* [2008] FCA 1259 at [11] and *Haidari v MIAC* [2008] FMCA 1314 at [8].

26. NOTIFICATION OF THE DECISION

From 15 March 2009

Prior to 15 March 2009

26.NOTIFICATION OF THE DECISION[1]

26.1 Introduction

26.1.1 This Chapter discusses the procedures for notifying decisions made in the Migration and Refugee Division (MRD) of the Tribunal and the different considerations which may arise. The Chapter also considers the consequences of a failure to comply with the statutory requirements.

26.1.2 This Chapter is to be read together with Chapter 8 – Notification by the Tribunal, which contains a discussion of the Tribunal's notification procedures generally.

26.2 Notification method - post 28 May 2014

26.2.1 Under the *Migration Act 1958* (Cth) (the Migration Act), the method of notification is different for decisions made orally and those made other than orally.

Oral decisions with oral reasons

26.2.2 If the Tribunal gives an oral decision with oral reasons, the applicant is taken to have been notified on the day and at the time the decision is given orally.[2] The oral statement must identify the day and time the decision is given.[3]

26.2.3 If the Tribunal gives an oral decision with oral reasons, it does not have to give a written statement of those reasons unless the applicant makes a written request for the statement within 14 days of the date of the oral statement,[4] or the Minister makes a written request at any time.[5]

26.2.4 If a request for a written statement is made from either the applicant or the Minister, the Tribunal must reduce the oral statement to writing and within 14 days after the day the request is received, give a copy of that statement to the applicant and the Secretary of the Department by one of the methods specified in ss 379A and 441A, or ss 379B and 441B, as relevant.[6] Regardless of which party requests the statement, a copy must also be given to the other party.

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 368D(1), 430D(1) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014).
[3] ss 368D(2)(a)(v), 430D(2)(a)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[4] s 368D(4), reg 4.27B; s 430D(4), reg 4.35F.
[5] ss 368D(5), 430D(5).
[6] ss 368D(4)–(5), 430D(4)–(5). In *Singh v MICMSMA* [2020] FCCA 748 the Court held that if the Tribunal does not provide the written statement within the timeframe which the Migration Act specifies, there will be no jurisdictional error for this reason alone (i.e. not giving a copy of the written statement of the oral reasons within 14 days of the request will not vitiate the decision): at [32].

Oral decisions without oral reasons

26.2.5 If the Tribunal gives an oral decision without oral reasons, the applicant is taken to have been notified, on the day and at the time the decision is given orally.[7] In practice, a one page record of the decision outcome is given to the applicant and to the Secretary either on the day of the hearing or no later than the next working day. The Tribunal must still produce a written statement of reasons for the decision. The written statement must record the day and the time the decision is given orally.[8]

26.2.6 Unlike the statutory regime in place prior to 18 April 2015, which required the Tribunal to give a copy of the written statement of reasons to the applicant and Secretary within 14 days, the current statutory regime only requires the Tribunal to make the statement. The Migration Act is silent on any obligation to produce the reasons within a specified period or on giving a copy of the decision to the applicant or Secretary.

Decisions in writing

26.2.7 For a decision, other than an oral decision, the Migration Act requires the Tribunal to notify the applicant of the decision by giving them a copy of the written statement within 14 days after the day on which the decision is taken to have been made.[9] A decision, including a dismissal decision under s 362B or 426A, is taken to have been made by the making of the written statement at the time and date it is made.[10] Notification must be made by one of the methods in s 379A or 441A.[11] This applies whether or not the applicant is in immigration detention. Where an applicant is in immigration detention, the Tribunal's practice is to have an officer (as defined in s 5(1) of the Migration Act, such as an officer of the Department), or a person employed by an entity that operates an immigration detention facility under contract (e.g. Serco employees) hand the decision to the applicant.[12]

26.2.8 The Tribunal must also give a copy of the written statement to the Secretary within 14 days after the date of the statement by one of the methods in s 379B or 441B.[13]

[7] ss 368D(1), 430D(1) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014).
[8] ss 368D(2)(b)(v), 430D(2)(b)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[9] ss 368A(1), 430A(1).
[10] ss 368(2), 430(2) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 362C(3), 426B(3) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[11] ss 368A(1), 430A(1), 362C(5), 426B(5).
[12] See 'Authorisation and Delegation under subsections 379A(2) and s 441A(2) of the *Migration Act 1958* and reg 5.02 of the *Migration Regulations 1994*' in effect from 22 May 2017 ('Authorisation and Delegation'). The Registrar has authorised under ss 379A(2) and 441(2) officers as defined in s 5(1) of the Migration Act and persons described in schedule A in the Authorisation and Delegation to hand documents, which includes a Tribunal decision, to recipients in immigration detention. The persons described in schedule A are 'persons who are from time to time employed by an entity that operates an immigration detention facility under contract with the Department of Immigration and Border Protection and located at or within an immigration detention facility'.
[13] ss 368A(2), 430A(2), 362C(7), 426B(7).

26.3 Notification method - 27 October 2008 - 27 May 2014

26.3.1 The provisions of the Migration Act dealing with notification of Tribunal decisions were significantly amended by the *Migration Legislation Amendment Act (No 1) 2008* (Cth). The relevant amendments applied to decisions made on or after 27 October 2008 and decisions made prior to that date but for which an invitation to a handing down of the decision had not been sent as at 27 October 2008.

26.3.2 This statutory scheme draws a distinction between reviews where an oral decision is given and those where the decision is given in the written statement of reasons.

Oral decision

26.3.3 An oral decision was given when the Tribunal gave its decision at the conclusion of the hearing and in the presence of the applicant or the applicant's representative.[14] If the Tribunal gave an oral decision, it must have given the applicant and the Secretary of the Department of Immigration a copy of the written statement prepared under s 368(1) or 430(1) within 14 days after the oral decision was made. An applicant was taken to be notified of an oral decision on the day on which the decision was made.[15]

26.3.4 There was no prescribed method in the Migration Act by which the statement of reasons for an oral decision must have been given. However, under the Regulations, notice or a statement in relation to a decision must have been given to an applicant by one of the methods in s 379A or 441A. That is, by hand, prepaid post, fax, email or other electronic means.[16]

26.3.5 The legislation similarly did not prescribe a method for giving the decision statement to the Secretary but the Migration Act permitted the relevant Tribunal to give it by one of the methods outlined in ss 379B and 441B. That is, by hand, prepaid post, fax, email or other electronic means.[17]

Decision in writing

26.3.6 Where the Tribunal elected not to give an oral decision, the decision was included in the written statement prepared under s 368(1) or 430(1). The Tribunal was required to notify the applicant of the decision by giving the applicant a copy of the written statement within 14 days after the date of the written statement[18] by one of the methods in s 379A or 441A.[19] This procedure was the same, whether or not the applicant was in immigration detention.

[14] *Sochorova v MIMIA* [2002] FCA 817 at [8].
[15] ss 368D, 430D.
[16] reg 4.40.
[17] ss 379AA, 441AA.
[18] That is the date on which the decision is taken to have been made: ss 368(2), 430(2).
[19] ss 368A(1), 430A(1) as amended by the *Migration Legislation Amendment Act (No 1) 2008* (Cth).

26.3.7 As with the current scheme, the Tribunal was also required to give a copy of the written statement to the Secretary within 14 days after the date of the statement by one of the methods in s 379B or 441B.[20]

26.3.8 For decisions other than oral decisions, performance of the notification requirements in ss 379A and 441A, and ss 379B and 441B, were critical elements in a review under Part 5 and Part 7 of the Migration Act and only when those requirements were fulfilled was an application 'finally determined' within the meaning of s 5(9)(a) of the Migration Act.[21] Accordingly, there must have been notification to the applicant *and* the Secretary, and those notifications must have been done in accordance with the Migration Act; actual notification would not have been sufficient.[22]

26.4 Notification method - 1 June 1999 - 26 October 2008

26.4.1 Prior to amendments introduced by *Migration Legislation Amendment Act (No 1) 2008* (Cth), the Tribunal was required to conduct a 'handing down' of decisions, to which both the applicant and the Secretary of the Department of Immigration (the Secretary) were invited, except in limited circumstances.[23] The decisions in respect of which a handing down was not required were:

- a decision that was given orally;
- a decision on the application of a person who was in immigration detention (RRT only);
- a decision on the application of a person who was in immigration detention *because* of a decision to refuse to grant or cancel a bridging visa (MRT only).

26.4.2 In cases where a handing down was required, the Tribunal was required to give the applicant and the Secretary written notice of the day on which, and the time and place at which, the decision was to be handed down.[24] The notice to the applicant had to be given by one of the methods specified in ss 379A and 441A.[25] The notice to the Secretary had to be given by one of the methods specified in ss 379B and 441B.[26]

26.4.3 The applicant and the Secretary had to be given at least the prescribed period of notice of the handing down.[27] Pursuant to reg 4.35E, the prescribed period for the

[20] ss 368A(2), 430A(2).
[21] *MIMAC v SZRNY* (2013) 214 FCR 374 at [84].
[22] While aspects of the majority judgment in *MIMAC v SZRNY* (2013) 214 FCR 374 suggested that this applied equally to decisions given orally, it was difficult to reconcile that view with their Honours' reference to the deeming provision in s 430D [s 368D], that oral decisions were taken to be notified when the decision was made and not when the applicant was given a copy of the decision. As this was not an issue the Court was required to decide, the comments about this could be regarded as *obiter dicta* and not binding.
[23] ss 368A, 368B, 430A, 430B.
[24] ss 368A(3), 430A(3).
[25] ss 368A(4)(b), 430A(4)(b).
[26] ss 368A(5), 430A(5).
[27] ss 368A(3), 430A(3).

then RRT decisions ended at the end of 7 days after the day on which notice was received.[28] For the then MRT decisions, reg 4.27A stated that the prescribed period ended at the end of 5 working days after the day on which the notice was received, or a shorter period of no less than 1 working day if the applicant agreed in writing.[29]

26.4.4 At the handing down, an authorised officer read out the outcome of the decision and the date of the handing down became the date of the decision.[30] Although an applicant was entitled to send a 'representative' to attend the handing down on his or her behalf, the Tribunal decision was taken to be handed down irrespective of whether the applicant and/or the Secretary were present.[31]

If applicant / representative attended the handing down

26.4.5 If either the applicant or a representative of the applicant was present at the handing down, a copy of the decision record was required to be handed to him or her.[32] If this occurred, the applicant was taken to have been 'notified' of the decision on the day of the handing down.[33]

If applicant / representative did not attend handing down

26.4.6 If neither the applicant nor a representative attended the handing down, a copy of the decision record had to be given to the applicant within 14 days of the handing down by one of the methods specified in s 379A or 441A.[34] A copy of the decision record was also given to the Secretary within 14 days after the handing down.[35]

Oral decisions

26.4.7 The procedure for notification of oral decisions was not amended by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) and was the same as the procedure for 27 October 2008 to 27 May 2014 matters referred to above.

Detainees

26.4.8 If the applicant was in immigration detention and the review was being heard by the RRT or in immigration detention because of a decision to refuse to grant or cancel a bridging visa (heard by the MRT), the Tribunal was required to give the applicant

[28] reg 4.35E was repealed by *Migration Legislation Amendment Regulation 2013* (Cth) (No 1) (SLI 2013, No 33).
[29] reg 4.27A was repealed by SLI 2013, No 33.
[30] ss 368B(4), 430B(4).
[31] ss 368B(9), 430B(9). The term 'representative' in this context was not defined and may or may not be the applicant's authorised recipient. Whether a person is an applicant's representative for the purposes of a handing down is a question of fact and depends on whether the representative was given an appropriate authority from the applicant. For a discussion of the general principles of agency, see Chapter 32 – Representatives and the Tribunal.
[32] ss 368B(5), 430B(5).
[33] ss 368C(1), 430C(1). See *Nguyen v MIMA* (2006) 204 FLR 138 at [37] where the Federal Magistrates Court held that notification of the decision by handing it to the applicant at the handing down constituted notification for the purposes of the Migration Act as well as actual notification.
[34] ss 368B(6), 430B(6).
[35] ss 368B(7), 430B(7).

and the Secretary a copy of the decision record within 14 days after the decision was made.[36] No method of notification of the decision record was specified in the Migration Act, but reg 4.40 specified that notices or statements relating to Tribunal decisions must be given by one of the methods specified in s 379A or 441A. Furthermore, reg 5.02 provided that documents to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf. It is unclear whether the Tribunal was *obliged* to give a copy of the decision record to the authorised recipient if an applicant in detention notified the Tribunal of one. Regulation 5.02 seems to permit notice to a detainee to be given to the applicant *or* the authorised recipient. In practice, the Tribunal's policy was to give notices, including decision notices, to both.

26.4.9 The Tribunal generally notified applicants in immigration detention of their decisions by faxing a copy to the detention centre with an instruction to the relevant officer to hand the decision record to the applicant. That officer acted as an agent of the Tribunal. This practice was upheld by the Federal Court in *Ozturk v MIMA*,[37] which found that the Tribunal was entitled to carry out its functions through an agent. The Court could find no implied prohibition upon engaging the services of an officer of the Department to carry out the function in question. However, the written statement had to be *physically* given to the applicant. It would not suffice to communicate to the applicant orally that the document had arrived, or to communicate the gist of the document, or even to read the document to the applicant.[38]

26.5 Notification method - pre June 1999

26.5.1 Prior to 1 June 1999, the Tribunal was required to give the applicant and the Secretary a copy of the decision statement within 14 days after the decision was made.[39] No method of service was specified in the Migration Act. However, r 4.40 provided that a statement would be duly given if given, *inter alia*, by prepaid post to the last address for service provided by the applicant in connection with his/her application for review or the residential address provided by the applicant in his/her application for review; by hand to the applicant or to a person authorised by the applicant; or by leaving it at the place of residence of the applicant with a person who appears to live there and have turned 16. Notice to applicants in immigration detention was governed by r 5.02.

[36] ss 368D(2), 430D(2).
[37] *Ozturk v MIMA* (2001) 113 FCR 392.
[38] *WACB v MIMIA* (2004) 210 ALR 190 at [37]. The Court was referring to the meaning of 'give' in s 430D(2), which was not defined, and not the 'by hand' provisions of ss 379A(2), 441A(2) and reg 5.02. The Court stated: '*the word "give" used in s 430D(2), the applicable provision in this case, was not defined. Accordingly, it is the ordinary meaning of the word, understood in its context, that must be considered. The context is that the [Tribunal] must give the applicant a copy of the written statement. In that setting, to give a document ordinarily requires its physical delivery, not some act of constructive delivery of possession which, at general law, may suffice to transfer property in a chattel.*.' In that case, it was not enough that a counsellor at the detention centre told the applicant of the decision. It was not relevantly 'given' until requested by him from the counsellor some weeks later. However the Court's observations would equally apply to the 'by hand' provisions of ss 379A(2), 441A(2) and reg 5.02.
[39] ss 368(2), 430(2) as then in force.

26.6 Content of the notification

26.6.1 Unlike notifications of primary decisions, the Tribunal is under no obligation to notify applicants of any specific information, such as where and when an application for judicial review may be made. For written decisions under ss 368 and 430 and oral decisions under ss 368D and 430D, the obligation is simply to give the applicant a copy of the decision record prepared under s 368(1) or 430(1), or ss 368D(2) or 430D(2). Under those provisions the decision statement must include:

- the decision on the review;
- the reasons for the decision;
- the findings on any material questions of fact;
- reference to the evidence or any other material on which the findings of fact were based;
- the day and time when the written statement was made or the decision was given orally.

26.6.2 For dismissal decisions under s 362B or 426A, the obligation is to give the applicant a copy of the decision record prepared under s 362C(2) or 426B(2). Under these provisions the decision statement must include the decision, the reasons for the decision and the day and time when the written statement was made. The copy of the statement must be given together with a notice which advises that the applicant may apply for reinstatement with 14 days of receiving the dismissal statement, the courses of action the Tribunal may take, and the consequences of not applying for re-instatement.[40] For decisions to confirm the dismissal of an application, the decision must indicate that under s 362B(1F) or 426A(1F), the decision under review is taken to be affirmed.[41]

26.6.3 In *SZLCD v MIAC*,[42] the copy of the decision which the Tribunal sent to the applicant omitted page 2 of the decision. The Federal Magistrates Court found that the provision of the incomplete written statement nonetheless complied with the Tribunal's statutory obligations because the content of the omitted page 2 did not touch upon the matters specified in s 430(1). This situation can be distinguished from the circumstances in *SZFLM v MIAC,*[43] where the Court held that posting the applicant a copy of the Tribunal decision with a page missing was a breach of s 430B(6), where the missing page set out the reasons for the decision. In that case, the decision record given to the applicant was insufficient to enable the applicant to understand why the decision was made.

[40] ss 362C(6), 426B(6) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[41] ss 368(1)(e), 430(1)(e).
[42] *SZLCD v MIAC* [2008] FMCA 542.
[43] *SZFLM v MIAC* [2007] FMCA 1. Section 430B was repealed by *Migration Legislation Amendment Act (No 1) 2008* (Cth).

26.6.4 The Tribunal is not obliged to translate or orally interpret the written reasons for decision into another language.[44] The Tribunal does, however, give applicants their decisions under cover of a letter which advises them to contact the Translating and Interpreting Service (TIS) for assistance.

26.6.5 The fact sheet attached to the cover letter also advises applicants that they may have a limited right to seek judicial review, although this information is not statutorily required.

26.7 Multiple review applicants

26.7.1 Where there are combined applications for review, the decision notification obligations apply equally to each applicant. However, if one applicant or another person is appointed as authorised recipient in respect of all applicants in the manner specified by s 379G or 441G, then each applicant would be properly notified by notification to that person.[45] Whether an applicant or applicants have appointed an authorised recipient or agent to whom correspondence may be sent is a question of fact. If there is no authorised recipient, ss 379EA and 441EA provide that a document given to any one person in a combined application is taken to be given to each of those applicants.[46]

26.7.2 The notification obligations for each applicant in a combined application may vary in particular situations. For example, where some but not all applicants have an authorised recipient.

26.8 Consequences of non-compliance with notification requirements

26.8.1 The Migration Act expressly provides that a failure to correctly notify a decision, including dismissal decisions under ss 362B and 426A, does not affect the validity

[44] *WACB v MIMIA* (2004) 210 ALR 190 at [43], [98].
[45] See e.g. *SZKDB v MIAC* [2007] FMCA 1036 at [29]–[35], *SZIHI v MIAC* [2007] FMCA 1332 at [9], *SZLMD v MIAC* [2008] FMCA 724 at [19] (upheld on appeal: *SZLMD v MIAC* [2008] FCA 1271), *MZXSP v MIAC* [2008] FMCA 374 at [18]–[19], *SZLQS v MIAC* [2008] FMCA 972 at [36], *MZWXH v MIMA* [2006] FCA 1322; and *Cabal v MIMA* [2001] FCA 546 at [15]. In *SZKDB* it was held that the form of application completed by all applicants presented the primary applicant or that person's authorised recipient as the only person to whom correspondence should be sent in relation to all of the applicants. On the application, the secondary applicants expressly authorised the Tribunal to communicate with the primary applicant *or* his/her authorised recipient. The Court concluded that the application was brought by the mother both in her own personal capacity and in her capacity as the parent of her infant daughter, and in those circumstances it was appropriate for the Tribunal to communicate with the primary applicant in both capacities; alternatively, she appointed herself as authorised recipient within s 441G. *SZIHI* involved a husband and wife and their son. Following the alternate reasoning in *SZKDB*, Raphael FM held that, having regard to the way the review application form was completed and signed, the principal applicant was the 'authorised recipient' for the other applicants so that notification to the principal applicant for the purposes of an invitation under s 425 constituted notification to the others. His Honour's reasoning would apply equally to a decision notice, at least for applicants who sign the declaration on the Tribunal's application forms that they authorise the Tribunal to communicate with applicant 1 or his or her authorised recipient about the application. However, there is some authority to suggest that the statutory scheme in force prior to the introduction of ss 379EA and 441EA permitted sending notices for joint applicants to one applicant, independently of ss 379G and 441G: see e.g. *Cabal v MIMA* [2001] FCA 546 and *SZDLA v MIMIA* (2005) 221 ALR 164 (special leave refused: [2006] HCATrans 21).
[46] ss 379EA and 441EA were inserted by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) and apply in relation to review applications made on or after 27 October 2008, or made prior to, but not finally determined by that date.

of the decision.[47] However, whether such failure has any consequences for the review depends on whether the decision was made before 28 May 2014 or on or after 28 May 2014. Further, non-compliance with the notification requirements may also have consequences for the cessation of that applicant's bridging visa and the time in which an application for judicial review may be commenced.

Decisions made on or after 28 May 2014

26.8.2 For decisions made on or after 28 May 2014, the Tribunal has no power to vary or revoke a decision, including dismissal decisions under ss 362B and 426A, after the day and time the decision is either given orally or the written statement is taken to have been made.[48] Where the decision was made in accordance with the Migration Act, the application will be finally determined under ss 5(9) and 5(9A).[49]

26.8.3 The Migration Act clearly provides that a failure to correctly notify a decision does not affect the validity of the decision.[50] The validity of a decision (including dismissal decisions under ss 362B and 426A), other than an oral decision, will not be affected by a failure to give a written statement of the decision and reasons to the applicant or the Secretary by one of the prescribed methods in s 379A or 441A, or s 379B or 441B within 14 days after the day on which the decision is take to have been made.[51]

26.8.4 Similarly, the validity of an oral decision will not be affected by a failure to give a written statement of the decision and reasons to the applicant or the Secretary by one of the prescribed methods in s 379A or 441A, or s 379B or 441B, within 14 days after a request is received to reduce an oral statement of decision and reasons to writing.[52]

26.8.5 While the validity of a dismissal decision is not affected by a failure to comply with s 362C(6) or 426B(6), which requires a copy of the dismissal statement together with a statement describing the effect of s 362B(1B)–(1F) or 426A(1B)–(1F) to be given to the applicant, a failure of the Tribunal to provide these statements means that the applicant has not received notice under s 362C or 426B. This may involve, for example, a failure to notify the applicant of the correct prescribed period within which to apply for reinstatement. A consequence of such a failure is that the 14 day period for reinstatement would not have commenced, and therefore, the condition precedent to the exercise of the power in ss 362B(1E) and 426A(1E) to confirm the decision to dismiss the application may not be satisfied. However, this has not been the subject of judicial review. In these circumstances (where there has been non-compliance), prior to taking action to confirm the decision to dismiss the application,

[47] ss 368A(3), 430A(3), 368D(7), 430D(7), 362C(8), 426B(8).
[48] ss 368(2A), 430(2A) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 368D(3), 430D(3) and 362C(4), 426B(4) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015). Note this only applies to a validly made decision, which does not involve a legal error.
[49] s 5(9A) was inserted by *Migration Amendment Act 2014* (Cth) (No 30, 2014).
[50] ss 368A(3), 430A(3), 368D(7), 430D(7), 362C(8), 426B(8).
[51] ss 368A(3), 430A(3), 362C(8), 426B(8).
[52] ss 368D(7), 430D(7).

the Tribunal will generally send the statement again with a letter complying with s 362C(6) or 426B(6).

26.8.6 Using the correct address for decision notifications is important. If the Tribunal does not notify an applicant at his or her correct address, it will be required to re-notify using the correct address. When re-notifying an applicant to correct a previous error, the address used must be one specified in ss 379A and 441A. In practice, it may not be possible for the Tribunal to comply with the 14 day timeframe to give a decision once that time has passed.

26.8.7 Only the Tribunal can notify an applicant of its decision for the purpose of discharging its statutory obligation. In *Guan v MIAC*,[53] the Tribunal had not validly notified the applicant and, four years after the Tribunal's decision, the Department purported to notify him of the decision by giving him a letter from an officer of the Department attaching a copy of the Tribunal's decision. The Court held that officers of the Department cannot purport to meet the Tribunal's obligation to notify its decision or to advise of the handing down of the decision at the relevant time.[54]

Decisions made before 28 May 2014

26.8.8 For decisions made before 28 May 2014, the majority in *MIMAC v SZRNY* held that the functions that must be completed before it could be said that a review was complete included notification to the applicant *and* the Secretary in accordance with the Migration Act,[55] suggesting that notification requirements formed part of the Tribunal's 'core function' of review. On this view a failure to comply with the decision notification requirements could arguably be construed as a failure by the Tribunal to meet an essential precondition to the exercise of power resulting in a statutory duty remaining unperformed.

26.8.9 As a result of the majority judgment in *MIMAC v SZRNY,* if notification of the decision to the applicant *and* the Secretary was not given in accordance with the Migration Act, namely ss 379A and 441A, and 379B and 441B, an application would not be finally determined within the meaning of s 5(9)(a) of the Migration Act. Accordingly, the Tribunal would remain obliged to consider any further relevant

[53] *Guan v MIAC* [2010] FMCA 802.
[54] *Guan v MIAC* [2010] FMCA 802 at [31]–[34]. It is significant that the purported notification in that matter was not a case of the Department simply handing the applicant the Tribunal's notification, but rather, the notification letter itself was from an officer of the Department. Note that the judgment in *Guan* related solely to decision notification for the purposes of the judicial review time limits, and no issue arose as to decision notification in the context of bridging visa 'in effect' provisions. *SZCCZ v MIMIA* [2006] FMCA 506, upheld on appeal in *SZCCZ v MIAC* [2007] FCA 1089, remains reliable authority for the proposition that actual notification will suffice for the purposes of those provisions even if formal notification does not comply with the statutory requirements.
[55] While aspects of the majority judgment in *MIMAC v SZRNY* (2013) 214 FCR 374 suggested that this applied equally to decisions given orally, it was difficult to reconcile that view with their Honours' reference to the deeming provision in s 430D [368D], that oral decisions were taken to be notified when the decision was made and not when the applicant was given a copy of the decision. As this was not an issue the Court had to decide the comments about this could be regarded as *obiter dicta* and not binding.

information that was received until such time as it correctly notified the applicant and the Secretary of its decision.[56]

26.8.10 Using the correct address for decision notifications was paramount. If the Tribunal did not notify an applicant at his or her correct address, it would be required to re-notify using the correct address and could not rely on any actual notification.[57] When re-notifying an applicant to correct a previous error, the address used must be one specified in ss 379A and 441A.

26.8.11 For the purposes of ss 368A and 368D, and ss 430A and 430D, it would not be possible in practice to comply with the 14 day timeframe once that time has passed. In *MIMAC v SZRNY* the majority did not consider the 14 day time frame specified in ss 368A and 368D, or ss 430A and 430D, and its relevance to the Tribunal being able to discharge its statutory notification requirements in ss 379A and 441A. However, although the Tribunal would never be able to comply with the 14 day requirement after that time has passed, the majority's reasons and conclusions in *MIMAC v SZRNY* appear to suggest this would not have presented a hurdle to valid notification.

26.8.12 Only the Tribunal can notify an applicant of its decision for the purposes of discharging its obligations under the Migration Act. Notification by the Department will not suffice.[58] In *MIMAC v SZRNY* the majority made clear that until such time as the Tribunal has notified both the applicant and the Secretary of its decision in accordance with s 379A or 441A, and s 379B or 441B, an application will not be finally determined within the meaning of the Migration Act.

Cessation of a bridging visa

Bridging visas granted prior to 19 November 2016

26.8.13 Bridging visas granted prior to 19 November 2016 in relation to an application to the Tribunal for review of a decision to refuse to grant a visa remain in effect until 28 days after notification of the Tribunal's decision.[59] The Tribunal's failure to comply with the notification requirements will, in some circumstances, have consequences for the cessation of an applicant's bridging visa.

[56] Note that in *SZTRI v MIBP* [2014] FCCA 1803 in circumstances where the Tribunal had provided its decision and reasons to the applicant, but not yet to the Secretary, the Court found the Tribunal was *functus officio* and distinguished *MIMAC v SZRNY* (2013) 214 FCR 374, on the basis that it concerned the meaning of s 5(9) of the *Migration Act*, and in particular the phrase 'subject to any form of review under Parts 5 or 7', rather than the question of when the Tribunal is *functus officio.* However, note that the Court did not engage in detail with the reasoning in those cases and the facts of this case are very different to those cases.
[57] *MIMAC v SZRNY* (2013) 214 FCR 374 at [84].
[58] See also *Guan v MIAC* [2010] FMCA 802 at [31]–[34].
[59] See Regulations sch 2, cls 010.511(b)(iii)(A), 020.511(b)(iii)(A), 030.511(b)(iii)(A), 050.511(b)(iii)(A) etc. in effect prior to 19 November 2016.

26.8.14 If the Tribunal makes an error in giving the decision record in accordance with s 379A or 441A and the applicant does not receive it,[60] the deemed receipt provisions will not apply and will not themselves trigger the cessation of the bridging visa. If an applicant is subsequently *actually* notified of the Tribunal decision and reasons (e.g. through a freedom of information request or by the Department), on current authority cessation of the bridging visa will be triggered. See Chapter 8 – Notification by the Tribunal for discussion about the deemed receipt provisions which inform whether an applicant has been notified of the decision.[61]

26.8.15 The requirement is only that the applicant be notified (actual or deemed) of the decision. It does not require the decision of which notice has been given to have been validly made.[62]

Bridging visas granted on or after 19 November 2016

26.8.16 Bridging visas granted on or after 19 November 2016 remain in effect until 35 days after the Tribunal makes its decision, and not notification.[63] This means that a failure to comply with notification requirements for these applications will not have consequences for the cessation of an applicant's bridging visa.

Judicial review time limits

From 15 March 2009

26.8.17 From 15 March 2009, an application for judicial review must be made within '35 days of the date of the migration decision'.[64]

26.8.18 The 'date of the migration decision'[65] in the context of migration decisions made by the MRD of the Tribunal[66] is:

- in the case of a migration decision made under Part 5 (migration reviews) of the Migration Act – the day the decision is taken to have been made under

[60] Or, for a notification sent prior to 5 December 2008, s 379A or 441A was not complied with, regardless of whether the document was received.
[61] It has been held 'notification' in the context of the cessation of a bridging visa included actual notification in the sense that the applicant in fact received a copy of the decision, whether from a Tribunal officer, a representative of the applicant or otherwise.[61] The Federal Magistrates Court found in *SZCCZ v MIMIA* [2006] FMCA 506 at [89]-[91], upheld on appeal to the Federal Court in *SZCCZ v MIAC* [2007] FCA 10, that an applicant may be 'notified' of the Tribunal decision for the purposes of the cessation of his or her bridging visa, even where the Tribunal's statutory notification procedures have miscarried. *SZCCZ v MIMIA* [2006] FMCA 506 at [89]-[91]. The Federal Court found no error in the judgment at first instance, but did not comment on this part of the reasons which are arguably *obiter dicta*.
[62] ss 368A(3), 430A(3). See also, *SZKUO v MIAC* (2009) 180 FCR 438 at [33]. Note, that is not clear what the judgment in *MIMAC v SZRNY* (2013) 214 FCR 374 has on this proposition.
[63] See Regulations sch 2, cls.010.511(b)(iii)(A), 020.511(b)(iii)(A), 030.511(b)(iii)(A), 050.511(b)(iii)(A) etc. as amended by *Migration Legislation Amendment (2016 Measures No 5) Regulation 2016* (Cth) sch 13 pt 58 item 5802.
[64] ss 477, 477A and 486A as amended by the *Migration Legislation Amendment Act (No 1) 2009* (Cth) and the *Tribunals Amalgamation Act 2015* (Cth) (No 60 of 2015).
[65] The definition of 'date of the migration decision' was amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth), which introduced a power to dismiss an application if an applicant fails to appear at a scheduled hearing. The amendments ensure 'non-appearance decisions' made using the power in s 362B or 426A as well oral and written decisions under s 368(2) or 430(2), and s 368D(1) or 430D(1), are captured for judicial review purposes.
[66] The expression 'migration decision' is currently defined in s 5 as meaning a privative clause decision, a purported privative clause decision or a non-privative clause decision.

ss 362C(3) (dismissal decision), 368(2) (written decision) or 368D(1) (oral decision);[67] or

- in the case of a migration decision made under Part 7 (protection reviews) of the Migration Act – the day the decision is taken to have been made under ss 426B(3) (dismissal decision), 430(2) (written decision) or 430D(1) (oral decision).[68]

26.8.19 The 35 day period begins to run, despite a failure of the Tribunal to comply with any of the requirements of ss 362C(3) and 426B(3), ss 368(2) and 430(2), ss 368D(1) and 430D(1)[69] and irrespective of the validity of the decision.[70]

26.8.20 This means that the time limit for applying for judicial review is not contingent on the applicant being notified of the Tribunal's decision. A defect in the Tribunal's notification will not prevent the time limits from running but may form the basis for the Court granting the applicant an extension of time in which to lodge the judicial review application.[71]

Prior to 15 March 2009

26.8.21 For applications for judicial review lodged prior to 15 March 2009, the time limits for applying for judicial review in the Federal Magistrates Court under s 477 were triggered by actual notification (as opposed to deemed notification).

26.8.22 For the purposes of s 477 of the Migration Act, 'actual notification' required physical possession by the applicant of the written statement of reasons prepared for the purposes of s 368(1) or 430(1).[72] There was some divergence of opinion in the Full Federal Court as to whether this required personal delivery by hand to the applicant by the Tribunal.

26.8.23 The most recent authority stipulated that, irrespective of how the Tribunal complied with its obligations to notify an applicant of its decision, if an applicant physically *received* a copy of the Tribunal's decision and reasons (for example, after it was posted), then there was actual notification of the decision for the purposes of s 477.[73]

[67] ss 477(3)(b), 477A(3), 486A(3).
[68] ss 477(3)(c), 477A(3), 486A(3).
[69] ss 477(4), 477A(4), 486A(4).
[70] ss 477(5), 477A(5), 486A(5).
[71] See ss 477(2), 477A(2), 486A(2). In *Guan v MIAC* [2010] FMCA 802 at [43]–[47], the Court refused to grant an extension of time to an applicant who had not been properly notified of a decision. The Court considered, among other things, that the applicant had put himself in a situation where he would not or could not be contacted to avoid hearing the outcome of the Tribunal's review, and had not only taken no steps to ascertain the outcome, but had taken steps to avoid finding out.
[72] See, for example, *Haque v MIAC* [2009] FMCA 705 at [2] and *SZNHQ v MIAC* [2009] FMCA 439. In *SZNHQ,* the Court found that the fact that an applicant refused to read the Tribunal's decision did not mean that he did not physically receive it.
[73] *SZKNX v MIAC* (2008) 172 FCR 264 at [25]. This is contrary to the earlier judgment of *MIAC v SZKKC* (2007) 159 FCR 565, in which another Full Court held (at [2], [5], [28], [37]) that only physical delivery by hand to the applicant would equate to actual notification for the purposes of s 477. *SZKNX* was followed in *SZFMW v MIAC* [2008] FCA 1862, *SZMYT v MIAC* [2008] FMCA 1718 and *Choi v MIAC* [2009] FMCA 83.

26.8.24 Where the applicant had nominated an authorised recipient, the time limits in s 477 only commenced to run where the statement of reasons for decision were physically received by the applicant.[74] A person was not notified of a decision for the purposes of s 477, merely by sending a copy of the statement of reasons to their authorised recipient, orally delivering the decision,[75] by communicating to the applicant orally that the document had arrived, communicating the gist of the document, or even by reading the document to the applicant.[76]

26.8.25 The statutory time limit for applying for judicial review in the High Court's original jurisdiction in s 486A was found to be invalid in *Bodrudazza v MIAC*.[77] As such, defects in the Tribunal's notification procedures did not impact on an applicant's ability to file an application for judicial review in that court.

[74] *SZKNX v MIAC* (2008) 172 FCR 264. This was also considered to be the case in the previous judgment of *MIAC v SZKKC* (2007) 159 FCR 565 at [2], [5], [37], [46]. Cf the earlier lower court matter of *SZIVA v MIMA* (2006) 204 FLR 95 at [46], in which Smith FM held that 'actual notification' requires the Court to investigate the date when the applicant personally received notice of the decision, but that this would be satisfied by the applicant's agent receiving the documents and communicating with the applicant their significance. On current authority, communication with the applicant would not of itself be sufficient - the applicant must be given the reasons for the decision.

[75] On the authority in *SZKNX v MIAC* (2008) 172 FCR 264, physical possession of the statement of reasons prepared under ss 368 or 430 is required. In the more restrictive *MIAC v SZKKC* (2007) 159 FCR 565, the Court held that in the case of an oral decision, s 430D(1) then in force contained a deeming provision, and as such would be ineffective for the purposes of s 477.

[76] See *WACB v MIMIA* (2004) 210 ALR 190 in relation to s 430D(2) as in force at the relevant time.

[77] *Bodrudazza v MIAC* (2007) 228 CLR 651.

27.PUBLICATION OF DECISIONS

27.PUBLICATION OF DECISIONS[1]

27.1 Publishing decisions

The power to publish

27.1.1 Section 66B of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) permits the Tribunal to publish its decisions and reasons for decisions.[2] The Tribunal can publish by any means it considers appropriate.[3]

27.1.2 However, the Tribunal is not authorised to publish information which is prohibited or restricted from disclosure under the AAT Act or any other Act that confers jurisdiction on the Tribunal, such as the *Migration Act 1958* (Cth) (the Migration Act).[4]

27.1.3 Tribunal decisions are published on AustLII.

Restrictions on publication

Identifying information – protection and related bridging visa cases

27.1.4 Section 431 of the Migration Act prohibits the AAT from publishing any Part 7 (protection) decision statement under s 430(1) which may identify an applicant or their relative or dependent.

27.1.5 To comply with s 431 the AAT omits applicants' and relatives' names from published decisions. In cases where such a person could be identified regardless of whether their name is included (for example, due to the unusual factual history, unique nature of claims or a combination of factors), the AAT may have to omit additional information or may not be able to publish the decision.

27.1.6 Section 501K of the Migration Act also prohibits the AAT from publishing any information which may identify an applicant or their relative or dependent, where the review by the AAT relates to the person in their capacity as a person who applied

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Before 1 July 2015, the Registrar of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) had a statutory obligation to ensure the publication of any decisions that the Principal Member considered were of particular interest, subject to any directions made by the Tribunal under s 378 [MRT] and s 440 [RRT] restricting publication. Sections 369 [MRT] and 431(1) [RRT] were repealed by *Tribunals Amalgamation Act 2015* (Cth) (the Amalgamation Act). Before 1 June 1999, the RRT and the Immigration Review Tribunal (IRT) were required to publish all decisions.
[3] *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 66B(1).
[4] AAT Act s 66B(2) .

for a protection visa or protection-related bridging visa or had a visa of that kind cancelled.

27.1.7 Although s 501K was originally intended to cover decisions of the kind reviewed in the AAT's General Division, in its terms there appears to be no reason why it would not also apply to reviews in the Migration and Refugee Division.[5] For Part 7 reviews, s 501K appears to have little additional work to do beyond the prohibition in s 431, except that it extends to publication of any kind (not just in the statement of reasons for decision). For Part 5 reviews, s 501K extends a similar prohibition to bridging visa review cases, where the person seeking review of the decision to refuse or cancel the bridging visa had applied for a protection visa at any time before the time they applied for that bridging visa.[6]

Directions under ss 378 or 440

27.1.8 The AAT may also restrict publication of information by making directions under s 378 (Part 5) and s 440 (Part 7) of the Migration Act. Where a direction of this kind is in force, the AAT must not publish the information, so information of this kind is also omitted from published decisions. For further information on these directions see Chapter 31 – Restrictions on Disclosing and Publishing Information of this Guide.

[5] Section 501K was in force for reviews by the pre-amalgamation AAT before 1 July 2015. There was no indication in the Amalgamation Act that its application was intended to be limited in any way to reviews in the General Division.
[6] If a person who has at any time in the past applied for a protection visa and subsequently applies for a bridging visa, that is an 'application for a protection related bridging visa', and the bridging visa granted as a result of that application is a 'protection-related bridging visa', pursuant to the definitions in s 501K(3). There is no requirement for there to be a direct link between the bridging visa application and the previous protection visa application, and there is no requirement that the protection visa application be ongoing.

28. REOPENING FINALISED MATTERS

28.REOPENING FINALISED MATTERS[1]

28.1 The doctrine of *functus officio*

28.1.1 The expression, *functus officio*, refers to the state of an administrator or tribunal which has discharged its duty or performed its functions so that nothing further remains to be done.[2] The effect of the doctrine of *functus officio* is 'that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform'.[3] At that point, the Tribunal will lack the power to consider the matter further.

When is a decision taken to be made

28.1.1 Under the current statutory scheme, the Tribunal may give an oral decision with oral or written reasons; or it may give a written statement of its decision and reasons. It may also find that it lacks jurisdiction to conduct a review and give a written record of its decision and reasons to that effect. Each of these are discussed in more detail below.

Oral decisions

28.1.2 An oral decision is taken to have been made, and the applicant is taken to have been notified, on the day and at the time the decision is given orally.[4] If the Tribunal gives an oral decision and oral reasons for the decision, the oral statement must identify the day and time the decision is given.[5] If the Tribunal elects to give an oral decision without oral reasons, it must produce a written statement of the reasons and the written statement must record the day and time the decision is given orally.[6]

28.1.3 The validity of an oral decision is not affected by:

- a failure to return to the Secretary documents provided in relation to the review; or
- a failure to give the Secretary a copy of a document containing evidence or material upon which the Tribunal's findings were based; or

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Butterworths Australian Legal Dictionary, 1997.
[3] *Jayasinghe v MIEA* (1997) 76 FCR 301 at 311.
[4] ss 368D(1), 430D(1) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014).
[5] ss 368D(2)(a)(v), 430D(2)(a)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[6] ss 368D(2)(b)(v), 430D(2)(b)(v) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015). The day and time of the oral decision is when the oral decision is made, and not when the written statement of the reasons is produced.

- a failure to give a written statement of the oral decision and reasons to the applicant or the Secretary of the Department by one of the prescribed methods in ss 379A and 441A or ss 379B and 441B within the specified period a request is received to reduce the oral decisions and reasons to writing.[7]

28.1.4 Provided the day and time the decision was made has been recorded on the written decision statement or identified in an oral statement where relevant, the application will be finally determined and the Tribunal will be *functus officio*. As discussed further below, once an oral decision is taken to have been made, there is no power to vary or revoke that decision.

Written decisions

28.1.5 For a decision including a dismissal decision under s 362B or 426A, but not an oral decision, the decision on review is taken to have been made by the making of the written statement, and to have been made on the day, and at the time, the written statement is made.[8] The written statement must record the day and time the statement is made.[9]

28.1.6 The Tribunal has no power to vary or revoke a decision, including dismissal decisions under ss 362B and 426A, after the day and time the decision is either given orally or the written statement made.[10] Accordingly, the application will be finally determined[11] and the Tribunal will be *functus officio* at that time.

28.1.7 The validity of a Tribunal decision is not affected by a failure to record the day and time when the written statement was made or the decision was given orally as the case requires.[12]

28.1.8 The validity of a decision (other than an oral decision), including a dismissal decision under s 362B or 426A, will not be affected by:

- a failure to return to the Secretary documents provided in relation to the review; or

- a failure to give the Secretary a copy of a document containing evidence or material upon which the Tribunal's findings were based; or

- a failure to give a written statement of the decision and reasons to the applicant or the Secretary of the Department by one of the prescribed methods

[7] ss 368D(7), 430D(7) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[8] ss 368(2), 430(2) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 362C(3), 426B(3) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[9] ss 368(1)(f), 430(1)(f) and ss 362C(2)(d)/426B(2)(d) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[10] ss 368(2A), 430(2A) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 368D(3), 430D(3) and 362C(4), 426B(4) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[11] ss 5(9)(a) and 5(9A) as amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014), and the *Tribunals Amalgamation Act 2015* (Cth).
[12] ss 368(4), 430(4) as inserted by *Migration Amendment Act 2014* (Cth) (No 30, 2014) and ss 368D(7), 430D(7) and 362C(8), 426B(8) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).

in ss 379A and 441A or ss 379B and 441B within 14 days after the day on which the decision is take to have been made.[13]

28.1.9 The validity of a dismissal decision under s 362B or 426A will also not be affected by a failure to give a notice which advises that the applicant may apply for reinstatement with 14 days of receiving the dismissal statement, the courses of action the Tribunal may take, and the consequences of not applying for re-instatement.[14]

28.1.10 In these circumstances, provided that the day and time the decision was made has been recorded on the written decision statement, the application will be finally determined and the Tribunal will be *functus officio*. As discussed further below, once a written decision is taken to have been made, there is no power to vary or revoke that decision.

No jurisdiction decisions

28.1.11 A finding that the Tribunal has 'no jurisdiction' to conduct a review is not a decision on the review made under Part 5 or Part 7 of the *Migration Act 1958* (Cth) (the Migration Act).[15] This is because the Tribunal can only conduct a review if an application for review has been properly made.[16] As an application that is made out of time, for example, does not meet an essential prerequisite for a valid application, the Tribunal lacks jurisdiction to conduct a review. While it is good administrative practice that the Tribunal provide reasons explaining why it has found no jurisdiction, those reasons are not being given under either Part 5 or Part 7 of the Migration Act. Accordingly, the statutory provisions about when a Part 5 or Part 7 decision is taken to be made, and the prohibition on varying or revoking a Part 5 or Part 7 decision, do not apply.

Previous statutory regimes

Tribunal decisions made 27 October 2008 – 27 May 2014

28.1.12 Under the statutory regime in place between 27 October 2008 and before 28 May 2014, for an oral decision, the Migration Act provided that the applicant was taken to be notified of the decision on the day on which the decision was made.[17] Accordingly, and while not free from doubt, it appears the Tribunal was *functus officio* when the oral decision had been given or communicated to the applicant.[18]

[13] ss 368(4), 430(4), 368A(3), 430A(3), 362C(8), 426B(8).
[14] ss 362C(8), 426B(8) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[15] See definition of 'decision on a review' in ss 337 and 410.
[16] ss 348(1), 414(1).
[17] Aspects of the majority judgment in *MIMAC v SZRNY* (2013) 214 FCR 374 suggested that communication to the applicant *and* the Secretary was required in accordance with the notification provisions of the Migration Act, however it was difficult to reconcile that view with the reference to the deeming provision in s 430D [s 368D], that oral decisions were taken to be notified when the decision was made and not when the applicant was given a copy of the decision. As this was not an issue the Court was required to decide, their comments about this could be regarded as *obiter dicta* and therefore not binding.
[18] ss 368D, 430D.

28.1.13 For a decision other than an oral decision, the Migration Act provided that the decision was 'taken to have been made on the date of the written statement'.[19] The Tribunal was required to then notify the applicant of the decision by giving the applicant a copy of the written statement of decision within 14 days after the day on which the decision was taken to have been made by one of the methods in ss 379A or 441A.[20] A copy of the statement was required to also be given to the Secretary within the same period.[21]

28.1.14 In the case of decisions other than oral decisions, the Tribunal was *functus officio* when its decision was beyond recall by the member constituting the Tribunal.[22] A decision was beyond recall when it was communicated to both the applicant and the Secretary, or some irrevocable step was undertaken to do so.[23] Communication was required to be in accordance with the notification provisions of the Migration Act; namely ss 379A, 441A, 379B and 441B.[24] Actual notification did not suffice if it was not given in accordance with the Migration Act.[25] Only when these requirements were fulfilled could an application be considered finally determined within the meaning of s 5(9)(a) of the Migration Act.

Tribunal decisions made 1 June 1999 - 26 October 2008

28.1.15 Under the statutory regime in place between 1 June 1999 and before 27 October 2008 for notification of Tribunal decisions, it was established that the Tribunal was not *functus officio* until its decision had been handed down.[26] The Court in *Inderjit Singh v MIMA* held that under this previous statutory scheme and in particular s 430B(4) as then in force, the decision was to be treated as final and operative as from the date on which the decision was handed down, that is, as from the 'date of the decision'.[27]

[19] ss 368(2), 430(2).
[20] ss 368A(1), 430A(1) as amended by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) (No 85 of 2008).
[21] ss 368A(2), 430A(2) as amended by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) (No 85 of 2008).
[22] *MIAC v SZQOY* (2012) 206 FCR 25 at [29], [34], [57]; *MIMAC v SZRNY* (2013) 214 FCR 374 at [84].
[23] *MIAC v SZQOY* (2012) 206 FCR 25 at [34]; *MIMAC v SZRNY* (2013) 214 FCR 374 at [84]. Although the majority, Griffiths and Mortimer JJ, in *MIMAC v SZRNY* did not express the principle in terms of 'irrevocable steps' their reasoning was not inconsistent with this aspect of *MIAC v SZQOY.* Note that in *SZTRI v MIBP* [2014] FCCA 1803 in circumstances where the Tribunal had provided its decision and reasons to the applicant, but not yet to the Secretary, the Court found the Tribunal was *functus officio* and distinguished *MIMAC v SZRNY* (2013) 214 FCR 374, on the basis that it concerned the meaning of s 5(9) of the Migration Act, and in particular the phrase 'subject to any form of review under Part 5 or 7', rather than the question of when the Tribunal is *functus officio.* In *Liu v MIBP* [2015] FCCA 714, Judge Driver referred to his earlier decision in *SZTRI*, and commented in *obiter* that it was 'highly likely' that the Tribunal was *functus officio* after notifying the applicant and his representative of a decision, regardless of whether the decision was also notified to the Secretary (at [19]). However, the Court in *SZTRI* (and *Liu*) did not engage in detail with the reasoning in those earlier cases and the facts in *SZTRI* and in *Liu* differed considerably from the previous cases. Although the Federal Circuit Court in *SZVXH v MIBP* [2017] FCCA 458 appeared to accept that the Tribunal was *functus* once it had electronically communicated the outcome of the review to the Secretary via the Department's ICSE system because the matter was no longer entirely intramural and had translated into a decision by an overt act, this does not appear consistent with the authorities in *SZQOY* and *SZRNY* and should be treated with caution.
[24] *MIMAC v SZRNY* (2013) 214 FCR 374 at [84]. The majority of Griffiths and Mortimer JJ held that an application was not finally determined by the Tribunal under Part 7 of the Migration Act until such time as it had notified both the applicant and the Secretary as required by ss 430A(1)–(2) [ss 368A(1)–(2)].
[25] *MIMAC v SZRNY* (2013) 214 FCR 374 at [84].
[26] *Inderjit Singh v MIMA* (2001) 109 FCR 18 at [34], [35], [38].
[27] ss 368B(4), 430B(4) in force at the relevant time specified the date on which the decision was handed down as the date of the decision. In the case of those decisions not subject to a handing down (oral decisions, persons in detention), and for which the legislation did not specify a 'date of decision', the Tribunal was regarded as *functus officio* once irrevocable steps were taken to communicate the decision to the parties: *Semunigus v MIMA* (2000) 96 FCR 533, *Inderjit Singh v MIMA* (2001) 109 FCR 18 at [38]. This distinction is still applicable to oral decisions, but not to decisions given to persons in immigration detention.

28.1.16 The Court in *Inderjit Singh v MIMA* observed that there was nothing that would appear to prevent the Tribunal from reconsidering, recalling or altering a decision record that it had signed prior to the date on which the decision was to be handed down. In fact, it had been held to be a jurisdictional error for the Tribunal to fail to take into account relevant material submitted prior to the handing down, including information provided on the day of, but prior to the actual 'handing down'.[28]

28.1.17 The requirement to hand down certain decisions was removed from the Migration Act by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) in relation to decisions on review made on, or after, 27 October 2008 and reviews in relation to which a decision was made but a written invitation to handing down had not been given before 27 October 2008.

Tribunal decisions made prior to 1 June 1999

28.1.18 Prior to 1 July 1999, the statutory scheme for notification of Refugee Review Tribunal decisions required the Tribunal to give the applicant a copy of the decision statement within 14 days after decision was made, but was silent as to the date at which the decision was taken to have been 'made'. The majority of the Federal Court in *Semunigus v MIMA* found that the Tribunal was probably not *functus officio* until it had communicated its decision to the applicant or irrevocable steps had been taken to have that done.[29]

28.2 Reopening a decision that has been made

Whether there is a power to reopen and in what limited circumstances can it be used

28.2.1 Whether the Tribunal has the power to reopen a matter once a decision has already been made will depend upon the circumstances of each case. Generally speaking, if the Tribunal has completed its statutory functions it will be *functus officio* and lack the power to reopen a decision that has been properly made and notified.[30]

28.2.2 To ensure consistency of approach in dealing with requests to reopen finalised matters, members generally consult with either an MRD Senior Member or the Division Head. Where reopening a matter is considered to be justified in the particular circumstances of a case, on some occasions the Tribunal may seek submissions from the Secretary of the Department on that issue before proceeding to do so although there is no obligation on the Tribunal to do so.[31]

[28] *SZJHK v MIMA* [2007] FMCA 248; *MZXTZ v MIAC* [2009] FCA 888 at [41].
[29] *Semunigus v MIMA* [2000] FCR 533.
[30] See s 474 which indicates that a decision of the Tribunal on a review is a privative clause decision which is final and conclusive. In *Diallo v MIAC* [2009] FMCA 642 at [5], the Court held that the Tribunal was correct not to reopen a decision in circumstances where it appeared to have complied with its statutory obligations and was *functus* and the matter was already the subject of a judicial review application; see also *SZNNJ v MIAC* [2009] FMCA 752 at [27].
[31] *Mora (Migration)* [2016] AATA 4198 at [43].

28.2.3 A decision may be reopened only where it is both lawful and sound to treat that decision as a nullity. This will only be the case where the existence of jurisdictional error is so obvious as to leave no real doubt about that conclusion, and there are no plausible countervailing considerations weighing against doing so.[32]

28.2.4 The authorities suggest that the situations in which the Tribunal may reopen a matter are extremely limited. In *MIMA v Bhardwaj*, the High Court held that whether an administrative tribunal could reconsider its own decision depended upon the nature and extent of the power conferred upon it by the legislation under which it is acting.[33] In *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* Downes J (sitting as then President of the AAT) referred to there being sound reasons to act with extreme caution before reconsidering a matter which had already been decided and that it would very rarely be wise for a tribunal to reconsider its own decision.[34] Downes J considered one appropriate basis for limiting reconsideration was to confine it to cases of administrative or similar type error.[35] He noted that there are 'problems of substance as well as practical problems in a tribunal reconsidering its own decision' and also queried how the same tribunal which made a decision could be reconstituted with power to determine that the first decision was wrong.[36] Importantly, he held that it is not competent for a tribunal to make a binding, or any, ruling as to whether it has made an error of law,[37] but that it will only be appropriate for tribunal decisions to be reconsidered pursuant to the *Bhardwaj* principle when an impugned decision was obviously wrong and when the cause of the error is some administrative or similar mistake.[38] It appears therefore that where the Tribunal can reopen a matter, it would not be required to make a ruling as to whether it has made an error of law, as the error should be obvious.

28.2.5 What constitutes an administrative type error may include overlooking an applicant's request for a hearing adjournment. For example, in *MIMA v Bhardwaj*, the Member had overlooked the applicant's request for a hearing adjournment and then affirmed the decision to cancel their visa after they did not appear on the mistaken belief that the applicant did not wish to advance any further submissions. The majority of the High Court considered that, having regard to the nature of the error and the relevant statutory regime at the time, there was no error in the Tribunal reopening and remaking its decision once it became aware that it had overlooked the applicant's adjournment request.[39] In effect, a decision made in

[32] *Mora (Migration)* [2016] AATA 4198 at [17].
[33] *MIMA v Bhardwaj* (2002) 209 CLR 597 at [3], [44], [111]–[113], [147].
[34] *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [13]–[15].
[35] *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [16].
[36] *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [10].
[37] *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [12].
[38] *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [17].
[39] A number of separate judgements were delivered in *Bhardwaj* however the judgment of Gaudron and Gummow JJ (McHugh J agreeing) appears to stand as the *ratio*. It turns upon their conclusion that the Tribunal' had failed to conduct a review as was required by the Migration Act and that the Tribunal's first decision was therefore not a 'decision on review' for the purposes of

excess of statutory authority or failing to exercise statutory authority may be regarded as vitiated by jurisdictional error and treated as no decision at all.

28.2.6 Errors which may be characterised as a change of mind on the evidence, or where a particular document or piece of evidence is not referred to in the decision (suggesting that it hasn't been considered), do not appear to be administrative type errors as understood by the High Court in *Bhardwaj*. In *Bhardwaj* Hayne and Callinan JJ expressed that it may not be appropriate for a case to be revisited based upon second thoughts or a change of mind, or because a document or piece of evidence was not referred to in a decision.[40]

28.2.7 In *CLV16 v MIBP*,[41] the Federal Circuit Court considered the effect of s 473EA, which provides that the Immigration Assessment Authority has no power to vary or revoke a decision after the day the written decision has been made, and held that once it had made a decision on the review, it lacked the power to vary or revoke its decision even if there was a jurisdictional error. Sections 368(2A) [Part 5] and 430(2A) [Part 7] are similarly worded provisions, and provide that the Tribunal has no power to vary or revoke a decision once the written statement is made. The Court noted that the High Court's decision in *Bhardwarj* turned upon the statutory scheme in the Migration Act as it then was, and that the current scheme made clear there was no power to recall a decision once it was taken to have been made. However, this judgment was overturned by the Federal Court in *MIBP v CLV16*, which found that the 'normal position' established in *Bhardwaj* was not displaced by s 473EA(3).[42] The Court held that s 473EA(3) did not prevent the IAA from reopening a decision it made without having regard to submissions which had been provided prior to the date of the decision. The Court's finding would equally apply to ss 368(2A) and 430(2A). In *MZARV v MHA* the Federal Court also rejected the contention that s 430(2A) [s 368(2A)] was intended to remove the Tribunal's power to reopen a matter where it is affected by a jurisdictional error. It held that the provision does not affect the Tribunal's power to reopen a matter where a decision is affected by jurisdictional error.[43] Therefore, ss 368(2A) and 430(2A) operate in relation to valid decisions which are not affected by jurisdictional error.

28.2.8 Where there is some doubt as to whether there has been a jurisdictional error, it should fall to the judicial function of a court to make a binding decision in relation to the decisions lawfulness and not the Tribunal itself.

ss 367 and 368 (at [44], [48] and [67]). However the findings of Gleeson CJ and Callinan J do not refer to the presence of jurisdictional error in the Tribunal's decision making process and appear to reflect a more limited application to breaches involving the failure to exercise jurisdiction as opposed to jurisdictional error which encompasses a broader range of errors (per Gleeson CJ at [15] and Callinan J at [163]).

[40] *MIMA v Bhardwaj* (2002) 209 CLR 597 at [149], [164].

[41] *CLV16 v MIBP* [2017] FCCA 1200 at [3], [5]–[8].

[42] *MIBP v CLV16* [2018] FCAFC 80 at [68]–[69]. An application for special leave to appeal from this judgment to the High Court was dismissed: *CLV16 v MIBP* [2018] HCATrans 266.

[43] *MZARV v MHA* [2019] FCA 1984 at [17]–[22]. In reaching its conclusion on s 430(2A), the Court had regard to the relevant Explanatory Memorandum which outlined the purpose of the provision which stated that the '[n]ew subsection 430(2A), preventing variation or revocation of a decision after it is made by the [Tribunal], applies only to a decision that has been validly made and that does not involve legal error': Explanatory Memorandum, Migration Amendment Bill 2013 (Cth) 15 [101].

28.2.9 If the Tribunal is considering whether to reopen a favourable decision, procedural fairness may require the applicant to be informed of the proposed action and given an opportunity to provide comment. It would also be appropriate to put the applicant and Secretary of the Department on notice of the proposed course of action given that it may affect the applicant's immigration status and bridging visa.

The power to reopen no jurisdiction matters

28.2.10 Where the Tribunal found it did not have jurisdiction in respect of a review application and has now concluded that it erred in reaching that conclusion, the Tribunal may consider reopening the matter. There is no practical difference in the power to reopen a substantive decision made on the merits of a case or a decision made that the Tribunal lacked jurisdiction, however, as discussed below, the existence of a jurisdictional error that has resulted in the Tribunal failing to conduct a review may provide sound grounds for that decision to be reopened (as the Tribunal has denied itself jurisdiction and has not considered the application).[44]

28.2.11 Where the Tribunal considers it erred in finding it didn't have jurisdiction may include situations where a review application didn't appear to be valid (for example, if it was lodged out of time), but subsequent court authority supports a finding that it was valid,[45] and also situations where the Tribunal has accepted a withdrawal and considered it did not have jurisdiction in respect of the review application but subsequent evidence supports a finding that the applicant did not authorise their agent to withdraw the review application. Therefore, where the Tribunal previously found it lacked jurisdiction but the Tribunal has now determined that this finding was made in error and the Tribunal does have jurisdiction, the Tribunal may consider reopening the matter.

If the power to reopen arises, when should a matter be reopened?

28.2.12 The Tribunal must first be satisfied that it has the power to reopen the matter. As noted above, the power to reopen will only arise in limited circumstances.

28.2.13 Merely forming an opinion that a jurisdictional error has arisen does not necessarily require the Tribunal reopen a finalised decision however and, as it has been

[44] *Mora (Migration)* [2016] AATA 4198 at [72]. In this case, the applicants had requested the Tribunal to reconsider its previous no jurisdiction decision in light of *Ahmad v MIBP* [2015] FCAFC 182, which overturned *MIBP v Lee* [2014] FCCA 2881. The previous Tribunal had applied *Lee* in reaching its conclusion that it did not have jurisdiction however following the subsequent authority in *Ahmad*, the Tribunal would have had jurisdiction. However where the Tribunal was correct to determine that it lacks jurisdiction but made an error in its process, or there is a sound alternative basis for its no jurisdiction finding, it would not appear to be a decision infected with a jurisdictional error such that it could be reopened by the Tribunal absent a court order: *Cao v MIAC* [2009] FMCA 70.

[45] See *AZF21 v MICMSMA* [2021] FCCA 2008 where the Tribunal had found that the review application had been applied for out of time but the Court held that as it was affected by defective notification, the Tribunal had failed to exercise jurisdiction in respect of a valid review application. The defective notification came to light after the Tribunal made its decision, as the Court held that notifications of that type were defective. The Court remitted the application to the Tribunal stating that, if it did not quash the Tribunal decision and remit it for reconsideration, there would remain an erroneous failure by the Tribunal to exercise its jurisdiction to review the decision, and there would, therefore, remain unsatisfied the right the applicant has for the Tribunal to review the decision: at [25]. The judgment indicates that, were an applicant to seek to have this type of matter reopened (rather than to seek judicial review), there is a strong reason to reopen it (being the unsatisfied right to have the decision reviewed).

suggested that the power to reconsider a decision should only be exercised in the rarest of cases, there are limited circumstances where the Tribunal should reopen the matter.

28.2.14 In the case of *Mora*, an interlocutory decision of the AAT considering a request to reopen an earlier no jurisdiction decision, the Tribunal endorsed the conclusions of the then AAT President, Downes J, in *Michael and Secretary, DEST and Edwards and Secretary, DHA*[46] that '…*in all but the rarest of cases, tribunal decisions must be treated as final…*' and stated that reasons justifying the refusal to reopen a decision include the existence of any circumstances that might lead a court to refuse relief in the exercise of its discretion, such as the existence of bad faith, delay, lack of standing, futility, adverse effect on the public interest and the public interest in good administration.[47] However factors in that case that did lead the Tribunal to consider it both lawful and sound to treat its earlier decision as a nullity included:

- there was clear, recent and unambiguous judicial authority available to support the conclusion that the Tribunal's earlier 'no jurisdiction' decision was plainly wrong;
- the application to reopen was filed promptly;
- the Tribunal had not yet considered, let alone made a decision on, the merits of the review;
- the applicant and the Secretary of the Department agreed as to what course the Tribunal should adopt;
- there was no unfairness or detriment to sound administrative practice flowing from reopening the matter;
- had the applicants instead sought judicial review of the no jurisdiction decision, there were no discretionary reasons raised for a court to refuse the relief sought; and
- the outcome of reopening the matter was consistent with both the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and was not inconsistent with promoting public trust in its decision-making.[48]

28.2.15 *Mora* was subsequently cited with approval by the Federal Circuit Court in *Lokuwithana v MIBP*.[49] In that case, the AAT had made a second decision after

[46] *Michael and Secretary, Department of Employment, Science and Training and Edwards and Secretary, Department of Health and Ageing* [2006] AATA 227 at [17].
[47] *Mora (Migration)* [2016] AATA 4198 at [52], [91].
[48] *Mora (Migration)* [2016] AATA 4198 at [20].
[49] *Lokuwithana v MIBP* [2017] FCCA 176 at [103]. See also *Erasga v MIBP* [2019] FCCA 228 at [75] where the Court held that *Mora* is not inconsistent with judicial authority and simply provides practice guidance to ensure that Tribunal reviews are not reopened excessively. In this matter, the Tribunal reopened the review when it realised that material, which was relevant to the

vacating its earlier decision because it had failed to consider relevant material. A preliminary issue for the Court was at which point in time the AAT's decision was finally made. The Court held that once it became known to the AAT that its first decision was affected by a jurisdictional error, it was open to the Tribunal to treat that earlier decision as a purported decision and to continue with the review.

28.2.16 In summary, the types of matters where the power to reopen arises and where there may be sound considerations in favour of reopening include where the Tribunal has not conducted a substantive review (because it erred in finding it did not have jurisdiction) or where an administrative type error has occurred such as where the Tribunal overlooked a request for postponement of the hearing or has overlooked a critical submission, which if considered would have affected the outcome of the review.

When can't or shouldn't a matter be reopened?

28.2.17 The Tribunal cannot reopen a decision because of errors within jurisdiction such as a factual error, where the decision-maker has changed his or her mind, or where there has been a change in circumstances.

28.2.18 Where there is some doubt as to whether there has been a jurisdictional error, it should fall to the judicial function of a court to make a binding decision in relation to the decisions lawfulness and not the Tribunal itself.[50]

28.2.19 Nor should a decision be reopened where there are countervailing considerations against doing so. In *Diallo v MIAC*,[51] for example, the Court commented that it would be presuming upon the jurisdiction of the Court for the Tribunal to unilaterally reopen a review on the basis that it had not completed its statutory function where that matter was already the subject of a judicial review application. Further, in the case of *Mora*, an interlocutory decision of the AAT considering a request to reopen an earlier no jurisdiction decision, the Tribunal endorsed the conclusions of the then AAT President Downes J in *Michael and Secretary, DEST and Edwards and Secretary, DHA*[52] that '*…in all but the rarest of cases, tribunal decisions must be treated as final…*' and stated that reasons justifying the refusal to reopen a decision include the existence of any circumstances that might lead a court to refuse relief in the exercise of its discretion, such as the existence of bad faith, delay, lack of standing, futility, adverse effect on the public interest and the public interest in good administration.[53]

review and had been provided by the applicant, had not been considered. The Court found it was open to the Tribunal to reopen the matter in these circumstances.

[50] See *Re Michael and Secretary, Department of Employment, Science and Training; Re Edwards and Department of Health and Ageing* [2006] AATA 227 at [10], [17] where the Downes J concluded that 'it will only be appropriate for tribunal decisions to be reconsidered pursuant to the *Bhardwaj* principle when an impugned decision was obviously wrong and when the cause of the error is some administrative or similar mistake'.

[51] *Diallo v MIAC* [2009] FMCA 642 at [5].

[52] *Michael and Secretary, Department of Employment, Science and Training and Edwards and Secretary, Department of Health and Ageing* [2006] AATA 227 at [17].

[53] *Mora (Migration)* [2016] AATA 4198 at [52], [91]. See also *Diallo v MIAC* [2009] FMCA 642 at [5] where the Court commented that it would be presuming upon the jurisdiction of the Court for the Tribunal to unilaterally reopen a review on the basis that it

28.2.20 Minor administrative or technical errors, such as, for example, erroneously referring to China as the applicant's country of nationality when it was in fact Indonesia, and it is clear the applicant was assessed against Indonesia, are unlikely to amount to a jurisdictional error.[54] Where there is no jurisdictional error, there is no power to reopen.

28.3 Repeat review applications

28.3.1 The concept of *functus officio* is also relevant in cases where applicants lodge repeat applications for review of a decision that has already been reviewed. If a valid application for review under Part 5 or 7 of the Migration Act has been received by the Tribunal and the Tribunal has carried out its statutory duty to review the decision, the decision is no longer a reviewable decision.[55] It is well established that the Tribunal cannot conduct a fresh review on the basis of a later application. The Tribunal has no jurisdiction to review a delegate's decision twice.[56] Even if circumstances have changed, this does not provide a basis for the Tribunal to accept a second review application, or to reconsider the delegate's decision.[57] This is the case even if a subsequent development of the law reveals the earlier decision to be legally incorrect.[58]

28.3.2 By way of example, in *SZBWJ v MIAC* the applicants lodged a second application for review of a delegate's decision with the Tribunal. The Tribunal found that it did not have jurisdiction to consider the applicants' second application for review but noted that the letter from the Department notifying the applicants of the delegate's decision was inadequate notification as it incorrectly stated the time limit to seek review. Notwithstanding that the application *prima facie* satisfied the requirements of ss 411 and 412 [Part 5 equivalents: ss 338 and 347], the Federal Court confirmed that the Tribunal is not empowered to embark upon a review or make a

had not completed its statutory functions where a matter was already the subject of a judicial review application. See also *SZJHK v MIMA* [2007] FMCA 248 at [41]–[45] and *Michael & Secretary DEST, Edwards & Secretary DHA* [2006] AATA 227. See also the Hon Justice Garry Downes AM, President, AAT, 'Finality of administrative decisions: The ramifications of *MIMA & Bhardwaj* (2002) 209 CLR 597', Hartigan Memorial Lecture, Brisbane, 30 November 2005. Justice Downes' speech, available electronically at http://aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/HartiganLectureNovember2005.pdf, contains discussion of some factors which might be taken into account when deciding to reopen a decision.

[54] *SZLQV v MIAC* [2008] FCA 795 at [6]–[8]. Contrast with *SZIFI v MIMIA* (2007) 238 ALR 611 where the Court held that two references in the decision record to the wrong country amounted to jurisdictional error.

[55] *SZBRB v MIAC* [2007] FMCA 1093 at [30]; *SZBRB v MIAC* [2007] FCA 1452 at [21]; and *SZBWJ v MIAC* [2008] FMCA 164 at [41].

[56] See e.g. *Jayasinghe v MIEA* (1997) 76 FCR 301 and *SZIIV v MIMA* [2006] FMCA 322.

[57] See *MIMA v Thiyagarajah* (2000) 199 CLR 343 at [30] and *MIMA v Bhardwaj* (2002) 209 CLR 597 at [7]. These principles have been confirmed in a large number of migration cases involving repeat applications to the Tribunal and the Courts, relating to the same primary decision. Many of these applications have been found to be an abuse of process, instituted for the purpose of prolonging the applicant's stay in Australia: see *SZASP v MIAC* [2007] FCA 771, *SZAQW v MIMA* [2006] FCA 1332, *SZIHQ v MIMA* [2006] FMCA 496, *SZIIV v MIMA* [2006] FMCA 322, *SZCKB v MIMA* & *Anor* [2006] FMCA 804, *SZBCE v MIMA* [2006] FMCA 1897, *SZBRB v MIAC* [2007] FCA 1452, *SZBWJ v MIAC* [2008] FMCA 164 and *SZMRE v MIAC* [2008] FMCA 1281.

[58] See *Kong v MIAC* [2011] FMCA 583 where the Court held that the Tribunal did not err in finding that it had no jurisdiction to reopen and review a decision made by it earlier, despite the earlier decision containing an error of the nature found to exist in *Dai v MIAC* (2007) 165 FCR 458 which related to the validity of condition 8202. The Court held that, as the applicant had sought judicial review of the Tribunal's earlier decision and there had been a final judicial determination of the issue as to whether or not the that decision was affected by jurisdictional error, the applicant was estopped from re-agitating that issue (at [23]). In *Kong v MIAC* [2011] FCA 1345 the Federal Court did not disturb the Federal Magistrates Court's conclusion that the Tribunal will be *functus officio* if it has carried out a review, judicially determined to be unaffected by jurisdictional error, even if subsequent developments in the law reveal its decision to be legally incorrect.

second decision on review of the delegate's decision in circumstances where the Tribunal's original decision was not attended with jurisdictional error.[59]

28.3.3 The Courts have also confirmed that there is no obligation on the Tribunal to hold a hearing under Act or otherwise in circumstances where it determines that it has no jurisdiction to determine an application.[60] Procedures are in place so that applications of this kind can be dealt with expeditiously.

28.4 Corrigenda or the slip rule

28.4.1 Section 43AA of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides a statutory basis for the Tribunal to correct an 'obvious error', such as a clerical or typographical error, in a written statement of reasons. That provision however does not apply to proceedings in the Migration and Refugee Division (MRD) of the Tribunal.[61] Nevertheless, the MRD of the Tribunal occasionally attempts to rectify such errors under the operation of the 'slip rule' in common law.

28.4.2 The 'slip rule' refers to the practice of altering a decision and reasons by corrigendum so as to correct minor clerical errors which have arisen from accidental slips or omissions and should not be used to change reasons or factual findings.[62]

28.4.3 The slip rule applies where a correction would not involve further deliberation by the decision maker and where amendment would not be a matter of controversy. For instance, in *SZLPH v MIAC*[63] although clear that the Tribunal affirmed the delegate's decision, a typographical error in relation to the outcome on the final page required a corrigendum. By issuing the corrigendum, the Tribunal complied with its obligation to notify the applicant of the Tribunal's decision and made it explicitly clear that the review had been determined adversely to the applicant.[64] There is also a line of authority which suggests that, unlike judicial determinations of a court, it is not open to administrative decision-makers such as the Tribunal to make alterations once a decision has been made.[65] It is therefore not certain whether or not the MRD of the Tribunal has a power to issue a corrigendum. However, as corrigenda are used to correct minor clerical errors, even if a court were to determine that the Tribunal had no such power to issue one, it may also

[59] *SZBWJ v MIAC* (2008) 171 FCR 299.
[60] *SZCOZ v MIAC* [2008] FMCA 1310 at [14].
[61] *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 24Z.
[62] See *SZMKN v MIAC* [2009] FMCA 954 2009) where the Tribunal had removed part of a sentence, being 'and (presumably) to establish a social network for himself in Australia', the day after the date of the decision record. The Court held at [80]–[82] that a change to the reasons by purporting to withdraw a finding of fact is outside the scope of a corrigendum, and that the corrigendum was void and of no effect. See also *SZTGE v MIBP* [2014] FCCA 1458 at [28].
[63] *SZLPH v MIAC* [2008] FCA 744 at [23]–[32]. See also *SZLPH v MIAC* [2008] FCA 744 at [26]–[28] where the Court proceeded on the basis that the Tribunal had validly issued a corrigendum; *SZNSI v MIAC* [2009] FMCA 1027 at [3] where the Court commented that the correction of a clerical error is an appropriate function for the use of the corrigendum and did not disclose any jurisdictional error; and *SZNVO v MIAC* [2009] FMCA 1167 at [31] and [42] where the Court found that the Tribunal correctly used a corrigendum to correct a typo (i.e. to note a missing 'not' in the phrase 'the Tribunal is satisfied…') in circumstances where it was clear from the face of the original decision what the Tribunal has found.
[64] *SZLPH v MIAC* [2008] FCA 744 at [28]. Also, *SZLQV v MIAC* [2008] FMCA 247 at [23] and *SZLAV v MIAC* [2008] FCA 795 at [6] where referring to the wrong country of reference was a mere slip of the pen and of no significance. Contrast with *SZIFI v MIMIA* (2007) 238 ALR 611 where two such slips constituted an error going to jurisdiction.
[65] See e.g. *EOO17 V MIBP* [2019] FCCA 1286 at [25] and *AYS15 v MIBP* [2015] FCCA 2865 at [6]–[7] where the Court noted there is no power in the Migration Act which expressly permits the correction of typographical errors.

appreciate that the typographical error is obvious on its face and is unlikely to have affected the Tribunal's statutory task of conducting a review.[66]

28.4.4 The issuing of a corrigendum does not affect the time at which the Tribunal became *functus officio* as the corrigendum is not a separate or replacement decision. Instead, it has the effect of speaking from the date of the original decision.[67]

28.4.5 A corrigendum which is not properly issued is void and of no effect.[68] However, where a corrigendum is void, the issue of the corrigendum does not itself amount to jurisdictional error. In such a case the purported correction would simply be of no effect if the Tribunal was *functus officio*.[69]

28.4.6 A correction is usually made, and corrigendum issued, by the Member who made the decision.[70] Where the decision in question was made by a former Tribunal Member, the matter is usually referred to the MRD Division Head, as the repository of the power to direct business of the MRD.[71]

[66] *AYS15 v MIBP* [2015] FCCA 2865 at [7]. See also *SZTGE v MIBP* [2014] FCCA 1458 at [28]–[30] where the Court noted that if it is possible for the Tribunal to issue a corrigendum, it is only to correct obvious and immaterial errors, and it may be unnecessary except to indicate that an error had been recognised by the Tribunal.
[67] *SZLPH v MIAC* [2008] FCA 744 at [28].
[68] *SZMKN v MIAC* [2009] FMCA 954 at [82].
[69] *Kaur v MIAC* [2010] FMCA 822 at [57].
[70] In *Kaur v MIAC* [2010] FMCA 822 at [63] the Court stated that it may be an 'inappropriate administrative practice' for a Tribunal officer to express a view that the Tribunal 'would' issue a corrigendum. However, in that case the corrigendum had been signed by the Member and the Court went on to say that an inappropriate administrative practice does not of itself constitute jurisdictional error.
[71] Under s 17K(6) of the AAT Act, the head of a Division (such as the MRD) has the function of assisting the President in the performance of the President's functions by directing the business of the Tribunal in the Division.

29. JUDICIAL REVIEW OF TRIBUNAL DECISIONS

29.10 Deterrence of unmeritorious cases

29.11 Dealing with court remittals

29. JUDICIAL REVIEW OF TRIBUNAL DECISIONS[1]

29.1 Introduction

29.1.1 Both the applicant and the Minister can seek judicial review of a decision of the Tribunal in its Migration and Refugee Division (MRD) under Division 2 of Part 8 of the *Migration Act 1958* (Cth) (the Migration Act).

29.1.2 Only the High Court, Federal Court and Federal Circuit and Family Court of Australia (Division 2)[2] have jurisdiction in relation to migration decisions.[3] The two key avenues for judicial review are to the Federal Circuit and Family Court of Australia (Division 2) for review under s 476(1) of the Migration Act and to the High Court pursuant to s 75(v) of the Constitution. The scope of the Federal Court's jurisdiction in relation to migration decisions include those matters transferred to it by the Federal Circuit and Family Court of Australia (Division 2).[4]

29.1.3 Division 2 of Part 8 of the Migration Act is confined by the use of the expression 'in relation to a migration decision' to applications for direct judicial review of migration decisions and does not extend to ancillary judicial review proceedings in respect of orders made in proceedings of that kind.[5]

29.1.4 Migration decisions that are 'privative clause decisions' or 'purported privative clause decisions' under s 474 of the Migration Act (see discussion below) are not reviewable under the *Administrative Decision (Judicial Review) Act 1977* (Cth) (the ADJR Act).[6]

29.1.5 Under s 479 of the Migration Act, only the applicant and the Minister are specified as parties to the review in relation to review of a 'migration decision'.[7] The Tribunal is, however, joined as a respondent in the proceedings as a matter of course. That is because any remedy must be directed to the officer of the Commonwealth who made the decision.[8]

[1]Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] For ease of reference, the Federal Circuit and Family Court of Australia (Division 2) will be referred to as the Federal Circuit and Family Court throughout this chapter.
[3] s 484(1).
[4] s 476A.
[5] See *Tang v MIAC* (2013) 217 FCR 55 at [10]. The Court found that proceedings to quash orders of the Federal Circuit Court refusing to extend time for the making of an application to quash the 'migration decision' of the Tribunal was not in 'in relation to' that migration decision.
[6] *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) sch 1 ss 3(da), db.
[7] *NAAA v* MIMA (2002) 117 FCR 287.
[8] *SAAP v MIMIA* (2005) 228 CLR 294 at [43], [91], [153], [180].

29.1.6 Although generally a party to the judicial review proceedings, the Tribunal does not take an active role in the litigation and generally will only enter an appearance submitting to the orders of the Court, save as to costs.[9] This is consistent with the principle that if a Tribunal becomes a protagonist in proceedings before a superior court, to do so may endanger the impartiality which it is expected to maintain in any subsequent proceedings that take place if and when relief is granted.[10] Having entered a submitting appearance it is not open to the Tribunal to contest the orders made by the Court on rehearing.[11]

29.2 The Federal Circuit and Family Court

29.2.1 The Federal Circuit and Family Court has jurisdiction to review decisions of the Tribunal made in the MRD under s 476(1) of the Migration Act. That section provides that the Court has the same original jurisdiction in relation to a 'migration decision' as the High Court has under s 75(v) of the Constitution. A 'migration decision' is defined in s 5(1) of the Migration Act as:

> *(a) a privative clause decision; or*
>
> *(b) a purported privative clause decision;*
>
> *(c) a non-privative clause decision; or*
>
> *(d) an AAT Act migration decision.*[12]

29.2.2 The Federal Court does not have jurisdiction under s 44 of *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) in relation to a privative clause decision, purported privative clause decision or an AAT Act migration decision.[13]

29.2.3 On 1 September 2021 the court known as the Family Court of Australia and the court known as the Federal Circuit Court of Australia were amalgamated to create the single court: the Federal Circuit and Family Court of Australia. The *Federal Circuit and Family Court of Australia Act 2021* (Cth) provides that the Family Court of Australia continues in existence as the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit Court of Australia continues in existence as the Federal Circuit and Family Court of Australia (Division 2).[14] Prior to the amalgamation, an applicant sought judicial review of a Tribunal decision made

[9] A similar approach by Reviewers in relation to judicial review of IMR recommendations would also seem appropriate: *SZQVI v MIAC* [2012] FCA 1026 at [43]–[45].
[10] *Hardiman, Ex parte; R v Australian Broadcasting Tribunal* (1980) 144 CLR 13.
[11] *Poonia v MIAC* [2011] FMCA 381. This was a decision originally remitted by consent for reasons relating to the construction of condition 8202 as explained in a note to the Court's orders. The Tribunal took a different view of the interpretation of the condition which the Minister had accepted and was of the view that the note to the Court's order was simply the Department's position on the question and not binding law. While the orders themselves are binding on the Tribunal and accompanying notes reflecting the basis for the Department's consent is likely to assist the Tribunal in its reconsideration, there appears to be no legal basis for the proposition that a notation of that kind is a binding order. Thus, his Honour's view presents difficulties for the Tribunal in cases remitted by consent where the Tribunal disagrees with the Department on a question of law for which there is no binding authority.
[12] As amended by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) with effect from 1 July 2015.
[13] *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 43C.
[14] *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 8.

in the Migration and Refugee Division in the Federal Circuit Court. From 1 September 2021, an applicant may seek judicial review of such a decision in the Federal Circuit and Family Court of Australia (Division 2). Effective from 1 September 2021, references to the Federal Circuit Court in the Migration Act were repealed and substituted with the Federal Circuit and Family Court of Australia (Division 2).[15]

Privative clause decision

29.2.4 A 'privative clause decision' is defined by s 474(2) of the Migration Act to mean a decision of an administrative character made, or proposed to be made as the case may be, under that Act or a regulation or other instrument made under that Act, other than certain decisions specified in ss 474(4) and (5) of the Migration Act.[16]

29.2.5 Under s 474(1) (the privative clause) a 'privative clause decision' such as a Tribunal decision made in the MRD, is 'final and conclusive', 'must not be challenged, appealed against, reviewed, quashed or called into question in any court'; and is 'not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'.[17]

29.2.6 A decision affected by jurisdictional error is not a 'privative clause decision'.[18] This means the prohibition in s 474(1) does not apply to Tribunal decisions affected by jurisdictional error.

29.2.7 A decision not affected by jurisdictional error is a privative clause decision if it complies with the three '*Hickman* provisos', namely that:

- the decision maker is acting in good faith;
- the decision relates to the subject matter of the legislation; and
- it is reasonably capable of reference to the power given to the decision maker.[19]

Non-privative clause decision

29.2.8 The phrase, 'non-privative clause decision' applies to a specified decision mentioned in ss 474(4) and (5)[20] and includes decisions under the Migration Act which are administrative decisions that do not relate to substantive decisions.

[15] *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth).
[16] These designated 'non-privative clause' decisions include decisions made under Division 7 of Part 5 [Offences] and Division 6 of Part 7 [Offences].
[17] s 474.
[18] *Plaintiff S 157/2002 v MIMIA* (2003) 211 CLR 476.
[19] These provisos were laid down by the High Court in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. In practice, a failure to comply with any of these three principles would also be regarded as jurisdictional error.
[20] Prescribed in reg 5.35AA.

Relevantly to the Tribunal, the following decisions are not privative clause decisions:

- Decisions relating to offences under Division 7 of Part 5 [migration reviews];
- Decisions relating to offences under Division 6 of Part 7 [protection reviews].[21]

29.2.9 Unlike privative clause decisions and purported privative clause decisions, 'non-privative clause decisions' are not excluded from the Court's jurisdiction under the ADJR Act.[22]

Purported privative clause decision

29.2.10 A 'purported privative clause decision' is defined as follows:

> *a decision purportedly made, proposed to be made, or required to be made under this Act or under a regulation or other instrument… that would be a privative clause decision if there were not:*
>
> *(a) failure to exercise jurisdiction; or*
>
> *(b) an excess of jurisdiction in the making of the decision.*[23]

29.2.11 The reference to a 'purported privative clause decision' was introduced into the Migration Act in an attempt to overcome the effect of the High Court's decision in *Plaintiff S157/2002 v MIMIA*[24], which held that a decision affected by jurisdictional error is not a decision made under the Migration Act and therefore not a 'privative clause decision' subject to the time limits and other restrictions on judicial review in the previous Parts 8 and 8A of the Migration Act.

29.2.12 A decision involving jurisdictional error (for example, a decision involving a failure to discharge 'imperative duties' or to observe inviolable limitations or restraints) is not a 'decision made under [the] Act' in the terms of s 474(2) and is therefore not a 'privative clause decision'.[25]

AAT Act migration decision

29.2.13 An 'AAT Act migration decision' is defined in s 474A of the Migration Act to mean the following decisions made under the AAT Act in relation to a Part 5 or Part 7 reviewable decision, or a member of the MRD:

- Appointment of members (s 6)

[21] s 474(4).
[22] s 476(3). Although not all actions taken under these provisions may be properly described as a 'decision' within the meaning of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).
[23] s 5E.
[24] *Plaintiff S157/2002 v MIMIA* (2003) 211 CLR 476.
[25] *Plaintiff S157/2002 v MIMIA* (2003) 211 CLR 476 at [40].

- Term of appointment (s 8)
- Remuneration and allowance (s 9)
- Acting appointments (s 10)
- Delegation (s 10A)
- Outside employment (s 11)
- Leave of absence (s 12)
- Termination of appointment (s 13)
- Disclosure of interest (s 14)
- Division Heads (s 17K)
- Deputy Division Heads (s 17L)
- Arrangement of business (s 18A)
- President's directions - arrangements of business – (s 18B)
- President's directions – constitutions (s 19A)
- Reconstitution (s 19D)
- Appointment of Registrar (s 24C)
- Staff (s 24N)
- Functions of Registrar and Staff (s 24P)
- Officers of the Tribunal (s 24PA)
- Resolving disagreements for multi member panels (s 42)
- Registries (s 64).[26]

Matters over which the Federal Circuit and Family Court does not have jurisdiction

29.2.14 There is a limited class of decisions over which the Federal Circuit and Family Court does not have jurisdiction. These include primary decisions,[27] certain privative

[26] As inserted by the Amalgamation Act from 1 July 2015. References to equivalent provisions in the Migration Act in relation to the MRT and RRT were repealed by the same Act. For transitional and saving arrangements, see the Amalgamation Act sch 9.
[27] 'Primary decision' is defined in s 476(4) and includes a privative clause or purported privative clause decision that is, or would have been reviewable in the Migration and Refugee Division of the Tribunal or Immigration Assessment Authority (IAA). In *Xia v MICMSMA* [2021] FCCA 1944 at [24]–[26], the Court rejected the applicant's argument that the Federal Circuit Court would

clause decisions or purported privative clause decisions of the Tribunal (in its General Division – s 500) and the Minister.[28]

Grounds of judicial review

29.2.15 The grounds of judicial review of migration decisions in the Federal Circuit and Family Court and in the limited jurisdiction of the Federal Court are the same as those in the High Court under s 75(v) of the Constitution.[29] This is intended to reduce the incentives for applicants to file judicial review applications in the High Court's original jurisdiction.[30]

29.2.16 As a consequence, applicants for judicial review may apply for constitutional writs of mandamus, prohibition or injunction and ancillary writs of certiorari, declaration and habeas corpus, but will only be eligible for relief if the relevant migration decision is affected by jurisdictional error.

Remittal of matters from High Court

29.2.17 Proceedings commenced in the High Court's original jurisdiction may only be remitted to the Federal Circuit and Family Court, unless the matter is one over which the Federal Court is given original jurisdiction.[31] The Federal Circuit and Family Court's jurisdiction to deal with matters remitted by the High Court is limited to those matters that relate to a 'migration decision'.[32]

29.3 The Federal Court

29.3.1 The original jurisdiction of the Federal Court is outlined in s 39B of the *Judiciary Act 1903* (Cth). The scope of the Federal Court's jurisdiction in relation to migration decisions is generally limited to proceedings transferred to it by the the Federal Circuit and Family Court and migration decisions made by the General Division of the AAT (e.g. under s 500) or the Minister personally under ss 500, 501, 501A, 501B and 501C of the Migration Act.[33]

29.3.2 Appeals to the Federal Court from a judgment of the Federal Circuit and Family Court relating to a migration decision are heard by a single judge unless a judge

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have jurisdiction to review a primary decision in circumstances where the Tribunal found it did not have jurisdiction because a location requirement was not met but the decision itself was a 'reviewable decision' as described in s 338. The Court reasoned that 'primary decision' in s 476(4)(a) refers to a decision of a delegate which was procedurally able to be reviewed under Part 5 or 7 at the time that it had been handed down, irrespective of whether a valid review application was made or whether the 'benefit of review has been lost by the conscious and deliberate act or omission of an applicant in placing themselves outside the migration zone at the respective times'. The Tribunal found it did not have jurisdiction in respect of the decision, a s 338(7A) reviewable decision, because the applicant was not in the migration zone at the time of the delegate's decision or when the review application was lodged which meant that the location requirements in s 347(3A) for a valid review application were not satisfied.

[28] s 476(2).
[29] ss 476, 476A and 476B.
[30] Explanatory Memorandum to Migration Litigation Reform Bill 2005 (Cth).
[31] s 476B.
[32] s 476B.
[33] s 476A. See also s 43C of the AAT Act.

considers it appropriate for the appeal to be heard by a Full Court.[34] An appeal may not be brought to the Full Bench of the Court from a judgment of the Federal Court constituted by a single Judge exercising the appellate jurisdiction of the Court in relation to an appeal from the Federal Circuit and Family Court.[35]

29.3.3 Appeals from a decision of the Federal Court in its original jurisdiction are to the appellate jurisdiction of the Federal Court. Appeals are heard by a Full Bench of the Court although a single judge may hear applications for:

- leave or special leave to appeal to the Court; or
- an extension of time within which to institute an appeal to the Court; or
- leave to amend the grounds of an appeal to the Court; or
- to stay an order of a Full Court;

and may

- join or remove a party to an appeal to the Court; or
- make an order by consent disposing of an appeal to the Court (including an order for costs); or
- make an order that an appeal to the Court be dismissed for want of prosecution; or
- make an order that an appeal to the Court be dismissed for failure to comply with a direction of the Court or a failure of the appellant to attend a hearing relating to the appeal; or
- give directions about the conduct of an appeal to the Court.[36]

29.4 The High Court

29.4.1 The source of the High Court's review jurisdiction is s 75(v) of the Constitution which provides that it has original jurisdiction 'in all matters… in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth…'. See discussion below for details on these remedies.

29.4.2 The High Court has powers to remit an application filed in its original jurisdiction to the Federal Circuit and Family Court or the Federal Court for consideration without an oral hearing.[37]

[34] s 25, *Federal Court of Australia Act 1976* (Cth) (FCA Act). The Federal Court's powers to grant relief whilst sitting in its appellate jurisdiction are listed in s 28 of the FCA Act and include the power under s 28(1)(b) to '*give such judgment, or make such order, as, in all the circumstances, it thinks fit*…'. It was however held in *SZQRB v MIAC* [2012] FCA 1053 that the power must be exercised for the proper discharge of the Federal Court's appellate jurisdiction so that relief would be confined to that which could have been granted in the (then) Federal Magistrates Court at first instance (at [22]–[24], [28]).
[35] FCA Act s 25(1AA).

29.4.3 The High Court also has an appellate jurisdiction. There is no automatic right to appeal unless the matter comes within the Court's original jurisdiction under s 75(v) of the Constitution.[38] Appeals from decisions of the Federal Court may only be taken by special leave of the High Court.[39] Generally speaking, special leave is granted where an application raises questions of law which are of public importance or in respect of which there are differences of opinion within the Federal Court.[40]

29.5 Time limits for judicial review

Federal Circuit and Family Court / Federal Court

Original Jurisdiction

29.5.1 The time limit within which applications for judicial review must be made to the Federal Circuit and Family Court, and Federal Court sitting in their original jurisdiction, vary depending upon when the proceedings were commenced.

Judicial review applications made on or after 15 March 2009

29.5.2 Applications for judicial review commenced on or after 15 March 2009 must be made to the Court within 35 days of the 'date of the migration decision'.[41] 'Date of the migration decision' is relevantly defined to mean:

- in the case of a Part 5 or Part 7 reviewable decision - the day the decision is taken to have been made under ss 362C(3) and 426B(3) (non-appearance decisions), 368(2) and 430(2) (written decisions) or 368D(1) and 430D(1) (oral decisions);[42]
- in the case of a decision made by the Immigration Assessment Authority (IAA) - the date of the written statement under ss.473EA(1).[43]

[36] FCA Act ss 24, 25.
[37] *Judiciary Act 1903* (Cth) (Judiciary Act) s 44(4).
[38] Cook and Creyke et al, 'Laying Down the Law' 6th Edition, LexisNexis Butterworths, 2005, p.438.
[39] See s 33(3) FCA Act.
[40] See s 35A of the Judiciary Act For a general discussion on the criteria for granting or refusing special leave see Australian Law Reform Commission, 'Discussion Paper 64: Review of the Judiciary Act 1903, Chapter 4, at 4.193-4.203'.
[41] ss 477(1), 477A(1). This time limit was introduced by the *Migration Legislation Amendment Act (No 1) 2009* (Cth). Although worded somewhat ambiguously, the transitional provisions relating to the introduction of these provisions also specify that if the judicial review application relates to a migration decision made before 15 March 2009, then the date of the migration decision will be treated as 15 March 2009 for the purposes of determining limits for review: s 477(2).
[42] s 477, as amended by the Amalgamation Act with effect from 1 July 2015. In *SZRPF v MIAC* [2013] FMCA 54 where the Tribunal's decision record contained two separate dates, being an earlier date appearing on the cover page, and a later date, being the date the decision record was certified by the Deputy Registrar, the Court held the 'date of the written statement' for the purposes of s 430(2) is the date when the preparation of the written statement to which s 430(1) refers is completed by the Tribunal member: at [37]. In that case, this was the earlier date on the cover page. The later date recorded by the Deputy Registrar beside the certification was likely to be the date of certification, with the date of the certification not being the date identified in s 430(1) and (2): at [38].
[43] s 477(3). Date of the migration decision is also defined to mean the date of the written decision made under s 43(1) of the AAT Act, for a decision made under that provision; and in any other case, the date of the written notice of the decision, or if no such notice exists, the date the Court considers appropriate.

29.5.3 The 35 day time limit commences to run despite a failure by the Tribunal to comply with any of the requirements of ss 368(1) or 430(1) and irrespective of the validity of the decision.[44]

29.5.4 Both the Federal Circuit and Family Court, and the Federal Court, may extend the 35 day period as the Court considers appropriate if:

- an application has been made in writing to the Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make an order extending the time; and
- the Court is satisfied it is necessary in the interests of the administration of justice to do so.[45]

29.5.5 The Federal Circuit Court has held that an extension of time can only be granted if it is necessary to do justice between the parties, which requires the Court to consider five factors: (a) the history of the matter; (b) the conduct of both parties; (c) the nature of the litigation; (d) the consequences for the parties of a grant or refusal of the extension; and (e), where a constitutional or prerogative writ is sought, the public interest in the efficacy of public acts, decisions and litigation.[46]

29.5.6 In contrast, the Federal Court previously considered five different factors: (a) that applications for an extension of time are not to be granted unless it is proper to do so, the legislative time limits are not to be ignored; (b) there must be some acceptable explanation for the delay; (c) any prejudice to the respondent in defending the proceedings, caused by the delay, is a material factor militating against the grant of an extension; (d) the mere absence of prejudice to the respondent is not enough to justify the grant of an extension; and (e) the merits of the substantial application are to be taken into account in considering whether an extension is to be granted.[47]

29.5.7 If the Federal Circuit and Family Court or Federal Court makes an order refusing the extension of time, or refuses to make an order extending the time, that judgment of the Court cannot be appealed to the Federal Court or High Court.[48]

[44] ss 477(4) and (5), 477A(4) and (5).
[45] ss 477(2), 477A(2).
[46] *SZTEN v RRT* [2013] FCCA 2100, applying McHugh J in *Re Commonwealth of Australia; Ex Parte Marks* (2000) 177 ALR 491. See also, *SZRIQ v MIBP* [2013] FCA 1284 where the Court held the Federal Circuit Court is not bound to consider the impact of the limitation on an appeal of a refusal to grant the extension application under s 476A(3) in all cases to discharge its obligations under s 477(2)(b), rather it is only required to consider whether to take that matter into account as one of the factors to be weighed in determining the application.
[47] *SZMNO v MIAC* [2009] FCA 797, applying *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344. The same approach was taken in *Wong v MIAC* [2009] FMCA 747 at [27].
[48] ss 476A(3)–(5). Note however *SZRBN v MIAC* [2012] FCA 984 where Flick J at [21] described the Full Federal Court's decision in *SZQDZ v MIAC* [2012] FCAFC 26 as 'curious' as it seemed to have the consequence that a decision made to dismiss an application made outside the time prescribed by s 477(1) would be reviewable, whereas a decision to refuse to make an order extending time pursuant to s 477(2) would not be. In *Tang v MIAC* [2013] FCAFC 139 at [31] the Full Federal Court held that a decision to refuse an extension is not 'in relation to a migration decision' for the purposes of s 476(1) and, consequently, s 476A(1) does not prohibit the Federal Court from exercising its original jurisdiction under s 39B(1) of the Judiciary Act See also *SZRIQ v MIBP* [2013] FCA 1284 where the Court held that it had jurisdiction under s 39B to review a decision to refuse an extension and noted that the High Court could also grant relief in its original jurisdiction.

29.5.8 Note that the 35 day time limit for judicial review does not apply to Independent Merits Review (IMR) assessments and recommendations, as they are not migration decisions for the purposes of s 477.[49]

Judicial review applications made before 15 March 2009

29.5.9 Proceedings for judicial review commenced on or after 1 December 2005 but before 15 March 2009 were required to be made within 28 days of actual (as opposed to deemed) notification of the Tribunal decision.[50] That period could be extended by up to 56 days if an application for an extension was made within 84 days of actual notification and the Court was satisfied it was in the interest of the administration of justice to grant the extension.[51]

29.5.10 Where proceedings were commenced in relation to 'migration decisions' made before 1 December 2005, and actual notification of the decision was given before that day, the time limits applied as if the actual notification of the decision took place on 1 December 2005.[52]

29.5.11 For the time limits to have applied, it was necessary to demonstrate both 'actual notification' of the decision to the applicant, and compliance with the then MRT's and RRT's notification provisions under the Migration Act, including ss 368–368D or ss 430–430D.[53] 'Actual notification' in this context required physical possession by the applicant of the written statement of reasons prepared for the purposes of ss 368(1) and 430(1). Although the Tribunal may have otherwise discharged its own notification obligations under the Migration Act, a person would not have been notified of a decision for the purposes of s 477, as it was then, merely by sending a copy of the statement of reasons to their authorised recipient, or orally delivering the decision.

[49] In *SZQDZ v MIAC* [2012] FCAFC 26 the Full Federal Court held that an Independent Merits Review (IMR) assessment and recommendation cannot be characterised as a 'decision of an administrative character made or proposed to be made under the Migration Act' within the meaning of s 474(2). The Court held the recommendations have no statutory or other legal force and the Minister is not bound to act on them and is entitled to make, or not make, a decision under s 46A or 195A regardless of the IMR's assessment or recommendation. In *WZAPN, WZAQD and WZAQE v MIAC* [2012] FMCA 235, the Court applied *SZQDZ v MIAC,* and held that the then Federal Magistrates Court's jurisdiction was enlivened by an injunction sought in relation to an anticipated decision of the Minister. See also *DZABS v MIAC* [2012] FMCA 297 where, in light of *SZQDZ v MIAC,* the Court made *obiter* comments describing its power, stating that its task was to determine whether such a future decision is likely to be vitiated by jurisdictional error if made in reliance upon the IMR decision.

[50] *Migration Litigation Reform Act 2005* (Cth) item 41.

[51] ss 477(2), 477A(2).

[52] *Migration Litigation Reform Act 2005* (Cth) item 42. Where the decision was made prior to 1 December 2005, but actual notification was not given before that date, it would appear that the amended s 477(1) did not apply: *Vu v MIAC* (2008) 101 ALD 211.

[53] *SZFLM v MIAC* [2007] FMCA 1 at [27] upheld on appeal in *SZFLM v MIAC* [2007] FCA 863 at [7]. See also *Von Kraft v MIMA* [2007] FMCA 244 at [41], upheld on appeal in *Von Kraft v MIAC* [2007] FCA 917 at [23] (although cf. *SZMYT v MIAC* [2008] FMCA 1718 where Driver FM suggested that compliance or non-compliance with the Tribunal's statutory notification regime may not have been significant when determining whether actual notification occurred). The most recent Full Court authority stipulates that irrespective of how the Tribunal complies with its obligations to notify an applicant of its decision, if an applicant physically receives a copy of the Tribunal's decision and reasons (for example after it was posted), there has been actual notification of the decision for the purposes of s 477: *SZKNX v MIAC* (2008) 172 FCR 264 at [25], followed in *SZMQE v MIAC* [2008] FMCA 1474 at [52], *SZMYT v MIAC* [2008] FMCA 1718 at [12]; cf *MIAC v SZKKC* (2007) 159 FCR 565, and *Toia v MIAC* [2009] FCA 166 delivered without consideration of *SZKNX*.

Appellate Jurisdiction

29.5.12 An application to the Federal Court sitting in its appellate jurisdiction must be filed: within 28 days after the date on which the judgment appealed from was pronounced or the order was made or the date on which leave to appeal was granted; or on or before a date fixed for that purpose by the court appealed from[54] unless the time for lodging an appeal is otherwise extended by the Court.[55]

29.5.13 An order of the Federal Circuit and Family Court refusing an extension of time, or the refusal of the Federal Circuit and Family Court to make an order extending time, cannot be appealed to the Federal Court.[56]

High Court

Original Jurisdiction

29.5.14 The time limits for making an application to the High Court for a remedy to be granted in the exercise of the Court's original jurisdiction is the same as that for the Federal Circuit and Family Court and Federal Court - 35 days from the date of the migration decision.[57] The date of the migration decision is defined in the same way as for the Federal Circuit and Family Court and Federal Court.[58]

29.5.15 The 35 day time limit commences to run despite a failure by the Tribunal to comply with any of the requirements of s 368(1) or 430(1) and irrespective of the validity of the decision.[59]

29.5.16 The power to extend the time for making an application is also the same as that for the Federal Circuit and Family Court and Federal Court - that is, the High Court may extend the period as the Court considers appropriate if:

- an application has been made in writing to the Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make an order extending the time; and
- the Court is satisfied it is necessary in the interests of the administration of justice to do so.[60]

29.5.17 The current time limits are a legislative response to the High Court decision in *Bodruddaza v MIMA*, in which it was held that the previous time limits imposed by

[54] *Federal Court Rules 2011* (Cth) ('*Federal Court Rules*') reg 36.03.
[55] *Federal Court Rules* reg 36.05.
[56] s 476A(3). This restriction applies to judgments that refuse the extension made on or after 15 March 2009: *Migration Legislation Amendment Act (No 1) 2009* (Cth). Note however *SZRBN v MIAC* [2012] FCA 984 where Flick J at [21] described the Full Federal Courts decision in *SZQDZ v MIAC* [2012] FCAFC 26 as 'curious' as it seemed to have the consequence that a decision made to dismiss an application made outside the time prescribed by s 477(1) would be reviewable, whereas a decision to refuse to make an order extending time pursuant to s 477(2) would not be.
[57] s 486A(1).
[58] s 486A(3) which specifies that the term has the meaning given by s 477(3).
[59] s 486A(4)–(5).
[60] s 486A(2).

the then s 486A of the Migration Act in relation to applications made to the High Court were invalid.[61]

Appellate Jurisdiction

29.5.18 An application for special leave to appeal to the High Court sitting in its appellate jurisdiction must be made within 28 days after the judgment in the inferior court was pronounced[62] unless the time for lodging the application for special leave to appeal is otherwise extended by the Court.[63]

29.5.19 An order of the Federal Court refusing an extension of time, or the refusal of the Federal Court to make an order extending time, cannot be appealed to the High Court.[64]

29.6 Precedent in the Australian Court System

29.6.1 The doctrine of precedent is often referred to as 'the hallmark of common law'[65]. Precedents are used by the courts in applying principles and rules of law. The fundamental rules of precedent are:[66]

- a court is bound by decisions of higher courts in its hierarchy;
- decisions made by courts in a different hierarchy are not binding, but may be given weight;
- precedents are not necessarily abrogated by the lapse of time.

29.6.2 The federal court hierarchy is the relevant hierarchy for the purposes of judicial review of decisions of the MRD and is as follows:

High Court of Australia

↑

Federal Court of Australia

↑

[61] *Bodruddaza v MIMA* (2007) 22 CLR 651. In that case the Court held that by fixing on the date of actual notification and not allowing for the range of vitiating circumstances which may affect administrative decision making, the section was invalid: at [55]. Whilst the decision in *Bodruddaza* was specific to s 486A and did not extend to the time limits in ss 477 and 477A for the then Federal Magistrates Court and Federal Court respectively, the implications of the decision were that applicants could overcome the time limits imposed on applications to these Courts by instead seeking remedies directly in the High Court pursuant to s 75(v) of the Constitution.
[62] *High Court Rules 2004* (Cth) ('*High Court Rules*') reg 41.02.1.
[63] *High Court Rules* reg 41.02.2.
[64] s 476A(4). This restriction applies to judgments that refuse the extension made on or after 15 March 2009: *Migration Legislation Amendment Act (No 1) 2009* (Cth). Note however *SZRBN v MIAC* [2012] FCA 984 where Flick J at [21] described the Full Federal Courts decision in *SZQDZ v MIAC* (2012) 200 FCR 207 as 'curious' as it seemed to have the consequence that a decision made to dismiss an application made outside the time prescribed by s 477(1) would be reviewable, whereas a decision to refuse to make an order extending time pursuant to s 477(2) would not be.
[65] Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, at 93.
[66] Cook and Creyke et al, 'Laying Down the Law' 6th Edition, LexisNexis Butterworths, 2005, p75.

Federal Circuit and Family Court of Australia (Division 2)

29.6.3 An important rule of precedent is that only the *ratio decidendi* of a case is binding.[67] The *ratio* can be described as pronouncements of legal principles necessary for a judge's decision on the facts of the case. This can be contrasted with *obiter dicta*, which are pronouncements of legal principles which are not strictly relevant to the case. *Obiter dicta* is often used by judges to clarify or illustrate legal principles which are being applied and can take the form of analogies, illustrations, points of contrast or conclusions based on hypothetical situations. *Obiter dicta* expressed by judges in superior courts often carry persuasive authority but are never binding.

29.6.4 Within the Australian system, courts have laid down rules in relation to the way they apply precedent. In particular, the rules cover:

- what weight a single judge should give to a decision of another single judge of the same court;
- what weight a court of appeal should give to its own previous decisions; and
- what weight a lower court should give to conflicting decisions of appellate courts.

29.6.5 Under current practice, a single justice of the High Court is not bound to follow an earlier decision of a single justice, but is obliged to follow a decision of a Full Bench of the High Court.[68] Similarly, Full Benches of the High Court do not regard themselves as bound by earlier Full Bench decisions.[69] However, in addition to the normal requirements that govern the grant of special leave, it is generally the case that leave is required to reargue a point that has been authoritatively determined by the Court.[70]

29.6.6 Judges sitting in the Federal Court of Australia are bound by decisions of the High Court. A single judge of the Federal Court, whether sitting in the Court's original[71] or appellate jurisdiction,[72] is bound by decisions of a Full Court of the Federal Court. Single judges are not bound by decisions of single judges sitting at the same level. Similarly, Full Courts are not bound by the judgments of earlier Full Courts. However, for reasons of comity, the principle exists that an earlier judgment of a judge or bench in sitting at the same level ought to be followed unless it is plainly or manifestly wrong.[73] Although the rules of precedent suggest that courts exercising original jurisdiction are bound by judgments of a court exercising appellate jurisdiction in the same judicial hierarchy; there is some uncertainty as to whether a

[67] See, for example, *Khant v MIAC* [2009] FMCA 328 at [34] - not disturbed in the subsequent successful appeal (*Khant v MIAC* (2009) 112 ALD 241).
[68] Cook and Creyke et al, 'Laying Down the Law' 6th Edition, LexisNexis Butterworths, 2005, at p.95.
[69] For example, in *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645, the Court declined to follow its earlier decision in *Viro v The Queen* (1978) 141 CLR 88.
[70] *SZEEU v MIMIA* (2006) 150 FCR 214 at [144].
[71] See *MIMIA v Farahanipour* [2000] FCA 605 at [20].
[72] See *Saeed v MIAC* (2009) 176 FCR 53 at [43] (not considered on appeal [2010] HCA 23) and *AZAAA v MIAC* 177 FCR 363 at [41].

single judge exercising the Court's original jurisdiction is bound by a decision of a single judge exercising the Court's appellate jurisdiction. [74]

29.6.7 The Federal Circuit and Family Court is bound by decisions of the High Court and the Full Federal Court. However, where a decision of the High Court and an appellate decision of the Federal Court are in apparent conflict, the Federal Circuit and Family Court would be obliged to follow the Federal Court decision as the immediately superior court. The decision of the High Court would be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the Federal Court.[75] A Federal Circuit and Family Court judge is also bound to follow a decision of a single judge of the Federal Court exercising appellate jurisdiction.[76] However, there is some uncertainty as to whether a Federal Circuit and Family Court judge is bound by a decision of a single judge exercising the Federal Court's original jurisdiction.[77] Even if Federal Circuit and Family Court judges are not bound by the decisions of single judges in the Federal Court's original jurisdiction they would ordinarily follow them as a matter of comity.[78] A Federal Circuit and Family Court judge is not bound by a decision of another Federal Circuit and Family Court judge, but as a matter of comity would normally follow an earlier judgment by a Federal Circuit and Family Court judge unless persuaded that it is plainly wrong.

29.6.8 A judgment will not be plainly wrong merely because of brevity of reasoning, the fact that the Court did not receive legal submissions on the particular point, or because the later Court holds a different opinion or finds the earlier reasoning unpersuasive.[79] However, a judgment may be plainly wrong if the earlier Court overlooked a relevant statutory provision, extrinsic evidence or other consideration which demonstrates that error in its opinion was manifest or unreasonable.[80] An example of a 'plain error', where a judge or bench is considering an earlier judgment of the same court is if the earlier judgment was pronounced *per incuriam*. The *per incuriam* rule is a rule of precedent used in relation to a decision which fails to take into account some relevant legal principle or judgment and therefore need not be followed.[81] The *per incuriam* rule is not available to courts in relation to a decision of a court superior in its hierarchy. It is a rule which applies only to a review by a court of its own decision.[82]

29.6.9 Where there are two decisions of a superior court that are in conflict, it is generally accepted that a lower court is bound to follow the most recent decision that is

[73] See *Saeed v MIAC* (2009) 176 FCR 53 at [38] - [41] (not considered on appeal [2010] HCA 23); *SZEEU v MIMIA* (2006) 150 FCR 214 at [148]-[149]; *Nguyen v Nguyen* (1990) 169 CLR 245 at 269; *MIMIA v Singh* (2000) 98 FCR 469 at [17].
[74] See *MIMIA v SZANS* (2005) 141 FCR 568 at [36].
[75] *SZGME v MIAC* (2008) 168 FCR 487 at [42].
[76] *SZGME v MIAC* (2008) 168 FCR 487 at [42] and *Muliyana v MIAC* [2009] FMCA 691 at [35] (not considered on appeal: (2010) 183 FCR 170.
[77] See *NAAT v MIMIA* (2002) 196 ALR 376 at [27]. See also *Suh v MIAC* (2009) 175 FCR 515 at [29].
[78] *MIMIA v SZANS* (2005) 141 FCR 568 at [38]; cited with approval in *Kim v MIAC* [2009] FMCA 634 at [3] - [4]. See also *Muliyana v MIAC* [2009] FMCA 691 at [36] (not considered on appeal: (2010) 183 FCR 170 and *Patel v MIAC* [2011] FMCA 19 at [54].
[79] *Muliyana v MIAC* [2009] FMCA 691 at [37]–[38] (not considered on appeal: (2010) 183 FCR 170.
[80] *SZEEU v MIMIA* (2006) 150 FCR 214 at [146]-[149].
[81] *Butterworths Concise Australian Legal Dictionary* (Butterworths, 1997).
[82] See *Khergamwala v MIAC* [2007] FMCA 690; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, at [177]; *Algama v MIMA* (2001) 115 FCR 253.

directly on point.[83] Where a more recent decision of an immediately higher court conflicts with an earlier decision of an even higher court, the lower court should assume that the earlier decision has been correctly distinguished and give effect to the more recent decision.[84]

29.7 Jurisdictional error

29.7.1 Jurisdictional error is the purported exercise by a tribunal of jurisdiction in excess of that which has been conferred upon it, or the failure to exercise its proper jurisdiction.[85]

29.7.2 The High Court in *Craig v South Australia*, described a jurisdictional error as follows:

> *If an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.* [86]

29.7.3 The different kinds of error listed in *Craig* are not exhaustive,[87] nor are they independent of each other. As the Court in *MIMIA v Yusuf* noted:

> *Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.*[88]

[83] *SZLIW v MIAC* [2009] FMCA 333 at [54]; *Uddin v MIAC* [2010] FMCA 553 at [8].
[84] *Patel v MIAC* [2011] FMCA 19 citing Lord Simon of Glaidsdale in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at [478], as cited by Black CJ and Allsop J in *SZGME v MIAC* (2008) 168 FCR 487 at [41].
[85] *Butterworths Concise Australian Legal Dictionary* (Butterworths, 1997).
[86] *Craig v South Australia* (1995) 184 CLR 163 at [179], approved in *MIMIA v Yusuf* (2001) 206 CLR 323 at [82].
[87] cf *Re Refugee* Review *Tribunal; Ex parte Aala* (2000) 204 CLR 82.
[88] *MIMIA v Yusuf* (2001) 206 CLR 323 at [82]. In *SZQQX v MIAC* [2011] FMCA 970 the Court noted that while taking into account an irrelevant consideration may lead to jurisdictional error, there is a distinction to be drawn between the Tribunal relying on an irrelevant consideration in analysing and reaching a conclusion, and the asking of questions which may ultimately be of no use or relevance to its task at [39].

29.7.4 More recently, Kirby J in *Commissioner of Taxation v Futuris Corporation Ltd*[89] commented that the recognised categories of jurisdictional error in Australian jurisprudence are not closed, but include:

- a mistaken assertion or denial of the very existence of jurisdiction
- a misapprehension or disregard of the nature or limits of the decision maker's functions or powers
- acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances
- acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion
- disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions to the validity of the decision maker's act or decision
- misconstruing the decision maker's Act in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers
- acting in bad faith
- a breach of natural justice.[90]

29.7.5 Where an error does not materially affect the overall decision or does not affect the exercise of a relevant power, it will not amount to jurisdictional error.[91] For instance,

[89] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 per Kirby J at [134] citing Aronson, 'Jurisdictional error without the tears', in Groves and Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines*, (2007) 330 at 335-336.

[90] See Chapter 7 – Procedural fairness and the Tribunal for a more detailed discussion of procedural fairness and the Tribunal.

[91] *Hossain v MIBP* [2018] HCA 34 at [30], [34]. Three other appeals were heard concurrently with *Hossain v MIBP*. As in *Hossain,* the majority's approach to whether there was jurisdictional error by the Tribunal turned on whether the error materially affected the decision. *Shrestha v MIBP; Ghire v MIBP; Achararya v MIBP* [2018] HCA 35 at [10]. See also *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [2] where the majority held that a breach of an obligation of procedural fairness constitutes a jurisdictional error if, and only if, the breach is material (i.e. if it deprived the applicant of the possibility of a successful outcome). The minority, Gordon and Nettle JJ, at [78]–[79] held that a breach of procedural fairness constitutes jurisdictional error but that a Court will only grant relief if the applicant has been deprived of the possibility of a successful outcome. See also *MIBP v Lium* [2019] FCA 1850 where the Tribunal referred to submissions purportedly provided by the applicant in its decision record but did not identify what they were, and the Court found at [85] that the reference could not have affected the outcome of the review and therefore did not result in jurisdictional error. The Court reasoned that the submissions either hadn't in fact been provided or, if they had been provided, could not be found to be relevant to the matter in circumstances where no evidence of the submissions (other than the reference in the Tribunal decision) was provided to the Court. For an example of where the Court found that the Tribunal's error was material, see *CRH16 v MICMSMA* [2021] FCA 1239 where it was accepted that the Tribunal failed to take into account witness statements from the appellant's mother and sister. The Court held that that the Tribunal's error was material as the statements were capable of corroborating the appellant's account, and that had the Tribunal accepted the statements it may have not made the findings it did (at [37]–[39]). The error was jurisdictional as the appellant was denied the realistic possibility of a successful outcome (at [41]–[42]). While the Court

where the Tribunal considers multiple criteria and makes separate independent findings on these criteria and one is affected by error, provided the conclusions on other criteria are sound, the Tribunal's error will not amount to a jurisdictional error. This is because the error could not have resulted in the making of a different decision due to other independent findings which are valid. For example, in *Hossain v MIBP*, the High Court unanimously held that the Tribunal's error in construing and applying Schedule 3 criteria was not a jurisdictional error because it could not have made a difference to its separate decision in relation to PIC 4004.[92]

29.7.6 Where the Tribunal has not afforded procedural fairness to an applicant (for example, where the Tribunal hasn't put the applicant on notice of a dispositive issue), for it to result in a jurisdictional error, the breach must have been material to the decision.[93] To demonstrate that the breach was material to the decision, an applicant must establish that there was a 'realistic possibility' that a different decision could have been made if the Tribunal had not erred.[94] The applicant does not need to demonstrate how they might have responded or acted differently if the breach hadn't occurred; what is required instead is a consideration of how the Tribunal made its decision, and then a determination, on the balance of probabilities, as to whether the decision could have been different if the Tribunal had afforded the applicant procedural fairness.[95] In *Nathanson v MHA*, it was held that where an applicant has been deprived of a chance to make submissions on a topic of relevance, reasonable conjecture from established facts about the decision-making process will readily show a reasonable possibility that the outcome would have been different.[96] The Court held that it may generally be the case that there is a 'realistic possibility' that there would have been a different outcome if an applicant

was of the view that there wasn't a 'brightline' distinction between materiality and the situation where overlooked evidence is sufficiently important, the Court held that the statements were 'sufficiently important' such that if materiality was a separate concept, it was satisfied (at [40]).

[92] *Hossain v MIBP* [2018] HCA 34 at [34]–[35].

[93] See e.g. *MZAPC v MIBP* [2021] HCA 17 at [38] where the Court held that what must first be determined when considering whether the Tribunal's decision is affected by jurisdictional error is the 'basal factual question of how the decision was made in fact' before considering whether the counterfactual question of whether the decision in fact made could have been different if the breach of the procedural fairness obligation had not occurred.

[94] *MZAPC v MIBP* [2021] HCA 17 at [39]. See also *BXP20 v MICMA* [2022] FCA 964 at [50]–[61]. The Court noted that the onus lies on the appellant to establish jurisdictional error and held that the appellant had failed to establish that the Tribunal had not considered material of sufficient importance to its statutory task when it ignored part of a medical opinion. That is, the appellant did not satisfy the Court that the failure by the Tribunal was material to the outcome. The Court held that the Tribunal had erroneously rejected parts of a medical opinion on an illogical basis and that the opinion was capable of materially contributing to a finding that 'compelling reasons' existed for not applying the Schedule 3 criteria in a Subclass 820 matter. The Tribunal had rejected the opinion on the basis that it relied upon the appellant's self-reporting, but some parts of the opinion relied upon third party material from other doctors.

[95] *Nathanson v MHA* [2022] HCA 26 at [39]. The High Court was considering a Tribunal decision in the General Division to affirm the delegate's decision to not to revoke the cancellation of a visa under s 501CA(4). The Tribunal denied the appellant procedural fairness by not putting them on notice of certain changes brought about by Ministerial Direction 79 (which the Tribunal was required to consider in making its decision and came into effect after the delegate had made their decision).

[96] In *Nathanson v MHA* [2022] HCA 26 at [39], the Court noted that the appellant was not given an opportunity to give or adduce evidence or to make submissions on the way in which two domestic violence incidents should have affected the Tribunal's consideration of the primary consideration of the protection of the Australian community. Kiefel CJ, Keane J and Gleeson J in their joint judgment held that '[a]s a matter of reasonable conjecture…the appellant may have been able to present evidence on his own behalf or from his wife, and to make submissions that could have led to a different characterisation by the Tribunal of the nature of the appellant's offending…The possibility that the appellant could have presented more to the Tribunal about how the incidents were to be evaluated could not be foreclosed by what was already before the Tribunal'. That possibility was realistic in the circumstances as the appellant may have been able to mitigate the significance of the offending.

was denied an opportunity to present evidence or make submissions on a topic or issue of relevance that required consideration.[97]

29.7.7 In relation to combined review applications before the Tribunal, where there is a jurisdictional error in the Tribunal's decision for one applicant and it may affect the Tribunal's decision for the remaining applicants, the Tribunal's review for the remaining applicants may be disabled by the jurisdictional error such that the error vitiates the entire decision (i.e. the decision for all applicants).[98] However, whether the jurisdictional error vitiates the decision for all applicants will turn on the facts of each matter and how the error affected the review for the other applicants.[99]

29.7.8 Factual errors will not normally amount to jurisdictional errors, unless the error is one of a 'jurisdictional fact'.[100] A jurisdictional fact is a factual precondition upon which the decision maker's jurisdiction depends. The satisfaction of the Minister under s 65(1)(a) of the Migration Act is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is thus a jurisdictional fact upon which the exercise of that authority is conditioned.[101]

29.7.9 In relation to protection visas, the existence or otherwise of a receiving country is not a 'jurisdictional fact'. In *MICMSMA v EGZ17*, the Federal Court held that the primary judge was incorrect to find that an IAA decision in relation to Afghanistan made prior to the Taliban's takeover of the country was affected by jurisdictional error on the basis that the country of Afghanistan as applied by the IAA no longer existed and that the IAA had exceeded its statutory powers. [102] The Federal Court

[97] *Nathanson v MHA* [2022] HCA 26 at [35].
[98] In *BIX18 v MICMSMA* [2020] FCCA 505, the jurisdictional error in the Tribunal's decision for two visa applicants (husband and wife), was found to have affected the Tribunal's decision to affirm the delegate's decision to refuse the other visa applicant (their child) a protection visa. The Tribunal found that it had no jurisdiction in relation to the parents on the basis the review application was lodged out of time, and proceeded to make a decision for the child. The Tribunal erred in finding it had no jurisdiction for the husband and wife as the notification was defective (at [52]). The Court held at [53]–[56] it was appropriate and desirable that the Tribunal consider the claims of all three applicants in one decision, which it would have done except for the error in relation to jurisdiction for the two applicants and that error vitiated the Tribunal decision in its entirety.
[99] In *BIX18 v MICMSMA* [2020] FCCA 505 at [56], the Court considered that the review for the child was 'truncated' because the Tribunal had not reviewed the claims of the parents. At [54] the Court also noted that if the delegate had made one decision for the family, the present situation would not have arisen. The delegate had made two separate decisions: one for the parents and one for their child (18 months after the parents' decision), even though the child was born prior to the decision for the parents and could have been included in the same decision. These factors appear to have influenced the Court's finding that the Tribunal erred.
[100] *Abebe v Cth of Australia* (1998) 197 CLR 510 at 560. For a general discussion on the issue, see *Essof v MIAC* [2009] FMCA 13.
[101] *MIAC v SZMDS* (2010) 240 CLR 611, at [40], [102], [119]. In relation to protection visas, see also *MICMSMA v EGZ17* [2022] FCAFC 12 at [32] where the Court noted that the exercise of the decision-making power depends on the existence of a jurisdictional fact, namely the reaching of a state of satisfaction or non-satisfaction by the decision-maker as to the refugee and complementary protection criteria in s 36(2)(a) and s 36(2)(aa) at the time that the decision was made. However, the various factual matters which the decision-maker must address in reaching a state of satisfaction, including whether the visa applicant has met relevant visa criteria, are not themselves jurisdictional facts simply because those facts necessarily need to be addressed in reaching the state of satisfaction leading to the grant or refusal of the visa. By way of example, in *AVJ17 v MICMSMA* [2022] FCA 1056 at [45]–[46], the Court found that a factual error in the DFAT report did not lead to jurisdictional error. The appellant had claimed that he was at risk of harm because he had departed Bangladesh by boat. The Tribunal considered the most recent DFAT report which referred to a 1982 Ordinance which made it an offence to depart Bangladesh by boat, but that DFAT was not aware of people being charged with this offence. The Tribunal found that the appellant was not at risk of harm, based on the appellant's own concession that he didn't think the Bangladeshi government would harm him and DFAT's position that they were not aware of people being charged. In fact, this 1982 Ordinance had been repealed by a 2013 Act. The Court held at [42] that a 'mere error of fact' does not constitute a failure to perform the statutory function. The Tribunal had not overlooked or ignored more up-to-date country information before it, and did not fail to engage with the appellant's claims. In effect, the Tribunal's error in assuming the 1982 Ordinance was still in operation was immaterial to the outcome.
[102] *MICMSMA v EGZ17* [2022] FCAFC 12 at [31]. The judgment overturned the judgment of the Federal Circuit and Family Court: *EGZ17 v MICMSMA* [2021] FedCFamC2G 10. See also *DVF18 v MICMSMA* [2021] FedCFamC2G 135 at [30] in which the Court held that the primary judge in *EGZ17* was plainly wrong to find that the receiving country was a jurisdictional fact.

held that the objective existence of the country or otherwise is not a precondition to the exercise of the Tribunal's power, and confirmed that the question about whether the IAA decision was lawfully made is determined by reference to the circumstances as they existed at the time of the decision, not circumstances which did not exist at that time.[103]

29.7.10 Illogicality or irrationality occurring in the context of jurisdictional fact can also amount to jurisdictional error.[104] However, a decision is not illogical or irrational or unreasonable simply because one possible conclusion has been preferred to another and reasonable minds might differ in respect of the conclusions to be drawn from probative evidence.[105]

29.7.11 This can be contrasted with decisions made in the exercise of a discretionary power. Such a decision may be set aside if it is so unreasonable that no reasonable person would have made it.[106] The limits on the exercise of the relevant decision-making power, and the area within which the decision-maker has a free discretion within the bounds of legal reasonableness, are governed by the legislative context of the particular decision.[107] In *Geldenhuys v MIAC,* the Tribunal decided to cancel the applicant's visa after purportedly considering the factors listed in the Departmental PAM3 'General Cancellation Powers' policy guidelines. The Federal Magistrates Court found that in exercising that discretion, there were many matters that a reasonable decision maker would have put into balance against cancellation and on any reasonable view those matters far outweighed the one matter that the Tribunal identified as being positively in favour of cancellation (its concern about whether the applicant had been forthcoming to the Tribunal). As such the Court

[103] *MICMSMA v EGZ17* [2022] FCAFC 12 at [33].
[104] *MIAC v SZMDS* (2010) 240 CLR 611 at [40], [102], [119] and, confirming the approach of Gummow and Hayne JJ in *MIMIA v SGLB* (2004) 207 ALR 12 at [37][38]. See also, *BZAAF v MIAC* [2011] FCA 480 at [14] where the Court in *obiter* comment raised a doubt as to whether the Full Court's finding in *SZNPG v MIAC* [2010] FCAFC 51, that unsound reasoning was not an error of law, could be reconciled with *SZMDS* in relation to illogicality. See *ELN20 v MICMSMA* [2022] FCA 931 at [39] where the Court, having regard to *SZMDS*, said the question to ask is whether it was open for the decision-maker to reason in the way it did. The query is not confined to the outcome of the decision-making process, but includes the actual process of reasoning engaged in, or adopted (at [40]). In ELN20, the Tribunal held that the appellant was not stateless but was a citizen of Vietnam, having regard to Article 15 of the 2008 Nationality Law of Vietnam. Article 15 provided that a child born inside or outside the Vietnamese territory whose parents, *at the time of his/her birth*, are both Vietnamese citizens has Vietnamese citizenship. After the appellant's birth, the appellant's father was taken into a re-education camp and released, and reports indicated that persons released from such camps were given Vietnamese citizenship. The Court held that it was not open to the Tribunal to conclude solely by reference to Article 15 and matters which occurred years after the appellant's birth, that the appellant was a citizen of the Socialist Republic of Vietnam and therefore not stateless, without directing attention to and considering the words 'at the time of his/her birth' in Article 15, and their effect on the analysis in which the Tribunal engaged (at [42]). The error in the Tribunal's reasoning did not merely pertain to a factual finding but was material to the outcome and there was a possibility a different outcome could have been reached if the Tribunal had addressed the full text of Article 15, and therefore it was a jurisdictional error (at [49]).
[105] *MIAC v SZMDS* (2010) 240 CLR 611 at [78], [130]–[131]. In *MZXSA v MIAC* [2010] FCAFC 123, the Federal Court identified the varied approaches taken by different members of the High Court in *SZMDS* in reasoning how illogicality or irrationality may constitute jurisdictional error (at [43]–[44]). It outlined at [43] the essence of Crennan and Bell JJ's reasoning as being that a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material that was before the decision-maker. It further found at [44] that the essence of the approach adopted by Gummow ACJ and Kiefel J was that jurisdictional error may be manifested by the process of reasoning actually adopted by the decision-maker, without more. The Court in *MZXSA* did not endorse either view, however, as illogicality and irrationality had not been established by the appellant in that case.
[106] *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See discussion in *MIAC v SZMDS* (2010) 266 ALR 367.
[107] *MIBP v SZVFW* [2018] HCA 30 at [54].

found the decision made by the Tribunal was so unreasonable that no reasonable decision maker could have made it.[108]

29.7.12 The ground of unreasonableness does not involve a separate consideration of materiality for it to amount to a jurisdictional error.[109] It either assumes from the unreasonableness of the outcome that something must have gone wrong in a fundamental way, or it requires a conclusion that the reasoning as a whole is so flawed that it cannot meet the implied condition of reasonableness that qualifies the valid exercise of the decision-making power.[110]

29.7.13 Unreasonableness is only established where the outcome or the whole of the reasoning falls short of the implied requirement that the decision-making power be exercised in a manner that is reasonable.[111] In *CWRG*, the applicant submitted that there were several flaws in the Tribunal's reasoning and each flaw was legally unreasonable in and of itself which demonstrated that the decision was legally unreasonable, without regard to its significance in the reasoning process as a whole.[112] The Court explained that this was not the correct approach in establishing unreasonableness, and the whole of the reasoning needs to be considered.

29.7.14 The High Court in *MIBP v SZVFW* held, unanimously, that on judicial review of an administrative decision for legal unreasonableness, an appellate court must reach its own conclusion as to whether the decision is legally unreasonable.[113]

29.8 Remedies

29.8.1 There are a range of orders the Court may make providing different remedies for various administrative actions. Constitutional remedies, also referred to as constitutional writs or prerogative writs,[114] are discretionary court orders providing remedies for different kinds of administrative action. The discretion to grant these remedies is exercised according to settled principles. The Court may refuse the remedy where the applicant has a different and equally effective remedy available, where there has been undue delay or where the applicant has forfeited the court's sympathy.[115] In order to grant prerogative relief, the prosecutor must prove to the

[108] *Geldenhuys v MIAC* [2010] FMCA 473 at [58]–[59].
[109] *CWRG v MICMSMA* [2022] FCA 1382 at [15].
[110] *CWRG v MICMSMA* [2022] FCA 1382 at [15].
[111] The Court explained at [38] that one reasoning flaw may make the whole decision unreasonable when considered in the context of the whole decision. However, it is necessary to approach the flaws by asking whether they establish an overall failure to conform to the reasonableness requirement which applies to whole outcome or overall reasoning, not to individual aspects.
[112] *CWRG v MICMSMA* [2022] FCA 1382 at [38].
[113] *MIBP v SZVFW* [2018] HCA 30 at [20]. The High Court found that the Federal Court was required to reach its own conclusion as to whether the Tribunal's decision was unreasonable, rather than merely determining whether the conclusion of the primary judge was open to them without going on to consider whether it was the right conclusion.
[114] They are referred to as 'prerogative' because they were originally available only to the Crown and not to the subject. The remedies enabled the Crown to ensure that public authorities and inferior courts carried out their duties within proper jurisdiction. The remedies became generally available to ordinary litigants by the end of the sixteenth century. For further discussion see Wade, *Administrative Law 7th edition* (Clarendon Press, 1994) p. 614.
[115] These principles were articulated in *SAAP v MIMIA* (2005) 228 CLR 294. In *MZYSU v MIAC* (2012) 132 ALD 341, the Court confirmed the settled principle that 'unclean hands' or bad faith for the purposes of the discretion to refuse relief will characteristically constitute 'significant dishonesty on which an applicant relies to subvert the proper processes of, and secure an advantageous outcome in, the relevant transaction or court proceeding'.

Court that the Tribunal made a jurisdictional error in reaching its decision.[116] A non jurisdictional error would not be a ground for prerogative relief.[117] In the context of the judicial review of the Tribunal's decisions, the three major prerogative writs are mandamus, prohibition and certiorari. Other forms of relief include injunctions, declarations and habeas corpus,[118] however applications for these remedies against the Tribunal or the Minister for Immigration are not as common. Each of the remedies serves a different purpose as set out below.

Mandamus

29.8.2 Mandamus is an order of the court compelling a public official to exercise a power in accordance with the law.[119] Mandamus commands the performance of a positive act; it does not have a preventative or negative effect.[120] Mandamus can only be issued if there has been a failure to exercise jurisdiction.[121] The duties which mandamus enforces must be public, that is, the duty must be sourced from statute.[122] For example, if the Tribunal makes a jurisdictional error, mandamus may be issued requiring the Tribunal to rehear and redetermine the application for review according to law.[123]

Prohibition

29.8.3 Prohibition is an order forbidding an officer or tribunal, which is acting in excess of jurisdiction, from proceeding any further.[124] This form of relief prohibits the impugned decision-maker and those relying on their decision from either doing something illegal which they are about to do, or from continuing on an illegal course of action already commenced.[125] Prohibition will only issue if there is want of jurisdiction or if jurisdiction is exceeded.[126]

29.8.4 Prohibition effectively functions to control a body which has power to make decisions affecting rights.[127] Prohibition will not lie if there is nothing left to prohibit. The remedy is available to prevent the enforcement of a decision made in excess of

[116] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [82] and *Re RRT; Ex parte Aala* (2000) 203 CLR 82. However a decision will not always be a nullity even where a jurisdictional error is established. In *MIBP v Hossain* [2017] FCAFC 82 the Court found that the applicant was not entitled to relief even though a jurisdictional error was established because the decision also contained an independent finding on an alternative criterion that was not affected by the error. Because this meant that the Minister was still required to refuse the visa, the Tribunal's decision was not a nullity. Although the error was, and remained, a jurisdictional error, relief could not be granted because the application for the visa was still required to be refused: (at [28]–[29]).
[117] *Craig v South Australia* (1995) 184 CLR 163.
[118] While habeas corpus is a prerogative writ, injunctions and declarations are private law remedies. Injunctions and declarations are called private law remedies because they were originally only used in private law but later became used in public law.
[119] *Butterworths Australian Legal Dictionary* (Butterworths, 1997).
[120] Aronson, *Judicial Review of Administrative Action* (LBC Information Services, 2000), p. 594.
[121] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, at 465 and confirmed in *Thayananthan v MIMIA* (2003) 132 FCR 222.
[122] *Bagg's case* (1615) 11 Co Rep 93b; *R v Dunsheath; Ex parte Meredith* [1951] 1 KB 127 at 133; and *Gardiner v Victoria* [1999] VSCA 100.
[123] See for example *Applicant WAEE v MIMIA* [2003] FCAFC 184 and *NAAG of 2002 v MIMIA* [2003] FCAFC 135.
[124] *Butterworths Australian Legal Dictionary* (Butterworths, 1997).
[125] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (LawBook Co, 3rd edition, 2004) p. 691.
[126] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 465 and confirmed in *Thayananthan v MIMIA* (2003) 132 FCR 222.

jurisdiction while the decision has a continuing effect on rights and duties and is capable of enforcement.[128] For example, if a court found that a Tribunal decision was made beyond jurisdiction, then prohibition may be issued to forbid the Minister or his delegates from taking any action in reliance upon the decision.[129]

Certiorari

29.8.5 Certiorari can be broken down into two parts. The first part is an order removing the official record of the impugned decision into the superior court issuing the certiorari order and the second part is an order quashing the impugned decision and the record.[130] In essence, a certiorari order is used to 'wipe the slate clean'[131] because it quashes the legal effect or the legal consequences of a decision.

29.8.6 Certiorari does not compel the decision-maker to start again. An application for certiorari is not an appeal but merely an application for review of a decision, and the superior court cannot substitute its own decision for that which is quashed.[132] For example, an order of certiorari may be issued to remove a Tribunal decision into the superior court and quash the decision of the Tribunal.[133]

29.8.7 An application for prerogative relief such as certiorari is made through an application for an order nisi. This is a two step process. Firstly, the applicant makes an application for an order nisi seeking the issue of prerogative relief. The applicant bears the onus of establishing an arguable case entitling him or her to an order nisi.[134] If the applicant does not make an arguable case for the grant of an order nisi, then the application is dismissed.[135] If the applicant makes an arguable case, then the court will grant an order nisi.[136]

29.8.8 An order nisi is a provisional order which will take full effect unless the person affected by it shows cause against it within a certain time, that is, unless he or she appears before the court, and gives some reason why it should not take effect.[137] For example, a court may grant an order nisi directed at the Tribunal and the Minister to show cause why certiorari should not issue to remove the Tribunal's decision to the Court to be quashed, mandamus should not issue directing the Tribunal to rehear and redetermine the review application according to law, and prohibition should not issue prohibiting the Minister or his delegates from acting upon, or giving effect to, the original decision of the Tribunal.

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[127] *Commissioner for Railways v Locke* (1970) 122 CLR 479.
[128] *R v Spicer; ex parte Waterside Workers' Federation of Australia* (1958) 100 CLR 324; *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1966) 66 FCR 511 at 533 and *Thayananthan v MIMIA* (2003) 132 FCR 222 at [20].
[129] See for example *Re MIMA; Ex parte Miah* (2001) 206 CLR 57.
[130] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (LawBook Co, 3rd edition, 2004) p. 691.
[131] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (LawBook Co, 3rd edition, 2004) p. 691.
[132] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (LawBook Co, 3rd edition, 2004) p. 692.
[133] See for example *Applicant WAEE v MIMIA* (2003) 75 ALD 630 and *NAAG of 2002 v MIMIA* [2003] FCAFC 135.
[134] *Re Refugee Review Tribunal; Ex parte HB* (2001) 179 ALR 513.
[135] See for example *Re Refugee Review Tribunal; Ex parte HB* (2001) 179 ALR 513 and *S53 of 2002 v Refugee Review Tribunal* [2003] FCA 1173.
[136] See for example *Re MIMA; Ex parte Miah* (2001) 206 CLR 57 and *Re MIMA; Ex parte S134/2002* (2003) 211 CLR 441.
[137] *Osborn's Concise Law Dictionary 8th Edition*, (Sweet and Maxwell, 1993), *Butterworths Australian Legal Dictionary* (Butterworths, 1997).

29.8.9 If cause is shown then the order nisi is discharged.[138] That is, if the Court determines that the applicant is not entitled to constitutional relief, then the writs do not take effect against the Tribunal and Minister. Where cause is not shown then an order nisi is made absolute.[139] That is, if the Court determines that the applicant is entitled to prerogative relief, then the writs take full effect against the Tribunal and the Minister.

29.9 Review under the Administrative Decisions (Judicial Review) Act 1977

29.9.1 The ADJR Act provides one of the principal avenues of judicial review of Commonwealth administrative decisions. Since the early 1990s, however, there have been limits on the application of the ADJR Act to decisions made under the Migration Act.

29.9.2 Under s 5(1) of the ADJR Act, a person who is aggrieved by a 'decision to which [the ADJR] Act applies' may apply to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) for an order of review in respect of the decision on any one or more of the specified grounds. A decision to which the ADJR Act applies is defined in s 3 to mean a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not):

- under an enactment as defined in s 3(a), (b), (c) or (d) (which includes almost all Commonwealth enactments); or
- by a Commonwealth authority or an officer of the Commonwealth under an enactment defined in s 3(ca) or (cb).[140]

Importantly, 'a decision to which [the ADJR] Act applies' does not include:

- a decision by the Governor-General; or
- a decision included in any of the classes of decisions set out in Schedule 1 to the ADJR Act.

29.9.3 Included amongst those decisions listed in Schedule 1 to which the ADJR Act does not apply are:

- a privative clause decision within the meaning of s 474(2) of the Migration Act; and

[138] See for example *Re MIMA; Ex parte S134/2002* (2003) 211 CLR 441.
[139] See for example *Re MIMA; Ex parte Miah* (2001) 206 CLR 57.
[140] A 'decision' in this context has been defined as generally, but not always, a decision which is final or operative and determinative, at least in a practical sense, of the issue or fact falling for consideration: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 327.

- a purported privative clause decision within the meaning of s 5E of the Migration Act. [141]

29.9.4 However, unlike privative clause decisions and purported privative clause decisions, 'non-privative clause decisions' (defined in s 474 and including decisions under the Migration Act which are administrative decisions that do not relate to substantive decisions) are not excluded from the Court's jurisdiction under the ADJR Act.[142]

29.9.5 For those decisions to which the ADJR Act applies, a person may by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.[143] This entitlement is, however, also subject to some exemptions. In relation to migration matters, these include decisions under the Migration Act, being:

- certain decisions under s 11Q (now repealed);
- decisions in connection with the issue or cancellation of visas;
- decisions whether a person is an *exempt non-citizen* in s 5(1)(b) of the Migration Act; or
- decisions relating to a person who, having entered Australia, as a diplomatic or consular representative of another country, a member of the staff of such a representative or the spouse or a dependent relative of such a representative, was in Australia at the time of the decision.

29.10 Deterrence of unmeritorious cases

29.10.1 The Federal Circuit and Family Court, Federal Court and High Court have the power to give a summary judgment if there are no reasonable prospects of defending or prosecuting the proceeding or part of the proceeding.[144] A proceeding need not be hopeless or bound to fail in order to have no reasonable prospect of success.

29.10.2 With the intention of deterring unmeritorious litigation, the Migration Act specifies that a person must not encourage another person to commence or continue migration litigation in a court if the migration litigation has no reasonable prospect of success and:

- proper consideration has not been given to the prospects of success of the litigation; or

[141] ADJR Act sch 1(da), (db).
[142] s 476(3). Although not all actions taken under these provisions may be properly described as a 'decision' within the meaning of the ADJR Act.
[143] ADJR Act s 13.
[144] *Federal Circuit Court of Australia Act 1999* (Cth) s 17A; FCA Act s 31A; Judiciary Act s 25A.

- a purpose in commencing the migration litigation is unrelated to the objectives which the court process is designed to achieve.[145]

29.10.3 If a person acts in contravention of this provision, that person may be liable to pay the costs incurred or already paid because of the commencement or continuation of the litigation.[146] Furthermore, if that person is a lawyer the court may make an order that the costs incurred by the litigant are not payable to the lawyer or that any costs already paid to the lawyer be repaid.[147]

29.10.4 Lawyers are required to certify in writing that there are reasonable grounds for believing that the litigation has a reasonable prospect of success before filing any documents commencing migration litigation.[148] Any documents not so certified will not be accepted by the courts.[149]

29.10.5 The courts also have discretion to refuse relief where, broadly, it would not be just for the action to succeed.[150] This will most often involve unwarrantable delay on the part of the applicant. Where the delay is significant and unexplained, the court may exercise its discretion to refuse relief. Where clear jurisdictional error is found by the court, but delay is considered as a grounds for dismissing the application, this must be 'weighed against the significance of the injustice done to [the applicant] by the erroneous approach [of the Tribunal]'.[151]

29.11 Dealing with court remittals

29.11.1 A Tribunal decision that a court has held to be invalid is no decision at all but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. There is a divergence of views in the courts as to the extent to which the process upon remittal to the Tribunal is a *de novo* one and in particular the extent to which a reconstituted Tribunal can rely on the procedures of the previous Tribunal without repeating them. See Chapter 6 – Constitution and reconstitution for a more detailed discussion.

[145] s 486E.
[146] s 486F(1)(a).
[147] s 486F(1)(c).
[148] s 486I(1).
[149] s 486I(2).
[150] *Re Refugee Review Tribunal and Anor; Ex parte Aala* (2000) 204 CLR 82, at [51].
[151] *SZGLK v MIMIA* (2006) 94 ALD 86 at [41].