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# 12 MERITS REVIEW OF PROTECTION RELATED DECISIONS

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# 12 MERITS REVIEW OF PROTECTION RELATED DECISIONS<sup>1</sup>

## Introduction

In most cases where an application for a protection visa is refused or a protection visa is cancelled by a delegate of the Minister for Home Affairs, the applicant is entitled to a merits review of that decision. Depending on the basis of the decision and immigration status of the applicant, merits review of protection visa decisions is either undertaken by the Administrative Appeals Tribunal (AAT) in its Migration and Refugee Division (MRD) or less frequently in its General Division, or by the Immigration Assessment Authority (IAA), an independent office within the AAT.<sup>2</sup> A decision made under s 197D(2) of the *Migration Act 1958* (Cth) (the Act) that a ‘protection finding’ would no longer be made in relation to certain unlawful non-citizens<sup>3</sup> is also reviewable by the MRD.

This Chapter sets out the jurisdiction of the AAT and the IAA to review decisions about protection visas, in terms of whether decisions are of a kind that are reviewable. It also sets out the AAT’s jurisdiction to review a decision made under s 197D(2) in relation to protection findings. It also briefly discusses whether a person has standing to apply for review, but does not deal with other requirements for establishing jurisdiction, such as matters relating to forms, fees and time limits to apply to the AAT for review.<sup>4</sup> It also outlines some special provisions governing reviews in the MRD, but it is otherwise beyond the scope of this Guide to discuss merits review procedure in the AAT and IAA.

## The AAT’s jurisdiction

### Which decisions can be reviewed?

The Act gives the AAT the power to review a range of decisions about protection visas, including a decision to refuse to grant, a decision to cancel, or a decision not to revoke a decision to cancel a protection visa.<sup>5</sup>

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<sup>1</sup> Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the 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.

<sup>2</sup> Previously, merits review of protection visa decisions was also conducted by the former Refugee Review Tribunal (RRT). However, from 1 July 2015, by operation of the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act), the RRT became part of the Administrative Appeals Tribunal. The kinds of decisions formerly reviewable by the RRT are now reviewable in the Migration and Refugee Division (MRD) of the AAT.

<sup>3</sup> An ‘unlawful non-citizen’ is a person who is not an Australian citizen, who is in the migration zone and who does not hold a visa that is in effect: ss 13, 14 of the Act.

<sup>4</sup> See s 412(1).

<sup>5</sup> See generally ss 411(1)(c)–(d), 414 and 500(1)(b)–(c), subject to the more specific restrictions described below. The AAT can also review certain pre-1994 decisions finding an applicant not to be a refugee, but these are unlikely to arise in current cases: ss 411(1)(a) and (b).

The AAT can review a decision to refuse to grant a protection visa except where:

- it is a 'Part 7-reviewable decision' (see discussion below under 'Which Division are they reviewed in?') and the person was not in Australia's migration zone at the time of the decision;<sup>6</sup>
- it is a 'fast track decision' (these are normally reviewed by the IAA);<sup>7</sup>
- it was made by the Minister personally under s 501 of the Act;<sup>8</sup>
- it relied on s 36(1B) of the Act (concerning a national security risk);<sup>9</sup> or
- the Minister has issued a certificate preventing review.<sup>10</sup>

The AAT can review a decision to cancel a protection visa except where:

- it is a 'Part 7-reviewable decision' and the person was not in Australia's migration zone at the time of the decision;<sup>11</sup>
- it was made by the Minister personally;<sup>12</sup>
- it was based on a national security risk;<sup>13</sup>
- the Minister has issued a certificate preventing review;<sup>14</sup> or
- the decision is a mandatory cancellation under s 501(3A) of the Act.<sup>15</sup>

The AAT can review a decision not to revoke the mandatory cancellation of a protection visa except where it was made by the Minister personally.<sup>16</sup>

The AAT can also review a decision made under s 197D(2) of the Act that a 'protection finding' would no longer be made in relation to certain unlawful non-citizens.<sup>17</sup>

<sup>6</sup> Section 411(2)(a).

<sup>7</sup> Section 411(2). See the discussion below about the IAA's jurisdiction for more information about 'fast track decisions'. Decisions made on certain character and security grounds (relying on ss 5H(2), 36(1C) or 36(2C)(a) or (b)) are not 'fast track decisions' as defined in s 5(1) and are reviewable by the AAT: s 500(1)(c).

<sup>8</sup> Section 500(1)(b) provides that only decisions by delegates of the Minister under s 501 are reviewable.

<sup>9</sup> Section 500(4A)(a).

<sup>10</sup> Section 411(2)(b) prevents the review of a decision subject to a 'conclusive certificate' issued under s 411(3). Section 500(1)(c) similarly prevents the review of a decision subject to an 'excluded person' certificate under s 502 (for decisions relying on ss 5H(2), 36(1C) or 36(2C)(a) or (b)). Both kinds of certificates can only be issued in the national interest.

<sup>11</sup> Section 411(2)(a).

<sup>12</sup> Section 411(2)(aa). Section 500(1)(b) also provides that only decisions by delegates of the Minister under s 501 are reviewable.

<sup>13</sup> As assessed by the Australian Security Intelligence Organisation: s 500(4A)(b).

<sup>14</sup> Section 411(2)(b).

<sup>15</sup> Section 500(4A)(c). Section 501(3A) provides that the Minister must cancel a visa if the person doesn't meet character requirements on the basis of a substantial criminal record or sexual offences involving children. A person whose visa is cancelled under this subsection can apply to have the cancellation decision revoked under s 501CA.

<sup>16</sup> Section 500(1)(ba) provides that only decisions by delegates of the Minister under s 501CA(4) are reviewable.

<sup>17</sup> Section 411(1)(e), inserted by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (No 35 of 2021) on 25 May 2021. The framework for decisions of the Minister involving a 'protection finding' includes ss 36A, 197C and 197D of the Act.

## Who can apply for review?

For a decision to refuse or cancel a protection visa, or a decision made under s 197D(2), only the non-citizen who is the subject of the primary decision can apply for review, and they must be physically present in Australia's migration zone when they apply.<sup>18</sup>

For a decision not to revoke the mandatory cancellation of a protection visa, an application for review may be made by or on behalf of any person whose interests are affected by the decision.<sup>19</sup>

## Which Division are they reviewed in?

Most protection visa related decisions the AAT reviews are 'Part 7-reviewable decisions' as defined in s 411 of the Act. These decisions must be reviewed in the MRD.<sup>20</sup> Decisions made under s 197D(2) of the Act about a 'protection finding' are also Part 7-reviewable decisions and must be reviewed in the MRD.<sup>21</sup>

The remaining protection visa related decisions the AAT can review could loosely be described as decisions made on security or character grounds. These decisions are not reviewable under Part 7 of the Act and are instead reviewed in the AAT's General Division.<sup>22</sup> Specifically, they are decisions to refuse or cancel a protection visa under s 501 or relying on ss 5H(2), 36(1C) or 36(2C), and decisions made under s 501CA(4) not to revoke a decision to cancel a protection visa under s 501(3A).<sup>23</sup>

## Limitations on the MRD's jurisdiction

In reviewing a decision to refuse or to cancel a protection visa that did not rely on ss 5H(2), 36(1C) or 36(2C), the MRD must also not make any determination on those provisions. The AAT's power to remit the visa application to the primary decision-maker for reconsideration is limited by the directions permitted by the *Migration Regulations 1994* (Cth) (the Regulations), and those regulations effectively prevent the MRD from making directions in

<sup>18</sup> Sections 412(2)–(3) of the Act for 'Part 7-reviewable decisions'. These limitations also apply to visa refusal and cancellation decisions referred to in ss 500(1)(b) and (c) (which would otherwise be governed by the standing provisions in s 27 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act): s 500(3)).

<sup>19</sup> AAT Act s 27.

<sup>20</sup> Section 409.

<sup>21</sup> As a decision made under s 197D(2) that a protection finding would no longer be made in respect of a person does not involve a decision to refuse to grant or to cancel a visa, the exceptions in s 411(1)(c) and (d) also do not apply.

<sup>22</sup> These decisions are not Part 7-reviewable decisions as defined in ss 411(1)(c) and (d) of the Act and are excluded from Part 7 review by ss 500(4)(b) and (c). Section 500(1)(c) expressly provides for review of decisions to *refuse* a protection visa relying on s 36(1C) or (2C), but there is no similar provision for reviews of decisions to *cancel* a protection visa relying on these provisions and it is unclear whether such decisions are reviewable by the AAT, but this may not matter as there does not appear to be any power in the Act to cancel a protection visa relying on these provisions. The AAT Act provides that the Tribunal's powers in a proceeding are to be exercised in the Division prescribed for such a proceeding or in the Division that the President of the AAT directs: s 17B(1)(a) of the AAT Act. No Divisions are prescribed for these proceedings but the AAT President's Direction *Allocation of Business to Divisions of the AAT* (with effect from 12 October 2017) specifies any application in relation to a Part 5-reviewable decision or a Part 7-reviewable decision within the meaning of the Act is to be allocated to the Migration and Refugee Division.

<sup>23</sup> See ss 411(1), 500(1) and 500(4). Sections 5H(2), 36(1C) and 36(2C) apply to applicants who have committed certain serious crimes or who are a danger to Australia's security and are discussed in [Chapter 7 – Exclusion and cessation](#). For visa applications made before 16 December 2014, the legislation referred to arts 1F, 32, 33(2) of the Refugees Convention but for applications made on or after that date, the references are to the codified statutory equivalents: see *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014).

relation to the kinds of matters described in ss 5H(2), 36(2C) or 36(1C).<sup>24</sup> While this limits only the MRD's powers to make directions, the reasoning of the Full Federal Court in *Daher v MIEA* makes clear that the AAT cannot adjudicate upon those provisions in its MRD.<sup>25</sup> Therefore, if an applicant otherwise meets the refugee definition or complementary protection criteria, but the material before the AAT raises an issue going to ss 5H(2), 36(1C) or 36(2C), the determination of those issues falls outside the scope of the MRD's jurisdiction.

However, the AAT could still affirm the decision on the basis that the applicant does not satisfy one of the other criteria for the visa, or remit the application with a direction that the applicant satisfies other aspects of the refugee or complementary protection criteria apart from that issue.<sup>26</sup> If the visa is later refused again at the primary level on the basis of that issue, the applicant may be able to have that later decision reviewed in the General Division.<sup>27</sup>

These same limitations do not apply to the review of a decision made under s 197D(2), however, as consideration of a 'protection finding' in s 197C may require consideration of ss 5H(2), 36(1C) and/or 36(2C).

## The IAA's jurisdiction – 'fast-track' decisions

Decisions to refuse protection visas processed under 'fast track' arrangements are subject to review by the IAA. The IAA is an office established within the MRD of the AAT.<sup>28</sup> It has jurisdiction to review a 'fast track reviewable decision', which is essentially a decision to refuse a protection visa to a fast track review applicant, other than a decision made on the

<sup>24</sup> Section 415(2)(c) and regs 4.33(3)(b), (4)(b) and (4)(c) of the Regulations. For visa applications before 16 December 2014, the references in reg 4.33(3)(b) were to arts 1F, 32 or 33(2) of the Refugees Convention: see reg 4.33(3)(b) as in force prior to the *Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015* (Cth) (SLI 2015, No 48). The longer descriptions in reg 4.33(4), which concern permissible directions relating to the complementary protection criterion in s 36(2)(aa), appear directed to the provisions in s 36(2C) that prevent an applicant from meeting s 36(2)(aa).

<sup>25</sup> *Daher v MIEA* (1997) 77 FCR 107; regs 4.33(3)(b), 4.33(4)(b)–(c). Although the Court in *Daher* was considering only art 1F, the Federal Court has since effectively confirmed that the principles from *Daher* continue to operate in respect of the current legislative provisions which provide a bifurcated review structure within the Tribunal: *Hamidy v MIBP* [2019] FCA 221 at [31]–[33], [52]–[53]; *GWRV v MICMSMA* [2022] FCA 602 at [20]–[24], upheld on appeal in *GWRV v MICMA* [2023] FCAFC 39 at [47] (application for special leave to appeal dismissed: *GWRV v MICMA* [2023] HCASL 117); and *SLGS v MICMSMA* [2022] FCA 1055 at [81]–[83] (undisturbed on appeal in *SLGS v MICMSMA* [2023] FCAFC 104).

<sup>26</sup> See the directions available under regs 4.33(3)(a), (3)(aa), (4)(a) and (5).

<sup>27</sup> This was the case in *GWRV v MICMSMA* [2022] FCA 602. The Court's view at [23]–[26] was that where any part of the primary decision to refuse the visa relied on there being serious reasons for considering that the applicant had committed a serious non-political crime before entering Australia (which is an exclusion found in ss 5H(2)(b) and 36(2C)(a)(ii)), the applicant must seek review in the General Division, even if the refusal decision also relied on findings that the applicant did not meet the refugee or complementary protection criteria. The General Division's jurisdiction would be confined to reviewing the refusal decision to the extent that reliance was placed on the serious crime finding. In dismissing an appeal, the Full Federal Court endorsed the primary judge's findings on these points: *GWRV v MICMA* [2023] FCAFC 39 at [48], [55]–[57] (application for special leave to appeal dismissed: *GWRV v MICMA* [2023] HCASL 117).

<sup>28</sup> See generally pt 7AA of the Act which establishes the IAA. Part 7AA was inserted by pt 1 of sch 4 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014), with effect from 18 April 2015: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543). It was then amended by the *Amalgamation Act*, continuing the existence of the IAA within the MRD of the AAT: sch 2, pt 3, item 187.

basis of ss 5H(2), 36(1B), 36(1C), 36(2C) or 501.<sup>29</sup> A fast track review applicant means a fast track applicant who is not 'excluded'.<sup>30</sup>

A 'fast track applicant' is an unauthorised maritime arrival who entered Australia on or after 13 August 2012 and before 1 January 2014, who has not been taken to a regional processing country, in respect of whom the Minister has waived the s 46A bar, and who has made a valid application for a protection visa.<sup>31</sup> The Act also allows for the specification by legislative instrument of other persons or classes of persons as fast track applicants.<sup>32</sup> The IAA cannot review a decision if the Minister has issued a conclusive certificate.<sup>33</sup>

A fast track applicant who is refused a protection visa does not need to apply to the IAA for a review, instead the decision is referred to the IAA.<sup>34</sup>

Decisions in respect of fast track applicants are not reviewable in the MRD of the AAT.<sup>35</sup> However, a decision that is made on the basis of ss 5H(2), 36(1C), 36(2C) or 501 of the Migration Act is reviewable in the AAT's General Division, even if the applicant is an excluded fast track applicant.<sup>36</sup>

The IAA conducts a limited form of merits review. Subject to limited exceptions, the IAA must determine the review only on the material that was available to the primary decision-maker.<sup>37</sup>

## Special provisions for reviews in the Migration and Refugee Division

There are some special statutory provisions governing the conduct of reviews in the MRD which concern the effect of earlier reviews, an applicant's obligations to make their case, and dealing with new claims and evidence. The Tribunal is also required to comply with certain directions made by the Minister. These requirements are discussed below.

<sup>29</sup> Section 473CC requires the IAA to review a 'fast track reviewable decision' referred to it. Paragraph (a) of the definition of 'fast track reviewable decision' in s 473BB refers to a 'fast track decision' in relation to a 'fast track review applicant'. A 'fast track decision' is defined as a decision to refuse a visa to a 'fast track applicant' except decisions made on the basis of ss 5H(2), 36(1B), 36(1C), 36(2C) or 501: s 5(1).

<sup>30</sup> 'Fast track review applicant' is defined in s 5(1). An 'excluded fast track applicant', defined in s 5(1), broadly includes a person who was subject to the statutory bar in s 91C, or has previously made an unsuccessful claim for refugee status in Australia or another country, or has presented a bogus document without reasonable explanation, or has made a claim that the Minister considers manifestly unfounded. It also included a person subject to the statutory bar in s 91N, prior to Subdivision AK of Division 3 of Part 2 of the Act being repealed on 24 June 2023 by Schedule 2 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) (No 26 of 2023). Review may be available for an excluded fast track applicant in accordance with a determination made by the Minister in a legislative instrument: s 473BC and paragraph (b) of the definition of 'fast track reviewable decision' in s 473BB.

<sup>31</sup> Section 5(1). The term 'unauthorised maritime arrival' is explained in [Chapter 1 – Protection visas](#).

<sup>32</sup> Paragraph (b) of the definition of 'fast track applicant' in s 5(1) and s 5(1AA)(b). At the time of writing, five such instruments were in force: IMMI 16/010 (F2016L00377) from 24 March 2016; IMMI 16/008 (F2016L00456) from 1 April 2016; IMMI 16/049 (F2016L00679) from 7 May 2016; IMMI 17/015 (F2017L01042) from 17 August 2017; and IMMI 19/007 (F2019L00506) from 2 April 2019. IMMI 18/019 (F2018L00672) was in effect from 31 May 2018 until it was disallowed by the Senate on 13 November 2018 at 18:33: Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 November 2018, 71-76 on motion by Senator McKim.

<sup>33</sup> If such a certificate is issued under 473BD, the decision is not a 'fast track reviewable decision' as defined in s 473BB.

<sup>34</sup> Section 473CA.

<sup>35</sup> Section 411(2)(c).

<sup>36</sup> Section 500(1) and definition of 'fast track decision' in s 5(1).

<sup>37</sup> See ss 473DC–473DF, 473DB.

## Effect of earlier review

Where the AAT (or former RRT) has conducted a review of a Part 7-reviewable decision and an applicant makes a further application for review of a Part 7-reviewable decision, s 416 provides that the Tribunal need not consider any information considered in the earlier application, and may have regard to, and take to be correct, a decision made about or because of that information.<sup>38</sup> However, this is subject to the Tribunal's obligation to review an application before it, such that it must not regard itself as constrained by the decision of the earlier Tribunal or prevented from considering all evidence and submissions before it.<sup>39</sup> A subsequent Tribunal considering a previous Tribunal's decision is also entitled to approach its discretion under s 416 by questioning whether the previous Tribunal made any errors which may suggest that any material findings it made were wrong, provided that the subsequent Tribunal does not disregard new information before it or fail to approach the review with an open mind.<sup>40</sup>

## Obligations on an applicant in making their case

The Migration Act places certain obligations on protection visa applicants in presenting their case. Section 5AAA clarifies that it is the responsibility of an applicant to specify all particulars of his or her claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Minister (or the Tribunal on review) does not have any responsibility or obligation to specify or assist in specifying any particulars of the claim, or to establish or assist in establishing the claim.<sup>41</sup> This is consistent with the well-settled proposition that it is for the applicant to make his or her own case.<sup>42</sup>

## Dealing with new claims and evidence

Section 423A, which applies to all Part 7-reviewable decisions, requires the Tribunal to draw an unfavourable inference as to the credibility of an applicant's claim or evidence where an applicant raises a claim or presents evidence that was not put forward before the primary decision was made, if the Tribunal is satisfied that the applicant does not have a reasonable

<sup>38</sup> Section 416, which also applies to the Tribunal's consideration of cases where the applicant had made an earlier application to the former RRT or to the General Division of the AAT. This does not apply to a decision that has been quashed by the Courts: *MZZZW v MIBP* (2015) 234 FCR 154 at [84]. The Federal Court in *SZSLM v MIBP* (2014) 240 FCR 267, endorsed the Court's construction of s 416 at first instance in *SZSLM v MIBP* [2014] FCCA 1043, confirming that s 416 is entirely permissive and does not require the Tribunal to take a decision or process of reasoning of a previous Tribunal as correct. See also *SZNOL v MIAC* [2012] FCA 917, *Nejad v MIMA* (1997) 79 FCR 153 and *Sun v MIEA* (1997) 81 FCR 71. Although the form of s 416 considered by the Court was repealed and substituted by the Amalgamation Act, its effect remains the same.

<sup>39</sup> *SZKOX v MIBP* [2015] FCCA 789 at [19], [21] where the Court found that it was reasonably open to the Tribunal to accept as correct an earlier Tribunal's findings on certain claims in circumstances where it showed it had an open mind to the question by giving the applicant notice that it regarded the first Tribunal's findings as evidence and offering the applicant an opportunity to make submissions about that, rather than simply adopting the first Tribunal's findings without considering the claims before it. The judgment was upheld on appeal: *SZKOX v MIBP* [2015] FCA 990. See also *AOM15 v MIBP* [2015] FCCA 2064 (upheld on appeal in *AOM15 v MIBP* [2015] FCA 1285; *SZVEY v MIBP* [2015] FCCA 2239).

<sup>40</sup> *WZATX v MICMSMA* [2020] FCA 1262 at [77]. See also *SZNOL v MIAC* [2012] FCA 917 at [45].

<sup>41</sup> Section 5AAA of the Act, inserted by item 1 of sch 1 to the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) with effect from 14 April 2015.

<sup>42</sup> *Prasad v MIEA* (1985) 6 FCR 155 at 169–70; *SZBEL v MIMIA* (2006) 228 CLR 152; at [40]; *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60 at [57] and [1]; *WAKK v MIMIA* [2005] FCAFC 225 at [73]; *MIMA v Lay Lat* (2006) 151

explanation as to why the claim was not raised or evidence presented before the primary decision.<sup>43</sup> This effectively requires applicants to present all claims and evidence to the primary decision-maker unless they have a reasonable explanation for not doing so.

Section 423A does not impose on the Tribunal a method by which it is to obtain an applicant's explanation for a claim or evidence that falls within the scope of the provision, nor does it prescribe any preconditions to its operation.<sup>44</sup> The Federal Court has also commented in *obiter* that s 423A has a 'limited compass', and that it does not limit or circumscribe credibility findings which may be made more generally about an applicant's claim.<sup>45</sup> Nonetheless, in order to reach the requisite level of satisfaction required by s 423A, the Tribunal must follow an active intellectual process when considering an applicant's new claim (or evidence) and the explanation provided as to the delay.<sup>46</sup> Further, the Tribunal should take care to ensure that it does not use s 423A to draw adverse inferences against the credibility of other claims or evidence that do not fall within the scope of the provision.<sup>47</sup>

## Ministerial Directions

Section 499(1) of the Act allows the Minister to give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or exercise of those powers. 'Ministerial Direction No 84 – Consideration of Protection visa applications' requires decision-makers, including the Tribunal, to take account of the Department of Home Affairs' 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' to the extent that they are relevant to the decision under consideration.<sup>48</sup> Those Guidelines contain the Department's interpretation of the Act, and set out examples of circumstances which may or may not fall within the protection visa criteria in ss 36(2)(a) and (aa).<sup>49</sup> The Direction also requires decision-makers to take account of certain country information assessments prepared by the Department of Foreign Affairs and Trade, where relevant.

FCR 214 at [76]; and *Abebe v Commonwealth* (1999) 197 CLR 510 at [187].

<sup>43</sup> Section 423A of the Act was inserted by item 14 of sch 1 to the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) and, by operation of item 15(4) to that Schedule, applies to protection visa applications made on or after 14 April 2015. A drafting oversight, by which s 423A referred to 'RRT-reviewable' decisions rather than 'Part 7-reviewable' decisions, was corrected from 25 May 2021 by item 3E of sch 1 to the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).

<sup>44</sup> *EQU19 v MICMSMA* [2022] FedCFamC2G 609 at [100]; similar comments were made in *obiter* by the Federal Court on appeal in *EQU19 v MICMA* [2023] FCA 1182 at [51]. In this case, even though the Tribunal's statement of reasons did not expressly refer to s 423A, the Court at first instance inferred that the Tribunal considered the applicant's reason for not having earlier raised a claim regarding his political opinion, found that the explanation was not reasonable and that this undermined the credibility of the claim. The Court drew this inference as it was 'tolerably clear' from two paragraphs of the decision record that the Tribunal considered the applicant's reason for not having raised the claim prior, that an implicit finding was made that the explanation was not reasonable, and that some of the wording used by the Tribunal reflected the language of the statute: at [99]–[100]. This judgment was upheld on appeal for similar reasons in *EQU19 v MICMA* [2023] FCA 1182 at [52]–[67].

<sup>45</sup> *EQU19 v MICMA* [2023] FCA 1182 at [51].

<sup>46</sup> *ASJ22 v MICMA* [2023] FedCFamC2G 476 at [61]–[64]. See also *DWP17 v MIBP* [2019] FCA 160 at [20]–[22].

<sup>47</sup> See for example *AMM21 v MICMA (No 2)* [2022] FedCFamC2G 496 at [29]–[30].

<sup>48</sup> Ministerial Direction No 84 was made under s 499 on 24 June 2019 and has effect from 25 June 2019. It replaced Ministerial Direction No 56 (dated 21 June 2013) to reflect changes to the citation of guidelines, but did not make any substantive changes.

<sup>49</sup> Department of Home Affairs, 'Policy: Refugee and humanitarian – Refugee Law Guidelines', re-issued 27 November 2022, and 'Policy: Refugee and humanitarian – Complementary Protection Guidelines', re-issued 29 February 2020.



The Direction states that it is desirable for first instance and review decision-makers to take consistent approaches to the decision-making task where there is no rational basis for inconsistencies. It goes on to say that, accordingly, it is desirable that subject to the Migration Act and Regulations and other applicable laws, decision-makers take as a starting point a common set of guidelines and country information.

Where relevant to the decision under consideration, the Tribunal must ‘take account’ of the Guidelines. The Full Federal Court has commented that it is highly desirable, if not essential, that a decision-maker’s reasons clearly expose consideration of Ministerial directions to demonstrate that the Guidelines have been taken into account. Merely adhering to the statutory scheme does not, of itself, establish that there has been compliance with the Direction, which ensures an additional safeguard to those claiming protection.<sup>50</sup>

However, as the Minister cannot make a direction under s 499 that is inconsistent with the Act or the Regulations, the Direction does not require the Tribunal to take account of any aspects of the Guidelines which are inconsistent with the Act and its interpretation by the Australian courts.<sup>51</sup>

It is for the Tribunal to determine whether the Guidelines or country information are relevant to the decision, and if a decision does not expressly refer to the Guidelines or country information, a court might infer that the Tribunal did not consider them to be relevant.<sup>52</sup> However, a court won’t always draw such an inference (depending for example on the manner in which the reasons are drawn, the context and whether there is material that detracts from or displaces the inference), and in some circumstances a failure to expressly engage with the Guidelines or country information may lead to error.<sup>53</sup> A court might also infer from language used in the decision that the Tribunal has in fact had regard to the Guidelines.<sup>54</sup>

<sup>50</sup> *BQL15 v MIBP* [2018] FCAFC 104 at [19] (application for special leave to appeal dismissed: *BQL15 v MIBP* [2018] HCASL 363). These comments suggest a more thorough consideration is required than that suggested by the Court at first instance: *BQL15 v MIBP* [2017] FCCA 1976. In that judgment, the Court held that the Complementary Protection Guidelines contain opinions about the law relating to complementary protection, and the duty to take them into account is not a duty to treat them as a fundamental element in the making of a decision, but rather a duty for the decision-maker to acquaint himself or herself with them for the purpose of informing himself or herself of the law to apply in the context of considering complementary protection claims: at [23]–[31]. Judge Manousaridis also made *obiter* comments that jurisdictional error would rarely arise for failure to take into account the Guidelines (at [34]), however in light of the Full Federal Court’s comments, this view should be treated with caution.

<sup>51</sup> Section 499(2); *SZTCV v MIBP* [2015] FCCA 1677 at [70] (upheld on appeal: *SZTCV v MIBP* [2015] FCA 1309) and *SZTCU v MIBP* [2014] FCCA 1600 at [40].

<sup>52</sup> *SZTMD v MIBP* [2015] FCA 150 at [20]. In that case, the Tribunal’s reasons were silent as to its consideration of the Guidelines or country information, and the Court held it was open to infer that it did not think that information was material to its task, following *MIMA v Yusuf* (2001) 206 CLR 323 [15]–[18]. In *SZUWX v MIBP* [2015] FCCA 2151 at [22]–[23], the Court found that it was not necessarily apparent that the Tribunal erred by failing to discuss the detail of the Guidelines in circumstances where the Tribunal was clearly aware of the Guidelines, having referred to them in the introductory portion of its reasons, and it was unclear what specific guidance the Guidelines might have provided (upheld on appeal, but this aspect of the reasoning was not expressly considered: *SZUWX v MIBP* [2015] FCA 1389. In *SZTPD v MIBP* [2015] FCCA 3109 at [52], the Court found that the Tribunal was not required to have regard to particular extracts from the Guidelines because those extracts were not relevant to the claims made.

<sup>53</sup> *SZTMD v MIBP* [2015] FCA 150 at [19]. See *SZUQZ v MIBP* [2015] FCCA 1552 and *ARS15 v MIBP* [2015] FCCA 2135 as examples of judgments where the Tribunal has been found to have erred by failing to consider the relevance of the Guidelines. See also *DQD16 v MIBP* [2021] FCA 1586 where the Federal Court found no basis to infer that the Tribunal considered the most recent DFAT report on Nepal, and that as the content of the report had credible and significant information on many of the issues raised by the appellants relevant to s 36(4) of the Act, the Tribunal erred by failing to consider it: at [70], [73]–[78].

<sup>54</sup> See *SZTCU v MIBP* [2014] FCCA 1600 at [42] and *BQL15 v MIBP* [2018] FCAFC 104 at [16]–[17] (application for special leave to appeal dismissed: *BQL15 v MIBP* [2018] HCASL 363). See also *AJW15 v MIBP* [2015] FCCA 2579 where the Court found that the Tribunal had considered the Guidelines by its reference to former Direction No 56 (now replaced by

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Direction No 84) and findings on matters discussed in the Guidelines: at [3]–[5]. On appeal, the Federal Court held that the Tribunal’s statement that it was required to take into account the Guidelines should in itself be sufficient to conclude that the Tribunal had done so: *AJW15 v MIBP* [2016] FCA 197 at [46].