Migration and Refugee Division Commentary

Other (MRD)

Current as at 19 September 2019

Absorbed Person Visas

CONTENTS

Overview

Section 34 of the *Migration Act 1958* (the Act) provides criteria by which a person is deemed to have been granted a permanent visa known as an absorbed person visa.[1] If the requirements in s.34(2) are met, the visa is taken to have been granted on 1 September 1994. The visa has a 'stay' component only and does not allow for travel, including re-entry, into Australia.[2]

The visa is granted by operation of law. Consequently there is no 'decision' in respect of an absorbed person visa and therefore no reviewable decision on which a person can apply for review to the Tribunal.[3] The issue of whether a person was deemed to have been granted an absorbed person visa typically arises for the Tribunal in relation to review of decisions to refuse to grant Return (Residence) (Class BB) visas (Subclasses 155 and 157) a criterion of which requires the visa applicant to be an Australian permanent resident or former Australian permanent resident.[4] In this context the applicant would ordinarily be seeking to establish that they hold an absorbed person visa.

The other context in which absorbed person visas are considered is in relation to decisions to cancel an absorbed person visa under s.501 of the Act. These decisions are not reviewable under Part 5 or Part 7, but are only reviewable in the General Division of the Tribunal.

The question of whether a person is deemed to have been granted an absorbed person visa within s.34 will often involve consideration of the person's migration history and their status in Australia under the Act at certain points in time. The legislative changes affecting the status of people under the Act have been the subject of some judicial consideration. A brief outline of the legislative changes relevant to this consideration is set out below. The cases which have considered the effect of the legislative changes are also discussed below.

Visa application requirements

There is no provision for a person to 'apply' for an absorbed person visa. Rather, a determination is made as to whether a person is deemed to have been granted an absorbed person visa on 1 September 1994 in circumstances where it is necessary to determine whether a person is (or was) a permanent resident.

[1] The current version of s.34 was inserted into the Act by s.8 of the *Migration Legislation Amendment Act 1994* (No. 60 of 1994) as s.26AB. It was renumbered and became s.34 pursuant to s.83 of the *Migration Legislation Amendment Act 1994* (No. 60 of 1994).
[2] s.34(1).
[3] See *Gunawan v MIAC* [2007] FMCA 805, considering the Court's jurisdiction.
[4] r.1.03 of the Migration Regulations 1994 (the Regulations) defines Australian permanent resident as 'a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.'

Visa Criteria

For a person to be deemed to have been granted an absorbed person visa on 1 September 1994, they must be a non-citizen currently in the migration zone who:

- on 2 April 1984, was in Australia;[5] and
- before that date, had ceased to be an immigrant;[6] and
- on or after that date has not left Australia;[7] and
- immediately before 1 September 1994, was not a person to whom s.20 of the Act as then in force then applied.[8]

A determination of whether a person meets the requirements under s.34 is a question of fact.

Determining whether an immigrant can be said to have been absorbed into the community and so have 'ceased to be an immigrant' prior to 2 April 1984 requires consideration of the applicant's status under the Act at that time, and consideration of any evidence that the immigrant had made the community his or her own, and that the community had shown a willingness to accept him or her.

The question of absorption is only relevant to the person's circumstances before 2 April 1984, as after that date, the concept of absorption as it applied to immigrants became irrelevant to the operation of the Act (i.e. it no longer referred to 'immigrants', see Legislative Background below). The Courts have identified a number of factors that should be taken into account in determining whether a person has been absorbed into the Australian community. These include:

- the time that has elapsed since the person's entry into Australia;
- the existence and timing of the formation of an intention to settle permanently in Australia;
- the number and duration of absences from Australia;
- family or other close ties with Australia;
- the presence of family members in Australia;
- employment history;
- economic ties, including property ownership;
- contribution to, and participation in, community activities;
- any criminal record.[9]

[5] s.34(2)(a).
[6] s.34(2)(b).
[7] s.34(2)(c), which provides that the term 'left Australia' has the meaning it had in the Act prior to 1 September 1994.
[8] s.34(2)(d). Section 20 of the Act as it was in force before 1 September 1994 dealt with circumstances where a non-citizen's entry was obtained by evasion or false or misleading statements.
[9] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [46] citing *Potter v Minahan* (1908) 7 CLR 277. In *Johnson*, French J made clear that this list was not exhaustive: at [46]. See also *Toia v MIAC* (2009) 177 FCR 125 and *Moore v MIAC* (2007) 161 FCR 236 at [53] and the cases referred to therein on the concept of absorption.

In making this judgment, it is permissible to consider a person's or family's history after 2 April 1984 to the extent that it may inform an assessment of their pre-existing degree of commitment to Australia.[10] The following principles may also be extracted from the cases:

- even if a person's parents retained a foreign cultural heritage, this would not be inconsistent with absorption into a multicultural Australian society;[11]
- family circumstances which may show a total disregard for acceptance of Australian standards and laws are only part of the 'evaluative metaphor' which is required to be carried out, and don't of themselves preclude a finding of absorption.[12]

A number of cases have recognised a broad principle that absorption may be precluded by community non-acceptance, which can be effected by statute.[13] On this basis, regardless of the person's circumstances in relation to the above factors, a person is precluded from being absorbed into the community if, as at 2 April 1984:

- the person held a temporary entry permit;[14] or
- the person was a prohibited immigrant.[15]

'Immigrant' – Legislative Background

To properly apply the concept in s.34(2)(b) of 'ceasing to be an immigrant' it is necessary to have regard to the legislative history of the Act and the concept of 'immigrant'. The Act has been subject to two periods of major legislative reform, the first of which occurred in 1984, the second in 1994. Prior to 2 April 1984, the Act made a distinction between 'immigrants'[16] and 'prohibited immigrants'. All immigrants entering Australia required an 'entry permit'[17] unless exempted.[18] Upon the expiry or cancellation of a temporary entry permit an 'immigrant' became a 'prohibited immigrant', unless another entry permit was issued.[19] The Minister had absolute discretion to cancel a temporary entry permit at any time.[20] This was

[10] *Toia v MIAC* (2009) 177 FCR 125, per Stone and Jacobson JJ (Moore agreeing), at [34]; *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [60].
[11] *Toia v MIAC* (2009) 177 FCR 125, per Stone and Jacobson JJ (Moore agreeing), at [68]; *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [47].
[12] *Toia v MIAC* (2009) 177 FCR 125, per Stone and Jacobson JJ (Moore agreeing), at [69]-[71]. In *Johnson v MIMIA (No 3)* (2004) 136 FCR 494, French J stated at [45]: 'The word "absorption" is an evaluative metaphor which invites consideration of a variety of factors relevant to its application. It is important to bear in mind also that it is a metaphor used in aid of the resolution of a question of constitutional fact, namely whether the person to whom it is applied has ceased to be an immigrant. The metaphor must not obscure the primary question.'
[13] See *Johnson v MIMIA (No 3)* (2004) 136 FCR 494; *Yong v MIEA* (1996) 67 FCR 566; *Tjandra v MIEA* (1996) 67 FCR 577; *Rooney v MIEA* (1996) 67 FCR 590; *Chee v MIMIA* (1997) 46 ALD 542; and *Sharma v MIMIA* (1997) 78 FCR 586.
[14] See *R v Forbes; Ex Parte Kwok Kwan Lee* (1971) 124 CLR 168 per Barwick CJ, at 172-173. An immigrant who held a valid temporary entry permit which authorised entry or further stay for a specified period could not become a member of the Australian community during that period. The authority to stay rested with the person being a holder of a temporary entry permit. The definition of 'temporary entry permit' in r.1.03 meant 'an entry permit whose effect was subject to a limitation as to time'. That definition was removed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No. 30), Schedule 1, Part 1, item [1] with effect from 22 March 2014.
[15] See discussion under *"Immigrant"* – Legislative Background.
[16] s.5(1) of the Act as in force immediately before 2 April 1984 defined an immigrant as 'a person intending to enter, or who had entered, Australia for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, Australia for the purpose of staying permanently.'
[17] The Act as in force at that time provided for three types of entry permits: an entry permit for a temporary stay (s.6(6)), an entry permit to enter or remain, or both (i.e. enter and remain) (s.6(3)).
[18] Exemptions were provided under s.8 of the Act as in force at that time.
[19] s.7(3).

subject to s.7(4) which provided that a person ceased to be a 'prohibited immigrant' at the expiration of a period of 5 years from the time their temporary entry permit was cancelled or expired, unless at the expiration of that period, a deportation order was in force.[21] In effect, the temporary entry scheme prior to 1984, meant that only 'immigrants' needed to hold an entry permit to enter and remain in Australia. The only way an 'immigrant' could have 'ceased to be an immigrant' was to become a member of the Australian community by way of being absorbed.[22]

The *Migration Amendment Act 1983* (1983 Amendment Act), which came into effect on 2 April 1984, shifted the Constitutional foundation of the *Migration Act* from s.51(xxvii) (immigration and emigration) to s.51(xix) (naturalisation and aliens). It substituted in the Act the terms 'non-citizen' for 'immigrant' and 'prohibited non-citizen' for 'prohibited immigrant'. Importantly, s.7(4) was repealed and s.8(2) of the 1983 Amendment Act rendered, as prohibited non-citizens, those persons whose status of 'prohibited immigrant' had been removed by s.7(4) of the Act. The repeal of s.7(4) and the associated amendments had the consequence that it was no longer possible for a prohibited immigrant to cease to hold that status merely by the passing of time without detection.[23] A possible unintended effect of these changes was that s.8(2) captured all persons who had benefited from s.7(4), regardless of whether they had been absorbed and therefore had ceased to be immigrants. Non-citizens, unlike immigrants, cannot cease to be a non-citizen and therefore be absorbed into the Australian community.

To overcome the injustice caused by the application of s.8(2) of the 1983 Amendment Act to the persons who had benefited from s.7(4) and been absorbed, s.16 of the *Migration Laws Amendment Act (No.2) 1992* was introduced and came into effect on 1 January 1993. This provided that s.8(2) of the 1983 Amendment Act 'does not apply, and never has applied' to a person who was in Australia on 2 April 1984 (the commencement of the 1983 Amendment Act); and before that date had ceased to be an immigrant and since that date has not left Australia.[24]

Section 34 of the Act continues to enact the legislative intention of s.16 of the *Migration Laws Amendment Act (No.2) 1992* by unwinding the effect of s.8(2) of the 1983 Amendment Act in relation to those persons who had, before 2 April 1984, ceased to be a prohibited immigrant when sufficient time had passed to enable them to have been absorbed into the Australian community and who have not left the country. Such persons were taken to have been granted an absorbed person visa as of 1 September 1994.

[20] s.7(1) of the Act empowered the Minister to cancel the temporary entry permit and s.7(3) provided that upon the expiration or cancellation of the permit, the holder became a 'prohibited immigrant' unless a further entry permit came into force.
[21] The Minister was empowered under s.18 to order the deportation of a prohibited immigrant.
[22] *Yong v MIEA* (1996) 67 FCR 566 at 572.
[23] *Tjandra v MIEA* (1996) 67 FCR 577 at 585.
[24] See discussion of legislative changes in *Yong v MIEA* (1996) 67 FCR 566 at 574-575.

Key Issues

Ceased to be an immigrant

Can a person who was a 'prohibited immigrant' as at 2 April 1984 have 'ceased to be an immigrant' as at that date?

There are a series of cases considering absorbed person visas in relation to the question of whether a person who was a 'prohibited immigrant' can have 'ceased to be an immigrant' prior to 2 April 1984 under s.34(2)(b) of the Act. The Courts have held that a person who was a 'prohibited immigrant' as at 2 April 1984 could not have ceased to be an immigrant on or before that date, and therefore could not satisfy s.34(2)(b) of the Act.[25] 'Prohibited immigrant' has been held to be a subclass of 'immigrants'.[26]

As noted in the Legislative Background section above, before the 1983 Amendment Act, under s.7(4) a person could cease to be a prohibited immigrant 5 years after the expiry or cancellation of the last temporary entry permit held. This does not mean upon the expiry of the 5 year period a person who ceased to be a 'prohibited immigrant' automatically ceased to be an immigrant – they merely ceased to be liable for deportation as a prohibited immigrant.[27] A finding of fact must still be made that a person had subsequently been absorbed and thereby ceased to be an immigrant by 2 April 1984. As s.34(2)(b) requires that a person ceased to be an immigrant prior to 2 April 1984, the person's last Temporary Entry Permit (TEP) must have expired or been cancelled prior to 2 April 1979 for there to be a possibility that they ceased to be an immigrant and were absorbed on or before 2 April 1984.

Children and absorption

There is a question of whether a child immigrant may be absorbed into the Australian community and therefore has 'ceased to be an immigrant'. The Courts have expressed different views on whether a child can be absorbed into the community in their own right, or whether they can only become absorbed by virtue of the absorption of their parents.[28] It appears that the issue may also turn on whether the child came as a member of a family unit, or as an unaccompanied minor.

Case law suggests that absorption of the parents will result in the absorption of the child.[29] In *Johnson v MIMIA (No 3)*[30], the Court suggested that where a child comes into Australia as part of a family unit, it is

[25] *Sit v MIMIA* [2003] FCAFC 40 (Moore, Tamberlin and Hely JJ, 11 March 2003)*; Boon Yin Chee v MIEA* (unreported, Lockhart, Heerey and Sundberg JJ, 13 June 1997) following *Tjandra v MIEA* (1996) 67 FCR 577. See also *Yong v MIEA* (1996) 67 FCR 566 and *Rooney v MIEA* (1996) 67 FCR 590.
[26] *Yong v MIEA* (1996) 67 FCR 566 at 573, citing Barwick CJ in *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172-173; *Tjandra v MIEA* (1996) 67 FCR 577 per Lindgren J at 584-585 noting that Stephen J's view in *Salemi v Mackellar (No 2)* (1977) 137 CLR 396 at 429-431 lends some support to the proposition that 'prohibited immigrant' is a sub-class of 'immigrant'.
[27] See *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172-173.
[28] In *Moore v* MIAC (2007) 161 FCR 236 at [53] the Court held that the absorption of children into the Australian community will be very much influenced by the absorption or otherwise of their parents although at [57] it also held that the lack of absorption of adults into the Australian community would not necessarily deny a finding that their children had been absorbed.
[29] When considering whether the child has left Australia, however, the focus is on the child. Section 34(2)(c) 'is directed at the non-citizen in respect of whom consideration is being given under s.34, and to that person alone, whether that person is an adult or a minor.' There is no 'warrant to import into a consideration of s.34(2)(c) the kind of reasoning which has been deployed in the authorities in respect of the requirement set out in s.34(2)(b). The concept of *leaving Australia* is clear enough. There is no room for subjective or qualitative judgments. Either the person in question left Australia or he/she did not. The expression "… *ceased to be an immigrant*…" involves vastly different considerations': *Toia v MIAC* [2009] FCA 166 (Foster J, 27 February 2009) at [192].
[30] (2004) 136 FCR 494.

necessary to apply the judgment about membership of the community to the child's parents or other adult guardian or carers with whom the child lives.[31] In that case, as the applicant was 9 years of age when he entered Australia, the Court considered it necessary to have regard to evidence about his parents' migration to, and settlement in Australia and their position in 1984. Having regard to these factors, the Court held that the family had become part of the Australian community as at 2 April 1984 and that the applicant was therefore deemed to have been granted an absorbed persons visa on 1 September 1994.[32] The required approach in relation to unaccompanied minors is less clear as the Courts have not made a determinative finding on this matter. In *R v Director-General of Social Welfare (Vic); Ex parte Henry*, the majority of the High Court contemplated that a child could be absorbed into the Australian community in their own right before reaching adulthood, but ultimately did not reach a conclusion on the issue.[33] Justice Stephen, in dissent on the outcome of the case, doubted that an unaccompanied minor could be absorbed into the Australian community before reaching adulthood. He considered that without legal capacity, a child could not form an intention of absorption into and resultant membership of the Australian community.[34] Unlike those children who arrived with their parents, unaccompanied minors could not acquire membership of the community as part of a family unit.[35] Although Justice Stephen's reasoning is in dissent, it is the only direct consideration on the issue of the ability of unaccompanied minors to be absorbed into the community and may be treated as persuasive by another Court.

British Subjects who entered Australia prior to 1 June 1959

The position of British subjects who entered Australia as of right under the *Immigration Act 1901-1949* and the question of whether they are subject to the provisions of the current Act and hold absorbed person visas have been the subject of some judicial consideration.

Prior to the commencement of the *Migration Act 1958* on 1 June 1959, British subjects had a common law right to enter and reside in Australia.[36] This right was not abrogated by the Act or the entry permit regime. British subjects who arrived before 1 June 1959 belong to a class of persons lawfully in Australia who stood outside the entry permit regime for so long as they continued to remain in Australia.[37] Such a person who has remained in Australia over a long period of time is likely to have been absorbed into the community, having regard to factors identified in *Johnson v MIMIA (No 3)*[38] (see above under Visa Criteria).

[31] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 per French J at [47].
[32] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 per French J at [61].
[33] *R v Director-General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 per Gibbs J at 374, Mason J at 382, Jacobs J at 385. The issue in this case was whether s.6 of the *Immigration (Guardianship of Children) Act 1946*, which confers upon the Minister for Immigration guardianship of unaccompanied minors, could be validly enacted under the Immigration power as conferred by s.51(xxvii) of the Constitution. The majority (Barwick CJ, Mason, Jacobs, McTiernan and Gibbs JJ) held that s.6 was a law with respect to immigration, as it operates to confer guardianship on the Minister for only as long as a child is an immigrant or remains under 18 years of age. It was held per Barwick CJ, McTiernan, Gibbs and Mason JJ, contra Stephen and Murphy JJ, that s.6 did not apply to children who, having been absorbed, have ceased to be immigrants. It left open the question of whether guardianship subsists after the child reaches 18 or whether it was possible for a child to have been absorbed into the Australian community before the age of 18. See also *Shaw v MIMIA* (2003) 218 CLR 28 per Callinan J at [183]; and the discussion on *R v Director-General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 in *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [38].
[34] *R v Director – General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 per Stephen J at 377.
[35] *R v Director – General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 per Stephen J at 378.
[36] See *Manatiy v MIMA* [2007] FCA 28 (Finn J, 29 January 2007) at [2] citing *Potter v Minahan* (1908) 7 CLR 277 at 305 that under the *Immigration Act 1901-1949* British Subjects had the right to enter and reside in 'any part of the King's Dominion except insofar as the right has been modified or abolished by positive law'.
[37] See *Manatiy v MIMA* [2007] FCA 28 (Finn J, 29 January 2007) at [28].
[38] (2004) 136 FCR 494.

Examples

Where the '5 year' period after cancellation/expiry of a Temporary Entry Permit has passed before 2 April 1984

Scenario

X entered Australia on a Temporary Entry Permit (TEP) that expired on 12 March 1974 and has since remained in Australia. X has settled in Australia, bought a home, found stable employment and has substantial family ties in Australia. X has applied for a Return (Residence) visa, so that he may leave and re-enter Australia. X claims that he is an Australian permanent resident as he was deemed to have been granted an absorbed person visa on 1 September 1994.

Discussion

X entered Australia as an 'immigrant' on a valid TEP. Upon expiry of that TEP on 12 March 1974, he was from that time on a 'prohibited immigrant' and liable for deportation. As X remained in Australia, the effect of the now repealed s.7(4) meant that at 12 March 1979, he was no longer a 'prohibited immigrant' as 5 years has passed since the expiry of his TEP, and there was no deportation order at the time.

For the purposes of s.34(2)(b), the fact that a person is no longer a 'prohibited immigrant' does not automatically mean that he has 'ceased to be an immigrant'. Decision makers would have to consider whether it could be said that, by 2 April 1984, X had been absorbed into the Australian community, having regard to the factors in *Johnson v MIMIA (No 3).*[39]

If the decision maker finds that X had been absorbed into the Australian community, it would be open to find that the person 'ceased to be an immigrant' before 2 April 1984 and therefore was granted an absorbed person visa on 1 September 1994, becoming a permanent resident under the current Act.

Where a person was a 'prohibited immigrant' as at 2 April 1984

Scenario

Y entered Australia with his wife and child on a TEP which expired on 12 December 1983. The family settled and have remained in Australia since then. Y now seeks a Subclass 155 visa for travel and re-entry into Australia. At issue is whether he can meet s.34(2)(b) by virtue of having 'ceased to be an immigrant on or before 2 April 1984'.

Discussion

Upon the expiry of the TEP on 12 December 1983, Y and his family members became 'prohibited immigrants'. They remained so until 2 April 1984, when s.8(2) of the 1983 Amendment Act made them 'prohibited non-citizens'. On the construction of the relevant legislative provisions as applied in *Tjandra v MIEA,*[40] if a person became a 'prohibited immigrant' before 2 April 1984 and had not ceased to be a 'prohibited immigrant' as at that date, they could not cease to be an immigrant after that date and could not meet s.34(2)(b). This is because a 'prohibited immigrant' is a subclass of 'immigrant' and the statutory provisions have effectively precluded absorption by the community prior to 2 April 1984.

[39] (2004) 136 FCR 494. See discussion above in the Visa Criteria section.
[40] (1996) 67 FCR 577. See above under Ceased to be an immigrant.

Where a person entered Australia as a child prior to 2 April 1984

Scenario

Z entered Australia at the age of 6 in 1981 with her parents on a Special Category visa (Subclass 444). She has not travelled outside Australia since her arrival. Z now wishes to travel and re-enter Australia and has applied for a Resident Return visa, and argues that she holds an absorbed person visa, having ceased to be an immigrant before 2 April 1984.

Discussion

Following the view taken in *Johnson v MIMIA (No 3),*[41] whether Z has been absorbed into the Australian community turns on an assessment of the parent's circumstances as at 2 April 1984. Z may be absorbed by virtue of the absorption of her parents. This is a finding of fact for the Tribunal.

Relevant Case law

Boon Yin Chee (unreported, Lockhart, Heerey and Sundberg JJ, 13 June 1997)	
Chee v MIMIA [1997] FCA 46; (1997) 46 ALD 542	
Gunawan v MIAC [2007] FMCA 805	
Johnson v MIMIA (No 3) [2004] FCA 137; (2004) 136 FCR 494	
Manatiy v MIMA [2007] FCA 28	
Moore v MIAC [2007] FCAFC 134: (2007) 161 FCR 236	
Potter v Minahan [1908] HCA 63; (1908) 7 CLR 277	
R v Director General of Social Welfare (Vic); ex parte Henry [1975] HCA 62; (1975) 133 CLR 369	
R v Forbes; Ex Parte Kwok Kwan Lee [1971] HCA 14; (1971) 124 CLR 168	
Rooney v MIEA [1996] FCA 1645; (1996) 67 FCR 590	
Salemi v Mackellar (No 2) [1997] HCA 26; (1977) 137 CLR 396	
Sharma v MIMIA [1997] FCA 1050; (1997) 78 FCR 586	
Shaw v MIMIA [2003] HCA 72; (2003) 218 CLR 28	
Sit v MIMIA [2003] FCAFC 40	
Tjandra v MIEA [1996] FCA 1638; (1996) 67 FCR 577	
Toia v MIAC [2009] FCA 166	

[41] (2004) 136 FCR 494.

Toia v MIAC [2009] FCAFC 79; (2009) 177 FCR 125	
Yong v MIEA [1996] FCA 572; (1996) 67 FCR 566	

Relevant legislative amendments

Title	Reference number
Immigration Act 1901-1949	No.17 of 1901
Migration Amendment Act 1983	No.112 of 1983
Migration Laws Amendment Act (No.2) 1992	No.175 of 1992
Migration Legislation Amendment Act 1994	No.60 of 1994
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014 No.30

Available Decision Templates

There is no specific decision template for absorbed person visas. The issue of whether a person is deemed to have an absorbed person visa typically arises in relation to review of decisions to refuse to grant Resident Return (Class BB) visas. There is a template available for Subclass 155 visa refusals where the applicant is in Australia called 'Subclass 155 - Resident Return Visa'. However, there are no paragraphs in the template specific to absorbed person visas. Further assistance is available from MRD Legal Services if required.

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Application of Policy

CONTENTS

Overview

Policy can be relevantly defined as 'a course or line of action adopted and pursued by a government, ruler, political party, or the like'.[1] All legislation has an underlying policy. Its proper application to legislation will promote values of consistency and rationality in decision-making, especially in areas of high volume decision-making. It provides guidance to those making decisions which are subjective and evaluative and so diminishes the importance of any individual predilections.[2] In the migration context, while each application is determined on its merits, policy provides the framework for consideration of an individual's circumstances in the context of many other such applications. In these situations the High Court has observed policy is important as 'the merits of an application cannot always adequately be considered by reference to the circumstances of the applicant alone.'[3]

The Department of Home Affairs' policy is found in the Procedural Instructions (the former Procedures Advice Manual (PAM3)). As well as containing policy guidelines, they also include the Department's interpretation of the relevant law. It should be noted that the Department's interpretation of the law is not policy in the true sense. While it provides guidance, it is in no sense binding on the Tribunal.

Decision-makers can, and in some circumstances must, have regard to policy. However, it is important for decision makers to recognise that, absent a statutory duty or binding ministerial direction, they are not bound by policy or interpretative guidelines and must ensure that any policy or guidelines that they rely upon are consistent with the law and are not applied as an inflexible rule of universal application.

The precise part which government policy should play is a matter for the Tribunal to determine in the context of the particular case and in light of the need for compromise between the desirability of consistency and the ideal of justice in the individual case.[4] The Tribunal is not entitled to abdicate its function of determining whether the decision made was, on the material before it, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with relevant government policy.[5] Slavish adherence to policy or reliance on interpretative guidelines that may be narrower or broader than the legislative requirements may lead to jurisdictional error, in particular, a failure to constructively exercise jurisdiction, and/or the Tribunal asking itself the wrong question.[6]

General Principles

The Tribunal must make an independent assessment of the material before it with a view to reaching the correct or (in the case of the exercise of a discretionary power) preferable decision.[7] While policy is clearly relevant to such determinations, it is not desirable to frame a general statement of the part which government policy should ordinarily play in the determinations of the Tribunal.[8] That is a matter

[1] *Macquarie Dictionary*, 3rd Edition, 2003.
[2] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Gageler, Keane and Gordon JJ in the majority; with Gageler J delivering a separate judgment, 17 December 2015) the majority at [54].
[3] [2015] HCA 50, 17 December 2015, Gageler J at [68].
[4] *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ and Deane J at 590-591. Regarding the 'correct or preferable' decision, Kiefel J stated in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [140]: "'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense."
[5] *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ and Deane J at 589-591.
[6] *Lobo v MIMIA* [2003] FCAFC 168 (French, Sackville and Hely JJ, 8 August 2003) at [63] - [64]; *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013).
[7] See *Hneidi v MIAC* [2010] FCAFC 20 (Spender, Emmett and Jacobson JJ, 5 March 2010) at [34].
[8] *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ and Deane J at 590; see also *Hneidi v MIAC* [2010] FCAFC 20 (Spender, Emmett and Jacobson JJ, 5 March 2010) at [43].

for the Tribunal to determine in the context of any particular case, informed by considerations of the desirability of consistency of administrative decisions but balanced against the ideal of justice in the individual case.[9]

Where the Tribunal considers that the correct or preferable decision results from the application of a policy, it should make it clear that it has considered the propriety of the particular policy and expressly indicate the considerations which have led it to that conclusion.[10] This requires consideration of the lawfulness of the policy, the role the policy plays in the determination being influenced by the nature of the power, and other considerations such as the nature of the policy. For example, policy contained in documents such as Explanatory Memoranda or other extrinsic aids in interpreting the policy intentions of Parliament should be distinguished from high level ministerial policy or policy contained in the Procedural Instructions, which represents policy made at the Departmental level or a set of administrative guidelines, whose contents cannot be elevated into legally relevant considerations or binding representations.[11]

Lawfulness of Policy

As a preliminary matter, decision makers should satisfy themselves that the policy in question is one authorised by the applicable Act, Regulations or other legislative instrument. In other words, the policy should not be inconsistent with the text or purpose of the relevant provision regarding which the policy seeks to provide guidance, for example by fettering the exercise of an otherwise broad discretion.

In this regard, a policy which is more narrow or restrictive than the legislation permits will not be a lawful policy and reliance on it is likely to result in a jurisdictional error.[12] As made clear by Brennan J in *Re Drake (No.2),* the policy should not be one in which its application would result in the Tribunal depriving itself of its freedom to give no weight to a policy in a particular case.[13]

For example, in *Zhu v MIBP*[14] the Federal Circuit Court found the Department's policy on exceptional circumstances for cl.857.213(b)(ii)(A) and (B) of Schedule 2 to the Migration Regulations 1994 (the Regulations) was inconsistent with the applicable Regulations. In this event, reliance on that policy, without taking into account the applicant's relevant circumstances amounted to jurisdictional error.

Similarly, in *Jaravaza v MIAC*[15] the Federal Circuit Court found the Tribunal erred in applying Departmental guidelines in its consideration of a Subclass 857 visa, which were clearly more restrictive than the legislative provisions. This was because they contained a section on assessing exceptional circumstances for age distinguishing between applicants 45 to under 60 years, and applicants 60 years and older in such a way not available under the Regulations. Again, the Tribunal's reliance on a policy which was inconsistent with the Regulations resulted in jurisdictional error.

[9] *Hneidi v MIAC* [2010] FCAFC 20 (Spender, Emmett and Jacobson JJ, 5 March 2010) at [43].
[10] See *Hneidi v MIAC* [2010] FCAFC 20 (Spender, Emmett and Jacobson JJ, 5 March 2010) at [44], *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ and Deane J at 591. In *Hneidi v MIAC* [2009] FCA 983 (Besanko J, 2 September 2009), his Honour stated at [55]: "… where a policy is lawful, the Tribunal would not normally consider the propriety of the policy as a policy. It would consider the propriety of applying the policy to the facts of the particular case."
[11] *Moller v MIAC* [2007] FMCA 168 (Smith FM, 28 February 2007) at [14]; *He v MIAC* [2009] FMCA 1142 (Nicholls FM, 11 December 2009) at [95] – [104]. See also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1978) 52 ALJR 254.
[12] *Lobo v MIMIA* [2003] FCAFC 168 (French, Sackville and Hely JJ, 8 August 2003) at [63] - [64]; *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013).
[13] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 645.
[14] [2013] FCCA 1490 (Judge Hartnett, 3 October 2013).
[15] [2013] FCCA 68 (Judge Nicholls, 19 April 2013).

Role of Policy in exercise of discretionary and non-discretionary powers

In the ordinary case, policy is a relevant factor for the Tribunal to take into account.[16] How the Tribunal should treat the policy, for example whether it should *apply* or *have regard to* that policy in a particular case will depend on a range of factors, including whether it is exercising a discretionary or non-discretionary power and whether the nature of the power suggests an emphasis on consistency or a focus on the circumstances of the individual case.[17]

A discretionary power is exercised at the decision-maker's discretion, that is, where there is power or authority for the decision maker to choose between alternatives, or to choose no alternative. Examples of a discretionary power are the Minister's power to substitute a more favourable decision for that of the Tribunal and the power to cancel a visa if satisfied a ground for cancellation has been made out. Discretionary powers are often indicated in legislation by use of the word 'may'.

On the other hand, a non-discretionary power is a power the decision-maker is required to exercise if certain circumstances are established, such as the power to grant a visa if satisfied the criteria and other requirements are met. Non-discretionary powers are sometimes indicated in legislation by use of the word 'must', but this is not always the case.

When exercising a discretionary power the Tribunal should have *regard* to policy, as a relevant consideration.[18] However, whether exercising a discretionary or non-discretionary power, policy is not *binding* on the Tribunal.[19] This was supported in *Re Drake and MIEA (No 2) (Re Drake No 2)* in which Brennan J stated, that 'the Tribunal ought not, indeed cannot, deprive itself of its freedom to give no weight to a Minister's policy in a particular case'.[20] Importantly, where policy goes beyond the requirements of the relevant legislation, reliance on that policy would likely constitute jurisdictional error,[21] as would the inflexible application of an otherwise lawful policy.[22]

Use of Policy in the Exercise of Discretionary Power

Where exercising a discretionary power the Tribunal should have regard to any relevant lawful policy. In *Re Drake No 2*[23] the Tribunal was exercising a discretionary power (deportation). Justice Brennan, sitting as the President of that Tribunal, stated:

> *In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.*[24]

[16] See, e.g., *Hneidi v MIAC* [2009] FCA 983 (Besanko J, 2 September 2009), at [37].
[17] The distinction of whether the decision maker is exercising a discretionary or non-discretionary power to the role of policy in the exercise of that power is one often missed. For example, in *He v MIBP* [2015] FCCA 2915 (Judge Vasta, 29 October 2015), both the Tribunal's reasons and the Minister's submissions failed to identify that policy was not relevant to the determination of that matter as the case concerned the interpretation of a statutory provision, not the exercise of a discretion.
[18] See for example *Mohammed v MIBP* [2018] FCA 887 (Middleton J, 18 June 2018) where the Court proceeded on the basis that applicable government policy can be a relevant consideration for the Tribunal as per the principle enunciated in *MILGEA v Gray* (1994) 50 FCR 189. However in this case the Court found that the policy did not apply to the appellant and could not be said to be a 'relevant' policy, which negated the application of the principles in *Gray's* case to the appellant's circumstances (at [23]).
[19] See, for example, *Qiao v MIAC* [2008] FMCA 380 (Orchiston FM, 28 March 2008) at [29] and *Skoljarev v Australian Fisheries Management Authority* [1995] FCA 1732 (Davies J, 12 December 1995).
[20] (1979) 2 ALD 634 at 644.
[21] See for example *Lobo v MIMIA* [2003] FCAFC 168 (French, Sackville and Hely JJ, 8 August 2003) at [63] - [64]; *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013).
[22] See *SZSKR v MIBP* [2014] FCCA 2 (Judge Driver, 31 January 2014).
[23] (1979) 2 ALD 634.
[24] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 642.

While the Tribunal cannot deprive itself of the freedom to give policy no weight when exercising a discretionary power in a particular case, there are substantial reasons which favour cautious and sparing departure from Ministerial policy, particularly if Parliament had scrutinised and approved the policy.[25] As Brennan J stated in *Re Drake No 2*:

> *Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.*[26]

Departure from policy may also, in some circumstances, be a relevant consideration in assessing the reasonableness of a discretionary decision. For example, in *Zhang v MIBP*,[27] the Court found Departmental guidelines to be a relevant consideration in the Tribunal's assessment of an applicant's request for additional time to make a complying investment for the purposes of a Subclass 188 visa. The Court held it was unreasonable for the Tribunal not to have at least partially applied the policy and given the applicant extra time in circumstances where that had not been the determinative issue before the delegate and the Tribunal had stated there was no cogent reason to not depart from the policy.[28]

However, the Tribunal must not determine an issue simply by resolving whether or not it conforms to policy. The Tribunal is not entitled 'to abdicate its function of determining a correct or preferable decision in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be'.[29] The application of policy assumes that, in the absence of any reason to the contrary, its standards and values are an appropriate guide in the particular case.[30] But where the policy is more narrow or restrictive than the legislation it will not be a lawful policy and reliance on it is likely to result in a jurisdictional error.[31]

The Tribunal should consider the totality of the circumstances in deciding whether to apply or depart from policy. The test is not to ascertain some particular factor or 'cogent reason' for not applying the policy, the Tribunal must consider whether the circumstances as a whole justify a conclusion that the policy is or is not appropriate in the circumstances of the particular case. The Tribunal is required to balance the demands of policy against the need for individual justice.[32] Indeed, as made clear by Brennan J in *Re Drake (No.2),* if the application of policy would work injustice in a particular case, that of itself would provide a cogent and sufficient reason to depart from a policy as 'consistency is not preferable to justice'.[33] Therefore, when exercising discretionary power, the existence of a policy will be a relevant consideration which should be taken into account, but the decision whether to apply the policy is one for the Tribunal having regard to all the circumstances of the case.

Use of Policy in Exercise of Non-Discretionary Power

When exercising a non-discretionary power the Tribunal may consider Departmental policy regarding the interpretation of a legislative provision. However, it should not treat the Department's opinion as

[25] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 644.
[26] (1979) 2 ALD 634 at 639. In *Hneidi v MIAC* [2010] FCAFC (Spender, Emmett and Jacobson JJ, 5 March 2010), the Court stated at [49] that these remarks were confined to a discussion of the place of *Ministerial* policy in the review of administrative action.
[27] *Zhang v MIBP* [2017] FCCA 134 (Riley J, 30 January 2017).
[28] *Zhang v MIBP* [2017] FCCA 134 (Riley J, 30 January 2017) at [42]. Other reasons for the Court's finding were that the Tribunal did not identify any harm in giving the applicant a few weeks to make the complying investment, the Tribunal decided the case on the same day as the hearing, and the policy was a rational approach in assessing the relevant clause.
[29] *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ and Deane J at 590.
[30] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 642.
[31] *Lobo v MIMIA* [2003] FCAFC 168 (French, Sackville and Hely JJ, 8 August 2003) at [63] - [64]; *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013).
[32] *Skoljarev v Australian Fisheries Management Authority* [1995] FCA 1732 (Davies J, 12 December 1995).

determinative in such matters. In *Port of Brisbane Corporation v DCT*[34] Moore J found that it was wrong to suggest the construction of relevant legislation and its application to the facts should be influenced by Departmental policy as it is no more than an expression of opinion about what the relevant legislation meant after it was enacted. His Honour pointed out that the *Drake* cases were a discussion of policy in the exercise of discretionary power and it would be an error of law for the Tribunal to state it must follow what policy says concerning the scope or meaning of a provision in the Act or Regulations.[35] When exercising a non-discretionary power, it is the duty of the decision maker to apply the statutory test.[36] Accordingly, while the Tribunal is not bound to consider policy, if it does have regard to it, the Tribunal must be mindful to bring its consideration back to the terms of the legislation; a failure to do so would likely result in a jurisdictional error.

Non-discretionary powers containing discretionary elements

On occasion the relevant legislative provision uses terms which suggest a discretionary or evaluative element, such as 'reasonable period', 'compelling circumstances' or 'undue costs'. In those circumstances, the High Court has noted that policy plays a significant role. In *Plaintiff M64/2015*, the High Court held that 'the subjectivity of the evaluation [of "compelling reasons for giving special consideration" to a matter] highlights the importance of guidelines. The importance of avoiding individual predilection and inconsistency in making choices between a large number of generally qualified candidates by the application of the open-textured criterion of "compelling reasons for giving special consideration" is readily apparent.'[37]

However, legislative provisions may also contain terms which, while appearing to involve the exercise of a discretion or an evaluative process, are in fact more correctly characterised as interpreting a statute and fact-finding. Referring to the distinction between such terms, the Full Federal Court has stated:

> *… minds may, without legal error, differ on the question whether facts that are at law capable of doing so, fall within or outside words that are used in a statute according to their ordinary or common understanding. Whether they do so will be a question of fact… Prime examples are ordinary English words that betoken evaluation according to current community standards, such as "offensive", "unreasonable", "oppressive", "unfair" and "unjust".*
>
> *The word "exceptional" is a simple non-technical word. It means "unusual" or "out of the ordinary" and is used in that sense in Sch 2, cl 856.213(c) of the Migration Regulations 1994 (Cth) (the Regulations). The word is not, however, of the obviously evaluative kind referred to above. It is necessary to carry out the legal task of exploring the meaning of the word in the particular regulatory context in which it occurs with a view to identifying, if it can be done, what is the "usual" or "ordinary" case that was in contemplation against which exceptionality is to be measured.*[38]

Importantly, this is not to suggest that the scope or meaning of legislation set out in Departmental guidelines cannot be used as a tool or aid in construing that legislation. There appears to be no error in the Tribunal having regard to any guidance that may be available in relation to legislative provisions containing such terms, including that provided in the Procedural Instructions but, as noted above, it is

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[33] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 645.
[34] (2004) 140 FCR 375.
[35] *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375 at 386.[2004] FCA 1232 at [25] - [26].
[36] *Su & Anor v MIMIA* [2005] FCA 655 (Hely J, 24 May 2005). The Court stated that "a decision as to whether the appellant was not the holder of a substantive visa when he applied for the visa in question because of factors beyond his control is a factual question, which requires neither the consideration of 'policy' nor the exercise of a discretion" (at [10]). Hely J found that the tribunal mechanically applied policy guidelines, rather than the statutory test, and thereby addressed the wrong question (at [14] and [17]).
[37] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Gageler, Keane and Gordon JJ in the majority; with Gageler J delivering a separate judgment, 17 December 2015) the majority at [54].
[38] *An v MIAC* (2007) 160 FCR 480 at 481-482.

clear that the Tribunal must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.[39]

Application of policy

Flexible application

Just as a decision-maker should not apply an unlawful policy, he or she may fall into error by applying an otherwise lawful policy in an inflexible manner.[40] It is important that decision makers not only state that they have not applied policy rigidly without regard to the particular circumstances of the case, but do so in substance.

For example, *Jaravaza*[41] illustrates that a statement by the Tribunal to the effect that the Departmental guidelines are 'a guide only' and that it is 'mindful that it must consider all of the circumstances of the case' will not necessarily prevent a finding of jurisdictional error if its reasoning suggests that it has not in fact asked the right question. In this case, the Court found that notwithstanding the Tribunal's statement to the contrary, the reasoning demonstrated that it did not consider 'all of the circumstances of the case' as required by the Regulations.[42]

Similarly, in *Zhu v MIBP*[43] the Federal Circuit Court held that the Tribunal had erroneously narrowed its consideration of an applicant's circumstances according to the Departmental policy with respect to 'exceptional circumstances' in cl.857.213(b)(ii) which was inconsistent with the Regulations. In that case, the Tribunal had relied on Departmental policy and excluded from its consideration the circumstance that nobody in the workplace spoke English, whereas the ordinary definition of 'exceptional circumstances' did not preclude that consideration.

Even in circumstances where the Tribunal has been careful to state it will not rigidly apply Departmental policy, but seeks to accord the words of the legislation with that policy, it is possible jurisdictional error may lie. For example, in *He v MIBP*,[44] the Federal Circuit Court found Departmental policy relating to when loans could be considered assets in a main business went beyond the plain words of cl.890.212. The Court found that the Tribunal's reasoning in that case, while acknowledging the policy went further than the legislative requirements, was 'an attempt to reconcile the words of the

[39] In *Xue Fan v MIAC* [2010] FMCA 490 (Burnett FM, 9 July 2010) at [22], the Court observed that the Department's policy instructions are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s.15AB *Acts Interpretation Act 1901*, that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that "if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Section 15AB(2) then provides that, "[w]ithout limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes" materials such as explanatory memoranda and relevant reports laid down before either House of Parliament. See also *Jaravaza v MIAC* [2013] (FCCA 68 (Judge Nicholls, 19 April 2013) and *SZSKR v MIBP* [2013] FCCA 2 (Judge Driver, 31 January 2014), In *SZSKR* the Court held (at [46] – [48]) that a delegate had made a jurisdictional error in treating policy guidance as a substitute for the statutory test in determining whether 'compelling and compassionate circumstances' had developed to justify waiver of a 'no further stay' visa condition.

[40] *SZSKR v MIBP* [2014] FCCA 2 (Judge Driver, 31 January 2014) at [46] – [48]. In *SZSKR*, the Court considered that a delegate inflexibly applied policy guidance in finding that 'compassionate and compelling circumstances' had not developed such as to justify waiver of a 'no further stay' visa condition. The delegate had found that the waiver policy in relation to the medical condition of close family members required that the officer be satisfied that the family member requires care and that the applicant is the only person who can provide that care. In applying the policy as a requirement and not as a guide, the delegate had "applied the policy inflexibly without regard to the merits of the case and thus unlawfully circumscribed his discretion" (at [48]).

[41] *Jaravaza v MIAC* [2013] FCCA 68.

[42] *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013) at [90].

[43] [2013] FCCA 1490 (Judge Hartnett, 3 October 2013).

[44] [2015] FCCA 2915 (Judge Vasta, 29 October 2015).

legislation with the policy'.[45] Such a reconciliation was impossible in that case and jurisdictional error was found.

In contrast, the decision in *Shi v MIBP*[46] provides an example of where the Tribunal's consideration of Departmental policy with respect to 'exceptional circumstances' in cl.857.213(b)(ii)(A) and (B) did not demonstrate jurisdictional error. In this case, the Federal Court found that the Tribunal had made clear early in its reasons that it understood that the guidelines in the policy did not have the status of legislative requirements, had instructed itself as to the meaning of 'exceptional circumstances' in a manner which made clear that it was not rigidly applying the policy and, most importantly, had expressed its conclusions in a way that made clear it conducted a balancing exercise, rather than one involving the mechanical application of the requirements of the policy.[47]

Which Version of the Policy Applies and the Status of Defunct Policy

As policy can change from time to time, a question may arise for decision-makers as to which version of the policy applies – the version that was in force at the time of the visa application or the version that is in force at the time of decision.

The question is resolved differently in relation to the application of policy than legislation. This is because generally speaking, there is no accrued right to the application of policy in existence at the time of application. This is because the doctrine of accrued rights arises from s.7 of the *Acts Interpretation Act 1901* and is based on the common law presumption against the retrospective operation of legislation. The application of this presumption will, as a general proposition and absent contrary intent, result in the version of the Act and the Regulations in force at the time of application being the version applicable as at the time of making a decision. In other words, the provisions of the Act and Regulations 'freeze' at the time of application. However, as this is based on a presumption relating to legislation, the doctrine does not generally apply to policy.

Therefore, decision makers should generally apply the most recent version of the policy, usually being that version as in force at the time of decision. In circumstances where policy has become defunct, for example because a visa subclass has been repealed, decision makers should apply the most recent version of the policy that existed prior to the repeal of the legislation.

Ministerial and Departmental Policy

As noted above, the extent to which the Tribunal must have regard to, or follow policy is dependent both on the nature of the power being exercised, and the character of the policy, for example whether it is Ministerial or Departmental.

Different considerations may apply to the application of each different kind of policy, but the weight to be placed on them is a matter for the Tribunal, having regard to the need to make an independent assessment of the material before it with a view to making the correct or preferable decision. While 'great weight' ought to be given by the Tribunal to policies developed in the political arena, it does not follow that lesser weight must be given, regardless of the factual circumstances, to statements of Departmental policy.[48]

[45] [2015] FCCA 2915 (Judge Vasta, 29 October 2015) at [22].
[46] [2015] FCA 131 (Besanko J, 27 February 2015). This was an appeal from *Shi v MIBP* [2014] FCCA 1278 (Judge Simpson, 19 June 2014).
[47] [2015] FCA 131 (Besanko J, 27 February 2015) at [52].
[48] *Hneidi v MIAC* [2010] FCAFC (Spender, Emmett and Jacobson JJ, 5 March 2010) at [58].

Ministerial Directions under section 499

Section 499 of the Act authorises the Minister to give written directions to a person or body having functions or powers under this Act (which includes the Tribunal) about the performance of those functions or the exercise of those powers (provided these would not be inconsistent with the Act or Regulations) and provides that decision makers must comply with such a direction.

The difference between Departmental policy guidelines and policy directions under s.499 was considered by Emmett J in *Rokobatini v MIMA*[49]. His Honour saw the significant difference between the two documents as being that the ministerial direction imposed an obligation on a person performing a function or exercising a power to which s.499 applies, whereas policy, at best, was a matter which should have been taken into account by the Tribunal[50]. A majority of the Full Court of the Federal Court (Whitlam and Gyles JJ) similarly noted in *Rokobatini v MIMA:*

> *The most obvious difference between the two [Policy and a Direction] is that the Direction must be followed by reason of s 499 of the Act, whereas the Policy might be taken into account in the manner discussed in various decisions of the Court*.[51]

Accordingly, the Tribunal is obliged to follow a lawful direction, i.e. a direction that is not inconsistent with the Act or Regulations. A direction that is inconsistent with the Act or Regulations, for example one that purports to fetter an unfettered discretion, is not lawful: see *Howells v MIMIA.*[52]

The Status of the Department's Policy

The Procedural Instructions issued by the Department of Home Affairs is a document that contains guidelines to the Department's interpretation and application of the Act and Regulations as well as procedures to be followed by Departmental officers. Much of the Procedural Instructions can properly be categorised as an opinion as to the interpretation of the legislation, rather than as 'policy'. Unlike directions made under s.499 of the Act, the Procedural Instructions are not a legislative instrument and does not have the force of ministerial direction given under s.499. As discussed above, the Tribunal should apply the most recent version of the Procedural Instructions that is in force at the time of the Tribunal's decision.

In *He v MIAC,*[53] the Federal Magistrates Court considered the use of Departmental policy (then known as PAM3) in determining what is 'a reasonable period' in the context of the definition of remaining relative in r.1.15 of the Regulations. The Court stated that:

> *A distinction may be drawn between a policy made at the level of government, that is at the political level, and a policy made at the departmental level (see Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158 at 163, and Hneidi v Minister for Immigration & Citizenship [2009] FCA 983 ("Hneidi") at [41] per Besanko J. His Honour also said:*
>
> "Different considerations may apply to the review of each kind of policy…"
>
> *…*
>
> *… [PAM3 as current in 2000] is at least, as its name suggests, intended to provide advice about procedures.*
>
> *The advice appears to be directed to "officers" (in context presumably officers of the Minister's Department). It is not directed to Tribunal members (see s.396 of the Act).*

[49] [1999] FCA 492 (Emmett J, 19 April 1999).
[50] *Rokobatini v MIMA* [1999] FCA 492 (Emmett J, 19 April 1999) at [27].
[51] [1999] FCA 1238 at [17].
[52] [2004] FCAFC 327 (Ryan, Lander and Crennan JJ, 16 December 2004).
[53] [2009] FMCA 1142 (Nicholls FM, 11 December 2009).

> *But, ultimately, nothing turns on this point because the Tribunal is entitled to have regard to "policy", both government (at the political level) and administrative (departmental).*
>
> *Further, there is no dispute that, while a policy (as distinct from a policy expressed in, or as, a regulation) is not binding on a decision maker, a policy applicable to the case is a relevant consideration ….. In Hneidi at [37] the Court said: "… In the ordinary case, a policy is a relevant factor for the Tribunal to take into account."*[54]

As noted by the Court in *Durzi v MIMIA*, when considering the issue of the role of PAM3 in relation to the interpretation of r.1.15:

> *PAM3 is simply a document which brings a number of relevant facts to the attention of the decision maker to which the decision maker may or may not have regard in considering whether an applicant has brought himself or herself within the criteria required in reg 1.15. It has no legislative effect. It does not construe reg 1.15. A decision maker is not bound to have regard to it or if a decision maker has regard to it the decision maker commits no error.* [55]

This view was restated in *Moller v MIAC*:

> *[PAM3's] status is merely a set of administrative guidelines, and its contents cannot be elevated into legally relevant considerations or binding representations (see Vishnumolakala v Minister for Immigration & Anor [2006] FMCA 1209 at [27]-[29] and cases there cited). Nor can its legal interpretations or restatements be applied by the Migration Review Tribunal or this Court as substitutes for the regulations, which must be construed according to their own language under principles of statutory interpretation.*[56]

Similarly, the court in *Sakhno v MIAC* stated that:

> *… policy, not matter how clearly set out, in the Procedures Advice Manual 3 of the department cannot change or amend the migration regulations, if what is set out in the policy document is not in accordance with the migration regulations, then it is wrong. It is the regulation that must be preferred to the policy document.*[57]

Where the 'policy' in the Procedural Instructions is not consistent with, or does not accurately reflect the regulations, the policy is unlawful and the regulation must prevail.[58] This is discussed in more detail above. There is thus a need for caution in applying the Procedural Instructions. The decision-maker must be satisfied that it is not inconsistent with or does not go beyond the regulations. In short, the decision-maker must bring his or her consideration back to the terms of the regulations.

Where the existence and content of a policy is regarded as a relevant fact by the Tribunal, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant consideration and for that reason may result in an improper exercise of the statutory power.[59] If a decision-maker, not bound to apply policy, purports to apply it as a proper basis for disposing of the case in hand but misconstrues or misunderstands it so that what is applied is not the policy but something else, then there may be reviewable error.[60]

[54] *He v MIAC* [2009] FMCA 1142 (Nicholls FM, 11 December 2009) at [95] – [104].
[55] [2006] FCA 1767 (Lander J, 19 December 2006) at [49].
[56] [2007] FMCA 168 (Smith FM, 28 February 2007) at [14].
[57] [2007] FMCA 1492 (Scarlett FM, 6 September 2007) at [55].
[58] See, e.g., *Alimi v MIAC* [2007] FMCA 1520 (Riley FM, 16 October 2007), *Total Eye Care Australia Pty Ltd v MIAC* [2007] FMCA 281 (McInnis FM, 8 March 2007), *Feng v MIAC* [2011] FMCA 576 (Barnes FM, 27 July 2011) at [70] – [72]. See also *Jaravaza v MIAC* [2013] FCCA 68 (Judge Nicholls, 19 April 2013).
[59] *MILGEA v Gray* (1994) 50 FCR 189 at 208.
[60] *MILGEA v Gray* (1994) 50 FCR 189 at 208.

Furthermore, as noted above, the inflexible application of an otherwise lawful policy in the Procedural Instructions can lead to a jurisdictional error.[61]

Similarly, while it is clear that Departmental interpretative *guidelines* do not have legislative effect, there have been cases where the Courts have, seemingly contrary to established principles, found the Tribunal committed jurisdictional error for purporting to follow Departmental guidelines and then misapplying the guidelines.[62] These cases did not involve the exercise of discretionary powers, but rather the interpretation of certain legislative provisions. To the extent that these cases appear to raise the guidelines to the level of a legislative requirement, they are not in line with existing authority. However, they demonstrate the risk to Tribunal decisions of, firstly, applying guidelines to the task of statutory interpretation as they would be applied in the exercise of a discretion and secondly, referring to policy or Departmental guidelines inaccurately, without clearly identifying the relevant question and bringing consideration of a matter relating to statutory interpretation back to the terms of the relevant legislative provisions. Consistent with authority, interpreting a regulation on the basis only of the Department's opinion of what the term means and nothing more could constitute a misapplication or misconstruction of the relevant regulation.

Relevant Case law

Alimi v MIAC [2007] FMCA 1520	Summary
An v MIAC [2007] FCAFC 97 ; (2007) 160 FCR 480	Summary
Drake v MIEA (1979) 24 ALR 577	
Re Drake and MIEA (No 2) [1979] AATA 179 (1979) 2 ALD 634	
Durzi v MIMIA [2006] FCA 1767	
Elbrow v MIMA [2004] FCA 595	Summary
Elliott v MIMA [2007] FCAFC 22 (2007) 156 FCR 559	Summary
Feng v MIAC [2011] FMCA 576	Summary
He v MIAC [2009] FMCA 1142	Summary
He v MIBP [2015] FCCA 2915	Summary
Hneidi v MIAC [2010] FCAFC 20; (1995) 133 ALR 690	
Hneidi v MIAC [2009] FCA 983	
Ho v MIMIA [2005] FMCA 1104	
Howells v MIMIA [2004] FCAFC 327	
Huang v MIMA [2007] FMCA 720	Summary
Islam v MIMIA [2000] FCA 1183	
Jaravaza v MIAC [2013] FCCA 68	Summary
Lobo v MIMIA [2003] FCAFC 168	Summary

[61] *SZSKR v MIBP* [2014] FCCA 2 (Judge Driver, 31 January 2014) at [46] – [48]. In *SZSKR*, the Court considered that a delegate inflexibly applied policy guidance in finding that 'compassionate and compelling circumstances' had developed such as to justify waiver of a 'no further stay' visa condition. The delegate had found that the waiver policy in relation to the medical condition of close family members required that the officer be satisfied that the family member requires care and that the applicant is the only person who can provide that care. In applying the policy as a requirement and not as a guide, the delegate had "applied the policy inflexibly without regard to the merits of the case and thus unlawfully circumscribed his discretion" (at [48]).

[62] *Elbrow v MIMIA* [2004] FCA 595 (Spender J, 14 May 2004) and *Elliott v MIMA* (2007) 156 FCR 559.

Plaintiff M64 /2015 v MIBP [2015] HCA 50 (17 December 2015)	
MILGEA v Gray [1994] FCA 1052; (1994) 50 FCR 189	
Mohammed v MIBP [2018] FCA 887	
Moller v MIAC [2007] FMCA 168	Summary
Port of Brisbane Corporation v DCT [2004] FCA 1232 (2004); 140 FCR 375	
Qiao v MIAC [2008] FMCA 380	
Rokobatini v MIMA [1999] FCA 492	
Rokobatini v MIMA [1999] FCA 1238; (1999) 57 ALD 257	
Sakhno v MIAC [2007] FMCA 1492	
Shi v Migration Agents Registration Authority [2008] HCA 31 (2008) 235 CLR 286	
Shi v MIBP [2014] FCCA 1278	Summary
Shi v MIBP [2015] FCA 131	Summary
Skoljarev v Australian Fisheries Management Authority [1995] FCA 1732; (1995) 133 ALR 690	
Su & Anor v MIMIA [2005] FCA 655	Summary
SZSKR v MIBP [2014] FCCA 2	Summary
Total Eye Care Australia Pty Ltd v MIAC [2007] FMCA 281	Summary
Xue Fan v MIAC [2010] FMCA 490	Summary
Zhang v MIBP [2017] FCCA 134	Summary
Zhu v MIBP [2013] FCCA 1490	Summary

Last updated/reviewed: 9 November 2018

Assurance of Support cases – Post 1 July 2004

Overview

An Assurance of Support (AoS) is a legal undertaking by a person (the assurer) to repay to the Australian Government certain social security payments paid by the Department of Human Services (DHS))to a person (a visa holder) covered by the AoS.

Some visa criteria include a requirement for an AoS.[1] Where an AoS is required, the assurance must be accepted by the Secretary of Social Services.[2] The *Social Security Act 1991* provides for an AoS to be given and accepted or rejected.[3]

Since 1 July 2004, DHS (formerly Centrelink)[4] has been responsible for processing all AoS applications.[5] Decisions not to accept an AoS are reviewable under the *Social Security (Administration) Act 1999*.[6] Where a decision to refuse to grant a visa is reviewable by the Tribunal, the review may require consideration of whether an AoS has been accepted or, where an AoS is a discretionary requirement, whether an AoS should be required. However, the Migration and Refugee division of the Tribunal does not have jurisdiction to review the decision to reject the AoS as this is not a Part 5 or Part 7 reviewable decision under the *Migration Act 1958*.

Key issues

Definition of Assurance of Support

The term 'assurance of support' is defined in the Migration Regulations 1994 (the Regulations).

For visa applications made before 22 March 2013, r.1.03 states that an 'assurance of support':

[1] See cl. 101.225, 102.225, 103.226, 114.225, 115.225, 117.224, 143.228, 151.229B, 802.222, 804.224, 835.222, 837.222, and 864.226 of Schedule 2 to the Regulations. The Discretionary AoS criterion for Subclass 100, 300, 309, 801 and 820 was omitted by Migration Legislation Amendment Regulations 2011 (No.2), effective 1 January 2012.

[2] In practice, this power is delegated under s.234 of the Social Security (Adminstration) Act 1999 by the Secretary to DHS employees. Prior to 22 March 2014, Schedule 2 AoS criteria referred to the Secretary of the Department of Family and Community Services rather than the Secretary of Social Services. However, the former reference was taken to apply to the various names of that Department. Section 19B of the *Acts Interpretation Act 1901* provides for an amending order where the names of portfolios or departments are changed. An AoS accepted by the Secretary of the Department of Social Services or the Department of Social Services at the relevant time will satisfy the Schedule 2 criteria. See Schedule 3, Part 5, Item 1 (13 March 2006) and Schedule 3, Part 7, Item 10 (18 December 2007) and Schedule 3, Part 14, Item 1 (12 November 2013) of the Acts Interpretation (Substituted References – Section 19B) Order 1997. From 22 March 2014, the Schedule 2 AoS criteria were amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No. 30) to refer directly to the 'Secretary of Social Services'. A new definition of 'Secretary of Social Services' was also inserted into r.1.03 of the Regulations. The ES to SLI 2014, No.30 stated 'For the purposes of the Principal regulations, the term 'Secretary of Social Services' is defined to mean the Secretary of the Department that is administered by the Minister administering section 1061ZZGD of the *Social Security Act 1991* (Social Security Act). As there are multiple Ministers that administer the Social Security Act it is necessary to refer to the relevant provision relating to Assurances of Support. The defined term remains current irrespective of the name of the portfolio of that Minister or any future changes in the name of the portfolio. The purpose of the amendment is to update the reference and avoid further amendments each time the portfolio name changes'. SLI 2014, No.30 amended a total of 42 provisions in Schedule 2 to the Regulations, to omit the words 'the Department of Family and Community Services' and substitute the words 'Social Services': Schedule 1, Part 3, items [71] and [75].

[3] s.1061ZZGD of the *Social Security Act 1991*. The definition of *Secretary of Social Services* under r.1.03 of the Regulations is also relevant, which is defined as the Secretary of the Department that is administered by the Minister administering section 1061ZZGD of the *Social Security Act 1991*. See note [2] above.

[4] Centrelink was integrated into the Department of Human Services on 1 July 2011 by the *Human Services Legislation Amendment Act 2011* (No 32, 2011).

[5] *Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Act 2003,* s.2, Schedule 3.

[6] *Social Security (Administration) Act 1999*, ss.3 and 126.

in relation to an application for the grant of a visa, means:

(a) for an assurance of support accepted by the Minister before 1 July 2004 — an assurance of support under Division 2.7; and

(b) in any other case — an assurance of support under Chapter 2C of the Social Security Act 1991.

For visa applications made on or after 22 March 2014, r.1.03 states that an 'assurance of support':

in relation to an application for the grant of a visa, means an assurance of support under Chapter 2C of the Social Security Act 1991.[7]

'Assurance of Support' is separately defined for the purpose of Chapter 2C of the *Social Security Act 1991* as:

... an undertaking by a person under this Chapter that the person will pay the Commonwealth an amount equal to the amount of social security payments that are:

(a) received in respect of a period by another person who:

(i) is identified in the undertaking; and

(ii) becomes the holder under the Migration Act 1958 of a visa granted in connection with the undertaking (whether or not the person continues to hold the visa throughout the period); and

(b) specified in a determination in force under section 1061ZZGH when the payments are received.[8]

An Assurance of Support (AoS) is, then, a legal undertaking by the assurer to repay to the Australian Government certain security payments paid by DHS to the person covered by the AoS. The assurer must be an Australian resident.[9] There is no requirement that the assurer be related to the visa applicant. In most cases, the AoS operates for 2 years.[10] The exception applies to Contributory Parent visas, where the AoS operates for 10 years. The AoS commences at the later time of either the:

- date of the relevant visa grant if the visa is granted to an applicant in Australia; or the
- date the visa holder first arrives in Australia holding the relevant visa.[11]

Assurance of support as a visa criterion

Acceptance of an AoS is prescribed in Schedule 2 as a time of decision criterion for the grant of certain visa subclasses (generally, permanent visas or temporary (provisional) visas likely to lead to the grant of a permanent visa).[12] The Schedule 2 criteria specify whether an AoS is mandatory or discretionary. Where an AoS is discretionary, the decision maker must decide whether to request an AoS. If an AoS is not requested, then the Schedule 2 criterion requiring acceptance of an AoS for that visa application does not apply.

[7] Regulation 1.03, as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No. 30), Schedule 1, Part 7, item [143] and applying to visa applications made on or after 22 March 2014: SLI 2014, No.30, Part 28, item [2801]. The amendment to r.1.03 omitted the redundant reference to assurances of support accepted by the Minister before 1 July 2004.

[8] See s.1061ZZGA of the *Social Security Act 1991*, Social Security (Assurances of Support) (DEEWR) Determination 2008.

[9] *Social Security Act 1991*, s.1061ZZGH; Social Security (Assurances of Support) (DEEWR) Determination 2008, para 7.

[10] *Social Security Act 1991*, s.1061ZZGH; Social Security (Assurances of Support) (DEEWR) Determination 2008, para 17.

[11] *Social Security Act 1991*, s.1061ZZGF(1).

[12] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > The AoS as a visa requirement > at [9.1] (re-issue date: 22/03/2014).

A mandatory AoS criterion typically states:

> *The Minister is satisfied that the assurance of support in relation to the applicant has been accepted by the Secretary of the Social Services.*[13]

An AoS is a mandatory requirement for a Contributory Parent (Subclass 143) and Contributory Aged Parent (Subclass 864) visa.[14] The AoS is a discretionary requirement for other visa subclasses, including for example, Child, and Adoption.[15]

A discretionary AoS criterion typically states:

> *If the Minister has requested an assurance of support in relation to the applicant, the Minister is satisfied that the assurance has been accepted by the Secretary of Social Services.*[16]

Merits Review

Since 1 July 2004, AoS applications, including unresolved applications made prior to that date have been processed by DHS (formerly Centrelink).[17] Decisions to reject an AoS are reviewable under the *Social Security (Administration) Act 1999*. The review provisions provide for internal review as well review by the Tribunal in its Social Security and General divisions but not in the Migration and Refugee Division.[18]

Procedure for Tribunal where Assurance of Support criterion is sole issue in dispute

In some cases, the visa refusal decision is solely made on the basis of the criteria requiring that an assurance of support has been accepted by the Secretary of the Department of Social Services. Where an AoS is mandatory, or has been requested (and the Tribunal agrees that it should be requested), the Tribunal may defer consideration of the matter while the applicant is referred to DHS to obtain the AoS assessment. If the assessment is favourable, the Tribunal can remit with a permissible direction relating to this AoS criterion. Where an AoS is rejected by DHS, the Tribunal

[13] Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No.30, Schedule 1, Part 3, item [75]. For a discussion of this change, see note [2].

[14] An AoS was also a mandatory requirement for a number of family visa subclasses repealed with effect from 2 June 2014 by the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 SLI No. 65 2014, including Subclasses 103 (Parent), 114 (Aged Dependent Relative), 115 (Remaining Relative), 804 (Aged Parent), 835 (Remaining Relative) and 838 (Aged Dependent Relative). For applications for these subclasses lodged before 2 June 2014, or for permitted combined applications taken to be made after that time in accordance with r.2.08 or r.2.08A, an AoS remains a mandatory Schedule 2 requirement. For matters decided on or before 1 January 2008, an AoS was also a mandatory requirement for Subclass 116 and 836 carer visas and the pre 1 September 2007 skilled migration visas (i.e. subclasses 134, 136, 137, 138, 139, 861, 862, 863, 880, 881, 882 and 883). However, this requirement was removed with effect from 1 January 2008, in respect of visa applications made but not finally determined prior to 1 January 2008 and visa applications made on or after 1 January 2008: Migration Amendment Regulations 2007 (No. 14) (SLI 2007 No. 356) and Migration Amendment Regulations 2007 (No. 7) (SLI 2007 No. 257).

[15] An AoS is a discretionary Schedule 2 requirement for the following visas: 101 (Child), 102 (Adoption), 117 (Orphan Relative), 151 (Former Resident), 802 (Child) and 837 (Orphan Relative). Note that there were AoS criteria for partner visas, but they were removed for visa applications not finally determined as at 1 January 2012, as well as visa applications made on or after that date: Migration Legislation Amendment Regulations 2011 (No. 2), r.7 and Schedule 5, item [1].

[16] Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No.30, Schedule 1, Part 3, item [75]. For a discussion of this change, see note [2].

[17] *Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Act 2003,* s.2, Schedule 3.

[18] *Social Security (Administration) Act 1999*, ss. 3, 126, 140, 142, 178, 179.

may need to consider whether it should delay its decision pending the assurer availing him/herself of the available review process. Relevant matters for consideration may include whether the applicant is taking reasonable steps to progress the review. Ultimately, if an AoS is not approved, the Tribunal must affirm the decision under review.

Tribunal's power to revisit discretion to request an Assurance of Support

Where an AoS is a discretionary requirement, an issue may arise as to whether the AoS should be requested in the first place. As the decision to impose a discretionary AoS is part of the exercise of the power under s.65 of the *Migration Act 1958* (the Act) (to grant or refuse a visa), the Tribunal can consider the question of whether to request a discretionary AoS in a particular case, pursuant to its powers under s.349 of the Act by which it can *exercise all the powers and discretions that are conferred by the Act on the person who made the original decision*.

This view finds some support in the *obiter* comments of Sackville J in *Esteron v MIEA*[19], where his Honour says (in relation to a similar provision contained in the Migration Regulations 1989):

> *The view I have expressed receives support from language used elsewhere in reg 131A(1) itself. Under reg 131A(1)(e), if the Minister forms the opinion that the applicant should provide an assurance of support, an assurance satisfactory to the Minister must be given. The reference to the Minister's opinion in reg 131A(1)(e) is clearly intended to include the opinion formed by the Tribunal on an application for review of the Minister's decision. This suggests that the references to "the Minister" in reg 131A(1) are not intended to be confined to the Minister or the delegate, as opposed to the Tribunal exercising its power to review the Minister's decision on the merits.*[20]

If considering revisiting the discretion however, the Tribunal needs to have a basis for making a decision not to request an AoS in the circumstances of the case.

Where an AoS is discretionary, Departmental guidelines contemplate that a delegate will request an AoS only if the delegate reasonably believes that an adult applicant, who needs to satisfy primary criteria, is likely to need any of the social security allowances that are recoverable under the AoS Scheme.[21] Departmental officers are advised, in deciding whether to request an AoS in the circumstances described above, to consider relevant social and economic aspects of the application including the applicant's age, employment prospects (including skills and qualifications) and eligibility for the prescribed allowances and, if sponsored, the ability of the sponsor to provide assistance beyond that to be provided as part of their sponsorship undertaking. On the other hand, officers are also recommended to consider whether compelling and compassionate circumstances exist that would constitute a justifiable reason to not request a discretionary AoS. [22]

In accordance with Departmental guidelines, relevant considerations may include the sponsor's financial status and the visa applicant's skills, education, employment history, English language ability and age. It may also be appropriate to seek information about a sponsor's social security payment

[19] (1995) 57 FCR 126.
[20] *Esteron v MIEA* (1995) 57 FCR 126 (Sackville J, 19 May 1995).
[21] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.1] (re-issue date: 22/03/2014).
[22] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.2] (re-issue date: 22/03/2014).

history.[23] Other circumstances, including those relating to the sponsor's background, social support, medical and psychological conditions and impact of delay in processing of the visa on her/his wellbeing and future prospects, are also all potentially relevant circumstances to the exercise of the discretion to request an assurance of support. However, in the end the Tribunal's task is to make 'the correct or preferable decision' on the available material and the Tribunal should take into account all of the relevant claims and evidence in undertaking its consideration.

The Departmental guidelines consider that it is open to withdraw a request to provide an AoS prior to decision provided there is a justifiable reason to do so.[24] This is consistent with the position that it is open to the Tribunal on review to make a fresh decision as to whether to request an AoS. The same considerations relevant to considering whether an AoS should be requested are relevant to the consideration of whether one is no longer required, taking into account any more recent information. The Departmental guidelines suggest that an improvement in the material circumstances of the applicant and/or the sponsor would constitute a justifiable reason for withdrawal of an AoS request, and also that compelling and compassionate circumstances affecting the interests of the applicant and/or sponsor may also warrant a withdrawal.[25]

In considering the exercise of the discretion as to whether to request an AoS (or revisiting the request made by the delegate), the Tribunal should have regard to any lawful policy, noting that it is not bound to apply policy, and would be in error to apply it as a legal requirement. For further guidance on the appropriate application of policy see MRD Legal Services' commentary: Application of policy.

If the Tribunal decides on review not to request an AoS, the Tribunal will not be able to remit with a permissible direction in relation to the AoS criterion as that criterion will no longer apply. In such a case, the Tribunal should go on to consider another criterion. [26]

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2007 (No. 7)	SLI 2007 No. 257
Migration Amendment Regulations 2007 (No. 14)	SLI 2007 No. 356
Migration Legislation Amendment Regulations 2011 (No.2)	SLI 2011 No. 250
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014 No. 30
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014	SLI 2014 No. 65

[23] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.2] (re-issue date: 22/03/2014).
[24] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.5] (re-issue date: 22/03/2016).
[25] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > Types of AoS at [12.5] (re-issue date: 22/03/2016).
[26] Under s.349(2)(c) of the Act the Tribunal has the power to remit a matter for reconsideration in accordance with such directions as permitted by the Regulations. Regulation 4.15(1)(b) prescribes a permissible direction as that the applicant must be taken to have satisfied a specified criterion for the visa. It will be necessary for the Tribunal to identify a criterion of the visa which the applicant satisfies in order to be able to remit the matter for reconsideration in accordance with the Act.

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Compelling and/or Compassionate Circumstances/Reasons

Contents

Overview

The Migration Regulations 1994 (the Regulations) contain certain criteria that may be waived, or found not to apply, on the basis of compelling and/or compassionate considerations. The most frequent matters seen by the Tribunal that involve 'compelling' and/or 'compassionate' considerations are:

- compelling or compassionate circumstances for not applying or waiving Partner visa criteria or sponsorship requirements;[1]
- compelling or compassionate reasons for absence or departure from Australia (Resident Return visas and Resolution of Status visas) (see below); and
- compelling or compassionate circumstances to waive the requirements of Public Interest Criterion (PIC) 4020 (see below).

Other references to compelling circumstances/reasons contained in the Regulations can be found in criterion 3003(d) and criterion 3004(d) of Schedule 3 (see below); public interest criterion 4013 (see below); compelling reasons for granting a visa having regard to the degree of persecution (Refugee and Humanitarian visas)(see below); 'compelling personal reasons' to work in Australia (Visitor visas);[2] and 'compelling need to work' (Bridging visas).[3]

In addition to reference in the Regulations to the terms 'compelling' or 'compassionate' reasons/circumstances, consideration of 'compelling' or 'compassionate' reasons/ circumstances may also arise in the context of case law, Ministerial Directions or departmental policy. Examples include the exercise of the discretion to waive the health requirement (Public Interest Criterion (PIC) 4007) (see below) and the discretion to cancel a visa (for example, cancellation under a prescribed ground in s.116).

General Principles

There is no specific definition of 'compelling' or 'compassionate' in either the *Migration Act 1958* (the Act) or the Regulations. Whether a circumstance or reason is compelling and/or a compassionate ground is a question of fact and degree for the Tribunal and one which requires a subjective assessment which takes into account all of the circumstances.[4] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears (e.g. 'compelling reasons **for the grant of the visa**'; 'compelling reasons **for the absence** [from Australia]'; 'compelling circumstances **affecting the nominator**', etc.) and the purpose of the relevant provision. For example, in *Lui v MIBP*[5] the applicant argued that as there had been a decision that there were compelling and compassionate circumstances under r.2.05(4) to waive condition 8503 on a business visa this was enough to find compelling reasons for not applying the

[1] 12-month rule for de facto visas (see below), 'waiver' of Schedule 3 criteria for onshore partner visas (see below) and 'waiver' of regulations 1.20J, 1.20KA and 1.20KB sponsorship limitations (see below)
[2] Clause 600.611(4)
[3] Clause 050.212(6A)(c), cl.050.212(8)(b).
[4] *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) at [34]. While the Court's comments were made in relation to s.41(2A) and r.2.05(4) in particular, they appear equally as applicable to where those terms appear elsewhere in the Act or Regulations. See also Whitlam J's comments in *McNamara v MIMIA* [2004] FCA 1096 (Whitlam J, 25 August 2004) at [10].
[5] *Lui v MIBP* [2015] FCA 1368.

Sch.3 criteria in relation to a subclass 820 visa application. The Court disagreed, commenting that the decision under r.2.05(4) could not amount to a compelling reason for cl.820.211(2)(d)(ii) when considering whether there were compelling reasons for not applying the Sch.3 criteria '… because the circumstances relevant to the waiver of condition 8503 was a different question from that raised by cl 820.211(2)(d).'[6]

The following general principles can be extracted from case law that has considered the meaning and scope of the various forms of the phrase 'compelling and/or compassionate':

- A determination as to whether a particular reason or reasons is compelling involves an evaluative judgment based on the circumstances of the case and with regard to the legislative context and any applicable policy.[7]

- To be 'compelling' the reasons in question must force or drive the decision-maker irresistibly to some end.[8] While the word 'compelling' may include reasons which are forceful, involve moral necessity or are convincing, it does not, by itself, necessarily require an involuntary element involving circumstances beyond a person's control.[9]

- It is relevant to take into account the purpose of the statutory provision in determining whether there are compelling reasons. However, circumstances which do not have a direct link to the purpose should not be excluded from consideration.[10]

- In assessing compelling and/or compassionate factors, the Tribunal should avoid applying any gloss, or using any policy interpretation, that would unduly fetter the scope of the discretion contained in the legislative expression. To do so could be to apply a higher test than the expressed words require and amount to jurisdictional error.[11]

The word 'compelling' is often, but not always, used together with the word 'compassionate' in the Regulations. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined as 'circumstances that invoke sympathy or pity', where 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'. Where the words 'compelling' and 'compassionate' are used in conjunction with each other (i.e. "…compelling *and* compassionate circumstances…") the requirement is cumulative in the sense that even if some of the circumstances

[6] *Lui v MIBP* [2015] FCA 1368 (Markovic J, 7 December 2015) at [40].
[7] See *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment), at [53]. See commentary below under Compelling Reasons for Refugee and Humanitarian Visa Grant.
[8] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment) at [31].
[9] *Paduano v MIMIA* (2005) 143 FCR 204 at [37]. Note certain regulations are worded, however, so as to specifically require such an 'involuntary element'. For example, r.2.05(4) requires 'compelling and compassionate circumstances … over which the person had no control'. In considering r.2.05(4), the Court in *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) found that the delegate's reference to policy to the effect that compelling circumstances generally referred to circumstances that were involuntary and characterised by necessity such that the visa holder was faced with a situation in which there was little or no alternative but to seek to remain in Australia did not establish a misstatement or misunderstanding of the law (at [33]).
[10] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016), applying *Monakova v MIMIA* [2006] FMCA 849 (Phipps FM, 16 June 2006). In these cases, the relevant purpose was permitting the person to make an application for a partner visa in Australia.
[11] *Paduano v MIMIA* (2005) 143 FCR 204, at [37]. See also *Schaap v MIMIA* [2000] FCA 1408 (Whitlam J, 6 October 2000) which held that there is no requirement that a circumstance could not have been foreseen in r.2.05, at [8]-[9]

are found to be compassionate, that will not suffice if the circumstances are not also compelling.[12] Rather, what is required is an event or events that are far-reaching and most heavily persuasive.[13]

Issue arising in specific contexts

12-month rule for de facto visas

Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. One of the requirements is that the de facto relationship existed for a period of 12 months immediately before the date of the application, unless the applicant can establish 'compelling and compassionate circumstances for the grant of the visa'.[14]

An assessment of these circumstances is not confined to the time of application and may extend to relevant circumstances at the time of decision.[15] It should be noted that the emphasis is not on the ousting of the '12 month rule', but whether such circumstances exist for the grant of the visa sought.[16] Accordingly, the Tribunal's consideration should not cease at the question whether or not compelling and compassionate circumstances exist. The Tribunal must go on to consider, if compelling and compassionate circumstances are found to exist, whether or not those compelling and compassionate circumstances exist *for the grant of the visa*.

PAM3 states that 'compelling and compassionate' is a high threshold, and that under policy compelling and compassionate circumstances may include, but are not limited to cases where:

- the applicant has a dependent child of the relationship;
- de facto relationships are illegal in the country in which one or both members of the couple reside; or

[12] *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) at [29]. While the Court in that case was considering the waiver provision in r.2.05(4) as it applied to condition 8503, the reasoning would appear equally as applicable where the composite term of 'compelling and compassionate' is used elsewhere in the Act or Regulations.

[13] In *Thongpraphai v MIMA* [2000] FCA 1590 (O'Loughlin J, 10 November 2000) which considered r.2.05, the Court stated at [21] that 'both words [compelling and compassionate] call for the occurrence of an event or events that are far-reaching and most heavily persuasive. Incidental matters are not to be taken into account except where it is appropriate to have regard to their totality.' In the context of waiving condition 8503 in accordance with r.2.05(4), the Court in *Hamoud v MIBP* [2015] FCCA 1087 (Judge Driver, 28 April 2015) concluded at [19] that when read together, *Thongparaphai v MIMA* [2000] FCA 1590 (O'Loughlin J, 10 November 2000) and *Terera v MIMIA* [2003] FCA 1570 make clear that 'circumstances' that fit the description 'compelling and compassionate' must not be a mere 'incidental matter' but must be 'far-reaching and most heavily persuasive' so that they result in a 'major change' to the applicant's situation.

[14] r.2.03A as introduced by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03A (4), (5). The pre 1 July 2009 definitions of 'de facto relationship' in r.1.15A (2A) and 'interdependent relationship' in r.1.09A had the same requirement: r.1.1.5A(2A), r.1.09A(2A).

[15] *Antipova v MIMIA* (2006) 151 FCR 480. In *obiter*, while considering the pre 1 July 2009 definition of 'de facto relationship' in r.1.15A(2A), Gray J said at [104]: 'The wording of reg 1.15A(2A) suggests strongly that, at whatever stage of whatever decision-making process the question of special circumstances arises, it is to be determined by reference to whatever circumstances exist at the date of decision. It would be a strange result if the circumstances to be considered differed according to whether the application of the definition of "spouse" was required to be applied at the time of application of the visa, or at the time of decision, or at some other stage, so that different views might be taken as to whether compelling and compassionate circumstances for the grant of the visa existed at different times. The wording of the provision suggests strongly that this is not the intention'. His Honour concluded, at [107]-[108] that the Tribunal in that case was wrong to follow *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 because that decision was distinguishable on the basis that it related to a very different provision to r.1.15A(2A), being a visa criterion that is specifically required to be satisfied at the time of application. Note *Boakye-Danquah* was later overruled by the Full Federal Court in *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016). Refer to the below discussion on Schedule 3 time of application requirements.

[16] *Antipova v MIMIA* (2006) 151 FCR 480 at [104], and at [106]-[107] citing *Neofotistou v MIMIA* [2005] FCA 919 (North J, 26 May 2005) at [24]-[25].

- a same sex couple has married overseas (whereby the couple is prevented from registering their relationship under State / Territory law).

PAM3 goes on to state that the pregnancy of the sponsor or applicant at the time of application would not (of itself) amount to 'compelling and compassionate circumstances for the grant of the visa', but that there may be exceptional or unique circumstances relating to the pregnancy that may do so. It also states that the genuineness of the de facto relationship does not, in itself, constitute 'compelling and compassionate circumstances', given that r.2.03A prescribes additional criteria that must be considered only after the applicant has satisfied the s.5CB requirements of a de facto relationship.[17]

Although decision makers should have regard to the examples set out in PAM3, care should be taken not to apply these inflexibly or to elevate any of these to the level of a legislative requirement.

In circumstances where the applicants have a dependent child of the relationship, the Federal Court has held that the child need not have been born of the relationship. The Tribunal should have regard not just to whether there is a child affected by the application, but whether compelling and compassionate circumstances arise out of the relationship between the applicant, sponsor and child.[18]

'Waiver' of Schedule 3 criteria for onshore partner visas

Certain onshore applications for partner visas are required to meet additional Schedule 3 criteria (including a requirement that the visa application be made within the period when the substantive visa was last held) unless 'the Minister is satisfied there are compelling reasons for not applying those criteria'.[19]

The Explanatory Statement to Statutory Rules 1996, No. 75 which accompanied the introduction of the provisions, stated (in relation to cl.820.211) that the inclusion of a 'waiver' provision was in recognition of the hardship that may result in circumstances where an unlawful non citizen seeks to apply for a spousal (partner) visa, but would otherwise be forced to leave Australia and apply offshore. The waiver was introduced to provide flexibility for the Minister where compelling circumstances arise, but only where there are reasons of a 'strongly compassionate' nature.[20] The Statement referred to the following circumstances as examples of where a waiver may be justified:

- there are Australian-citizen children from the relationship; or
- the applicant and his or her nominator are already in a long-standing spouse (partner) relationship which has been in existence for two years or longer.

Previous versions of PAM3 had mirrored the examples provided in the Explanatory Statement, as well as suggesting a range of other examples of circumstances that would amount to compelling

[17] PAM3 – Migration Regulations - Div 2.1/Reg 2.03A - Criteria applicable to de facto partners – About Regulation 2.03A – 'Compelling and compassionate circumstances' (re-issue date 10/10/2015) .Interestingly, although of less relevance now, the PAM guidelines for pre-1 July 2009 applications are less detailed and the existence of a dependent child of the relationship is the only example given of 'compelling and compassionate circumstances': see PAM3: Div 1.2/r.1.15A at paragraph 35.3 (re-issue date 9/08/2008).

[18] *Graham v MIMIA* [2003] FCA 1287 (Lee J, 22 October 2003). This was a concession by the Minister (at [8]) that the Court considered appropriate.

[19] cll.820.211(2)(d)(ii) & 826.212(2)(e)(ii). Note that Subclass 826 was removed from 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144), Schedule 1, item [257].

[20] While the Explanatory Statement provides background information, the focus should remain on the wording in cl.820.211(2)(d)(ii). It would be erroneous to ask if there were reasons of a 'strongly compassionate' nature when the wording of the provision asks if there are 'compelling reasons'.

circumstances.[21] However, those examples were removed on 1 July 2014 and the policy guidance now focuses on the circumstances that resulted in the applicant becoming unlawful and emphasises the consideration of whether the circumstances are beyond the applicant's control.[22]

While the circumstances highlighted in PAM3 will often be relevant to the assessment of the waiver, the Tribunal should ensure that consideration of an applicant's 'compelling reasons' are not limited to the circumstances surrounding their unlawful status. It is obliged to consider *all* the circumstances of the case including those arising after visa application and up to the time of decision[23] and any matters put forward by an applicant and determine on the evidence as a whole whether there are compelling reasons for not applying the Schedule 3 criteria.[24] Furthermore, it would appear to improperly limit the circumstances contemplated in cl.820.211(2)(d)(ii) to require that the circumstances are beyond the applicant's control.

Other aspects of the current PAM3 guidance are less problematic. For example, policy indicates that, as a general rule, the existence of a genuine spouse or de facto relationship between the applicant and the sponsoring partner, and the hardship that may be suffered if the parties are separated and the applicant is forced to apply for a partner visa outside of Australia, should not of itself amount to compelling circumstances. There is some support for this position in the judgment of *Sidhu v MIBP*, where the Federal Circuit Court found it was open to the Tribunal to conclude that the fact that the couple had been married (for less than a year) was not of itself a sufficiently compelling reason to justify waiving the Schedule 3 requirements.[25] Additionally, in *Chan v MIBP*, the Federal Circuit Court held that the existence of a long-term relationship does not of itself mean that the Tribunal must find that there are compelling reasons for not applying the Schedule 3 criteria.[26]

Ultimately, whether the circumstances are 'compelling' will be a matter of fact and degree for the Tribunal to determine. In doing so, the Tribunal is required to apply 'his [or her] own mind to the issues raised', engage with the materials for him or herself, evaluate them and to give them genuine consideration. A cursory consideration will not suffice.[27] Further, the purpose of the waiver provision is a relevant consideration for the Tribunal to take into account.[28] In the context of cl.820.211(2)(d)(ii),

[21] See, for example, the PAM3 as at 22/3/2014 provided for a list of examples of compelling circumstances including, inter alia, maternity issues (and age-related maternity issues); extended periods of separation; employment and financial circumstances; impact on step-children; the circumstances in the applicant's home country; and psychological and material hardship.
[22] PAM3 - Migration Regulations - Sch2 Visa 820 - Partner - The UK-820 primary applicant – Eligibility at [8.7] (re-issue date: 19/11/2016). It identifies a list of matters decision-maker should have regard to, including any history of non-compliance by the applicant; the length of time the applicant has been unlawful; the reasons why the applicant became unlawful; the reasons why the applicant did not seek to regularise their status sooner and what steps, if any, the applicant has taken to regularise their status (other than applying for a partner visa).
[23] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016) per Robertson J at [22] and Griffiths J at [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.
[24] *MZYPZ v MIAC* [2012] FCA 478 (Bromberg J, 9 May 2012) at [12]. See also *Sidhu v MIBP* [2014] FCCA 167 (Judge Hartnett, 2 February 2014) at [36] and [37].
[25] [2014] FCCA 167 (Judge Hartnett, 2 February 2014)
[26] [2017] FCCA 2893 (Judge Street, 23 November 2017) at [14].
[27] In *MZYPZ v MIAC* [2012] FCA 478 (Bromberg J, 9 May 2012) at [19]. The Court held that the process required by cl.820.211(2)(d)(ii) entails a duty to consider whether compelling reasons exist. It held that whether it was safe for the appellant to return to Sri Lanka, in the circumstances where there was some probative material indicating that it was unsafe for him to return, was an issue capable of grounding a finding that compelling reasons existed. The Court found that, by rejecting this material on the unstated assumption that because his previous RRT application had been rejected that the material before the Tribunal must also be rejected, the Tribunal failed to engage with this material and give it genuine consideration.
[28] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016) at [26]. In considering the principles in *Monakova v MIMA* [2006] FMCA 849 (Philips FM, 16 June 2006), the Court held that to the extent that *Monakova* might be read as identifying a principle that the Tribunal should disregard circumstances of hardship unless a direct link is manifested of the applicant suffering hardship if required to leave Australia, that would be going beyond the statutory provision and might constitute a misconstruction of the relevant kind (at [32]).

that purpose is to deal with cases where there are compelling reasons for not putting particular applicants to the hardship of having to leave Australia to apply for a partner visa.[29]

Schedule 3 – Timing of Compelling Circumstances

In considering whether there are compelling reasons for not applying Schedule 3 requirements, the Tribunal is required to have regard to circumstances that existed at the time of application and circumstances that arose after the time of visa application.[30]

In *Waensila v MIBP*[31] the Full Federal Court held that Tribunal erred in failing to take into account events or circumstances that emerged after the date of the visa application in considering whether there were compelling reasons for not applying Schedule 3 criteria. The Court observed that the purpose of the waiver is to provide greater flexibility to respond to compelling circumstances[32] and the text of the relevant provisions in cl.820.211(2)(d)(ii) do not contain any clear words that have the effect of confining that consideration to events which only existed at the time of the visa application.[33]

'Waiver' of regulations 1.20J, 1.20KA and 1.20KB sponsorship limitations

The approval of sponsorships for all subclasses of partner visas is subject to certain limitations on sponsorships contained in r.1.20J and r.1.20KA. The approval of sponsorships for partner visas and child visas is also subject to limitations on 'sponsors of concern' as defined in r.1.20KB.

Regulation 1.20J - Limitation on serial sponsorship

Regulation 1.20J is concerned with preventing serial sponsorship. It allows sponsorship approval in circumstances where a sponsor has successfully sponsored more than one partner, only 'if the Minister is satisfied that there are compelling circumstances affecting the sponsor'.[34] In this provision the compelling circumstances must specifically affect the *sponsor*. For further detail on the nature of the sponsorship limitations, see MRD Legal Services Commentary: Limitation on Sponsorships.

The legislative intention of this provision can be found in the Explanatory Statement which indicates that the Minister can approve sponsorships or nominations if 'compelling circumstances' exist.[35] These include:

- the previous spouse or interdependent partner has died;
- the previous spouse or interdependent partner has abandoned the sponsor or nominator, and there are children requiring care and support;
- the new relationship is long-standing;[36] or

[29] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016) at [18], citing Griffiths J in *Waensila v MIBP* [2016] FCFAC 32.
[30] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016).
[31] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016) per Robertson J at [22] and Griffiths J at [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.
[32] *Waensila v MIBP* [2016] FCAFC 32 per Dowsett J at [2], Robertson J at [18] and Griffiths J at [56].
[33] *Waensila v MIBP* [2016] FCAFC 32 per Dowsett J at [2], Robertson J at [16] and Griffiths J at [58].
[34] r.1.20J(2).
[35] Explanatory Statement to SR 1996 No. 211.
[36] What is a reasonable period for the purpose of defining 'long-standing' will depend on the evidence, the circumstances of each case and the nature of the hardship/detriment that would be suffered if the sponsorship/nomination were not approved. While the length of the relationship should be 'long-standing', this period of time per se should not be the determinative factor but ought to draw its significance from a number of other factors relevant to the case. Guidance may be drawn from the

- there are dependent children of the new relationship.

These points have been incorporated into PAM3 in relation to this provision.[37] These examples are not exhaustive and the Tribunal should consider the individual circumstances of each case, taking account of the fact that the purpose of the sponsorship limitation is to prevent abuse of the partner/fiancé migration provisions. PAM3 also identifies the following as relevant when considering waiving the bar on repeat sponsorship:

- the nature of the hardship/detriment that would be suffered (by the sponsor) if the sponsorship were not approved;

- the extent and importance of the ties the sponsor has to Australia, and the consequent hardship/detriment that would be suffered if the sponsorship were not approved and the sponsor were to feel compelled to leave Australia to maintain their relationship with the applicant.[38]

The meaning of 'compelling circumstances' in the context of r.1.20J was considered by the Full Federal Court in *Babicci v MIMIA*.[39] The Court held that 'on any view of the meaning of [compelling], the circumstances must be so powerful that they lead the decision-maker to make a positive finding that the [provision] should be waived'.[40]

In *Nagaki v MIBP* the Court identified particular circumstances which *of themselves* could not constitute compelling circumstances in the context of r.1.20J:

- The genuineness of the relationship between the applicant and sponsor could not, in and of itself, constitute a compelling circumstance affecting a sponsor. The Court commented that, were it otherwise, every applicant who demonstrated that they were a spouse for the purposes of cl.820.211(2)(a) would fall within the exception in r.1.20J(2).[41]

- An applicant's entitlement to fast-track the process of obtaining a Partner (Residence) visa on the basis of being in a partner relationship for three years or longer within the definition of 'long-term partner relationship in r.1.03, cannot amount to a compelling circumstance affecting the sponsor for r.1.20J(2). The definition of long-term partner relationship in r.1.03 has no statutory relevance or application for the purposes of r.1.20J(2).[42]

However, this is not to say that the existence of a genuine long term relationship could not form part of the circumstances which the decision-maker may find amount to compelling circumstances affecting the sponsor. The obligation upon the Tribunal is to consider the claims put forward by the applicant and whether it is satisfied that those circumstances are compelling circumstances affecting the sponsor.

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definition of 'long-term partner relationship' in r.1.03, which is included in cll.100.221(5) and 801.221(6A). It refers to a spouse or de facto relationship of not less than 3 years, or not less than 2 years if there is a child (other than a step-child) of both parties.

[37] PAM3 - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing Reg. 1.20J at [7.2] (re-issue date: 18/11/2016).

[38] PAM3 - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing Reg. 1.20J at [7.2] (re-issue date: 18/11/2016).

[39] *Babicci v MIMIA* (2005) 141 FCR 285.

[40] *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The Court found no error in the approach taken by the Tribunal in considering whether each of the circumstances, alone or together, 'compelled' the exercise of the discretion or that it was 'forced or driven to waive the prohibition'. Contrast *Babicci v MIMIA* [2004] FCA 1645 (Moore J, 16 December 2004) at [16]-[17].

[41] *Nagaki v MIBP* [2016] FCCA 1070 (Judge Jarrett, 6 May 2016) at [58].

[42] *Nagaki v MIBP* [2016] FCCA 1070 (Judge Jarrett, 6 May 2016) at [69].

Regulation 1.20KA - Limitation on 'split applications'

Regulation 1.20KA prevents persons who have been granted contributory parent or aged contributory parent visas from sponsoring a pre-existing spouse or de facto partner for a partner or prospective marriage visa for 5 years after the day when the person was granted the contributory parent visa.[43]

However, the sponsorship may be approved:

- if the visa applicant had *compelling reasons*, other than his or her financial circumstances, for not applying for a contributory parent visa at the same time as their spouse or de facto partner; or

- if the visa applicant applied for a contributory parent visa at the same time as the sponsor and withdrew the application before it was granted, the visa applicant had *compelling reasons*, other than his or her financial circumstances, for withdrawing the application for a contributory parent visa.

The purpose of this regulation is to prevent the practice known as 'split applications'. That is, where one member of a married or de facto couple applies for a contributory parent visa claiming that their partner is not migrating, and once he or she is granted a permanent contributory parent visa, he or she sponsors their partner for a partner or prospective marriage visa. The effect of this practice is that the person who migrates on a partner or prospective marriage visa avoids paying the higher visa application charge for a contributory parent visa.[44]

The explanatory statement and Departmental Guidelines set out that *compelling reasons* may include where the visa applicant was unable to migrate with the proposed sponsor due to family illness or other obligations, other than financially-related obligations.[45]

However, consideration should be given to any reasons which are claimed to be compelling and whether the *applicant* was *compelled* to not apply or withdraw their application at the relevant time. It is for the Tribunal to make a judgment as to whether the applicant's reasons were compelling in all the circumstances, as opposed to *the Tribunal* having to be *compelled*.

To achieve the stated purpose, the wording of the regulation specifically excludes the possibility of waiving the limitation on the basis that the applicant's financial circumstances presented a compelling reason not to apply or to withdraw at the relevant time. Consideration of the applicant's inability to pay the fee may therefore be construed as an irrelevant consideration when considering whether to waive the limitation.[46]

For further detail on the operation of this sponsorship limitation, see MRD Legal Services Commentary: Limitation on Sponsorships.

[43] Introduced by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2. It applies to a partner visa application made on or after 1 July 2009.
[44] Explanatory Statement to Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2.
[45] Explanatory Statement to Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2; PAM 3 Migration Regulations - Divisions - Div 1.4B - Limitation on Certain Sponsorships under Division 1.4 - Sponsorship Limitations - Partner (Provisional / Temporary) and Prospective Marriage Visas at [12.2] (re-issue date: 18/11/2016).
[46] While having regard to the sponsor's circumstances has not been specifically excluded, it will depend on the facts of the case whether the applicant and the spouse had intertwined their finances to the extent that regard to the sponsor's finances is inseparable from regard to the applicant's finances.

Regulation 1.20KB – Restrictions on sponsorship where 'sponsor of concern'

Regulation 1.20KB prevents persons[47] who have been charged or convicted of a child sex offence or similar serious offences from sponsoring a spouse or child[48] where any of the applicants are under 18 years at the time of the decision on the application for approval of the sponsorship.[49] The limitation applies to visa applications made on or after 27 March 2010.

The sponsorship limitation does not apply where:

- none of the applicants is under 18 years at the time of the decision for approval of the sponsorship; or
- the sponsor or their spouse or de facto partner was charged with a registrable offence, and that charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; or
- the sponsor or their spouse or de facto partner was convicted of a registrable offence, and the conviction has been quashed or otherwise set aside.[50]

If the limitation does apply, the Minister, or the Tribunal on review, nevertheless retains discretion to approve the sponsorship if:

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, and they have not been subsequently charged with a registrable offence, and there are *compelling circumstances* affecting the sponsor or the applicant;[51] or
- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, has subsequently been charged with a registrable offence but such charge has been withdrawn, dismissed or otherwise disposed of without the recording of the conviction, and there are *compelling circumstances* affecting the sponsor or the applicant.[52]

Compelling circumstances are not defined for the purpose of r.1.20KB. The Explanatory Statement accompanying the regulations introducing the provision does not provide any situations or examples which may be considered as compelling circumstances. Similarly, PAM3 indicates that compelling should be given its ordinary dictionary meaning, and does not provide examples or guidance, other than that it is for the sponsor or applicant to demonstrate compelling circumstances.[53] One important factor to note is that the compelling circumstances may affect the sponsor *or* the applicant for the visa. Other than this, the discussion above under General Principles may assist.

[47] For child visa applications only, this includes the sponsor or the sponsor's spouse or de facto partner.
[48] Specifically r.1.20KB applies to sponsorships for the purposes of Child (Migrant) (Class AH), Child (Residence) (Class BT), Extended Eligibility (Temporary) (Class TK), Partner (Temporary) (Class UK), Prospective Marriage (Temporary) (Class TO) visas, and Partner (Provisional) (Class UF) visas.
[49] Introduced by Migration Legislation Amendment Regulations 2010 (No.2) (SLI 2009, No.116), Schedule 1.
[50] r.1.20KB(2), (7) and (8).
[51] r.1.20KB(4) and (9). Note the wording of r.1.20KB(9)(b) – which appears to refer to *the sponsor* having completed the sentence, rather than the spouse or de facto partner of the sponsor.
[52] r.1.20KB(5) and (10).
[53] See PAM3 – Migration Regulations - Div 1.4 - Form 40 sponsorship – Protection of children – Sponsors of concern – Assessing Sponsorship Applications against reg.1.20KB - Approving sponsorships under reg.1.20KB waiver provisions, at [29] (re-issue date: 9/5/2014).

For further information on the operation of this sponsorship restriction, see MRD Legal Services Commentary: Limitation on Sponsorships.

Compelling reasons for absence from Australia for resident return visas

Eligibility for a Subclass 155 Resident Return visa[54] is tied to specific criteria requiring an applicant to not have been absent for a continuous period of, and/or periods that total, more than 5 years since the applicant last departed Australia, unless there are compelling reasons for that absence.[55]

PAM3 provides the following examples of compelling reasons for any continuous or cumulative absence of 5 years or more since last departing Australia:

- severe illness or death of an overseas family member;
- work or study commitments by the applicant or their partner that are of a professional nature, in circumstances where the acquired experience results in a benefit to Australia;
- the applicant is living overseas in an ongoing relationship with an Australian citizen partner;
- the applicant or the applicant's accompanying family members have been receiving complex or lengthy medical treatment preventing travel;
- the applicant has been involved in legal proceedings such as sale of property, custody, or contractual obligations and the timing was beyond the applicant's control;
- the applicant has been caught up in a natural disaster, political uprising or other similar event preventing them from travel; or
- the applicant can demonstrate they have been waiting for a significant personal event to occur that has prevented them from relocating to or returning to Australia.[56]

However, care must be taken in following these examples. In *Paduano v MIMIA*[57] the Court held that the expression 'compelling reasons for the absence' refers to the applicant's absence and it is the *applicant* who must have been 'compelled' by the reasons for his absence.[58] It is for the Tribunal, therefore, to make a judgment as to whether the reasons for the absence are forceful (and therefore convincing) by reference to some standard of reasonableness such as a reasonable person in the same circumstances as the applicant (as opposed to the Tribunal having to 'be compelled' by the compelling reasons).[59]

[54] Subclass 155 (Five Year Resident Return) is part of the Return (Residence) Visa Class (Class BB). See item 1128, Schedule 1 to the Regulations.
[55] cl.155.212(3)(a) and (b) for applicants outside of Australia; cl.155.212(3A)(b) for applicants in Australia. For further detail about the applicable criteria, see MRD Legal Services Commentary: Resident Return Visas.
[56] PAM3 – Migration Regulations - Sch2 RRV - Resident return visas (RRVs) - BB-155 – Five Year Resident Return – Absence for more than 5 years – compelling reasons for absence (re-issue date: 19/11/2016). In respect of this last dot point PAM3 goes further and suggests that the period of time for any such event would have to be reasonable in its context. For example, a 12 month delay while waiting for a dependent child to complete their schooling or a tertiary qualification is likely to be a decision that a reasonable person, facing the same set of circumstances would make, however waiting to relocate to Australia for several years would not generally be considered to be a decision a reasonable person would make.
[57] *Paduano v MIMIA* (2005) 143 FCR 204.
[58] *Paduano v MIMIA* (2005) 143 FCR 204.
[59] *Paduano v MIMIA* (2005) 143 FCR 204 at [41]. See also *Cirillo v MIBP* [2015] FCCA 2137 (Judge Neville, 14 August 2015). In *Cirillo*, the applicant claimed that he was compelled to remain in Italy for 17 years due to strong family and cultural ties and various events involving close family members. The Court held that the Tribunal erred by finding that *it* was not satisfied the

In considering the meaning of 'compelling' the Court in *Paduano* held that it should not be read narrowly so as to exclude forceful reasons which raise moral necessity.[60] Equally, there is nothing which confines it to reasons incorporating an involuntary element, involving circumstances beyond the applicant's control as suggested by the examples in PAM3.[61]

Additional criteria applicable to unlawful non-citizens and certain bridging visa holders (Schedule 3)

Consideration of 'compelling reasons' also arises in the context of additional criteria which are applicable to unlawful non-citizens and certain bridging visa holders in Schedule 3 to the Regulations:

- For an applicant who has not, on or after 1 September 1994, been the holder of a substantive visa and, on 31 August 1994, was either an illegal entrant or the holder of an entry permit that was not valid beyond 31 August 1994, the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[62]

- For an applicant who ceased to hold a substantive or criminal justice visa on or after 1 September 1994, or who entered Australia unlawfully on or after 1 September 1994 and had not subsequently been granted a substantive visa, then the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[63]

PAM3 states that 'compelling' in this context should be given its normal dictionary definition and then refers to that definition as 'brought about by moral necessity'.[64] However, restricting it to such situations which involve 'moral necessity' arguably imposes a more restrictive test than the ordinary meaning of 'compelling' otherwise does. Accordingly, the Tribunal should consider reasons which are forceful, are convincing as well as those reasons which involve moral necessity in determining if they are compelling or otherwise.

PAM3 also notes that compelling reasons may stem from compassionate factors, the applicant's circumstances or those of another and circumstances beyond the applicant's control (such as serious accident or illness depending upon the circumstances).[65] However, again, the Tribunal should be mindful that the word 'compelling' does not, by itself, necessarily require any of these factors (such as an involuntary element involving circumstances beyond a person's control).[66] The guidelines suggest that all the circumstances of the case, individually and cumulatively, should be considered.

Once compelling reasons have been found to exist, there must be a link between their existence and the granting of the visa insofar as there must be 'compelling reasons for granting the visa. In

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reasons for the applicant's absence from Australia were compelling, when it was *the applicant* who must be compelled. Further, the Tribunal erred in not applying the relevant standard of reasonableness as set out in *Paduano*.

[60] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

[61] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

[62] Criterion 3003(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions.

[63] Criterion 3004(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions. In *Su v MIMIA* [2005] FMCA 107 (Lloyd-Jones FM, 24 February 2005), the Court rejected an argument that the Tribunal should have considered and explored the difficult recent birth of the applicants' son as a 'compelling circumstance' for cl.3004(d) in circumstances where the Tribunal had found the applicant did not satisfy cl.3004(c) relating to factors beyond the applicant's control.

[64] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016)

[65] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).

[66] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

considering this, PAM3 recommends that considering the likely consequences of not granting the visa might assist in this process.[67]

Waiver of Public Interest Criterion 4020

The requirements of cl.4020(1) and (2) may be waived if the decision maker is satisfied that there are:

- compelling circumstances that affect the interests of Australia;[68] or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen[69]

that justify the granting of the visa. However, the waiver provisions do not apply to the identity requirements in PIC 4020(2A) and PIC 4020(2B).[70]

The waiver is a two-staged inquiry:

1) first, the decision-maker needs to consider whether there are compelling circumstances within the meaning of PIC4020(4)(a) or (b), and, if so,
2) the decision-maker must then consider whether to exercise the discretion to waive the requirements of PIC4020, having regard to those circumstances.[71]

The following case law provides guidance as to the operation of the waiver and how the phrases 'compelling' and 'compassionate' operate in the PIC4020 context:

- *Kaur v MIBP* – the Full Court confirmed that the Tribunal is not obliged to apply international treaty obligations, such as the United Nations Convention on the Rights of the Child.[72]
- *Singh v MIBP* - the Court comprehensively examined the elements of PIC4020(4)(b). It held that 'interests' refers to any present or future state of affairs that is or may be of benefit or to the advantage of the relevant person, and that 'circumstances that affect' requires a comparison between the position the relevant person will be in if the visa applicant is granted a visa, with the position the relevant person will be in if the visa applicant is not granted a visa.[73] The word 'compassionate' implies the existence of a person or persons suffering or being distressed, such that circumstances would be compassionate where they induce a decision maker to alleviate the suffering that will be brought about by the visa applicant not being granted by granting the visa, whereas circumstances will be 'compelling' where the position the person will be in if the visa is not granted compared to that they would be in if it were granted are such as to irresistibly urge, force, or oblige the decision-maker to grant the visa.[74] However, the notion that the decision-maker was required to waive PIC4020 once satisfied there were compelling or compassionate circumstances is not correct in light of *Kaur v MIBP* [2017] FCAFC 184.

[67] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).
[68] cl.4020(4)(a).
[69] cl.4020(4)(b).
[70] These provisions were inserted by Migration Amendment (2014 Measures No.1) Regulation 2014, SLI2014 No.32, schedule 1, item [1].
[71] *Kaur v MIBP* [2017] FCAFC 184 (Dowsett, Pagone and Burley JJ, 27 November 2017) at [26].
[72] *Kaur v MIBP* [2017] FCAFC 184 (Dowsett, Pagone and Burley JJ, 27 November 2017) at [22].
[73] *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017) at [29]-[32].
[74] *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017) at [34]-[35].

- *Bi v MIBP* – the failure by the Tribunal to set out any authorities on the meaning of compelling, nor spell out its understanding of the word, did not demonstrate any misunderstanding of its meaning.[75] In addition, the Tribunal was required to engage in an active intellectual process in relation to the matters put forward by the applicant as justifying waiver, and it did so by weighing those matters and accepting they made a contribution to Australia, but concluding they did not reach the standard or level of compelling circumstances in PIC4020(4)(a).[76]

- *Singh v MIBP* - referred to general case law on the meaning of compelling circumstances that might assist decision-making in this context.[77] The review applicant had provided a letter of support from the director of a business, referring to damage to the company that may result from not being able to employ him. The Court noted that the evidence did not address disadvantage to the director personally, or establish that he would suffer any detriment if the appellant were not employed, and the company was not an Australian citizen and found it was open to the Tribunal to conclude that the consequences to the company were speculative and not compelling. The Court commented that 'compelling circumstances' are limited to those which have a special or strong persuasive force,[78] and relied on earlier authorities referring to circumstances 'evoking interest, attention … in a powerfully irresistible way', that 'must be so powerful',[79] or force or drive the decision-maker 'irresistibly' to be satisfied.[80]

- *Vyas v MIMAC* - the Court found no error in the Tribunal's findings that, whilst accepting that it would be disadvantageous to an Australian business to lose the applicant as an employee, it was not a compelling or compassionate circumstance as the cost to the business of recruiting, training and replacing a staff member was an ordinary aspect of the operation of almost all business which occurred on an ongoing basis.[81] The Court also found no error in the Tribunal's finding that, whilst it would be distressing for the applicant and her husband to be separated from their family members in Australia who would be saddened by their departure, it would not have such a 'deleterious' effect such that family members would 'totally break down'.[82]

- *Sharma v MIBP* - the Court found no error in the Tribunal's consideration of 'compassionate or compelling circumstances' in PIC 4020(4)(b).[83] An elderly Australian couple had provided a statement regarding support received from the applicant that they would have to endure physical and emotional hardship if the applicant were to leave Australia. The Tribunal accepted the bond existed but found that the circumstances did not amount to compassionate or compelling circumstances, referring among other things to the judgment in *Vyas* and the circumstances identified in the Explanatory Statement to SLI 2011, No.13, which introduced PIC 4020. The Court found the Tribunal was entitled to have regard to the matters it did.[84]

[75] *Bi v MIBP* [2017] FCCA 2652 (Judge Riley, 1 November 2017) at [22].
[76] *Bi v MIBP* [2017] FCCA 2652 (Judge Riley, 1 November 2017) at [37], distinguishing *Sharma v MIBP* [2015] FCCA 2669 (Judge Emmett, 6 October 2015), where the Court held the Tribunal had failed to actively engage with the claimed circumstances and give reasons for its failure to be satisfied that PIC4020(1) should be waived. The Court did not consider whether *Sharma* was wrongly decided.
[77] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [21]-[24].
[78] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [20].
[79] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [21]-[22], citing *Babicci v MIMIA* [2014] FCA 1645 *and Babicci v MIMIA* (2005) 141 FCR 285.
[80] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [23]-[24], citing *Plaintiff M64/2015 v MIBP* [2015] HCA 50.
[81] *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013).
[82] *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013).
[83] *Sharma v MIBP* [2016] FCCA 961 (Judge Emmett, 4 May 2016).
[84] *Sharma v MIBP* [2016] FCCA 961 (Judge Emmett, 4 May 2016) at [53].

- *Mudiyanselage v MIAC* - the Court found no error in the Tribunal's acceptance of the applicant's claims to have worked unpaid for over a year and to have been a victim of fraud and noted her position as a graphic pre-press tradesperson at Australia Post but, having regard to the ordinary meaning of the terms 'compassionate' and 'compelling' and relevant departmental policy, found these factors did not constitute compelling and compassionate circumstances that affected the interests of Australia or of an Australian citizen, permanent resident or eligible New Zealand citizen.[85]

- *Ibrahim v MIBP* – the Court found no error in the in the Tribunal's finding that meeting one of the primary criteria for the grant of the visa will not, of itself, be sufficient to demonstrate compelling or compassionate circumstances that justify waiver of PIC 4020(1).[86] While the Tribunal accepted that the review applicant wanted the visa applicants to join him in Australia where he could care for them, the Tribunal found that this reason did not go beyond the requirements for the grant of the visa, which required that the visa applicants be the orphan relatives of the review applicant. The Tribunal should, however, be wary of making statements that a certain circumstance could never be a compelling or compassionate circumstance.[87]

Further guidance on circumstances that may amount to compelling or compassionate circumstances may be found in Department policy and in the Explanatory Statement to SLI 2011, No.13. Although not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances.[88] Additional information on the Departmental Policy and the Explanatory Statement can be found in the MRD Legal Services Commentary on '[PIC 4020 and bogus documents/false or misleading information]'.

Ultimately, whether a circumstance or reason is compelling and/or compassionate is a question of fact and degree for the Tribunal.[89] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in PIC 4020(4) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen. The Tribunal is obliged to consider all the circumstances of the case including *any* matters put forward by an applicant, engage in an active intellectual process in relation to these matters, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances. If satisfied that there are compelling and/or compassionate circumstances, only then can the Tribunal consider those circumstances in the application of the discretion to waive the requirements of PIC4020(1) and (2) as the case may be.

[85] *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012 at [38]–[50]), upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court on appeal did not consider exceptional circumstances in the waiver provisions.
[86] *Ibrahim v MIBP* [2017] FCCA 882 (Judge Jarrett, 3 May 2017) at [86] and [98].
[87] In *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017), the Court found the Tribunal had erred by incorrectly construing PIC4020(4)(b) as excluding from the notion of compassionate or compelling circumstances the emotional bonds and support the partner visa applicant and sponsor each other because it regarded these matters to be the hallmarks or usual incidents of a genuine partner relationship: at [56].
[88] *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012 at [43]) where the Court noted it was open for the Tribunal to be guided by Department policy. This was upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court in this case did not have regard to the question of exceptional circumstances in the waiver provisions. See PAM3 - Migration Regulations - Schedules - Sch4 - 4020 - The integrity PIC - Discretion to Waive - PIC 4020(4) (re-issue date: 19/5/2016).
[89] See e.g. the comments in *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [18] to the effect that the PIC 4020 waiver depends on the satisfaction of the Tribunal and the assessment of the facts is a matter for the Tribunal.

Compelling Reasons for Refugee and Humanitarian Visa Grant

Although not reviewable by the Tribunal, 'compelling reasons' has been the subject of judicial consideration in the context of the criterion in cl.202.222 for Refugee and Humanitarian (Class XB) (Subclass 202) visas. This consideration provides some guidance in relation to the 'compelling reasons' requirement in similar statutory contexts.

In *Plaintiff M64/2015 v MIBP*[90] the High Court was asked to consider the proper construction and operation of cl.202.222(2) and in particular, the role of the consideration of subparagraphs 202.222(a)-(d). Specifically, cl.202.222 requires that 'there are compelling reasons for giving special consideration to granting' the visa having regard to the four factors in cl.202.222(2)(a)-(d). The majority of the Court drew a distinction between the nature of the decision entrusted to the Minister as not being a 'determination' but, rather, 'satisfaction'. They held that state of satisfaction must be informed by the factors mentioned in pars (a) to (d), to which the Minister must have regard in making the single evaluation required in order to grant a Subclass 202 visa.[91] However, the state of mind required must be one reached by reference to 'reasons' that are 'compelling'. In outlining what this meant, the Court held that those reasons must 'force or drive the decision-maker' 'irresistibly' to be satisfied that 'special consideration' should be given to granting the particular application.[92]

Public Interest Criterion 4013

Applicants for certain visas must meet PIC 4013. In general terms, PIC 4013 cannot be satisfied by a visa applicant who has had a visa cancelled less than 3 years before the date of application, unless the Minister is satisfied that, in the particular case:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa within 3 years of the cancellation.

There has been limited consideration of compelling circumstances affecting the interests of Australia in this context.[93] In *Anupama v MIAC* [94] the Court held that the Tribunal should have considered whether the Department had committed a civil wrong by giving negligent advice to the applicant and, if so, whether it was a compelling circumstance affecting the interests of Australia to remedy that wrong.[95] In contrast in *Wang v MIAC*[96] the Court found no error in the Tribunal's conclusion that applicant's claims to suffer mental illness and to have contributed an economic benefit to Australia in the form of school fees and future taxes, did not constitute compelling circumstances or affect the

[90] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment, 17 December 2015).
[91] *Plaintiff M64/2015 v MIBP* [2015] HCA 50; French CJ, Bell, Keane and Gordon JJ at [30].
[92] *Plaintiff M64/2015 v MIBP* [2015] HCA 50; French CJ, Bell, Keane and Gordon JJ at [31], citing *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 285 at 289 [21] ('force or drive the decision-maker') and *Paduano v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 204 at 211 [32], 213 [37] ('irresistibly').
[93] See *Anupama v MIAC* [2009] FMCA 817 (Driver FM, 10 September 2009) at [31]. The Court held that the exercise of the discretion miscarried because the Tribunal asked itself the wrong question. In the circumstances of that case, the applicant had claimed to the Tribunal that she had been incorrectly advised by the Department, and the Tribunal's findings were open to be interpreted as an acceptance of that account.
[94] [2009] FMCA 817 (Driver FM, 10 September 2009)
[95] *Anupama v MIAC* [2009] FMCA 817 (Driver FM, 10 September 2009) at [31].
[96] [2009] FMCA 865 (Turner FM, 16 September 2009).

interests of Australia.[97] For a more detailed discussion, see MRD Legal Services commentary: Public Interest Criterion 4013.

Other references to 'compelling and/or compassionate'

Most consideration of 'compelling and/or compassionate' circumstances is based on express provisions in the Act or the Regulations However, there are circumstances where these considerations are implied in the Regulations, for example, in the proper approach to the exercise of some discretions. These include the discretion to waive the health criterion[98] (implied by case law), and the discretion to cancel a visa (implied by reference to case law and policy).[99]

Public Interest Criterion 4007 – Health Waiver

Public Interest Criterion 4007 (health requirements) may be waived if the Minister is satisfied that the granting of the visa would be unlikely to result in '**undue cost to the Australian community or undue prejudice to access to health care or community services**'.

The Full Federal Court has held that 'over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play.'[100]

PAM3 reflects that in assessing whether there is a basis to waive the 4007 health criteria, decision-makers should take into account any compelling and compassionate circumstances of the applicants, for example, close family links to Australia and/or reasons why the family would find it difficult to return to their home country.[101] For further information in relation to the health waiver, see MRD Legal Services Commentary: Health Criteria.

Cancellation of visas under s.116

The discretion to cancel a visa under s.116 of the Act arises if certain grounds for cancellation are found to exist. In some cases the grounds incorporate legislative considerations of 'compelling reasons', for example, s.116(1)(fa) permits the cancellation of a student visa if the visa holder is not or is likely not to be, a genuine student or is engaging in conduct not contemplated by the visa and the regulations provide that the decision-maker, in considering whether this ground exists, may have

[97] *Wang v MIAC* [2009] FMCA 865 (Turner FM, 16 September 2009) at [31]. The Court also held that there was no substance in the applicant's argument that the risk factors in PIC 4013(2) did not apply because his previous visa was cancelled after he made an application for a new visa. In this regard it held that it was open for the Tribunal to find that the overlap of visa application and visa cancellation did not amount to compelling or compassionate circumstances that would impact on any other institution or person beyond the applicant himself.

[98] PIC 4007(2)(b)(i)-(ii).

[99] For further detail on considerations relevant to the discretion to cancel a visa see MRD Legal Service commentaries: Cancellation under s.109 and Cancellation under s.116.

[100] *Bui v MIMA (*1999) 85 FCR 134 at [47]:'The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is 'undue' may import consideration of compassionate or other circumstances. It may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person will make some significant calls upon health or community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandates such an outcome. But over and above the consideration of the likelihood that the cost or prejudice will be "undue" there is the discretionary element of the Ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play'.

[101] PAM3 – Migration Regulations - Sch4/4005-4007 – The health requirement - Health waivers – The PIC 4007 health waiver – what does 'undue' mean? (re-issue date 14/10/2016).

regard to matters including where the education-provider deferred enrolment because of compelling or compassionate circumstances and the Minister is satisfied those circumstances have ceased to exist.[102]

In other cases, there are no legislative provisions referring to compelling or compassionate reasons/circumstances, but there are references to compelling and/or compassionate circumstances in PAM3 policy relating to the exercise of the discretion to cancel a visa on specified grounds. For further information about the various policy considerations, in particular whether policy is to consider 'compelling', 'compassionate', 'compelling *and* compassionate' or 'compelling *or* compassionate' reasons/circumstances, refer to the current PAM3 policy for the applicable ground of cancellation. See also MRD Legal Services commentary: Cancellation under s.116.

Relevant Case Law

Al Souhmarani v MIBP [2016] FCCA 2866	Summary
Anani v MIMAC [2013] FCCA 1140	
Antipova v MIMIA [2006] FCA 584; (2006) 151 FCR 480	Summary
Anupama v MIAC [2009] FMCA 817; (2009) 112 ALD 564	Summary
Babicci v MIMIA [2005] FCAFC 77; (2005) 141 FCR 285	Summary
Babicci v MIMIA [2004] FCA 1645;	Summary
Bi v MIBP [2017] FCCA 2652	
Boakye-Danquah v MIMIA [2002] FCA 438; (2002) 116 FCR 557	Summary
Bojanovic v MIMIA [2002] FCA 113; (2002) 124 FCR 416	Summary
Bozanich v MIMIA [2002] FCA 81	Summary
Bui v MIMA [1999] FCA 118; (1999) 85 FCR 134	
Chan v MIBP [2015] FCCA 47	Summary
Chan v MIBP [2017] FCCA 2893	
Cirillo v MIBP [2015] FCCA 2137	Summary
MIMA v Dunne [1999] FCA 204; (1999) 94 FCR 72	
Gayudan v MIAC [2010] FMCA 233	
Graham v MIMIA [2003] FCA 1287	Summary
Hamoud v MIBP [2015] FCCA 1087	
Ho v MIMIA [2005] FMCA 1104	
Ibrahim v MIBP [2017] FCCA 882	Summary
Kaur v MIBP [2017] FCAFC 184	Summary
Khanfer v MIMIA [2003] FMCA 238	Summary
Liu v MIAC [2010] FMCA 60	Summary
Liu v MIBP [2015] FCA 1368	
Mala v MIMIA [2005] FMCA 556; (2005) 189 FLR 341	

[102] s.116(1A) and r.2.43(1C) and (1D).

Mao v MIMIA [2005] FMCA 89	
McNamara v MIMIA [2004] FCA 1096	
Monakova v MIMIA [2006] FMCA 849	Summary
Mudiyanselage v MIAC [2012] FMCA 887	Summary
Mudiyanselage v MIAC [2013] FCA 266; (2013) 211 FCR 27	Summary
MZYPZ v MIAC [2012] FCA 478	Summary
MZYPZ v MIAC [2011] FMCA 531	Summary
Nagaki v MIBP [2016] FCCA 1070	Summary
Neofotistou v MIMIA [2005] FCA 919; (2005) 144 FCR 478	Summary
Paduano v MIMIA [2005] FCA 211; (2005) 143 FCR 204	Summary
Phan v MIAC [2007] FMCA 88	Summary
Plaintiff M64/2015 v MIBP [2015] HCA 50	
Schaap v MIMIA [2000] FCA 1408; (2000) 63 ALD 65	
Sharma v MIBP [2016] FCCA 961	Summary
Sidhu v MIBP [2014] FCCA 167	
Singh v MIBP [2016] FCA 156	
Singh v MIBP [2017] FCCA 2461	Summary
Su v MIMIA [2005] FMCA 107	Summary
Thongpraphai v MIMIA [2000] FCA 1590	
Terera v MIMIA [2003] FCA 1570; (2003) 135 FCR 335	
Waensila v MIBP [2016] FCAFC 32	Summary
Wang v MIAC [2009] FMCA 865	

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The ‘Continues to Satisfy’ Criterion

CONTENTS

Overview

A visa applicant may be required to demonstrate at the time of decision that he or she 'continues to satisfy' or 'continues to meet' certain time of application requirements for the grant of a visa. In these circumstances, the question arises whether these phrases require continuity from the time of application until the time of decision. The answer depends on the construction of the particular provision, but generally will fall within one of two possible scenarios:

- the visa applicant must satisfy the relevant criteria **at all times** from the time of application to the time of decision without interruption; or
- the applicant must satisfy these requirements **both** at the time of application and at the time of decision (i.e. an interruption is contemplated).

The judicial consideration of these two constructions outlined in this commentary indicates that which interpretation applies in a particular case depends upon the content and context of the criterion being considered.

The 'continues to satisfy' criterion and similar expressions

The expression 'continues to satisfy' is used in the context of a time of decision criterion for the grant of several visa subclasses.[1] The word 'continue' or 'continues' also arises in several other contexts in relation to visa criteria and visa conditions. The related form 'continuing' is used within the Act and Regulations[2] as are synonyms such as 'throughout'.[3] Similarly, the phrase 'continues to meet' appears in the Act and Regulations,[4] and, in the absence of any contrary intention, the expression may be construed in the same manner as 'continues to satisfy', with no distinction being made in the ordinary meaning of the words 'meet' and 'satisfy'. The related expressions 'continue to be' and 'continues to be in force' are also used in relation to other statutory requirements such as visa conditions and nomination and sponsorship requirements.[5]

The expression 'continues to satisfy' a criterion is not defined in the *Migration Act 1958* (the Act) or in the Migration Regulations 1994 (the Regulations) and the nature of the requirement will vary depending upon the particular grammatical form[6] and context in which it arises.[7] Accordingly, as a

[1] The expression 'continues to satisfy' is a time of decision requirement within several visa subclasses. For example, an applicant 'continues to satisfy the criterion set out in clause 070.211': cl.070.221. Note also that several time of decision criteria apply where an applicant 'would continue to meet the requirements' of a time of application subclause except an acceptable intervening event occurred such as death or cessation of the relationship: cl.820.221(2)(a) and (3)(a).
[2] For example, that a married relationship is 'genuine and continuing' (s.5F(2)(c)) or a carer must be willing and able to provide 'substantial and continuing' assistance (r.1.15AA(1)(f)).
[3] The word 'throughout' in the expression 'throughout the period of 12 months immediately preceding the making of the application' of Item 7170 then in force was interpreted to mean 'from the beginning to the end of': *Yu v MIAC* [2007] FMCA 153 (Smith FM, 23 March 2007) at [22]. This required satisfying the specified tests over the full period of 12 months preceding the visa application and not satisfying those tests on each moment of time during that twelve month period.
[4] For example, cl.143.221 requires that the applicant 'continues to meet the requirements set out in clause 143.211'.
[5] For example, cl.309.222 requires that at the time of decision, the sponsorship of a spouse for a Partner visa must be 'still in force'. Similarly, condition 8516 requires that the holder must 'continue to be' a person who satisfied the primary or secondary criteria for the grant of the visa.
[6] This includes, for example matters such as tense. In *Opoku-Ware v MIBP* [2015] FCCA 1638 (Judge Lloyd-Jones, 19 June 2015) the Court held that the present tense of the verb 'continues' used in cl.101.221(2)(b) was relevant in determining that the applicant must be still undertaking studies at the time of decision (at [78]).
[7] For example, the expression 'continues to satisfy the criteria for approval' was considered in *Huang v MIBP* [2014] FCCA 1581 (Judge Manousaridis, 22 July 2014) at [19] in the context of cl.856.221(1)(c), which required that, at the time the decision was made, the decision maker was satisfied that the appointment that had been previously approved 'continues to satisfy the criteria for approval'. In this case, a five year sponsorship bar had been imposed on the sponsoring employer pursuant to s.140M(2) between the date of application and the Tribunal's decision. This barred the sponsor from making future applications for approval as a sponsor in relation to prescribed visa classes. In considering whether the sponsor 'continued to satisfy the

starting point, regard should be had to the ordinary meaning of the words. In this regard, the Macquarie Dictionary (3rd ed.) defines the word 'continue' in part as follows:

> *Continue – 1. to go forwards or onwards in any course of action; keep on. 2. to go on after suspension or interruption. 3. to last or endure. 4. to remain in place; abide; stay. 5. to remain in a particular state or capacity …*

The definition includes the concept of going on or resuming after an interruption (in other words, continues to) as well as remaining in existence (in the sense of continuously, or without interruption). These two possible meanings affect the interpretation of relevant legislative requirements.

However, it is important when considering the meaning of the particular expression in question, that the decision maker has regard to the statutory context and, where relevant, the purpose of the criteria in question to determine whether an applicant 'continues to satisfy' a particular criterion.[8] In this regard, when interpreting an Act or a Regulation, the construction that would promote the purpose or the object underlying the Act or Regulation is to be the preferred interpretation.[9] Reference could be made where permissible to the legislative intent behind the criteria evidenced in extrinsic materials such as explanatory memoranda.[10] Examples of the judicial approaches to the construction of this phrase are outlined below.

Judicial interpretations of the 'continues to satisfy' requirement

The expression 'continues to satisfy' has been judicially considered in different contexts, with the Courts emphasising that the meaning to be attributed to the phrase will depend upon the particular statutory context in which it appears.[11] Whether certain facts or circumstances must exist for a period leading up to and including the relevant time will depend on the wording of the particular criterion.

To that extent, it is necessary, as a starting point, to have regard to the criterion or criteria to which the phrase is directed. It will not be possible for the Tribunal to ask and answer the question to be posed by the 'continues to satisfy' criterion without determining what were the relevant criteria which the applicant is required to continue to satisfy. For example, in *Ismail v MIAC* the Court considered whether the Tribunal had correctly applied cl.421.230 which required that 'there is no reason to believe that the applicant does not continue to satisfy the primary criteria for the grant of a Subclass 421 visa'. In finding the Tribunal had correctly focused on the criterion in cl.421.230, the Court observed that it was not possible for the Tribunal to ask and answer the question to be posed by clause 421.230 without determining what was the relevant primary criteria which the appellant

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criteria for approval', the Court held that this meant that although the employer may have satisfied the criteria specified in r.5.19(1C)(a) at the date of application, the employer must remain in a position to satisfy the same criteria at the time a decision is made to grant or not to grant an Employer Nomination visa. The employer was not, at the time the Tribunal made its decision, in a position to satisfy r.5.19(1C)(a)(iii).

[8] For example, in determining the meaning of the phrase 'continue to be a person who would satisfy the primary or secondary criteria' in condition 8516, the Court in *Singh v MIBP* [2015] FCCA 2998 (Judge Smith, 27 November 2015) found it helpful to understand the purpose of the overall condition. The Court found a number of contextual considerations, including the class and subclass of visa applied for, suggested that the purpose of condition 8516 is to ensure that a visa holder remains in Australia for the same purpose for which the visa was granted, which was, in that case, to undertake higher education studies. The purpose of having and granting student visas is not simply to have non-citizens enrolling at the moment of being granted a visa but, rather, to continue that enrolment in order to attain a higher education. Having regard to that purpose, the Court found no error in the Tribunal's use of the word 'maintain' in considering whether the applicant had breached condition 8516: at [52] – [58]. Affirmed in *Singh v MIBP* [2016] FCA 679 (Buchanan J, 8 June 2016).

[9] Section 15AA, *Acts Interpretation Act 1901* (Cth).

[10] Section 15AB, *Acts Interpretation Act 1901* (Cth).

[11] See for example *Opoku-Ware v MIBP* [2015] FCCA 1638 (Judge Lloyd-Jones, 19 June 2015); *Liang v MIAC* (2009) 175 FCR 184 at [47]; and *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) at [80].

continued to satisfy. In this case that criterion was that he had 'an established reputation in the field of sport'.[12]

That said, two distinct constructions of this requirement have emerged depending upon the particular context:

- the first construction requires that applicants simply satisfy the criterion at two distinct points in time, first at the time of application and then again at the time of decision;
- the second construction requires a visa applicant to satisfy the relevant criteria at all times without interruption.

It has been suggested that the first interpretation may apply where the word 'continues' refers to a status which has a temporal condition whereas the latter applies for an activity-based criterion carrying with it no temporal limitation.[13] The two constructions differentiate between focusing on a visa applicant's activities, which must continue at all times without interruption,[14] and focusing on a visa applicant's status at two different points in time.[15] However, no overarching rule is to be applied and the statutory context is not required to be determined by the concepts of status or activity.[16] As a result, although this may be a useful way of categorising some of the differences in the text of particular provisions, as discussed below courts have in practice had regard to several other considerations, such as the language, tense, purpose, drafting history and the overall context, including the presence of words such as 'maintained' or 'continuously' when determining their meaning.[17]

The first construction: satisfying criteria at two points in time

The most common approach reflected in the case law is to consider the 'continues to satisfy' requirement as meaning that applicants need only satisfy the relevant criteria at two points in time: first at the time of application and again at the time of decision. Any change in status, conditions or circumstances after the time of application is permitted provided the relevant criteria for the grant of the visa are satisfied at the time of decision. This construction has been applied to cl.806.221[18] and cl.840.221.[19]

For example, cl.806.221 requires that at the time of decision the applicant 'continues to satisfy' the criteria in cl.806.213. Relevantly, cl.806.213 required that at the time of application the applicant was a special need relative of a settled Australian citizen, permanent resident or eligible New Zealand citizen. The Federal Court in *Xiang v MIMIA* observed that the meaning of the word 'continues' could not be considered in isolation and its meaning must be gathered from the context:

> *The context is that a visa applicant must be a 'special need relative' both at the time of application, and at the time of decision, to satisfy that criteria. It will be remembered that a*

[12] *Ismail v MIAC* (2009) 112 ALD 99 at [28].
[13] *Xiang v MIMIA* (2004) 81 ALD 301 at [9] – [10]; *Liang v MIAC* (2009) 175 FCR 184 at [42], [46] – [47], [50].
[14] For example as considered in *Rao v MIMA* [2001] FCA 1755 (Allsop J, 11 December 2001) and *Liang v MIAC* (2009) 175 FCR 184 at [47].
[15] For example, in *Xiang v MIMIA* (2004) 81 ALD 301 at [9].
[16] *Xiang v MIMIA* (2004) 81 ALD 301 at [9].
[17] For example, the majority's conclusion in *Shahi v MIAC* (2011) 246 CLR 163 that cl.202.221 does not engage with any of the requirements in cl.202.211(1)(b) turned on a close examination of the provisions in question as well as their language, drafting history and statutory context. See also *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) where the Court closely examined the language, context and purpose of cl.101.213(1)(c) and cl.101.221(2)(b) and found that the Tribunal misapplied these criteria by requiring the applicants to be involved in continuous study until the time of decision.
[18] *Xiang v MIMIA* (2004) 81 ALD 301.
[19] *Cheung v MRT* (2004) 141 FCR 243.

> *special need relative is defined as a relative who is willing and able to provide the requisite assistance to an Australian or New Zealand citizen or resident. The first point to note is that the word to be construed is the verb 'continues' and not the adjective 'continuing'. Second, it is plain that the word 'continues' is not concerned with any activity on the part of the visa applicant, but rather with the applicant's status; a status which has a temporal condition.*[20]

Accordingly, the relevant question was whether the applicant was (at the time of application) and still is (at the time of decision) a special need relative. That is to say, the applicant 'continues' that status if the applicant still is a special need relative at the time when the decision is made.[21] In that case, the Court found there was no legal requirement that a person who was a special need relative at the time of application and at the time of decision continued to be so in the intervening period.[22]

The second construction: satisfying criteria at all relevant times without interruption

The second common construction of the 'continues to satisfy' requirement suggests that the relevant criteria must be satisfied at all relevant times from the date of application through to the date of decision without interruption. This interpretation has been found to be applicable, for example, to cl.560.227,[23] cl.845.221[24] as well as to condition 8516.[25]

For example, cl.560.227 specified that, if the application was made in Australia, the applicant 'continues to satisfy' the criterion in cl.560.213. Clause 560.213 provided that, for applications made in Australia, 'the applicant has complied substantially with the conditions to which the visa (if any) held, or last held, by the applicant is, or was, subject'. In *Rao v MIMA,* the Court considered that the perfect tense ('has complied')[26] in cl.560.213 could be imported into a time of decision criterion to allow an assessment of compliance at and *between* the times of application and decision concluding:

> *I do not think that the use of the word 'continues' was intended to limit the enquiry only to the precise date of decision (which might be a date beyond the reach of any material before the delegate or the Tribunal); nor do I think that the use of the word 'continues' was intended to restrict the enquiry to a visa held or which had been held at or before the time of application. No rational purpose consistent with the Act or regulations would be so advanced. Rather, the evident purpose of requiring substantial compliance with conditions attached to visas would be frustrated.*[27]

In other words, the enquiry envisaged for the Tribunal under cl.560.227 concerned compliance with all visas held from the time of application until the time of decision.

A similar approach has been adopted in some business visa cases. For example, cl.845.221 requires at the time of decision that a visa applicant 'continues to satisfy' cl.845.213 to 845.218. Clause 845.213 requires at the time of application, the applicant to have had an 'ownership interest' in one or more established main businesses in Australia for 18 months immediately preceding the application and 'continues to have an interest of that kind'. In *Liang v MIAC* the Federal Magistrates Court held that the visa applicant did not continue to have an ownership interest in a main business of the kind

[20] *Xiang v MIMIA* (2004) 81 ALD 301 at [9].
[21] *Xiang v MIMIA* [(2004) 81 ALD 301 at [10]. The Court noted that this conclusion was 'probably inconsistent' with *Rao v MIMA* [2001] FCA 1755 (Allsop J, 11 December 2001) (which considered cl.560.227) but left the issue unresolved. *Xiang* was considered in *Ignatious v MIMIA* (2004) 139 FCR 254 with respect to an amended definition of 'remaining relative' but did not address the 'continues to satisfy' criterion.
[22] *Xiang v MIMIA* [(2004) 81 ALD 301 at [10].
[23] *Rao v MIMA* [2001] FCA 1755 (Allsop J, 11 December 2001).
[24] *Liang v MIAC* (2009) 175 FCR 184.
[25] *Kumar v MIBP* [2015] FCCA 728 (Judge Street, 26 March 2015).
[26] The use of the perfect tense 'has complied' in *Rao* was distinguished in *Zhang v MIMIA* (2005) 143 FCR 90 where Ryan J emphasised the importance of the particular terms and context and observed that the construction of cl.457.221 considered in that case was not complicated by a requirement that an applicant 'continues to satisfy' the criterion.
[27] *Rao v MIMA* [2001] FCA 1755 (Allsop, J, 11 December 2001) at [24].

nominated *between* the time of application and time of decision.[28] Dismissing an appeal of this decision, Logan J noted in *obiter* that the intention, reflected in the language of cl.845.213(b), is that there should be no gap in the holding of an ownership interest. This was because in addition to the temporal limitation in cl.845.213(a), which looks to the 18 months immediately preceding the application, there is a further and cumulative temporal limitation in cl.845.213(b) that the ownership interest is 'maintained'. Noting that the meaning of 'continues' depends upon context and whether it was used in relation to an activity or a status, the Court distinguished this from the situation in *Xiang v MIMIA* where the Court found 'continues' in that context was used in relation to a status (namely, being a special need relative) and did not require the status be held in the interval between application date and decision date.

This view was more recently supported in *Yang v MIBP*,[29] where the court held that r.1.11 requires that an applicant must continue to hold an ownership interest in the applicable main business/es over a period of two years. In considering this issue, the Court looked at the purpose and overall statutory context of r.1.11 observing at [68]:

> *It is, in my view, clear that the regulation is intended to ensure continuity in the holding of an ownership interest. Such continuity is emphasised by the requirements in regulation 1.11(1)(b) to maintain a direct and continuous involvement in the day to day management of those businesses. The requirement in clause 890.221 that an applicant continue to satisfy clause 890.211 at the time of decision, requires the applicant to continue to satisfy the requirement in light of the limitation on the number of main businesses which can be nominated for the purpose of the Regulations at the time of application. There is nothing 'extreme' or 'arbitrary' in such a construction. Rather, such a construction is consistent with the regulatory requirement for ownership continuity over a two year period prior to application. A similar argument made by the applicant was rejected in relation to a similar regulation in Tung-Liang Liang v Minister for Immigration[30].*

Similarly, in *Liang v MIAC* the word 'continues' was found to relate to an activity that the relevant provision envisioned as continuing in the interval between these dates. His Honour reasoned as follows:

> *If a visa criterion contains a temporal limitation in relation to possession of a particular status at the time of application, a visa applicant who then has that status and who also has that status at the time when the decision in respect of that application is made, necessarily 'continues' to have that status. Furthermore, the visa applicant will 'continue' to have that status at the time of decision irrespective of whatever his or her status may be in the period which elapses after the date of application and before the date of decision. On the other hand, in respect of an activity based criterion carrying with it no temporal limitation, satisfaction at the time of decision that the visa applicant 'continues to' meet that criterion will necessarily require scrutiny of whether that activity was maintained in the interval.*[31]

This construction has also been adopted in relation to compliance with condition 8516, which relevantly requires the applicant continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa.[32] In *Singh v MIBP*[33] the applicant argued that

[28] *Liang v MIAC* [2008] FMCA 966 (Burnett FM, 16 July 2008) at [64]-[66] and [83]-[85]. The applicant is this case did not maintain a direct and continuous involvement in the management of a 'main business' from the time of application to the time of decision because he ceased to have an interest in one main business and commenced involvement with another business two months later.
[29] *Yang v MIBP* [2014] FCCA 1576 (Judge Driver, 14 October 2014).
[30] (2009) 175 FCR 184.
[31] *Liang v MIAC* (2009) 175 FCR 184 at [47]. Logan J at [51] identified cl.845.217 (which requires a person to have overall had a successful business career) as an example of an activity-based criterion carrying no temporal limitation.
[32] *Kumar v MIBP* [2015] FCCA 728 (Judge Street, 26 March 2015). At [6] the Court had regard to the words 'continue to be' and upheld the Tribunal's decision which gave condition 8516 a temporal requirement which required a continuous state of affairs.
[33] [2015] FCCA 2998 (Judge Smith, 27 November 2015).

he could comply with condition 8516 where he had stopped complying with it at one point and had resumed complying with it at a later point in time. Smith J rejected this construction in the context of a Student (Temporary) (Class TU) higher education visa as it 'would have anomalous results' and be inconsistent with the purpose of the condition. The Court said:

> *The purpose of having and granting student visas is not simply to have non-citizens enrolling at the moment of being granted a visa but, rather, to continue that enrolment in order to attain a higher education.*
>
> *For those reasons, the Tribunal's use of the word "maintain" at [10] of its reasons does not reveal any error. It was correct to conclude that, because the applicant was no longer an eligible higher degree student after 8 April 2014, he no longer satisfied the criteria in sub-cl.537.223(1A). The words "maintain" and "no longer" are not contained in condition 8516 but they do bear the same meaning as "continue". Although decision-makers might risk error by failing to adhere to the statutory text, to do so does not necessarily mean that the wrong test has been applied: Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559 at 572.*[34]

'Continues to satisfy' a criterion containing multiple requirements

It may be a time of decision criteria that an applicant is required to continue to satisfy several time of application requirements. These requirements may be expressed as separate criteria or as a number of elements (including alternatives) of a single criterion. As considered below, the 'continues to satisfy' requirement does not mean that only one of the two possible interpretations set out above applies to every requirement in the same way.[35]

'… continues to satisfy the criteria…'

Where a time of decision criterion requires an applicant to continue to satisfy a number of time of application criteria,[36] it may be necessary to determine whether each time of application requirement must continue to be satisfied at the time of decision. Some requirements (e.g. those requiring an applicant to have done something prior to the visa application) will by default continue to be satisfied at the time of decision because they are not capable of varying over time.

For example, in *Cheung v MRT*[37] the Court considered the requirement in cl.840.221 that at the time of decision the applicant 'continues to satisfy the criteria in clauses 840.211 to 840.218'. One of these criteria, cl.840.212, referred to a state of affairs which was maintained in two periods of time in the past. It required that the applicant 'has had' an ownership interest in the qualifying business throughout any two periods of one fiscal year in the four fiscal years immediately preceding the application. The Court found in this case that once these matters are shown to have occurred the criteria are satisfied. Contrasting cl.840.221 with a provision requiring an applicant to *have* an ownership interest at the time of application and for a period preceding that,[38] the Court observed that:

> *Clause 840.221 cannot be read as extending the periods up to and including the time of the making of the application. Although it refers to the criteria continuing to be satisfied, it must be taken to refer only to those criteria which require something to be maintained, for example, the*

[34] *Singh v MIBP* [2015] FCCA 2998 (Judge Smith, 27 November 2015) at [57]-[58].
[35] See, for example *Shahi v MIAC* (2011) 246 CLR 163.
[36] For example, cl.050.221 requires an applicant for a Subclass 050 Bridging visa to continue to satisfy the criteria set out in [time of application] clauses 050.211 and 050.212.
[37] *Cheung v MRT* (2004) 141 FCR 243.
[38] See, for an example of such a provision, *Lobo v MIMIA* (2003) 132 FCR 93 at 98, where the Court considered at [13] a provision which required an applicant to have an ownership interest in one or more established main businesses in Australia for a period of eighteen months immediately preceding the making of the application and it was necessary that the applicant 'continues to have an interest of that kind'.

holding of the visa referred to in cl.840.211 and the commitment to establish an eligible business in Australia referred to in cl.840.217.[39]

'… continues to satisfy the criterion…'

It may be that a time of application 'criterion' - which an applicant is required to continue to satisfy at the time of decision - itself contains a number of requirements. For example, cl.101.221(b) requires certain Subclass 101 (Child) visa applicants to 'continue to satisfy the criterion in cl. 101.213'. Clause 101.213 contains five requirements: that an applicant is not engaged to be married, does not have a spouse or de facto partner, has never had a spouse or de facto partner, is not engaged in full-time work, and has been undertaking full-time study. Some requirements by their language and nature imply a continuous requirement: for example, 'has never had a spouse or de facto partner'. In contrast, cl.101.213(1)(c) when read with cl.101.221(2)(b) does not require an applicant to have been 'continuously involved' in study from the time of commencement of their studies up until the time of decision.[40] The requirement not to be engaged to be married could logically be satisfied at two points in time, even though that requirement may not have been met all times throughout the period, and there is no obvious incongruence with the purpose of the scheme in construing the provision accordingly.

Indeed, the 'continues to satisfy' criterion may not apply to each requirement within the relevant time of application criterion. For example, in considering cl.202.221, which required that an applicant 'continue to meet the criterion' in cl.202.211 and which itself contained a number of requirements, the High Court observed that:

All of the requirements of cl.202.211(2), other than the requirement about membership of the immediate family of the proposer, are requirements that, if met at the time of application, cannot thereafter cease to be met. Or to put the same point positively, the only one of the requirements of cl.202.211(2) satisfaction of which can change over time is the requirement about membership of the immediate family. That requirement can cease to be met by the simple effluxion of time (because the person in question attains the age of 18 years). It can cease to be met because dependency ceases. It can cease to be met because of a change in marital status (by dissolution of a marriage). It can change because there is some change in the relationship between persons that makes one the 'de facto partner' of the other.

…

There is an evident textual awkwardness in reading the requirement of 'continues to satisfy' the criterion as engaging with only one of the several requirements that go to make up the relevant criterion. And that awkwardness is increased when the requirement in question is expressed as 'continues to be' a member of the immediate family. As the plaintiff submitted, the requirement would have to be read textually as being that the applicant 'continues to continue to be' a member of the immediate family of the proposer.[41]

[39] *Cheung v MRT* (2004) 141 FCR 243 at [21]. Clause 840.221 was contrasted with the provision considered in *Lobo v MIMIA* (2003) 132 FCR 93 which required an applicant to have an ownership interest in one or more established main businesses in Australia for a period of 18 months immediately preceding the making of the application and that he or she 'continues to have an interest of that kind'. *Cheung* was overturned on appeal in *Cheung v MIMIA* (2005) 143 FCR 117 on another point and the construction of 'continues to satisfy' not considered.

[40] In *Hussain v MIBP* [2017] FCCA 3247 (Judge Barnes, 20 December 2017) the Court found that the Tribunal erred by adopting this construction (at [114]). For further discussion of *Hussain* and the study requirement for Subclass 101 and 802 visas, please refer to the MRD Legal Services commentary: 'Subclass 101 & 802 - Child visas'.

[41] *Shahi v MIAC* (2011) 246 CLR 163 per French CJ, Gummow, Hayne and Bell JJ at [22], [26]. Heydon J in dissent at [45] indicated that the time of decision requirement cl.202.221 'requires the applicant to continue to satisfy whichever of the matters in [time of application] cl 202.211 are capable of varying over time. It is capable of affecting applicants adversely so far as a matter is capable of varying over time. But it is not capable of affecting applicants adversely so far as a matter is not capable of varying over time, for it is inevitable that the applicant will continue to satisfy the requirement in relation to it'.

The majority concluded that cl.202.221 should not be read as engaging with all of the time of application requirements in cl.202.211 but only the first criterion in cl.202.211 concerning substantial discrimination within the visa applicant's home country. Although this reasoning should be confined to the particular provisions in question, the judgment emphasises the importance of closely examining the specific language of the provision as well as the drafting history and specific statutory context.

Relevant Case Law

Cheung v MRT [2004] FCA 1725; (2004) 141 FCR 243	
Ignatious v MIMIA [2004] FCA 1395; (2004) 139 FCR 254	Summary
Ismail v MIAC [2009] FCA 1187; (2009) 112 ALD 99	Summary
Huang v MIBP [2014] FCCA 1581	Summary
Hussain v MIBP [2017] FCCA 3247	Summary
Kumar v MIBP [2015] FCCA 728.	
Liang v MIAC [2008] FMCA 966	Summary
Liang v MIAC [2009] FCA 189; (2009) 175 FCR 184	Summary
Lobo v MIMIA [2003] FCAFC 168; (2003) 132 FCR 93	Summary
Opoku-Ware v MIBP [2015] FCCA 1638	Summary
Rao v MIMA [2001] FCA 1755	Summary
Shahi v MIAC [2011] HCA 52; (2011) 246 CLR 163	Summary
Singh v MIBP [2015] FCCA 2998	Summary
Xiang v MIMIA [2004] FCAFC 64; (2004) 81 ALD 301	Summary
Yang v MIBP [2014] FCCA 1576	Summary
Yu v MIAC [2007] FMCA 153; (2007) 209 FLR 470	Summary
Zhang v MIMIA [2005] FCA 693; (2005) 143 FCR 90	Summary

Available Decision Templates

There are no decision templates or optional standard paragraphs specifically addressing the meaning of 'continues to satisfy' as it depends upon the context and content of the particular requirement.

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Eligible New Zealand Citizen

CONTENTS

Overview

In addition to Australian citizens and Australian permanent residents, certain New Zealand citizens, that is, 'eligible New Zealand citizens', are able to sponsor their family members for certain types of visas. The concept of 'eligible New Zealand citizen' is also relevant to other aspects of the migration scheme.[1]

The term 'eligible New Zealand citizen' is presently defined in r.1.03 of the Migration Regulations 1994 ('the Regulations') as a New Zealand citizen who is a protected SCV holder within the meaning of s.7 of the *Social Security Act 1991*. This definition, effective 1 July 2017, reflects the policy intention that eligible New Zealand citizens have the same entitlements as Australian citizens and permanent residents in relation to the sponsorship of family members for Australian visas.[2]

The July 2017 amendments addressed discrepancies between the definition of eligible New Zealand citizen and 'protected Special Category visa holder' under the Social Security Act. In particular, certain New Zealand citizens who commenced residing in Australia in the three months after 26 February 2001 were able to become protected Special Category visa holders but did not fall within the definition of eligible New Zealand citizen. Further, the requirement to meet certain health and character public interest criteria at the time of last entry to Australia was not included in the definition of protected Special Category visa holder. By aligning the definition under the Migration Regulations with the definition under the Social Security Act, any protected Special Category visa holders who were not also eligible New Zealand citizens acquired this status on 1 July 2017.[3]

Prior to 1 July 2017, an eligible New Zealand citizen was defined as a New Zealand citizen who would have met certain public interest criteria (PIC) at the time of his or her last entry to Australia, and was physically present in Australia as a Subclass 444 (Special Category) visa holder on 26 February 2001 or during a specified period before 26 February 2001, or has a certificate issued under the Social Security Act which states that he or she was residing in Australia on 26 February 2001.

This definition was substituted from 27 February 2001[4] to limit the group of New Zealand citizens who are able to sponsor family members to Australia without having first attained permanent residence in Australia. Before this amendment, New Zealand citizens who held a Special Category visa, were usually resident in Australia and met certain public interest criteria at the time of last entry were eligible New Zealand citizens.[5] Most Schedule 2 visa criteria requiring sponsorship before and since the 2001 amendment allow sponsorship by an eligible New Zealand citizen.[6] People who fell within this definition at the time of amendment have generally retained this status. However the definition of eligible New Zealand citizen was substantially narrowed. The amendments did not affect the ability of New Zealand citizens to travel to, live, stay and work in Australia under the Trans-Tasman Travel

[1] For example, public interest criteria (PIC) 4013, 4014 and 4020 of Schedule 4 and special return criteria (SRC) 5002 and 5010 of Schedule 5 to the Migration Regulations 1994, involve consideration of whether there are compassionate or compelling circumstances affecting the interests of an 'eligible New Zealand citizen' as well as Australian citizens and permanent residents when exercising the discretion to grant a visa.
[2] Explanatory Statement, Migration Legislation Amendment (2017 Measures No.3) Regulations 2017 (F2017L00816), 14.
[3] Explanatory Statement to F2017L00816, 15.
[4] r.1.03 as amended by item 1, Schedule 1 to the Migration Amendment Regulations 2001 (No.1) (SR 2001 No.27). The amendment commenced on 27 February 2001: r.2, SR 2001 No.27.
[5] r.1.03 as it stood immediately prior to 27 February 2001.
[6] See, for example, cl.116.212 (for a Carer visa) and cl.309.213 (for a Spouse (Provisional) visa) as in force before and after 27 February 2001.

Arrangement, nor did they affect the issuing and processing of Special Category visas,[7] which are the primary means of New Zealand citizens entering Australia and staying on a temporary basis.[8]

Definition of Eligible New Zealand Citizen

From 1 July 2017, r.1.03 provides that an eligible New Zealand citizen is a New Zealand citizen who is a protected SCV holder within the meaning of s.7 of the *Social Security Act 1991*. The Social Security Act defines a protected SCV holder as follows:

(2A) A person is a protected SCV holder if:
(a) the person was in Australia on 26 February 2001, and was a special category visa holder on that day; or
(b) the person had been in Australia for a period of, or for periods totalling, 12 months during the period of 2 years immediately before 26 February 2001, and returned to Australia after that day.

(2B) A person is a protected SCV holder if the person:
(a) was residing in Australia on 26 February 2001; and
(b) was temporarily absent from Australia on 26 February 2001; and
(c) was a special category visa holder immediately before the beginning of the temporary absence; and
(d) was receiving a social security payment on 26 February 2001; and
(e) returned to Australia before the later of the following:
(i) the end of the period of 26 weeks beginning on 26 February 2001;
(ii) if the Secretary extended the person's portability period for the payment under section 1218C—the end of the extended period.

(2C) A person who commenced, or recommenced, residing in Australia during the period of 3 months beginning on 26 February 2001 is a protected SCV holder at a particular time if:
(a) the time is during the period of 3 years beginning on 26 February 2001; or
(b) the time is after the end of that period, and either:
(i) a determination under subsection (2E) is in force in respect of the person; or
(ii) the person claimed a payment under the social security law during that period, and the claim was granted on the basis that the person was a protected SCV holder.

(2D) A person who, on 26 February 2001:
(a) was residing in Australia; and
(b) was temporarily absent from Australia; and
(c) was not receiving a social security payment;
is a protected SCV holder at a particular time if:
(d) the time is during the period of 12 months beginning on 26 February 2001; or
(e) the time is after the end of that period, and either:
(i) at that time, a determination under subsection (2E) is in force in respect of the person; or
(ii) the person claimed a payment under the social security law during that period, and the claim was granted on the basis that the person was a protected SCV holder.[9]

A determination can be made under ss.7(2E), 7(2F) or 7(2G) of the Social Security Act that a person was *residing in Australia on 26 February 2001*, but was temporarily absent from Australia on that

[7] Created by s.32 of the *Migration Act 1958*. See Special Category (Class TY) at item 1219 of Schedule 1 to the Regulations, and Subclass 444 (Special Category) in Schedule 2 to the Regulations.
[8] These changes to the Regulations were introduced to support the bilateral social security arrangement between the Australian and New Zealand Governments of 1 July 2002. See Joint Prime Ministerial Communique on New Australia/New Zealand Social Security Arrangements, 26 February 2001. The agreement itself is set out in Schedule 4 of the *Social Security Act 1991* as in force at 1 July 2001.
[9] Social Security Act s.7(2A)-(2D).[10] Social Security Act s.7(2E)(a), s.7(2F) and s.7(2G).

day,[10] or that they commenced or recommenced *residing in Australia* during the period of 3 months beginning *on 26 February 2001*.[11] Applications for determinations under s.7(2E) were required to be made by 26 February 2002.[12] For persons who commenced, or recommenced residing in Australia during the period of 3 months beginning 26 February 2001, applications for determinations were required to be made by 26 February 2004.[13]

For applications made before 1 July 2017, an eligible New Zealand citizen was defined in r.1.03 as:[14]

> *a New Zealand citizen who:*
>
> *(a) at the time of his or her last entry to Australia, would have satisfied public interest criteria 4001 to 4004 and 4007 to 4009; and*
> *(b) either:*
> *(i) was in Australia on 26 February 2001 as the holder of a Subclass 444 (Special Category) visa that was in force on that date; or*
> *(ii) was in Australia as the holder of a Subclass 444 visa for a period of, or periods that total, not less than 1 year in the period of 2 years immediately before 26 February 2001; or*
> *(iii) has a certificate, issued under the Social Security Act 1991, that states that the citizen was, for the purposes of that Act, residing in Australia on a particular date.*[15]

The 'particular date' referred to in r.1.03(b)(iii) is 26 February 2001.[16] A 'certificate' issued under the Social Security Act refers to a determination made under ss.7(2E), 7(2F) or 7(2G) of that Act.

At present, there is no judicial or other consideration relating to the definition of 'eligible New Zealand citizen'.

Sponsorship by Eligible New Zealand Citizen

New Zealand citizens who meet the definition of eligible New Zealand citizen are able to sponsor certain family members to Australia without obtaining a permanent residence visa.

Most New Zealand citizens arriving in Australia from 27 February 2001 no longer fall into the definition of eligible New Zealand citizen. As most Schedule 2 visa criteria relating to sponsorship require the sponsor to be an eligible New Zealand citizen, an Australian permanent resident or an Australian

[10] Social Security Act s.7(2E)(a), s.7(2F) and s.7(2G).
[11] Social Security Act s.7(2E)(b), s.7(2F).
[12] Social Security Act s.7(2F)(b)(i).
[13] Social Security Act s.7(2F)(b)(ii).
[14] This version of the definition was inserted by the Migration Amendment Regulations 2001 (No.4) (SR 2001 No.142) and applies to visa applications made on or after 1 July 2001: see r.4(1). It made minor amendments to the definition inserted by the amendments of 27 February 2001 to correct the date in the equivalent to paragraph (b)(i) from 27 February 2001 to 26 February 2001 and re-ordered the paragraphs to ensure the definition correctly reflected the intention that public interest criteria 4001 to 4004 and 4007 to 4009 apply to all New Zealand citizens seeking to come within the definition of eligible New Zealand citizen, not just those that come within the previous definition equivalents to paragraphs (b)(i) and (ii).
[15] The determination of whether a New Zealand citizen was residing in Australia on that date is made by Centrelink, the Department of Human Services, based on a range of criteria set out in the social security legislation associated with whether the person is 'residing in Australia'. Replaced Departmental guidelines stated that this was intended to cover New Zealand citizens who could demonstrate firm plans to relocate to Australia or who had prior residence and intended to return to Australia but who were not in Australia on 26 February 2001, perhaps, for example, due to work commitments: PAM3: Act – Identity, biometrics & immigration status – New Zealand citizens in Australia at [4] (issued 19/09/2008).
[16] Although 'particular date' is not expressly defined in the Regulations or in the Social Security Act, it is clearly ascertainable from s.7 of that Act, which sets out the circumstances in which a certificate will be issued stating that a person is 'residing in' Australia at the relevant time. Section 7(2) of the Social Security Act relevantly defines an 'Australian resident' as a person who is a 'protected SCV holder'. The term 'protected SCV holder' is further defined in ss.7(2A)–(2D), and includes a person in respect of whom a determination is made under s.7(2E), s.7(2F) or s.7(2G). Given that a determination issued under these provisions must state, among other things, that the person was *residing in Australia on 26 February 2001*, or commenced or

citizen, the effect is that most New Zealand citizens arriving in Australia from 27 February 2001 can only sponsor people for immigration to Australia if they become Australian permanent residents or citizens.

Before 1 July 2017, Subclass 444 visa holders who were also eligible New Zealand citizens could sponsor non-New Zealand citizen family members for Subclass 461 (New Zealand Family Relationship) visas. The Subclass 461 criteria were amended on 1 July 2017 to remove this sponsorship ability[17] and align the sponsorship options for eligible New Zealand citizens with those available to Australian citizens and Australian permanent residents.[18]

Public Interest Criteria

Before 1 July 2017, in order to fall within the definition of eligible New Zealand citizen the sponsor must satisfy the decision maker that at the time of his or her last entry into Australia, they would have satisfied public interest criteria (PIC) 4001 to 4004, 4007 and 4009 **and** that they meet **one** of the requirements in subclause r.1.03(b) (as it applied before 1 July 2017). Whether a sponsor satisfies the criteria is a matter of fact for the Tribunal to determine on the material before it. There is no requirement to meet these criteria for applications made on or after 1 July 2017.

The PIC which must be satisfied at the time of the sponsor's last entry to Australia pertain to character (4001); ASIO assessments (4002);[19] determinations by the Foreign Minister (4003 and 4003A); outstanding debts to the Commonwealth (4004); and health (4007). In addition, PIC 4009 requires the decision maker to consider whether the individual intended to live permanently in Australia and if they sought entry as a member of a family unit, whether they could obtain support in Australia from other members of their family.

In relation to PIC 4001 and 4004 Departmental guidelines advise that, whilst the New Zealand citizen must satisfy the decision maker that they would have satisfied the PIC at the time they last entered Australia, in effect the eligible New Zealand citizen seeking to be approved as a sponsor will need to provide current standard character checks when the form 40 (sponsorship for migration form) is lodged.[20] Whilst it is arguable that health and character checks may be indicative of the sponsor's ability to satisfy the relevant requirements at a time in the past, decision makers must ensure that they apply the correct test when considering this criterion and make findings as to whether the sponsor would have satisfied the relevant PIC at the time of their last entry to Australia. The relevant version of the public interest criterion which the Tribunal must be satisfied the person would have met is that in force at the time of the Tribunal's decision.

Whether a person would have met a health criterion at the relevant time is a question of fact for the Tribunal. Whether an opinion of a Medical Officer of the Commonwealth (MOC) is necessary depends on whether the visa application before the Tribunal relates to a temporary or permanent visa, and whether there is information known to Immigration to the effect that the person may not meet any of

recommenced *residing in Australia* during a specified period beginning *on 26 February 2001*, the 'particular date' referred to in r.1.03(b)(iii) of the Regulations is 26 February 2001.
[17] cl.461.212(2)(a) and (b) as amended by F2017L00816, sch 5 item 3.
[18] Explanatory Statement to F2017L00816, 16.
[19] The prescription of PIC 4002 as a criterion for the grant of a protection visa is beyond the power conferred by s.31(3) of the Act and is therefore invalid: *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 (French CJ, Gummow, Hayne, Heydon, Grennan, Kiefel and Bell JJ, 5 October 2012), per French CJ at [71], Hayne J at [221], Crennan J at [399] and Kiefel J at [459]. However, the Court only considered PIC 4002 in the context of protection visa applications and it is not clear whether it would apply in the context of assessing whether a person is an Eligible New Zealand Citizen.
[20] Policy – Migration Regulations – Divisions – Div 1.4 – Form 40 sponsors & sponsorship – Requirements to be met by the Sponsor – New Zealand citizens – Eligible New Zealand citizens (re-issued 16/02/2016).

those requirements.[21] Where the criterion requires sponsorship by an eligible New Zealand citizen, the relevant 'person' referred to in r.2.25A (circumstances in which the Minister must seek the opinion of a MOC) may refer to either or both of the sponsor and the visa applicant.

For additional information relating to public interest criteria 4001 and 4007 please refer to MRD Legal Services commentary 'Public Interest Criterion 4001' and 'Health Criteria' respectively.

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2001 (No.1)	SR 2001 No.27
Migration Amendment Regulations 2001 (No.4)	SR 2001 No.142
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014	SLI 2014 No.65
Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017	F2017L00816

Last updated/reviewed: 8 November 2018

[21] r.2.25A of the Regulations.

Subclass 151 (Former Resident)

CONTENTS

Overview

The Subclass 151 (Former Resident) visa, which is the only subclass in Special Eligibility (Class CB), is a visa enabling persons who have spent most of their childhoods as Australian permanent residents to resume their permanent residence status or to return to Australia. It is available to both onshore and offshore applicants who are former residents. This commentary addresses applications for review in relation to Subclass 151 visas applied for on or after 1 November 2005.[1] For applications made before this date, contact MRD Legal Services.

Merits Review

Subclass 151 (Former Resident) is a permanent visa available to both onshore and offshore applicants from 1 November 2005.[2] The post 1 November 2005 Subclass 151 visa substantially reflects the requirements for the former Subclass 151 visa. It caters for two specific applicant groups: 'long residence applicants' and 'defence service applicants'.

A decision to refuse to grant a Subclass 151 visa where the visa application was made on or after 1

[1] Amendments made on 1 November 2005 by the Migration Amendment Regulations 2005 (No. 9) (SLI 2005 No. 240) collapsed the former Subclass 832 (Close Ties) visa and Subclass 151 (Former Resident) visas into the current Subclass 151 visa.
[2] Migration Amendment Regulations 2005 (No.9) (SLI 2005 No.240), r.12(1).

November 2005 is a Part 5-reviewable decision under s.338(2) of the Act if the applicant is onshore at time of application. The applicant has standing to apply for review in such cases.[3] Alternatively, the decision will be reviewable under s.338(6) if the visa applicant is offshore at the time of application and has a parent, spouse, de facto partner, child, brother or sister who is an Australian citizen or Australian permanent resident. In the latter instance, such relatives have standing to seek review of the decision under s.347(2)(c) of the Act.

Requirements for making a valid application

The requirements for making a valid application for a Special Eligibility (Class CB) visa are contained in item 1118A of Schedule 1 to the Regulations. An application is validly made if:

- it is made on the prescribed form;[4]
- it is made at the prescribed place and in the prescribed manner;[5] and
- the visa application charge is met.[6]

An applicant for a Special Eligibility (Class CB) visa may combine the application with that of a member of a family unit.[7]

Key Visa Criteria

The criteria for a Subclass 151 visa comprise primary and secondary time of application and time of decision criteria. At least one person included in the application must meet the primary criteria, which are outlined below.

Time of application criteria

At the time of application, an applicant must qualify as either a 'long residence applicant' or a 'defence service applicant' as defined in Part 151.1.[8]

A *long residence applicant* means an applicant who:

- spent the greater part of his or her life before the age of 18 in the migration zone as an Australian permanent resident; and
- did not at any time acquire Australian citizenship; and
- has maintained business, cultural or personal ties with Australia; and
- has not turned 45 at the time of application.[9]

A *defence service applicant* means an applicant who:

- has completed at least 3 months continuous Australian defence service; or
- was discharged before completing 3 months service on grounds of medical fitness, where

[3] s.347(2)(a).
[4] Item 1118A(1). For applications made on or after 18 April 2015, the approved form is that specified in an instrument under r.2.07(5): Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34). For applications made before that date, the approved form was specified in Item 1118A(1) itself, namely 47SV.
[5] Item 1118A(3)(a). For applications made before 18 April 2015, the application must be posted or delivered to a specified address: 1118A(3)(a). For applications made on or after this date, the application must be made as specified in a legislative instrument for 1118A(3)(a) under r.2.07(5) and the applicant may be in or outside Australia, but not in immigration clearance: see Item 1118A(3)(aa) inserted by SLI 2015, No.34. For the applicable instrument see the RRV App tab in the MRD Legal Services Commentary: Register of Instruments - Miscellaneous and other visa classes.
[6] Item 1118A(2).
[7] Item 1118A(3)(b).
[8] cl.151.212.
[9] cl.151.111.

the applicant became medically unfit for service or further service because of the applicant's Australian defence service.[10]

Where an applicant in Australia does not hold a substantive visa at the time of application (and did not hold a Subclass 771 (Transit) visa immediately before ceasing to hold a substantive visa), the applicant must satisfy Schedule 3 criterion 3002 (i.e. the application must have been lodged within 12 months of the expiry of their last substantive visa or last unlawful entry into Australia).[11]

Time of decision criteria

At the time of decision the applicant must satisfy the following criteria:

- any requested assurance of support has been accepted.[12] See Legal commentary: Assurance of Support;
- certain public interest criteria - different criteria apply depending on whether the person applies in or outside Australia and whether he or she is a 'long residence applicant' or a 'defence service applicant'.[13] Other members of the applicant's family unit (whether or not they are included in the application) must also satisfy various public interest criteria; [14]
- special return criteria 5001 and 5002 - if the applicant has previously been in Australia.[15] An applicant who is outside Australia at time of decision must also satisfy special return criterion 5010.[16] Other members of the applicant's family unit (whether or not they are included in the application) must also satisfy various special return criteria.[17]
- *for applications made from 1 November 2005 and before 24 November 2012* certain passport requirements.[18]

In relation to the public interest and special return criteria, the criteria that apply to an onshore 'long residence applicant' are the same as a 'defence service applicant'. For example, long residence applicants who are *in* Australia and defence service applicants must satisfy public interest criterion 4007 (the health criterion which includes the waiver provision).[19] This criterion must also be satisfied by members of their family unit, unless the family member is not an applicant for a Class CB visa in which case the Minister (or Tribunal on review) has discretion to require them to undergo assessment.[20]

However, long residence applicants who are *outside* Australia must satisfy public interest criterion

[10] cl.151.111.
[11] cl.151.211.
[12] cl.151.229B.
[13] cl.151.221 - 151.224. Clause 151.221(a) was amended by item [52] of Schedule 2 to the Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256), to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4021 requires either; that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an instrument in writing for cl.4021(a); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl.151.229C which was repealed with effect from 24 November 2012, see item [53] of Schedule 2 to the Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256). The amendment to cl.151.221(a) applies to all visa applications made on or after 24 November 2012.
[14] cl.151.225-228. PIC 4019 (values statement) was inserted by Migration Amendment Regulations 2007 (No.12) (SLI 2007, No.314) to apply to visa applications made on or after 15 October 2007: r.4 and Schedule 1.
[15] cl.151.229 and 151.229A.
[16] cl.151.229A. SRC 5010 relates to holders and former holders of Foreign Affairs (or AusAID) student visas or former student visa holders who are supported financially by a foreign government.
[17] cl.151.225(c), cl.151.226(c), cl.151.227A and cl.151.227B. These provisions were inserted by Migration Amendment Regulations 2005 (No.12) (SLI 2005, No.339) to apply to visa applications made on or after 20 December 2005 or applications made on or after 1 November 2005 that have not been finally determined: r.4(2) and Schedule 3.
[18] For applications made between 1 November 2005 and 23 November 2012, this requirement is found in cl.151.229C. However, this clause was repealed with effect from 24 November 2012 by item [53] of Schedule 2 to the Migration Legislation Amendment Regulation (2012) (No.5) (SLI 2012, No.256). For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl.151.221(a) refers – see above).
[19] cl.151.223.
[20] cl.151.226 and cl.151.227.

4005 (no waiver).[21] This criterion also applies to all their family members, unless the family member is not an applicant for a Class CB visa and the Minister (or Tribunal on review) exercises the discretion to not require the assessment.[22] For commentary on relevant public interest criteria, see MRD Legal Services Commentary Health Criteria – 4005, 4006A & 4007 and Public Interest Criterion 4001 .

Key Issues

Long residence applicant

An alternate time of application criterion for the grant of a Subclass 151 visa is to be a 'long residence applicant'.[23] An applicant meets the requirements of being a 'long residence applicant' if the applicant:

- spent the greater part of his or her life before the age of 18 in Australia as a permanent resident;
- did not at any time acquire Australian citizenship;
- has maintained business, cultural or personal ties with Australia; and
- has not turned 45 at the time of application.[24]

Greater part of his or her life before the age of 18

In order to meet the 'long residence applicant' requirement, the applicant must have spent 'the greater part of his or her life before the age of 18' in Australia as a permanent resident.

Determining the period which represents the greater part of an applicant's life before the age of 18 requires the Tribunal to apply a simple arithmetic, quantitative assessment to conclude that the *greater part of [a person's] life before the age of 18* is at least half of the period from birth to 18 years of age, namely 9 years or more.[25]

Maintained personal, business or cultural ties

The definition of 'long residence applicant' requires an applicant to have 'business, cultural or personal ties' with Australia. What amounts to 'business, cultural or personal ties' is a question of fact for the Tribunal on the evidence before it.[26] The requirement that the applicant 'has *maintained'* such ties implies the forming of these ties prior to departing Australia.

Departmental guidelines provide some guidance with examples as to what may constitute evidence to satisfy this criterion.[27] This includes, but is not limited to:

- frequent correspondence with (and from) relatives and/or friends in Australia
- frequent visits to Australia for business, cultural or personal reasons
- ownership of property in Australia (with evidence also of their ongoing active interest in that property) or
- other economic or business interests in Australia in which the applicant demonstrates an

[21] cl.151.222.
[22] cl.151.225.
[23] A long residence applicant is defined in Part 151.1
[24] The age requirement was inserted by SR 2000, No.62 at the same time as the insertion of the requirements relating to the 'defence service applicant'.
[25] A similar requirement was found in r.55 of the 1989 regulations, and was considered in *Skea v MILGEA* [1994] FCA 1151 (Moore J, 10 June 1994) at paragraph [15].
[26] See *Ji v MIMA* [2001] FCA 904 (Merkel J, 9 July 2001) at [5]-[6]. The Court considered a Resolution of Status (Temporary)(Class UH) Subclass 850 visa, which included a criterion cl.850.214(2)(a) which required an applicant to have "maintained close business, cultural or personal ties in Australia;…". This reasoning of Merkel J was not disturbed on appeal, see *Ji v MIMA* [2002] FCA 166 (Sundberg, Marshall and Weinberg JJ, 27 February 2007).
[27] Policy – Migration Regulations- Schedules - Sch2 Visa 151 – Former Resident – Long residence applicant - Has maintained ties with Australia (reissued 21/11/2015).

ongoing active concern.

However, there does not appear a requirement that the applicant have maintained ties to any particular degree. This would be a question of fact for the Tribunal.

Defence service applicant

An alternate time of application criterion for the grant of a Subclass 151 visa is to be a 'defence service applicant'.[28] An applicant meets this requirement if they:

- have completed at least 3 months continuous Australia defence service; or
- were discharged before completing 3 months of Australian defence service because the applicant was medically unfit for service, or further service, and became medically unfit because of the applicant's Australian defence service.

Although the Departmental guidelines indicate that eligibility under this stream is generally limited to members of the permanent Australian Defence Force, and that a member of the Reserve Defence Force or the Emergency Defence Force is not usually eligible,[29] ultimately this will be a finding of fact for the Tribunal.

Relevant case law

Ji v MIMA [2002] FCA 166	Summary
Ji v MIMA [2001] FCA 904	
Skea v MILGEA [1994] FCA 1151	

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2005 (No.9)	SLI 2005, No.240
Migration Amendment Regulations 2005 (No.12)	SLI 2005, No.339
Migration Amendment Regulations 2007 (No.12)	SLI 2007, No.314
Migration Legislation Amendment Regulation (2012) (No.5)	SLI 2012, No.256
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34

Available decision templates

There is no specific decision template for Subclass 151. Members should use the generic visa refusal template and seek further assistance from MRD Legal Services if required.

[28] A 'defence service applicant' is defined in cl.151.111
[29] Policy – Migration Regulations – Schedules - Sch2 Visa 151 – Former Resident - Defence service applicants (reissued 21/11/2015).

Last updated/reviewed: 3 December 2018

Health Criteria – PIC 4005, 4006A and 4007

CONTENTS

Overview

Health criteria[1] are prescribed in Schedule 2 to the Migration Regulations 1994 ('the Regulations') as criteria for a range of visa subclasses which are required to be met at time of decision. The health criteria are in the form of Public Interest Criteria ('PIC') set out in Schedule 4 of the Regulations. The Schedule 4 PIC are referred to by number in the Schedule 2 criteria for visa subclasses and are therefore effectively criteria under Schedule 2 for the grant of a visa. [2] There are currently 3 different PIC relating to health requirements: PIC 4005, 4006A and 4007. PIC 4006A has been repealed for visa applications made from 18 March 2018 but continues to apply to Subclass 457 (Temporary Work (Skilled)) visa applications made before that date.[3]

Similar to circumstances relating to the determination of certain claims of domestic/family violence, some health criteria requirements are substantively determined by an expert, not by the Minister's delegate or Tribunal. Where the matter arises as an issue, the decision-maker must seek the opinion of a Medical Officer of the Commonwealth (MOC) in relation to whether a person suffers a disease or condition.[4] Where a MOC opinion is properly made, the Tribunal must take that opinion to be correct for the purposes of deciding whether a person meets the requirements or satisfies the criterion for grant of a visa.[5]

There are three main issues arising in cases where meeting the health criteria is the issue in dispute for the visa application. The first is whether a person has undertaken a medical assessment as required by the Regulations or as requested by a MOC. The second issue is, in cases where a MOC opinion has been obtained and identifies that the applicant does not meet the relevant health requirement in the applicable PIC, whether the MOC opinion is properly made and therefore must be taken to be correct. The third issue arises where the PIC provides for waiver of the health requirements in certain circumstances.

There is no provision for waiver in relation to PIC 4005. In these cases, where an adverse MOC opinion has been obtained, the only issue will be the validity of the MOC opinion. The requirements for a valid opinion are discussed below. In PIC 4006A and PIC 4007 there is provision for waiver. The details of the requirements for the waiver are also discussed further below.

[1] This commentary relates to the legislative provisions of Division 2.5A of the Migration Regulations 1994 (the Regulations) and PIC 4005-4007 of the Regulations current as at time of writing.
[2] Regulation 2.03(2) states that if a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred must be satisfied by an applicant as if it were set out at length in the Schedule 2 criterion.
[3] PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which PIC 4006A applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 & 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.
[4] r.2.25A(1) as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI2014 No. 30), Schedule 1, Part 2, item [11]. For all applications for temporary visas, and for applications for permanent visas made from a specified country, where there is no information known to Immigration to the effect that the person may not meet the health requirements, the decision-maker may determine that the person satisfies health criteria without seeking the opinion of a MOC.
[5] r.2.25A(3), *MIMA v Seligman* (1999) 85 FCR 115.

Key Requirements

The Health Criteria 4005-4007

The following requirements are common to all three health criteria, PIC 4005, 4006A and 4007:

- an applicant who is in a class of persons specified in a written instrument, must undertake any medical assessment specified and be assessed by the person specified;[6]
- the applicant must comply with any request by a MOC to undertake a medical assessment;[7]
- the applicant is free from tuberculosis;[8]
- the applicant is free from a disease/condition that is, or may result in the applicant being, a threat to public health or danger to the Australian community;[9]
- the applicant is free from a disease/condition in relation to which a person who has it would be likely to require health care or community services or meet the medical criteria for provision of a community service during the specified period; and provision of the health care or community services relating to the disease/condition (regardless of whether the health care or services will actually be used in connection with the applicant) would be likely to:
    - result in a significant cost to the Australian community in the areas of health care and community services;[10] or
    - prejudice access of an Australian citizen or permanent resident to health care or community services;[11] and
    - If the MOC has requested a signed undertaking that the applicant present himself/herself to health authorities for a follow-up medical assessment in the place of residence in Australia, the applicant has provided such undertaking.[12]

The specified period to be taken into account in determining whether an applicant must be free of the relevant disease or condition which would require health care/community services is:

- for permanent visas and temporary visas specified in a written instrument - the period commencing when the application is made;
- for all other temporary visas - the period for which the Minister intends to grant the visa.[13]

For visa applications made before 5 November 2011, the requirement that the provision of health care/community services must not result in a 'significant cost' to the Australian community does not apply to applicants who would not be eligible for the provision of health care or community services due to the subclass of temporary visa applied for, where that subclass is not specified in the relevant instrument.[14] The temporary visa subclasses specified are those that form a pathway to potentially

[6] PIC 4005(1)(aa), 4006A(1)(aa), 4007(1)(aa) as inserted by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011 No. 105), Schedule 4. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[7] PIC 4005(1)(ab), 4006A(1)(ab), 4007(1)(ab) as inserted by (SLI 2011 No. 105). These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6
[8] PIC 4005(1)(a), 4006A(1)(a), 4007(1)(a).
[9] PIC 4005(1)(b), 4006A(1)(b), 4007(1)(b).
[10] r.1.03 defines "community services" as including provision of an Australian social security benefit, allowance or pension.
[11] PIC 4005(1)(c), 4006A(1)(c), 4007(1)(c) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[12] PIC 4005(1)(d), 4006A(1)(d), 4007(1)(d) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[13] PIC 4005(2), 4006A(1A), 4007(1A). For the relevant instrument, see 'VisaSc' tab of the Register of Instruments: Health Criteria
[14] PIC 4005(3), 4006A(1B), 4007(1B). These provisions were repealed and substituted for visa applications made on or after 5 November 2011: Migration Amendment Regulations 2011 (No. 6) (SLI 2011 No. 199). For the relevant instrument, see 'VisaSc' tab of the Register of Instruments: Health Criteria

obtaining a permanent visa, such as a Subclass 309 (Partner (Provisional) visa. In general terms, those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

For visa applications made on or after 5 November 2011, the requirement that the provision of health care/community services not result in a significant cost to the community, *does* apply to those applicants for a temporary visa not specified by the Minister (generally speaking, this means a temporary visa which is not a provisional visa expected to be a pathway to permanent residence) but only in respect of certain services. That is, the health care and community services to be assessed in the 'no significant cost' requirement does not include those specified by instrument, where the application is for a subclass of temporary visa not specified by instrument.[15]

There are provisions for waiver of the health care/community services requirement in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of this requirement in PIC 4005.

The waiver in PIC 4006A provides that the Minister may waive the requirements of PIC 4006A(1)(c) if the 'relevant nominator' has given the Minister a written undertaking that they will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).[16]

The waiver in PIC 4007 provides that the Minister may waive the requirements of PIC 4007(1)(c) if the applicant satisfies all other criteria for the grant of the visa and the Minister is satisfied the grant of the visa would be unlikely to result in:

- undue cost to the Australian community; or
- undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

For information relating to considering the waiver, see below 'Waiver of the Health Criterion'.

Special provisions relating to certain health criteria

Regulation 2.25A requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4005(1)(a), 4005(1)(b), 4005(1)(c), 4007(1)(a), 4007(1)(b), or 4007(1)(c).[17] For visa applications made before 18 March 2018, r.2.25A also requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4006A(1)(a), 4006A(1)(b) or 4006A(1)(c).[18] In deciding whether a person meets one of the above mentioned criteria, the Tribunal is to take the opinion of the MOC to be correct.[19]

[15] PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the Register of Instruments: Health Criteria.
[16] PIC 4006A(2). PIC 4006A only applies to Subclass 457 Temporary Work (Skilled) visas made before 18 March 2018. PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the repeal of Subclass 457 (the only subclass to which it applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.
. The term "relevant employer" was replaced with "relevant nominator" by the Migration Amendment Regulations 2009 (No.13) (SLI 2009 No. 289), and applies to visa applications made on or after 9 November 2009, or those made before, but not finally determined by 9 November 2009: r.3; Schedule 1, Item [2]. The amendment reflects similar changes in Subclass 457 criteria affected by Migration Amendment Regulations 2009 (No.9) (SLI 2009 No. 202) applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.
[17] r.2.25A(1).
[18] PIC 4006A was repealed for visa applications made on or after 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of

However, there is no requirement to seek a MOC opinion if:

- the application is for a temporary visa and there is no information indicating that the person may not meet any of those requirements;[20] or
- the application is for a permanent visa that is made from a country specified by Instrument[21] for these purposes and there is no information indicating that the person may not meet any of those requirements.[22]

Where there is evidence that the applicant may not meet any of the health requirements, in particular, may be suffering from some form of disease or medical condition, it will not be open to the decision-maker to find that the applicant meets the relevant health requirement without seeking a MOC opinion.

Key Issues

Required and requested medical assessments

Under PIC 4005(1)(aa), 4006A(1)(aa), and 4007(1)(aa), an applicant may be required, if they are a member of a class of persons specified in a written instrument to undertake a medical assessment. An applicant may also be required under PIC 4005(1)(ab), 4006A(1)(ab) and 4007(1)(ab), to undertake any medical assessment if requested by a MOC.

Assessment required by written instrument

Unless exempted, an applicant who is in a class of persons specified in a written instrument must undertake any medical assessment specified in the instrument and must be assessed by the person specified in the instrument unless a MOC decides otherwise.[23]

The instrument sets out classes of persons based on countries (grouped according to risk) of which the applicant is a citizen, or where an applicant has recently spent time. The instrument also specifies required medical assessments for each class of person, as well as rules for applying it, e.g. where a person is a class of person in more than one group of countries, the relevant group is the higher risk group.[24]

Within a class of persons, different medical assessments may be required depending on factors including the length of intended stay, type of visa applied for, intended work or education, pregnancy, and likelihood of entering a health care facility.

Schedule 1, Part 1 and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.

[19] r.2.25A(3).

[20] r.2.25A(1)(a).

[21] For the relevant instrument, see the 'Country' tab of the Register of Instruments: Health Criteria.

[22] r.2.25A(1)(b).

[23] PIC 4005(1)(aa), 4006(1A)(aa), 4007(1)(aa), inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6. For the relevant instrument see "HealthAssess" tab in the Register of Instruments - Health Criteria. The relevant instrument appears to be the one in place at the time of decision. See *Sarabia v MIBP* [2017] FCCA 2642 (Judge Dowdy, 31 October 2017), where the Court held the Tribunal had incorrectly identified a revoked instrument as the relevant instrument, rather than the instrument which applied at the time of its decision: at [22].

[24] For the relevant instrument, see "HealthAssess" tab in the Register of Instruments - Health Criteria.

The instrument also specifies who must conduct the assessment, depending on whether it is conducted within or outside Australia.

An applicant must undertake any assessment required. An applicant who undertakes some but not all required assessments does not meet the criterion. As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the required assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

The Explanatory Statement which accompanied the introduction of this requirement explains the intention behind this requirement:

> *[the health criteria do] not currently provide for medical assessments, such as a chest x-ray, which an applicant must undertake. Currently, under the Department of Immigration and Citizenship's policy, most applicants undertake medical assessments by reference to their country of citizenship or residence, intended activities, and their intended stay period in Australia. The policy also provides that the individual circumstances of an applicant may be considered when determining the relevant medical assessments.*
>
> *The purpose of new paragraph (aa) is to clearly provide in the Principal Regulations that, if an applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph, then they must:*
>
> - *undertake all medical assessments specified by the Minister in an instrument in writing for this paragraph; and*
> - *be assessed by the person specified in the instrument.*
>
> *The effect of this new paragraph is that an applicant must undertake medical assessments by reference to the instrument.*
>
> *The purpose of new paragraph (aa) is also to provide for discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.* [25]
>
> *Another purpose of the amendment is to address the recent decision by the Migration Review Tribunal (MRT) in* 0901884 *[2010] MRTA 905. Under the Department of Immigration and Citizenship's policy, an applicant was to undertake a chest x-ray to determine whether the applicant had active tuberculosis. In this case, the applicant refused to undertake a chest x-ray and the MRT accepted the applicant's skin test (Mantoux test) for latent tuberculosis as an alternative test. The Department of Immigration and Citizenship's view is that the result of a chest x-ray (as opposed to other tests) should be required as evidence of active tuberculosis status.*
>
> *Therefore, the MRT decision has an implication that if an applicant chooses to undertake a medical assessment other than a chest x-ray regarding their tuberculosis status, then public health in Australia may be exposed to an increased threat of tuberculosis.*
>
> *It is intended that relevant medical assessments such as a chest x-ray would be specified by the Minister in an instrument in writing for new paragraph (aa).*
>
> *More broadly, this same risk applies to all aspects of the health requirement. If it is not addressed through regulation amendments, it could have a serious impact on the operation of the immigration health requirement and, through it, the health of the Australian community.*

[25] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.

Exemption from medical assessment

Even if the applicant is in the specified class of persons, a MOC may decide that a particular applicant is not required to undertake a specified medical assessment by a specified person. The purpose of this exemption is:

> *… to provide for a discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.*[26]

Whether a MOC has decided that an applicant is not required to undergo an assessment by a specified person is a question of fact. The Tribunal has no power to review that determination, or to consider whether it is reasonable.

Assessment requested by MOC

Under PIC 4005(1)(ab), PIC 4006A(1)(ab) and 4007(1)(ab), an applicant must comply with any request by a MOC to undertake a medical assessment.[27]

The Explanatory Statement which accompanied the introduction of this requirement states that the purpose of the requirement to undertake a medical assessment is:

> *… to require the applicant to comply with the Medical Officer of the Commonwealth's request to undertake a medical assessment. This would help:*
> - *protect the Australian community from public health and safety risks;*
> - *contain public expenditure on health care and community services; and*
> - *safeguard the access of Australian citizens and permanent residents to heath care and community services in short supply.*[28]

As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the requested assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

Free from a disease or condition

PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require that *for the relevant period* the applicant "is free from a disease or condition in relation to which" a person who has it would be likely to require health care or community services or meet the medical criteria for the provision of a community service.[29]

The relevant period

The period in which a person must be free from a disease or condition in relation to which a person who has it would require health care or community services or meet the medical criteria for the provision of a community service during the relevant period to meet PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c), varies depending upon the type of visa sought.

[26] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.
[27] Inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6.
[28] Explanatory Statement to (SLI 2011 No.105).
[29] PIC 4005(1)(c)(i), 4006A(1)(c)(i), 4007(1)(c)(i), as amended by SLI 2011 No. 105. The criteria apply to visa applications made, but not finally determined, before 1 July 2011, and visa applications made after 1 July 2011.

For all permanent visa applicants and applicants for a temporary visa of a subclass specified in a written instrument (generally provisional visas), the relevant period is the period commencing when the application is made.[30] No end date is specified.

For all other temporary visa applicants, the relevant period is the period for which the Minister intends to grant the visa.[31] That is, the duration of the visa, commencing on the date the Minister intends to grant that visa.

Access to health care or community services or significant cost

Generally speaking, a person must be free from a disease or condition where the provision of health care or community services to a person with that condition would be likely to:

- result in a significant cost to the Australian community in the areas of health care and community services; OR
- prejudice the access of an Australian citizen or permanent resident to health or community services.[32]

Unless the application is for a temporary visa and there is no information known to Immigration to the effect that the person may not meet the health criteria, or is for a permanent visa that is made from a specified country, the decision maker *must* seek an opinion of a MOC on whether a person meets these criteria and must take that opinion to be correct.[33] The decision maker's role is limited to ensuring the MOC opinion is valid.[34]

The Department issues Notes for Guidance for MOC. These provide that a MOC is to consider the information in the Notes and apply these principles and some of the specifics when assessing an applicant against health requirements.[35]

Exemption to the "no significant cost" requirement

Visa applications made before 5 November 2011

For visa applications made before 5 November 2011, the "no significant cost" requirement does not apply to applicants:

- who are applying for a temporary visa; AND
- who would not be eligible for the provision of health care or community services due to applying for or holding that temporary visa subclass; AND
- that visa subclass is of a type not specified in a written instrument.[36]

In general terms, the effect is that those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

[30] PIC 4005(1)(c)(i), 4005(2), 4006A(1)(c)(i), 4006A(1A), 4007(1)(c)(i), 4007(1A). For the relevant instrument see "VisaSc" tab in Register of Instruments - Health Criteria.
[31] PIC 4005(2), PIC 4006A(1A), 4007(1A).
[32] PIC 4005(1)(c)(ii), 4006A(1)(c)(ii), 4007(1)(c)(ii),.
[33] Regulation 2.25A. See Assessing the Health Criteria.
[34] See Assessing Validity of a MOC Opinion.
[35] PAM3 - Migration Regulations -Schedules - Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - Notes for Guidance for Medical Officers of the Commonwealth of Australia (re-issued 19/11/2016).
[36] PIC 4005(3), 4006A(1B), and 4007(1B) were introduced by SLI 2011 No. 105 and applied to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6. Those provisions were repealed and substituted for visa applications made on or after 5 November 2011: SLI 2011 No. 199: r.5, Schedule 3. For the relevant instrument see "VisaSc" tab in Health Criteria – Register of Instruments.

The exemption appears, in light of its subsequent amendment (discussed below - Visa applications made on or after 5 November 2011) and the Explanatory Statement accompanying the amendments which introduced it, to be based on the premise that temporary visa holders are not eligible for health care or community services when they are in Australia.

The Explanatory Statement states:

> *The purpose of this amendment is to address the Federal Court's decision in* Robinson v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] FCA 1626 (*Robinson*). The Federal Court relevantly held at paragraph [43] that:*
>
> > *A proper construction of Public Interest Criterion 4005 of the [Principal Regulations], requires the MOC [Medical Officer of the Commonwealth] to ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition. It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*
>
> *Therefore, when considering the current paragraph 4005(c) in relation to provision of health care or community services to a person and the potential costs of the disease or condition that person has, the "hypothetical person" test established in the case of* Robinson *must be applied. An interpretation of this test is that the applicant's individual circumstances must not be taken into account. For example, although certain applicants would not be eligible for a particular service in Australia (due to the type of visa they are applying for and would hold if granted), this could not be taken into account for the purpose of deciding whether the provision of the service would be likely to result in a significant cost to the Australian community in the areas of health care and community services.*
>
> *The Federal Court decision is problematic for temporary visa applicants because in most cases, the applicants (due to the type of visa they are applying for and would hold if granted) would not have access to the same range of publicly-funded services available to an Australian resident such as a permanent visa holder. Hence, despite having a significant medical condition, the costs of this condition would not be passed on to the Australian community, as the person would not be eligible for these services and therefore would be expected to pay for any services required either personally or through a health insurance scheme, for example.*
>
> *It certainly would not seem fair or reasonable, for example, to refuse to grant a temporary visa to an applicant with a disability, or an elderly applicant, on the basis of services they would not be eligible for when in Australia (due to the type of visa they are applying for and would hold if granted).*
>
> *Further, the purpose… is that* [the 'no significant cost' requirement] *does not apply if an applicant applies for a temporary visa being of a particular subclass that is not specified in the instrument… It is intended that this instrument would specify temporary visas that may lead to a permanent visa, and persons who hold this type of temporary visa would be eligible for health care or community services when they are granted a permanent visa in Australia.*
>
> *Therefore, the effect… is that if an applicant applies for a* [temporary] *visa subclass that is not specified in that instrument, then* [the 'no significant cost' requirement] *does not apply because such an applicant would not be eligible for health care or community services when they are in Australia.*[37]

For the exemption to apply to those pre 5 November 2011 applicants who have applied for a visa not specified by the Minister, the applicant must not be eligible for health care or community services when they are in Australia due to the nature of the visa. Whether an applicant would not be eligible for

the provision of health care or community services due to applying for a temporary visa subclass or holding that temporary visa subclass is a question of fact for the decision maker. In determining this, regard may be had, but is not limited, to evidence such as:

- Schedule 2 criteria for the grant of such temporary visas which may require an applicant to arrange for health insurance;[38]
- any conditions imposed on the visa, notably Condition 8501 which provides that if an applicant meets the primary or secondary criteria for the grant of a visa, he or she must maintain adequate arrangements for health insurance while they are in Australia;
- any relevant information available from the Department and on its website indicating whether or not holders of particular temporary visa subclasses are covered by Australia's national health scheme or must hold adequate health insurance cover for the entire time they are in Australia;[39]
- any relevant information on the Australian Government Medicare website;[40]
- the existence and terms of any reciprocal health care agreements between Australia and the country of nationality of the visa applicant;[41] and
- any evidence submitted by the applicant.

Visa applications made on or after 5 November 2011

For visa applications made on or after 5 November 2011, there is no blanket exemption from the 'no significant cost' requirement for non-specified temporary visa applicants. If a person applies for a temporary visa, the subclass of which is not specified by the Minister in an instrument, then they must still be assessed against the 'no significant cost' requirement, but not in relation to all health care and community services. Instead, the health care and community services assessed will not include health care and community services specified by the Minister.[42] Persons who have applied for a temporary visa of a type specified in the instrument are required to be assessed in relation to the full range of health care and community services.

According to the Explanatory Statement that accompanied the introduction of this requirement, the criterion reflects the position that despite restriction on access to health related services, some temporary visa holders may nevertheless have access to some health care or community services which would result in a cost to the community:

> *The purpose of new subclause 4005(3) is to address an unintended consequence of existing subclause 4005(3) that commenced on 1 July 2001 as part of the* Migration Legislation Amendment Regulations 2011 (No. 1). *The unintended consequence is that, because of existing subclause 4005(3), a MOC is not able to consider the potential cost for the provision of health care and community services that may be used while in Australia but for which the applicant is not technically eligible.*
> *…*

[37] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.15.
[38] For example, cl.457.223B, 572.225.
[39] See for example http://www.border.gov.au/Trav/Stud/More/Health-Insurance (accessed 30 November 2016).
[40] See for example: https://www.humanservices.gov.au/customer/services/medicare/medicare-card?utm_id=9 (accessed 16 November 2016).
[41] The Australian Government has signed Reciprocal Health Care Agreements (RHCA) with the governments of the United Kingdom, Sweden, the Netherlands, Belgium, Finland, Norway, Slovenia, Malta, Italy, New Zealand and the Republic of Ireland which entitles nationals of these countries to limited subsidised health services for medically necessary treatment while visiting Australia. For further information, see http://www.humanservices.gov.au/customer/services/medicare/reciprocal-health-care-agreements?utm_id=9 (accessed 16 November 2016).
[42] PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the Register of Instruments: Health Criteria.

… it is possible that certain temporary visa applicants with diseases or medical conditions could access health care or community services even if they are not eligible for them. This might occur, for example, because a hospital will not refuse to provide medical treatment to people who require it. As these cases would result in a cost to the Australian community, it is reasonable that these costs should be taken into account by a MOC when assessing the applicant against the health criteria.

There are, however, certain health care or community services that cannot be accessed by temporary visa applicants such as social security payments. The effect of new subclause 4005(3) is that a MOC is not required to assess the relevant temporary visa applicant… against the specified health care and community services. The specified health care and community services include those which a temporary visa applicant is unlikely to be able to access.[43]

Assessing the health criteria - role of the Medical Officer of the Commonwealth and the Tribunal

Where the Minister or Tribunal is required by r.2.25A to seek an opinion from the MOC in determining whether an applicant meets the relevant health criterion, the Tribunal is to take the opinion of the Medical Officer of the Commonwealth (MOC opinion) to be correct.[44] However, this only applies where the MOC opinion is of a kind authorised by the Regulations.[45]

Where a MOC opinion was obtained under r.2.25A, and formed the whole or part of the reason for the refusal of the visa by the delegate and the applicant seeks review, the Tribunal may decide that a further MOC opinion is required.[46] The Regulations provide that in this circumstance a fee of $520 is payable for the further opinion.[47] There is no prescription as to who must pay the costs of a further MOC opinion although it is the Tribunal's policy to require the applicant to pay the fee.

If the applicant elects not to obtain a further MOC opinion, the Tribunal must consider the MOC opinion that was before the delegate. If that opinion is validly made, it must take that opinion to be correct.

If that opinion does not amount to an assessment of the relevant health criterion in accordance with the Regulations as at the time of the Tribunal's decision, the Tribunal will need to obtain a valid MOC opinion.[48] Whether a fee is payable in these circumstances depends upon whether r.5.41 applies. See Fees for a further MOC Opinion.

While the Tribunal is only required to take as correct a MOC opinion that complies with the Regulations, the Tribunal has no power to set aside a Medical Officer's opinion. Where the MOC opinion before the Tribunal does not comply with the Regulations, the Tribunal cannot determine the requirements of the health criteria for itself. The Tribunal must seek a fresh opinion or make enquiries of the MOC in order to clarify concerns regarding the opinion until it is satisfied it has a valid MOC opinion.

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

[43] Explanatory Statement to SLI 2011, No.199, pp.28-9.
[44] r.2.25A(3).
[45] *MIMA v Seligman* (1999) 85 FCR 115 at [66].
[46] A further MOC opinion in these circumstances has previously been described as a Review MOC opinion or RMOC opinion. However, there is no position provided for in the Regulations called a Review Medical Officer of the Commonwealth.
[47] r.5.41. There are standard letter templates for inviting the applicant to provide a further MOC opinion and advising them of the fee. NB, if the applicant refuses the invitation, the Tribunal may still be obliged to seek a further MOC opinion. See 'Currency of MOC Opinion'.
[48] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115.

Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to what is the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC opinion finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it appears that it is necessary to have a valid MOC opinion before the Tribunal can properly consider the waiver requirements.

Fees for a further MOC opinion

Regulation 5.41 provides for a fee for a further opinion of a MOC in merits review. It only applies where:

- the Minister was required to seek the opinion of a MOC under r.2.25A; and
- the visa refusal occurred because in the opinion of the MOC, the person did not satisfy a health criterion; and
- a further opinion of a MOC is required for the review.

Where an opinion was never validly made, r.5.41 does not apply. For example, an opinion that further medical evidence is required to determine whether a person meets a health criterion (often referred to as a "deferred opinion") is not an opinion that a person did not satisfy a health criterion. In such circumstances, there is no legislative requirement for payment of a fee to obtain another MOC opinion. The relevant case team may be contacted if assistance is needed in obtaining a valid MOC opinion.

Where a MOC opinion was validly made, but is no longer current, r.5.41 applies, and a fee for a further MOC opinion is payable. The Tribunal's policy is that the fee is payable by the applicant. The Tribunal may also require the Secretary of the Department to obtain a further MOC and provide the opinion to the Tribunal.[49]

Assessing Validity of a MOC opinion

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it is necessary to have a valid MOC opinion before the decision maker can properly consider the waiver requirements.

In determining whether there is a valid MOC opinion, the decision maker must be satisfied that it has:

- an opinion;[50]

[49] Section 363(1)(d) of the *Migration Act 1958.*
[50] There is a standard form prepared by the Department titled "Medical Opinion of an Officer of the Commonwealth" (form 884) or the opinion may be in a document with a heading of "Medical Opinion". If the document contains a heading such as "Deferred Opinion", there may be some question as to whether that amounts to an opinion for the purposes of r.2.25A.

- by a Medical Officer of the Commonwealth (defined in r.1.03 to mean a medical practitioner appointed by the Minister in writing under r.1.16AA to be a Medical Officer of the Commonwealth for the purposes of the Regulations);[51]
- the opinion is on a matter referred to in r.2.25A(1) or (2) (for the purposes of (1) an opinion on whether a person meets certain health requirements); and
- the opinion addresses satisfaction of these requirements at the time of the Minister's decision.[52]

To ensure the MOC opinion addresses the applicable criterion some initial matters to check are:

- whether the opinion refers to the correct criterion. For example, if the opinion refers to PIC 4005 when the applicable criterion is 4007, this should be referred back to the MOC for clarification;
- whether the opinion correctly reflects assessment of costs and access to health care or community services during the relevant period;
- whether the opinion has assessed a temporary visa applicant against the "no significant cost" requirement, where the applicant is exempted from the requirement.

The MOC is entitled to differ in his/her opinion from reports put to him/her and is not obliged to give reasons for why any medical report or opinion was rejected. As a result of this it is difficult to successfully challenge a MOC opinion on the basis of an imputed rejection of expert medical evidence.[53]

The MOC is required to form his or her own opinion about whether the relevant PIC is satisfied after taking into account all material logically probative of that opinion before him or her. In so doing, the MOC is required to act reasonably and there must be a logical basis for the opinion. In *Haque* the Court considered an RMOC opinion for an applicant with learning difficulties.[54] The Court held that the opinion lacked an evidentiary basis and accordingly the Tribunal was not bound to accept it. As the Tribunal considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

The opinion must reflect that the MOC has asked himself or herself the correct question, based on the terms of the requirement in the relevant PIC. Particular issues that have been the subject of judicial consideration in relation to the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) include:

- whether the MOC has considered the relevant characteristics of the person with the disease/condition of the applicant (the hypothetical person test); and

[51] In *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), the Court found that the Tribunal was entitled to presume that the MOC was a MOC without referring to any evidence, until the appointment was challenged (at [127]).
[52] *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [19] citing *MIMA v Seligman* (1999) 85 FCR 115 at [48]-[49].
[53] *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [14], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [32]-[37].
[54] *Haque v MIBP* [2015] FCCA 1765 (Judge Smith, 2 July 2015). In this case, the MOC obtained a specialist paediatrician's report which stated that the applicant 'suffers from autistic spectrum disorder with moderate developmental delay and behavioural problem. She is functioning fairly well and attending to all her personal hygienes and activities of daily living.' Upon review the applicant sought a new opinion, providing the Tribunal with a number of expert medical reports which suggested varying degrees of independence of applicant. The RMOC opinion found the applicant did not satisfy PIC 4005 as she was a person with 'severe cognitive impairment' and was 'totally dependent in all of her activities of daily living'. The RMOC did not personally examine applicant, but rather based the opinion on information including the medical reports. However, none of the reports supported the conclusion the applicant was totally dependent on others in all of her activities of daily life. The Court concluded that as the RMOC opinion was based upon a fact for which there was no evidence or any other logical basis, the opinion was not one formed according to law. That being so, the Tribunal was not bound to accept it and, because it considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

- what is considered as "health care" in determining whether a person with the applicant's disease/condition with such requirements would likely result in significant cost to the Australian community; and
- obligations on the MOC in relation to an opinion that provision of health care or community services would result in a significant cost.

In *Traill v MIAC*[55] the Court considered the delegate's application of PIC 4005(1)(c) and found that the delegate constructively failed to exercise his jurisdiction because he relied upon the MOC's opinion which did not properly address the visa criterion upon which it bore and failed to meet the minimum standard for such an opinion. The Court noted that the report contained no opinion on whether the applicant had the capacity to function in his daily life without support; and that the MOC failed to properly ascertain the form or level of the condition suffered by the second applicant and then proceeded to make an assessment at a higher level of generality by reference to a generic form of an unidentified condition. The Court was further concerned that the report was simply a template statement drawn from a precedent used by the MOC. Taking these matters into account, the Court concluded that the report was so uninformative so as to be unreliable.[56] However, while it is well settled that for r.2.25A(3) to apply the MOC opinion must be one that is authorised by the regulations, aspects of the Court's criticism of the opinion in this case may be misleading as to what the regulations require, including, for example, the reference to whether the applicant had the capacity to function in his daily life without support. Nonetheless, to the extent that the opinion in question follows a 'template' (as the Court suggested) the Tribunal may need to consider whether an MOC opinion before them is affected. The Tribunal should also be careful to ensure it considers the terms of the relevant regulations.

Importantly, the MOC opinion must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[57] Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that, in order to meet this requirement at time of decision, the Tribunal will need to obtain a further opinion.

Where the MOC opinion relates to PIC 4005(1)(c)(ii)(A), 4006A(1)(c)(ii)(A) or 4007(1)(c)(ii)(A), i.e. that provision of health care of community services relating to the disease or condition would be likely to result in significant cost to the Australian community, the MOC is not obliged to state what the significant costs would be in order for the MOC opinion to be valid.[58] It is for the MOC to determine whether a cost is significant based on his or her medical judgment.[59] Nor is the MOC obliged to explain why a particular cost is considered to be a significant cost.[60]

The 'hypothetical person' test'

The provisions of PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require the MOC to consider whether or not the relevant disease or condition is such that a hypothetical person with it would be likely to require health care or community services or meet the medical criteria for the provision of a community service; and whether that provision of health care or community services would be likely to

[55] [2013] FCCA 2 (Judge Driver, 14 June 2013).
[56] *Traill v MIAC* [2013] FCCA 2 (Judge Driver, 14 June 2013) [45]-[47].
[57] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115. The Court in *Applicant Y* was considering Item 4007(1)(c).
[58] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [13], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [46]. The Court in JP1 was considering a MOC opinion in relation to (then) PIC 4005(c) for an applicant with HIV.
[59] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [33] referring to *MIMA v Seligman* (1999) 85 FCR 115 at [53].
[60] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [57].

result in significant cost to the Australian community; or would be likely to prejudice access of Australian residents to health care or community services. The person referred to in these provisions is not the applicant, but a hypothetical person who suffers from the disease or condition which the applicant has.[61] It is not a prediction of whether the particular applicant will in fact require such health care or community services.[62]

The test is for a hypothetical person because the MOC could reasonably be expected to be able to assess the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care. However, one would not necessarily expect a MOC to inquire into the financial circumstances of a particular applicant or any family members or other sources of financial assistance.[63]

The test is for a hypothetical person who suffers from the form or level of condition suffered by the applicant. In *Robinson v MIMIA*[64] Siopis J found that the MOC opinion was not valid and the Tribunal erred in taking it to be correct, as it did not make the assessment based on the relevant level of the condition held by the applicant. In particular his Honour held:

> *A proper construction of Public Interest Criterion 4005 of the Regulations, requires the MOC to* ***ascertain the form or level of condition suffered by the applicant*** *in question and then to apply the statutory criteria by reference to* ***a hypothetical person who suffers from that form or level of the condition.*** *It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*[65] *(emphasis added)*

The Tribunal should consider the relevant MOC opinion before concluding that it is bound to accept it as correct. If the Tribunal is of the view that the opinion reflects that the MOC has applied the test in PIC 4005(1)(c) or 4007(1)(c) incorrectly by making its assessment by reference to the generic form of the disease or condition, it cannot take it to be correct. The appropriate course of action would be to seek a new opinion from the MOC.

As the legislation requires the MOC to consider a hypothetical person with the form or level of the disease or condition suffered by a particular applicant, there is no requirement to consider other details of a particular applicant's circumstances. The legislation does not require the MOC to examine personal factors of the applicant such as age, degree of compliance with medical regimes or ability to work, pay taxes and contribute to the community in order for the opinion to be valid.[66]

The opinion must be clear on its face as to what is the disease or condition to which the relevant PIC relates.[67] In *Ramlu v MIMIA*[68] the Court found jurisdictional error in the Tribunal decision on the basis that the Tribunal failed to turn its mind to issues relevant to assessing the validity of the further MOC

[61] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. The Court was considering a challenge to the validity of PIC 4005(c) following amendments made after the decision in *MIMA v Seligman* (1999) 85 FCR 115 which found r.2.25B as it then was to be invalid. The Court in *Imad* found the amended 4005 was valid. Justice Heerey followed his own decision in *Inguanti v MIMA* (2001) FCA 1046 at [10] (Heerey J, 3 August 2001).
[62] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. See also *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [44] and *Triandafillidou v MIMIA* [2004] FMCA 20 (Bryant CFM, 6 February 2004) at [57]-[58].
[63] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [14].
[64] *Robinson v MIMIA* (2005) 148 FCR 182.
[65] *Robinson v MIMIA* (2005) 148 FCR 182 at [43]. This case involved a visa application refused on the basis that the primary applicant's son, who had Down's Syndrome, failed to satisfy (then) 4005(c). The child only had a mild version of the condition. The Court, in concluding the MOC opinion was invalid and the Tribunal decision subject to jurisdictional error followed authorities including *Seligman* (where the Full Court at [83] made reference to "his level of impairment'), *Imad* at [14] and *Inguanti*, and expressly declined to follow the views of Finkelstein J at first instance in *X v MIMIA* [2005] FCA 429 on this issue.
[66] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [41]-[47].
[67] *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [22].
[68] [2005] FMCA 1735 (Driver FM, 14 December 2005).

opinion. The further MOC opinion in question referred to a number of diseases and conditions suffered by the applicant, but was not clear to which one(s) (then) paragraph 4005(c)(ii)(A) applied. The failure to state this clearly in the opinion meant that the Tribunal could not be clear what the relevant disease was, let alone the level of it. The Tribunal did not, therefore, consider issues relevant to whether the MOC opinion was properly made.

In light of this judgment it would be appropriate for the Tribunal, when presented with a MOC opinion which does not clearly identify which of an applicant's diseases or conditions has caused them to fail the health criteria, to seek clarification from the MOC or a revised opinion. Furthermore it would be advisable for the Tribunal to make clear in its decision that it has considered whether the MOC opinion has been properly made.

Currency of the MOC opinion

The MOC opinion being considered by the Tribunal must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[69] Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that it seek a further opinion. This will be so even where the applicant has refused the invitation to obtain a further MOC opinion, as the primary obligation is upon the Minister or the Tribunal to obtain an opinion which would enable the making of a determination.

Where the Tribunal consults an out of date report, it risks taking into account irrelevant considerations in the form of medical opinions which no longer apply to an applicant.[70] Whether the Tribunal will need to obtain a further MOC opinion will depend on the circumstances of the case. Considerations relevant to whether further investigation is required by the Tribunal include:

- the amount of time that has elapsed between the issue of the MOC's report and the Tribunal's decision;
- any evidence of change (and, in particular, improvements) in the applicant's health; and
- the degree to which any other medical opinions demonstrate a lack of currency and reliability in the MOC opinion.[71]

Evidence of change in the ability to test or establish the level or severity of a condition due to the applicant's age at the time of decision may also indicate that a MOC opinion is no longer valid.[72]

Where the applicant has refused an invitation to obtain a further MOC opinion at review stage and, on the basis of the above considerations, the original MOC opinion is no longer current and cannot be taken to be correct, the Tribunal will need to obtain a further MOC opinion. The Tribunal may require

[69] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115 (French, North and Merkel JJ, 1 March 1999).
[70] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [22].
[71] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [20]. In *Applicant Y* the MOC opinion relied upon by the Tribunal was almost 2 years old as at the time of the Tribunal decision, the applicant having refused the invitation to obtain a further MOC opinion upon review. The applicant had submitted recent reports from the applicant's doctor to the Tribunal indicating an improvement in the applicant's condition since her initial diagnosis as HIV positive and that her prognosis was generally good. The medical evidence indicated that the applicant would not require hospitalisation in the reasonably foreseeable future, while the MOC opinion implied hospitalisation and significant inpatient management as the basis for its assessment of 'significant cost'. In *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) the Court rejected submissions based on *Applicant Y* in circumstances where the MOC opinion was only 4 months old and the applicant was arguing not that the MOC opinion itself was out of date, but rather that it was based on out of date guidelines.
[72] See *Pokharel v MIBP* [2016] FCCA 3295 (Howard J, 19 December 2016). In *Pokharel* the MOC opinions were based on a medical report that had been prepared when the applicant was only 3 months and 16 days old and the medical report noted that the degree of intellectual impairment for the condition was highly variable. The Court held that the Tribunal had asked itself a wrong question by failing to consider whether either of the opinions reflected the level or severity of the condition as at the date of decision (when the applicant was two years old).

the Secretary of the Department to arrange a further MOC opinion in accordance with s.363(1)(d) of the Act.

When must the Tribunal seek a MOC opinion?

The MOC opinion must address satisfaction of the health criterion requirements *at the time of the Tribunal's decision* upon review.[73] If a MOC opinion was obtained at primary level, depending on the nature of the evidence to the Tribunal, it may no longer be an opinion that the applicant satisfies the requirements at the time of decision.

Where the reason for refusal of the visa was wholly or partly as a result of an opinion of a MOC that a person did not meet a health criterion, the Tribunal may seek a further MOC opinion at review stage. There is a prescribed fee payable in these circumstances. Tribunal policy is that the fee is payable by the applicant. Where the Tribunal is obtaining a MOC opinion for the first time, that is, it is not a request for a further MOC opinion within the meaning of r.5.41, or where a valid MOC opinion was obtained, but was not a reason for the delegate's refusal of the visa, there is no *prescribed* fee.

If a valid MOC opinion was obtained at primary level and the reason for the refusal was wholly or partly the result of an opinion of a MOC, and the applicant refuses to obtain a further MOC opinion, the Tribunal will need to consider whether it can take the original MOC opinion to be correct in relation to satisfaction of the health criterion requirements at time of decision (see Currency of the MOC Opinion above). If it cannot take the original MOC opinion to be correct, then the Tribunal will still need to obtain a valid MOC opinion.[74] In these circumstances the Tribunal itself would need to obtain a further MOC. The Tribunal has the power to require the Secretary of the Department to arrange for any medical examination that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.[75]

Where the health criterion is the sole issue in dispute before the Tribunal, the Tribunal must address it in reviewing the decision. Failure to do so may constitute jurisdictional error on the grounds of 'failure to exercise jurisdiction', or 'failure to review the decision'. If no MOC opinion has yet been obtained, the Tribunal must seek the opinion of a MOC unless the matter falls within one of the exceptions in r.2.25A(1)(a) or (b). Where the matter does fall within one of the exceptions, the Tribunal may be able to decide the health criteria without a MOC opinion where there is no information known to the Tribunal (either through the application or otherwise) to the effect that the person may not meet any of the health requirements. The Tribunal may request that the Department arrange for the applicant to attend a panel doctor for assessment.[76] The necessary medical information can then be forwarded to the Tribunal who then makes a decision in relation to the health criteria (unless the medical information suggests the person may not meet the health criterion, in which case the Tribunal must seek a MOC opinion).

Regulation 2.25A(1) only requires that the Minister 'seek the opinion' of an MOC. How the opinion is requested or obtained is not provided for in the Regulations. There is no requirement for the Tribunal

[73] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18] citing *MIMA v Seligman* (1999) 85 FCR 115.
[74] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [28]. The Court noted that the primary obligation under r.2.25A is on the Minister or the Tribunal to obtain a report which would enable the making of a determination.
[75] Section 363(1)(d) of the *Migration Act 1958.*
[76] Section 363(1)(d) of the *Migration Act 1958* authorises the Tribunal to require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. In addition, s.60 provides that the Minister may require the applicant to visit and be examined by a person qualified to determine the applicant's health, physical or mental condition at a reasonable time and place, if the health, physical or mental condition of the applicant is relevant to the grant of a visa. In these circumstances an applicant must make every reasonable effort to attend such examination. Following *obiter dicta* by the High Court in *MIAC v SZKTI* (2009) 238 CLR 489 at [33], it appears that the Tribunal may also have this power.

to specify an individual MOC when seeking an opinion.[77] See the Letter Template Index and National Registry Procedures for procedural information about seeking an opinion from the MOC.

Health care

What is counted as falling within the meaning of 'health care' is relevant to the assessment of whether the cost of that care will be 'significant' for the purposes of PIC 4005(1)(c)(i), 4006A(1)(c)(i) or 4007(1)(c)(i). This issue is relevant to the Tribunal in terms of assessing whether the MOC has given an opinion that is authorised by the Regulations in assessing whether the health care required by a person with the condition/disease of the applicant would be likely to result in significant cost to the Australian community. There has been some consideration as to whether prescription medication which is self-administered comes within the meaning of 'health care' such that it can properly be taken into account in calculating whether the cost of that 'health care' would be 'significant'.

'Health care' in this context involves the provision of care by somebody to the person, but such provision does not necessarily require 'an element of personal attention or activity' by the provider. It has been held that the MOC may take into account the costs of self-administered medication when assessing whether the provision of 'health care' would be likely to result in a significant cost to the Australian community. The Court in *MIMIA v X* stated:

> *It is not necessary to mark the outer limit of the concept of the term "health care" in the context of the Regulations or to define exhaustively what kinds of persons might qualify as providers or the means by which provision might be made. The term must at least include, in our opinion, the prescription of medication by a legally qualified medical practitioner and the dispensing of that medication by a pharmacist. The fact that a particular medication is self-administered by the person, even if some considerable time after the prescription or the dispensing, cannot sensibly be isolated from the total process. Moreover, in the present case the prescription and dispensing is linked with the monitoring, which is unarguably health care.*[78]

Waiver of the Health criterion

There is provision for waiver of the requirements in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of the requirement in PIC 4005(1)(c) or for any of the requirements in 4005-4007 in relation to tuberculosis or a disease/condition that would be a threat to public health in Australia or a danger to the Australian community.

PIC 4007

The waiver in PIC 4007(2) is only available if the applicant satisfies all other criteria for grant of the visa: PIC 4007(2)(a). If other criteria for the visa are in dispute, the Tribunal will not be in a position to consider the waiver until it is satisfied that the applicant meets those other criteria. There is no similar requirement in relation to the waiver in PIC 4006A(2).

Further, the waiver provision in PIC 4007(2) is only available if the Minister is satisfied that the granting of the visa would be unlikely to result in 'undue cost' to the Australian community or 'undue prejudice' to the access to health care or community services of an Australian citizen or permanent

[77] *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), at [63].
[78] *MIMIA v X* (2005) 146 FCR 408 (Black Cj, Heerey and Weinberg JJ, 29 September 2005) at [12]. The Full Court also held at [13] that the term "health care" is used in the same sense in 4005(c)(i)(A) and in the opening words of 4005(c)(ii). The Full Court disagreed with Finkelstein J at first instance who had held that health care necessarily requires an element of personal attention or activity by the provider and that the term 'health care' did not extend to the mere provision of prescription medication that is self administered: *X v MIMIA* [2005] FCA 429 (Finkelstein J, 15 April 2005) at [24].

resident. The consideration of these points relates back to the assessment in the adverse MOC opinion.[79]

There are then, two conditions which must be met before the waiver can be exercised:

1. the applicant must satisfy all other criteria for the grant of the visa: cl.4007(2)(a)
2. the decision maker must be satisfied that grant of the visa would be unlikely to result in:
   (a) undue cost to the Australian community: cl.4007(2)(b)(i); **or**
   (b) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident: cl.4007(2)(b)(ii).

The circumstances in which the Tribunal has power to actually exercise the waiver, will be rare, if they arise at all. Most often, the Tribunal is restricted to determining the question of satisfaction that grant of the visa would be unlikely to result in undue costs or prejudice to access. If the Tribunal is satisfied that the grant would be unlikely to result in either, it may remit with a direction that the applicant meets PIC 4007(2)(b) for the purpose of the relevant Schedule 2 visa criterion. Once the decision is remitted to the Department, an officer must determine whether the applicant satisfies all other criteria for grant of the visa and if so, must consider the waiver.

Strictly speaking, the task of determining whether costs or prejudice are "undue" is more accurately characterised as one of interpretation and fact-finding than as the exercise of a discretion.[80] Nevertheless, the Tribunal may have regard to any guidance that may be available in relation to legislative provisions containing such terms, such as may be given in Departmental guidelines, but it must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.[81]

Departmental guidelines in relation to the PIC 4007 health waiver tend to conflate the prior question of satisfaction as to the unlikelihood of undue cost and undue prejudice with the exercise of the discretion itself. They state:

What does 'undue' mean

Although 'undue' is not defined in migration law:

- *the dictionary definition of undue is "unwarranted; excessive; too great" and*
- *the courts have indicated that a broad range of discretionary considerations can be taken into account in determining whether costs or prejudice to access are "undue", which, in a given case, may include mitigation of costs or service, or consideration of compelling and compassionate circumstances.*

What to take into account

[79] Note that while r.2.25A requires the Tribunal to take a MOC's opinion to be correct for the purposes of determining whether a person meets PIC 4007(1)(c), a MOC does not need to be taken to be correct for the purposes of determining whether the significant cost or prejudice is 'undue'.

[80] See MRD Legal Services commentary, Application of policy, "Use of Policy and Guidelines in Exercise of Non-Discretionary Power"

[81] In *Xue Fan v MIAC* [2010] FMCA 490 (Burnett FM, 9 July 2010) at [22], the Court observed that PAMs are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s.15AB *Acts Interpretation Act 1901*, that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that "if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Section 15AB(2) then provides that, "[w]ithout limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes" materials such as explanatory memoranda and relevant reports laid down before either House of Parliament.

Given the broad range of discretionary considerations that can be taken into account, the individual circumstances of the visa applicant need to be considered in coming to a conclusion about whether the granting of the visa would be unlikely to result in undue cost or undue prejudice to access.

Each health waiver case must be considered on its merits – with all relevant factors taken into account, including any compelling and/or compassionate circumstances that warrant a waiver being exercised (for example, close family links to Australia and/or reasons why the family would find it difficult to return to their home country).

When making a waiver decision, section 65 delegates should consider the following policy guidelines for the relevant type of visa being processed - as the nature of the individual circumstances involved are likely to vary depending on the type of visa that has been applied for (even though the same PIC applies).[82]

The guidelines state relevant factors which are afforded significant weight for non-humanitarian visas,[83] and also set out factors to be taken into account and given particular weight in relation to humanitarian visas[84] and Foreign Affairs or Defence Sector students.[85]

Compelling and compassionate circumstances may be relevant to the consideration of the waiver; however, considerations are not restricted to such circumstances. The Full Court of the Federal Court considered the operation of the health waiver in the case of *Bui v MIMA*.[86] The Court held that the evaluation of whether an identified significant cost would be 'undue' may import consideration of compassionate or other circumstances and commented that it 'may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person would make some significant call upon health and community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category, that mandate such an outcome.'[87] For further information please see MRD Legal Services Commentary on 'Compelling and/or Compassionate Circumstances'.

See the National Registry Procedures NRP 'Investigations' for further information on processing MOC related matters.

PIC 4006A

PIC 4006A only applies to Subclass 457 (Temporary Work (Skilled)) visas made before 18 March 2018.[88]

[82] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 Overview (re-issued 18/11/2017).
[83] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – Assessing a waiver for a humanitarian visa (re-issued 18/11//2017).
[84] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 waivers for non-humanitarian visas – Factors afforded significant weight under policy (re-issued 18/11/2017).
[85] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4007 waivers for Foreign Affairs or Defence Sector students (re-issued 18/11//2017).
[86] *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999). This case involved judicial review of a decision of a delegate that the applicant did not meet PIC 4007 in the form prior to the amendments of 1 July 1999. The waiver was not exercised. The Full Court held at [49] that a request to the applicant to provide information on "compelling and compassionate circumstances" did not demonstrate an unduly restrictive approach to the exercise of the waiver. The delegate's decision was overturned following *MIMA v Seligman* (1999) 85 FCR 115 and the invalidity of r.2.25B.
[87] *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999) at [47].
[88] PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which it applied) from that date. The amendments do not affect visa applications made before 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation. The Subclass 457 visa was replaced with the Class GK Subclass 482 (Temporary Skills Shortage) visa and applicants for Subclass 482 must satisfy health criterion 4007.

PIC 4006A(2) provides a power to waive part of the health requirement (namely PIC 4006A(1)(c)) 'if the *relevant nominator* has given the Minister a written undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements'.[89]

'Relevant nominator' is defined in PIC 4006A(3) to mean an approved sponsor who:

- has lodged a nomination in relation to a primary applicant, or
- has included an applicant who is a member of the family unit of a primary applicant in a nomination for the primary applicant, or
- has agreed in writing for an applicant who is a member of the family unit of a primary applicant to be a secondary sponsored person in relation to the approved sponsor.

Note that not all Subclass 457 applicants are required to have a nomination lodged in respect of them. Only those applicants applying for the cl.457.223(2) [Labour Agreement] and cl.457.223(4) [Standard Business Sponsor] must be the subject of an approved nomination.

Subclass 457 applicants who applied under the 'service sellers' stream[90] and the 'persons accorded certain privileges and immunities' stream before 24 November 2012 [91], are not required to be the subject of a nomination. For these applicants, the waiver in PIC 4006A cannot be accessed.

Before the requirements of PIC 4006A(1)(c) can be waived, it must first be established that an applicant has a disease or condition that would result in them not being able to satisfy those requirements. Once that is established, the written undertaking must relate to *that* disease or condition.

There is no discretion to waive the requirements in the absence of a written undertaking. The term 'undertaking' is not defined in the Act or the Regulations, nor is the form of the undertaking prescribed. It is only necessary that the undertaking:

- be written
- be given by the relevant nominator
- be given to the Minister
- and be an undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).[92]

In the absence of a statutory definition, the word 'undertaking' is to be given its ordinary meaning. The Macquarie Dictionary Online relevantly defines the word as 'a promise; pledge; guarantee'.[93] Where there is persuasive evidence that a purported undertaking cannot be met, there is some doubt that the term 'undertaking' can meaningfully be applied. As discussed below, consideration of whether a nominator can meet the purported undertaking may also be a relevant factor in considering whether to exercise the waiver.

[89] The term "relevant employer" in PIC 4006A was replaced with "relevant nominator" by SLI 2009 No. 289 and applies to *visa* applications made on or after 9 November 2009 as well as those made prior to, but not finally determined by that date: r.3(3); Schedule 2, Items [2] and [3]. According to the Explanatory Statement to SLI 2009 No. 289, the amendment "ensures that it is always the approved sponsor who has identified the visa applicant in the nomination, or has agreed in writing to be the approved sponsor of the visa applicant, who gives the written undertaking to meet the costs associated with the visa applicant's health condition, regardless of whether the approved sponsor is also the visa applicant's employer." The amendment reflects similar changes in references from employer to nominator in Subclass 457 criteria affected by SLI 2009 No. 202 applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.

[90] cl.457.223(8).

[91] cl.457.223(9) as in force prior to 24 November 2012. The Privileges and Immunities stream was removed from the Subclass 457 visa by the Migration Legislation Amendment Regulations 2012 (No. 4) (SLI 2012 No. 238), item 228 of Schedule 1.

[92] PIC 4006A(2).

The Tribunal must be satisfied that any written undertaking it has is from the relevant nominator. Departmental guidelines state:

> *…if the 'relevant nominator' is a company, the undertaking must have been 'executed' by the company.*
>
> *Under s.127 of the Corporations Act 2001, a company may execute a document:*
> - *without using a common seal if the document has been signed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director*
> - *using a common seal if the affixing of the seal has been witnessed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director.*[94]

The Tribunal may have regard to these guidelines, but should not treat them as binding evidentiary requirements. It is a matter for the Tribunal to determine what evidence is necessary to satisfy it that the undertaking has been given by the nominator. In the case of a nominator who is a company or unincorporated association, the Tribunal must be satisfied that the individual giving the undertaking has authority to do so on behalf of the nominator.

PIC 4006A(2) is ambiguous as to whether, for the undertaking to have been given to the Minister, it is necessary that it have been addressed to the Minister, or whether it is sufficient that an unaddressed undertaking be provided to the Minister (or Tribunal). On the one hand, it is arguable that the undertaking must be addressed to the Minister (or Tribunal), based on a view of an undertaking as a promise, pledge or guarantee addressed specifically to a person or group of persons, who may act in reliance on that promise. On the other hand, it is arguable that a breach of the undertaking is unenforceable by the Minister, and that there is no clear policy purpose to be served by making the discretion to exercise the power conditional upon an undertaking being specifically addressed to the Minister. On either construction, the relevant nominator must consider and express a commitment to meet the undertaking, and the Minister will have a record of the undertaking and whether it was honoured available when considering applications relating to the nominator in future. The Explanatory Statement which introduced the waiver for PIC 4005A (later renumbered as PIC 4006A in a technical amendment[95]) provides little if any guidance on this point.[96]

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[93] Macquarie Dictionary Online, accessed 16 November 2016.

[94] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers - PIC 4006A (UC-457 Only) (re-issued 18/11/2017). Under ss.128 and 129 of the *Corporations Act 2001*, a person is, broadly speaking, entitled to assume that a document executed in this manner has been executed by someone authorised to act for the company in any dealings with that company.

[95] According to the Explanatory Statement for SLI 1995 No. 117: "In December 1994, public interest criterion 4005A was introduced into Schedule 4. It was intended as a relaxed health criterion for temporary entry classes 413 (Executive), 414 (Specialist) and 418 (Educational) with the relevant employer giving an undertaking to meet certain medical costs if they arose. However, 4005A was inadvertently included in a number of other classes that had criteria listed as 4001 to 4006. This regulation omits item 4005A and reinserts it as item 4006A which overcomes the problem".

[96] According to the Explanatory Statement for SLI 1994 No. 376: "The new public interest criterion 4005A is identical to existing public interest criterion 4005 but with an additional provision that a health objection on the grounds that the applicant's disease or condition would result in undue costs to Australian community resources and public funds may be waived where the proposed employer, or the family head's proposed employer, has provided a written undertaking to meet all costs related to the applicant's disease or condition. The waiver is available only where the applicant's disease or condition is not a public health risk or danger to the Australian community."

As mentioned above, the undertaking must be that the relevant nominator will meet all the costs related to *the specific* disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c). An undertaking stating that the nominator will meet the applicant's health costs without reference to the condition would not appear to meet this description.

The undertaking must be that the relevant nominator will meet *all* the costs related to the relevant disease or condition. Departmental guidelines state:

> *The relevant nominator must undertake to meet all of the costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c).*
>
> *The undertaking must therefore, include the assessed estimated costs.*
> *…*
>
> *In most cases, the MOC's opinion that the applicant fails to satisfy the health requirement will be based on the likely cost of health care and community services in Australia….*
>
> *… generally, it would be reasonable to expect that a larger organisation would be able to meet a higher level of costs than a smaller organisation or an employer who is an individual. However, each case must be considered on its own merits.*
>
> *If there is doubt about the capacity of the relevant nominator to be able to meet the potential costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c), s.65 delegates should request suitable documentary evidence (such as a letter from an auditor or accountant) confirming the capacity of the relevant nominator to meet those costs*.[97]

These guidelines should not be elevated to the status of legal requirements. In particular, PIC 4006A(2) contains no express requirement that the nominator must have an estimate of what all the relevant costs are before undertaking to meet all of them. Even if a nominator does have an opinion of a MOC as to health costs, it is not bound to consider that assessment correct. The undertaking is to pay all the relevant costs, regardless of whether they turn out to be more or less than the costs estimated by the MOC or nominator at the time the undertaking is given.

While not an express statutory requirement, the awareness of the nominator as to potential costs, however they are assessed, may be relevant to the decision whether to waive the requirement in PIC 4006A(1)(c).

Once a relevant undertaking has been given, the Tribunal has a discretion whether or not to exercise the waiver. Departmental guidelines state:

> *Under policy, before the s.65 delegate makes a decision to exercise a PIC 4006A(2) health waiver, they must assess whether the undertaking must be capable of being honoured.*
>
> *Consideration should be given to:*
> - *whether the relevant nominator has dishonoured previous undertakings*
> - *whether the relevant nominator has the capacity to meet the estimated costs involved and*
> - *if the 'relevant nominator' is a company, the undertaking must have been executed by the company.*[98]

[97] PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement >-Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).
[98] PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).

In exercising a discretion, the Tribunal should have regard to policy, but must not determine an issue simply by resolving whether or not it conforms to policy. In particular, the Tribunal should not decline to exercise the waiver simply because the undertaking does not meet one of these requirements, some of which appear to go beyond the requirements of the Regulations. The Tribunal may, however, consider each of the circumstances referred to, together with any other relevant information before it, and exercise its discretion based on the total circumstances of the case and having regard to the purpose of the provision. See Application of policy for further details.

Note that there is no provision to waive the requirements of PIC 4006A(1)(a) or (b), i.e. that the applicant be free from tuberculosis and from a disease or condition that could threaten public health in Australia or endanger the Australian community.

'One fails all fail' visa criteria

The so-called 'one fails, all fail' criteria have the effect of including health requirements in primary criteria for visa subclasses which apply to primary visa applicants, secondary visa applicants *and*, in certain circumstances, members of the family unit who are not included in the visa application.

The requirement for members of an applicant's family unit, even where they are not applicants for the visa, to satisfy the health requirement in PIC 4005 or 4007, generally appears in criteria for permanent visas, or temporary visas which provide a basis for grant of a later permanent visa. Typically, the member of the family unit not included in the application must meet the health requirement unless 'the Minister is satisfied that it would be unreasonable to require the person to undergo assessment'. An example of this is the Subclass 801 (Partner) (Residence) visa, where it is a requirement in cl.801.224(2)(b) that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who satisfies PIC 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

In considering this question, the person must first be a member of the family unit of the visa applicant/s. 'Member of the family unit' is defined in r.1.12 of the Regulations[99].

The 'unreasonable to require the person to undergo assessment' exception

In circumstances where the Tribunal is satisfied the person is a member of the family unit of the visa applicant and is not included in the visa application, then the Tribunal can consider whether it would be unreasonable to require the person to undergo assessment.

It is not possible for the Tribunal to be satisfied that it would be unreasonable to require a person to undergo assessment where the person has already undergone assessment. The exempting power does not exist to undo an assessment actually completed.[100] The power does not exist to be

[99] For visa applications made prior to 19 November 2016, a member of the family unit of an applicant includes dependent children ('dependent child' is defined in r.1.03 of the Regulations) and relatives who are dependent upon the relevant visa applicant. 'Dependent is also defined in r.1.05A of the Regulations. For visa applications made on or after 19 November 2016 or a visa granted as a result of such an application, Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 (F2016L01696) amended the definition to set an upper age limited of 23 years for children or step-children who are dependent unless they are incapacitated for work, and is limited to family members within the nuclear family. These amendments do not apply to refugee, humanitarian and protection visas. For further information see MRD Legal Services commentary 'Member of a Family Unit'.

[100] *MIMA v Ma* (1998) 82 FCR 455 at 460 (Whitlam J, 31 March 1998). The case concerned a Parent visa application. The daughter of the visa applicants was originally included in the visa application, underwent a health examination and was found by the MOC not to meet PIC 4005(c). The parents then withdrew her from the visa application. The Tribunal remitted the matter, finding that it could not see any good reason for requiring the daughter to undergo assessment. The Court set aside

exercised when it is known that a person is unable to satisfy the specified health criteria, even when the applicant has not yet undergone assessment.

What is unreasonable will depend on the individual circumstances of the case. Departmental guidelines indicate that non-migrating family members are not ordinarily required to complete health examinations, but circumstances where it may be reasonable to require an examination include:

- where the non-migrating family member is a young child remaining in their country of origin without parental support;
- where the non-migrating family member is remaining in their country of origin where there is ongoing conflict and stability; or
- where there is evidence that the non-migrating family member will ultimately seek to migrate to Australia.[101]

Assessment of non-applicant family members

Where the decision-maker finds that it would not be 'unreasonable to require the person to undergo assessment', the non-applicant family member will need to satisfy the relevant health criterion. Setting aside the exception, the assessment of whether a non-applicant satisfies the PIC is not materially different from the assessment that would be made for a primary or secondary visa applicant.

One question that may arise in such cases relates to the fact that both PIC 4005 or 4007 refer to an assessment of 'the applicant'. The concern with this terminology is that non-applicant (non-migrating) family members are not 'applicants' in any ordinary sense. While the use of the term may suggest some uncertainty about how the PICs operate with respect to non-applicants, no such ambiguity arises in the Schedule 2 criteria that require non-applicants be assessed against the health criteria.[102] For this reason, non-applicant family members should be assessed against PIC 4005 and 4007, notwithstanding that perceived ambiguity.

To construe the provisions as applying to anyone other than the non-applicant family member would result in a criterion such as cl.801.224(2)(b) having no utility.[103] It would also undermine the clear purpose of such a provision which is to ensure a decision-maker or MOC can properly consider any disease or condition (and any associated costs) that may affect a non-applicant family member, and the impact those matters may have on the potential grant of the visa.

Remittal power

If the Tribunal is satisfied that an applicant meets a discrete part of PIC 4005, 4006A or 4007 then it is permissible to remit with a direction that the applicant satisfies the particular sub criterion for the purpose of the relevant Schedule 2 clause (e.g. remit with direction that applicant meets PIC 4007(2)(b) for the purpose of cl.309.225 of Schedule 2 to the Regulations).[104] See Chapter 3 of the Procedural Law Guide for more detail about the remittal power.

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the Tribunal decision for legal error as it had no power to exercise the exemption. See also *Satya Nand v MIEA* (1996) 71 FCR 52 (Moore J, 27 November 1996).at 55-56

[101] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers – Non-migrating family members (re-issued 18/11/2017).

[102] For example cl.801.224(2)(b)) clearly provides that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who, inter alia, satisfies PIC 4007.

[103] If such a criterion is assessed by reference to any one other than the non-applicant family member, the assessment against PIC 4005 or 4007 would become redundant, as any 'applicant' would already have been assessed against the applicable health criteria. For example, in the context of a Subclass 801 (Partner) (Residence) visa, the primary applicant would need to satisfy PIC 4007 under cl.801.223(1)(a), and any secondary applicants would need to satisfy PIC 4007 as part of cl.801.224(1)(a).

[104] s.349(2)(c), r.4.15(1)(b) and r.2.03.

Relevant case law

Applicant Y v MIAC [2008] FCA 367	Summary
Blair v MIMA [2001] FCA 1014	Summary
Bui v MIMA [1999] FCA 118	
Haque v MIBP [2015] FCCA 1765	Summary
Imad v MIMA [2001] FCA 1011	Summary
JP1 & Ors v MIAC [2008] FMCA 970	Summary
MIMA v Ma [1998] 82 FCR 455	
Pokharel v MIBP [2016] FCCA 3295	Summary
Sarabia v MIBP [2017] FCCA 2642	
Satya Nand v MIEA [1996] FCA 1057	
Ramlu v MIMIA [2005] FMCA 1735	Summary
Reynolds v MIAC [2010] FMCA 6	Summary
Robinson v MIMIA (2005) 148 FCR 182	Summary
MIMA v Seligman (1999) 85 FCR 115	
Traill v MIAC [2013] FCCA 2	Summary
Triandafillidou v MIMIA [2004] FMCA 20	Summary
MIAC v Wainwright [2010] FMCA 29	Summary
MIMIA v X [2005] FCAFC 209	Summary

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment Regulations 2008 (No.1)	SLI 2008 No.91
Migration Amendment Regulations 2009 (No. 9)	SLI 2009 No. 202
Migration Amendment Regulations 2009 (No. 13)	SLI 2009 No. 289
Migration Amendment Regulations 2011 (No. 6)	SLI 2011 No. 199
Migration Legislation Amendment Regulations 2011 (No. 1)	SLI 2011 No. 105
Migration Legislation Amendment Regulation 2012 (No. 4)	SLI 2012 No. 238
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014 No. 30
Migration Amendment Regulation (2016 Measures No.4) Regulation 2016	F2016L01696
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available Decision Templates/Precedents

There are two decision templates available which are applicable to visa applications made but not finally determined before, or made on or after, 1 July 1999. These are:

- **Health criterion – PIC 4005 -** this template is suitable for a review of a visa refusal on the basis of PIC 4005

- **Health criterion – PIC 4007** - this template is suitable for a review of a visa refusal on the basis of PIC 4007

Last updated / reviewed: 14 August 2018

OVERVIEW OF THE MRD REVIEW PROCESS

This Guide presents an overview of the process for primary migration/refugee decisions and reviews by the MRD. You can find more detailed information in the MRD Procedural Law Guide (PLG) and other resources this document refers to.

Visas and related primary decisions

PLG ch. 1, 2

A person needs a visa to be lawfully in Australia, otherwise they can be detained or removed. An applicant (the visa applicant) applies for a class of visa. Each class has one or more subclasses and some subclasses have streams. Each class has a two letter identifier and each subclass has a three digit identifier, e.g. Partner (Temporary) (Class UK) (Subclass 820).

Sometimes, a person needs to be sponsored by an Australian citizen, permanent resident or an approved business sponsor to get a visa. For some business/work visas, a business needs to be approved as a sponsor, and an occupation needs to be nominated for a person to work in.

A delegate at the Department of Home Affairs (the Department) assesses the visa application against the criteria (generally in Schedule 2 to the Migration Regulations) and makes a decision to grant or refuse the visa (or approve a sponsor or nomination). Visas can also be cancelled on various grounds, including providing incorrect information to the Department, not complying with visa conditions, or being a risk to public safety.

The Department has to notify the relevant person (e.g. the visa applicant) about their decision. It usually does this by sending a decision notification letter with the decision record attached.

AAT Jurisdiction

PLG ch. 2, 4, 5

A person (the review applicant) can apply to the AAT for review of the Department's decision. Depending on the circumstances, the review applicant might be the visa applicant, but not always (see the 'standing' requirement below). For the AAT to have the power or 'jurisdiction' to review a decision, the application must:

- relate to a Part 5 [general migration] or Part 7 [protection] reviewable decision
- be made in the approved form (or in a form which 'substantially complies')
- be made within the prescribed time limits (which depend on the kind of decision and where the person was when the Department made the decision)
- be made by the person with standing to apply (e.g. the visa applicant, sponsor, nominator, person whose visa was cancelled or a specified Australian relative)
- *for Part 5 review applications* – be accompanied by the prescribed fee or a fee reduction application and 50% of the prescribed fee. For Part 7 review applications, no fee is payable at the time of lodgement; however if the review application is not successful then the full fee will be payable
- meet any other requirements, e.g. about the location of the review applicant (they may need to be onshore at the time of lodgement or the time of the Department's decision, or both).

The requirements for making a valid review application are strict and if they are not met the AAT will not have jurisdiction. Table 1 at the end of ch 4 of the PLG sets out the time limits and standing and location requirements for Part 5 and Part 7 reviews. Some review applications can be combined.

You can use the Jurisdictionary and the Eligibility Calculator to assess whether a valid review application has been made. The Jurisdictionary provides guidance on jurisdiction issues and is searchable by case number or by the type of decision for review using the three digit subclass identifier. The Eligibility Calculator calculates the last day of the prescribed time limit. If it appears the AAT doesn't have jurisdiction, the AAT sends a natural justice letter asking the person to tell us why they think we have jurisdiction. The Presiding Member considers the response.

Getting documents and evidence, disclosing adverse information PLG ch. 10, 11, 31

The Department has to give the AAT the documents relevant to the review. This is usually the Department's file. Applicants can request access to written material given or produced to the AAT under s.362A (active Part 5 reviews only) and any person can request access to documents held by the AAT under the *Freedom of Information Act 1982* (FOI) at any time. The Department can issue 'non-disclosure certificates' that restrict the AAT from disclosing sensitive or confidential information on the file.

The AAT can get information in any way it likes. It can issue a summons to compel a person to give documents or appear at a hearing to give evidence. It can ask the Department for submissions. There are also formal procedures in s.359(2)/s.424(2) of the Migration Act to invite to a person to provide information.

The AAT also has a duty under s.359A/s.424A to give certain adverse information to an applicant and invite them to comment on or respond to it. This can be done orally at a hearing under s.359AA/s.424AA, or in writing.

If the AAT sends a written invitation under s.359(2)/s.424(2) or s.359A/s.424A, it must give the applicant the prescribed time period to respond from the time of receipt: see the Prescribed Periods Table. The AAT can extend the time for response at its discretion, but only if the initial time has not yet expired. If an applicant fails to respond to a written invitation within the prescribed period (or as extended), they lose their right to a hearing. For Part 5 reviews, the AAT has no power to hold a hearing in these circumstances. For Part 7 reviews, the AAT can still invite the applicant to a hearing.

Hearings PLG ch. 12, 13, 18

If the AAT cannot make a favourable decision based on the documents, it must invite the review applicant to a hearing, to give them an opportunity to present evidence and arguments, except in limited circumstances. These are where the review applicant consents to the AAT deciding the review without the review applicant appearing before it or fails to respond to a written invitation under s.359(2)/s.424(2) or s.359A/s.424A. Hearings can be held in person or by telephone or video link, and can be for a single case or a multiple applicant hearing/telephone list (MAHL/MAPL).

The applicant may have a representative and can ask the AAT to take evidence from witnesses. The representative cannot present oral arguments or formally address the AAT on the review applicant's behalf, unless the AAT Member allows them to. The AAT provides an interpreter if needed. The AAT usually takes evidence on oath or affirmation. The Department is not a party and does not participate in the review.

The hearing invitation must give applicants at least the prescribed period of notice of the hearing from the time of receipt: see the Prescribed Periods Table. The AAT can adjourn or postpone the hearing to a later date.

If the applicant fails to appear at a hearing, the AAT can proceed to a decision or dismiss the application without giving the applicant a further opportunity to appear. If the AAT dismisses an application, it can re-instate it if the applicant asks within 14 days of receiving the dismissal decision and the member considers it appropriate to do so.

Sending correspondence PLG ch. 8

Case correspondence (e.g. the invitations described above) must be given by specified methods. The Migration Act 'deems' correspondence to be received at a specified time when it is given by a specified method. If the person is not in immigration detention, the methods include:

- email or fax to the last email address/fax number provided for the review
- prepaid post to the last address provided for the review (the document must be dated and dispatched within 3 working days)
- handing it to the recipient or an appropriate person at the last address provided.

If the person is in immigration detention, the AAT sends the correspondence to the detention centre (usually by email or fax) where it is then given to the person by hand.

A review applicant can nominate an 'authorised recipient' (usually their representative) to receive correspondence on their behalf. Case correspondence is generated in CaseMate and you can view sample correspondence on the intranet in the Letter Templates Index.

Decisions PLG ch. 24, 26, 28

The AAT can:

- affirm the decision (agree with the primary decision)
- remit the matter for reconsideration in accordance with directions (sending it back to the Department with a direction that a certain criterion is met)
- set the decision aside and substitute a new decision (e.g. not to cancel the visa)
- vary the decision (e.g. in points test assessments and sponsor bar cases).

It can give the decision:

- orally with oral reasons at a hearing (the applicant can ask for a written version)
- orally at the hearing and provide written reasons later
- in writing with written reasons.

Once a decision on the review is made, a Member may reopen it if it is affected by a clear jurisdictional error in certain circumstances. If the applicant thinks the decision is wrong in law, they can seek judicial review in the Federal Circuit Court (FCC) or the High Court.

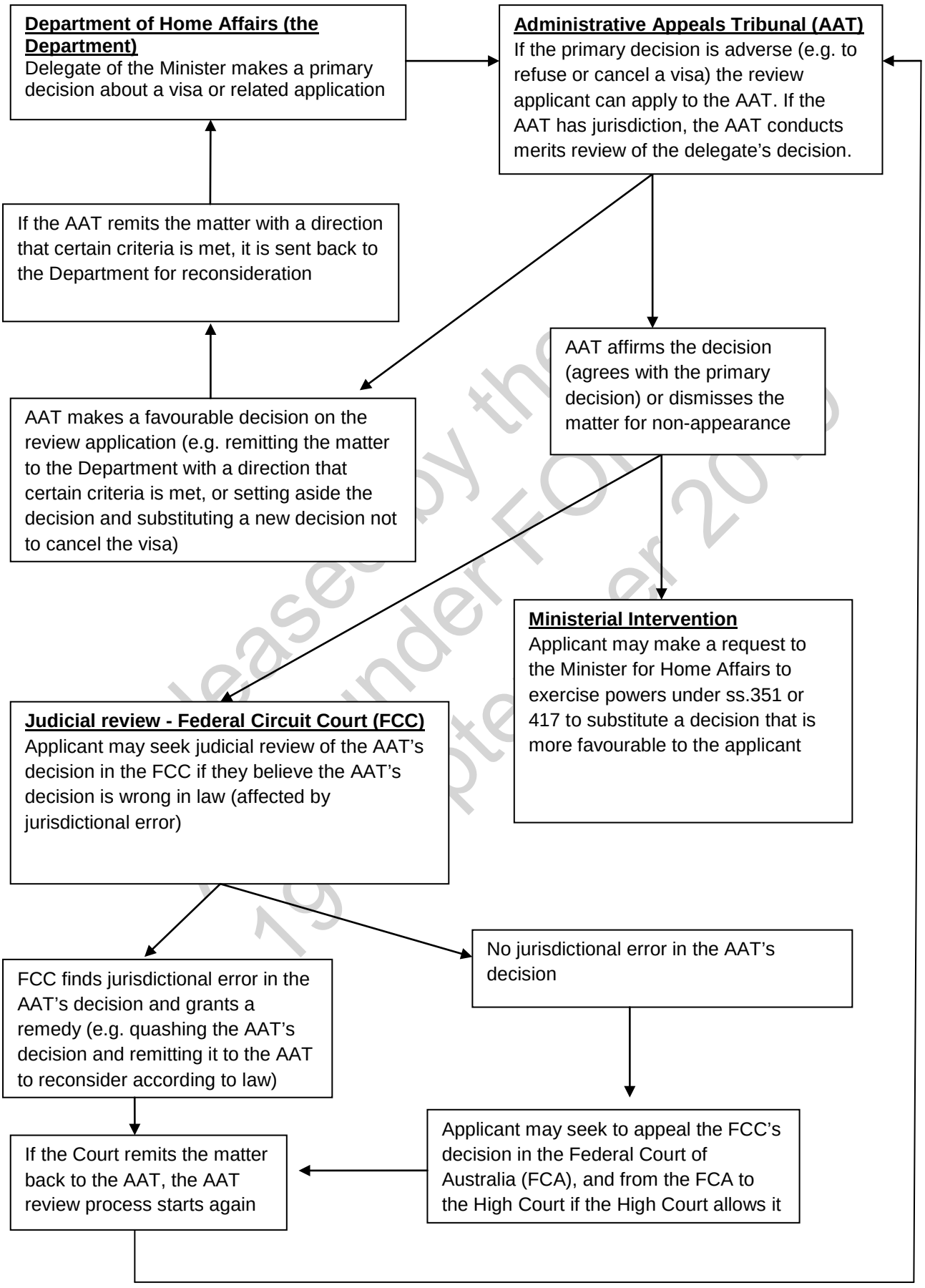
A review application can be withdrawn at any time prior to a decision being made on the application. Once an application has been withdrawn it cannot be reinstated.

Refunds PLG ch. 5

The AAT will refund 50% of the full application fee if the review applicant receives a favorable decision on any case. In circumstances where the application fee has been reduced by 50% because of severe financial hardship and the review applicant receives a favourable decision, 50% the reduced fee already paid will be refunded (i.e. 25% of the full fee will be refunded). If the review application is invalid, the whole fee paid will be refunded.

If an application is withdrawn, the application fee can only be refunded if it was withdrawn due to certain circumstances relating to the death of a visa/review applicant or family member, grant of the same kind of visa, or a parent visa application made after the review.

Flowchart of decision-making and appeal processes – MRD



Public Interest Criterion 4001

CONTENTS

Introduction

Public Interest Criterion (PIC) 4001 refers to a character test under the *Migration Act 1958* (the Act). Most visa subclasses provide that the Minister must be satisfied that the visa applicant meets the requirements of PIC 4001 as a criterion for the grant of the visa.[1] However, the requirements can also extend to a person other than a visa applicant. A number of visa subclasses require that each member of the family unit who is *not* an applicant for the visa must also satisfy PIC 4001.[2] In addition to the requirement in PIC 4001, applicants may also be required to satisfy additional criteria in r.2.03AA, relating to the provision of documents or information for character test and security assessments.

Where the Tribunal is required to review a decision refusing to grant a visa under s.65 of the Act because the person has not met the requirements of PIC 4001, it must assess for itself whether the person satisfies that criterion. There are also additional criteria, set out in r.2.03AA of the Regulations that must be met.

This commentary is confined to consideration of review of s.65 decisions under Parts 5 and 7 of the Act in the Migration and Refugee Division (MRD) of the Tribunal. Except where otherwise specified, all references to the Tribunal are to the MRD of the Tribunal.

Public Interest Criterion 4001 and related requirements

Public Interest Criterion 4001 is set out in Schedule 4 to the Migration Regulations 1994 (the Regulations).[3] It provides that either:

(a) the applicant/person[4] satisfies the Minister that s/he passes the character test; or

(b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the applicant/person would fail to satisfy the Minister that s/he passes the character test; or

(c) the Minister has decided not to refuse to grant a visa to the applicant/person despite reasonably suspecting that s/he does not pass the character test; or

(d) the Minister has decided not to refuse to grant a visa to the applicant/person despite not being satisfied that s/he passes the character test.

[1] eg cl.051.213(a) provides that, to be granted a Bridging Visa E (Subclass 051), the Minister is satisfied that the applicant satisfies the public interest criteria (PIC) 4001, 4002 and 4003.
[2] eg cl.186.213 provides that each member of the family unit of the applicant who is not an applicant for a Subclass 186 visa satisfies certain PIC, including PIC 4001.
[3] The validity of PIC 4001 has not been judicially considered, unlike PIC 4002 which was found invalid: *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 per French CJ at [71], Hayne J at [221], Crennan J at [399] and Kiefel J at [459].
[4] For visa applications made on or after 9 November 2009, references to 'the applicant' were replaced by 'the person': Migration Amendment Regulations 2009 (No.12) (SLI 2009, No. 273). The amendment aligns Schedule 2 and Schedule 4 to make clear that eligible sponsors or non-applicant family members, and not only visa applicants, may be assessed against PIC 4001: Explanatory Statement to SLI 2009, No. 273.

The PIC 4001 requirements

Clause 4001(a) is met if the person satisfies the Minister (or Tribunal on review) that he or she passes the character test (see below). This requires considering s.501(6) of the Act. Unless the Tribunal concludes that the person does not pass the character test because one or more of s.501(6)(a) - (h) applies, then they pass the character test and will satisfy cl.4001(a).

Clause 4001(b) is met if the Minister (or Tribunal on review) is satisfied that, after having made appropriate inquiries, there is nothing to indicate that the person would fail to satisfy the Minister (Tribunal) that the person passes the character test. There is no judicial authority on the meaning of 'appropriate inquiries' in this context and what constitutes 'appropriate inquires' will therefore depend on the circumstances of the particular case.[5] Further guidance on what may constitute 'appropriate inquiries' may also be derived from the Tribunal's general duty to make inquiries during a review.[6]

Once there has been a positive finding that a person does not meet cl.4001(a), cl.4001(b) cannot be satisfied either, even if being considered at a later point in time as to when the finding was made in relation to cl.4001(a). This is because a previous negative finding regarding cl.4001(a) would itself be 'something' which indicates the person would fail the test, such that it could not be said that there was 'nothing' to indicate that they would.

An applicant must satisfy one of the four alternatives in cl.4001(a) to (d). Whether an applicant meets cl.4001(a) and (b) involves respectively an assessment by the Tribunal as to whether the applicant meets the character test and a finding, after appropriate enquiries, that there is nothing to indicate that the person would fail to satisfy the Minister that the person passes the character test. Both cl.4001(a) and (b) require the Tribunal to have regard to the character test in s.501(6) of the Act (see below). Clause 4001(a) involves a direct assessment of the character test, whereas cl.4001(b) is a less intensive question of whether the decision-maker is satisfied there is nothing (as in no information or other evidence) to suggest the person might fail the character test. Where there is such information (for example, the presence of past convictions in a criminal record check) an applicant would presumably not be able to meet cl.4001(b), however this would not prevent them from meeting one of the other elements in PIC 4001.

For cl.4001(c) and (d), the Tribunal's role upon review is more confined, involving a finding of fact as to whether a decision-maker other than the Tribunal (i.e. the Minister, the relevant s.501 delegate or the Tribunal in the General Division) has properly exercised the relevant power to make the relevant kind of decision.[7]

Additional criteria applicable to character tests and security assessments – r.2.03AA

Where a person is required to satisfy PIC 4001 for the grant of a visa, additional criteria are prescribed under r.2.03AA that must be met for the grant of visa. This criterion requires an applicant to provide requested documentation or information relating to the applicant's character and criminal history.

[5] For example, and while non-exhaustive, inquiries made with the Department, Australian police and the police force of the person's home country may amount to 'appropriate inquiries' in the particular circumstances of a case.
[6] See Chapter 7 of the Procedural Law Guide.
[7] PIC 4001(c) and (d) concern assessments under s.501 which can only be made by the Minister acting personally under s.501(3) (s.501(4)), or a person having the appropriate delegation. Where an application has been made to the Tribunal under Part 5 or 7 of the Act the Tribunal will only ever be able to find that a person meets PIC 4001(c) or (d) if the Minister has already made such a finding because they cannot exercise the discretion referred to.

The additional criterion in r.2.03AA applies to all current applications.[8] The additional criterion is essentially a codification of a longstanding administrative practice of the Department of requesting that applicants provide police clearances and criminal histories from countries where they reside, or have previously resided, so that decision-makers can assess applicants' ability to satisfy PIC 4001.[9]

Regulation 2.03AA requires that where the Minister has requested certain documents or information, the person has provided the documents or information. The documents or information that can be requested are as follows:

(a) a statement (however described) provided by an appropriate authority in a country where the person resides, or has resided, that provides evidence about whether or not the person has a criminal history; and

(b) a completed approved form 80.

The term 'appropriate authority' is not defined in the Act or Regulations, although a note to r.2.03AA refers to 'a police force' as an example of such an authority. While the police force in a particular country may often be the relevant authority for the purposes of r.2.03AA, the question of what constitutes an 'appropriate authority' from any particular country will be one for the decision-maker to determine on the available evidence. Having regard to the purpose of the provision, this may include a person or body authorised to issue a statement of criminal history under the law of that particular country.[10]

Subject to the waiver provision discussed below, a failure to provide the evidence requested under r.2.03AA would mean that the person has failed to satisfy a criterion for the visa and the decision-maker must refuse the application on that basis. It is not open to a decision-maker to find that an applicant satisfies PIC 4001 despite a failure to provide a statement as required under r.2.03AA(2).

Waiver of the requirement in r.2.03AA

Under r.2.03AA(3), the Minister (or Tribunal) may waive the requirement to provide a statement from the appropriate authority where satisfied that it is not reasonable for the applicant to do so. What constitutes 'not reasonable' is a matter for the decision-maker to determine having regard to any relevant circumstances. One example of a situation where the waiver might be exercised provided in the Explanatory Statement to the Regulation that introduced r.2.03AA is where the applicant's country is affected by a civil conflict and it may not be reasonable to require the person to provide the statement.[11] It is important to highlight that while the 'statement' requirements in r.2.03AA(2)(a) can be waived, the waiver does not extend to requests to provide the completed approved Form 80.[12]

The waiver also does not extend to consideration of whether the request for the statement was reasonable or otherwise ought to have been made. Regulation 2.03AA(2) applies where the Minister, delegate or Tribunal 'has requested' the statement. Although there has been no judicial consideration on this point, the Tribunal's power to exercise all the powers and functions of the decision-maker[13] (and by

[8] Inserted by Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014 No.199) to apply to applications made on or after 12 December 2014, as well as those made prior to, but not finally determined as at that date.
[9] Explanatory Statement to SLI 2014, No.199 at p.10-11
[10] For example, Criminal Records checks in Canada are administered by the Royal Canadian Mounted Police under the *Criminal Records Act* (R.S.C., 1985, c. C-47). Refer: http://www.rcmp-grc.qc.ca/cr-cj/index-eng.htm (accessed 17 July 2017).
[11] Explanatory Statement to SLI 2014 No.199 at p.19
[12] Departmental Form 80 'Personal particulars for assessment including character assessment'.
[13] Section 349(1)

implication to revoke a request made by the Minister or delegate) does not appear to overcome the fact that the Minister or delegate has requested the statement. The waiver itself applies where it is not reasonable for the applicant to provide the document, which does not appear to extend to whether it is not reasonable to require the applicant to provide the document.[14]

The 'Character Test'

The expression 'character test' is not defined in the Regulations, however the reference to the character test in PIC 4001 is taken to be a reference to s.501(6) of the Act.[15]

Subsection 501(6) is entitled 'Character Test'. In summary, s.501(6) currently provides that a person does not pass the character test if:[16]

- the person has a 'substantial criminal record'
- the person has been convicted of an offence related to their immigration detention
- the person has been convicted of escaping from immigration detention (s.197A)
- the Minister reasonably suspects:
  - that the person is a member of, or associated with, a group, organisation or person involved in crime, or
  - that the person has been or is involved people smuggling trafficking, genocide or other serious international crimes
- having regard to past and present criminal and general conduct, the person is not of good character
- there is a risk that the person would engage in certain criminal, harassing, vilifying, inciting, disruptive or violent conduct in Australia
- the person has been convicted or found guilty of sexually based offences involving a child
- the person has, in Australia or a foreign country, been charged with or indicted for crimes against international humanitarian law
- the person has been assessed by ASIO as risk to security, or

[14] The Explanatory Statement to SLI 199 of 2014 refers to whether or not it is reasonable to require the person to provide a statement in relation to an application for a visa.' This is broader than the wording of the waiver provision itself and should be understood as referring only to the reasonableness of the applicant complying with the requirement, not the reasonableness of imposing requirement itself.

[15] *Awa v MIMIA* (2002) 189 ALR 328 [2002] FCAFC 63 (Spender RD, Nicholson and North JJ, 19 March 2002) at [11] and *SZLDG v MIAC* (2008) 166 FCR 230 at [86]. Note also that expressions used in a legislative instrument have the same meaning as the enabling legislation unless the contrary intention appears: s.13(1)(b), *Legislative Instruments Act 2003* (Cth).

[16] The character test in s.501(6) was substantially amended by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (No.129 of 2014). These amendments apply to a decision to grant or refuse a visa if the visa application was made on or after 11 December 2014, or if the visa application was made before, but not finally determined at that date. The changes also apply to a decision to cancel a visa on or after 11 December 2014.

- an Interpol notice in relation to the person is in force and it is reasonable to infer the person would present a risk to the Australian community or a segment of that community.

Unless there is an express finding of one or more of sub-sections (a) to (h) applying, a person is otherwise taken to have passed the test.[17]

For the purposes of the character test, 'substantial criminal record' (see below), 'court', 'imprisonment' and 'sentence' are specifically defined, and the circumstances of periodic detention, residential schemes or programs and convictions are also addressed.[18]

Mandatory policy considerations for s.501 decisions - Direction 65

Further guidance on the interpretation of s.501 is also contained within Direction No. 65 (Direction made under s.499 of the Act), 'Visa refusal and cancellation under s.501 and revocation of a mandatory cancellation of a visa under s.501CA'. The Direction is made up of: a Preamble (objectives, general guidance, exercise of the discretion, taking into account relevant considerations); Part A (visa holders – primary and other considerations relevant to the discretion to cancel a visa); Part B (visa applicants – primary and other considerations relevant to a decision to refuse a visa) and Part C (considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of a visa); Annex A (overview of the character test, application of the character test); and Annex B (defined terms).

The Direction is a mandatory consideration for decision-makers exercising powers under s.501 (ie departmental delegates and the Tribunal in its General Division) but not for decision-makers considering whether a person satisfies the character test for the purposes of PIC 4001(a). Nevertheless it provides guidance on matters that may be relevant to PIC 4001 decision-makers.

A copy of the Direction is available on the 'CharDirect' tab on the Register of Instruments - Miscellaneous and other visa classes.

The grounds in detail

Substantial criminal record - ss.501(6)(a), (7) and (7A)

Section 501(6)(a) of the Act provides that a person fails the character test if they have a 'substantial criminal record'.

The term 'substantial criminal record' is currently set out in s.501(7) as follows:

> *A person has a substantial criminal record if:*
> *(a) the person has been sentenced to death; or*
> *(b) the person has been sentenced to imprisonment for life; or*
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
> *(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more;*[19] *or*

[17] Section 501(6); *Godley v MIMIA* (2004) 83 ALD 411 per Lee J at [78]-[80]. This effectively reverses the onus intended by s.501(1) for the person to satisfy the Tribunal that they pass the character test.
[18] See s.501(7)-(10), (12).
[19] s.501(7)(d) as amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014* (No.129 of 2014). The amended version applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.[20]

Whether a person has a 'substantial criminal record' is largely a question of fact. The meaning relies primarily on criminal convictions and sentences which can be established from external records. In relation to terms of imprisonment, s.501(7)(c) and (d) are concerned with the sentence that has been imposed, rather than the term of imprisonment actually served.[21]

In addition, under s.501(7A) if a person has been sentenced to 2 or more terms of imprisonment to be served *concurrently* (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms. For example, where a person is sentenced to 2 terms of 3 months imprisonment for 2 offences to be served concurrently, the total of those terms would be 6 months for the purposes of the character test.[22]

Conviction of offence by immigration detainees - s.501(6)(aa) and (ab)

Sections 501(6)(aa) and 501(6)(ab) are concerned with whether a person has been convicted of a particular offence.[23]

Under s.501(6)(aa) a person does not pass the character test if they have been convicted of an offence committed:

- while in immigration detention; or
- during an escape from immigration detention; or
- during a period where the person has escaped from immigration detention but before the person was taken into immigration detention again.

In addition, under s.501(6)(ab) a person will not pass the character test if they have been convicted of an offence against s.197A. That section provides that a detainee must not escape from immigration detention.[24]

[20] s.501(7)(f) as inserted by No.129 of 2014. The amended version applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.

[21] *Seyfarth v MIM*IA (2005) 142 FCR 580 at [27] and the cases cited therein. Although the Court's reasoning on this point relates only to s.501(7)(c), it is equally applicable to s.501(7)(d). See also *Brown v MIAC* (2010) FCR 113 at [68]-[74] and [114], where the person was sentenced to a term of imprisonment of 12 months or more within the meaning of s 501(7)(c) notwithstanding that execution of her sentences was suspended.

[22] s.501(7A) as inserted by No.129 of 2014. The amended version applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.

[23] Introduced by the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (No.81 of 2011), to strengthen the consequences of criminal behaviour by persons in immigration detention and provide an additional basis for refusing to grant or cancelling a visa on character grounds: Explanatory Memorandum to Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 at pp.5-6. These provisions apply to decisions made on or after 26 April 2011, whether the conviction or offence occurred before, on or after that date.

[24] The penalty is 5 years imprisonment.

Sections 501(6)(aa) and (ab) will only be relevant if the person is or was in immigration detention. The term 'immigration detention' essentially means being in the company of, restrained by, or held by or on behalf of an officer or directed person in a detention centre, prison or remand centre, police station, vessel or another approved place.[25]

Criminal association or membership - s. 501(6)(b)

Section 501(6)(b) is concerned with whether the Minister reasonably suspects that a person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person, and that group, organisation or person has been or is involved in criminal conduct.

Unlike the previous version of s.501(6)(b) which required an actual association with a person, group or organisation, the current version contains a lower threshold and now only requires that the Minister reasonably suspects that the person has or had an association or membership with a group, organisation or person involved in criminal conduct. The intention of the amendments to this requirement, as explained in the Explanatory Memorandum to the Bill that introduced it, is that membership of such a group or organisation alone would be sufficient to cause a person to not pass the character test.[26]

Reasonably suspects

Whilst the term 'reasonably suspects' has not been the subject of judicial consideration in the context of s.501(6)(b), the same term was considered in *Goldie v Commonwealth*[27] for the purposes of the power to detain unlawful non-citizens in s.189. In that case, the majority found that the term 'reasonably suspects' was used as an alternative to 'knows' and suggested that something substantially less than certainty was required.[28]

Direction No. 65 is broadly consistent with this interpretation, indicating that a suspicion in this context is less than a certainty or belief, but more than speculation or idle wondering. For a suspicion to be reasonable, the Direction states that it should be a suspicion that a reasonable person could hold in particular circumstances and based on an objective consideration of relevant material.[29]

Meaning of association

The term 'association' to which s.501(6)(b) refers is not defined in the Act, but it requires an association involving some sympathy with, support for or involvement in the criminal conduct of the person, group or organisation with whom the person is said to have associated with.[30] Under Direction No. 65, mere knowledge of a group would not be enough to demonstrate an association. The association must be such as to have *some negative* bearing upon the person's character.[31] In establishing an 'association', Direction No. 65 also refers to the nature of the association and its degree, frequency and duration.[32]

[25] See s.5.
[26] Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill 2014 at [41]. See also *Roach v MIBP* [2016] FCA 750 at [136] and [140].
[27] *Goldie v Commonwealth* (2002) 117 FCR 566.
[28] *Goldie v Commonwealth* (2002) 117 FCR 566, per Gray and Lee J at [4]-[6].
[29] Direction No. 65, Annex A, Section 2, at [3].
[30] *MIAC v Haneef* (2007) 163 FCR 414 at [130]. While the Court's comments were made in the context of s.501(6)(b) as it previously stood prior to the amendments made by No.129 of 2014, the comments on the meaning of association are still relevant.
[31] Direction No. 65, Annex A, Section 2, at [3]. See also *MIAC v Haneef* (2007) 163 FCR 414 at [127]-[130].
[32] Direction No. 65, Annex A, Section 2, at [3].

Meaning of membership

Section 501(6)(b) currently refers not only to criminal association, but also membership of such groups or organisations.[33] The term 'membership' contemplates a person belonging to or being a part of that group or organisation and does not require sympathy with, support for or involvement in criminal conduct.[34]

Meaning of involved in criminal conduct

The term 'involved in criminal conduct' in s.501(6)(b) should be given its ordinary and natural meaning and not a technical legal meaning. A group is 'involved in criminal conduct' if the Minister suspects that members of the group commit crimes in their capacity as members of the group, using the facilities or resources of the group, or with the group's express tacit approval.[35]

People smuggling/trafficking and serious international crimes - s.501(6)(ba)

Section 501(6)(ba) provides that a person does not pass the character test if the Minister reasonably suspects that they have been, or is, involved in conduct constituting one or more of the following:

- an offence under one or more of ss.233A -234A (relating to people smuggling);
- an offence of trafficking in persons; or
- the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

The Explanatory Memorandum to the Bill that introduced s.501(6)(ba) states that the provision is intended to ensure that a person does not pass the character test where there is a reasonable suspicion that the person has been involved in one of the listed serious offences, without requiring that the person has been convicted of the offence.[36]

As noted above, reasonable suspicion does not require the decision-maker to be certain that the relevant conduct has occurred, but the view must be more than just speculation. This is discussed in more detail above.

Past and present conduct - s.501(6)(c)

Section 501(6)(c) requires a person to be of good character, having regard to their past and present *criminal* conduct, and past and present *general* conduct. A person does not meet the character test if, having regard to *either* or *both* limbs, the person is found not to be of good character.

Past and present criminal conduct – s.501(6)(c)(i)

The first limb in s.501(6)(c) provides that a person does not pass the character test if, having regard to their 'past and present *criminal* conduct', they are not of good character. This subparagraph refers to conduct as distinct from convictions for which s.501(6)(a) may also apply if they have a substantial criminal record. The expression 'past and present criminal conduct' should be read compendiously; it would be an error to only look at the applicant's past *or* present conduct.[37]

[33] s.501(6)(b) as amended by No.129 of 2014.
[34] *Roach v MIBP* [2016] FCA 750 at [136]-[142].
[35] *Roach v MIBP* [2016] FCA 750 at [171].
[36] Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill 2014 at [43].
[37] *Mujedenovski v MIAC* (2009) 112 ALD 10 at [41]-[43].

This ground typically applies to frequent or habitual low-level offenders, or when a person has been acquitted of an offence on a technical ground. When concluding that a non-citizen is not of good character, decision makers must take into account all the relevant circumstances of a particular case, including evidence of rehabilitation and recent good conduct.[38]

Section 2 of Annex A of Direction No. 65 identifies some factors that the Tribunal may take into account when considering s.501(6)(c)(i) in the context of PIC 4001, including: the nature, severity and frequency of the person's criminal conduct; material which may place the conduct in context such as judicial commentary or parole reports; as well as any conduct indicating character reform.[39]

Past and present general conduct – s.501(6)(c)(ii)

Under the second limb of s.501(6)(c) a person will not pass the character test if, having regard to their 'past and present *general* conduct', the person is not of good character. This ground commonly applies to persons who have previously provided false information or documents to the Department or other Commonwealth bodies,[40] although it would not be limited to such circumstances. Instead, the decision-maker would be looking to all circumstances, to identify continuing general conduct that demonstrates a 'lack of enduring moral quality', while also having regard to evidence of recent good conduct.[41]

As noted above, the expression 'past and present general conduct' should be read compendiously and it would be an error to only look at the applicant's past *or* present conduct.[42]

Direction No. 65 identifies some factors that the Tribunal may take into account when considering s.501(6)(c)(ii) in the context of PIC 4001 including: the person's history of serious breaches of migration laws in Australia or another country, including any circumstances that led to removal or deportation; dishonourable or premature discharge from the armed forces as a result of serious conduct; involvement in terrorist activities; trafficking or possession of trafficable quantities of proscribed substances; political extremism; extortion; fraud; or involvement in war crimes or crimes against humanity.[43]

Risk of certain conduct - s.501(6)(d)

Section 501(6)(d) provides that a person will not pass the character test if, in the event the person was allowed to enter or to remain in Australia, there is a risk the person would:

(i) engage in criminal conduct in Australia; or
(ii) harass, molest, intimidate or stalk another person in Australia; or
(iii) vilify a segment of the Australian community; or
(iv) incite discord in the Australian community or in a segment of that community; or
(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

[38] See further *Godley v MIMIA* (2004) 83 ALD 411 per Lee J at [56].
[39] Direction No. 65, Annex A, Section 2, at [5.1].
[40] Examples of this can be found in *Re Li and MIMIA* [2005] AATA 841 (Friedman SM, 31 August 2005); *Re Sorensen and MIMIA* [2006] AATA 96 (Walker SM, 7 February 2006); *Zou and MIAC* [2008] AATA 538 (Ettinger SM, 4 July 2008) and *Still and MIAC* [2008] AATA 759 (Isenberg SM, 28 August 2008).
[41] In *Godley v MIMIA* (2004) 83 ALD 411, Lee J stated at [56] that: 'before past and present general conduct may be taken to reveal indicia that a visa applicant is not of good character, continuing conduct must be demonstrated that shows a lack of enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct there must be due regard given to recent good conduct'. This judgment is also cited in Direction No. 65, Annex A, Section 2, at [5].
[42] *Mujedenovski v MIAC* (2009) 112 ALD 10 at [41]-[43].
[43] Direction No. 65, Annex A, Section 2, at [5.2].

Under Direction No. 65 there will be a 'risk' if there is evidence suggesting more than a minimal or remote chance of the person engaging in the type of conduct specified in s.501(6)(d).[44]

The test posed by s.501(6)(d) is a forward looking one. While past conduct may be a relevant consideration in assessing s.501(6), Direction No. 65 provides that it would not be sufficient to merely find that the person has engaged in conduct specified in s.501(6)(d) in the past. For a person to fail the character test on this basis, there must be a risk that the person would engage in the future in the specified conduct set out in s.501(6)(d)(i)-(v).[45]

Risk of engaging in criminal conduct – s.501(6)(d)(i)

Under s.501(6)(d)(i) a person does not pass the character test if, in the event the person was allowed to enter or to remain in Australia, there is a 'risk' that they would engage in criminal conduct in Australia. This may be an issue when a person has a history of offences overseas but does not have a 'substantial criminal record', or when they have engaged in conduct overseas that would be criminal in Australia.[46]

Whilst under section 2 of Annex A of Direction No. 65 the reference to 'criminal conduct' should be read as conduct for which a criminal conviction could be recorded, the Tribunal is not bound by this Direction and should turn its own mind to the question to avoid an error of law.[47]

Harassing, molesting, stalking, intimidating another – s.501(6)(d)(ii)

Section 501(6)(d)(ii) currently provides that a person does not pass the character test if, in the event the person was allowed to enter or remain in Australia, there is a risk that they would harass, molest, intimidate or stalk another person in Australia. For the purposes of the character test conduct may amount to harassment or molestation even though it does not involve violence or threatened violence to the person[48] or consists only of damage, or threatened damage, to property belonging to or in the possession of or used by the person.[49]

Examples provided in section 2 of Annex A of Direction No. 65 of relevant conduct include: breaching the terms of an Apprehended Domestic Violence (or similar) Order; conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches to children, including via electronic media; and conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed in response to a person's behaviour towards them, another individual, or their own or another individual's property.[50]

Risk of vilification, discord or danger to the community - ss.501(6)(d)(iii), (iv) and (v)

Under ss.501(6)(d)(iii)-(v) a person does not pass the character test if, in the event the person was allowed to enter or to remain in Australia, there is a risk that the person would:

- vilify a segment of the Australian community; or
- incite discord in the Australian community or in a segment of that community; or

[44] See Direction No. 65, Annex A, Section 2, at [6].
[45] See Direction No. 65, Annex A, Section 2, at [6].
[46] See eg *Re Mack and MIMIA* [2004] AATA 42 (Handley SM, 21 January 2004) and *Re Hand, MILGEA v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 667 dealing with similar provisions.
[47] Direction No. 65, Annex A, Section 2, at [6.1].
[48] s.501(11)(a).
[49] s.501(11)(b).
[50] Direction No. 65, Annex A, Section 2, at [6.2].

- represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Whilst these various terms are not further defined and have not been the subject of direct judicial consideration, in *Irving v MILGEA*[51] a Full Court of the Federal Court considered the terms violent or seriously disruptive behaviour under a previous version of the test. The Court held that whilst the adjective 'disruptive' had its ordinary English meaning of tending to rend or burst asunder or forcibly server, in turn requiring that the activity have the effect of polarising two sections or elements of a community beyond mere disagreement or controversy, it need not be accompanied by physical violence,[52] and the term 'activities disruptive to the Australian community' connoted actions designed to divide or rend the cohesiveness of the community.[53]

Direction No. 65 also provides some guidance on these issues with relevant factors listed as including, but not limited to a person: holding or advocating extremist views such as the use of violence as a legitimate means of political expression; having a record of encouraging disregard for law and order (such as in the course of addressing public rallies); engaging or threatening to engage in conduct likely to be incompatible with the smooth operation of a multicultural society; participating in, or being active in promotion of, politically motivated violence or criminal violence and/or being likely to propagate or encourage such action in Australia; and provoking civil unrest in Australia via the person's intended activities and proposed timing of their presence in Australia in relation to the presence of another individual group or organisation holding opposing views.[54]

Under Direction No. 65 the operation of s.501(6)(d)(iii), (iv) and (v) should be balanced against Australia's well established tradition of free expression and are not intended to provide a charter for denying entry or continued stay based merely upon the expression of unpopular opinions. The Direction does say, however, that where these opinions may attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.[55]

Sexually based offences involving a child - s.501(6)(e)

Section 501(6)(e)[56] provides that a person does not pass the character test if: a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child; or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction.

The term 'sexually based offences involving a child' is not elsewhere defined. Direction No. 65 indicates that it would include, but not be limited to, offences such as child sexual abuse, indecent dealings with a

[51] (1993) 44 FCR 540. The Court was considering whether holocaust-denying speeches could attract violent or seriously disruptive behaviour by the applicant's supporters and opponents.
[52] *Irving v MILGEA* (1993) 44 FCR 540 per Ryan J at [6].
[53] *Irving v MILGEA* (1993) 44 FCR 540 per Lee J at [30]. See also Drummond J at [15]-[16] where he endorsed the findings of the primary judge that "[t]aken together the words "activities disruptive of the Australian community…refer to some acute division or conflict within the community taken as a whole or within some community group".
[54] Direction No. 65, Annex A, Section 2, at [5.3].
[55] Direction No. 65, Annex A, Section 2, at [5.3]. This represented a shift from the guidance in Direction 55, which stated that 'the grounds in these sub-paragraphs are not intended to provide a charter for denying entry or continued stay to persons merely because they hold and are likely to express unpopular opinions, *even if these opinions may attract strong expressions of disagreement and condemnation from some elements of the Australian community*' (emphasis added).
[56] s.501(6)(e) as inserted by No.129 of 2014.

child, possession or distribution of child pornography, internet grooming, and other non-contact carriage services offences.[57]

Crimes under international humanitarian Law - s.501(6)(f)

Section 501(6)(f)[58] provides that a person does not pass the character test if the person has, whether in Australia or a foreign country, been charged with, or indicted for, one or more of the following:

- the crime of genocide
- a crime against humanity
- a war crime
- a crime involving torture or slavery
- a crime that is otherwise of serious international concern

ASIO assessments and Interpol notices - ss.501(6)(g) and (h)

Under s.501(6)(g)[59] a person will not meet the character test where they have been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of s.4 of the *Australian Security Intelligence Organisation Act 1979*).[60] Under s.501(6)(h)[61] a person will alternatively not meet the character test where an Interpol notice in relation to the person is in force, and it is reasonable to infer from that notice that the person would present a risk to the Australian community or a segment of that community.

According to the Explanatory Memorandum that introduced these grounds in 2014, the purpose of ss.501(6)(g) and (h) is to acknowledge that a person who is the subject of an adverse ASIO assessment or Interpol notice is likely to represent a threat to the security of the Australian community or a segment of that community.[62]

Section 501(6)(g) does not contain an evaluative element as the decision-maker's role is confined to identifying whether the person has been relevantly assessed by ASIO as a risk to security.[63]

[57] Direction No. 65, Annex A, Section 2, at [7(2)].
[58] s.501(6)(f) as inserted by No.129 of 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014. According to the Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 at [52], the purpose of the provision is to ensure that where a person has been charged with or indicted for one of these serious offences, the person objectively does not pass the character test regardless of whether the person also fails the 'substantial criminal record' limb of the character test in s.501(7).
[59] Section 501(6)(h) was inserted by No.129 of 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.
[60] Under s.4 of the ASIO Act, 'security' is defined as (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: espionage; sabotage; politically motivated violence; promotion of communal violence; attacks on Australia's defense system; or attacks of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in (aa).
[61] Section 501(6)(h) was inserted by No.129 of 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.
[62] Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 at [55].
[63] An applicant who is subject to an adverse ASIO security assessment may challenge the assessment before a court. If the challenge succeeds and a court quashes the adverse assessment, it is then a nullity and it would be a jurisdictional error for the Minister (or the Tribunal on review) to rely on the quashed assessment for the purposes of s.501(6)(g). See *BSX15 v MIBP* [2017]

In contrast s.501(6)(h) requires the decision-maker to determine whether there is an Interpol notice in force, and then decide whether it is reasonable to infer from the notice that the person would be a risk to the Australian community (or a segment thereof). The latter element would be a question of fact for the decision-maker, having regard to information (such as charges and past convictions) referred to in the notice.

The Tribunal's Jurisdiction and Powers

The MRD of the Tribunal has the power to review a decision that the applicant does not satisfy PIC 4001, as it forms part of the exercise of the power under s.65 of the Act (to grant or refuse a visa).[64] This may require assessing whether the person passes the character test (see above). The Tribunal can also consider whether the applicant has satisfied the additional criteria in r.2.03AA.

Although the MRD of the Tribunal does **not** have jurisdiction to review a decision to refuse or cancel a visa under s.501 on character grounds,[65] a decision that a person does not meet the requirements of PIC 4001 is not a decision made under that section.[66]

The Tribunal conducting a review in the MRD cannot remit a matter to the Department on the basis that it should consider the application of s.501. The Tribunal may only remit a matter in accordance with such directions or recommendations that are prescribed for that Division and not matters relating to character as prescribed by the relevant provision in the Regulations.[67]

Where the Tribunal decides to waive the requirement to provide a statement under r.2.03AA(2)(a), it can remit the matter with a direction that the applicant must be taken to have satisfied r.2.03AA(2).[68] However, if a completed Form 80 has been requested and not provided, the applicant will not be able to meet r.2.03AA(2).

The Tribunal may remit a matter with a direction that the applicant satisfies r.2.03AA(2) even though the applicant, on the basis of the material before the Tribunal, would not satisfy PIC 4001. Ordinarily, the Tribunal would be required to consider any issues squarely arising on the material before it relating to whether the applicant meets the criteria for the visa in exercising the power to grant or refuse to grant a visa under s.65 as part of the review for the purposes of review under ss.349 and 415.[69] However, the requirement to provide a statement or Form 80 under r.2.03AA(2) is a preliminary step to the assessment

FCAFC 104 (Barker, Robertson and Burley JJ, 11 July 2017), at [63]-[65]. While no final order was in effect at the time of writing, the Court indicated that it would quash the ASIO assessment on the basis of failure to afford the applicant procedural fairness. An issue which may arise for the Tribunal is whether it should delay its decision at the request of an applicant on the basis that the relevant ASIO assessment is being challenged.

[64] Subsection 65(1) relevantly requires that 'the other criteria for [the visa] prescribed by…the regulations have been satisfied' before the visa is granted. A decision to refuse a visa because the applicant does not meet PIC 4001 under s.65 is a Part 5-reviewable decision under s.338 and a Part 7-reviewable decision under s.411. Note that a decision to refuse to grant a protection visa because of exclusion under Article 1F (or ss.5H(2) or 36(1C)) or s.36(2C) is reviewable by the Tribunal in its General Division: s.500(1)(c).

[65] While s.500 provides that a decision of a delegate to refuse or cancel a visa under s.501 is reviewable by the Administrative Appeals Tribunal, such review is conducted in the General Division, not the MRD which is limited to reviews under Part 5 and Part 7 of the Act. See s.17B of the *Administrative Appeals Tribunal Act* 1975 and the President's General Practice Direction 'Allocation of Business to Divisions of the AAT. Decisions made personally by the Minister are not subject to merits review and may only be challenged in the Federal Court.

[66] Note that a delegate making a decision under s.65 will not necessarily have the delegated authority to make a decision under s.501: see *SZLDG v MIAC* (2008) 166 FCR 230 at [51]-[54].

[67] See ss.349(2)(c) and r.4.15(1) and s.415(2)(c) and r.4.33.

[68] For more information on permissible directions see Chapter 3 of the Procedural Law Guide.

[69] See Chapter 3 of the Procedural Law Guide and *Dhanoa v MIAC* (2009) 109 ALD 373.

of matters relevant to the decisions in PIC 4001(c) and (d) and the power to refuse to grant a visa under s.501, which are matters in relation to which the Tribunal does not have jurisdiction. It therefore will not be appropriate to consider whether the applicant satisfies PIC 4001 in cases where an assessment should be made under s.501 and a permissible direction is available.

Relevant case law

Awa v MIMIA (2002) 189 ALR 328	Summary
Brown v MIAC [2010] FCAFC 33; (2010) FCR 113	
BSX 15 v MIBP [2017] FCAFC 104	
Godley v MIMIA [2004] FCA 774; (2004) 83 ALD 411	
Goldie v Commonwealth of Australia [2002] FCA 433	
Hand v Hell's Angels Motorcycle Club (1991) 25 ALD 667	
Irving v MILGEA (1993) 44 FCR 540	
MIAC v Haneef [2007] FCAFC 203; (2007) 163 FCR 414	
Mujedenovski v MIAC [2009] FCAFC 149; (2009) 112 ALD 10	
Plaintiff M47/2012 v Director General of Security [2012] HCA 46	Summary
Roach v MIBP [2016] FCA 750	
Seyfarth v MIMIA [2004] FCA 1713	
Seyfarth v MIMIA [2005] FCAFC 105; (2005) 142 FCR 580	
SZLDG v MIAC [2008] FCA 11; (2008) 166 FCR 230	

Relevant legislative amendments

Migration Amendment Regulations 2009 (No.12)	SLI 2009, No.273
Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011	No.81 of 2011
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.199
Migration Amendment (Character and General Visa Cancellation) Act 2014	No.129 of 2014
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014	SLI 2014 No.135

Available Templates

There are no decision templates or optional paragraphs in existence. If PIC 4001 is the only issue in dispute, the Generic Decision template can be used. Please contact MRD Legal Services for further assistance.

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Public Interest Criterion 4013

CONTENTS

Introduction

A number of temporary visas include criteria intended to prevent persons who have previously been the subject of certain adverse migration action from obtaining a further visa for a certain period (or in some cases at all).[1] Such criteria are prescribed in Schedule 2 to the Migration Regulations 1994 (the Regulations) and set out in Schedules 4 and 5.[2]

The relevant criteria which are of this 'exclusionary' nature are:

- public interest criteria (PIC) 4013 and 4014 (Schedule 4 to the Regulations), and
- special return criteria (SRC) 5001, 5002 and 5010 (Schedule 5 to the Regulations)

The criteria specify that particular persons cannot be granted certain visas to travel to, enter, and remain in Australia for a certain period (exclusion period)[3], unless certain exceptions apply.

The general purpose of such exclusion periods is to:

- demonstrate the seriousness with which breaches of migration or other Australian laws are viewed;
- deter people from breaching migration laws; and
- maintain the integrity of migration policies.[4]

Exclusion periods do not prevent a person from applying for a visa. A person potentially subject to an exclusion period can validly apply for a visa, however, they must satisfy the criteria prescribed in Schedule 2 for the relevant visa subclass, including PIC 4013 or 4014 or prescribed special return criteria.

PIC 4013 commonly arises for consideration for the Tribunal in relation to review of student visa refusals where a previous student visa of the visa applicant has been cancelled. As yet there has been only limited judicial consideration of PIC 4013.

For information about special return criteria, see MRD Legal Services commentary: Special Return Criteria.

The requirements of Public Interest Criterion 4013

Public Interest Criterion 4013 is set out in Schedule 4 to the Regulations. Where an applicant for a visa is affected by a 'risk factor' as set out in that criterion, he or she is required to satisfy one of the two alternate criteria set out in cl.4013(1).

[1] They include (but are not limited to) student, business, skilled and visitor visas, but not bridging, partner or protection visas.
[2] Section 31(3) of the *Migration Act 1958* gives the power to prescribe criteria for visas or classes of visa and r.2.03(1) of the Regulations states that the prescribed criteria for the grant of a visa are set out in a relevant Part of Schedule 2. If a criterion in Schedule 2 refers to a Schedule 4 criterion by number, that criterion must be satisfied as if set out in full in Schedule 2: r.2.03(2).
[3] The term 'exclusion periods' is not defined in the legislation. It is a generic term that refers to the periods of time specified in PIC 4013, 4014 and SRC 5001, 5002 and 5010.
[4] Explanatory Statement to SR2002, No.10.

Relevantly, cl.4013(1)(a) requires that the visa application has been made more than 3 years after the date of the relevant visa cancellation or the relevant Ministerial decision. Or, in the alternative, cl.4013(1)(b) requires that the decision maker be satisfied that in the particular case there are:

- compelling circumstances affecting the interests of Australia; or
- compassionate or compelling circumstances affecting the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen

that justify granting the visa within 3 years after the date of the visa cancellation or determination.

The Risk Factors

Clauses 4013(1A), (2), (2A) and, from 12 December 2014, (3) specify the current circumstances in which a person is affected by a risk factor.[5] For visa applications made prior to 22 March 2014 where the delegate's decision to refuse to grant the visa was made before 12 December 2014, a previous version of cl.4013(3) applies and additional risk factors prescribed in cl.4013(4)-(5) apply.[6]

PIC 4013(1A): visa cancelled due to incorrect information/bogus documents or identity

The risk factors in cl.4013(1A) vary depending on the date a decision is made to grant or refuse the visa under which PIC 4013 is being considered.[7]

Where a decision is made to refuse a visa *on or after 12 December 2014* a person is affected by a risk factor if a visa previously held by the person was cancelled under:

- s.109, s.116(1)(d), s.116(1AA) or (1AB) or s.133A of the Act; or
- s.128 of the Act because the Minister was satisfied 116(1)(d) of the Act [visa could have been cancelled under s.109] applied to the person; or
- s.133C of the Act because the Minister was satisfied that s.116(1)(d), or ss.116(1AA) [identity] or (1AB) [incorrect information] of the Act applied to the person.

These cancellation decisions broadly include where the applicant provided incorrect information or bogus documents, where the Minister is not satisfied as to the applicant's identity, or in the exercise of the Minister's personal powers to cancel a visa.

[5] cl.4013(1A) and (2) were amended and (3) was inserted with effect from 12 December 2014 by Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014 No.199). The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. The transitional that applies to these amendments is worded atypically to other recent transitionals. While not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies to new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

[6] cl.4013(3), (4) and (5) were repealed with effect from 22 March 2014 by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No,30). They continue to apply in limited circumstances to visa applications made before, on, or after 22 March 2014 where the visa application is taken to have been made in accordance with r.2.08, 2.08A or 2.08B and the non-citizen mentioned in r.2.08(1)(a) (with respect to an application made in accordance with r.2.08), or the original applicant mentioned in r.2.08A(1)(a) or 2.08B(1)(a) (with respect to an application made in accordance with r.2.08A or 2.08B), applied for his or her visa *before* 22 March 2014.

[7] cl.4013(1A) was amended with effect from 12 December 2014 by SLI 2014 No.199. The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. For discussion of the operation of this transitional, see fn.5.

Where a decision is made to refuse a visa *prior to 12 December 2014*, the circumstances are more limited. Prior to this date, a person is affected by the risk factor specified in PIC 4013(1A) if their previous visa was cancelled under:

- s.109, or s.116(1)(d); or
- s.128 (because the ground in s.116(1)(d) applied).

What if the visa cancellation has been reversed?

If a visa cancellation decision under s.109 has been set aside by a Court or Tribunal, cl.4013(1A) is not engaged, because in those circumstances s.114(1) provides that the visa is taken never to have been cancelled. Similarly, where the Minister revokes a decision to a cancel a visa under s.133A(3) or s.133C(3) the original cancellation decision is taken not to have been made.[8]

However, there is no equivalent provision in respect of decisions made under s.116(1)(d), (1AA) or (1AB) or s.128 (on the basis of the ground in s.116(1)(d)).

Whether PIC 4013 is engaged where a decision under s.116 or s.128 has been set aside or revoked arises more generally in the context of cl.4013(2) and is discussed below. If this arises as an issue, advice may be sought from MRD Legal Services.

PIC 4013(2): visa cancelled on specified grounds

The risk factors in cl.4013(2) vary depending on the date the visa application was lodged, and the date a decision is made to refuse the visa under which PIC 4013 is being considered.

A person is affected by the risk factor specified in cl.4013(2) if their *previous* visa was cancelled under ss.116 or 128 of the Act on any of the grounds listed in cl.4013(2)(a) - (d), namely:

- the person was found by Immigration to have worked without authority;[9]
- in relation to certain visa holders – the person breached specified visa condition(s) for that visa;[10]
- for former Subclass 773 (Border) visa holders who were apparently eligible for certain substantive visas at the time the Border visa was granted – the person breached a specified condition;[11]
- for former student visa holders – the visa cancellation decision maker was satisfied that s.116(1)(fa) applied, namely the visa holder;
  - was not, or was not likely to be, a genuine student; or
  - engaged, was engaging, or was likely to engage, while in Australia, in conduct not contemplated by the visa;[12]
- *for all visa applications made on or after 17 April 2019,* the Minister was satisfied that

[8] s.133F(6)
[9] cl.4013(2)(a).
[10] cl.4013(2)(b). Part 2 of Schedule 4 to the Migration Regulations includes a table of conditions applicable to certain subclasses of visas for the purposes of cl.4013(2). It lists the applicable visa subclasses and the specified conditions. For example, under item 4058C, the specified visa conditions for a Subclass 572 (Vocational Education and Training Sector) visa are conditions 8101, 8104, 8105, 8202, 8501, 8517 or 8518.
[11] cl.4013(2)(c). Part 2 of Schedule 4 to the Migration Regulations includes a table of specified conditions applicable to certain subclasses of visas which, for the purposes of cl.4013(2)(c), the Subclass 773 (Border) visa holder may have been eligible for.

r.*2.*43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (o), (oa), (ob), (s) or (t) applied to the person.[13]

- *for visa applications made on or after 18 March 2018 and before 17 April 2019,* the Minister was satisfied that r.*2.*43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (o), (oa) or (ob) applied to the person.[14]
- *for visa applications made on or after 23 March 2013 and before 18 March 2018, where the decision to refuse the visa under PIC 4013 was made on or after 12 December 2014,* the Minister was satisfied that r.*2.*43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (m), (o), (oa) or (ob) applied to the person.[15]
- *for visa applications made on or after 23 March 2013 and before 18 March 2018, and where the decision to grant or refuse the visa on the basis of PIC 4013 was made before 12 December 2014*, the Minister was satisfied that r.2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (m) or (o) applied to the person.[16]
- *for visa applications lodged before 23 March 2013*, *where the decision to refuse the visa on the basis of PIC 4013 was made prior to 12 December 2014*, the visa cancellation decision-maker was satisfied that r.2.43(1)(i), (ia), (j), (k), (ka), (kb), (m) or (o) applied to the person.[17] In broad terms, the specified grounds relate to the visa holder not having, or ceasing to have, a genuine intention to stay in Australia for relevant purposes, such as visiting temporarily, tourism, business, working or other activities for which the visa was granted, or the Minister reasonably suspects the person has committed certain offences under the Act, or that the visa was obtained as a result of fraudulent conduct.

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[12] cl.4013(2)(ca).

[13] cl.4013(2)(d) as amended by Schedule 1, item [2] of the Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019 (F2019L00575). These amendments inserted r.2.43(1)(s) and (t). Paragraph 2.43(1)(s) provides that Subclass 600, 601, 651, 676 and 771 visa holders who are in Australia and who have not been immigration cleared may have their visas cancelled where the Minister reasonably believes that the person has contravened subsections 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015*. Paragraph 2.43(1)(t) broadly provides that a temporary visa may be cancelled where the Minister reasonably believes that the person has imported goods to which Regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* applies and for which permission to import has not been given.

[14] cl.4013(2)(d) as amended by Schedule 1, item [172] of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262). These amendments inserted r.2.43(1)(kc) which broadly provides that a Subclass 482 (Temporary Skill Shortage) visa can be cancelled if the visa holder did not have, or ceased to have, a genuine intention to perform the nominated occupation, or if the position associated with the occupation is not genuine.

[15] cl.4013(2)(d) as amended by SLI 2014 No.199, Schedule 4, item [3803]. These amendments inserted r.2.43(1)(oa) and (ob), which provide grounds for cancellation where the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State or Territory (whether or not the holder held the visa at the time of the conviction and regardless of the penalty imposed (if any)); or that the Minister is satisfied that the holder is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning or intelligence that: the holder has committed an offence against a law of another country and is likely to commit a similar offence; or the holder is a serious and immediate threat to public safety. Subclause 4013(2)(d) was amended with effect from 12 December 2014 by SLI 2014 No.199. As discussed above, the transitional that applies to the amendments in SLI 2014 No.199 is worded atypically to other recent transitionals. While not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies to new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

[16] cl.4013(2)(d) as amended by Migration Amendment Regulation 2013 (No.1) (SLI 2013 No. 32) Schedule 6 item [300]. These amendments inserted the cancellation ground in r.2.43(1)(ea) which provides that the case of a Subclass 601 (Electronic Travel Authority) visa — that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted; or has ceased to have that intention.

[17] cl.4013(2)(d). Regulations 2.43(1)(i),(j),(k) and (ka) apply to circumstances where the person is the holder of a visitor visa as specified in the relevant subclause and the Minister is satisfied that, despite the grant of the visa, the visa holder did not have or has ceased to have an intention only to visit, or stay in Australia temporarily; r.2.43(1)(ia) and (kb) relate to certain temporary visa holders who the Minister is satisfied did not have at the time of visa grant, or have ceased to have, a genuine intention to stay temporarily in Australia to carry out the proposed work , activity or occupation in relation to which the visa was granted, or a nomination made: inserted by Migration Legislation Amendment Regulations 2011 (No.1) and applying to visa applications made but not finally determined before 1 July 2011, and made on or after 1 July 2011; r.2.43(1)(m) relates to where the Minister reasonably suspects that the visa holder has committed an offence under certain sections of the Act relating to people smuggling; r.2.43(1)(o) applies where the Minister reasonably suspects the visa has been obtained as a result of fraudulent conduct of any person - this regulation only applies to visa applications made on or after 1 July 2004.

What if the visa cancellation has been reversed?

Where a visa cancellation decision under s.116 or s.128 has been reversed (e.g. set aside or revoked), the operation of cl.4013(2) is unclear as there is no equivalent to s.114, to the effect that in these circumstances the visa is taken never to have been cancelled, and the question has not been the subject of specific judicial consideration. However, if such a decision is set aside by a Court on the basis that it involved jurisdictional error, the general principle is that it is no decision at all,[18] and on that basis the visa may therefore be regarded as having never been cancelled.[19]

If a decision made under s.116(1)(d) is set aside by a Tribunal, the Tribunal's decision operates prospectively in the absence of the exercise of any power to back-date the decision.[20] Similarly, it would appear that where a cancellation decision under s.128 is revoked pursuant to s.131, the revocation would be operative from the date it is made.[21]

On one view, because Tribunal decisions operate prospectively, it would remain the case that the visa 'was cancelled', and cl.4013(2) would be engaged, even though the cancellation was subsequently reversed.

The alternative and preferable view is that once the cancellation is set aside or revoked, it could not be said that the visa 'was cancelled' and cl.4013(2) would have no operation. The decision in *Al Tekriti v MIMIA*[22] provides strong support for this view. The issue before the Court in that case was whether s.48 of the Act prevented the applicant from making a spouse visa application in circumstances where a decision to refuse a protection visa had been set aside by the Tribunal.[23] Section 48 operates if a non-citizen 'was refused a visa' or, like cl.4013(2), 'held a visa that was cancelled'. Justice Mansfield held that the 'refusal' to which s.48 refers was not intended to be the event of the delegate's decision irrespective of whether it is subsequently set aside, whether by a form of review under the Act or by judicial determination, and therefore that the applicant's spouse visa application was not prohibited by s.48 because the applicant had not been refused a protection visa.[24] In reaching that conclusion, his Honour considered the effect of s.349(3) and s.415(3), and expressed the view that it would do violence to the plain language of those provisions to treat a decision of a delegate which has been set aside by a tribunal under Part 5 or Part 7 as a decision refusing the visa, and further, that there was no apparent reason why the legislature would intend s.48 to operate when the delegate's decision has been set aside by a reviewing tribunal.[25] While that case was concerned with the expression 'was refused' in s.48(1)(b)(i) where a visa refusal was set aside by the Tribunal in what is now its General Division, the Court's reasoning would appear to be equally applicable to the expression 'was cancelled' in s.48(1)(b)(ii) and to the same expression in cl.4013(2), where a visa cancellation is set aside by the Tribunal in relation to an application for review made under Parts 5 or 7 of the Act. On that view, where a decision to cancel a visa has been reversed by the Tribunal, cl.4013(2) would not be engaged.

[18] *MIAC v Bhardwaj* (2002) 209 CLR 597 at [33].
[19] For example, *Sukhera v MIMIA* [2004] FCA 1427 (Allsop J, 8 November 2004) where the Court declared that the purported cancellation under s.116 was of no effect and had no effect in law on the then existing visa held by the applicant.
[20] *Kim v MIAC* (2008) 167 FCR 51, per Tamberlin J at [33], Besanko J agreeing.
[21] See s.133.
[22] (2004) 138 FCR 60.
[23] Section 48 prevents non-citizens from applying for a visa, other than a visa of a class prescribed for the purposes of the section.
[24] *Al Tekriti v MIMIA* (2004) 138 FCR 60 at [35]-[36].
[25] *Al Tekriti v MIMIA* (2004) 138 FCR 60 at [28].

PIC 4013(2A): automatic cancellation under s.137J

A person is affected by the risk factor specified in cl.4013(2A) if they previously held a student visa that was automatically cancelled under s.137J of the Act.[26] Whether the previous visa was cancelled under s.137J is a question of fact for the Tribunal.

What if the automatic cancellation was revoked?

The risk factor in cl.4013(2A) does not apply if the automatic cancellation was subsequently revoked under s.137L or s.137N of the Act. This is because, in these circumstances, s.137P provides that the student visa is taken never to have been cancelled.

Similarly, evidence of a judicial declaration that the visa in question was not automatically cancelled[27] would support a conclusion that the visa was not cancelled for the purposes of the risk factor in cl.4013(2A).

PIC 4013(3) (current version): visa cancellation under s.116(1)(e)

There are two versions of the risk factor in cl.4013(3), one that applies to pre 23 March 2014 visa applications (previous version) where the delegate refused to grant the visa prior to 12 December 2014, and the current version which applies to a decision of the delegate to refuse to grant a visa on or after 12 December 2014.[28]

The current version of this risk factor as it applies to a decision to refuse to grant a visa on or after 12 December 2014, arises where a visa previously held by the person was cancelled because the Minister was satisfied that a ground mentioned in s.116(1)(e) of the Act applied to the person. Section 116(1)(e), which applies to visas held on or after 11 December 2014 subject to one exception,[29] provides grounds for cancelling a visa where the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community; or the health or safety of an individual or individuals.

[26] Section 137J applies if a notice was sent under s.20 of the *Education Services for Overseas Students Act 2000* and provides for automatic cancellation 28 days after the date of the notice unless the non-citizen complies with the notice or attends an office of immigration for the purposes of explaining the alleged breach. The automatic cancellation process was effectively abolished by amendments to s.20 of the Education Services Overseas Student Act 2000 (the ESOS Act) made by Migration Legislation Amendment (Student Visas) Act 2012, which prevents the issuing of a s.20 notice after 13 April 2013.Consequently the automatic cancellation (and revocation) process has effectively ceased from that date: ESOS Act, s.20(4A) as inserted by *Migration Legislation Amendment (Student Visas) Act 2012* (No.192, 2012) with effect from 13 April 2013

[27] For example, *Uddin v MIMIA* [2005] FMCA 841 (Scarlett FM, 3 June 2005) (declaration that the applicant's student visa was not cancelled by operation of law under s.137J); *Hossain v MIAC No.2* [2010] FCA 306 (Buchanan J, 26 March 2010) (declarations that the notice sent to the applicant was ineffective for the purposes of s.20 of the *ESOS Act 2000* and s 137J of the Migration Act, and that the applicant did not cease to be the holder of a Subclass 571 visa consequent upon the issue of the purported notice sent to the applicant).

[28] Note that between 12 December 2014 and 18 April 2015, cl.4013(1) only referred to risk factors mentioned in subclauses (1A), (2) or (2A), and not the risk factor mentioned in subclause (3). As a result, for decisions to refuse a visa for non-satisfaction of PIC 4013 in this period the risk factor in cl.4013(3) was not relevant and as a consequence, subclause (3) falls out of the operation of the temporary exclusion period scheme. This omission was rectified by a technical amendment made by Item 2 of Schedule 3 of the Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34) and applies to all visa applications made but not finally determined before 18 April 2015, and visa applications made on or after 18 April 2015to ensure that subclause (3) is captured.

[29] s.116(1)(e) as amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014 (*No.129 of 2014). These amendments apply to a visa held on or after 11 December 2014, except where the visa holder was issued a notice under s.119 (notice of proposed cancellation under s.116) prior to that date. Clause 4013(3) itself was amended with effect from 12 December 2014 by SLI 2014 No.199. The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. As discussed above, the transitional that applies to the amendments in SLI 2014 No.199 is worded atypically to other recent transitionals. And while not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

PIC 4013(3), (4) and (5): cancellation or cessation of temporary entry permits (pre 22 March 2014 visa applications decided prior to 12 December 2014)

The risk factors in cl.4013(3), (4) and (5) as they apply to visa applications lodged *prior to 22 March 2014*[30] concern persons whose temporary entry permit was cancelled on certain grounds, or whose holder was the subject of certain determinations that there had been a failure to comply with a terminating condition of the permit or a condition of entry of the permit. These 3 provisions are very unlikely to arise for consideration as the risk factors to which they relate must have occurred prior to 1 September 1994, and will in all likelihood have occurred more than 3 years before the date of the visa application being considered. If this does arise as an issue, advice may be sought from MRD Legal Services.

Satisfying PIC 4013 when affected by a risk factor

If a person is affected by one of the risk factors in PIC 4013, he or she may meet PIC 4013 in one of 2 alternative ways, namely:

- if the visa application under consideration is made more than 3 years after the relevant visa cancellation / Ministerial determination, or
- the Minister is satisfied that there are compelling circumstances that affect the interest of Australia, or compassionate or compelling circumstances that affect the interests of an Australia citizen, permanent resident or eligible New Zealand citizen that justify the granting of the visa within the 3 year period.

Application made more than 3 years after the relevant cancellation

Subject to establishing compelling/compassionate considerations, cl.4013(1)(a) sets a minimum period that must have elapsed before a person who is affected by a prescribed risk factor can be granted a visa. To satisfy PIC 4013 under this limb, the current visa application under consideration must have been made more than 3 years after the relevant cancellation decision that gave rise to the risk factor.

Cancellation of previous visa after the lodgement of current visa application

Clause 4013(1)(a) does not apply, and therefore cannot be satisfied, where the cancellation of a previously held visa has occurred *after* the date of application for the visa under consideration.

The terms of cl.4013(1)(a) suggest it applies only where the subsequent visa application has been *made after* the cancellation of the previous visa.[31]

[30] cl.4013(3), (4) and (5) were repealed with effect from 22 March 2014 by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014 No.30) for visa applications made on or after that date.

[31] In *Wang v MIAC* [2009] FMCA 865 (Turner FM, 16 September 2009), the applicant's previously held student visa was cancelled *after* the application for a new visa was made. The Court held that cl.4013(1)(a) did not cover the applicant as the new visa was made within three years of the cancellation of the earlier visa suggesting that cl.4013(1)(a) does apply in those circumstances. Given that the Court came to this conclusion without express consideration of the actual terms of cl.4013(1)(a), it is preferable, following general principles of statutory interpretation, to apply the ordinary or natural meaning of the word '*after*'. The Court rejected the applicant's argument that the risk factors in PIC 4013(2) did not apply because his previous visa was cancelled after he made the application for the new visa, and further held that it was open for the Tribunal to find that the

Where the visa cancellation occurs after the subsequent visa application is lodged, although the applicant cannot meet cl.4013(1)(a), he or she may instead be able to satisfy the requirements in cl.4013(1)(b). That is, consideration will need to be given to whether there are compelling circumstances affecting the interests of Australia; or compassionate or compelling circumstances affecting the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, which justify the granting of the visa within 3 years after the cancellation.

Compassionate or compelling circumstances

Clause 4013(1)(b) provides an alternative to the 3 year exclusion period specified in PIC 4013(1)(a) if compassionate or compelling circumstances can be established.

Under cl.4013(1)(b), a person who is affected by a risk factor other than that mentioned in the current cl.4013(3), will satisfy PIC 4013 if the Minister is satisfied that, in the particular case there are:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

that justify the granting of the visa within 3 years after the cancellation or determination.

Where an applicant meets the requirements of PIC 4013 on the basis of cl.4013(1)(b), a finding on this basis will only extend to the particular visa application being considered. Where a person makes a further visa application before the exclusion period has elapsed, they will again have to satisfy the decision maker that there are again the relevant kind of circumstances that justify the granting of the visa for cl.4013(1)(b).

Clause 4013(1)(b) requires consideration of:

- whether there are compelling or compassionate circumstances of the relevant kind in the particular case and, if so;
- whether those circumstances justify granting the visa.

There are no definitions of compelling or compassionate circumstances in the Act or Regulations, and there is limited judicial consideration of this provision in the context of PIC 4013. Whether a circumstance or reason is compelling and/or compassionate is a question of fact and degree for the decision maker. In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in PIC 4013(1)(b) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen. See also the MRD Legal Services commentary on Compelling and/or compassionate circumstances.

Departmental guidelines for primary decision makers (PAM3) also provide some guidance on what may amount to compelling or compassionate circumstances, while making it clear that whether there are compelling or compassionate circumstances depend on the circumstances of the individual

overlap of visa application and visa cancellation of his previous visa did not amount to compelling or compassionate circumstances that would impact on any other institution or person beyond the applicant himself.

case.[32] Whilst not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances. However, the Tribunal should avoid elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the provision in PIC 4013(1)(b) and consider the individual circumstances of the case.

Compelling circumstances that affect the interests of Australia

Whether there exist compelling circumstances that affect the interests of Australia is a question of fact and degree for the Tribunal. Departmental guidelines suggest such circumstances may exist if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa;
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa. [33]

Departmental guidelines state that compelling circumstances affecting the interests of Australia would not include circumstances if the non-citizen merely claims that, if granted the visa, they would:

- work and pay taxes;
- pay fees to an education provider; or
- spend money in Australia.[34]

The Departmental guidelines indicate that compelling circumstances may arise where the exclusion period has arisen from either a Departmental error or as an unintended consequence of the exclusion provisions.[35] The guidelines states that exclusion provisions may be regarded as having an unintended effect if the person previously made every effort to leave Australia whilst a lawful non-citizen (eg. while holding a bridging visa) but did not leave before the visa ceased due to factors beyond their control, such as:

- health issues;
- unavoidable delays by airlines; or
- delays associated with travel documents; or
- they were a minor at the time their visa ceased and it can be demonstrate that they were not responsible for their own departure arrangements.[36]

[32] PAM3 - Migration Act - Visa cancellation instructions - Exclusion periods – Compelling circumstances & Compassionate circumstances (reissued 08/07/2016).
[33] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods – Compelling circumstances – Affecting the interests of Australia (reissued 08/07/2016).
[34] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods – Compelling circumstances- Departmental policy (reissued 08/07/2016).
[35] In *Anupama v MIAC* [2009] FMCA 817 (Driver FM, 10 September 2009), the Court held that the exercise of the discretion miscarried because the Tribunal asked itself the wrong question. In that case, the applicant had claimed to the Tribunal that she had been incorrectly advised by the Department, and it appeared the Tribunal accepted that claim. The Court held that, in those circumstances, the Tribunal should have considered whether the Department had committed a civil wrong by giving negligent advice to the applicant and, if so, whether it was a compelling circumstance affecting the interests of Australia to remedy that wrong.
[36] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods - Compelling circumstances – Unintended consequences (reissued 08/07/2016).

Generally, the exclusion provisions should not be regarded as having an unintended effect in cases if, for example:

- the person claims they inadvertently breached a condition of the Electronic Travel Authority (ETA) because the travel agent failed to inform of the conditions of the ETA; or
- the person claims they inadvertently became an unlawful non-citizen because they did not receive a visa label when their visa was granted and were therefore unaware of their visa expiry date; or
- the person claims the Department wrongly cancelled a previous visa but:
  - although they applied for the cancellation to be revoked or reviewed the decision maker decided not to revoke or set aside the cancellation; or
  - they failed to apply for the cancellation decision to be revoked or reviewed, even though they were able to do so.

Nevertheless, if it appears that the cancellation was incorrect at law (for example, as a result of the principles established in *Dai v MIAC,*[37] *Uddin v MIMIA,*[38] or *Hossain v MIAC*[39] and *Mo v MIAC,*[40] – see discussion below) that may amount to a compelling circumstance that affects the interest of Australia, justifying the granting of the visa within 3 years after the cancellation.

Further, Departmental policy also states that there may be compelling circumstances affecting the interests of Australia in the case of persons whose last substantive visa was a Student visa and who are applying for a new Student visa. In particular, where the applicant's circumstances, including previous study history in Australia, clearly demonstrate that they have been a genuine student in Australia, and there is no evidence that they have actively or intentionally abused or sought to circumvent immigration laws, decision makers may accept that compelling and compassionate circumstances exist.[41]

See also MRD Legal Services commentary on Compelling and/or compassionate circumstances.

Compassionate or compelling circumstances affecting interests of an Australian citizen, permanent resident or eligible New Zealand citizen

Whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen is a question of fact and degree for the decision maker. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined in the dictionary as 'circumstances that invoke sympathy or pity' whereas 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'.

Departmental guidelines also suggest circumstances that may be regarded as compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen.[42] Under these guidelines, such circumstances may exist if the visa applicant was not granted the visa and, as a result:

- family members in Australia would be left without financial or emotional support;

[37] *Dai v MIAC* (2007) 165 FCR 458.
[38] *Uddin v MIMIA* [2005] FMCA 841 (Scarlett FM, 7 June 2005).
[39] *Hossain v MIAC* (2010) 183 FCR 157.
[40] *Mo v MIAC* [2010] FCA 162 (Buchanan J, 2 March 2010).
[41] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods - Compelling circumstances – Former Student visa holders (reissued 08/07/2016).
[42] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods – Compassionate circumstances (reissued 08/07/2016).

- family members in Australia would be unable to properly arrange a relative's funeral in Australia; or
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and is therefore subject to an exclusion period).

The guidelines also suggest that there may be compelling circumstances affecting the interests of such person/s if the visa applicant was not granted the visa and, as a result:[43]

- a business operated by an Australian citizen would have to close down because it lacked the specialist skills required to carry out the business;
- civil proceedings instigated by an Australian permanent resident would be jeopardised by the absence of the non-citizen witness; or
- an eligible New Zealand citizen would be unable to finalise legal and property matters associated with divorce proceedings without the physical presence of the non-citizen in Australia.

For further information, see the MRD Legal Services commentary: Compelling and/or compassionate circumstances.

Other Issues arising in the consideration of PIC 4013

Operation of PIC 4013 where cancellation appears or is alleged to be invalid

In considering the operation of PIC 4013, a question may arise as to whether an earlier visa cancellation, which was not set aside or revoked by a Court or Tribunal, was nevertheless invalid, for example as a result of *Dai v MIAC,*[44] *Uddin v MIMIA,*[45] or *Hossain v MIAC*[46] and *Mo v MIAC.*[47]

The validity of certain cancellations has most commonly arisen in the context of student visas, with the Courts, in a number of cases referred to below, finding that during certain periods, and in certain circumstances, cancellation of students visas were invalid:

- *Dai affected cases*[48] – where breach of condition 8202(3)(b) occurred pre-1 July 2007
- *Uddin affected cases*[49] – s.20 notices issued between 4 June 2001 and 25 January 2007
- *Hossain*[50] and *Mo*[51] affected cases – s.20 notices issued between 1 July 2007 and 16 December 2009.

[43] PAM3 - Migration Act – Visa cancellation instructions - Exclusion periods - Compelling circumstances- Affecting interests of an Australian citizen/resident (reissued 08/07/2016).
[44] (2007) 165 FCR 458.
[45] [2005] FMCA 841 (Scarlett FM, 7 June 2005).
[46] (2010) 183 FCR 157.
[47] [2010] FCA 162 (Buchanan J, 2 March 2010).
[48] (2007) 165 FCR 458.
[49] [2005] FMCA 841 (Scarlett FM, 7 June 2005).
[50] (2010) 183 FCR 157.
[51] [2010] FCA 162 (Buchanan J, 2 March 2010).

Where this issue arises, the Tribunal will need to consider the impact of the cancellation decision on the PIC 4013 assessment.[52] However, the scope of the enquiry in these circumstances is unclear, and in particular to what extent the Tribunal is required to consider the validity of the cancellation, or, if it forms the view that the cancellation was invalid, whether it should proceed on the basis that the visa was nevertheless cancelled, or on the basis that the visa was never cancelled.[53]

Given that the cancellation or non-revocation decision itself is not the decision under review, the better view is that if the visa was in fact cancelled, and the cancellation has not been reversed or found by a Court *in that particular case* to be invalid, the Tribunal should proceed on the basis that the visa 'was cancelled' for the purposes of PIC 4013.

On that approach, the applicant would be affected by the risk factor but the validity of the cancellation would be relevant to the consideration under cl.4013(1)(b) of whether there are compelling/compassionate circumstances justifying the grant of the visa.

Relevant case law

Al Teriki v MIMIA [2004] FCA 772	Summary
Anupama v MIAC [2009] FMCA 817	Summary
Bui v MIMA [1999] FCA 118	
Chintala v MIMA [2006] FMCA 999	
Dai v MIAC [2007] FCAFC 199; (2007) 165 FCR 458	Summary
Hossain v MIAC [2010] FCA 161; (2010) 183 FCR 157	Summary
Hossain v MIAC No.2 [2010] FCA 306	
Kim v MIAC [2008] FCAFC 73; (2008) 167 FCR 51	Summary
Mo v MIAC [2010] FCA 162	Summary
Sukhera v MIMIA [2004] FCA 1427	Summary
Uddin v MIMIA [2005] FMCA 841	Summary
Wang v MIAC [2009] FMCA 865	

Relevant legislative amendments

Migration Amendment Regulations 2002 (No 1)	SR 2002 No 10

[52] See *Chintala v MIAC* [2006] FMCA 999 (Emmett FM, 13 July 2006), where the Court held that in the context of a visa refusal because PIC 4013 was not satisfied, the Tribunal was *not* required to consider whether the cancellation in question was valid *where that was not an issue raised by the applicant or otherwise squarely raised on the material*. The Court held at [62] that "although the cancellation may have been invalid [as a result of *Uddin*], where that was not an issue before the Tribunal raised by the Applicant or his solicitor, the Tribunal was entitled to proceed on the basis of being satisfied in respect of the criteria as to whether or not the Applicant's student visa had been cancelled. The Tribunal was not required to further consider whether such cancellation was invalid where no such issue was raised by the Applicant and was not otherwise squarely raised on the material before the Tribunal". The Court's reasons suggest that where the issue as to the validity of the cancellation *is* raised by either the applicant or the material, the Tribunal would need to consider that question.

[53] While the reasons in *Chintala v MIAC* [2006] FMCA 999 (Emmett FM, 13 July 2006), suggest that the Tribunal would need to consider the question of the validity of the cancellation if raised as an issue, the Court was not called upon to consider what approach the Tribunal should take in those circumstances, and the judgment provides no guidance on that question.

Migration Legislation Amendment Regulations 2011 (No. 1)	SLI 2011 No. 105
Migration Amendment Regulation 2013 (No.1) (SLI 2013 No. 32)	SLI 2013 No. 32
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014 No.30
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.199
Migration Amendment (Character and General Visa Cancellation) Act 2014	SLI 2014, No.129
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015 No. 34
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262
Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019	F2019L00575

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PIC 4020, bogus documents and false or misleading information

CONTENTS

Overview

The terms 'bogus document' and 'information that is false or misleading' are used in the *Migration Act 1958* (the Act) and the Migration Regulations 1994 (the Regulations) in a number of contexts - as criteria for the grant of a range of visas, as the basis for cancellation of visas, and as the basis for cancelling or barring a sponsor. Specifically:

- For a broad range of skilled, business, student, family and partner visas, public interest criterion (PIC) 4020 is a basis for visa refusal in certain circumstances where there is evidence that bogus documents or information that is false or misleading in a material particular have been provided;

- Visas can be cancelled under:

    - section 109 of the Act where a visa applicant gave incorrect information (including information that is false or misleading) or a bogus document; and

    - section 116 and the prescribed ground in r.2.43(1)(l) where a sponsor for a Subclass 457 or 482 visa holder has given false or misleading information;[1]

- In the context of sponsorship bars and cancellation, r.2.90 provides for the cancellation or barring of the approval of a sponsor where the sponsor has provided false or misleading information to Immigration or to the Tribunal.

PIC 4020 is now the most common context in which the issue of bogus documents or false or misleading information arises.

For guidance on cancelling under ss.109 and 116 and cancelling/barring under r.2.90 see the MRD Legal Services Commentary: Cancellation of Visas under Section 109, Cancellation of Visas under s.116 and Business Sponsorship Bars and Cancellation.

PIC 4020

Operation of PIC 4020

PIC 4020 is a primary and secondary criterion for the grant of a wide range of family, partner, skilled, business and student visas. It provides a ground to refuse a visa in certain circumstances where bogus documents or false or misleading information have been provided in relation to the visa application, or a recent visa grant. It was introduced initially in April 2011 to address some deficiencies in the existing time of decision criteria of certain skilled visas, and was then extended to some business visas.[2] It is now a requirement for the grant of most visa subclasses (see below).

[1] r.2.43(1)(l)(ii).
[2] PIC 4020 inserted by Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.13). See Explanatory Statement to SLI 2011, No. 13, at p.18. Prior to 2 April 2011, there was no provision of general application in the migration legislation that allowed the Minister to refuse a visa where an applicant had provided bogus documents or false or misleading information. The power to refuse a visa on that basis was limited to circumstances where the primary visa applicant did not satisfy the 'false or misleading information' time of decision criteria specific to skilled visas, for example cl.880.224.

Broadly speaking, cl.4020(1) and (2) require that:

- there is no evidence that the applicant has given a bogus document or information that is false or misleading in a material particular for the current visa application or a recently held visa[3]; and

- in the period starting 3 years before the application was made and ending when the decision on the visa is made, the applicant and their family members have not been refused a visa for giving bogus documents or false or misleading information[4] (unless the person was under 18 at the time the application for the refused visa was made[5]).

The above requirements apply whether or not the Minister became aware of the bogus document or false or misleading information because of information given by the applicant.[6] Further, these requirements may be waived in some circumstances.[7]

Additionally, cl.4020(2A) and (2B) broadly require that:

- the applicant meets the identity requirement;[8] and

- in the period starting 10 years before the application was made and ending when the decision on the visa is made, the applicant and their family members have not been refused a visa for failing to meet the identity requirement[9] (unless the person was under 18 at the time the application for the refused visa was made).[10]

The waiver provisions do not apply to the above requirements relating to identity.[11]

Each of the elements of PIC 4020, as well as the waiver provisions, is discussed in more detail below.

Visas subject to PIC 4020

PIC 4020 is a criterion for the grant of a broad range of visas. For some visas, the criterion applies to all live applications,[12] whereas for others - including student visas, some business, skilled, partner

[3] That is, a visa held in the period of 12 months before the application was made: cl.4020(1). For visa applications made between 18 November 2017 and 5.56pm on 5 December 2017, this requirement applied in relation to visas that the applicant held, or applied for (whether or not the visa was granted), in the 10 years before the application was made, rather than only visas held in the previous 12 months: PIC4020(1)(b) as amended by the Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (F2017L01425). This amending regulation was disallowed by the Senate at 5.56pm on 5 December 2017: Commonwealth, *Parliamentary Debates*, Senate Hansard, 5 December 2017, 96-97. Disallowance had the effect of repealing the amending regulation from that time: ss.42(1) and 45(1) of the *Legislation Act 2003*.
[4] cl.4020(2).
[5] Clause 4020(2AA) was inserted by Migration Legislation Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014, No.163) for all applications made on or after 23 November 2014 and to applications not finally determined as at that date for all applications to which PIC 4020 applies.
[6] cl.4020(3).
[7] cl.4020(4).
[8] Clause 4020(2A) was inserted into PIC 4020 by Migration Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.32) for all applications made on or after 22 March 2014 and to applications not finally determined as at that date to which PIC 4020 applies.
[9] Clause 4020(2B) was inserted into PIC 4020 by SLI 2014, No.32 for all applications made on or after 22 March 2014 and applications not finally determined as at that date to which PIC 4020 applies.
[10] Clause 4020(2BA) was inserted by SLI 2014, No.163 for all applications made on or after 23 November 2014 and to applications not finally determined as at that date to which PIC 4020 applies.
[11] cl.4020(4).
[12] A challenge to the validity of PIC 4020 as a criterion for 'live' applications was rejected in *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014) at [50]. See also *Kaur v MIBP* [2013] FCCA 1162 (Judge Driver, 4 October 2013) at [58] in which it was also noted that the introduction of PIC 4020 provided a benefit to applicants by allowing for the waiver of PIC 4020(1) and (2) in compassionate and compelling circumstances. Such a change could in no meaningful sense be described as unreasonable, oppressive or unjust.

and family visa subclasses - the criterion only applies to visa applications made on or after a certain date.

In the case of a range of these visa subclasses, legislative amendments designed to include PIC 4020 as a criterion for the particular subclass were seemingly intended to apply to all unresolved visa applications as at the date of introduction. However, as a result of technical drafting issues, these amendments appear to have a more limited operation. The Attachment to this Commentary provides details of the visa applications to which PIC 4020 applies.

'No evidence before the Minister…'

PIC 4020 requires that there be no evidence before the Minister that the applicant has given a bogus document *or* information that is false or misleading in a material particular. The use of the disjunctive 'or' between the words 'bogus document' and 'information' sets up two discrete categories and makes it clear that evidence of one or the other will suffice, and it is unnecessary that there be evidence of both in order to attract the provisions of cl.4020(1).[13]

When considering this element of cl.4020(1), regard should be had to the following principles:

- The word 'evidence' is used to impose a requirement that the facts conveyed by the material must be sufficiently probative to lead to the conclusion that information given in connection with the application for a visa was false or misleading in a material particular.[14] The consideration of 'evidence' requires an assessment of the quality of the evidence being relied on by the Tribunal before finding whether an applicant fails to satisfy the criterion,[15] and satisfaction that there is 'evidence' is to be formed reasonably upon the material before it.[16]

- There is a distinction between the evidence of giving 'information that is false or misleading in a material particular' and evidence of the giving of a 'bogus document'. Whilst PIC 4020 implies the need for 'probative evidence', PIC 4020 only requires evidence that a bogus document has been submitted, not that a document that has been submitted is bogus. Therefore, if a document which is found to be bogus under the 'relatively undemanding test' of 'reasonable suspicion' has been submitted in connection with a visa application, no more is needed to show that there is 'evidence' of the sort referred to in cl.4020(1).[17]

[13] *Thind v MIBP* [2013] FCCA 1438 (Judge Lucev, 21 October 2013) at [20]. Appeal dismissed: *Thind v MIBP* [2014] FCA 207 (Bromberg J, 28 February 2014).
[14] *Sharma v MIMAC* [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013) at [33]-[37]. The Court expressly endorsed the decision in *Talukder v MIAC* [2009] FCA 916 as relevant to the proper construction of the word 'evidence' as it appears in PIC 4020, notwithstanding that the decision in *Talukder* was concerned with a version of cl.886.224 ('false and misleading information' criterion) which contained different words and had since been repealed.
[15] *Talukder v MIAC* [2009] FMCA 223, cited with approval in the context of PIC 4020 in *Sandhu v MIMAC* [2013] FCCA 491 (Judge Driver, 26 July 2013) (appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842 (Cowdroy J, 20 August 2013)). The Court in *Talukder* stated that the use of the word 'evidence' in cl.880.224 (as it was prior to 2 April 2011) 'establishes that the clause requires something more than mere existence of information suggestive of falsity. It requires some probative information. In other words, a decision maker cannot simply take any information suggestive of falsity as sufficient for the purposes of the clause. The decision maker must satisfy himself or herself that the information is acceptable as evidence pointing to false or misleading information having been given for the purposes of establishing the validity of the visa application and that the falsity or misleading information was material to the visa application' (at [18] – [21]). Appeal dismissed in *Talukder v MIAC* [2009] FCA 916 at [19]-[21].
[16] *Sharma v MIMAC* [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013) at [39].
[17] *Singh v MIMAC* [2013] FCCA 1435 (Judge Cameron, 24 September 2013) at [25]; cited with approval in *Sun v MIBP* [2015] FCCA 2479 (Judge Jarrett, 11 September 2015) at [27]. Judge Jarrett's reasoning in *Sun* was approved on appeal *Sun v MIBP* [2016] FCAFC 52 (Logan, Flick and Rangiah JJ, 5 April 2016) per Logan J at [21]. In *Sun* the Full Court rejected an argument that the requirement that there be 'no evidence' imposed an onus or burden on the Tribunal of proving that a document was bogus, per Flick and Rangiah JJ at [73]-[75], Logan J agreeing.

- There is no limitation by reference to its source, on the information which may comprise 'evidence'.[18] In this respect, information may come from sources other than the applicant. This is reflected in the terms of cl.4020(3) that makes clear that the requirements in PIC 4020 apply whether or not the Minister became aware of the document or information because of information given by the applicant.

These principles were applied in the following cases:

- In *Sandhu v MIMA* the Court found that the source of information in that case (a person having personal knowledge of fraudulent activity) and its content (a plea of guilty on the part of the person involved in producing fraudulent references and his possession of documents identical to that submitted to the relevant assessing authority) was sufficiently probative of the document in question being one to which the definition of 'bogus document' applied.[19]

- In *Sharma v MIMAC*[20] the Court found that it was reasonably open to the Tribunal to regard the applicant's evidence that his alleged employer had '…provided [reference] letters to so many other people who have not worked there', together with information obtained by the Department concerning the authenticity of his reference letter, as constituting material that was sufficiently probative to lead to the conclusion that the alleged employer's reference letter contained a statement that was false and misleading.[21]

- In *Verma v MIBP* the Court confirmed that an opinion may constitute evidence sufficiently probative to lead to the conclusion that a document provided was bogus or that information given was false or misleading in a material particular. It was reasonably open for the Tribunal to regard as probative the opinion of an IELTS test provider that an imposter had undertaken an IELTS test in circumstances where there was material before the Tribunal which enabled it to assess whether the opinion expressed was itself based on probative material.[22]

- In *Patel v MIBP*[23] the Court found that there is no requirement for the evidence to be 'direct evidence of fact' and it is open to the Tribunal to rely upon information which it finds through its own research. It was open to the Tribunal to suspect that the difference between information it had found itself by using the IELTS online verification system and information in a document submitted by the applicant was explained by the latter being a bogus document.

- The Court in *Palikhe v MIBP* rejected arguments that the Tribunal should not consider evidence that has arisen out of a fraud committed upon the applicant or evidence obtained pursuant to a search warrant issued under s.3E of the *Crimes Act* 1914 (Cth).[24] It held that

[18] *Luthra v MIAC* [2009] FCA 575 at [27]. See also *Luthra v MIAC* [2009] FMCA 170 (Barnes FM, 10 March 2009). Those cases concerned the construction of cl.880.224 (as it was prior to 2 April 2011).
[19] *Sandhu v MIMAC* [2013] FCCA 491 (Judge Driver, 26 July 2013) at [39]: appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842 (Cowdroy J, 20 August 2013).
[20] [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013).
[21] *Sharma v MIMAC* [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013) at [43].
[22] *Verma v MIBP* [2017] FCCA 2079 (Judge Manousaridis, 1 September 2017) at [88]. The Court also inferred the Tribunal had doubts about whether photographs of a person undertaking two different tests were of the one person, as the applicant claimed, or two, as the IELTS provider claimed: at [89]. Undisturbed on appeal: *Verma v MIBP* [2018] FCAFC 87 (North, Farrell and Davies JJ, 7 June 2018). Special leave to appeal from this judgment was dismissed: *Verma v MIBP* [2018] HCASL 298 (10 October 2018).
[23] [2014] FCCA 2059 (Judge Cameron, 11 September 2014) at [26], undisturbed on appeal: *Patel v MIBP* [2015] FCAFC 22 (Edmonds, Buchanan and Flick JJ, 3 March 2015). In the Federal Circuit Court no error was found in the tribunal's reasoning that information on the IELTS online verification system was sufficiently probative to lead to a reasonable suspicion that the IELTS test result form provided by the applicant was a bogus document. It was open to the tribunal to trust the information it obtained from the IELTS online verification system and to not believe that the test centre would inflate the applicant's results (at [26]).
[24] *Palikhe v MIBP* [2014] FCCA 1875 (Judge Riethmuller, 29 August 2014).

the Tribunal was not required to disregard the skills assessment even if a nullity at law, and nor was it prevented from using information obtained under warrant.[25]

Bogus document

The phrase 'bogus document' for the purpose of cl.4020(1) is defined in s.5(1) of the Act.[26] Under s.5(1), a bogus document is one that the Minister *reasonably suspects*:

- purports to have been, but was not, issued in respect of the person; or
- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.[27]

What amounts to a 'bogus document' is determined separately from the overall consideration of PIC 4020[28] and is a question of fact for the Tribunal to determine.[29] The Federal Court has commented that the Tribunal should first determine whether a document is a 'bogus document' as defined in s.5(1) of the Act, and then go on to consider whether there is no evidence that an applicant has given or caused it to be given to a party listed in 4020(1).[30]

Reasonably suspects

To meet the definition of 'bogus document', there need only be a 'reasonable suspicion' of a document being bogus, not probative evidence. The relevant test is whether the Tribunal reasonably suspects the document is a document that falls within one of the three limbs as set out above, not whether one or more of the three limbs is satisfied as a matter of fact.[31] A reasonable suspicion in this context requires objective circumstances (which are not mere surmise or conjecture) upon which the reasonable suspicion of the decision-maker is founded.[32] For example, when the definition in paragraph (c) of the definition of bogus document is read in conjunction with cl. 4020(1), the criterion requires that there is *no evidence* before the Minister (or Tribunal) that the applicant *has given*, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a document that the Minister *reasonably suspects* is a document that was *obtained* because of a false or misleading statement.[33]

[25] *Palikhe v MIBP* [2014] FCCA 1875 at [30] -– [32] and [37] - [40]. See also *Dhillon v MIBP* [2014] FCCA 552 (Burchardt J, 28 April 2014).
[26] s.5(1) as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (No.35 of 2015). Section 97 was repealed by that Act from 18 April 2015 and replaced by the identical definition in s.5(1).
[27] In *AIB16 v MIBP* [2017] FCAFC 163 (Tracey, Mortimer and Moshinsky JJ, 16 October 2017) it was held that there is no relevant distinction, for the purposes of the definition of 'bogus document', between an 'original' and a copy of the same document: at [76]. This judgment was in the context of s.91W; however the Court's findings would apply equally in the context of PIC 4020.
[28] *Singh v MIMAC* [2013] FCCA 1435 (Judge Cameron, 24 September 2013) at [24].
[29] *Palikhe v MIBP* [2014] FCCA 1875 at [30] - [32] and [37] - [40].
[30] *Salopal v MIBP* [2018] FCA 1308 (Colvin J, 28 August 2018) at [88]. While the Court's comments were *obiter*, they would be treated by lower courts as persuasive in regards to the approach to assessing cl.4020(1) and would presumably be followed.
[31] See for example *Sun v MIBP* [2015] FCCA 2479 (Judge Jarrett, 11 September 2015) at [45] where the Court stated that the primary issue in terms of a person's authority to alter documents under paragraph (b) of the definition of 'bogus document' is whether the decision maker reasonably suspects there was a lack of authority, not whether that authority was lacking as a matter of fact.
[32] *Sun v MIBP* [2016] FCAFC 52 (Logan, Flick and Rangiah JJ, 5 April 2016) per Flick and Rangiah JJ at [86], citing *George v Rockett* (1990) 170 CLR 104 at 115-116, see also Logan J at [21]*; cf Rani v MIBP* [2015] FCCA 455 (Judge Driver, 2 March 2015) at [18], stating the evidence must be sufficient to induce a suspicion of the kind a reasonable person may apprehend, applying *George v Rockett* (1990) 170 CLR 104 at 112-113.
[33] *Sandhu v MIMAC* [2013] FCCA 491 (Judge Driver, 26 July 2013) at [44]: appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842 (Cowdroy J, 20 August 2013).

Addressing the elements of the definition

It is necessary to address the elements of the definition in s.5(1) and identify which paragraph applies. References to the non-genuineness of a document, or statements that the document appears to be falsified, do not amount to a finding that a document is a bogus document as defined.[34] The distinction should also be drawn between a document reasonably suspected of being a 'bogus document' within the meaning of s.5(1), and any false information or misleading statements which are given and which may lead to a 'bogus document' being obtained. For example, a work reference submitted to a relevant assessing authority for a 'skills assessment' which contained statements that were false or misleading is not a 'bogus document' within the meaning of paragraph (c) of the definition as the work reference was not *obtained* because of a false or misleading statement, rather the skills assessment (obtained on the basis of the work reference) constitutes the 'bogus document'.[35]

Must the bogus document be relevant to the visa criteria?

There is no requirement that the falsity of a bogus document should be relevant to the criteria being considered.[36] The definition of 'bogus document', unlike the definition of 'false or misleading in a material particular' in cl.4020(5), does not contain any reference to visa criteria, and so is not affected by the limitations imposed by the definition of 'false and misleading in a material particular' (discussed below).[37]

While a bogus document is not required to be relevant to the visa criteria, cl.4020(1) does require the document to have been given 'in relation to' a application for a visa. The phrase 'in relation to' should be given a broad meaning as it refers to the *purpose* for which the document or information is given to the identified person.[38] It does not have the narrower restricted meaning of 'relevant to' or 'probative of' in the sense that the document or information provided is capable of being logically probative of the criteria to be satisfied for the grant of a visa; nor is its meaning informed by the definition of 'information that is false or misleading in a material particular'.[39] For example, a bogus document submitted as part of a visa application would plainly be 'in relation to' the visa application.[40] This would appear to be the case even in circumstances where the bogus document was not directly relevant to the visa application.[41]

[34] *Shu v MIMIA* [2003] FCA 791 (Emmett J, 23 June 2003) at [33]-[35]. The Court held in the context of cancellation under s.109 for breach of s.103 of the Act (not to provide bogus documents) that findings about a work reference variously referring to it as 'a false work reference'; 'a document that is false and misleading'; and 'a document that purports to be a genuine employment reference' but that 'the content of this document is not genuine' did not reflect consideration of the correct question for the definition of *bogus document* and s.103; *cf Maharjan v MIBP* [2016] FCCA 3029 (Judge Manousaridis, 25 November 2016) at [17] where the Court inferred that the Tribunal had directed its mind to the definition , and in particular, to whether bank statements given by the applicant were counterfeit, when it found they were 'not genuine' based on information from the bank that the statements were 'fraudulent' without identifying for which of the three reasons the document was bogus. The judgment was overturned on appeal, however this aspect was not the subject of consideration: *Maharjan v MIBP* [2017] FCAFC 213 (Gilmour, Logan and Mortimer JJ,15 December 2017).

[35] *Singh v MIMAC* [2013] FCCA 1435 (Judge Cameron, 24 September 2013) at [27]-[29]. See also *Sharma v MIMAC* [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013) where the Court at [29]-[30] was satisfied that false work reference letters themselves did not fall within any of the categories of *bogus document* as defined, but that a TRA skills assessment which was obtained by relying upon work reference letters which contained false and misleading information did.

[36] *Arora v MIBP* [2016] FCAFC 35 (Buchanan, Perram and Rangiah JJ, 11 March 2016) at [15].

[37] *Arora v MIBP* [2016] FCAFC 35 (Buchanan, Perram and Rangiah JJ, 11 March 2016) at [15] and [17]. See also *Batra v MIAC* (2013) 212 FCR 84; *Thind v MIBP* [2014] FCA 207 (Bromberg J, 28 February 2014) and *Mudiyanselage v MIAC* (2013) 211 FCR 27 at [23]-[31].

[38] *Nanre v MIBP* [2015] FCA 528 (White J, 29 May 2015) at [27].

[39] *Nanre v MIBP* [2015] FCA 528 (White J, 29 May 2015) at [27] and [31].

[40] *Nanre v MIBP* [2015] FCA 528 (White J, 29 May 2015) at [27]. See also the discussion in *Nanre v MIBP* [2015] FCCA 135 (Judge Demack, 22 January 2015) at [54].

[41] In *Nanre v MIBP* [2015] FCCA 135 (Judge Demack, 22 January 2015), the applicant argued that as TRA was not a valid assessing authority at the time the bogus reference letter was provided, the bogus document given to TRA by the applicant was not given 'in relation to' the application for the visa. The Court rejected this argument finding that it was plainly given in relation to the visa application, even though the application was deficient in the sense that TRA was not specified as an assessing authority at the time it was given: at [54].

Information that is false or misleading in a material particular

For the purposes of PIC 4020, the phrase 'information that is false or misleading in a material particular' is defined in cl.4020(5) to mean information that is:

- false or misleading at the time it is given; and
- relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

False or misleading information

The question of what constitutes false or misleading information involves several considerations. Most importantly, PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake).[42] While it is not necessary for a visa applicant to know of, or be directly involved in, any falsehood for PIC 4020 to be engaged, there must have been knowledge or intention on somebody's part.[43]

In order to be misleading, the information must convey or contain a misrepresentation. Such a view is consistent with the interpretation of false or misleading representations about goods or services under the Australian Consumer Law.[44] The representation may be about an existing state of facts or a future state of affairs such as in circumstances where an applicant must satisfy a criterion with a prospective aspect. For example, the nature of cl.572.223(2)(c), which requires the Minister to be satisfied that an applicant *will have access* to certain funds, requires that the information must form a type of representation as to a future state of affairs.[45] While no direct 'representation' is required, the submission of evidence of a loan, the funds of which were completely withdrawn shortly after the date of application, could be information that was false or misleading in respect of the requirement that the funds be available for the period of the visa.[46]

What constitutes false or misleading information is a question of fact for the decision maker to determine having regard to the circumstances of the case.[47] However it is important to correctly characterise the purported false or misleading information when considering whether PIC 4020 is satisfied. Failure to do so may result in jurisdictional error.[48]

There is no requirement that the information in question has in fact misled anybody and it may be the case that the information is 'objectively' false or misleading.[49] However, an element of fraud or

[42] *Trivedi v MIBP* (2014) 220 FCR 169 at [32] and [54].
[43] *Trivedi v MIBP* (2014) 220 FCR 169 at [28], [33] and [49].
[44] *Kaur v MIMAC* [2013] FCCA 933 (Judge Driver, 23 August 2013) at [63]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014).
[45] *Kaur v MIBP* [2015] FCCA 2568 (Judge McGuire, 29 October 2015) at [29]. Appeal dismissed: *Kaur v MIBP* [2016] FCA 540 (Jessup J, 20 May 2016) at [13]-[14].
[46] *Kaur v MIBP* [2015] FCCA 2568 (Judge McGuire, 29 October 2015) at [29]. Appeal dismissed: *Kaur v MIBP* [2016] FCA 540 (Jessup J, 20 May 2016) at [13]-[14].
[47] *Kaur v MIMAC* [2013] FCCA 933 (Judge Driver, 23 August 2013) at [63]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014).
[48] See for example *Larney v MHA* [2019] FCA 700 (Kerr J, 21 May 2019). In that case, the Court found that the Tribunal asked itself a wrong question by focussing not on whether the information the appellant had provided by answering the question asked of him in the application form "No" (in response to the question, *'[h]as the applicant been in any previous relationships with persons other than the sponsor?*') was false or misleading in a material circumstance, but on the quite different questions that arose from the Tribunal's misunderstanding of the information he had provided. The Court held that by asking itself the wrong question, the Tribunal fell into jurisdictional error.
[49] *Kaur v MIMAC* [2013] FCCA 933 (Judge Driver, 23 August 2013) at [65]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014). In *Singh v MIBP* [2014] FCCA 510 (Judge Emmett, 18 March 2014) the applicant provided a letter of reference to TRA which was found to have erroneously stated that the applicant worked 900 hours. In these circumstances the Court held it was open for Tribunal to find that the applicant did not satisfy cl.4020(1)(a) on the basis the letter of reference submitted to TRA was false and misleading.

deception by somebody is also necessary in order to attract the operation of PIC 4020.[50] Accordingly, to focus only on whether information is objectively false, without considering whether the information is purposefully false or misleading, would give rise to jurisdictional error.[51]

An omission is also capable of amounting to false or misleading information, for example failure to answer a question on a visa application form about previous visa applications.[52]

At the time it is given

The definition of 'information that is false and misleading in a material particular' in cl.4020(5)(a) requires the information to be false or misleading *at the time it is given*. It is clear from the express terms of cl.4020(5)(a) that this question must be addressed at the time the information is given.[53] The effect of cl.4020(5)(a) is that something which may have been given at a particular time, but later becomes false because of different information or a change in circumstances, does not fall within the meaning of false or misleading for the purposes of PIC 4020.[54] In contrast, the question of relevance or materiality in cl.4020(5)(b) can, depending on the criterion, apply at the time of application or decision.

Relevant to any criteria

For information to be 'false or misleading in a material particular' in the context of PIC 4020, there must be a visa criterion upon which the allegedly false information could materially bear.[55] The definition in cl.4020(5)(b) focuses upon the materiality of the information. It applies to information which goes to something which will or might determine the visa application and is not concerned with information that is irrelevant to the visa requirements.[56] However, the referable criterion cannot be PIC 4020 itself.[57]

In most instances this will not present any difficulties. However the requirement has raised issues in the context of certain skilled visa applications made before 1 October 2011 where the time of application criteria relates to obtaining a skills assessment by a relevant assessing authority.

Before 1 October 2011, bodies such as Trades Recognition Australia (TRA) were not validly specified as relevant assessing authorities, meaning that time of application criteria relating to obtaining a skills assessment by a relevant assessing authority (e.g. cl.485.214) do not apply.[58] Therefore, false or misleading information cannot be regarded as 'relevant' to such criteria.[59] Accordingly, where the relevant skills assessment criterion for the purpose of cl.4020(5) is a time of application criterion, and

[50] *Trivedi v MIBP* (2014) 220 FCR 169 at [33].
[51] For instance, in *Kaur v MIBP* [2014] FCA 1276 (25 November 2014, Barker J) at [57]-[61], the Court held that the Tribunal erred when it asked whether the information was objectively false or misleading, and did not consider the question of whether the information had the necessary quality of 'purposeful falsity' required of PIC 4020.
[52] *Umer v MIBP* [2017] FCCA 2934 (Judge Lucev, 29 November 2017) at [46]-[47], which held that the Tribunal was correct to find that the review applicant's failure to answer a question on a visa application form about previous visa applications was misleading in circumstances where the review applicant knew that there was a previous visa refusal, knew he had not provided the correct information, and made no effort to correct the omission.
[53] *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014) at [45].
[54] *Kaur v MIBP* [2014] FCCA 1264 (Judge Lloyd-Jones, 18 June 2014) at [79].
[55] *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012) at [68].
[56] *Kaur v MIBP* [2014] FCCA 1264 (Judge Lloyd-Jones, 18 June 2014) at [80] and [81]. See also *Singh v MIBP* [2018] FCCA 1136 (Manousaridis J, 9 May 2018).
[57] *Singh v MIBP* [2015] FCCA 1939 (Judge Barnes, 22 July 2015) at [63]. In considering the materiality requirement in cl.4020(5), the Court held that 'It was a misconstruction and misunderstanding of the applicable law for the Tribunal to determine the relevance of the information given by the applicant about the nature of his employment for the purposes of cl.4020(1) by reference to the applicable version of cl.485.224 which simply required him to satisfy public interest criteria, including PIC 4020'. This overcomes the reasoning in *Bari v MIAC* [2013] FMCA 14, which appeared to accept a submission that information will be false or misleading 'in a material particular' if it is relevant to the criterion which requires satisfaction of PIC 4020, which would arguably mean that any false or misleading information would be false or misleading information 'in a material particular' even if otherwise irrelevant to all other visa criteria.
[58] See *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012).
[59] *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012).

relates to a pre-1 October 2011 visa application, it would not be open to conclude that the information in question was 'false or misleading in a material particular'.[60]

The problem with the specification of relevant assessing authorities was remedied from 1 October 2011.[61] Therefore, where the skills assessment forms part of a time of decision criterion (e.g. cl.485.221(1)), including for pre-1 October 2011 visa applications, it would be open to conclude that the information was 'false or misleading in a material particular' at the time of decision.[62]

The approval of a relevant assessing authority is immaterial to the question of whether an applicant has given a bogus document (see discussion above).[63]

Further, while the specification of relevant assessing authorities resolves the question of whether information is false or misleading in a material particular, at least in terms of time of decision criteria, where a relevant assessing authority was not validly specified at the time the information was given to it, then PIC 4020 may not be enlivened. See discussion below.

Given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth

PIC 4020 requires that there be no evidence that the information or bogus document was given, or caused to be given, *to* any of the specific entities or persons provided - namely the Minister, an officer, the Tribunal,[64] a relevant assessing authority[65] or a Medical Officer of the Commonwealth.

For information or a document to engage the operation of PIC 4020 it must be given to a person when the person is the holder of the statutory office or the performer of the statutory role.[66] Thus, a decision maker will not only need to identify the persons or entities that received the information or document, they will also need to be satisfied these persons or entities held the relevant position or office, or – in the case of relevant assessing authority – were properly specified, *at the time the information or document was provided*.

Relevant assessing authority

In many instances, there will be no issue identifying that the entity or person(s) who received the information or document are of a kind provided for under PIC 4020. However, there will be instances where the person or body is not of a type provided for under PIC 4020 and this may be determinative of the PIC 4020 assessment.

In the case of a 'relevant assessing authority', the Regulations require that a body is a relevant assessing authority if it has been specified as such by the Minister in a written instrument.[67] There is

[60] *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012). The approach in *Singh v MIAC* was followed in a number of cases: *Dhiman v MIAC* [2012] FMCA 646 (Barnes FM, 10 July 2012) at [37]-[39] (Subclass 485 visa refusal) and *Brar v MIAC* [2012] FMCA 519 (Driver FM, 31 July 2012) at [71] (cancellation under s.109).
[61] An instrument, IMMI 11/068, was made in October 2011 specifying TRA as a relevant assessing authority. The validity of that instrument was upheld in *Zhang v MIAC* [2012] FMCA 1011 (Barnes FM, 2 November 2012), insofar as it was relevant to time of decision criteria. The Court's reasoning in *Zhang* as to the validity of IMMI 11/068 would be equally applicable to subsequent instruments that have since replaced 11/068, in relation to applications for General Skilled Migration visas which require a suitable skills assessment at time of decision (e.g. cl.485.221(1), 885.222(1)).
[62] *Kaur v MIBP* [2014] FCA 281 (Wigney J, 27 March 2014).
[63] *Arora v MIBP* [2016] FCAFC 35 (Buchanan, Perram and Rangiah JJ, 11 March 2016) at [14]. *Mudiyanselage v MIAC* (2013) 211 FCR 27 at [38].
[64] Clause 4020(1) was amended by SLI 2015, No.103 to remove reference to the Migration Review Tribunal and replace it with the 'Tribunal during the review of a Part 5-reviewable decision' as a result of the MRT's amalgamation with the Administrative Appeals Tribunal (AAT) from 1 July 2015. A document or information given to the Migration Review Tribunal prior to 1 July 2015 is taken to have been given to the AAT: item 15AC of Schedule 9 to the *Tribunals Amalgamation Act 2015.*
[65] as defined in r.1.03 and r.2.26B.
[66] *Sharma v MIBP* [2014] FCCA 2821 (Judge Cameron, 9 December 2014) at [30].
[67] r.2.26B.

uncertainty as to whether a document or information given to a body such as Trades Recognition Australia (TRA) before it was specified as a relevant assessing authority is caught by cl.4020(1) due to the conflicting authority on this issue.[68] Please contact MRD Legal Services if this issue arises.

The provision of false or misleading information or a bogus document to a body that was not *specified* as a relevant assessing authority at the relevant time may be immaterial if the information or document was also given to any of the other persons or entities provided for under PIC 4020, such as the Minister or the Tribunal on review.[69]

Given or caused to be given

For the requirements in cl.4020(1) and (2) to be engaged, it is not necessary to show knowing complicity by the visa applicant.[70] The words 'given or caused to be given' do not import a mental element.[71] All that is necessary is that the information provided was purposefully false.[72] However while it is not necessary to show that the bogus document or the false or misleading information was provided with the visa applicant's knowledge and complicity, the document or information must still be 'given or caused to be given' by the visa applicant.

The principle of 'knowing falsehood' applies to the provision of information that is false or misleading in a material particular and to the provision of a 'bogus document' within the meaning of paragraphs (a) and (b) of the definition of *bogus document*[73] (it is less clear whether it applies to paragraph (c) of the definition of *bogus document* which dictates that a document may be a bogus document if obtained because of a false or misleading statement *'whether or not made knowingly)'.*[74] While it is not strictly necessary for decision makers to make a positive finding that the information or document was purposefully false or contained purposefully false or misleading information, as the test is

[68] In *Sharma v MIBP* [2014] FCCA 2821 (Judge Cameron, 9 December 2014) Judge Cameron found that information given to TRA before it was specified as a relevant assessing authority was not 'given to a relevant assessing authority' and the Tribunal erred in finding that PIC 4020 was engaged. However, in *Fan v MIBP* [2015] FCCA 505 (Judge Cameron, 2 February 2015) His Honour stated that he no longer holds this view, and found that it was of no significance that TRA was not a relevant assessing authority at the time the information was given as long as it was a relevant assessing authority at the time of decision. However *Fan* should be treated with caution as His Honour considered the correct and binding view on the issue to be as set out in *Kaur v MIBP* 2014] FCA 281 (Wigney J, 27 March 2014). As *Kaur* turned on the construction of cl.4020(5)(b) (i.e. 'relevant to any criteria'), it is not clear why his Honour considered it 'binding' in relation to the separate question of whether the information or document had been 'given to a relevant assessing authority' at a time prior to that body being properly specified as such.

[69] In *Batra v MIAC* [2012] FMCA 544 (Riley FM, 24 July 2012) the Court considered the provision of a bogus document in the context of a visa cancellation under s.109. The Tribunal found that a TRA skills assessment, obtained on the basis of a false work reference, was a bogus document provided to the Minister. The fact that TRA was not at the material time specified as a 'relevant assessing authority' was immaterial. Appeal dismissed: *Batra v MIAC* (2013) 212 FCR 84 at [60] – [61]. See also *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012) where the Court considered whether a TRA skills assessment also obtained on the basis of a false work reference, was a 'bogus document' for the purpose of PIC 4020. Consistently with *Batra,* the Court held that although TRA had not been validly appointed as a relevant assessing authority, this was not relevant to whether the applicant *gave the Minister* a bogus document and that it was open for the Tribunal to conclude the applicant had provided such a document to the Minister. Upheld on appeal: *Mudiyanselage v MIAC* (2013) 211 FCR 27. See also *Bajwa v MIBP* [2014] FCCA 2890 (Judge Purdon-Sully, 10 December 2014) and *Sekhon v MIBP* [2014] FCCA 2834 (Judge Cameron, 9 December 2014).

[70] *Trivedi v MIBP* (2014) 220 FCR 169 at [43]-[44]. Cited with approval in *Singh v MIBP* [2018] FCAFC 52 (per Griffiths and Moshinsky JJ, Bromberg J dissenting) at [144].

[71] *Vyas v MIAC* [2012] FMCA 92 (Driver FM, 17 May 2012) at [68]. This view was endorsed in *Sran v MIBP* [2013] FCCA 37 (Judge Nicholls, 17 January 2014).

[72] *Trivedi v MIBP* (2014) 220 FCR 169. See also *Chung v MIBP* [2015] FCA 163 (Perry J, 5 March 2015) at [25]. In that case the Court found that the inclusion of a skills assessment reference of which the assessing authority had no record, and evidence that the assessing authority had no skills assessment reference referable to the appellants was sufficient for the Tribunal to find there was information associated with the visa application which had the necessary quality of purposeful falsity. It was not necessary for the Tribunal to go further and determine whether the visa applicants had knowingly been involved in the provision of that false information or document before finding that there has been a failure to comply with PIC 4020.

[73] *Patel v MIBP* [2015] FCAFC 22 (Edmonds, Buchanan and Flick JJ, 3 March 2015), applying *Trivedi v MIBP* (2014) 220 FCR 169. See also *Chopra v MIBP* [2014] FCCA 2064 (Judge Driver, 5 September 2014).

[74] Neither *Patel v MIBP* [2015] FCAFC 22 (Edmonds, Buchanan and Flick JJ, 3 March 2015) nor *Trivedi v MIBP* (2014) 220 FCR 169 expressly considered the scope and effect of paragraph (c) as the facts in those cases did not give rise to such consideration.

satisfaction that there is no evidence to the contrary,[75] including such a statement can make clear the decision maker has turned her or his mind to this question.

Where false or misleading information or a bogus document is given by an agent, it is neither necessary for an applicant to be aware that false information has been given by the agent, nor that the applicant gave instructions to provide false information to the agent in order to be responsible for false or misleading information being given.[76]

Where an applicant lodges a visa application through an agent, the applicant, being a principal, will be bound under the common law principles of agency by the acts of an agent acting within the scope of his or her authority. Actual authority may be express or implied[77] and a principal can be liable for the actions of an agent, even if the agent's act is unlawful or amounts to fraud.[78] As a result, even where an applicant did not fill out an application form or physically give the relevant information or documents, they may be found to have caused a bogus document or false or misleading information to be given to a specified person, and thus not to have complied with PIC 4020, despite allegations of fraud by an agent or third party.[79] However, fraud can invalidate a visa application (see discussion below).

Effect of fraud on the visa application

A visa application may be invalid where fraud has prevented the primary decision-maker from carrying out their functions or has stultified the visa application process.[80] Where it is alleged that third party fraud has resulted in an invalid visa application, the validity of the application is a jurisdictional fact to be determined by the decision-maker.[81] Failure to do so is likely to result in jurisdictional error. In *Maharjan v MIBP*[82] the Federal Court found that the Federal Circuit Court erred by not deciding the jurisdictional fact of whether the alleged fraud in that case had invalidated the visa application or the visa application process. The Court's reasoning would apply equally to the Tribunal's assessment of any claims of third party fraud.

Whether a visa application is invalidated as a result of third party fraud will depend on the role of the applicant and the precise nature of the agency relationship between the parties. If the applicant is complicit in the fraud or 'indifferent' to it (in the sense of being indifferent to an agent acting unlawfully or dishonestly[83]), the visa application will not be invalidated by the third party's conduct. Whether an

[75] *Faruque v MIBP* [2015] FCA 1198 (Katzmann J, 9 November 2015) at [26].
[76] See *Singh v MIBP MIBP* [2018] FCAFC 52 (per Griffiths and Moshinsky JJ, Bromberg J dissenting) at [152] where the Court held that it was reasonably open to the Tribunal to find that the applicant had caused the bogus document to be given to the Department because he was content to have his brother-in-law act as his intermediary, and that in such circumstances it is not necessary to determine whether or not the visa applicant had knowledge of or was complicit in the fraudulent conduct. See also *Singh v MIBP* [2015] FCCA 2776 (Judge Whelan, 14 October 2015) at [49].
[77] *Lysaght Bros & Co Ltd v Falk* (1905) CLR 443 as cited in *Sran v Minister for Immigration and Anor* [2014] FCCA 37 at para.66.
[78] *Brown v Citizen's Life Insurance Co Ltd* (1904) 2 SR (NSW) 202; *Lloyd (Pauper) Appellant v Grace* [1912] AC 716 as cited in *Sran* at paras.63 and 78.
[79] For example, in *Singh v MIBP* [2015] FCCA 2776 (Judge Whelan, 14 October 2015), the Court found at [56] that '[i]t is consistent with the conclusions of Buchanan J in *Trivedi* that the provisions of s.98 of the Act should apply to PIC 4020 and that an applicant should be deemed to have completed an application form where he or she causes a form to be filled out or his/her behalf'.
[80] *Maharjan v MIBP* [2017] FCAFC 213 (per Gilmour and Mortimer JJ, Logan J dissenting) at [113].
[81] *Maharjan v MIBP* [2017] FCAFC 213 (per Gilmour and Mortimer JJ, Logan J dissenting).
[82] [2017] FCAFC 213 (per Gilmour and Mortimer JJ, Logan J dissenting).
[83] In *Gill v MIBP* [2016] FCAFC 142 (Kenny, Griffiths and Mortimer JJ, 17 October 2016) the Full Federal Court held that there is a relevant distinction between indifference as to how a migration agent, acting lawfully and properly, can achieve a visa applicant's desired outcome and indifference as to whether that outcome is achieved acting unlawfully or dishonestly. The Court concluded that, in order for there to be a finding that the applicant was complicit in the migration agent's fraud, the applicant must be indifferent to that agent acting unlawfully or dishonestly. See also *Kaur v MIBP* [2019] FCAFC 53 (Murphy, Mortimer and O'Callaghan JJ, 3 April 2019) where the Federal Court found that what is meant by indifference in this context is "reckless indifference" as to the truth of the representation, which is said to be deliberately false (at [134]). In this case the Federal Court found that the factual findings of the Federal Circuit Court did not rise to a level which could justify a description of the appellant as being "recklessly indifferent" to the truth of the claims and material put forward by the migration agent in the visa application form (at [141]).

applicant can be said to be complicit in or indifferent to the fraud will depend on the facts of the case. Evidence as to the third party's relationship with the applicant and the scope of any authority given to them either expressly or impliedly may be relevant in establishing whether an applicant is complicit in or indifferent to any relevant conduct.

For example, in *Sran v MIBP*[84] the Court found that an agency agreement for the purpose of lodging a visa application was established, in circumstances where the applicant instructed the agent to make an application on his behalf, a fee was discussed, and the applicant was aware the application was to be made. The Court further found that the applicant's indifference to the detail of the application was such as to make the scope of the authority broad enough to include the provision of false or misleading information to the Department in relation to the applicant's skills assessment. As such, the validity of the visa application was found not to be vitiated by the agent's conduct.

Therefore, in cases where it is claimed that a bogus document or false or misleading information was given as a result of third party fraud, making findings of fact on the scope of the agent's authority to act on the applicant's behalf in relation to the visa application could avoid a jurisdictional error of the kind found in *Maharjan*.

If the decision-maker is satisfied on the evidence that the agent was responsible for the fraud and the applicant was neither complicit nor indifferent to it, the next question to be determined is how, if at all, the fraud affected the decision-making processes under the Act. Where fraud stultifies the decision-making process, the application is in law no application at all.[85] An invalid application cannot be considered.[86] Therefore if the Tribunal were to find that a visa application is not valid, the appropriate decision would be to set the decision aside and substitute a new decision pursuant to s.349(2)(d) of the Act that the visa application was not valid an cannot be considered.[87]

Waiver of PIC 4020

The requirements of cl.4020(1) and (2) may be waived if the decision maker is satisfied that there are:

- compelling circumstances that affect the interests of Australia;[88] or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, and Australian permanent resident or an eligible New Zealand citizen[89]

that justify the granting of the visa.

This waiver does not apply to the identity criteria in cl.4020(2A) and (2B).[90]

The waiver is a two-staged inquiry:

[84] [2014] FCCA 37 (Judge Nicholls, 17 January 2014). Similarly, in *Koirala v MIBP* [2014] FCCA 842 (Judge Turner, 12 March 2014) at [6] and [7], the Court concluded that it was open to the Tribunal to find that the applicant's lack of involvement or failure to take any interest in the visa application demonstrated that the applicant had instructed the agent to lodge the application and that he was indifferent as to how that agent went about that task. See also *Singh v MIBP* [2014] FCCA 1816 (Riethmuller J, 20 August 2014), where the Court found it was open for the Tribunal to conclude that the applicant was indifferent to the contents of their visa application. The Court found that the applicant provided 'flimsy' evidence of their interaction with the agent and if the applicant not been indifferent to the way in which the visa obtained, a detailed account of would be expected (at [33] – [35]).
[85] *Maharjan v MIBP* [2017] FCAFC 213 (per Gilmour and Mortimer JJ, Logan J dissenting) at [102] - [103].
[86] s.47(3) of the Act.
[87] *SZANA v MIMIA* [2004] FCA 203 (Hely J, 12 March 2004) at [26] agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407 (Allsop J, 9 December 2003).
[88] cl.4020(4)(a).
[89] cl.4020(4)(b).
[90] cl.4020(4).

1) first, the decision-maker needs to consider whether there are compelling circumstances within the meaning of PIC 4020(4)(a) or compassionate or compelling circumstances within the meaning of PIC4020(4)(b), and, if so,

2) the decision-maker must then consider whether to exercise the discretion to waive the requirements of PIC 4020, having regard to those circumstances.[91]

'Compelling' or 'compassionate' circumstances

The terms 'compelling' or 'compassionate' are not defined in the Act or Regulations. The determination of whether circumstances are compelling or compassionate is essentially one of subjective judgement[92] and is a question of fact and degree for the decision maker.

It is not sufficient for the purposes of the waiver that there are compelling or compassionate circumstances alone. The circumstances must affect the interests of Australia, an Australian citizen, permanent resident or an eligible New Zealand citizen.[93] A company is not an Australian citizen for the purposes of PIC 4020(4)(b).[94]

Guidance on circumstances that may amount to compelling or compassionate circumstances may be found in the Explanatory Statement to SLI 2011, No.13 which introduced PIC 4020, and the Department's policy guidelines.[95] While not binding, the Tribunal may have regard to the department's interpretation and examples of what may constitute compelling or compassionate circumstances.[96]

According to the Explanatory Statement it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant.[97] The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:

[91] *Kaur v MIBP* [2017] FCAFC 184 (Dowsett, Pagone and Burley JJ, 27 November 2017) at [26].
[92] *Kandel v MIBP* [2015] FCCA 2093 (Judge Smith, 7 August 2015) at [32]. However, while a subjective judgment may quite properly be explained simply by a bald statement of conclusion (*Kandel* at [32]), decision makers are nonetheless required to engage in an active intellectual process of considering the applicant's evidence and giving reasons for failing to waive PIC 4020(1) where argued to avoid acting unreasonably (see *Sharma v MIBP* [2015] FCCA 2669 (Judge Emmett, 6 October 2015) at [47]). Indeed, overly brief reasons for such a conclusion may indicate the Tribunal did not perform its function of review according to the law: *MIAC v SZLSP* [2010] FCAFC 108 at [91].
[93] *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013). The Court, at [14], found the Explanatory Statement of assistance in considering the plain words of the waiver provision, such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause. Aspects of the Court's reasoning appear to leave open the possibility that it would be sufficient for the applicant to be the subject of the compassionate or compelling circumstances as long as a relevant person or the interests of Australia would also be affected, however the Court did not have to resolve this question.
[94] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [16]-[17]. The Court noted that the evidence of the director of the trucking company that was before the Tribunal referred to damage to the company and did not address disadvantage to the director personally.
[95] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances (re-issue date 1/1/18).
[96] *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012 at [43]) where the Court noted it was open for the Tribunal to be guided by Department policy - appeal dismissed in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court in this case did not consider the waiver provisions.
[97] Explanatory Statement to SLI 2011, No.13, at 19. The Court in *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013) found the ES to be of assistance in considering the plain words of the waiver provision such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause (at [14]).

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);

- that family members in Australia would be left without financial or emotional support; and

- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period.[98]

In addition, the Department's guidelines suggest that there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or

- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or

- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.[99]

The policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.[100]

Various judgments have considered claims based on employment in Australia and the 'interests of Australia'. The judgments considering the meaning of this connote more significant, objective and public interest than that associated with mere employment in Australia.[101] While it is not the case that employment in a business in Australia could never amount to compelling circumstances affecting the interests of Australia, there is a distinction between the disadvantage to an Australian business in 'losing' an employee, and circumstances which affect Australia.[102] It is a question of fact and evidence for the Tribunal as to whether the claimed circumstances relating to employment in a particular case constitute compelling circumstances affecting Australia.

While the above examples may or may not constitute compassionate or compelling reasons in an individual case, the Tribunal is obliged to consider all the circumstances of the case including any matters put forward by an applicant in relation to the waiver, and determine on the evidence as a whole whether there are compelling or compassionate circumstances.[103] For the avoidance of doubt,

[98] Explanatory Statement to SLI 2011, No.13, at 19-20.
[99] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances – Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).
[100] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).
[101] *Deb v MIBP* [2016] FCCA 3351 (Judge Nicholls, 22 December 2016) at [45], citing various other cases including *Raza v MIBP* [2015] FCCA 1623 and *Kandel v MIBP* [2014] FCCA 1479.
[102] *Deb v MIBP* [2016] FCCA 3351 (Judge Nicholls, 22 December 2016) at [56].
[103] See for e.g. *Kaur v MIBP* 2013] FCCA 1162 (Judge Driver, 4 October 2013). The Court rejected an argument that the Tribunal's statement that it was '…not satisfied that [the] circumstances [were] of the kind contemplated in the Explanatory Statement' demonstrated a fettering of its enquiry limited to the parameters cited in the Explanatory Statement. See also *Fernando v MIBP* [2016] FCCA 409 (Judge Hartnett, 1 March 2016) where the Tribunal fell into jurisdictional error by failing to consider aspects of the applicant's claims that the impact upon his Australian citizen sponsor and the sponsoring business if he had to cease employment amounted to compelling reasons per cl.4020(4).

the Tribunal's consideration of all claims relevant to the waiver should be expressly set out in the decision record.[104]

The discretionary matters in cl.4020(4) are unrelated to the content and the reasons for any breaches of PIC 4020(1) and (2).[105] Accordingly, claims made by an applicant in relation to PIC 4020(1) or (2) would not need to be considered in relation to compelling or compassionate circumstances in the absence of relevant claims in relation to PIC 4020(4). This does not mean that circumstances falling under PIC 4020(1) or (2) could never be relevant to the waiver, rather the obligation is to consider the case as put by the applicant in relation to the waiver.

For further detail and discussion of 'compelling' or 'compassionate circumstances' in general and in the context of PIC 4020(4) see MRD Legal Services commentary: Compelling and/or compassionate circumstances.

Past refusals on the basis of PIC 4020

With limited exception, cl.4020(2) requires the decision-maker to be satisfied that in the relevant period, the applicant and any family unit members have not been refused a visa because of a failure to satisfy cl.4020(1) (provision of false or misleading information / bogus documents). The exception is where the applicant was under 18 at the time the application for the refused visa was made – see below.[106]

Consideration of cl.4020(2) is not restricted to members of the family unit who are included in the visa application but applies if any member of the applicant's family unit had been refused a visa on the basis of not satisfying cl.4020(1) in the relevant period.

In circumstances where the primary decision is that the applicant does not satisfy PIC 4020(2) the matters that may arise on review are whether the decision on the earlier visa application was in fact 'because of' the provision of a bogus document or false or misleading information, or was for some other reason; whether the visa applicant is a member of the family unit of the person; and whether compelling/compassionate circumstances exist and the requirements of cl.4020(2) should be waived.[107]

The relevant period

The relevant period in cl.4020(2) starts 3 years before the current visa application was made.[108] The relevant period ends when the Minister makes a decision to grant or refuse the visa under consideration,[109] meaning the decision of the delegate and not the Tribunal on review.[110]

[104] See for e.g. *Sarkar v MIBP* [2016] FCCA 2435 (Judge Smith, 15 September 2016) at [21] - [24]. The Court found that a reference in the decision record to a claim put forward in support of exercising the waiver provision in cl.4020(4) was insufficient to show that the Tribunal had, on balance, considered the claim. The Court held that there must be some mental process attached to the document which contained the relevant claim.
[105] *Singh v MIBP* [2016] FCCA 774 (Judge Emmett, 4 May 2016) at [60]. The applicant had made express claims in relation to cl.4020(1) that the provision of incorrect information was a mistake and unintentional which the Tribunal had not considered. The Court found the error in relation to cl.4020(1) would not have materially affected the consideration of cl.4020(4) in the circumstances of the case and, based on the Tribunal decision, rejected that the Tribunal's refusal to waive was a result of cumulative consideration of the information in cl.4020(1) and bogus documents given by the applicant.
[106] cl.4020(2AA).
[107] *Thakur v MIBP* [2016] FCA 473 (Perry J, 5 May 2016) at [32].
[108] cl.4020(2)(a).
[109] cl.4020(2)(b).
[110] *Josan v MIBP* [2016] FCCA 493 (Judge Dowdy, 11 March 2016) at [58]. Appeal dismissed in *Josan v MIBP* [2017] FCA 1418 (Davies J, 29 November 2017). Special leave to appeal from this judgment was dismissed: *Josan v MIBP* [2018] HCASL 31 (14 March 2018).

Past refusal

Whether the applicant or any family members have been refused a visa in the past on the basis of cl.4020(1) is a question of fact for the decision maker. To assist with the enquiry, information may be sought from the Department about the previous refusal decision.

A conclusion by the primary decision-maker that an applicant does not meet cl.4020(1) does not mean that they have a past refusal for the purpose of cl.4020(2) when the Tribunal is considering that same visa application.[111]

In determining whether the past refusal falls within the relevant period, there is some uncertainty in relation to the operative decision where the previous visa refusal was the subject of merits review. It appears arguable that it is the Tribunal's decision, rather than the primary decision, which is operative and determinative of an applicant's immigration status.[112] However, in *Josan v MIBP* the Court considered the reference in cl.4020(2)(b) to the Minister making a decision to grant or refuse the application referred to the decision of the delegate and not the Tribunal on review.[113] The Court appeared to accept that the relevant period runs from the date of the decision of the delegate, even in circumstances where the Tribunal has affirmed the delegate's decision.[114] This interpretation turns upon the wording used in cl.4020(2), namely that a Tribunal decision to 'affirm' a primary decision is not a decision to 'refuse' to grant a visa.[115]

The interpretation that cl.4020(2) refers to the delegate's decision has the result that a previous Tribunal decision to affirm a visa refusal on the basis that the applicant did not satisfy cl.4020(1) where the delegate did not refuse on the basis of PIC 4020 would not fall within cl.4020(2). However, there has not been any direct judicial consideration of this, as the limited judicial consideration of the effect of a past refusal has occurred in the context of arguments relating to the utility of the Court granting relief being sought (rather than whether the decision-maker correctly applied or interpreted cl.4020(2)). Consequently, the implications of the interpretation in *Josan* remain unconsidered by the Courts.

[111] This is because Tribunal conducts a *de novo* merits review in which it stands in the shoes of the primary decision-maker in considering the visa application afresh: *MIMIA v VSAF of 2003* [2005] FCAFC 73 (Black CJ, Sundberg and Bennett JJ, 10 May 2005) at [16]; *MIMA; Ex parte Miah* (2001) 206 CLR 57.

[112] *SZGGS v MIMIA* [2006] FCA 378 (Rares J, 15 March 2006). In attempting to seek review of a decision of a delegate already considered by the Tribunal and courts, Rares J noted that '[n]o consequence would ensue in law if the applicant were permitted to bring such an appeal for it is the decision of the Tribunal on the application for review from that decision which is the act in the law which is legally operative and affects the applicant's current status as a person who is not entitled to a protection visa. This view was cited with approval by Heydon J in dismissing an Application for Reinstatement (see *SZGGS v MIMIA* [2006] HCATrans 352 (26 June 2006)).

[113] *Josan v MIBP* [2016] FCCA 493 (Judge Dowdy, 11 March 2016) at [58]. Appeal dismissed in *Josan v MIBP* [2017] FCA 1418 (Davies J, 29 November 2017), however the Federal Court expressly did not consider it necessary to address the question as to whether the 3 year period would run from the delegate's decision or the Tribunal decision. Special leave to appeal dismissed: *Josan v MIBP* [2018] HCASL 31 (14 March 2018).

[114] *Josan v MIBP* [2016] FCCA 493 (Judge Dowdy, 11 March 2016) at [52]-[58]. The Court appeared to consider its interpretation, and the decision on utility in *Prodduturi v MIBP* [2015] FCAFC 5 (Perram, Perry and Gleeson JJ, 29 January 2015) was consistent with the principle in *Kim v MIAC* (2008) 167 FCR 578 at [23] that an affirmation of a decision of the delegate by the Tribunal has the effect that the decision of the delegate is the original decision which continues to operate and is not substituted by the later decision of the Tribunal. Appeal dismissed in *Josan v MIBP* [2017] FCA 1418 (Davies J, 29 November 2017), however the Federal Court expressly did not consider it necessary to address the question as to whether the 3 year period would run from the delegate's decision or the Tribunal decision. Special leave to appeal dismissed: *Josan v MIBP* [2018] HCASL 31 (14 March 2018).

[115] See, for example, *SZRNJ v MIBP* [2014] FCCA 782 where Judge Cameron considered wording in s.48A of the Act, being similar to that in PIC 4020(2), and found that 'a Tribunal affirmation of a delegate's decision to refuse a visa is not itself a refusal, but only a confirmation or ratification of the original decision, which is left undisturbed'. This view is favoured by the Department.

Exception to the exclusion period – applicant under 18 at time refused visa application was made

The exclusion period in cl.4020(2) (discussed above) does not apply to any applicant that was under 18 at the time the application for the refused visa was made (ie. the previous visa application refused on the basis of cl.4020(1).[116]

According to the Explanatory Statement to the Regulation that introduced these exceptions, the purpose of these exceptions is to ensure that a person is not disadvantaged by an application made when they were a minor because they would not be held accountable for the actions of a parent/guardian.[117]

The identity requirement

PIC 4020 also requires that the decision-maker must be satisfied as to the applicant's identity (cl.4020(2A)). Further, the decision maker must be satisfied that in the period starting 10 years before the application was made and ending when there is a decision on the visa, the applicant and any family unit member must not have been refused a visa because of a failure to satisfy this identity requirement (cl.4020(2B)).[118] See the above discussion about past refusals on the basis of PIC 4020, which also applies to cl.4020(2B).

These provisions were introduced because identity fraud was considered a matter of serious concern given that a person's identity is the foundation of all checks, including national security and character checks; and as entitlements, such as a driver's licence or Medicare card, are dependent on the accurate identification of an applicant.[119]

The Explanatory Statement to the Regulation that introduced this requirement suggests that in considering this criterion, decision-makers may have regard to a range of identity documents, including a person's passport but will need to consider to the applicant's individual circumstances, including whether they have access to identity documents, when determining if the identity requirements are satisfied.[120]

The exclusion period in cl.4020(2B) does not apply to any applicant that was under 18 at the time the application for the refused visa was made (ie. the previous visa application refused on the basis of cl.4020(2A).[121] According to the Explanatory Statement to the Regulation that introduced these exceptions, their purpose is to ensure that a person is not disadvantaged by an application made when they were a minor because they would not be held accountable for the actions of a parent/guardian.[122]

Secondary applicants

PIC 4020 is prescribed as a secondary criterion for the grant of a broad range of visas. Where a primary visa applicant has been refused a visa on the basis of failing to satisfy cl.4020(1) (provision of

[116] Clause 4020(2AA) inserted by SLI 2014, No.163 for visa applications made on or after 23 November 2014 and applications made prior to, but not finally determined as at that date.
[117] Explanatory Statement to SLI 2014, No.163 at p.16.
[118] These provisions were inserted by SLI 2014, 32 and apply to visa applications not finally determined at 22 March 2014 and visa applications made on or after that date.
[119] Explanatory Statement to SLI 2014, No.32, at 3.
[120] Explanatory Statement to SLI 2014, No.32, at 3.
[121] Clauses 4020(2BA) inserted by SLI 2014, No.163 for visa applications made on or after 23 November 2014 and applications made prior to, but not finally determined as at that date.
[122] Explanatory Statement to SLI 2014, No.163 at p.16.

false or misleading information / bogus documents) or (2A) (identity fraud), a question may arise as to what the implications are for the secondary applicant and whether they themselves satisfy PIC 4020.

Generally speaking, if the Tribunal finds that the primary applicant does not satisfy the criteria for the grant of the visa and is affirming the decision, it would be open to find that the secondary applicant does not satisfy the relevant secondary criterion in Schedule 2 of the Regulations which requires them to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of the relevant visa.

Alternatively, the Tribunal may find that the secondary applicant does not satisfy cl.4020 - in particular cl.4020(2) or (2B), which relevantly require that the applicant (being the secondary applicant) and each member of the family unit has not been refused a visa because of cl.4020(1) or (2A). However, before such a finding could be reached the Tribunal would need to have made the decision on the primary applicant. This is because, as discussed above, the primary applicant has not been refused a visa on the relevant basis until the Tribunal has affirmed the primary decision.[123]

Where the Tribunal finds that the primary applicant meets cl.4020(1) and cl.4020(2A), or waives the requirements of cl.4020(1), the secondary applicant may satisfy cl.4020(2) or (2B), providing there are no other family unit members who have been refused a visa for a failure to satisfy cl.4020(1) or (2A) in the relevant period, including members of the family unit who are not included in the application.

Relevant case law

AIB16 v MIBP [2017] FCAFC 163	Summary
Arora v MIBP [2016] FCAFC 35	
Bajwa v MIBP [2014] FCCA 2890	Summary
Bari v MIAC [2013] FMCA 14	Summary
Batra v MIAC [2012] FMCA 544	Summary
Batra v MIAC [2013] FCA 274; (2013) 212 FCR 84	Summary
Brar v MIAC [2012] FMCA 519	Summary
Chopra v MIBP [2014] FCCA 2064	
Chung v MIBP [2015] FCA 163	Summary
Dhiman v MIAC [2012] FMCA 646	Summary
Fan v MIBP [2015] FCCA 505	Summary
Faruque v MIBP [2015] FCA 1198	Summary
Fernando v MIBP [2016] FCCA 409	Summary
Gill v MIBP [2016] FCAFC 142	Summary
Gill v MIBP [2015] FCCA 1	Summary
Josan v MIBP [2016] FCCA 493	Summary
Josan v MIBP [2017] FCA 1418	

[123] This is because Tribunal conducts a *de novo* merits review in which it stands in the shoes of the primary decision-maker in considering the visa application afresh: *MIMIA v VSAF of 2003* [2005] FCAFC 73 (Black CJ, Sundberg and Bennett JJ, 10 May 2005) at [16]; *MIMA; Ex parte Miah* (2001) 206 CLR 57.

Kandel v MIBP [2015] FCCA 2093	
Kandel v MIBP [2015] FCA 706	Summary
Kaur v MIBP; Prodduturi v MIBP [2013] FCCA 1805	Summary
Kaur v MIBP [2013] FCCA 1162	Summary
Kaur v MIBP [2014] FCCA 1264	Summary
Kaur v MIBP [2014] FCA 281	Summary
Kaur v MIBP [2014] FCA 1276	
Kaur v MIMAC [2013] FCCA 933	Summary
Kaur v MIBP [2015] FCCA 2568	Summary
Kaur v MIBP [2016] FCA 540	
Kaur v MIBP [2019] FCAFC 53	
Kaur v MIBP [2017] FCAFC 184	Summary
Koirala v MIBP [2014] FCCA 842	Summary
Larney v MHA [2019] FCA 700	Summary
Luthra v MIAC [2009] FCA 575; (2009) 109 ALD 492	Summary
Luthra v MIAC [2009] FMCA 170	Summary
Maharjan v MIBP [2016] FCCA 3029	
Maharjan v MIBP [2017] FCAFC 213	Summary
Mudiyanselage v MIAC [2012] FMCA 887	Summary
Mudiyanselage v MIAC [2013] FCA 266; (2013) 211 FCR 27	Summary
Nanre v MIBP [2015] FCCA 135	Summary
Nanre v MIBP [2015] FCA 528	Summary
Palikhe v MIBP [2014] FCCA 1875	Summary
Patel v MIBP [2014] FCCA 2059	
Patel v MIBP [2015] FCAFC 22	Summary
Prodduturi v MIBP [2014] FCA 624	
Prodduturi v MIBP [2015] FCAFC 5	Summary
Rani v MIBP [2015] FCCA 455	
Salopal v MIBP [2018] FCA 1308	Summary
Sandhu v MIMIA [2013] FCCA 491	Summary
Sandhu v MIMAC [2013] FCA 842	
Sarkar v MIBP [2016] FCCA 2435	Summary
Sekhon v MIBP [2014] FCCA 2834	Summary
Sharma v MIMAC [2013] FCCA 1280	Summary
Sharma v MIBP [2014] FCCA 2821	Summary
Sharma v MIBP [2015] FCCA 2669	Summary
Singh v MIAC [2012] FMCA 145	Summary
Singh v MIMAC [2013] FCCA 1435	Summary
Singh v MIBP [2014] FCCA 510	
Singh v MIBP [2014] FCCA 1816	
Singh v MIBP [2015] FCCA 1939	Summary
Singh v MIBP [2015] FCCA 2776	

Singh v MIBP [2016] FCA 156	
Singh v MIBP [2016] FCCA 774	Summary
Singh v MIBP [2018] FCAFC 52	Summary
Singh v MIBP [2018] FCCA 1136	Summary
Shu v MIMIA [2003] FCA 791	
Sran v MIBP [2014] FCCA 37	Summary
Sun v MIBP [2016] FCAFC 52	
Sun v MIBP [2015] FCCA 2479	
SZGGS v MIMIA [2006] FCA 378	
SZRNJ v MIBP [2014] FCCA 782	Summary
Talukder v MIAC [2009] FCA 916	Summary
Talukder v MIAC [2009] FMCA 223; (2009) 108 ALD 583	
Thakur v MIBP [2016] FCA 473	Summary
Thind v MIBP [2013] FCCA 1438	Summary
Thind v MIBP [2014] FCA 207	
Trivedi v MIAC [2013] FCCA 400	Summary
Trivedi v MIBP [2014] FCAFC 42; (2014) 220 FCR 169	Summary
Umer v MIBP [2017] FCCA 2934	Summary
Verma v MIBP [2017] FCCA 2079	Summary
Verma v MIBP [2018] FCAFC 87	
Vyas v MIAC [2012] FMCA 92	Summary
Vyas v MIMAC [2013] FCCA 1226	Summary
Zhang v MIAC [2012] FMCA 1011	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2006 (No.5)	SLI 2006, No.238
Migration Amendment Regulations 2007 (No.12)	SLI 2007, No.314
Migration Amendment Regulations 2009 (No.5))	SLI 2009, No.115
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13
Migration Amendment Regulations 2011 (No.6)	SLI 2011, No.199
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.32
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014	SLI 2014, No.65
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.163

Migration Amendment (Protection and Other Measures) Act 2015	No.35, 2015
Migration Legislation Amendment (2015 Measures No.2) Regulation 2015	SLI 2015, No.103
Tribunals Amalgamation Act 2015	No. 60 of 2015
Migration Legislation Amendment (2015 Measures No.3) Regulation 2015	SLI 2015, No.184
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (NB: Disallowed (and repealed) from 17:56 5 December 2017)	F2017L01425
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulation 2018	F2018L00262

Available decision templates / precedents

There is one template/precedent designed specifically for decisions relating to PIC 4020:

- **Public Interest Criterion 4020:** This template is designed for use in any Tribunal visa refusal review where the issue in dispute is whether the applicant satisfies PIC 4020. The template uses CaseMate data on the visa type to incorporate relevant background information in the decision.

There are also optional paragraphs available relating to PIC 4020:

- **Optional Standard Paragraphs - Public Interest Criteria:** These are additional standard paragraphs that can be inserted into visa refusal decisions if required (and where applicable).

Last updated/reviewed: 25 July 2019

Attachment

Schedule of applicability of PIC 4020 amendments		
Subclass	**Criteria**	**Visa application date range**
Partner Visas		
100	cl.100.222(a), 100.224(1)(a), 100.322(a).	Visa applications made on or after 15 October 2007.[1]
300	cl.300.223	Visa applications made on or after 1 July 2013.[2]
	cl.300.226	Visa applications from at least 1 November 1995.[3]
	cl.300.323	Visa applications made on or after 15 October 2007.[1]
309	cl.309.225(a), 309.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl.309.228(1)(a)	All live applications.[4]
801	cl.801.226, 801.325	Visa applications made on or after 24 November 2012.[5]
	cl.801.224(1)	Visa applications made on or after 15 October 2007.[1]
820	cl.820.226, 820.326	Visa applications made on or after 24 November 2012.[5]
	cl.820.224(1)	Visa applications made on or after 15 October 2007.[1]
Family Visas		
101	cl.101.223(a), 101.227(1)(a), 101.323(1)	Applications made on or after 15 October 2007.[1]
102	cl.102.223,102.323	All live applications.[4]
	cl.102.226(1)	Visa applications made on or after 1 August 1996.[6]
103	cl.103.224(a) and 103.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl.103.227(1)(a)	All live applications.[4]
114	cl.114.223, 114.323	Visa applications made on or after 15 October 2007.[1]
	cl.114.226	All live applications.[4]
115	cl.115.223, 115.323	Visa applications made on or after 15 October 2007.[1]
	cl.115.226	All live applications.[4]
116	cl.116.223, 116.323	Visa applications made on or after 15 October 2007.[1]
	cl.116.226	All live applications.[4]
117	cl.117.223, 117.225(1), 117.323	All live applications.[4]
143	cl.143.224(a), 143.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl.143.225A	All live applications.[4]
173	cl.173.224(a)	Visa applications made on or after 15 October 2007.[1]
	cl.173.328	Visa applications made on or after 24 November 2012.[5]
	cl.173.226(a)	All live applications.[4]
445	cl.445.225(a), 445.227(1)(a), 445.324(a)	Visa applications made on or after 15 October 2007.[1]
461	cl.461.223(a)	
802	cl.802.223(a), 802.224(1)(a)	
	cl.802.226A(2)(a)(ii)	Visa applications made on or after 26 April 2008.[7]
	cl.802.326	Visa applications made on or after 24 November 2012.[5]
804	cl.804.225, 804.226(1), 804.322	Visa applications made on or after 15 October 2007.[1]
835	cl.835.223(a), 835.224(1)(a), 835.322(a)	

836	cl.836.223(a), 836.224(1)(a), 836.322(a)	
837	cl.837.223, 837.224(1), 837.322	All live applications.[4]
838	cl.838.223, 838.224(1)(a), 838.322(a),	Visa applications made on or after 15 October 2007.[1]
864	cl.864.223, 864.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl.864.224(a), 864 224A	All live applications.[4]
884	cl.884.224, 884.226	Visa applications made on or after 15 October 2007.[1]
	cl.884.328	Visa applications made on or after 24 November 2012.[5]
Business visas		
119	cl.119.223(a), 119.225(1)(a), 119.322(a),	All live applications.[8]
121	cl.121.224(a), 121.226(1)(a), 121.322(a)	
132 (pre 1 July 2012)	cl.132.222(a), 132.322(2)	Visa applications made on or after 15 October 2007.[9]
132 (post 1 July 2012)	cl.132.213, 132.312	All live applications.[10]
160	cl.160.222(a), 160.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.160.224	All live applications.[11]
161	cl.161.222(a), 161.322(a)	Visa applications made on or after 15 October 2007.[9]
	161.224	All live applications.[11]
162	cl.162.223(a), 162.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.162.225	All live applications.[11]
163	cl.163.223(a), 163.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.163.225	All live applications.[11]
164	cl.164.223(a), 164.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.164.225	All live applications.[11]
165	cl.165.225(a), 165.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.163.223(a)	All live applications.[11]
186	cl.186.213, 186.313	All live applications.[10]
187	cl.187.213, 187.313	
188	cl.188.213, 188.312	
401	cl.401.216, 401.316,	All live applications.[12]
402	cl.402.216, 402.316,	
403	cl.403.216, 403.316	
405	cl.405.227(6), 405.228(6), 405.329(3)(a), 405.330(3)(a), 405.227(7)(a) and 405.228(6A)(a)	Visa applications made on or after15 October 2007.[13]
407	cl.407.219A(1), 407.317(1)	Visa applications made on or after 19 November 2016.[14]
408	cl.408.216(1), 408.317(1)	Visa applications made on or after 19 November 2016.[14]
416	cl.416.223(a), 416.323(a)	All live applications.[12]
420 (post 24 Nov 2012)	cl.420.216 and 420.316	All live applications.[12]
457	cl.457.224(a), 457.227(1)(a), 457.325(a)	All live applications.[8]
482	cl.482.217, 482.317	Visa applications made on or after 18 March 2018.[15]
488	cl.488.223	All live applications.[16]
845	cl.845.223(a), 845.224(1)(a), 845.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl.845.224(2)(a)	All live applications.[11]
846	cl.846.224(a), 846.225(1)(a), 846.322(a)	Visa applications made on or after 15 October 2007.[9]

	cl.846.225(2)(a)	Visa applications on or after 1 October 2006.[17]
856	cl.856.223(1)(a), 856.225(1)(a), 856.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
857	cl.857.223(1)(a), 857.225(1)(a), 857.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
888	cl.888.215 and 888.312	All live applications.[10]
890	cl.890.222(a), 890.223(1)(a), 890.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
891	cl.891.223(a), 891.224(1)(a), 891.322(1)(a)	
892	cl.892.223(a), 892.224(1)(a), 892.322(1)(a)	
893	cl.893.224(a), 893.225(1)(a), 893.322(1)(a)	
Skilled visas		
124	cl.124.228, 124.327	All live applications.[18]
175	cl.175.223(a), 175.322(a),	Visa applications made on or after 15 October 2007.[19]
	cl.175.225(d)	All live applications.[8]
176	cl.176.224(a), 176.322(a)	Visa applications made on or after 15 October 2007. [18]
	cl.176.226(d),	All live applications.[8]
189	cl.189.215, 189.312	All live applications.[10]
190	cl.190.216, 190.312	
475	cl.475.224(a), 475.322(a)	Visa applications made on or after 15 October 2007.[18]
	cl.475.226(d)	All live applications.[8]
476	cl.476.222(a), 476.322(a)	Visa applications made on or after 15 October 2007.[18]
	cl.476.224(d)	All live applications.[8]
485	cl.485.224(a), 485.322(a)	Visa applications made on or after 15 October 2007 and before 23 March 2013.[20]
	cl.485.226(d)	Visa applications made before 23 March 2013.[21]
485 (post 23 Mar 2012)	cl.485.216(1), 485.216(3), 485.313(1)	Visa applications made on or after 23 March 2013.[22]
487	cl.487.228(a), 487.324(a)	Visa applications made on or after 26 April 2008.[23]
	cl.487.230(d)	All live applications.[8]
489	cl.489.211, 489.312	All live applications.[10]
495	cl.495.225, 495.322, 495.229(a)	All live applications.[8]
496	cl.496.228, 496.231(a), 496.324	
858	cl.858.227, 858.326	All live applications.[17]
880	cl.880.225, 880.227(1), 880.322	All live applications.[8]
881	cl.881.228, 881.229(1), 881.324	
882	cl.882.228, 882.229, 882.324	
883	cl.883.225, 883.228(a)(i) and (ii), 883.324(a)(i) and (ii)	
885	cl.885.224(a), 885.322(a).	Visa applications made on or after 15 October 2007. [18]
	cl.885.226(d)	All live applications.[8]
886	cl.886.225(a), 886.322(a),	Visa applications made on or after 15 October 2007.[18]
	cl.886.227(d)	All live applications.[8]
887	cl.887.223(a), and 887.322(a).	Visa applications made on or after 15 October 2007.[18]
	cl.887.225(a)	All live applications.[8]
Student visas		
500	cl.500.217(1), 500.317(1)	Visa applications made on or after 1 July 2016.[24]

570	cl. 570.224(a) , 570.323(a)	Visa applications made on or after 5 November 2011.[11]
571	cl.571.224(a), 571.323(a)	
572	cl.572.224(a), 572.323(a)	
573	cl.573.224(a), 573.323(a)	
574	cl.574.224(a), 574.323(a)	
575	cl.575.224(a), 575.323(a)	
576	cl.576.223(a), 576.323(a)	
580	cl.580.223(3)(a), 580.324	
590	cl.590.218, 590.314	Visa applications made on or after 1 July 2016.[23]
Other visas		
410	cl.410.221(8)(a), 410.321(3)(a)(i)	Visa applications made on or after15 October 2007.[13]
417	cl.417.221(2)(b)	All live applications.[15]
462	cl.462.221(b)	
600	cl.600.213(1)	Visa applications made on or after 23 March 2013.[25]
771	cl.771.222	All live applications.[17]
988	cl.988.222, 988.322	All live applications.[17]

ENDNOTES - KEY

[1] SLI 2013, No.146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.
[2] SLI 2013, No.146, commencing 1 July 2013.
[3] SLI 2013, No.146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 1 November 1995 version of the criteria.
[4] SLI 2013, No.146, commencing 1 July 2013.
[5] SLI 2013, No.146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 24 November 2012 version of the criteria.
[6] SLI 2013, No.146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 1 August 1996 version of the criteria.
[7] SLI 2013, No.146 The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 26 April 2008 version of the criteria.
[8] SLI 2011 No.13, commencing 2 April 2011.
[9] SLI 2011, No.199. The amendments purport to apply to all unresolved applications as at 5 November 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.
[10] SLI 2012, No.82, commencing 1 July 2012.
[11] SLI 2011, No.199, commencing 5 November 2011.
[12] SLI 2012, No.238, commencing 24 November 2012.
[13] SLI 2015, No.184. The amendments purport to apply to all unresolved applications as at 21 November 2015 but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.
[14] Migration Amendment (Temporary Activity Visas) Regulation 2016. New visa subclass, amendments commencing 19 November 2016.
[15] Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulation 2018. New visa subclass, amendments apply to an application for a visa made on or after 18 March 2018.
[16] SLI 2014, No 32, commencing 22 March 2014.
[17] SLI 2011, No.199. The amendments purport to apply to all unresolved applications as at 5 November 2011, but due to drafting technicalities, were not compatible with the form of the pre 1 October 2006 version of the criteria.
[18] SLI 2015, No.184, commencing 21 November 2015.
[19] SLI 2011, No.13. The amendments purport to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.
[20] SLI 2011, No.13. The amendments purported to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria. Part 485 was repealed and substituted by SLI 2013, No.33, commencing 23 March 2013.
[21] SLI 2011, No.13. Part 485 was repealed and substituted by SLI 2013, No.33, commencing 23 March 2013.
[22] SLI 2013, No.33, commencing 23 March 2013.
[23] SLI 2011, No.13. The amendments purport to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 26 April 2008 version of the criteria.
[24] Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016. New visa subclass, amendments apply to an application for a visa made on or after 1 July 2016.
[25] Migration Amendment Regulation 2013 (No. 1). New visa subclass, amendments apply to an application for a visa made on or after 23 March 2013.

Special Return Criteria (Schedule 5)

CONTENTS

Introduction

Special Return Criteria (SRC) 5001, 5002 and 5010 are set out in Schedule 5 to the Migration Regulations 1994 (the Regulations). These SRC place certain restrictions on the ability of people who have previously held visas to qualify for subsequent visas by excluding them from Australia, unless certain exceptions apply.

Exclusion periods do not prevent a person from applying for a visa. However, they may prevent a person from being granted a visa. This is because an applicant must satisfy the relevant criteria prescribed in Schedule 2 for the relevant visa subclass, which may include SRC 5001, 5002 and 5010.

The requirements of Special Return Criteria 5001, 5002 and 5010

Special Return Criteria 5001, 5002 and 5010 are set out in Schedule 5 to the Regulations. Broadly, the SRC place certain restrictions on the ability of people who have previously held visas and are subsequently deported and/or had their visas cancelled from subsequently applying for certain visas.

Special Return Criterion 5001

Special Return Criterion (SRC) 5001 permanently excludes people who have previously been deported or have had their visa cancelled under character grounds from Australia. SRC 5001 does not apply if the visa was refused, rather than cancelled, on character grounds.

Deportation

SRC 5001(a) applies to visa applicants who left Australia while subject to a deportation order[1] under s.200 of the current Act or its equivalent in earlier versions of the *Migration Act 1958* (the Act).[2]

Cancellation

SRC 5001(b) applies to a person whose visa has been cancelled under s.501 of the Act, *as in force before 1 June 1999*, wholly or partly because the Minister, having regard to the person's past criminal conduct, was satisfied that the person is not of good character.

SRC 5001(c) applies to a person whose visa has been cancelled under s.501, s.501A[3] or s.501B[4] of the current Act, on certain grounds. The range of relevant cancellation grounds differs depending on the date the decision to grant or refuse the visa is made:

[1] This term is defined in s.5(1) as an order for the deportation of a person made under, or continued in force by, the Act.
[2] ss.55, 56 or 57 of the Act as in force on and after 19 December 1989 but before 1 September 1994; or ss.12, 13 or 14 of the Act as in force before 19 December 1989.
[3] Subsections 501A(2) and (3) provide that the Minister personally can set aside an original decision of a delegate or the Tribunal (in its General Division) not to refuse/cancel the visa, and substitute their own decision to refuse to grant or cancel the visa, where the Minister reasonably suspects that the person does not pass the character test in s.501 and the Minister is satisfied that the refusal or cancellation is in the national interest.

- Where the decision was made to grant or refuse the visa *prior to 12 December 2014*, the relevant visa cancellation under s.501, s.501A[5] or s.501B[6] must have been wholly or partly because:
    - the person did not pass the character test because he/she had a substantial criminal record;[7] or
    - having regard to their past and present criminal conduct they were not of good character;[8] or
    - having regard to their past and present criminal conduct and general conduct they were not of good character;[9]
    - if the cancellation has not been revoked under s.501C(4).[10]
- Where the decision was made to grant or refuse the visa *from 12 December 2014*,[11] cl.5001(c) applies where the applicant is a person whose visa has been cancelled under s.501, s.501A[12] or s.501B[13] of the Act, if:
    - the cancellation has not been revoked under ss.501C(4) or 501CA(4) of the Act;[14] or
    - after cancelling the visa, the Minister has not, acting personally, granted a permanent visa to the person.[15]

SRC 5001(d) applies to visa applications made *from 17 October 2015*[16] where a person whose visa has been cancelled under s.501BA of the Act if the Minister has not, acting personally, granted a permanent visa to the person after that cancellation.[17]

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[4] Under s.501B the Minister may intervene at any time before or during a review process; that is, after a delegate's decision has been made to refuse to grant or to cancel a visa, but before the Tribunal (in its General Division) has made a final decision on the matter. The Minister can then substitute a decision to refuse or cancel the visa in question in certain circumstances, including that the Minister is satisfied that the refusal or cancellation is in the national interest.

[5] Subsections 501A(2) and (3) provide that the Minister personally can set aside an original decision of a delegate or the Tribunal (in its General Division) not to refuse/cancel the visa, and substitute their own decision to refuse to grant or cancel the visa, where the Minister is satisfied that it is in the national interest to do so.

[6] Under s.501B the Minister may intervene at any time before or during a review process; that is, after a delegate's decision has been made to refuse to grant or to cancel a visa, but before the Tribunal (in its General Division) has made a final decision on the matter. The Minister can then substitute a decision to refuse or cancel the visa in question.

[7] s.501(6)(a) and s.501(7).

[8] .s.501(6)(c)(i).

[9] s.501(6)(c)(i) and (ii).

[10] Under s.501C(4) the Minister may set aside a decision to refuse or cancel a visa under s.501(1) or (2) in certain circumstances.

[11] Clause 5001(c) was substituted with effect from 12 December 2014 by Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014, No.199). The amendment applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[12] Subsections 501A(2) and (3) provide that the Minister personally can set aside an original decision of a delegate or the Tribunal (in its General Division) not to refuse/cancel the visa, and substitute their own decision to refuse to grant or cancel the visa, where the Minister is satisfied that it is in the national interest to do so.

[13] Under s.501B the Minister may intervene at any time before or during a review process; that is, after a delegate's decision has been made to refuse to grant or to cancel a visa, but before the Tribunal (in its General Division) has made a final decision on the matter. The Minister can then substitute a decision to refuse or cancel the visa in question.

[14] cl.5001(c)(i) as inserted by SLI 2014, No.199. The amendment provision applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[15] cl.5001(c)(ii) as inserted by SLI 2014, No.199. The amendment provision applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[16] SRC 5001(d) applies to visa applications made on or after 17 October 2015, being the day after Migration Amendment (Special Category Visas and Special Return Criterion 5001) Regulation 2015 (SLI 2015, No.169) commences.

[17] Section 501BA of the Act was inserted by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* to allow the Minister to personally set aside, in the national interest, a decision made under s.501CA by a delegate or the AAT in its General Division to revoke a decision to cancel a visa under s.501(3A): see Explanatory Statement to SLI 2015, No.169. The powers in section 501BA allow the Minister to personally cancel a person's visa in circumstances where: the person's visa was cancelled for failing to meet the character test due to having substantial criminal records or committing sexually based offences involving a child;

If the visa cancellation was made on the basis of grounds not specified in SRC 5001(b), (c) or (da), the applicant will be able to satisfy SRC 5001.

Where the decision was made to grant or refuse the visa *on or after 12 December 2014*, cl.5001(c) was amended to remove reference to specific cancellation grounds under s.501. The effect of this amendment is that a person cancelled under *any* ground in s.501 will be unable to satisfy SRC 5001 if the visa decision was made to grant or refuse the visa on or after 12 December 2014.

In contrast, where the decision was made to grant or refuse the visa *prior to 12 December 2014*, cl.5001(c) does not apply to applicants where their previous visa was cancelled on grounds other than those specifically provided for in cl.5001(c). For example, if the visa applicant has previously had their visa cancelled under s.501 because the person was convicted of an offence that was committed while the person was in immigration detention,[18] this will not bring them within cl.5001(c) and consequently they can satisfy SRC 5001.[19]

It should be noted that there is no equivalent to the reference in cl.5001(c) or (d) regarding revocation of visa cancellation in relation to deportation orders. A deportation order under s.200 of the Act is not dependent upon the person's visa being cancelled, or the non-citizen being an unlawful non-citizen.[20] However, it may be inferred that the reference in cl.5001(a) is to a valid deportation order.[21] Whether the visa applicant left Australia while subject to a deportation order or their visa has been cancelled under the relevant provisions of s.501 will be a question of fact for the Tribunal, which may be established from Departmental records.

Period of exclusion

In the absence of a reference to a time period within which SRC 5001 operates and in the absence of any judicial authority or expression of any legislative intention to the contrary, the period of exclusion under SRC 5001 appears to be indefinite and there is no provision for a waiver of this criterion.[22]

Special Return Criterion 5002

Special Return Criterion 5002 provides that a visa applicant, who has been *removed* from Australia because they were an unlawful non-citizen or the dependent of an unlawful non-citizen under ss.198, 199 or 205 of the Act, cannot be granted a visa within 12 months of the removal, unless there are certain compelling or compassionate circumstances to justify the grant of the visa.

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and a decision was made to revoke the cancellation of this person's visa. In exercising his power under section 501BA, the Minister will be, in effect, cancelling the person's visa for the second time.

[18] s.501(6)(aa)(i).

[19] cl.5001(c).

[20] Section 82(4) of the Act provides that a visa ceases to be in effect when the holder leaves Australia because of a deportation order made under s.200.

[21] See *Lesi v MIMIA* [2003] FCA 209 (Von Doussa J, 19 March 2003); and *Lesi v MIMIA* [2003] FCAFC 285 (Mansfield, Selway and Bennett JJ, 11 December 2003). Decisions of the Minister to make deportation orders under s.200 of the Act because of circumstances in s.201 are reviewable by the Tribunal (in its General Division): s.500(1)(a). Ordinarily, any review rights will have been exercised before the person leaves Australia because of a deportation order.

[22] This is consistent with Departmental policy which states that if SRC 5001 applies, the person is subject to permanent exclusion from Australia: see Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).

Section 198 provides various situation specific powers that permit the removal of unlawful non-citizens from Australia. Section 199 provides for the removal of dependants of unlawful non-citizens, where the removal is requested by the unlawful non-citizen or their spouse or de facto partner. Similarly, s.205 of the Act provides for the removal of the dependants of people who have been deported under s.200 of the Act, where this action is requested by the spouse or de facto partner or the person being deported.

Whether a person has been removed from Australia within the last 12 months is a question of fact for the Tribunal, to be established on the evidence before it. Similarly, the question of whether the applicant has applied for the visa within 12 months of being removed under ss.198, 199 or 205 of the Act, will be established by having regard to the evidence before it. If the applicant has been removed from Australia, the applicant will be excluded from Australia for 12 months unless there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian Citizen, an Australian permanent resident or an eligible New Zealand citizens to justify granting the visa within that 12 month exclusion period (see below).

Special Return Criterion 5010

Special Return Criterion 5010 places a two year exclusion period on the ability of holders of Foreign Affairs (formerly AusAid)[23] student visa or certain student visas that are provided with financial support by the government of a foreign country to obtain further visas.[24] The two year exclusion period does not apply if the applicant meets the requirements of cl.5010(3) or 5010(5).

Through the operation of 'student visa',[25] SRC 5010 generally applies to holders and former holders of Subclass 500 (student) visa for those student visa applications made *on or after 1 July 2016* and the following Class TU student visas for student visa applications made *before 1 July 2016*[26]*:*

- 570 - Independent ELICOS (English Language Intensive Courses for Overseas Students) Sector;
- 571 - Schools Sector;
- 572 - Vocational Education and Training Sector;
- 573 - Higher Education Sector;
- 574 - Postgraduate Research Sector;
- 575 - Non-Award Sector; and
- 576 - Foreign Affairs or Defence Sector.[27]

SRC 5010 does not apply to the holders of Subclass 580 Student Guardian visas.

[23] The Subclass 576 'Foreign Affairs or Defence Sector' visa was formerly named the 'AusAID or Defence Sector' visa. See: Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No. 82), Schedule 5, item [1], which amended references to this subclass to reflect that on 1 November 2013, AusAID ceased to exist as an executive agency and its functions were integrated into the Department of Foreign Affairs.
[24] cl.5010(4).
[25] 'Student visa' is defined in r.1.03.
[26] With effect from 1 July 2016, schedule 5 exclusion criterion SRC 5010 was amended by Schedule 4 (Student visa simplification) of the Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 (F2016L00523). The definition of 'student visa' was amended to insert (aa) Subclass 500 (Student) visa.
[27] Formally known as 'AusAID or Defence Sector' visa. See fn27.

Foreign Affairs student visa holders

Special Return Criterion 5010 places certain restrictions on the ability of holders of Foreign Affairs (formerly 'AusAID') student visas and former holders of Foreign Affairs (or AusAID) student visas to obtain further visas. This is to ensure that, generally, Foreign Affairs (AusAID) students return to their home country to put their skills and knowledge gained through education and training programs in Australia to use in the further development of their home country by working there for at least 2 years.

Before 1 July 2016, the term 'Foreign Affairs student visa' was defined in r.1.04A(1) to mean either a Subclass 560, 562 or 576 visa granted to a primary applicant in a full time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister; or an equivalent former visa or entry permit[28] or equivalent transitional visa.[29]

From 1 July 2016, the term 'Foreign Affairs student visa' is defined in r.1.04A(1) to mean a student visa granted to a primary applicant in a full time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister.[30]

For further discussion on Foreign Affairs student visas see the MRD Legal Services commentary: Subclass 576 AusAID / Foreign Affairs or Defence Sector.

Other Student Visa holders

SRC 5010 will apply to student visa holders and former student visas holders of the visas identified above, other than Foreign Affairs (or AusAid) student visa holders, if the visa was granted to an applicant who is or was provided financial support by the government of a foreign country. In determining if SRC 5010 applies to a visa applicant the Tribunal will first have to consider whether the applicant is the holder, or was the holder, of a student visa and whether the applicant received the financial support of a foreign government whilst they were holding that visa.

Financial Support

In order to make the finding that an applicant was 'provided financial support by the government of a foreign country' the Tribunal must find that: the applicant was receiving support; that the support was financial; and the support was provided by a foreign government.[31]

The Court in *Ahmed v MIAC*[32] (*Ahmed*) considered the meaning of 'financial support' in the context of SRC 5010.[33] The Court interpreted 'support' according to its ordinary meaning of taking action to give a person assistance, countenance or backing or taking action of keeping from failing, exhaustion or

[28] From 1 March 1999 to 1 July 2016 ''equivalent former visa or entry permit'' was defined in r.1.04A(1) as a Group 2.2 (student) visa or entry permit, within the meaning of the Migration (1993) Regulations, granted to a person who, as an applicant, satisfied the primary criteria for the grant of the visa or entry permit and was a student in a full time course of study or training under a scholarship scheme provided by AIDAB or AusAID.
[29] 'Equivalent transitional visa'' is defined in r.1.04A(1) to a mean a transitional (temporary) visa within the meaning of the Migration Reform (Transitional provisions) Regulations that either: is, or was, held by a person because the person held an equivalent former visa or entry permit; or was granted on the basis that the person satisfied the criteria for the grant of an equivalent former visa or entry permit.
[30] The definition of 'Foreign Affairs student visa' was amended by F2016L00523. Specific references to Subclass 560 (Student), Subclass 562 (Iranian Postgraduate) and Subclass 576 (Foreign Affairs or Defence Sector) visas were removed from the definition. The new Subclass 500 (Student) visa was included by the definition of 'student visa' in r.1.03.
[31] *Ahmed v MIAC* [2008] FMCA 811 (Lucev FM, 30 June 2008) at [32].
[32] [2008] FMCA 811 (Lucev FM, 30 June 2008).
[33] *Ahmed v MIAC* [2008] FMCA 811 (Lucev FM, 30 June 2008) at [32]-[44].

perishing, namely the supplying of a living thing with what is necessary for subsistence.[34] This suggests that payment to cover general subsistence needs, such as food and shelter, would constitute 'financial support' within SRC 5010.

There is a distinction between payment for services rendered and 'financial support' for the purpose of SRC 5010. If the money provided to the visa applicant is only payment for services rendered, it would not be 'support'.[35] The Court in *Ahmed* made no criticism of the Tribunal's view that 'financial support' is not limited to scholarships or formal sponsorship arrangements between a visa holder and a foreign government; nor was it limited to the payment of course fees only or living expenses. *Ahmed* also suggests that in certain circumstances salary could be 'financial support'. However, if a case concerns payments to an applicant by a foreign government in the form of a salary, the Tribunal will have to consider whether the provision of salary was 'support' in the relevant sense for SRC 5010.

Exceptions to SRC 5010

If the applicant is subject to cl.5010(1) or (2) and has not been outside Australia for at least 2 years since ceasing the relevant course they will need to show one of the following to satisfy SRC 5010:

- that the last substantive visa held by the applicant related to a course that was designed to be undertaken over a period of less than 12 months,[36]
- the Foreign Minister (or AusAID Minister) or the foreign government that provided the financial support for the course of study or training supports the grant of the visa;[37] or
- that the waiving of the requirement is justified by compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (see below).[38]

Whether the applicant satisfies the exemptions to the two year exclusion period set out in cl.5010(3) or 5010(5) is a finding of fact for the Tribunal.

Whether an applicant's previous course was one that was designed to be undertaken over a period of less than 12 months will also be a question of fact for the Tribunal, which can be established by having regard to information about the previous course undertaken.

Similarly a letter of support or other relevant documentation from the Foreign (or AusAID) Minister, or the relevant foreign government that provided the financial support for the course of study or training, which demonstrates support for the grant of the visa, is likely to provide evidence that cl.5010(3) is satisfied.

[34] *Ahmed v MIAC* [2008] FMCA 811 (Lucev FM, 30 June 2008) at [35].
[35] *Ahmed v MIAC* [2008] FMCA 811 (Lucev FM, 30 June 2008) at [42].
[36] SRC 5010(3).
[37] SRC 5010(5)(a). This provision was amended to include reference to the 'Foreign Minister' by SLI 2014, No. 82 with effect from 1 July 2014.
[38] SRC 5010(5).

Compassionate or compelling circumstances

Decision makers have discretion to grant a visa to an applicant in circumstances if an exclusion period in SRC 5002 or 5010 applies and has not elapsed, if they are satisfied that certain circumstances exist to justify granting the visa.

Special Return Criterion 5002 relevantly provides that a visa applicant may still be granted the visa notwithstanding that they were removed from Australia within 12 months of the visa application under consideration if the Minister, or the Tribunal on review, is satisfied that in the particular case:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen

justify the granting of the visa within 12 months of their removal.

Similarly cl.5010(5) has the effect that a visa applicant may still be granted a visa notwithstanding that they have spent less than two years outside of Australia since ceasing their course if the Minister is satisfied that, in the particular case:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen

justify the waiver of the requirement that the visa grant be supported by the Foreign (or AusAid) Minister or the government of the foreign country that provided financial support to the applicant.

If the decision-maker is satisfied that such compelling and/or compassionate circumstances exist, the applicant satisfies the requirements of SRC 5002 or 5010 whether or not they have been outside Australia for the prescribed exclusion period. This is the case only in relation to the particular visa application being considered. If the person makes another visa application before the exclusion period has elapsed, they will again have to satisfy the exclusion criteria (if any) applicable to the visa.

There are no definitions of compelling or compassionate circumstances in the Act or Regulations, and there has been no direct guidance by way of judicial interpretation in the context of SRC 5002 or SRC 5010(5). Whether a circumstance or reason is compelling and/or a compassionate ground so as to justify the grant of visa or waiver of the relevant requirement is a question of fact and degree for the Tribunal.

In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in SRC 5002 and 5010 will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen.

For a general discussion on compelling and compassionate circumstances, see MRD Legal Services commentary: Compelling and/or compassionate circumstances and Public Interest Criterion 4013 (discussion on compassionate or compelling circumstances).[39]

Compelling circumstances that affect the interests of Australia

Whether there exist compelling circumstances that affect the interests of Australia is a question of fact and degree for the Tribunal. Departmental policy[40] suggests such circumstances may exist if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa;
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.

These considerations may be relevant in relation to a consideration of compelling circumstances affecting Australia in the context of either SRC 5002 or SRC 5010 depending on the circumstances of the applicant and the visa to which the criterion relates.

The guidelines go on to state that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen claims that, if granted the visa, they would:

- work and pay taxes;
- pay fees to an education provider; or
- spend money in Australia.

The guidelines suggest that compelling circumstances may arise where the exclusion period has arisen from either a Departmental error or as an unintended consequence of the exclusion provisions.[41]

It states that exclusion provisions may be regarded as having unintended consequences if the person previously made every effort to leave Australia whilst a lawful non-citizen (eg. while holding a bridging visa) but did not leave before the visa ceased due to factors beyond their control, such as:

- health issues;
- unavoidable delays by airlines; or
- delays associated with the issue of travel documents; or
- they were a minor at the time their visa ceased and it can be demonstrated that they were not responsible for their own departure arrangements.[42]

[39] Note the 'compassionate or compelling' clause in the context of SRC 5002 and 5010 is identical to the 'compassionate or compelling' clause in the context of Public Interest Criterion 4013.
[40] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).
[41] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).
[42] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).

The guidelines set out the view that generally the exclusion provisions should not be regarded as having unintended consequences in cases if, for example:

- the person claims they inadvertently breached a condition of the Electronic Travel Authority (ETA) because the travel agent failed to inform of the conditions of the ETA; or
- the person claims the Department wrongly cancelled a previous visa but:
    - although they applied for the cancellation to be revoked or reviewed the decision maker decided not to revoke or set aside the cancellation; or
    - they failed to apply for the cancellation decision to be revoked or review, even though they were able to do so.[43]

These considerations appear to largely relate to SRC 5002, and only when the visa applicant became an unlawful non-citizen as a result of these actions and was subsequently removed from Australia.

In relation to certain former student visa holders[44] who are applying for a new student visa, Departmental guidelines suggest that compelling circumstances affecting the interests of Australia may arise where the applicant's circumstances, including previous study history in Australia, clearly demonstrate that they have been a genuine student in Australia and there is no evidence that they have actively or intentionally abused or sought to circumvent immigration laws. The Departmental guidelines state that where a student wishes to apply for another student visa, significant weight may also be given where there is evidence of a clear continuing study intention.[45]

Whilst not binding, the Tribunal may have regard to the Department's interpretation of what may constitute compelling circumstances affecting Australia. However, the Tribunal should avoid elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the relevant provision in SRC 5002 or 5010 and consider the individual circumstances of the case.

Compassionate or compelling circumstances affecting interests of an Australian citizen, permanent resident or Eligible New Zealand citizen

Whether there exist compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen is a question of fact and degree for the Tribunal. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined in the dictionary as 'circumstances that invoke sympathy or pity', whereas 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'.[46]

Departmental guidelines provide some examples as to what may be compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand

[43] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).
[44] Departmental Policy refers to persons whose last substantive visa was a student visa: see Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).
[45] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).
[46] In *Bui v MIMA* [1999] FCA 118 at [47] (French, North and Merkel JJ, 1 March 1999), in discussing Schedule 3 waivers, the Court held at [47]: "There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandate such an outcome. But over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play."

citizen. Departmental policy states such circumstances may exist if the visa applicant was not granted the visa and, as a result:

- family members in Australia would be left without financial or emotional support;
- family members in Australia would be unable to properly arrange a relative's funeral in Australia; or
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and is therefore subject to an exclusion period).[47]

There may be compelling circumstances affecting the interests of such person/s if the visa applicant was not granted the visa and, as a result:

- a business operated by an Australian citizen would have to close down because it lacked the specialist skills required to carry out the business;
- civil proceedings instigated by an Australian permanent resident would be jeopardised by the absence of the non-citizen witness; or
- an eligible New Zealand citizen would be unable to finalise legal and property matters associated with divorce proceedings without the physical presence of the non-citizen in Australia.[48]

These are examples only. The Tribunal may have regard to the Department's interpretation of what may constitute compassionate or compelling circumstances affecting the interests of an Australian citizen etc. However, the Tribunal should avoid elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the relevant provision and the individual circumstances of the case.

Merits review

A refusal to grant a visa because the applicant does not meet the requirement of a prescribed visa criterion, including where applicable SRC 5001, 5002 or 5010, is a decision under s.65 of the *Migration Act 1958* (the Act).

A decision to refuse a visa on the basis that the applicant does not meet SRC 5001, 5002 or 5010 under s.65 could be a Part 5-reviewable decision within the meaning of s.338 of the Act, provided it falls under one of the specified categories of Part 5-reviewable decisions.

If the Tribunal is required to review a decision to refuse to grant a visa under s.65 of the Act on the basis that the applicant has not met the requirements of SRC 5001, 5002 or 5010, the Tribunal must assess for itself whether the applicant, in its view, satisfies that criterion.

[47] Policy – Migration Act - Visa cancellation instructions -Exclusion periods (last reviewed 8 July 2016).
[48] Policy – Migration Act - Visa cancellation instructions - Exclusion periods (last reviewed 8 July 2016).

Relevant case law

Ahmed v MIAC [2008] FMCA 811	Summary
Lesi v MIMIA [2003] FCA 209	Summary
Lesi v MIMIA [2003] FCAFC 285	Summary
Bui v MIMA [1999] FCA 118	

Relevant legislative amendments

Title	Reference number
Migration Amendment (AusAID) Regulation 2013	SLI 2013, No.268
Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014	SLI 2014, No. 82
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.199
Migration Amendment (Character and General Visa Cancellation) Act 2014	No.129 of 2014
Migration Amendment (Special Category Visas and Special Return Criterion 5001) Regulation 2015	SLI 2015, No.169
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523

Available templates

Special Return Criteria 5001, 5002 and 5010 rarely arise for consideration in Tribunal review. For this reason there are no decision templates or optional paragraphs in existence. If the SRC are the only issue in dispute, the Generic Decision template can be used. Please contact MRD Legal Services for further assistance as necessary.

Last updated/reviewed: 12 November 2018

Securities

CONTENTS

Overview

A security is an incentive, such as a deposit of cash, Treasury bonds, or negotiable instruments[1], which may be required in certain cases to ensure compliance with visa conditions or with the provisions of the *Migration Act 1958* (the Act) or Migration Regulations 1994 (the Regulations) more generally. The payment of security, if requested, is a criterion for the grant of certain visas. The authority to require security is contained in s.269(1) of the Act. This power is separate from the power to grant or refuse a visa under s.65 of the Act.

Some decisions relating to requiring a security are reviewable by the Tribunal under Part 5 of the Act. Other decisions are not, of themselves, reviewable but a security related criterion may need to be considered during the review of a decision to refuse a visa.

Power to require and take a security

Section 269(1) of the Act contains a broad power to require and take security, including (but not limited to) security to ensure compliance with visa conditions. It provides that:

> *An authorized officer may, subject to subsection (1A), require and take security for compliance with the provisions of this Act or the regulations or with any condition imposed in pursuance of, or for the purposes of, this Act or the regulations.*

Subsection 269(1A) provides that the power to require and take security in relation to an application for a visa arises only where:

- the security is for compliance with conditions that will be imposed on the visa, if the visa is granted; and
- the officer has indicated those conditions to the applicant. [2]

Subsection 269(1A) applies in relation to visa applications made after 15 March 2009.[3]

Visas may be subject to specified conditions and conditions may be imposed by the Minister.[4] These include conditions imposing restrictions on work or study in Australia, or requiring the visa holder to report to or maintain contact with the Department. These conditions (if any) are set out or referred to in the relevant Part of Schedule 2 to the Regulations.[5]

[1] s.269(1)(a).
[2] Inserted by items 18 and 19 of Schedule 3, Part 3 to the *Migration Legislation Amendment Act (No.1) 2008* (No.85 of 2008).
[3] Being the first day after 6 months from date of Royal Assent for the *Migration Legislation Amendment Act (No.1) 2008*: item 20 of Schedule 3, Part 3 and s.2 of No.85 of 2008. The amendments were intended to overcome the problem identified in *Tutugri v MIMA* (1999) 95 FCR 592 at [48]-[49] which raised doubts about the power to request and take security for compliance with conditions to be imposed on a visa *before* the visa is actually granted, given that a condition does not bind the visa holder until after visa grant. Subsection 269(1A) makes clear that the permission to require and take security can arise only in the specified circumstances prior to visa grant: Explanatory Memorandum to No.85 of 2008 at [122]-[126].
[4] s.41. On the distinction between s.41(1) and s.41(3) conditions, see *Krummrey v MIMIA* (2005) 147 FCR 557 at [25]-[29].
[5] rr.2.05(1) and (2).

Merits Review

Since 1 November 2000, a decision that relates to requiring a security is reviewable under Part 5 of the Act only if it is connected to a broader decision to refuse to grant a visa and requiring a security is mentioned in the criteria for the visa. For the purposes of s.338(9) of the Act (prescribed decisions that are Part 5-reviewable), r.4.02(4)(f) provides that the following is a Part 5-reviewable decision:

> *a decision that:*
> *(i) relates to requiring a security; and*
> *(ii) relates to the refusal to grant a visa, being a visa for which the Minister is to have regard to a criterion to the effect that if an authorised officer has required a security for compliance with any conditions that the officer has indicated to the applicant will be imposed on the visa if it is granted, the security has been lodged.*

The Explanatory Statement explains that, even when a security is required for compliance with conditions that will be imposed if the visa is granted, and the visa is refused, if requiring a security for compliance with visa conditions (as described in subparagraph 4.02(4)(f)(ii)) is not mentioned in the criteria for the grant of the visa, and the visa is refused, then the decision to require the security is not reviewable by the Tribunal.[6]

The visa subclasses that require lodgement of a security, if requested, as a criterion for the grant of the visa include:

- Subclass 050 - Bridging (General), and
- Subclass 600 - Visitor (in the Tourist and Sponsored Family Stream).[7]

A security decision relating to a refusal to grant a Subclass 600 visa is not reviewable under Part 5 of the Act. See here for further discussion.

Subclass 050 contains criteria that relate to the taking of security, although the criteria themselves do not require exercise of the power in s.269. These criteria are:

- *050.223 The Minister is satisfied that, if a bridging visa is granted to the applicant, the applicant will abide by the conditions (if any) imposed on it;* and
- *050.224 If an authorised officer has required a security for compliance with any conditions that the officer has indicated to the applicant will be imposed on the visa if it is granted, the security has been lodged.*

On its face, a decision to refuse a visa on the basis that the applicant does not meet cl.050.224 appears to fit the description in r.4.02(4)(f)(ii) (Part 5-reviewable decision), that is, a decision that relates to requiring a security and to the refusal to grant a Subclass 050 visa. However, the decision relating to requiring a security is a separate (albeit related) decision made under s.269 of the Act. The legislation contemplates that a s.269 decision to require or not require security for compliance with conditions should occur alongside the decision as to whether an applicant meets cl.050.223.[8] These are two independently Part 5-reviewable decisions. It should not be assumed that an application for

[6] Explanatory Statement to Migration Amendment Regulations 2000 (No. 5) (SR 2000, No.259) states that a decision to require a security made more generally under s.269 would not be reviewable.
[7] Clauses 600.225 and 600.235 inserted by Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.32). Subclass 600 effectively replaced Subclasses 679 Sponsored Family and 459 Sponsored Business Visitor (Short Stay) from 23 March 2013.
[8] See *Tennakoon v MIMA* [2001] FCA 615 (Gray J, 25 February 2001) at [24].

review of a decision to refuse a bridging visa automatically results in the s.269 decision being before the Tribunal.

A decision to refuse to grant a Subclass 050 visa will not always be accompanied by a related security decision, for example, where the applicant did not meet one of the 'time of application' criteria in cl.050.212 and the primary decision maker did not need to consider the 'time of decision' requirement in cl.050.223. In those circumstances there is no security decision and the Tribunal's jurisdiction under r.4.02(4)(f) does not arise.

A decision not to require a security can be a decision that 'relates to requiring a security' for the purposes of r.4.02(4)(f)(i). For example, if the primary decision maker considered that no amount of security would be sufficient to ensure that the applicant would abide by the conditions imposed on a bridging visa if granted,[9] there may also be a decision relating to requiring a security under s.269, even though no security was requested. For further information on this issue in the context of a Subclass 050 visa, see MRD Legal Services Commentary on Bridging E (Class WE) Visa.

Applications for review

Standing

Review applications of decisions relating to requiring securities can be made by the non-citizen in respect of whom the decision is made: that is, the visa applicant.[10] The visa applicant also has standing to seek review of the related decision to refuse to grant a Subclass 050 visa.[11]

Time for lodgement

For detainees, applications for review of a decision that relates to requiring a security must be given to the Tribunal within 2 working days after notification of the related visa refusal decision.[12] This mirrors the time frame in which detainees must seek review of a decision refusing a bridging visa where the detainee is in detention because of that refusal.[13] For non-detainees, the time limit for both the visa refusal and the security decision is 21 days after notification of the decision.[14]

Review application

If a person applies for review of a security decision and a related visa refusal decision, the applications for review are taken to be combined.[15] This provision is intended to ensure that the Tribunal's review of the two decisions can proceed as one matter.[16]

Fees

No fee is payable on a review application for a decision to refuse to grant a Subclass 050 bridging visa to a non-citizen who is in immigration detention because of that refusal, or on an application by a detainee for review of a security decision to which r.4.02(4)(f) applies.[17] For non-detainees, there is a

[9] Such as occurred in *NABY v MIMIA* [2002] FCA 1475 (Branson J, 28 November 2002) and *BACH v MIMIA* [2005] FMCA 392 (Scarlett FM, 16 March 2005).
[10] s.347(2)(d) and r.4.02(5)(e).
[11] See ss.338(2) and 347(2)(a) if the applicant is not in immigration detention, ss.338(4)(a) and 347(2)(a) if the applicant is in immigration detention as a result of the bridging visa refusal.
[12] s.347(1)(b)(iii) and r.4.10(2)(aa).
[13] ss.338(4)(a) and 347(1)(b)(i) and r.4.10(2)(a).
[14] ss.338(2) and 347(1)(b)(1) and r.4.10(1)(a) for the visa refusal decision; and ss.338(9) and 347(2)(d) and r.4.10(1)(d) for the decision relating to the security.
[15] r.4.12(5). The Tribunal application form for applicants in immigration detention provides for combined applications for review of a decision to refuse a bridging visa and any related security decision.
[16] Explanatory Statement to Migration Amendment Regulations 2000 (No. 7) (SR 2000, No.335).
[17] r.4.13(2)(a) and (b). In addition to initial applications while in detention, it would appear that no fee is payable on repeat applications where the applicant is in detention as the applicant in those cases would not be in detention but for the visa refusal or cancellation.

fee for review applications in respect of the decision to refuse to grant the visa and the decision concerning the security.[18] However, if an applicant applies for review of a visa refusal decision and a related security decision, only one fee will be payable because the applications are taken to be combined.[19]

In sum, in the case of a Subclass 050 security decision and related decision to refuse to grant the Subclass 050 visa to a person who is in detention because of that refusal, the applicant may apply to the Tribunal for review of both decisions within 2 working days after notification of the visa refusal decision and no fee is payable. For non-detainees, the time limit for each decision is 21 working days after notification and one fee is payable if applications are lodged for review of both decisions. In both cases, the review applications are taken to be combined so that the review of the two decisions can proceed together.

Powers on review

Section 349(1) of the Act provides that the Tribunal may, for the purposes of the review of a Part 5-reviewable decision, exercise all the powers and discretions that are conferred by the Act on the person who made the decision. These powers and discretions are limited to the purposes of the review. Thus, on the review of a decision made under s.65(1) of the Act to refuse to grant a visa, the only question before the Tribunal is whether that decision was the correct or preferable decision. The Tribunal cannot make *any* decision that an officer may have been authorised to make, including decisions under s.269 to require a security.[20] On the review of a decision relating to requiring a security, s.349(1) confers powers on the Tribunal only for the purposes of reviewing *that* decision.

The Tribunal may affirm or vary the decision, set it aside and substitute a new decision, or, for prescribed matters, remit it for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the Regulations.[21] The relevant *prescribed matters* are:

- an application for a visa;[22] and
- the requiring of a security mentioned in r.4.02(4)(f).[23]

Permissible directions

In respect of visa applications, a permissible direction for the purposes of remittal is that the applicant must be taken to have satisfied a specified criterion or criteria for the visa.[24]

In respect of requiring a security, under r.4.15(3) the Tribunal may direct the primary decision maker:

- to indicate to the applicant that a condition specified by the Tribunal will be imposed on the visa if granted; and
- to require a security for compliance with that condition (whether or not a security has already been required).

[18] r.4.13(1).
[19] r.4.12(5) and r.4.13(3).
[20] See *Tutugri v MIMA* (1999) 95 FCR 592 at [46] and cases cited therein.
[21] s.349(2).
[22] r 4.15(1)(a).
[23] r.4.15(2).
[24] r.4.15(1)(b)

Thus, on an application for review of a visa refusal together with a security decision, the Tribunal may remit the matter directing the primary decision maker to impose a specified condition and require a security for compliance with the condition.

The powers to affirm the decision and to set it aside and substitute a decision are also available. For the decision to require a security, the Tribunal may set the decision aside and substitute a decision not to require a security.[25] For the visa refusal, where the Tribunal is satisfied that the applicant satisfies *all* the criteria *and* the other matters specified in s.65(1)(a), it may set aside the decision and substitute a decision to grant the visa.[26] Typically however, the Tribunal will focus on the criteria in dispute and if satisfied the applicant meets those criteria, will remit with a direction to that effect.

Subclass 050 – Bridging (General)

Consideration of securities in the context of cls.050.223 and 050.224

The relevant 'time of decision' criteria include compliance with any conditions imposed upon the grant of a bridging visa (cl.050.223) and lodging a security for compliance with these conditions where one is required (cl.050.224).

In any particular case, the powers available to the Tribunal on review will depend on the application for review before it. If it is conducting a review of both a visa refusal and a security related decision, it may exercise both the s.65 power and the s.269 power. If it only has an application for review of a visa refusal before it, but not for a security related decision, the power in s.269 is not enlivened.

For further discussion on the powers and questions relevant to the Tribunal in particular types of reviews, see above, Powers on review. For further information on cls.050.223 and 050.224, see MRD Legal Services Commentary Subclass 050 – Bridging (Class WE) visa.

Security Requirement

Only officers authorised for the purposes of s.269 of the Act (or those reviewing such decisions) may require a security. In the context of Subclass 050, a security serves to ensure compliance with specific visa conditions, primarily to ensure that a non-citizen maintains contact with the Department whilst pursuing a substantive visa application, or making arrangements to depart Australia.[27]

For cl.050.224, the relevant security can only be for compliance with a condition that will be *imposed* and an authorised officer has indicated to the applicant that the condition will be imposed if the visa is granted. For the Act and Regulations more generally, a security requested under s.269 could be for compliance with a condition to which the visa is automatically subject (pursuant to s.41(1)).[28]

Where the Tribunal is reviewing a bridging visa refusal and an associated s.269 decision, there are several steps that it must follow. The steps themselves and their order are both important.[29] These steps (and the powers under which they are exercised) are:[30]

[25] s.349(2)(d).
[26] s.349(2)(d).
[27] See Policy – Migration Act – Compliance and Case Resolution (CCR) Instructions – Program visas – Bridging E visas – BVE 050 Securities – Reasons for requiring a security (reissued 19/11/2016).
[28] On the distinction between s.41(1) and s.41(3) conditions, see *Krummrey v MIMIA* (2005) 147 FCR 557 at [25]-[29].
[29] *Tennakoon v MIMIA* [2001] FCA 615 (Gray J, 25 May 2001) at [18], [23], [25]; *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [22].
[30] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 per Finkelstein J at [22], expanding on what was said in *Tennakoon v MIMIA* [2001] FCA 615 (Gray J, 25 May 2001) at [18].

1. The decision maker must decide what conditions (if any) ought to be imposed on the grant of a visa (this is a factual matter to be determined in reviewing the s.65 bridging visa refusal: cl.050.223);
2. If conditions are to be imposed, the decision maker must ask whether they will be complied with without any security being taken (s.65 bridging visa refusal, cl.050.223);
3. If the answer is yes, no security should be imposed (s.269, r.4.02(4)(f)(ii)). If the answer is no, the decision maker must proceed to the next question, which is;
4. Will the conditions be complied with if security is taken? (s.65 bridging visa refusal, cl.050.223);
5. If the answer is no, the visa ought not to be granted because the criterion set out in cl.050.223 will not be met (s.65, cl.050.223. It will follow from this finding that for any associated s.269 and r.4.02(4)(f)(ii) review, no security will be required). If the answer is yes (s.65, cl.050.223), security should be required and the decision maker must assess the appropriate amount and type of security to be imposed (s.269, r.4.02(4)(f)(ii));
6. If security has been required, the decision maker must see whether or not it has been lodged (s.65, cl.050.224). If it has not been lodged, the visa application should be rejected because cl.050.224 has not been satisfied. If it has been lodged (provided all other relevant criteria have been met), the visa must be granted.

Thus, if in reviewing the bridging visa refusal the Tribunal decides that an applicant will not comply with conditions of the visa even if security is taken, the issue of imposing a security does not effectively need to be considered further (assuming there is a s.269 review before the Tribunal). This is because the object of imposing a security is to secure compliance with conditions and, once it is determined that conditions will not be complied with, nothing is achieved by requiring any security.[31] The appropriate direction for the s.269 and r.4.02(4)(f)(ii) review will be that nil security is required. However, if the Tribunal considers that security will ensure compliance, security should be required and the Tribunal must assess the appropriate amount and type of security to be imposed.

In assessing the appropriate amount of security (for a s.269 review), the sum should be designed to secure compliance with the relevant condition(s) and no more[32] and be reasonable in all the circumstances.[33] Requesting excessive security would be to punish applicants and not to secure compliance with conditions. The amount should provide a reasonable assurance that there will be compliance.[34]

To arrive at that amount, decision makers must have regard to the nature of the condition to be complied with, and the particular circumstances of the person bound by the condition (in the context of a Subclass 050 visa, the applicant), particularly his or her financial position. Fixing a trivial amount, for example, would not be expected to secure compliance with conditions by a very wealthy applicant. Specifying an arbitrary amount, without regard to the financial circumstances of the particular applicant, would not be an exercise of the s.269(1) power. That is not to say that the amount must be in a sum that the applicant is capable of providing. However if the amount is well beyond their means,

[31] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [21]; *Liu v MIAC* [2008] FMCA 725 (Wilson FM, 6 June 2008) at [33].
[32] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [27].
[33] *Mitrevski v MIMA* [2001] FCA 221 (Merkel J, 9 March 2001) at [8].
[34] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [26].

that could indicate that the authorised officer, or the Tribunal on review, has done no more than pay lip service to the obligation to have regard to his/her financial position.[35]

In assessing the appropriate amount, the Tribunal may have regard to the Department's guidelines[36] but these should not be applied inflexibly at the expense of the merits of the individual case.[37] Each case turns on its own facts.[38] For example, an applicant's strong desire to remain in Australia,[39] or the fact that an applicant has almost exhausted all avenues of appeal together with other factors including a past lack of co-operation with the authorities,[40] may be relevant.

A breach of Australia's migration laws may also be a factor. The significance of the laws breached, the wilfulness of the breach, the existence of mitigating circumstances and whether the applicant has indicated contrition are relevant matters because they bear upon the applicant's character including their honesty and reliability.[41]

It would be wrong to conclude that an applicant would not abide by conditions which the Tribunal considers should be imposed solely on the basis that a security offered is insufficient to ensure compliance. Rather, it is necessary to ask the broader question of whether the conditions would be complied with if security were taken. Only if the answer is 'yes', is it necessary to consider the appropriate amount to be imposed.[42] Similarly, if the applicant has no funds to put at risk, it would be wrong to assume that taking a security from third parties, including family members or friends, would not induce compliance. In those circumstances, the Tribunal should not overlook the possibility that the applicant would not place the third party's assets at risk, or that the third party will endeavour to seek compliance with the conditions.[43]

The right of an applicant to lodge security for compliance with conditions to be imposed on the grant of the visa must be real. Thus, when considering whether a security has been lodged for the purposes of cl.050.224, the decision maker must be satisfied that the applicant has had an opportunity to do so. In most cases, it will be necessary to allow a reasonable time to elapse to see whether the security has been lodged. However, if an applicant, when invited to lodge a security, makes it clear that he or she will not do so irrespective of how much time is allowed, the decision maker may act upon this indication.[44]

Conditions

Conditions that may be imposed on a Subclass 050 visa are provided for in cl.050.6 and set out in Schedule 8 to the Regulations.[45] Clause 050.6 also sets out conditions to which the visa is subject. However, the cl.050.223 criterion refers only to conditions *imposed* on the visa.[46]

[35] See, generally, *Tennakoon v MIMIA* [2001] FCA 615 (Gray J, 25 May 2001) at [19]-[20]; *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [27].
[36] See in particular Policy – Migration Act – Compliance and Case Resolution (CCR) Instructions – Program visas – Bridging E visas – BVE 050 securities – Considerations when determining the amount of the security (reissued 19/11/2016).
[37] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [23]-[24].
[38] See *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [16]; *BACH v MIMIA* [2005] FMCA 392 (Scarlett FM, 16 March 2005) at [23].
[39] See *VWEX v MIMIA* [2004] FCA 460 (Weinberg J, 20 April 2004) at [62].
[40] See *SWPB (No 2) v MIMIA* [2005] FCA 851 (Mansfield J, 24 June 2005) at [33].
[41] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [15].
[42] *NABY v MIMIA* [2002] FCA 1475 (Branson J, 28 November 2002). See also *BACH v MIMIA* [2005] FMCA 392 (Scarlett FM, 16 March 2005) where the Court held at [35]-[37] that the Tribunal had erred when it affirmed the decision not to request a security for the reason that the amount the applicant could access for a security was not sufficient to ensure compliance, that a high security was needed to provide a reasonable assurance of compliance, without assessing what that amount would be that would ensure compliance.
[43] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [20].
[44] *Tennakoon v MIMIA* [2001] FCA 615 (Gray J, 25 May 2001) at [21].
[45] They are, depending upon the particular circumstances, 8101, 8104, 8116, 8201, 8207, 8401, 8402, 8403, 8505, 8506, 8507, 8508, 8509, 8510, 8511, 8512,8548, 8564 and 8566.

When considering cl.050.223, consideration may need to be given as to whether the conditions imposed by the primary delegate should also be imposed on review and, if so, whether the applicant would comply with those conditions. Consideration of the conditions to be imposed is required as part of the consideration of cl.050.223, and the Tribunal exercises all of the powers and functions of the delegate in considering which conditions would be imposed and whether a security is required. If the Tribunal is not satisfied that a bridging visa applicant would abide by the conditions without any security, the Tribunal must then consider if the applicant will comply with the conditions if given a financial incentive to do so.[47] For further discussion, see above, Security Requirement.

Determining which conditions may be applied

In determining what conditions (if any) are to be imposed on a visa, regard should be had to the legislative purpose of the bridging visa scheme. Not only does cl.050.223 itself imply that conditions will be imposed lawfully and correctly, but the power to require and take security in relation to a visa application *only applies if* the security is for conditions imposed *in pursuance of, or for the purposes of, this Act or the regulations*.[48]

According to the explanatory memorandum accompanying the introduction of bridging visas:

> *Bridging visas*
> *51 The grant of a bridging visa will provide an unlawful non citizen with temporary lawful status so that detention or continued detention is no longer mandatory. A bridging visa will generally be granted to eligible persons while an application for another visa is being processed and/or to allow the non-citizen to finalise their affairs before departing Australia. The criteria for the grant of bridging visas will be set out in the Migration Regulations. The criteria will restrict grant to those unlawful non-citizens who are considered unlikely to abscond after the grant of a bridging visa.*[49]
> …
> *Section 26C Bridging visas*
> *28 Another temporary visa class. The visa is needed because of the provision that all persons known or reasonably suspected to be unlawful non-citizens will be detained – see new section 54W. Generally, such non-citizens (other than those who arrive in Australia without prior authority and those who are refused entry to the country) will be able to apply for, and usually be granted (see new section 26ZO), a 'bridging visa' if they satisfy the relevant prescribed criteria for the visa. The grant of the bridging visa will give the grantee a temporary lawful status so that the requirement to hold the person in detention no longer applies – see new section 54ZD.*
>
> *29 Bridging visas are primarily aimed at unlawful non-citizens who have made an application for a substantive visa or for those who are prepared to leave Australia and seek time to first put their affairs in order before leaving the country.*[50]

Many of the discretionary conditions are directly concerned with maintaining contact while a person makes arrangements to depart or regularise their status (e.g. conditions to do with reporting, staying at or notifying an address, presenting a ticket to depart, obtaining or showing a passport, leaving by a

[46] On the distinction, see *Krummrey v MIMIA* (2005) 147 FCR 557 at [25]-[29]. In light of what the Court said at [28]-[29], the conditions described in cls.050.611B(a) and 050.612A(2) as ones that '*must* be imposed' should be read as conditions to which the visa is subject, in the circumstances specified by cls.050.611B and 050.612A(1) respectively.
[47] *Applicant VAAN of 2001 v MIMIA* (2003) 70 ALD 289 at [10]. *NABY v MIMIA* [2002] FCA 1475 (Branson J, 28 November 2002) and *BACH v MIMIA* [2005] FMCA 392 (Scarlett FM, 16 March 2005) are cases in which the Court found error in the Tribunal's consideration of this point. These cases identified the error as the Tribunal incorrectly considering whether the amount of security that the applicant could afford would be sufficient to ensure compliance with conditions, rather than whether they would comply with conditions if a security were imposed and, if the answer is yes, considering the amount of security necessary to ensure compliance.
[48] s.269(1A).
[49] Explanatory Memorandum to Migration Reform Bill 1992, p.10.
[50] Explanatory Memorandum to Migration Reform Bill 1992, p.19.

specified date, making a substantive visa application). Which of those conditions should be imposed will largely depend upon the individual's circumstances.

Condition 8101 (no work) is generally mandatory, where it applies. Conditions restricting study do not appear at face value to be relevant to the bridging visa scheme, although the commencement of a course of study may not be behaviour consistent with someone claiming to be making arrangements to depart. For further information on this issue please see MRD Legal Services Commentary on Bridging E (Class WE) Visa and the Applicable visa conditions for Bridging visa E (General).

Consideration of cls.050.223 and 050.224 in the absence of a security decision review

Where the Tribunal is reviewing a bridging visa refusal and there is no related review of a security related decision, the fact of any security required by an authorised officer will be relevant for cl.050.224, and may be relevant for cl.050.223.

If, for the purposes of cl.050.223, the Tribunal finds that the applicant will comply with conditions without a security being required, it may remit with a direction that the applicant meets cl.050.223. The Tribunal may not remit with a direction that a security be required.

If the Tribunal finds that the applicant will comply with conditions, but only if security of a particular amount is required, it may make a factual finding to that effect. It can then remit with a direction that an applicant meets cl.050.223. Such a decision does not involve an exercise of the power under s.269, but merely factual findings relevant to the criteria in cl.050.223. If an authorised officer has required security of a different amount, this must be taken into account to the extent it is relevant, but it does not preclude the Tribunal from making a (non-binding) factual finding that a different amount would be required to ensure that an applicant will abide by visa conditions.

If the Tribunal finds that an applicant will not comply with conditions regardless of any security that may be imposed, the Tribunal must find that cl.050.223 is not satisfied and affirm the decision.

For the purposes of cl.050.224, where there is no accompanying application for review of a security related decision, the Tribunal need only address two simple factual questions:

- *whether an authorised officer required security for compliance with any conditions that officer has indicated to the applicant will be imposed on the visa if it is granted*

  Whether an officer has required security should be apparent from the face of the decision record. The decision record should also have evidence that that officer is an 'authorised officer'; whether the evidence is sufficient to satisfy the Tribunal is for it to determine.

- *and if so, whether such security has been lodged*

  In the absence of an application for review of the security related decision, it has no power to make a direction as to security that can replace the authorised officer's security requirement.

Neither of these questions requires consideration of the exercise of the power under s.269 to impose a security. For further information on this issue please see MRD Legal Services Commentary on Bridging E (Class WE) Visa.

The Schedule 2 criteria for Subclass 600 also require lodgement of a requested security. Although the lodgement of a requested security is a criterion for the grant of a Subclass 600 Visitor visa, a related decision to require security for these subclasses is not a Part 5-reviewable decision.

Considering the security related criteria on review

A security may be required for sponsored applicants in the Tourist stream or Sponsored Family stream.[51] Relevantly, the requirements are as follows:

- *Tourist Stream:* an officer authorised under section 269 of the Act (which deals with security for compliance with the Act) has asked for the lodgement of a security[52] and the security has been lodged;[53]
- *Sponsored Family Stream:* if an officer authorised under section 269 of the Act (which deals with security for compliance with the Act) has asked for the lodgement of a security, the security has been lodged.[54]

Merits Review

Decisions to refuse to grant a Subclass 600 visa in the Tourist and Sponsored Family stream are generally reviewable by the Tribunal, and some may be reviewable under more than one subsection of s.338 where there is a sponsorship requirement or where the purpose is to visit a relative in Australia.[55] However, the Tribunal does not have jurisdiction under s.338(9) and r.4.02(4)(f) to review any related security decision in respect of this visa class. Rather, its power is restricted to considering, for the purposes of s.65 of the Act, whether the criteria for the grant of the visa are met.

A decision that relates to requiring a security and is connected to a decision to refuse to grant a visa is reviewable by the Tribunal only if requiring a security is mentioned in the criteria for the visa in the way specified in r.4.02(4)(f)(ii) – that is 'a criterion to the effect that if an authorised officer has required a security *for compliance with any conditions* that the officer has indicated to the applicant will be imposed on the visa if it is granted, the security has been lodged.'[56]

Against that legislative background, and having regard to the ordinary meaning of the words of r.4.02(4)(f)(ii), it appears that a security decision relating to a visa refusal will only be reviewable by the Tribunal under Part 5 if a criterion for the visa satisfies the elements of r.4.02(4)(f)(ii). That is, there must be a criterion to the effect that:

- if an authorised officer has required a security
- for compliance with conditions
- that the officer has indicated to the applicant will be imposed if the visa if granted

[51] cls.600.225 and 600.235 as inserted by SLI 2013, No.32.
[52] cl.600.225(1)(d).
[53] cl.600.225(2).
[54] cl.600.235.
[55] ss.338(2), (5) and (7).
[56] r.4.02(4)(f) and the similarly worded cl.050.223 were inserted on 1 November 2000. It was intended that the MRT (as the Tribunal then was) should have jurisdiction to review security decisions relating to Subclass 050 visa refusals. The Explanatory Statement to the amendment states that the clause was rephrased following *Tutugri v MIMA* (1999) 95 FCR 592: see Explanatory Statement to the Migration Amendment Regulations 2000 (No. 5) (SR 2000, No.259). As a result, if a security is required, the applicant must be made aware of the conditions to be imposed on the visa before he or she lodges the security.

- the security has been lodged.

Unlike the security mentioned in cl.050.224, a security decision relating to a refusal to grant a Subclass 600 is not reviewable under Part 5 of the Act. In order for a security decision to be reviewable under r.4.02(4)(f), it must be a decision that relates to the requiring of a security and relates to the refusal to grant a visa. Decisions under cls.600.225 and 600.235 do not relate to decisions to require a security and decisions to refuse a visa, they are only concerned with whether the security has been lodged. Whether a security has been required is a factual circumstance determining the application of those criteria, and not a substantive part of the criteria themselves. Only cl.050.223 falls under r.4.02(4)(f) because it requires a decision on whether an applicant will comply with conditions, which incorporates a decision on whether to require a security and therefore relates to both the requiring of a security and refusal of a visa.

Practical considerations also suggest that r.4.02(4)(f) is not intended to apply to these decisions.[57] If a security decision were reviewable for those subclasses, there would be no alignment of either standing or time limits for applications for review of security decisions with the related visa refusal decisions.[58] The 'combined application' provision relevant to security decisions[59] would not apply, and the two decisions could not proceed as one matter. As none of the 'combined application' provisions[60] are applicable, the review fee would be payable in respect of each review.[61]

Conditions

The conditions to which Subclass 600 is subject are provided for in cl.600.6 and set out in Schedule 8. In addition, there are conditions that may be imposed for Subclass 600 in the Tourist Stream.[62]

The Tribunal cannot itself require a security, formally recommend that requirement or review a decision requiring a security for compliance with conditions in relation to Subclass 600. However, a security decision made under s.269 may be relevant to the question whether the Tribunal is satisfied that the applicant intends to comply with the visa conditions. Thus, for example:

- If the Tribunal is satisfied that the applicant will comply with the visa conditions but only with a security, and a security of an appropriate amount has been requested and paid, the Tribunal may remit the matter with a direction that the applicant must be taken to have satisfied that criterion;

- Alternatively, if the Tribunal is not satisfied that the applicant will comply with the visa conditions without a security, and no security has been requested, the criterion will not be met.

[57] Specifically, this applies to the Tourist or Sponsored Family Streams reviewable under s.338(5) and s.338(7).
[58] The person who has standing to apply for review of the visa refusal is the relevant sponsor or relative (ss.338(5), 347(2)(b); 338(7), 347(2)(c)). However, if the related security decisions were reviewable, it is the visa applicant who would have standing (s.347(2)(d), r.4.02(5)(e)). For non-detainees, there is no specific provision for time limits concerning security decisions and the general time limit for decisions prescribed under subsection 338(9) applies. Thus a review application would have to be lodged with the Tribunal by the visa applicant within 21 days after he or she receives notification of the security decision: s.347(1)(b)(iii) and r.4.10(1)(d). By contrast, the time limit for review applications for refusal decisions concerning most applications in the Subclass 600, Tourist and Sponsored Family stream is 70 days after notification. Note the exception is in relation to the Tourist stream where the visa application was made in the migration zone which is reviewable under s.338(2) and where the time limit for review is 21 days after the notification is received by the visa applicant: r.4.10(1)(a). However, based on the wording of cl.600.225, the Tribunal would still not appear to have jurisdiction to review a security decision having regard to the requirements of r.4.02(4)(f). For further information see Visitor Visas – Overview commentary page.
[59] r.4.12(5).
[60] r.4.12.
[61] r.4.13.
[62] See further cls.600.611(3)(b) and 600.611(4)(d); cls.459.612, 459.613A and 459.615 for visa applications made before 23 March 2013.

On the other hand, requiring a security under s.269 may not be relevant to the Tribunal's assessment as to whether the criteria in cls.600.225 or 600.235 are satisfied. For example, regardless of whether a security has been requested and paid:

- If the Tribunal is satisfied that the applicant intends to comply with the visa conditions, even without a security, it may remit the matter with a direction that the applicant must be taken to have satisfied that criterion;

- Alternatively, if the Tribunal is not satisfied that the applicant intends to comply with the visa conditions, even with a security of any amount, the criterion will not be met.

Security related criteria

On the review of a decision to refuse to grant a Subclass 600 visa in the Tourist and Sponsored Family stream, the only questions relevant to the security related criteria are whether:

- a security has been requested by an officer authorised under s.269,

  and if so

- the security has been lodged.

The jurisdiction given by r.4.02(4)(f) does not extend to the Subclass 600 security criterion as noted above.

If **no** security has been requested by an officer authorised under s.269, then the security related criterion will be satisfied.

If a security has been requested by an officer authorised under s.269, the only question for the Tribunal is whether, at the time of decision, the security has been lodged.

It appears that the power under s.269(1) as qualified by s.269(1A) is exercisable by a Departmental delegate in relation to a visa applicant while the application is before the Tribunal. Once a review application has been lodged concerning a decision made under s.65 to refuse to grant a visa, the delegate is *functus officio* in relation to that decision because there is no further function for the delegate to perform.[63] While the power under s.269(1) is limited by the two requirements in s.269(1A), it appears fairly broad and there is no clear reason why it may not be exercised at any time for any reason before a decision is made on review or upon reconsideration by the Department. It is accordingly possible that an authorised officer may require a security from a visa applicant during the review by the Tribunal of a decision to refuse to grant the visa. In that case, when considering the security criterion in cl.600.225 or cl.600.235 the Tribunal would need to consider whether the security has been lodged.

When considering whether the security has been lodged, the Tribunal must be satisfied that the applicant has had an opportunity to lodge it. In some cases, it may be necessary to allow a reasonable time to elapse to determine whether the security has been lodged. However if an applicant, when invited to lodge a security makes clear that he or she will not do so irrespective of how much time is allowed, the decision maker may act upon this indication.[64]

[63] See *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 at 225; see also *Re Bloomfield & Sub-Collector of Customs, ACT* (1981) 4 ALD 204, *Re Sarina & Sec DSS* (1988) 14 ALD 437, and *Re Jonsson & Marine Council* (1990) 11 AAR 439.
[64] See *Tennakoon v MIMIA* [2001] FCA 615 (Gray J, 25 May 2001) at [21]. The Court in that case was discussing the security criterion in cl.050.224, but the same principle would apply in relation to cls.600.225 and 600.235.

Available Decision Templates

There is a general decision template for Bridging E Subclass 050 visas which includes the relevant directions available for decisions relating to requiring a security.

- **Subclass 050 - General** - There are also optional paragraphs relating to abiding by conditions and requiring a security criteria for Bridging E visas.

- **Optional Standard Paragraphs - Visitor Cases** - There are no templates available which specifically address the criteria relating to a security for the Subclass 600 Visitor (Class FA) visas. For further assistance please contact MRD Legal Services.

Relevant Case Law

Applicant VAAN of 2001 v MIMIA [2002] FCA 197; (2003) 70 ALD 289	Summary
BACH v MIMIA [2005] FMCA 392	
Director General Security v Sultan & Anor (1998) 90 FCR 334	
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary
Liu v MIAC [2008] FMCA 725	Summary
Mitrevski v MIMA [2001] FCA 221	
NABY v MIMIA [2002] FCA 1475	Summary
R v Moodie & Ors; Ex parte Mithen (1977) 17 ALR 219	
Re Bloomfield & Sub-Collector of Customs, ACT (1981) 4 ALD 204	
Re Sarina & Sec DSS (1988) 14 ALD 437	
Re Jonsson & Marine Council (1990) 11 AAR 439	
SWPB (No 2) v MIMIA [2005] FCA 851	
Takli v MIMA [2000] FCA 1490	Summary
Tennakoon v MIMIA [2001] FCA 615	Summary
Tutugri v MIMA [1999] FCA 1785; (1999) 95 FCR 592	
VWEX v MIMIA [2004] FCA 460	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2000 (No. 5)	SR 2000, No.259

Migration Amendment Regulations 2000 (No. 7)	SR 2000, No.335
Migration Legislation Amendment Act (No.1) 2008	No.85 of 2008
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32

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Resident Return Visas

CONTENTS

Overview

The Return (Residence) (Class BB) visa is a visa for Australian permanent residents and certain former Australian citizens or former Australian permanent residents who are seeking to return to Australia after a period of absence. This class of visa contains two subclasses: Subclass 155 (Five Year Resident Return) and Subclass 157 (Three Month Resident Return). There are also Subclass 159 (Provisional Resident Return) visas, which are temporary visas within Class TP, however these are rarely considered by the Tribunal and are therefore not referred to in this commentary.

According to Departmental guidelines (PAM3), the purpose of the Return (Residence) visa is to facilitate the re-entry into Australia of non-citizen permanent residents, former permanent residents and former citizens and ensure that only those people who have a genuine commitment to residing in Australia, or who are contributing to Australia's well-being, retain the eligibility to return to Australia as permanent residents.[1]

This commentary is based on the regulations relevant to all applications made on or after 1 July 1999 and includes the amending regulations which took effect on this date.[2]

Requirements for a valid visa application

The requirements for making a valid application for a Class BB Return (Residence) visa are set out in Item 1128 of Schedule 1 to the Migration Regulations 1994 (the Regulations). In general terms, those requirements are:

- **form and fee** - the application is made in the prescribed manner;[3] and the visa application charge paid at time of application;[4]
- **location -** the application may be made in or outside Australia, however, in certain circumstances the applicant must be in Australia and the application must be made in Australia;[5]

[1] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - Introduction - About resident return visas (RRVs) - Purpose (re-issue date 1/7/2016).
[2] Migration Amendment Regulations 1999 (No.4) (SR 1999, No.68).
[3] Item 1128(1) and (3)(a). For applications made on or after 18 April 2015, the application must be made on an approved form specified by legislative instrument and in a manner specified by legislative instrument: see Item 1128(1) and 1128(3)(a) amended by Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34). For the applicable instrument see the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes. For applications made before 18 April 2015, the application must be made on the prescribed form, otherwise in writing, or by oral application: Item 1128(1), (3)(a)(iii) and (3)(ba) of Schedule 1 to the Migration Regulations 1994.The option of making an oral application was removed for visa applications made on or after 10 September 2016: item 1128(3)(ba) omitted by item 3 of Schedule 1 to the Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (F2016L01390).
[4] Item 1128(2)(a) for the base application charge.
[5] Item 1128(3)(a), (aa) and (b). For written applications, the application may be made in or outside Australia, but not in immigration clearance, and the applicant must be in Australia to make an application in Australia: see item 1128(3)(a)(i) and (ii) for applications made before 18 April 2015; and Item 1128(3)(aa) and the approved legislative instrument specified for this item in the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes for applications made on or after that date: SLI 2015, No.34. For internet applications made before 1 July 2012, the applicant must be in Australia. For internet applications made on or after 1 July 2012, the applicant may be in or outside Australia: item 1128(3)(b) as amended by SLI 2012, No.106. For oral applications made before 10 September 2016, the application must be made in Australia as permitted by r.2.09(2) or (3) and, for applications made before 18 April 2015, the applicant must be in Australia: Item 1128(3)(ba)(i) repealed from 18 April 2015 by SLI 2015, No.34; for applications made on or after 18 April 2015 and before 10 September 2016 see Item 1128(1) and the relevant instrument: 'RRV App' tab in MRD Legal Services Register of Instruments - Miscellaneous and other visa classes. The option of making an oral application was removed for visa applications made on or after 10 September 2016: see r.2.09(2) and (3) and item 1128(3)(ba) of Schedule 1 omitted by Schedule 1 to the Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (F2016L01390).

- **combined applications -** *for visa applications made before 1 July 2012*, applications by persons who are included in the passport of another applicant can be made at the same time and combined;[6]
- **visa status** - *for visa applications made on or after 1 July 2012*, the applicant must not hold a Transitional (Permanent) visa that is taken to have been granted under r.9 of the Migration Reform (Transitional Provisions) Regulations;[7]
- **exclusion of certain former visa holders -** an application may not be valid where the most recent permanent visa held by the person was the subject of a cancellation notice under s.135(1) of the *Migration Act 1958* (the Act) or was the subject of a decision to cancel the visa under s.134.[8]

Visa criteria

All visa applicants for Return (Residence) visas must meet the primary criteria. There are no secondary criteria specified.

Criteria common to both Subclasses

There are some requirements that are common to both the Subclass 155 (Five Year Resident Return) and Subclass 157 (Three Month Resident Return) visas. At time of application, for both subclasses, the following requirements must be met:

- **residency status -** the applicant must
  - be an Australian permanent resident; or
  - have been an Australian citizen but subsequently lost or renounced Australian citizenship, or
  - be a former Australian permanent resident, other than a former Australian permanent resident whose most recent permanent visa was cancelled.[9]

The time of decision criteria are identical for both subclasses, and require that:

- **special return criteria** –
  - *for visa applications made prior to 1 July 2012*, the applicant satisfies special return criterion 5001 if the visa application is made outside Australia;[10]

[6] Item 1128(3)(c). Item 1128(3)(c) was substituted by SLI 2012, No.106. This removed the ability of a person to lodge a combined application where s/he is included in the passport of another Class BB visa applicant if the visa application is made on or after 1 July 2012.
[7] Item 1128(3)(c) as amended by SLI 2012, No.106. Transitional (Permanent) visas are taken to have been granted under r.9 of the Migration Reform (Transitional Provisions) Regulations to people who, immediately before 1 September 1994, held an Authority to Return or a Return Endorsement. It is intended that holders of Transitional (Permanent) visas retain their more beneficial 'travel and stay' arrangements, rather than be able to apply for and be granted a Class BB visa which has less beneficial 'travel and stay' arrangements: see Explanatory Statement to SLI2012, No.106.
[8] Item 1128(3)(d) and (e). This requirement was introduced for visa applications made on or after 1 July 2004 to prevent certain business visa holders circumventing cancellation of their visas by applying for and being granted resident return visas: Migration Amendment Regulations 2004 (No.2) (SR 2004, No.93) and Explanatory Statement to SR 2004, No.93. Note that for applications made on or after 18 November 2017, there was a brief period prior to disallowance of the Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (F2017L01425) at 17:56 on 5 December 2017 during which a different form of item 1128(3)(d) applied. The amending regulation broadened the scope of item 1128(3)(d) to cover cancellation under any section of the Migration Act and any notice of cancellation issued under the Migration Act. However the amending regulation was repealed from the time of disallowance: ss.42(1) and 45(1) of the *Legislation Act 2003*.
[9] cl.155.211 and cl.157.211.
[10] cl.155.221 and cl.157.221. See amendments made by SLI 2012, No.106, which apply to visa applications made on or after 1 July 2012.

- *for visa applications made on or after 1 July 2012*, the applicant satisfies special return criterion 5001 if the applicant is outside Australia;[11]

- **passport –**

- *for visa applications made from 1 July 2005 and prior to 24 November 2012,* the applicant is the holder of a valid passport or it would be unreasonable to require the applicant to be the holder of a valid passport.[12]

- *for visa applications made on or after 24 November 2012;* the applicant satisfies the passport requirements in public interest criterion 4021.[13]

For a brief period, applicants were prevented from being granted a Resident Return visa where their last permanent visa had been cancelled or was under consideration for cancellation.[14]

Which Subclass should the applicant be assessed against?

An applicant applies for a class of visa[15] and is entitled to be assessed against each subclass that is included in the class. When assessing an application for a Return (Residence) (Class BB) visa, the applicant is usually first considered against the criteria for a Subclass 155 visa as the more advantageous visa. If the applicant is not eligible for that subclass, they must be considered against the criteria for a Subclass 157 visa. A Subclass 157 visa is only in effect for a period of 3 months from the date of the grant[16] and therefore has less stringent time of application criteria than the Subclass 155 visa, which may be granted for a period of up to 5 years.[17] If an applicant is eligible for both subclasses, the Departmental practice is to grant the Subclass 155 as the more advantageous visa.[18]

Criteria specific to Subclass 155

At time of application, an applicant for a Subclass 155 visa must meet one of four alternative requirements set out in cl.155.212.[19] These relate to: physical residence in Australia, substantial ties with Australia or being a member of a family unit of a Subclass 155 holder or someone who meets the requirements of cl.155.212.

Physical residence in Australia - cl.155.212(2)

The applicant will meet cl.155.212 if, at time of application, he or she was:

[11] cl.155.221 and cl.157.221 as amended by SLI 2012, No.106, for visa applications made on or after 1 July 2012.
[12] cl.155.222 and cl.157.222: applicable to visa applications made on or after 1 July 2005, inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005, No.134). Note these provisions were omitted with effect from 24 November 2012 by Migration Legislation Amendment Regulation 2012 (No.5) (SLI2012, No.256).
[13] Clauses 155.222 and 157.222 were amended by SLI 2012, No.256 which introduced new Public Interest Criterion, PIC 4021. This requires either: that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an instrument in writing for cl.4021(a) (see the PIC '4021 Passports' tab in the Register of Instruments Miscellaneous and Other Visa Classes; **or** that it would be unreasonable to require the applicant to hold a passport. The amendment applies to visa applications made on or after 24 November 2012.
[14] For applications made on or after 18 November 2017, there was a brief period prior to disallowance of the Migration Legislation Amendment (2017 Measures No.4) Regulations 2017(F2017L01425) at 17:56 on 5 December 2017 during which cl.155.223 and 157.223 applied. Disallowance had the effect of repealing the amending regulation from that time: ss.42(1) and 45(1) of the *Legislation Act 2003*.
[15] s.45 Migration Act.
[16] cl.157.511.
[17] cl.155.511. For visa applications made prior to 1 July 2012, a Subclass 155 visa is generally granted for a period of 5 years from the date of grant; or a shorter period determined by the Minister. For visa applications made on or after 1 July 2012, only applicants who meet cl.155.212(2) and 155.211 at the time of application, i.e. lawfully present in Australia for period(s) of not less than 2 years in the period of 5 years immediately before the application, will be granted a Subclass 155 visa for a period of 5 years. Applicants who meet cl.155.212(3), (3A) or (4) will be granted a Subclass 155 visa for a lesser period depending on which of these criteria they meet: see SLI 2012, No.106.
[18] PAM3 - Migration Regulations – Schedules - Sch2 RRV - Resident return visas - Assessing RRV Applications – Which subclass (re-issue date 1/7/2016).
[19] cl.155.212(1).

- lawfully present in Australia for a period of, or periods that total, not less than 2 years in the period of 5 years immediately before the application for the visa; and
- during that time, the applicant was the holder of a permanent visa or permanent entry permit or was an Australian citizen and was not the holder of a temporary visa (other than a kind specified and held concurrently with the permanent visa/entry permit), or of a bridging visa.[20]

Unlike some of the alternate criteria in cl.155.212, the applicant may be either in or outside Australia at time of application.

Substantial ties with Australia - cl.155.212(3), (3A)

If the applicant does not meet the physical residence criteria, he or she may still satisfy cl.155.212 based on the nature of their ties to Australia.[21] The requirements differ depending on whether the visa applicant is in or outside Australia at the time of application. According to Departmental guidelines, the policy intention of the 'substantial ties' provision is to allow visas to be granted to people who have substantial ties with Australia and are contributing to Australia's well-being, but who have not spent sufficient time physically present in Australia in the past 5 years to satisfy the physical residence criterion.[22]

Offshore applicants

If the applicant is outside Australia at the time of application, the decision maker must be satisfied that the applicant has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and the applicant:

- has not been absent from Australia for a continuous period of 5 years or more immediately before the application for the visa, unless there are compelling reasons for the absence, and holds a permanent visa, or last departed Australia as an Australian permanent resident, or last departed Australia as an Australian citizen, but has subsequently lost or renounced Australian citizenship; or
- was an Australian citizen, or an Australian permanent resident, less than 10 years before the application, and has not been absent from Australia for a period of, or periods that total, more than 5 years in the period from the date that the applicant last departed Australia as an Australian citizen or Australian permanent resident to the date of application, unless there are compelling reasons for the absence.[23]

According to the Explanatory Statement to Migration Amendment Regulations 1999 (No.6) (SR 81 of 1999), the second of these 2 alternatives:

> *…implements a policy change which enables former permanent residents, and former Australian citizens, who have travelled on temporary visas to Australia to regain their entitlement to permanent resident status in certain circumstances. Especially since the introduction of Electronic Travel Authorities, a large number of people have travelled on temporary visas without realising that this would mean loss of their resident status.*

[20] cl.155.212(2). For visa applications made on or after 1 July 2002, the applicant may be the holder of a Subclass 601 (Electronic Travel Authority) visa, a Subclass 773 Border visa, Subclass 956 Electronic Travel Authority (Business Entrant — Long Validity) visa, Subclass 976 Electronic Travel Authority (Visitor) visa or Subclass 977 Electronic Travel Authority (Business Entrant — Short Validity) visa held concurrently with the permanent visa or the permanent entry permit: Migration Amendment Regulations 2002 (No.2) (SR 2002, No.86), s.5(2) and Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.32).
[21] cl.155.212(3) and (3A).
[22] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 Five Year Resident Return – Substantial ties of benefit to Australia – About the 'substantial ties of benefit' provision (re-issue date 1/7/2016).
[23] cl.155.212(3).

Onshore applicants

If the applicant is in Australia at the time of application, the decision maker must be satisfied that the applicant:

- has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and
- has not been absent from Australia for a continuous period of 5 years or more since:
  - the date of grant of the applicant's most recent permanent visa, unless there are compelling reasons for the absence, or
  - the date on which the applicant ceased to be a citizen, unless there are compelling reasons for the absence.[24]

Members of the family unit

An applicant will alternatively meet cl.155.212 if they are a member of the family unit of a person who: has been granted a Subclass 155 visa and that visa is still in effect, or meets the requirements in cl.155.212(2), (3) or (3A) and has lodged a separate application for a Return (Residence) (Class BB) visa.[25]

Further information as to the meaning of 'member of the family unit' is available from the MRD Legal Services Commentary: Member of a family unit.

Criteria specific to Subclass 157

The Subclass 157 visa only entitles the visa holder to a 3 month stay and thus the criteria which need to be met have a lower threshold than the criteria relating to the Subclass 155 Five Year Resident Return Visa.

Subclass 157 visas are intended for permanent residents or former citizens who have less than two years' physical residence in Australia and have not yet established substantial ties of benefit to Australia.[26]

At time of application, an applicant for a Subclass 157 visa must meet one of 2 alternate requirements in cl.157.212.[27] The first requirement relates to physical presence and reasons for departure and the second to being a member of a family unit of a Subclass 157 visa holder.

Physical presence and reasons for departure

The requirements for physical presence in Australia for a Subclass 157 visa are less stringent than those for the Subclass 155 visa. The focus of the criterion is on the reasons for the applicant's departure from Australia. To meet this alternate criterion, the applicant must:

[24] cl.155.212(3A).
[25] cl.155.212(4). For visa applications made prior to 1 July 2012, an applicant who is a member of the family unit of a person who meets cl.155.212(2), (3) or (3A) and has lodged either a combined or separate Class BB visa application may satisfy the requirements of cl.155.212(4)(b). Clause 155.212(4)(b) was amended by SLI 2012, No.106 such that for visa applications made on or after 1 July 2012, only an applicant who is a member of the family unit of a person who meets cl.155.212(2), (3) or (3A) and has made a separate Class BB visa application can meet cl.155.212(4)(b).
[26] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 157 - Three Month Resident Return – About BB 157 - Purpose (re-issue date 1/7/2016).
[27] cl.157.212(1).

- be lawfully present in Australia for a period of, or periods that total, not less than 1 day but less than 2 years in the period of 5 years immediately before the application for the visa and during that time:
  - was the holder of a permanent visa or a permanent entry permit or an Australian citizen and
  - did not hold a temporary visa (other than a kind specified concurrently with the permanent visa/permit), or a bridging visa;[28] and
- either:
  - have compelling and compassionate reasons for departing Australia, or
  - if outside Australia, had compelling and compassionate reasons for his or her last departure from Australia.[29]

Member of the family unit

An applicant will alternatively satisfy cl.157.212 if he or she is a member of the family unit of a person who: has been granted a Subclass 157 visa and that visa is still in effect, or meets the requirements of cl.157.212(2) and has lodged a separate application for a Return (Residence) (Class BB) visa.[30]

Absence from Australia

If the applicant is outside Australia, there is an added requirement that the applicant has not been absent from Australia for a continuous period of more than 3 months immediately before making the application for the visa, unless the Minister is satisfied that there are compelling and compassionate reasons for the absence.[31]

Key issues

There is very little case law in relation to this visa class and its requirements. Decisions tend to turn on the issues of substantial ties which are of benefit to Australia and compelling reasons for absence from Australia. Departmental guidelines set out the Department's view as to what is meant by, and may be relevant to, these provisions.[32] While the Tribunal may have regard to these guidelines in forming its own view of the meaning of the legislation, it is not appropriate to apply them as if the interpretations and directions in them are binding on the Tribunal. For further discussion on the application of policy generally, see MRD Legal Services Commentary: Application of policy.

Discussion of these issues, as well as compelling and compassionate reasons for departure from Australia and the case law, is set out below.

[28] cl.157.212(2)(a). For applications made on or after 1 July 2002, the applicant may be the holder of a Subclass 601 (Electronic Travel Authority) visa, a Subclass 773 Border visa, Subclass 956 Electronic Travel Authority (Business Entrant — Long Validity) visa, Subclass 976 Electronic Travel Authority (Visitor) visa or Subclass 977 Electronic Travel Authority (Business Entrant — Short Validity) visa held concurrently with the permanent visa or the permanent entry permit: SR 2002, No.86, and SLI 2013, No.32.
[29] cl.157.212(2)(b).
[30] cl.157.212(3). For visa applications made prior to 1 July 2012, an applicant who is a member of the family unit of a person who meets cl.157.212(2) and has lodged either a combined or a separate Class BB visa application may satisfy the requirements of cl.157.212(3)(b). Clause 157.212(3)(b) was amended by Migration Legislation Amendment Regulation 2012 (No. 3) (SLI 2012, No. 106 such that for visa applications made on or after 1 July 2012, only applicants who is a member of the family unit of a person who meets cl.157.212(2) and has made a separate Class BB visa application can meet cl.157.212(3)(b).
[31] cl.157.213.
[32] PAM3 - Migration Regulations - Schedules - Sch2 RRV - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia (re-issue date 1/7/2016).

Substantial ties which are of benefit to Australia

One of the alternative time of application requirements for a Subclass 155 visa is that the applicant has substantial personal, cultural, business or employment ties with Australia which are of benefit to Australia.[33] Departmental guidelines (PAM3) state that decision makers should consider the whole of the applicant's relevant ties with Australia and determine whether cumulatively an applicant's substantial ties are of benefit to Australia.[34] The decision maker should have regard to all the circumstances of the case in determining whether the person has substantial ties of the relevant kind to Australia.

Business ties

The alternative requirement that the applicant have 'substantial business … ties with Australia which are of benefit to Australia' is not further defined in the Regulations. Departmental guidelines (PAM3) suggest that an applicant needs to have substantial ownership interests in a business and be involved in the management of the business. This business should be an Australian business or a branch of a business which has connections with Australia.[35] However, the legislation does not require an applicant to have substantial ownership interests and be involved in the management of the business, and to this extent PAM3 is inconsistent with the legislation and caution should be exercised before relying upon it.

Examples of what may be relevant in determining if an applicant has substantial business ties to Australia set out in the guidelines include:

- if the activities of the business have led to the creation of employment in Australia, or offshore, for Australian citizens or permanent residents. Evidence of downstream creation of employment in Australia should also be taken into consideration if there is a direct connection with the applicant's business activities;
- whether it generates revenue in or for Australia;
- the size of the business;
- if the business activity enhances links with other countries;
- whether the activity has led to production of goods or services in Australia of merchantable quantity;
- whether the business is actively trading at the time of application;
- evidence of recent taxation assessment of the business in Australia;
- evidence of exporting Australian knowledge and technology;
- evidence of introducing new technology into Australia.[36]

The guidelines also indicate that, for an applicant whose relationship with a family business in Australia is by means of ownership of shares, the shares would need to be sufficient to generate a substantial income for the applicant or be such that the business could not operate without them.[37]

[33] cl.155.212(3), (3A)(a).
[34] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident Return Visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – About the 'substantial ties of benefit' provision (re-issue date 1/7/2016).
[35] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial business ties of benefit to Australia (re-issue date 1/7/2016).
[36] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial business ties of benefit to Australia (re-issue date 1/7/2016).
[37] PAM3 - Migration Regulations - schedules > Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial business ties of benefit to Australia (re-issue date 1/7/2016).

However, this interpretation appears to go beyond the language of the Regulations and while regard may be had to the guidelines, construction of the relevant legislation and application to the facts should not be determined by them. While the benefits to Australia of such a business may be potential, that is, may not be realised until some point in the future, the ties to the business must exist at time of application. The legislation requires that at time of application the applicant 'has' substantial business ties with Australia. It will not suffice if the applicant indicates an intention to acquire a financial interest in such a business at some point in the future, or did not acquire such an interest, or have some other tie (e.g. an agreement to purchase) to business until after the visa application.

Departmental guidelines do not limit the matters that may be relevant in assessing the benefit to Australia of substantial business ties. Generally speaking, regard should be had to the applicant's individual circumstances and the terms of the relevant criterion.

Cultural ties

The alternative requirement that the applicant have 'cultural … ties with Australia which are of benefit to Australia' is also not further defined in the Regulations. Departmental guidelines (PAM3) suggest that an applicant involved in intellectual, artistic, sporting or religious pursuits which are not strictly of a business or employment nature may also have a cultural tie with Australia. Further, a substantial cultural tie may exist if the applicant's cultural pursuits are conducted at a professional level or with a degree of public recognition.[38] This latter example does however seem to go beyond the actual wording of the Regulations.

Examples of 'cultural ties' provided in Departmental guidelines include:

- a person who is accepted as a member of a cultural community within Australia who is actively involved in traditional activities;
- a person involved in the Arts at a professional level;
- members of religious communities in Australia; or
- sports persons or professional support staff who are members of Australian sporting associations.[39]

However, consideration should be given to any benefit to Australia which has been put forward by the applicant and care should be taken not to raise the examples in the guidelines to the level of a legislative requirement.

As with business ties, the relevant cultural ties must exist at time of application, although the benefit to Australia could be achieved in the future.

Employment ties

Similar to the 'business' and 'cultural ties' requirement, there is no further explanation in the Regulations as to what is required to establish that a person has 'substantial …employment … ties with Australia which are of benefit to Australia'. The Departmental guidelines state that an applicant who is currently employed in Australia, or who has accepted a formal offer of employment in Australia

[38] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial cultural ties of benefit to Australia (re-issue date 1/7/2016).
[39] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial cultural ties of benefit to Australia (re-issue date 1/7/2016).

where the employment offer is consistent with their qualifications and experience, may have a substantial employment tie of benefit to Australia.[40]

Departmental guidelines state that an applicant employed outside Australia may also be considered to have employment ties with Australia if employed by:

- an Australian organisation (e.g. a company, university, college, religious organisation);
- a Commonwealth, state, territory or local government organisation (including a government business enterprise or a statutory authority/agency);
- the Australian office of an international charity organisation; or
- as a representative of Australia in an international organisation to which the *International Organisations (Privileges and Immunities) Act 1963* applies within the meaning of s.3(1) of that Act.[41]

In assessing whether an employment tie is substantial and of benefit to Australia, PAM3 suggests that a relevant consideration is whether the applicant is employed in a permanent, temporary or contract capacity, and an agreed wage or salary is paid to undertake the work. Casual work would not normally be considered to be substantial tie unless the applicant had been living in Australia for a significant period in the last 2 years.[42] Further, PAM3 suggests that if the applicant has not commenced work but has accepted an employment offer, consideration should be given to whether the employment offer is consistent with the applicant's qualifications and experience. In such cases, the immediacy of the commencement of employment would be an important factor. Other indicators of an intention to reside in Australia should also be considered, including tenancy agreements or home ownership documentation and enrolment of children in school.[43]

While these considerations may provide assistance as to the kinds of matters which could be taken into account, some of these guidelines are narrower than the actual wording of the legislation, and should not be raised to the level of a legislative requirement. The totality of the circumstances of the applicant should be considered in the context of the terms of the legislation.

Note that while the benefit to Australia of the relevant employment need not be realised until some point in the future, the relevant employment tie must exist at the time of application.

Personal ties

The alternative requirement that the applicant have 'personal ties with Australia which are of benefit to Australia' is also not further explained in the Regulations. Departmental guidelines provide examples of circumstances that the Department considers may indicate personal ties with Australia, including where the applicant has:

- a history of long term residence in Australia prior to the last five years, particularly, if the applicant has spent their formative years in Australia, or has spent a significant amount of time in Australia since first being granted a permanent visa;

[40] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial employment ties of benefit to Australia (re-issue date 1/7/2016).
[41] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial employment ties of benefit to Australia (re-issue date 1/7/2016).
[42] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial employment ties of benefit to Australia (re-issue date 1/7/2016).
[43] PAM3 - Migration Regulations - Schedules -Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial employment ties of benefit to Australia (re-issue date 1/7/2016).

- been living outside Australia with an Australian citizen partner or, in the case of a minor child, Australian citizen parent, who has previously lived in Australia;
- been living in Australia for more than 12 months in the last 5 years, including as a temporary resident;
- one or more Australian citizen minor children living in Australia (including at boarding school) where no legal impediment to access exists;
- been living overseas with their family unit, including Australian partners and minor children, and the applicant provides evidence of imminent plans to return to Australia with their family to live;
- personal assets in Australia, for example family home or single investment property – although whether there was a benefit to Australia will depend on whether it is occupied, for example by a close family member or actively being rented; or
- close family members (that is, of a type for which family reunion might be available under the Family Stream of the Migration Program) who have substantial residence in Australia and are Australian permanent residents or Australian citizens.[44]

The guidelines recognise that a person may have substantial ties to more than one country and the Regulations do not require an applicant to have greater ties to Australia. Whether an applicant regards Australia as home and intends to reside permanently are identified as relevant considerations in assessing whether a personal tie is substantial.[45]

Departmental guidelines also suggest that substantial personal ties may be of benefit to Australia in the sense that the applicant is, or has been, a participating member of the Australian community and economy, and that their ties enrich the lives of individual Australian residents and citizens. Moreover, enabling a family unit to remain together can be considered of benefit to Australia if there is evidence of an imminent intention for the family unit to domicile themselves in Australia.[46]

Whilst such matters may, in an individual case, be relevant to determining whether substantial personal ties with Australia which are of benefit to Australia exist, the decision maker should always ensure that the focus of its enquiry is on the terms of the legislation.

Compelling reasons for absence from Australia

Where an applicant for the Resident Return visa does not meet the physical residence requirements of the Subclass 155 visa, in addition to having substantial ties of benefit to Australia, the applicant must also have not been absent from Australia for a continuous period of five years or more unless there are 'compelling reasons for the absence'. There is no definition of the term 'compelling reasons' in the Regulations.

Whether a circumstance is a compelling reason is a question of fact, having regard to the proper meaning of 'compelling'.

[44] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas – BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial personal ties of benefit to Australia (re-issue date 1/7/2016).
[45] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial personal ties of benefit to Australia (re-issue date 1/7/2016).
[46] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Substantial ties of benefit to Australia – Substantial personal ties of benefit to Australia (re-issue date 1/7/2016).

The Federal Court considered the meaning of 'compelling' in the context of a Resident Return visa in *Paduano v MIMIA.*[47] The Court held that the expression 'compelling reasons for the absence' referred to the applicant's absence and it was the *applicant* who must have been 'compelled' by the reasons for his absence. It is for the decision maker, therefore, to make a judgment as to whether the reasons for the absence are forceful (and therefore convincing) by reference to some standard of reasonableness such as a reasonable person in the same circumstances as the applicant.[48]

The Court in *Paduano v MIMIA* further held that 'compelling' should not be read narrowly so as to exclude forceful reasons which raise moral necessity.[49] Equally, there is nothing which confines it to reasons incorporating an involuntary element, involving circumstances beyond the applicant's control.[50]

Relevantly, the Court stated:

> *The ordinary meaning of the adjective 'compelling' is not confined to the meanings used by the Tribunal when it construed the legislative expression. The legislative expression is wide and unqualified. 'Compelling' in its wide, ordinary meaning means 'forceful'. Forceful reasons for an absence may involve physical, legal or moral necessity or may, by reason of their forcefulness, be convincing. There is nothing in the express wording of the relevant subclause which indicates that 'compelling', where it occurs, should be read narrowly so as to exclude forceful reasons which raise moral necessity or which are convincing. Equally, there is nothing in the express wording, or the context, which indicates that 'compelling reasons for the absence' must be confined to reasons incorporating an involuntary element, involving circumstances beyond a person's control, involving physical or legal necessity or cognate with the reasons given as examples in MSI 356.*[51]

The Departmental guidelines (PAM3) provide that although a compelling reason that is beyond the applicant's control will carry greater weight, there is no legal requirement for the absence to be beyond the applicant's control for it to be considered compelling. PAM3 suggests that it would generally be reasonable to expect that for there to have been an absence, the applicant had been residing in Australia prior to the period of absence, and there would need to be evidence that the applicant had plans to live in Australia.[52] This latter consideration appears to go beyond the legislative requirement.

Moreover, PAM3 suggests that when assessing compelling reasons for absence, it is reasonable for consideration to be given to the balance between the compelling reason for absence as well as any overarching benefit to Australia.[53] It also suggests that decision-makers should consider the reasons in the context of the amount of time the applicant previously lived in Australia and their intentions of returning to Australia to live.[54] However, the actual wording of the legislation does not require a balance between the benefit to Australia and the compelling reason for the absence. The benefit to Australia and the compelling reasons for the absence are two separate requirements in the Regulations. Further, there is no legislative requirement for an intention to return to live in Australia.

[47] *Paduano v MIMIA* (2005) 143 FCR 204.
[48] *Paduano v MIMIA* (2005) 143 FCR 204 at [41]. See also *Cirillo v MIBP* [2015] FCCA 2137 (Judge Neville, 14 August 2015). In *Cirillo*, the applicant claimed that he was compelled to remain in Italy for 17 years due to strong family and cultural ties and various events involving close family members. The Court held that the Tribunal erred by finding that *it* was not satisfied the reasons for the applicant's absence from Australia were compelling, when it was *the applicant* who must be compelled. Further, the Tribunal erred in not applying the relevant standard of reasonableness as set out in *Paduano*.
[49] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[50] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[51] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[52] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Absence for more than 5 years – Compelling reasons for absence (re-issue date 1/7/2016).
[53] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Absence for more than 5 years – Compelling reasons for absence (re-issue date 1/7/2016).
[54] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Absence for more than 5 years – Compelling reasons for absence (re-issue date 1/7/2016).

While the Tribunal may have regard to the guidelines, it should take care not to apply them as inflexible rules of universal application, and should bring its consideration back to the terms of the legislative criterion.

Departmental guidelines provide the following examples of compelling reasons:[55]

- severe illness or death of an overseas family member;
- work or study commitments by the applicant [or partner] that are of a professional nature, in circumstances where the acquired experience results in a benefit to Australia;
- the applicant is living overseas in an ongoing relationship with an Australian citizen partner;
- the applicant or the applicant's accompanying family members have been receiving complex or lengthy medical treatment preventing travel;
- the applicant has been involved in legal proceedings such as sale of property, custody, or contractual obligations and the timing was beyond the applicant's control; or
- the applicant has been caught up in a natural disaster, political uprising or other similar event preventing them from travel;
- the applicant can demonstrate they have been waiting for a significant personal event to occur that has prevented them from relocating to or returning to Australia. The period of time for any event would have to be reasonable in its context.

In sum, the meaning of 'compelling' in cl.155.212 is wide and unqualified;[56] and care should be taken not to artificially exclude meanings which conflict with the interpretation suggested by Departmental guidelines. While factors such as whether circumstances were beyond an applicant's control may be relevant in determining whether there were compelling reasons for the absence, decision makers should avoid giving the impression that an involuntary element is a requirement for reasons to be 'compelling'.

For further discussion on the term 'compelling' see the MRD Legal Services Commentary 'Compelling and/or Compassionate Circumstances/Reasons'.

Compelling and compassionate reasons (Subclass 157)

As noted above, it is a criterion for a Subclass 157 visa that the applicant has compelling and compassionate reasons for departing Australia, or for his or her last departure from Australia.[57] Where the applicant is outside Australia, it is also a criterion for the visa that they have compelling and compassionate reasons for the absence.[58] 'Compelling and compassionate reasons' is not defined in the Regulations and it is for the decision maker to give the term its ordinary meaning.

The requirement for compelling and compassionate reasons could be viewed as more onerous than compelling circumstances. Departmental guidelines state that this is a strong test of the reasons for a person's absence because the applicant must demonstrate both components and a reason which is considered 'compelling' will not necessarily also be a 'compassionate' reason for departure/absence. The examples given include:

[55] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return – Absence for more than 5 years – Compelling reasons for absence (re-issue date 1/7/2016).
[56] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[57] cl.157.212(2).
[58] cl.157.213.

- unexpected severe illness or death of a family member; or
- the applicant is involved in custody proceedings for their child.[59]

Further information on the interpretation of 'compelling and/or compassionate reasons' in relation to other visa criteria can be found in the MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

Member of Family Unit

As noted above, a person can also be granted a Subclass 155 or 157 visa as a 'member of a family unit'.[60] As there are no secondary criteria, member of the family unit is included as one of the alternative primary criteria for the visa. There is no requirement for the family members to apply at the same time as the family head,[61] but their eligibility for the visa will be linked to their family head's satisfaction of the criteria for the visa grant,[62] or the visa held by the family head, unless they can meet the residence and substantial ties criteria in their own right. Generally the family head will be the person required to satisfy the physical residence or substantial ties criteria. Further information on the requirements of r.1.12 is available in the MRD Legal Services Commentary: Member of family unit.

Merits review

There are three potential bases under s.338 of the Act by which a decision to refuse a Return (Residence) (Class BB) visa may be reviewable by the Tribunal, depending on the physical location of the applicant, and where the application was made, or taken to be made. These are:

- s.338(2) - where the applicant is onshore and the visa application is made onshore
- s.338(6) - where the applicant is offshore and the visa application is made offshore
- s.338(7A) – where the applicant is offshore but visa application is made / taken to be made onshore (i.e. an internet application)

Bases for reviewing a decision to refuse a Resident Return visa

Onshore applicants - Applicant onshore, application made onshore – s.338(2)

A decision to refuse a Return (Residence) (Class BB) visa is reviewable under s.338(2) of the Act if:

- the applicant was physically present in Australia at the time the visa application was made; and
- the visa application was made in Australia.

[59] PAM3 - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB-157 - Three Month Resident Return-–Lawful presence in Australia and reasons for absence – Compassionate and compelling (re-issue date 1/7/2016).
[60] cl.155.212(4) and cl.157.212(3).
[61] As noted above, for visa applications made on or after 1 July 2012, an applicant who is included in the passport of another applicant for a Class BB visa can no longer validly make a combined application at the same time and place with the other applicant under Schedule 1 to the Regulations: see SLI 2012, No.106.
[62] For visa applications made on or after 1 July 2012, the member of the family unit applicant must lodge a separate application for a Return (Residence) (Cass BB) visa to that of their family head: see cl.155.212(4)(b) and cl.157.212(3)(b) as amended by SLI 2012, No.106.

In these circumstances, the visa applicant is the person with standing to apply for review.[63] The review application must be lodged within 21 days after the notification of the primary decision is received by the applicant.[64] The applicant must be in the migration zone at the time the review application is made.[65]

Offshore applicants

Whether a decision is reviewable under s.338(6) or (7A) depends on where the visa application is made. In some cases the location of the visa applicant is not determinative of where the visa application is made, or taken to be made.

Where application may be made

Requirements for where and how Class BB applications may be made are set out in item 1128 of Schedule 1 to the Regulations. These requirements were amended on 18 April 2015 to allow for the place and manner for making the application to be specified by instrument,[66] and on 10 September 2016 to remove the option of making oral applications.[67]

Post 18 April 2015 applications

From 18 April 2015, the manner and place an application for a Class BB visa can be made is specified by legislative instrument.[68] The instrument in force at the time of writing specifies that an application can be made by internet.[69] The instrument specifies no requirement as to location of the applicant, although such applications will always be taken as made in Australia - see below. The instrument specifies that, for an application that is not an internet application (i.e. a paper application), an application by an applicant who is outside Australia must be made at a diplomatic, consular or immigration office maintained by or on behalf of the Commonwealth of Australia.[70] The option of making an oral visa application was removed for applications made on or after 10 September 2016.[71] However for applications made before that date, the instrument in force at that time specified that oral applications could only be made in Australia and not in immigration clearance and no requirement as to location of the applicant was specified.[72]

Item 1128(3)(aa) provides that an applicant 'must be in Australia to make an application in Australia'. Prima facie this provision creates a problem for the ability of non-citizens outside Australia to make a valid internet application for the visa or a valid pre-10 September 2016 oral application. For the following reasons, the better approach appears to be to limit item 1128(3)(aa) to applications other than internet or pre-10 September 2016 oral applications, with the result that only a paper application by an applicant who is outside Australia, must be made outside Australia.

Firstly, item 1128(3)(aa) reflects the requirements set out in the instrument for the making of a valid paper application. The instrument specifies that an application by an applicant who is inside Australia must be made by posting or delivering the application by courier service to a specified address in

[63] s.347(2)(a).
[64] r.4.10(1)(a).
[65] s.347(3).
[66] Item 1128(3)(a) repealed and substituted by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) with effect from 18 April 2015.
[67] See item 1128(3)(ba) omitted by item 3 of Schedule 1 to the Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (F2016L01390).
[68] Item 1128(3)(a).
[69] Section 8 of Part 2 of IMMI 17/031, table item 1. For the applicable instrument see the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes
[70] Section 8 of Part 2 of IMMI 17/031, table item 1. For the applicable instrument see the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes.
[71] See item 1128(3)(ba) omitted by item 3 of Schedule 1 to the Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 (F2016L01390).
[72] IMMI 16/042. For the applicable instrument see the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes.

Australia and an application by an applicant who is outside Australia must be made at a location outside Australia.[73]

Secondly, item 1128(3)(b) provides that, for an internet application, the applicant may be in or outside Australia, but not in immigration clearance. If item 1128(3)(aa) is not limited in its application, particularly in relation to internet applications, it conflicts with sub-paragraph 1128(3)(b). It would also result in the provision in the instrument which states that 'an application may be made in or outside Australia, but not in immigration clearance' being redundant. Likewise, the requirement for making a valid pre-10 September 2016 oral application in item 1128(3)(ba)(i) as it stood prior to that date, provided that the applicant must be in Australia to make an application in Australia. If item 1128(3)(aa) is not limited in its application, this provision would be otiose.

The instrument for item 1128(3)(a) essentially replicates the pre-18 April 2015 version of paragraph 1128(3)(a) as it related to paper applications, apart from the requirement that an applicant 'must be in Australia to make an application in Australia', which now appears in item 1128(3)(aa).[74] While the Explanatory Statement to the amending regulations did not expressly state that the new item 1128(3)(aa) was intended to relate to visa applications other than internet or oral applications, it stated that the amending legislation inserts 'paragraphs in the relevant items of Schedule 1 to provide where an applicant must be located at the time of application, either inside or outside Australia as appropriate. These provisions were previously in the repealed paragraphs and were reinserted by the current paragraphs.'[75] It also stated that 'the amendments do not substantially alter the existing arrangements'.[76] While not beyond doubt, this would appear to indicate that paragraph 1128(3)(aa) relates to visa applications other than internet or pre-10 September 2016 oral applications, as contained in the pre-18 April 2015 version of paragraph 1128(3)(a).

Pre 18 April 2015 applications

From 1 July 2012 until 17 April 2015, applications for Resident Return (Class BB) visas could be made as internet applications, which are taken to be made in Australia for the reasons outlined below regardless of the location of the applicant.[77] Conversely a written (i.e. paper) application by an offshore applicant could only be made outside Australia.[78]

Applicable ground of review

Applications from offshore applicants may be reviewable under s.338(6) or s.338(7A).

Applicant offshore, application made offshore – s.338(6)

A decision to refuse a visa is reviewable under s.338(6) of the Act if the visa could not be granted while the non-citizen is in the migration zone. A Return (Residence)(Class BB) visa could not be granted while the non-citizen is in the migration zone if:

- the applicant is physically outside Australia at the time the visa application is made; and

[73] Section 8 of Part 2 of IMMI 17/031, table item 1. For the applicable instrument see the 'RRVApp' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes.
[74] Items 1128(3)(a) and (aa) were repealed and substituted by Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No. 34) with effect from 18 April 2015.
[75] Explanatory Statement to SLI 2015, No.34, pp 21-22.
[76] Explanatory Statement to SLI 2015, No.34, p.9 'Overview of the Legislative Instrument – Schedule 6'.
[77] Item 1128(3)(b) as amended by SLI 2012, No.106 for applications made on or after 1 July 2012 and before 18 April 2015. In the Explanatory Statement to SLI 2012, No.106, the purpose of the amendment was given as 'to allow applicants who are outside Australia, as well as those in Australia but not in immigration clearance, to lodge an internet application for a Class BB visa'. The related amendment to cl.155.412 was described as 'consequential to the amendment made to 1128(3)(aa) which allows people outside Australia to lodge an internet application for a Class BB visa'.
[78] Item 1128(3)(a)(ii) as in force immediately prior to 18 April 2015. It provided that, for an application that is not an internet or oral application, an applicant must be in Australia to make an application in Australia.

- the visa application is made *outside* Australia.[79]

Section 338(6) would apply if the offshore applicant has made a paper application at an offshore location.

In these circumstances, an Australian citizen or an Australian permanent resident who is a parent, spouse, de facto partner, child, brother or sister of the visa applicant has standing to apply for review.[80] The review application must be made within 70 days after the notification of the primary decision is received by the visa applicant.[81]

Applicant offshore, application made onshore (internet application) – s.338(7A)
A decision to refuse a visa is reviewable under s.338(7A) of the Act if the application was made when the visa applicant was outside the migration zone and the visa could be granted while the visa applicant is either in or outside the migration zone. A Return (Residence)(Class BB) visa would only be reviewable under this provision if:

- the visa application was made on or after 1 July 2012;[82]
- the applicant was physically *outside* Australia at the time the visa application was made; and
- the visa application was made, or taken to be made *inside* Australia.

Persons who are outside Australia who make an internet application are taken to have made the application inside Australia (see discussion below).

The current instrument indicates that a paper application may not validly be made in Australia where the applicant is outside Australia.[83]

If section 338(7A) applies, the visa applicant has standing to apply for review and the application must be lodged within 21 days after the notification of the primary decision is received.[84] While the applicant must be outside Australia at the time of making the visa application, he or she must be in Australia both at the time of the primary decision is made and at the time the review application is lodged.[85]

How does the Tribunal determine whether a decision is reviewable under cl.338(6) or (7A)?

Whether a decision is reviewable under s.338(6) or (7A) depends on where the visa application is made. From 1 July 2012, an internet application by an offshore applicant is taken to be made in Australia, whereas a written (i.e. paper) application is made in the location at which it is physically received. One of the requirements for standing under s.338(6) is that the visa is a visa that could not be granted while the applicant is in the migration zone. In contrast, s.338(7A) requires that the visa is one that could be granted while the applicant is either inside or outside Australia. Whether a Class BB

[79] cl.155.411, cl.157.411.
[80] s.347(2)(c)
[81] r.4.10(1)(c).
[82] As a consequence of amendments to cl.155.412 and cl.157.412 by SLI 2012, No.106. The amended cl.155.412 and cl.157.412 provides that if the application is made in Australia, the applicant may be in or outside Australia, but not in immigration clearance, at time of grant.
[83] Section 8 of Part 2 of IMMI 17/031, table item 1. Note that although a previous instrument IMMI 16/042 indicated that an application that is not an oral or internet application (i.e. a paper application) may be made in or outside Australia, a valid paper application was not able to be made in Australia where the applicant was outside Australia due to the operation of item 1128(3)(aa) - see the discussion above in relation to the interpretation of that provision.
[84] s.347(2)(a) and r.4.10(1)(a).
[85] s.347(3A).

visa can be granted while the applicant is in Australia is set out in the 'Circumstances applicable to grant' in cl.155.411 and 155.412 and cl.157.411 and 157.412.

- Under cl.155.412/cl.157.412, *if the application is made in Australia*, the applicant may be in or outside Australia, but not in immigration clearance, at the time of grant. Although the applicant must be outside Australia when making the visa application for both s.338(6) and (7A), because an internet application is taken to be made in Australia regardless of the applicant's physical location, the visa can be granted when the applicant is in or outside Australia at the time of grant, thus satisfying the requirement in s.338(7A)(b). Conversely, this will also mean that an essential requirement for standing under s.338(6)(a) – that the visa could not granted while the applicant is in Australia – cannot be satisfied.
- In contrast, under cl.155.411/cl.157.411, if the application is made outside Australia, the applicant must be outside Australia at the time of grant. If the visa application was made offshore in writing (i.e. paper application), the requirement in s.338(6)(a), that the visa is one that could not be granted while the applicant is in the migration zone, will be satisfied. Conversely, an essential requirement for standing under s.338(7A)(b) – i.e. that the visa could be granted when the applicant is either in or outside Australia – cannot be satisfied.

The effect of this is that the grounds of jurisdiction for applicants under s.338(6) and (7A) are mutually exclusive. Thus, where an applicant is offshore, identifying whether the visa application was made via the internet or via a written paper application will be critical in determining the type of Part 5-reviewable decision, and the associated jurisdictional requirements.

Why is an internet application for a Resident Return visa taken to be made in Australia?

An internet application for a Class BB is taken to be made in Australia, regardless of the physical location of the visa applicant.

This is because:

- an internet visa application is made in Australia, as it is received at an office of Immigration in Australia. This is so regardless of the location of the visa applicant at the time it is sent. Section 14B(1) of the *Electronic Transactions Act 1999*, provides that for the purposes of a law of the Commonwealth, unless otherwise agreed an electronic communication is taken to have been received at the place where the addressee has its place of business. It is not until a visa application is received by the Department, in the sense of it taking physical possession of it, that it can be said to have been 'made'.[86] If an application is not made until it is received by the Department, then by operation of s.14B, unless otherwise agreed by the parties, an internet application is made when it is taken to have been received at the relevant office of Immigration *in Australia*.
- Regulation 2.10C, which specifies the time an application is made, provides that Internet applications are taken to have been made at the time corresponding to the time at which the internet application is made in Australia (e.g. EDST), indicating that such applications are considered as having been made in Australia.
- Departmental policy also notes that 'an Internet application is made in Australia unless

[86] *Mohammed v MIBP* [2014] FCCA 139 (Judge Driver, 31 January 2014) at [29].

the Regulations expressly prescribe otherwise'.[87]

Combined applications

Note that applicants may only combine their review applications in limited circumstances. For visa applications made on or after 1 July 2012, applications may be combined where the visa applications have been combined in a way permitted by r.2.08 (new born child); and r.2.08A (additional family members).[88] For visa applications made prior to 1 July 2012, an applicant who is included in the passport of another Class BB visa applicant can validly combine their application at the same time and place under item 1128(3)(c) of Schedule 1 to the Regulations.[89]

Relevant case law

Cirillo v MIBP [2015] FCCA 2137	Summary
Paduano v MIMIA (2005) 143 FCR 204	Summary
Mohammed v MIBP [2014] FCCA 139	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 1999 (No.4)	SR 1999, No.68
Migration Amendment Regulations 2001 (No.5)	SR 2001, No.162
Migration Amendment Regulations 2002 (No.2)	SR 2002, No.86
Migration Amendment Regulations 2004 (No.2)	SR 2004, No.93
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134
Migration Amendment Regulations 2011 (No.2)	SLI 2011, No. 33
Migration Legislation Amendment Regulation 2012 (No.3)	SLI 2012, No.106
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34
Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016	F2016L01390
Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (NB: Disallowed (and repealed) from 17:56 5 December 2017)	F2017L01425

[87] PAM3 - GenGuideA - All visas - Visa application procedures - Internet applications – 'Where' is an internet application made (re-issue date 1/7/2016).
[88] r.4.12.
[89] For visa applications made on or after 1 July 2012, item 1128(3)(c) was substituted by SLI 2012, No.106. This removed the ability of a person to lodge a combined application where they are included in the passport of another Class BB visa applicant. See Chapter 4 of the Procedural Law Guide for further information on adding family members to the visa application.

Available decision templates

There is one relevant template specific to Subclass 155 visa refusal decisions:

- **Subclass 155 general -** this template is suitable for visa applications made on or after 1 July 1999. This is a generic template and does not focus on any single issue. There are two versions available, one for onshore applicants and one for offshore applicants.

A sample of the template can be viewed on the Intranet.

There is no decision template specific to the Subclass 157 visa class. It is recommended that Members use the Generic decision template in these cases.

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Subclass 417 – Working Holiday Visa

CONTENTS

Overview

The Working Holiday (Temporary) (Class TZ) visa class contains only one subclass, being the Subclass 417 (Working Holiday) visa. The visa allows young people (18 to 30 or 35 years old)[1] from specified countries to have an extended holiday supplemented by short term employment. A person can not hold more than two Working Holiday visas in their lifetime.

The provisions enabling a person to apply for and be granted a second working holiday visa were introduced in relation to visa applications made on or after 1 November 2005.[2] Prior to this amendment, it was a time of application criterion that the applicant had not previously entered Australia as the holder of a working holiday visa and all applications for working holiday visas were required to be made offshore.[3] The Tribunal only has jurisdiction in relation to onshore applications for working holiday visas and only second working holiday visas can be applied for onshore. Therefore, this commentary focuses on applications for second working holiday visas made on or after 1 November 2005.

The second working holiday visa is designed to encourage visa holders to work in industries in regional Australia where there are significant labour shortages. For visa applications made from 1 November 2005 to 30 June 2008, persons who undertook 3 months 'seasonal work' in regional Australia while holding a first working holiday visa, may have been eligible to apply for a second working holiday visa.[4] For visa applications made on or after 1 July 2008 the requirements for a second working holiday visa changed from having carried out 3 months 'seasonal work' to 3 months 'specified work' which was expanded to include construction work and to more comprehensively cover work in the mining sector.[5]

The criteria and requirements for making a valid application for a Subclass 417 visa are found in item 1225 in Schedule 1 to the Migration Regulations 1994 (the Regulations). The criteria for the grant of the visa are set out in Part 417 in Schedule 2 to the Regulations.

Subclass 417 is a temporary visa, permitting holders who are outside Australia when the visa is granted to travel to Australia within 12 months of the grant and remain in, leave and re-enter Australia on multiple occasions for 12 months from the date of first entry. If the applicant was in Australia when their second working holiday visa was granted and held a first working holiday visa when they made their second working holiday visa application, the visa will allow them to stay in, leave and re-enter Australia on multiple occasions for a total of 24 months from the date of first entry into Australia on their first working holiday visa. If the applicant was in Australia but not the holder of a first working holiday visa, the second working holiday visa will allow the applicant to stay in, leave and re-enter Australia on multiple occasions for 12 months from the date of the second visa grant.

The Subclass 417 Working Holiday visa is significantly different to the Subclass 462 Work and Holiday visa which is targeted at young professionals from a more limited range of countries.[6] Subclass 462 visa refusals are rarely reviewable by the Tribunal.[7]

[1] The maximum age increased from 30 to 35 (or a younger age if that age is specified for the applicant's passport type) from 1 July 2017: cl.417.211(2)(b) as amended by the Migration Legislation Amendment (2017 Measures No.3) Regulations 2017 (F2017L00816).
[2] Migration Amendment Regulations 2005 (No.9) (SLI 2005, No.240), Schedule 6, r.2, r.8.
[3] cl.417.211 as at 31 October 2005.
[4] SLI 2005, No.240, Schedule 6, r.2, r.8.
[5] Migration Legislation Amendment Regulations 2008 (No.1) (SLI 2008, No.91), Schedule 1, r.3.
[6] 1224A(3)(a). For the applicable instrument setting out the countries with which Australia has arrangements for Work and Holiday visas for applications made on or after 18 April 2015, see the WorkHolApp tab in the MRD Legal Services

Requirements for Making a Valid Visa Application

The requirements for a valid application for the Subclass 417 (Working Holiday) visa are set out in item 1225 of Schedule 1 to the Regulations. Different requirements apply depending upon whether the applicant has previously held a working holiday visa.

For visa applications made prior to 22 March 2014, 'Working holiday visa' is defined to include not only a Working Holiday (Class TZ) visa, but also:

- a visa issued under the Migration (1989) Regulations that contained an endorsement describing the visa a as working holiday visa (code T18 or code 417)
- a class 417 (working holiday) visa and entry permit within the meaning of the Migration (1993) Regulations;
- a visa granted before 19 December 1989 in accordance with the law in force at the time for the same purposes as those listed above.[8]

Form and Fee requirements

An application for a Subclass 417 visa is validly made if:

- it is made on the prescribed form;[9]
- the visa application charge is met;[10] and
- it is made at the prescribed place and in the prescribed manner.[11] In this regard, there are different lodgement requirements for paper applications depending upon whether the applicant is, or has previously been in Australia as the holder of a working holiday visa.[12]

Commentary: Register of Instruments - Miscellaneous and other visa classes. For applications made before this date, see the 'sc462-EdQual' tab in the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes.

[7] Only visa applications validly made in the migration zone are reviewable under s.338(2). Applications for Subclass 462 visas can only be made in Australia by holders of Subclass 462 visas: Item 1224A(3). To make a valid application, a person who holds a Subclass 462 visa must declare that he or she has carried out 'specified Subclass 462 work' for a total period of at least 3 months while holding a subclass 462: Item 1224A(3)(c)(iii) as amended by Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696), which applies to visa applications made on or after 19 November 2016. For the applicable instrument see the '462Work' tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes. It appears the relevant instrument is that in force at the time of application. For information about requirements for Subclass 462 visa applications before 19 November 2016, contact MRD Legal Services.

[8] Item 1225(5). This provision was repealed on 22 March 2014 by Migration Amendment (Redundant and Other Provisions) Regulation 2014 SLI 2014, No. 30, Schedule 1, part 1 item [2]. The amendment applies to applications made on or after 22 March 2014.

[9] Item 1225(1). For applications made on or after 18 April 2015, the approved form is that specified in an instrument under r.2.07(5): Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34). For the applicable instrument see the WorkHolApp tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes. For applications made before that date, the approved form was specified in Item 1225(1) itself, namely either form 1150 (paper applications) or form 1150E (Internet applications).

[10] Item 1225(2).

[11] Item 1225(3). For applications made on or after 18 April 2015, the application must be made as specified in a legislative instrument for 1225(3) under r.2.07(5): see Item 1225(3) inserted by SLI 2015, No.34. For the applicable instrument see the WorkHolApp tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes. For applications made between 27 October 2008 and 18 April 2015, for a person seeking a second 'working holiday visa' (visa applications made prior to 22 March 2014) or 'Subclass 417 visa' (visa applications made on or after 22 March 2014), the application must be posted to a specified address or faxed to a specified number: item 1225(3)(a) as amended by Migration Amendment Regulations 2008 (No.7) (SLI 2008, No.205). Applications lodged prior to 27 October 2008 could not be lodged by fax. For, the relevant instrument specifying the postal address see the 'sc417-POBox' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes. For a person who has not previously held a 'working holiday visa' (visa applications made prior to 22 March 2014) or 'Subclass 417 visa' (visa applications made on or after 22 March 2014), the application must be made either in any foreign country (if the applicant is a member of a specified class of persons for that purpose); or in a specified foreign country (if the applicant is a member of specified class persons for that purpose: item 1225(3)(b). Since 15 May 2009 nationals of all countries with which Australia has a reciprocal Working Holiday arrangement can lodge an application in any country: See the 'sc417–Passport' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes for the relevant specified classes of persons.

[12] See item 1225(3).

Item 1225 contains no provisions for an applicant to combine the application with that of a member of a family unit.

Additional requirements for applicants for a first working holiday visa

Applicants for a first working holiday visa:

- must be outside Australia when they lodge the application;[13]
- must hold a working holiday eligible passport (as specified in the relevant legislative instrument);[14] and
- *for applications made on or after 21 August 2010* - the applicant must not have previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa.[15]

Additional requirements for applicants for a second working holiday visa

If the application is for a second working holiday visa (that is, the applicant is or has previously been in Australia as the holder of a working holiday visa[16] or Subclass 417 visa):

- the applicant must not be in immigration clearance;[17]
- the application must be accompanied by a declaration that the applicant has carried out 'specified work' in regional Australia for a total period of at least 3 months as the holder of that visa.[18] 'Specified work' and 'regional Australia' are specified in an instrument in writing.[19]
- the applicant has previously held not more than 1 working holiday visa (for applications made prior to 22 March 2014) or a Subclass 417 visa (for applications made on or after 22 March 2014).[20]
- the applicant must hold a working holiday eligible passport (as specified in the relevant legislative instrument);[21]
- if the applicant is in Australia at time of application, the applicant must hold a substantive visa or have held a substantive visa at any time in the period of 28 days immediately before making an application;[22] and
- *for applications made on or after 21 August 2010* - the applicant must not have previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa.[23]

[13] Item 1225(3A)(a).
[14] Item 1225(3A)(b). For a list of eligible passports, see the 'sc417 – Passport' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes.
[15] Item 1225(3C), inserted by Migration Amendment Regulations 2010 (No.7) (SLI 2010, No.232) applying to visa applications made on or after 21 August 2010. According to the Explanatory Statement, the purpose of this amendment is to prevent a person who has previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa from applying for a Subclass 417 (Working Holiday) visa, and thus ensure that the applicants cannot access both visas if they hold passports issued by more than one country.
[16] Note the definition of 'working holiday visa' was repealed with effect from 22 March 2014, by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) applying to applications made on or after 22 March 2014.
[17] Item 1225(3B). In addition, for applications made before 18 April 2015, the application must not be made in immigration clearance: Item 1225(3B) (a) and (b). For applications made after this date the requirement that the application must not be made in immigration clearance has been removed: see SLI 2015, No.34.
[18] Item 1225(3B)(c). 'Specified work' was substituted for 'seasonal work' by amending regulations which commenced on 1 July 2008: Migration Legislation Amendment Regulations 2008 (No.1) (SLI 2008, No.91). 'Seasonal work' was similarly defined as work of a kind specified by the Minister in a Gazette notice but had a narrower definition than 'specified work'.
[19] Item 1225(5). For the relevant instrument see the '417Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes. It appears the relevant instrument is that in force at the time of application.
[20] Item 1225(3B)(d). The definition of 'working holiday visa' was repealed with effect from 22 March 2014, by SLI 2014, No.30.The amendment applies to applications made on or after 22 March 2014.
[21] Item 1225(3B)(e).
[22] Item 1225(3B)(f).
[23] Item 1225(3C), inserted by Migration Amendment Regulations 2010 (No.7) (SLI 2010, No.232), Schedule 1, item [1]. The amendment applies only to visa applications made on or after 21 August 2010: r.3(2). According to the Explanatory Statement, the purpose of this amendment is to prevent a person who has previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa from applying or a Subclass 417 (Working Holiday) visa, and thus ensure that the applicants cannot access both visas if they hold passports issued by more than one country.

As noted above, if the applicant has already held two working holiday visas in Australia, he or she cannot make a valid application for the visa. Technical amendments to the Regulations applying in relation to applications for a visa made on or after 27 October 2008[24] clarified that a person cannot *hold* more than two Working Holiday visas in Australia. Prior to this, the Regulations referred to applicants who had 'not previously entered' Australia as the holder of a Working Holiday visa, but this was amended to rectify an unintended consequence whereby an applicant who was granted their second Working Holiday visa in Australia and did not leave and re-enter Australia as the holder of that visa, may have been eligible for a further Working Holiday visa.[25].

Visa Criteria

All applicants for a Subclass 417 visa must meet the primary criteria at time of application and time of decision. There are no secondary criteria.[26]

Time of Application Criteria

At the time of application, cl.417.211 requires that:

- for applications made before 1 July 2017, the applicant has turned 18 and has not turned 31, or, for applications made from 1 July 2017, the applicant has turned 18 and is no more than 35 years of age, or a younger age if that age is specified for the kind of passport that the applicant holds;[27]
- the applicant holds a working holiday eligible passport (as specified in the relevant legislative instrument);[28]
- the Minister is satisfied that the applicant seeks to enter and remain in Australia as a genuine visitor whose principal purpose is to spend a holiday in Australia;[29]
- the Minister is satisfied that the applicant has sufficient money for the fare to the applicant's intended overseas destination on leaving Australia and personal support for the purposes of a working holiday;[30]
- the Minister is satisfied that the applicant has a reasonable prospect of obtaining employment in Australia;[31]
- the Minister is satisfied that the applicant will not be accompanied by dependent children during his or her stay in Australia;[32] and
- if the applicant has previously been in Australia as the holder of a Working Holiday visa (applications lodged prior to 22 March 2014) or a Subclass 417 visa (applications lodged on or after 22 March 2014),[33] the Minister is satisfied that the applicant has carried out specified work[34] in regional Australia[35] for a total period of at least 3 months as the holder of that visa.[36]

[24] Migration Amendment Regulations 2008 (No.7) (SLI 2008, No.205), Schedule 2, r.4.
[25] SLI 2008, No.205, Schedule 2 and Explanatory Statement.
[26] cl.417.3.
[27] cl.417.211(2)(b). This provision was amended by Item 1, Schedule 9 of 2017L00816 for visa applications made from 1 July 2017. For the instrument setting out countries for which a younger age limit is specified, see the WorkHolApp tab in the MRD Legal Services Register of Instruments - Miscellaneous and other visa classes.
[28] cl.417.211(2)(c) This requirement is in cl.417.211(2)(a) for applications made from 1 July 2017 due amendments made by Item 1, Schedule 9 of 2017L00816. For the relevant instrument see the WorkHolApp tab in the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes.
[29] cl.417.211(4)(a).
[30] cl.417.211(4)(b).
[31] cl.417.211(4)(c).
[32] cl.417.211(4)(d). NB this provision was inserted on 27 October 2008 by SLI 2008, No.205. These amending regulations also omitted cl.417.211(2)(a) which previously required that the applicant had no dependent children.
[33] Note the definition of 'working holiday visa' was repealed with effect from 22 March 2014, by SLI 2014, No.30, Schedule 1, part 1 item [244].The amendment applies to applications made on or after 22 March 2014.
[34] For applications made prior to 1 July 2008, the regulations referred to 'seasonal work' rather than 'specified work' and an earlier gazette notice applied. See the '417 Work&RegAust' tab of the MRD Legal Services Register of Instruments

In addition, for applications made from 1 December 2015, the applicant must be remunerated for the work in accordance with relevant Australian legislation and awards.[37]

Time of Decision Criteria

At the time of decision, cl.417.221 requires that:

- the applicant continues to meet the time of application criteria except for the age criterion;[38]
- the applicant satisfies certain public interest and special return criteria;[39]
- the Minister is satisfied that the applicant intends to comply with any conditions subject to which the visa is granted;[40]
- approval of the application would not exceed any cap on Working Holiday visas or classes of visa including the Working Holiday visa;[41] and
- Foreign Affairs (formerly AusAID) students meet other special requirements,[42] unless the Minister is satisfied that there are certain reasons for waiving the requirements.[43]

For applications lodged prior to 22 March 2014, the time of decision criterion cl.417.222 requires that applicants for a second Working Holiday visa have complied substantially with the conditions that applied to any visa held by the applicant and has not previously held more than 1 Working Holiday visa in Australia.[44]

For applications lodged on or after 22 March 2014, cl.417.222, requires that applicants for a second Subclass 417 visa have complied substantially with the conditions that applied to any visa held by the applicant and has not previously held more than one Subclass 417 visa in Australia.[45]

The application can be lodged either in or outside of Australia; however if the applicant was outside Australia when the application was lodged, he or she must be outside Australia when the visa is granted. If the applicant was in Australia when the visa application was lodged, he or she must be in Australia when the visa is granted.[46]

Miscellaneous and Other Visa Classes for a list of the 'specified work'. It appears the relevant instrument is that in force at the time of application.

[35] Areas having postcodes specified in the relevant Instrument are taken to be 'regional Australia' for the purposes of the Working Holiday visa. See '417 Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes for a list of the prescribed areas. It appears the relevant instrument is that in force at the time of application.

[36] cl.417.211(5). Note that where the relevant work was not undertaken in a full-time capacity, Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015 (SLI 2015, No.184) codified in cl.417.211(5)(b) departmental practice to count periods of equivalent part time work totalling 3 months as sufficient to meet this requirement.

[37] cl.417.211(5)(c) applies to visa applications from 1 December 2015 but does not apply in relation to work carried out before that date: SLI 2015, No.184.

[38] cl.417.221(2)(a). Note that cl.417.221(2)(a) was amended by SLI 2010, No.232, Schedule 1, Item [2]. This amendment is a technical amendment to remove the reference to cl.417.211(2)(a) which is a redundant provision removed by SLI 2008, No.205.The amendment applies to visa applications made on or after 21 August 2010: SLI 2010, No.232, r.3(2). Clause 417.221(2)(a) was again amended from 1 July 2017 to reinsert a reference to cl.417.211(2)(a), which, from this date, contains the requirement for applicants to hold a working holiday eligible passport: Item 2, Schedule 9, F2017L00816.

[39] cl.417.221(2)(b) and cl.417.221(3). Note that PIC 4020 was inserted into cl.417.221(2)(b) by Migration Amendment (2014 Measures No.1) Regulation 2014, SLI 2014, No.32, schedule 3 item [2]. This applies to all visa applications made but not finally determined as at 22 March 2014, and for applications made on or after that date,

[40] cl.417.221(4).

[41] cl.417.221(5). There are currently no caps in place.

[42] cl.417.221(6). To meet this requirement, the applicant must be a Foreign Affairs student or a Foreign Affairs recipient, and have the support of the Foreign Minister for the grant of the visa. Prior to 1 July 2014, cl.417.221(6) referred to AusAID Students/Recipients, and the AusAID Minister respectively. Amendments were made to cl.417.221(6) to reflect AusAID ceasing as an agency in 2013 through Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No. 82) for applications made from 1 July 2014.

[43] The Minister may waive the requirements of subclause (6) if the Minister is satisfied that, in the particular case, waiver is justified by compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

[44] cl.417.222.

[45] cl.417.222 amended by SLI 2014, No.30, Schedule 1, part 1 item [245].The amendment applies to applications made on or after 22 March 2014.

[46] cl.417.412

Key Issues

There is currently no case law in relation to this visa class and its requirements. As only decisions to refuse *second* Working Holiday visas are reviewable by the Tribunal, reviews of Subclass 417 visa refusals tend to focus on the requirement for visa applicants to have carried out 3 months specified work.[47] The Tribunal also commonly conducts reviews of s.116 cancellations of Subclass 417 visas for breach of work limitation or as circumstances permitting the grant of the visa no longer exist. Discussion of the key issues is set out below.

Not accompanied by dependent children

In the case of applications lodged on, or after, 27 October 2008, it is a criterion for the grant of the visa that the applicant is not accompanied by dependent children during their stay.[48] 'Dependent child' is defined in r.1.03. This is a time of application criterion which the applicant must continue to satisfy at time of decision.[49] This does not exclude pregnant women from applying, however, if they give birth to a child during the visa period they may come within the cancellation provisions in s.116(1)(a).[50]

For applications made prior to 27 October 2008, the Regulations require that applicants must not have dependent children. Under r.1.03 an applicant with a natural or adopted child or a step-child being a child who is under 18 and is not married or engaged to be married, has a dependent child. The applicant would therefore be ineligible for the visa regardless of whether they have contact or custody or provide financial support to the child. Given the age requirements for this visa subclass, it is unlikely that an applicant would have a child aged over 18. If, however, an applicant did have a natural or adopted child or a step-child who was over 18, the child would need to meet the definition of 'dependent' in r.1.05A or be incapacitated for work due to the total or partial loss of the child's bodily or mental functions to be a dependent child under r.1.03. See the MRD Legal Services Commentary Dependent and dependent child for further discussion.

Genuine Visitor

The Regulations require that at the time of application and time of decision the applicant seeks to enter and remain in Australia as a genuine visitor whose principal purpose is to spend a holiday in Australia. The decision-maker must be satisfied that the visa applicant will not work or study beyond what is permitted by the visa and intends to depart within the period of stay of the visa granted. Policy guidance suggests that applicants would only fail to meet this requirement if there was strong evidence that they would breach the conditions of the visa (including the condition[51] to work with any employer for no more than 6 months).[52]

Cases which have considered the visitor visa criteria in relation to purpose of visit and genuine visit may be relevant, however, the criteria for visitor visas are worded differently and this would need to be taken into account if applying the case law.[53] In *MIMA v Saravanan*, Marshall J held that the "purpose" of the visitor visa application should be determined by reference to what the applicant intended to do

[47] For applications made prior to 1 July 2008, the Regulations referred to 'seasonal work' rather than 'specified work'. The amendment was introduced by Migration Legislation Amendment Regulations 2008 (No. 1) (SLI 2008, No 91).
[48] cl.417.211(4)(d). NB this provision was inserted on 27 October 2008 by SLI 2008, No.205. These amending regulations also omitted cl.417.211(2)(a) which previously required that the applicant had no dependent children.
[49] cl.417.211(4)(d) and cl.417.221(2)(a).
[50] Policy - Sch2Visa417 – Working Holiday - Not to be accompanied by dependent children (re-issue date 118/11/2017).
[51] Visa condition 8547.
[52] Policy - Sch2Visa417 – Working Holiday - Genuine Visitor (re-issue date 18/112017).
[53] See MRD Legal Services Commentary: Subclass 676 and 686 and Subclass 679 for further information.

during the duration of the requested visit.[54] Therefore, a person who intends to extend their stay in Australia after their working holiday may still be considered to be a genuine visitor for the purpose of a Subclass 417 visa application.[55] However, the criteria being considered in *Saravanan* related to a purpose 'other than business or medical treatment' whereas for a Subclass 417 visa the Tribunal would need to be satisfied that the applicant's 'principal purpose is to spend a holiday in Australia'.

Sufficient Money

The Regulations require that at the time of application and time of decision the applicant has sufficient money for the fare to the applicant's intended overseas destination on leaving Australia; and personal support for the purposes of a working holiday.[56] Departmental guidelines state that offshore applicants should only be required to demonstrate they have sufficient money for personal support for the initial stage of their working holiday (3 months) as they are able to supplement their funds through short term employment in Australia. The amount of money needed to be considered sufficient will vary but the Department generally regards AUD$5000, in addition to money for return airfare, to be sufficient to cover the initial 3 month stay of a 12 month working holiday.[57] The Regulations require the applicant to have sufficient money for personal support for the purposes of a working holiday, thus three months appears to be an arbitrary figure not required by the Regulations. Regard would need to be had to all the applicant's circumstances, including his or her ability to find and undertake short-term employment.

Departmental policy also adopts a liberal approach in relation to onshore applicants by not requiring them to provide evidence of sufficient money for a fare to leave Australia and regarding them as having sufficient money for personal support unless the Department has received adverse information suggesting otherwise.[58]

Specified Work

For applications lodged on or after 1 July 2008, an applicant who is applying for a second Working Holiday visa must have carried out at least three months specified work[59] in regional Australia while holding a Working Holiday visa. This is a time of application criterion which must continue to be satisfied at time of decision.[60] 'Specified Work' and 'Regional Australia' are defined by reference to a written instrument.[61] The applicable instrument appears to be that in force at the time of application, rather than that in force at the time the applicant held the previous Working Holiday visa, as the obligation to declare that specified work has been undertaken in regional Australia is not invoked until the time of application,[62] and there is nothing in the terms of the instruments which would give them effect prior to this time. This interpretation would also accord with the purpose of the second Working Holiday visa program to help alleviate labour shortages in regional areas.[63]

[54] *MIMA v Saravanan* (2002) 116 FCR 437 at [39].
[55] Policy - Sch2 Visa417 – Working Holiday – Genuine Visitor (re-issue date 18/11/2017).
[56] cl.417.211(4)(b) and cl.417.221(2).
[57] Policy - Sch2Visa417 - Working Holiday – Money for personal support (re-issue date 118/11/2017).
[58] Policy - Sch2Visa417 – Working Holiday – Money for personal support, see also Fare to leave Australia (re-issue date 18/11/2017).
[59] For applications made prior to 1 July 2008, the Regulations referred to 'seasonal work' rather than 'specified work' and an earlier legislative instrument applies. The amendment was introduced by SLI 2008, No.91. See the 'sc 417 - 417 Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes for the prescribed list of 'specified work'.
[60] cl.417.211(5) and cl.417.221(2)(a).
[61] Item 1225(5) Schedule 1 to the Regulations and cl.417.111. See the '417 Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes for the relevant instrument.
[62] Item 1225(3B) of Schedule 1 to the Regulations.
[63] Policy - Sch 2Visa 417 – Working Holiday – About the Working Holiday Visa Program (re-issue date 18/11/2017).

The types of work specified include plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction as well as specific subsets of these types of work. In determining whether the work performed by an applicant falls within one of the categories of 'specified work', particularly for broader categories relating to construction and mining, Department guidelines state that regard should be had to the Australian New Zealand Standard Industrial Classification (ANZSIC).[64] The 2006 ANZSIC can be found at http://www.abs.gov.au. However, it is important to note that while the ANZSIC may provide useful guidance about 'specified work' it does not form part of the legislative requirements. Accordingly, the Tribunal should not consider itself bound by that document but rather ensure that it applies the test set out in the Regulations.

For applications lodged prior to 1 July 2008 the Regulations refer to 'seasonal work' instead of 'specified work'. If an application was made before this date the Tribunal would need to refer to this definition and the Legislative Instrument in force at the time of application.[65] In general, 'seasonal work' was defined more narrowly and the change to specified work was aimed at expanding the work covered to include construction work and some work in the mining industry which was not previously covered.

Meaning of Work

This definition of 'work' in r.1.03 of the Regulations states that work means an activity that, in Australia, normally attracts remuneration. Whilst the construction of that definition is a question of law, the question of whether a visa holder's activities fall within the definition is a question of fact to be determined by the Minister (or the Tribunal on review).[66] The definition provided in r.1.03 may include an activity for which an individual visa holder is not remunerated. It is sufficient that it 'be an activity that normally attracts remuneration'.[67] For further information on the meaning of 'work' generally please refer to MRD Legal Services Commentary on Visa Conditions 8104 and 8105 (work restrictions).

A total period of at least 3 months

The expression, '3 months' is not defined in the Regulations. However Departmental guidelines suggest that 3 months is taken to mean 88 days which is the shortest possible combination of months in a calendar year. Further, these guidelines specify that the work should be the equivalent of full time work for that employer, that region and that industry. For example, according to Departmental policy if standard practise in the industry is 2 weeks on and 2 weeks off, the applicant would be considered to have worked for 4 weeks in such a situation.[68] A question arises as to whether part time work would be sufficient to meet this requirement and is answered in some way by reference to the date of application.

Visa applications made prior to 1 December 2015

Clause 417.211 does not on its face require the work to be done on a full time basis. Further, the instrument for 'specified work' refers only to 'any type of work identified in the list below' and does not

[64] Policy - Sch2Visa417 – Working Holiday – Types of specified work (re-issue date 18/11/2017).
[65] SLI 2008, No.91, r.3 and Schedule 1. See the 'sc 417 - 417 Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes.
[66] *Al Ferdous v MIAC* [2011] FCA 1070 (Stone J, 20 September 2011) at [25], where her Honour observed that 'involved in that finding [that the applicant's activity was capable of being work within the meaning of the definition and was in fact work] is a conclusion of law in the construction of the definition and a question of fact in finding that the appellant's actions were work within the definition as construed'.
[67] *Braun v MILGEA* (1991) 33 FCR 152 at 156 (French J, 10 December 1991). *Braun* considered the definition in then r.2, in which work was also defined 'as an activity that, in Australia, normally attracts remuneration'.
[68] Policy - Sch2 Visa417 – Working Holiday - Meaning of 3 months (re-issue date 18/11/2017).

explicitly require the work to be conducted on a full time basis.[69] Departmental guidelines in effect immediately before 1 December 2015, largely identical to the current guidelines, indicated that the work had to be the equivalent of full time work in the relevant industry, however, this appears to go beyond the requirements of the legislation.[70] Accordingly, decision makers should be careful to ensure that they apply the test set out in the Regulations.

These Departmental guidelines also drew a distinction between the counting of full-time and part-time or casual work which similarly did not appear justified by the wording of the provision. The policy stated that applicants who were employed full time may count weekends and days where they were paid but unable to work due to illness or climatic conditions, however, if the applicant worked part-time or casually they may only count the full days actually worked (not weekends) and could not count any time they were unable to work due to injury or climatic conditions towards the 3 month period. For example, under these Departmental guidelines, if the applicant works on a farm 3 days a week for 3 months and four days is considered full time work by the farm then weekends cannot be counted, so the applicant must work a total of 88 days.

The Department's guidelines thus appear to give a specific interpretation to the expression, '3 months', which was more restrictive and, therefore, inconsistent with the legislative requirement. An alternative approach would be to determine what the standard full time hours for the particular industry in which the applicant has been employed would be over 3 calendar months and compare that with the hours worked by the applicant.

These guidelines further indicated that the shortest period that can be counted towards the specified work requirement is 1 day of full time work for the particular industry. Therefore, if the applicant completes 88 days of specified work, but only works 5 hours a day and 5 hours is *not* considered a standard "full time" day, none of this work can be counted. This interpretation also appears to go beyond the terms of the provision and as such caution should be exercised before applying it.

The requirement to carry out 'at least 3 months' specified work refers to the cumulative period of work carried out by the applicant and the work need not be completed in a continuous block. It should be noted that specified work done while the holder of a visa other than a Working Holiday visa cannot be counted towards the 3 month period.

Visa applications made after 1 December 2015

These difficulties appear to have been overcome somewhat by legislative amendment for visa applications made from 1 December 2015. For applications made from this date, the total period of work carried out, whether on a full-time, part-time or casual basis, must be or be the equivalent of at least three months of full-time work.

Further, the applicant must have been remunerated for the work in accordance with relevant Australian legislation and awards.[71] The amendments reflect the earlier Departmental practice outlined above relating to assessing the 88 day 'specified work' requirement and address a trend of Subclass 417 visa holders accepting underpaid or non-paid work which was contributing to their exploitation.[72] The amendment does not, however, apply to work carried out before 1 December

[69] See the 'sc 417 - 417 Work&RegAust' tab of the MRD Legal Services Register of Instruments Miscellaneous and Other Visa Classes, specifically the instruments from IMMI 08/048 and subsequently contain this wording.
[70] PAM3: Sch2 - Visa417 – Working Holiday - Meaning of 3 months (compilation 21/11/15 – 30/11/2015).
[71] Schedule 5 to SLI 2015, No. 184.
[72] Explanatory Statement to SLI 2015, No. 184 at 8.

2015.[73] This ensures equity for those who have undertaken specified work before commencement of the amending regulation but apply for a second Subclass 417 visa after commencement.[74]

In assessing this requirement, Departmental policy guides decision makers to check the hourly rate of pay on the pay slips provided by the applicant against minimum wage rates.[75] It goes on to note that decision makers should apply "a relatively 'light touch' processing check rather than an exhaustive analysis of the applicant's pay rate history", but where an applicant clearly appears to have been underpaid, or not paid at all, a higher level of scrutiny may be warranted and referred to the Fair Work Ombudsman for investigation. The Tribunal may also be required to assess whether applicants covered by "piecework" agreements were remunerated according to the correct piecework rate. A piece rate is where an employee gets paid by the piece, that is, they are paid for the amount picked or packed etc. The Fair Work Ombudsman's website outlines the formula to calculate the piecework rate for a range of industries such as horticulture.

Visa Conditions

The current conditions state that:

- the holder must not be employed by any 1 employer for more than 6 months without the prior permission in writing of the Secretary (i.e. Secretary of the Department of Immigration) (Visa condition 8547);
- the holder must not engage in any studies or training in Australia for more than 4 months (Visa condition 8548). [76]

There are also discretionary conditions which may be imposed under cl.417.612 including 8106, 8107, 8301, 8303, 8501, 8502, 8503, 8516, 8522, 8525 and 8526.

The Tribunal may also be required to review cancellations of Subclass 417 visas under s.116 where these conditions have been breached.

Merits Review

A decision to refuse a Subclass 417 visa is reviewable under Part 5 of the Act if the visa applicant made the application while in the migration zone.[77] This means that only refusals of second Working Holiday visas will be reviewable. The visa applicant has standing[78] and the application for review must be lodged within 21 days after the notification is received by the visa applicant.[79] The applicant is required to be in the migration zone at the time of the Tribunal application.[80]

[73] To the extent that the application relates to work carried out before 1 December 2015, new cl.417.211(5)(c) does not apply: item 4802 of Schedule 13 to the Regulations, as inserted by the amending Regulation.
[74] Explanatory Statement to SLI 2015, No. 184 at 9.
[75] Policy - Sch2Visa 417 - Working Holiday – Appropriate remuneration (re-issue date 18/11/2017). The guidelines note that the national minimum hourly wage (before tax) for 2015-2016 is AUD 17.29. This is AUD 656.90 for a 38 hour week. Casual employees also receive a casual loading of at least a 25% on this base rate. The national minimum wage is reviewed, and changes, every financial year. For ongoing case officer reference, pay rates are on the Fair Work Ombudsman's Pay calculator webpage.
[76] The current conditions apply in relation to an application for a visa made on or after 1 July 2006: Migration Amendment Regulations 2006 (No. 2) (SLI 2006, No.123) r.4 and Schedule 6. For applications made on or after 1 July 2005 and before 1 July 2006 the relevant visa conditions were 8108 and 8201: Migration Amendment Regulations 2005 (No.3) (SLI 2005, No.133) r.4 and Schedule 14.
[77] s.338(2).
[78] s.347(2)(a).
[79] r.4.10(1)(a).
[80] s.347(3).

Decisions to cancel Subclass 417 (Working Holiday) visas under s.109 or s.116 are also reviewable by the Tribunal. For further information see the MRD Legal Services Commentary: Cancellation under s109 or Cancellation under s.116.

Relevant Case Law

Al Ferdous v MIAC [2011] FCA 1070	
Braun v MILGEA (1991) 33 FCR 152	

Relevant Legislative Amendments

Title	Reference number
Migration Amendment Regulations 2005 (No.3)	SLI 2005, No.133
Migration Amendment Regulations 2005 (No.9)	SLI 2005, No.240
Migration Legislation Amendment Regulations 2008 (No.1)	SLI 2008, No.91
Migration Amendment Regulations 2008 (No.7)	SLI 2008, No.205
Migration Amendment Regulations 2010 (No.7)	SLI 2010, No.232
Migration Legislation Amendment Regulation 2012 (No. 5)	SLI 2012, No. 256
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.32
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No. 82
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34
Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015	SLI 2015, No.184
Migration Legislation Amendment (2017 Measures No.3) Regulations 2017	F2017L00816

Available Decision Templates

There is one Subclass 417 decision template:

- **Subclass 417 - General** - this template is suitable for reviews of decisions to refuse a Subclass 417 visa where the visa application was lodged on or after 27 October 2008.

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Substantial Compliance with Visa Conditions

CONTENTS

Overview

Certain visa criteria in the Migration Regulations 1994 (the Regulations) require that the applicant has complied substantially with the conditions of a previously or currently held visa.

For some visa criteria, such as cl.457.221, the 'complied substantially' requirement is a discrete requirement. For others it forms part of a broader assessment as, for example, in cl.600.211 where the question of whether the applicant has complied substantially with visa conditions is relevant to the broader question of whether an applicant genuinely intends to stay temporarily in Australia.

In addition to being a Schedule 2 visa requirement, the consideration also arises in the context of certain Schedule 3 criteria. Both cl.3003(e) and cl.3004(e), for example, require the decision maker to be satisfied that the applicant has complied substantially with the conditions that applied to their last visa (if any), including any subsequent bridging visa.

While some 'complied substantially' criteria will only arise where the applicant is in Australia at the time of application or assessment,[1] other criteria are not so limited.[2]

Prior to March 2014, it was a requirement for student visas that the applicant had complied substantially with visa conditions that applied to their last visa. While it has since been removed as a criterion for student visas, much of the case law derives from the student visa context and is relevant to the assessment of complied substantially requirements in other contexts.

'Complied substantially' criteria

The requirement to comply substantially with visa conditions

While a number of visa subclasses contain primary and secondary criteria requiring that the applicant has complied substantially with the visa conditions that applied to their last held visa(s), the wording, structure and precise requirements of each criterion varies across the subclasses.

Discrete requirement

For example, the complied substantially requirement in cl.457.221 of the Subclass 457 Temporary Work (Skilled) visa arises as a discrete requirement:

If the applicant is in Australia, the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant, and to any subsequent bridging visa.

In this context, the focus of the criterion is on the applicant's substantial compliance with the conditions attached to their last substantive visa and any subsequent bridging visas. It requires a retrospective assessment, identifying the relevant visa(s), the conditions (if any) that apply or applied to those visa(s) and the extent to which those conditions have been complied with.

This type of complied substantially requirement may be assessed by reference to the last of any substantive visa an applicant holds (or held) or it may apply only in relation to applicants who hold (or

[1] See cl.405.223; 410.221(6); 416.226; 457.221; and 461.225.
[2] See cl.417.222(a) which enlivens if the applicant is, or has previously been, in Australia as the holder of a Subclass 417 visa. Refer also to the broader complied substantially criteria in cl.400.213; 401.214; 402.214; 403.212; 420.214; 600.211; and 602.215.

held) specific visa classes and/or subclasses. For these more specific criteria, compliance with the conditions that attached to those particular visas is the only relevant consideration. Where an applicant does not hold (or has not held) a visa of the specified kind, the question of non-compliance with the conditions of any other type of visa would not be relevant to the assessment of the criterion.

Part of broader requirement

In other circumstances, the 'complied substantially' requirement may form part of a broader assessment of the applicant's circumstances.[3] For example, the Subclass 600 Visitor Visa requires consideration of the applicant's past compliance with visa conditions as part of an overall assessment of the genuineness of the applicant's intention to stay in Australia temporarily. Clause 600.211 relevantly provides:

> *The applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to:*
>
> *(a) whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject; and*
>
> *…*

Unlike with the discrete 'complied substantially' criteria, the assessment of the applicant's past compliance with visa conditions is not the sole focus of this assessment. Rather, it is a relevant consideration that informs the broader question of the applicant's intention to stay temporarily in Australia. In this context, a finding that an applicant had not complied substantially with a condition which applied to their last substantive visa would not necessarily be fatal to the applicant satisfying this criterion, although that non-compliance would be relevant in assessing whether the applicant is a genuine temporary entrant.

Key Issues

Which visa is relevant to the assessment?

Most commonly, the complied substantially requirements relate to those conditions which were attached to an applicant's last substantive visa and/or any subsequent bridging visas held. The use of the term 'last substantive visa' clearly excludes from consideration any non-compliance that occurred in relation to any substantive visa(s) held *prior to the last* substantive visa held.[4] The term '*any subsequent* bridging visa' broadens the consideration to any and all bridging visas held by an applicant, provided the bridging visa(s) were held subsequent to the last substantive visa. The term 'substantive visa' is defined in s.5 of the Act to mean a visa other than a bridging visa, criminal justice visa,[5] or an enforcement visa.[6]

One variation that arises in complied substantially criteria across the various subclasses is whether the requirement applies to "…*the last of any substantive visas held by the applicant,* ***and*** *to any*

[3] Provisions such as this currently arise in the following subclasses: Subclass 400 Temporary Work (Short Stay Activity) (cl.400.213, cl.400.313); Subclass 401 Temporary Work (Long Stay Activity) (cl.401.214, 401.314); Subclass 402 Training and Research (cl.402.214, 402.314); Subclass 403 Temporary Work (International Relations)(cl.403.212, 403.314); Subclass 407 Training (cl.407.217, cl.407.315); Subclass 408 Temporary Activity (cl.408.213, cl.408.315); Subclass 420 Temporary Work (Entertainment) (cl.420.214, 420.314); Subclass 600 Visitor (cl.600.211); and Subclass 602 Medical Treatment (cl.602.215).
[4] However, where the assessment forms part of a broader 'having regard to' criterion such as in cl.600.211, consideration of conduct on an earlier substantive visa could be relevant under 'any other relevant matter'.
[5] s.38 of the Act.
[6] s.38A of the Act.

subsequent bridging visa", or "…*the last substantive visa, **or** any subsequent bridging visa, held by the applicant…*".

The use of the word 'and' as a conjunctive between the substantive and bridging visas requires the applicant to have complied substantially with the conditions of their last substantive visa *as well as* all subsequent bridging visas. An applicant, for example, who held two subsequent bridging visas after their last substantive visa ceased would, in these circumstances, need to have complied substantially with the conditions of each of those visas.

In other forms of the criterion, however, the complied substantially requirement is expressed as applying to the last substantive visa '*or'* any subsequent bridging visas. The use of 'or' in this context creates some uncertainty as to the scope of the consideration and which visa (or visas) must be assessed for substantial compliance. On one view, if emphasis is placed solely on the word 'or', consideration is directed to substantial compliance with *either* the last substantive visa *or* any subsequent bridging visa(s), but not necessarily both. On a second view, if emphasis is placed on the words"… *or any subsequent bridging visa…",* where a substantive visa has been followed by subsequent bridging visa(s), the consideration is only directed towards substantial compliance with the conditions of the subsequent bridging visa(s). On a third view, the use of the word 'or' effectively acts as a conjunction conditional on the relevant circumstance arising, such that consideration of substantial compliance is directed to the last substantive visa and any subsequent bridging visas *where applicable*.

Where this wording arises in Schedule 2, it is invariably part of a broader assessment (e.g. as in cl.600.211 as part of genuine temporary entrant assessment)[7] and not part of a discrete complied substantially criterion such as cl.457.221.[8] These broader provisions also include the option for the decision maker to have regard to 'any other relevant matter' which would also allow the decision maker to consider the applicant's compliance with visa conditions attached to any previous visa. In this context, the third interpretation, which would incorporate consideration of substantial compliance with conditions of the last substantive visa held along with any applicable subsequent bridging visas, would appear to be the preferable interpretation as it is consistent with the context in which the issue of substantial compliance is being considered.[9]

Identifying visa conditions

Consideration of the complied substantially criteria necessarily requires the identification of the relevant conditions which apply (or applied) to the relevant visa(s) before considering whether or not an applicant has substantially complied with those conditions.

Generally speaking, the conditions that apply to the grant of a visa of a particular subclass are identified in the corresponding Part of Schedule 2 to the Regulations.[10] Some conditions apply by operation of law, others are discretionary.[11] The requirements of the conditions themselves are then

[7] Refer to cll.400.213; 401.214; 402.214; 403.212; 407.217; 407.315; 408.213; 408.315; 420.214; 600.211; and 602.215.
[8] For example, cl.405.223; 410.221(6); 416.226; 457.221; and 461.225.
[9] Departmental guidelines on visas with the substantial compliance element as part of the genuine intention criterion refer to the general guidelines on 'Substantial compliance with visa conditions' in PAM3 - Sch8 - Visa conditions - About visa conditions. However, these guidelines state that it 'does not deal with the Schedule 2 'genuine intention' primary/secondary criterion for certain temporary work visas that includes 'substantial compliance' as a factor in assessing that 'genuine intention' criterion. Nothing in this Part is to be regarded as relevant in assessing those various Schedule 2 'genuine intention' criteria': PAM3 - Sch8 - Visa conditions - About visa conditions at [6] (re-issue date 18/4/15).
[10] e.g. Div 573.6 of Schedule 2 to the Regulations. Within this division, cl.573.611(a) requires that an applicant who satisfies the primary criteria is subject to the mandatory conditions 8105, 8202, 8501, 8516, 8532 and 8533. Depending upon certain circumstances, conditions 8303, 8523 and 8535 may, as a matter of discretion, also be imposed (cl.573.611(e)).
[11] Section 41 of the Act provides that visas may be issued subject to conditions, and these may take the form of mandatory conditions (i.e. those to which a visa is automatically subject by operation of law: s.41 and r.2.05(1)) or discretionary conditions (i.e. those which apply due to the exercise of discretion by a decision maker).

set out in Schedule 8. Ascertaining which mandatory conditions applied will usually be a straightforward consideration of the relevant provisions in Schedule 2 under 'xxx.6 – Conditions'. However, whether a particular discretionary condition was actually applied to the visa is a finding of fact on the evidence that must be made prior to assessing an applicant's compliance with that condition. Evidence may be in the form of movement records, notification of visa grant or other Departmental records.

Caution should be applied when considering conditions that were attached to multiple bridging visas. While typically the applicable conditions on successive bridging visas would be the same, a change in the bridging visa applicant's circumstances may result in different conditions being imposed and in some cases a bridging visa holder subject to work restrictions (condition 8101 – no work) can apply for a bridging visa without work restrictions.[12] Therefore, it cannot be assumed that conditions on successive bridging visas will be the same.

Relevant considerations when determining whether an applicant has complied substantially

The issue of substantial compliance will only arise in relation to those conditions which have been breached[13] and to which the concept can logically apply (see discussion below). In determining whether an applicant has complied substantially with a condition, decision makers may take into account a range of matters according to the evidence in the particular case, including subjective matters such as the applicant's reasons for failing to satisfy the condition.[14]

For example, in *Kim v Witton* Sackville J considered the relevant circumstances in that case as including:

- the nature of the breach of condition;
- the significance of the breach, especially by reference to the purposes for which the visa or entry permit was granted;
- whether or not the applicant deliberately flouted the condition; and
- if the applicant failed to appreciate that he or she was in breach of the condition, what, if anything, contributed to that failure and, in particular, whether the Department misled the applicant.[15]

However, it should be emphasised that there is no rigid test to be applied and these considerations should not be elevated to the status of relevant considerations in every case.[16] His Honour made it clear that the factors listed were not intended to be exhaustive and that in general it is a matter for decision makers to assess the weight to be accorded to such factors, having regard to the circumstances of the case.[17]

[12] See for example cl. 050.212(6A) and (8) and cl.050.613.
[13] *Chowdhury v MIMIA* [2005] FMCA 1243 (Barnes FM, 6 September 2005) at [37].
[14] See *Kim v Witton* (1995) 59 FCR 258 at [271], *Baidakova v MIMA* [1998] FCA 1436 (Katz J, 12 November 1998), *Shrestha v MIMA* [2001] FCA 1578 (Gray J, 9 November 2001), *Soegianto v MIMA* [2001] FCA 1612 (Ryan J, 15 November 2001) and *MIMA v Modi* (2001) 116 FCR 496 at [18].
[15] *Kim v Witton* (1995) 59 FCR 258 at 271.
[16] See *Shrestha v MIMA* [2001] FCA 1578 at [17], *MIMA v Modi* (2001) 116 FCR 496 at [23].
[17] *Kim v Witton* (1995) 59 FCR 258 at 271.

As Grey J observed in *Shrestha v MIMA,* the factors listed by Sackville J were merely matters that, as a matter of logic, would have been relevant in the circumstances of the case before him.[18] Although in many cases those considerations or similar ones will be logically relevant to a determination whether there has been substantial compliance with a visa condition, this does not mean that, in every case, there is an obligation to take into account every one of those factors. The circumstances of the case will determine what is relevant.[19]

Ultimately, whether or not an applicant has complied substantially with a condition will depend on the circumstances of the case, and will be a question of fact for the decision maker having regard to wording of the condition itself, the applicant's conduct and any other relevant considerations (including the factors identified in *Kim v Witton*).

What conditions are capable of substantial compliance?

The concept of substantial compliance has been expressly found to have application in relation to the 'no work' requirement in condition 8101[20] and in relation to condition 8516,[21] which requires the visa holder to continue to be a person who would satisfy the primary or secondary criteria for visa grant. The concept of substantial compliance has also been found to have application in the context of the enrolment requirement in condition 8202(2), which applies to student visas.[22]

Are there any conditions to which the concept of substantial compliance has no application?

In limited instances, the Courts have found that there are some conditions to which the concept of substantial compliance has no logical application. In such cases, the Regulations are to be read as not admitting any qualification of substantial compliance.

One such condition is condition 8202(3), which applied to certain student visa holders. The Court in *Jayasekara* found that the requirements in the pre-1 July 2007 version of condition 8202(3), which turned on certification (or the absence of certification) of a breach by education providers, were matters to which substantial compliance has no relevance – either the breach occurred or it did not.[23] The reasoning in that case was held to be equally applicable to the post 1 July 2007 version of condition 8202(3), under which a student visa holder complies with the provision unless an education provider has certified a lack of satisfactory course progress or attendance.[24]

Certain other visa conditions would also appear to be conditions to which the concept of substantial compliance has no application, although only in limited cases. For example, condition 8519, which

[18] [2001] FCA 1578 (Gray J, 9 November 2001).
[19] *Shrestha v MIMA* [2001] FCA 1578 (Gray J, 9 November 2001) at [17].
[20] In *Poskus v MIMIA* [2005] FCAFC 156 (Sundberg, Marshall and North JJ, 10 August 2005), the Full Federal Court found no error in the Tribunal's finding that the applicant had not complied substantially with condition 8101 in circumstances where he had worked over a three month period, and was aware that he was prohibited from working.
[21] In *Haq v MIMAC* [2013] FCA 204 (Buchanan J, 3 September 2013), the Federal Court found no error in the Tribunal's finding that as the applicant had failed to maintain enrolment and undertake study during an eight month period from the time his last student visa was granted, he had not complied substantially with condition 8516. While the Tribunal accepted that the applicant had suffered depression, it considered he had not been so severely affected as to stop work or seek medical or counselling services, and considered the breach of the condition to be significant given the purpose for which the student visa was granted.
[22] In *Hadiyoal v MIBP* [2013] FCCA 2070 (Jones J, 11 November 2013), the Court found no error in the Tribunal's conclusion that as the applicant had not been enrolled in a registered course for over a year, she had not substantially complied with condition 8202(2) which attached to her last held visa. See also *Fwati v MIMIA* [2003] FCA 1478 (Selway J, 12 December 2003) which was conducted on the basis that the concept of substantial compliance could apply to the enrolment requirement in 8202(2).
[23] In *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004), Ryan J held that there was no scope for operation of the distinction between strict compliance and substantial compliance on the academic results component of condition 8202(3) (as it stood prior to 1 July 2007) which required student visa holders to achieve 'an academic result that is certified by the education provider to be at least satisfactory' for a specified period: either the education provider has certified that the applicant's academic results for the relevant period have been at least satisfactory or it has not. That case was referred to with approval in *Jayasekara v MIMIA* (2006) 156 FCR 199 at [15] where Heerey and Sundberg JJ held that where there was no certificate there was no compliance, let alone substantial compliance. Their Honours added '[s]till less could reasons or explanations for non-compliance amount to compliance, substantial or otherwise'.
[24] *Ahmed v MIBP* [2015] FCA 1059 (Flick J, 1 October 2015) at [13].

applies to Subclass 300 Prospective Marriage visa holders, provides that the holder must enter into the marriage in relation to which the visa was granted within the visa period of the visa. This condition turns on the occurrence of a discrete event and is difficult to reconcile with the idea of substantial compliance.

Where a condition to which the concept of substantial compliance cannot apply is breached, the question of whether the applicant *substantially* complied with the condition does not arise. The only consideration is whether the breach occurred. Thus, where the breach is established, there is no room for consideration of the kinds of factors referred to in *Kim v Witton* (see discussion above).

Is the applicant required to substantially comply with each condition individually or all conditions as a whole?

Where the question of the applicant's compliance with visa conditions arises as a discrete criterion (e.g. cl.457.221), it is necessary to consider whether the applicant has substantially complied with each and every condition individually.[25] It is not permissible to make a global assessment of the applicant's 'overall compliance' with visa conditions, balancing compliance with one condition against non-compliance with another, so as to arrive at an overall conclusion about 'substantial compliance'.[26]

Once a finding is made that an applicant has not 'complied substantially' with any one of the conditions attaching to their last or current visa, it is not necessary for the decision maker to then address compliance with any of the remaining conditions attaching to the visa. In the context of a discrete complied substantially criterion, a failure to comply substantially with one condition means the criterion as a whole is not satisfied.[27]

Similarly, where the condition itself contains discrete cumulative elements, the substantial compliance criterion requires substantial compliance with each element of the condition individually. Thus, if it is found that there has not been substantial compliance with one element of a condition, it will not be necessary to address any of the other elements of the condition.[28]

For example, to comply with condition 8107(3), certain Subclass 457 visa holders must, among other things, commence work within 90 days of arriving in Australia; not cease employment for more than 90 or 60 consecutive days (depending upon when the visa was granted);[29] and, where applicable, maintain and hold any licence, registration or membership that is mandatory to perform that occupation.[30] If it were established that the applicant had not complied substantially with the requirement to commence employment within 90 days of arriving in Australia, it would not be

[25] *Peng v MIMA* (2000) 105 FCR 63 at [16]; *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004) at [12]; *Chowdhury v MIMIA* [2005] FMCA 1243 (Barnes FM, 6 September 2005) at [32]-[34]; *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[31], referring to cll.560.213, 573.212, 572.212 and 573.235 respectively. This view was also confirmed in the context of the Schedule 3 requirement in cl.3004(e): *Montero v MIBP* [2014] FCCA 946 (Judge Manousaridis, 9 May 2014) upheld on appeal in *Montero v DIBP* [2014] FCAFC 170 (Allsop CJ, Logan and Flick JJ, 12 December 2014). See also *Grewal v MIBP* [2016] FCA 1229 (McKerracher J, 14 October 2016) at [30]-[31] in which the Court followed *Montero v DIBP* [2014] FCAFC 170in the context of cl.572.235.

[26] *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[30] and *Chen v MIAC* [2011] FMCA 177 (Burnett FM, 8 April 2011) at [19]-[20].

[27] *Chowdhury v MIMIA* [2005] FMCA 1243 (Barnes FM, 6 September 2005) at [33] and *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [31], referring to *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004) at [12].

[28] See *Shang v MIMA* [2006] FCA 1453 (Lander J, 8 November 2006) at [26]. That observation was made in the context of visa cancellation under s.116(1)(b) of the Migration Act 1958 (the Act) for breach of a visa condition. However the same point has been made in the context of the substantial compliance criterion. In that context, Tamberlin J in *Gurung v MIMIA* [2002] FCA 772 (Tamberlin J, 26 July 2002) at [16] referred to the fact that the individual requirements of condition 8202 were cumulative, and Ryan J in *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004) at [11]-[12] applied that reasoning in finding that as one of the requirements of condition 8202 was not met the substantial compliance criterion was not satisfied.

[29] cl.8107(3)(b) was amended to change the period which a visa holder can cease employment from 90 days to 60 days by Schedule 1 to Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696). It applies to visas granted on or after 19 November 2016.

[30] cl.8107(3)(aa), (b) and (c).

necessary to consider the other requirements of condition 8107, as the applicant will have failed to comply substantially with condition 8107 and will be unable to satisfy the substantial compliance criterion.

Relevant case law

Ahmed v MIBP [2015] FCA 1059	
Baidakova v MIMA [1998] FCA 1436	Summary
Casse v MIMAC [2013] FCA 1007	Summary
Cai v MIAC [2011] FMCA 922	Summary
Chen v MIAC [2011] FMCA 177	Summary
Chowdhury v MIMIA [2005] FMCA 1243	
Fwati v MIMIA [2003] FCA 1478	Summary
Gunawardena v MIMIA [2005] FCA 31	Summary
Gurung v MIMIA [2002] FCA 772	Summary
Hadiyoal v MIBP [2013] FCCA 2070	
Hao Jiang v MIAC [2007] FCA 907	Summary
Haq v MIMAC [2013] FCA 880	
Jayasekara v MIMIA [2006] FCAFC 167; (2006) 156 FCR 199	Summary
Kim v Witton [1995] FCA 1508; (1995) 59 FCR 258	
MIMA v Modi [2001] FCA 1656; (2001) 116 FCR 496	Summary
Modi v MIMA [2001] FCA 529	Summary
Montero v MIBP [2014] FCCA 946	Summary
Montero v MIBP [2014] FCAFC 170	Summary
Musapeta v MIAC [2007] FMCA 729	
Patel v MIAC [2011] FMCA 112	Summary
Peng v MIMIA [2000] FCA 1672; (2000) 105 FCR 63	Summary
Poskus v MIMIA [2005] FCAFC 156	
Purohit v MIAC [2012] FMCA 477	Summary
Shang v MIMA [2006] FCA 1453	
Shrestha v MIMIA [2001] FCA 1578	Summary
Singh v MIAC [2009] FMCA 1261	Summary
Singh v MIAC [2011] FMCA 972	Summary
Weerasinghe v MIMIA [2004] FCA 261	Summary
Zhang v MIMIA [2005] FCA 693; (2005) 143 FCR 90	Summary

Available Decision Precedents

There are no decision templates or optional standard paragraphs specific to the various discrete criteria requiring substantial compliance with visa conditions of visas held. The Generic decision template may be used where a discrete substantial compliance criterion is in issue. The following templates contain complied substantially elements as part of a broader cumulative requirement:

Subclass 600 – Visitor visa – Genuine Visit – This template can be used where the issue of substantial compliance with visa conditions arises in the context of cl.600.211 and the assessment of whether the applicant genuinely intends to stay in Australia temporarily for the purpose for which the visa is granted.

Subclass 401 – General – This template can be used where the issue of substantial compliance with visa conditions arises in the context of cl.401.214 and the assessment of whether the applicant genuinely intends to stay temporarily in Australia to carry out the occupation or activity for which the visa is granted.

Subclass 402 – General – This template can be used where the issue of substantial compliance with visa conditions arises in the context of cl.402.214 and the assessment of whether the applicant genuinely intends to stay temporarily in Australia to carry out the occupation, program or activity for which the visa is granted.

Last updated/reviewed: 8 November 2018

REGISTER OF INSTRUMENTS MISCELLANEOUS AND OTHER VISA CLASSES		
No.	**Tab name**	**Instrument description**
1	Index	
2	417 Work&RegAust	Subclass 417 - Specified/Seasonal Work and Regional Australia (Subitem 1225(5) & cl.417.111)
3	WorkHolApp	Work and Holiday / Working Holiday Visa Application Arrangements (Items 1224A, 1225 and cl.417.211(2), 462.212(b) 462.221(c))
4	PIC4021Pass	PIC 4021 - Class of Passports
5	NonInternetVAC	Visas attracting a non-internet application charge -rr.2.12C(7)(a) and 2.12C(8))
6	SubTempVAC	Visas attracting a subsequent temporary application charge -r.2.12C(5)
7	CharDirect	Direction under s.499 - Visa refusal and cancellation under s.501 & revocation of mandatory cancellation of a visa under s.501CA
8	RRVApp	Resident Return Visa Application Arrangments (Items 1118A, 1128 and 1216 and subregulation 2.09(3))
9	NZ(FamRel)App	New Zealand (Family Relationship) Visa Application Arrangements (Item 1214BA)
10	SpecCatApp	Special Category Visa Application Arrangements (Item 1219)
11	Aus Values	Australian Values Statement for Public Interest Criterion 4019 - 2015 (Schedule 4, Part 3, Clause 3.1)
12	UNSCResolutions	Specification of United Nations Security Council Resolutions for Migration (United Nations Security Council Resolutions) Regulations 2007
13	462Work	Specification of areas of work and kinds of work - 'specified Subclass 462 Work' (r.1.15FA)
14	MovementRecords	Access to Movement Records (r.3.10A(2))

Ceased instruments

11	sc417Pass	Subclass 417 - Working Holiday Visa Eligible Passport (Subitems 1225 (3)(b)(i) & (ii) and cl.417.111)
12	sc417POBox	Subclass 417 - Working Holiday visa - PO Box Addresses (item 1225(3)(a)(i))
13	sc462persons(1224A(3)(b)(iii))	Subclass 462 - Class of persons (item 1224A(3)(b)(iii))
14	sc 462persons(1224A(3)(c)(iii))	Subclass 462 - Class of persons (item 1224A(3)(c)(iii))
15	Sc 462EdQuals	Subclass 462 - Educational qualifications & foreign countries (items 1124A(3)(a), (aa), (ab), cl.462.214, 221)

Last updated: 16/08/2019

Subclass 417 - Specified/Seasonal Work and Regional Australia (Subitem 1225(5) & cl.417.111)

Title	immi ref	FRLI Reference	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (IMMI 17/018: Working Holiday Visa – Specified Work and Regional Australia) Instrument 2017	17/018	F2017L01032	15/08/17	current	16/087	yes	Signed 03/08/17; registered 14/08/17; commenced 15/08/17
Working Holiday Visa - Definitions of 'Specified work' and 'Regional Australia' (Subitem 1225(5))	16/087	F2016L01441	16/09/16	14/08/17	16/041	yes	Signed 13/9/16; registered 15/9/16; commenced 16/9/16
Working Holiday Visa - Definitions of 'Specified work' and 'Regional Australia' (Subitem 1225(5))	16/041	F2016L00757	01/07/16	15/09/16	08/048	yes	Signed 5/05/16; Registered 10/05/16; Commenced 1/07/16
Working Holiday Visa - Definitions of 'Specified work' and 'Regional Australia' (Subitem 1225(5))	08/048	F2008L02264	01/07/08	30/06/16	08/046	yes	Signed 23/06/08; Registered 26/06/08; Commenced 01/07/08.
Working Holiday Visa - Definitions of 'Seasonal work' and 'Regional Australia' (Regulation 1225(5))	08/046	F2008L01738	29/05/08	30/06/08	06/091	yes	Signed 26/05/2008; Registered 28/05/08; Commenced day after registration on FRLI.
Working Holiday Visa - Definitions of 'Seasonal work' and 'Regional Australia' (Regulation 1225(5))	06/091	F2007L00075	11/01/07	28/05/08	06/069	yes	Signed 20/12/2006; Registered 10/01/07; Commenced day after registration on FRLI.
Working Holiday Visa - Definitions of 'Seasonal work' and 'Regional Australia' (Regulation 1225(5))	06/069	F2006L03212	26/09/06	10/01/07	06/014	yes	Signed 21/09/2006; Registered 26/09/06; Commenced on day of registration of the FRLI.

Working Holiday Maker Visa - Definitions of 'Seasonal Work' and 'Regional Australia' (Regulation 1225(5))	06/014	F2006L01844	01/07/06	25/09/06	05/087	yes	Signed 11/5/06; Registered 20/06/06; Commenced 1/7/06.
Working Holiday Maker Visa - Definitions of 'Seasonal Work' and 'Regional Australia' (Regulation 1225(5))	05/087	F2005L03299	01/11/05	30/06/06	-	yes	Signed 25/10/06; Registered 31/10/05; Commenced 1/11/05.

Notes

1.1225(3B)(c) specifies that for a second application for a Subclass 417 visa, the application be accompanied by a declaration that the applicant has carried out 'specified work' in regional Australia for a total period of at least 3 months as the holder of that visa.

2. 1225(5) states that 'specified work' and 'regional Australia' are defined by reference to written instrument.

Subclass 417 and 462 - Work and Holiday / Working Holiday Visa Application Arrangements (Items 1224A, 1225 and cl.417.211(2), 462.212(b) 462.221(c))

Title	immi ref	FRLI Reference	In force		Applies to	Revokes	explanatory statement	Notes
			from	until				
Migration (LIN 19/184: Arrangements for Work and Holiday Visa Applications) Instrument 2019	19/184	F2019L00918	1/07/19	Current	Work and Holiday (Temporary) (Class US) visa applications made on or after 1 July 2019.	18/174 (with exceptions for visa applications made before 1 July 2019)	yes	Signed 26/06/19; registered 28/06/19; commenced 01/07/19. Specifies the requirements for making a valid Work and Holiday visa application. Also specifies educational and age requirements for Subclass 462 visas.
Migration (LIN 19/183: Arrangements for Working Holiday Visa Applications) Instrument 2019	19/183	F2019L00903	1/07/19	Current	Working Holiday (Temporary) (Class TZ) visa applications made on or after 1 July 2019.	18/173 (with exceptions for visa applications made before 1 July 2019)	yes	Signed 26/06/19; registered 27/06/19; commenced 01/07/19. Specifies the approved forms and the place and manner for making a Working Holiday visa application. It also outlines the criteria for a Subclass 417 visa.
Migration (LIN 18/174: Arrangements for Work and Holiday Visa Applications) Instrument 2018 Compilation 2	18/174	F2019C00170	4/03/19	30/06/2019 (continues to apply in relation to certain visa applications)	Work and Holiday (Temporary) (Class US) visa applications made but not finally determined before 1 July 2019.	n/a - Compilation	-	This is a compliation of LIN 18/174, taking into account amendments made by LIN 19/088 which commenced on 04/03/19 (see note below). Specifies the requirements of making a Work and Holiday visa application. Signed, registered on 05/03/2019; commenced 04/03/19.
Migration (LIN 18/174: Arrangements for Work and Holiday Visa Applications) Instrument 2018 Compilation 1	18/174	F2019C00169	18/02/19	03/03/19	n/a - Compilation	n/a - Compilation	-	This is a compilation of LIN 18/174, taking into account amendments made by Migration LIN 19/088 which commenced on 18/02/19 (see note below). Specifies the requirements of making a Work and Holiday visa application. Registered on 5/03/2019; commenced 18/02/19.
Migration (LIN 19/088: Arrangements for Work and Holiday Visa Applications) Amendment Instrument 2019	19/088	F2019L00140	18/02/19 (except Sch 2) 04/03/19 (Sch 2)	05/03/19	-	18/174 (s.6(5)(b) - (e), Sch 1 (table item 2) and Sch 2 (table item 10))	yes	This amends LIN 18/174 by exempting Chilean applicants from certain requirements (Sch 1), amending lodgment requirements for Malaysian applicants (Sch 2) and requiring online applications except in certain circumstances (Sch 2). Sch 1 commenced 18/02/19 and applies to applications made from that date. Sch 2 commenced 04/03/19 and applies to applications made from that date. Signed 13/02/19; registered 14/02/19.
Migration (LIN 18/174: Arrangements for Work and Holiday Visa Applications) Instrument 2018	18/174	F2018L01576	17/11/18	30/06/19	-	18/102	yes	This instrument specifies the requirements of making a Work and Holiday visa application. Note that s.6(5)(b) - (e) was repealed and replaced by Sch 1 of LIN 19/088 for visa applications made from 18/02/19. Sch 1 (table item 2) and Sch 2 (table item 10) were repealed and replaced by Sch 2 of LIN 19/088 for visa applications made from 04/03/19 (see note above). Signed 14/06/18; registered 15/11/18; commenced 17/11/18.

Migration (IMMI 18/102: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2018 - Compilation No.1	18/102	F2018C00824	01/11/18	16/11/18	n/a - Compilation	n/a - Compilation	_	This is a compilation of IMMI 18/102 as amended and in force on 1 November 2018 and incorporates IMMI 18/173.
Migration (LIN 18/173: Arrangements for Working Holiday Visa Applications) Instrument 2018	18/173	F2018L01507	01/11/18	30/06/2019 (continues to apply in relation to certain visa applications)	Working Holiday (Temporary) (Class TZ) visa applications made but not finally determined before 1 July 2019.	18/102 (ss.8 & 9, Sch 3 & 4)	yes	Made 26/10/18; registered 30/10/18; commenced 01/11/18. Specifies application, passport and age requirements for Working Holiday Visas.
Migration (IMMI 18/102: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2018	18/102	F2018L00773	01/07/18	16/11/18 (except ss.8 & 9, Sch 3 & 4) 31/10/18 (ss.8 & 9, Sch 3 & 4)	-	18/023	yes	Signed 07/06/18; registered 14/06/18; commenced 01/07/18.
Migration (IMMI 18/023: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2018 - Compilation No. 1	18/023	F2018C00212	15/03/18	30/06/18	n/a - Compilation	n/a - Compilation	_	This is a compilation of IMMI 18/023 as amended and in force on 15 March 2018 and incorporates IMMI 18/056.
Migration (IMMI 18/023: Arrangements for Work and Holiday and Working Holiday Visa Applications) Amendment Instrument 2018	18/056	F2018L00249	15/03/18	16/03/18	-	n/a	yes	This amends 18/023 from 15/03/18 by removing Bangladesh as a foreign country for the purposes of paragraph 1224A(3)(a) of Schedule 1 to the Migration Regulations 1994. Signed 22/02/18; registered 14/03/18; commenced 15/03/18
Migration (IMMI 18/023: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2018	18/023	F2018L00098	15/02/18 (except item 5 of Sch 2) 01/03/18 (item 5 of Sch 2)	30/6/18	-	17/097	yes	Signed 05/02/18; registered 12/02/18; commenced 15/02/18, except for item 5 of Schedule 2 which commenced on 01/03/18 (this relates to applicants from the Czech Republic)
Migration (IMMI 17/097: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2017	17/097	F2017L01240	01/10/17	14/02/18	-	17/050	yes	Signed 19/09/17; registered 22/09/17; commenced 01/10/17
Migration (IMMI 17/050: Arrangements for Work and Holiday and Working Holiday Visa Applications) Instrument 2017	17/050	F2017L00861	01/07/17 (Parts 1&2, Sch 1-4 & 7) 01/08/17 (Part 3, Sch 5 & 6)	30/09/17	-	17/003	yes	Signed 29/06/2017; registered 30/06/2017; commenced on 01/07/2017, except for Part 3 and Schedules 5 and 6 which commenced on 01/08/2017 (these relate to applicants from Singapore)
Arrangements for Work and Holiday and Working Holiday Visa Applications 2017/003 - Compilation No.1	17/003	F2017C00150	01/03/17	30/06/17	n/a - Compilation	n/a - Compilation	_	This is a compilation of IMMI 17/003 as amended and in force on 1 March 2017 and incorporates IMMI 17/022.

Arrangements for Work and Holiday and Working Holiday Visa Applications Amendment Instrument 2017	17/022	F2017L00140	01/03/17	02/03/17	-	n/a	yes	Signed 20/02/2017; registered 22/02/2017; commenced 01/03/2017. Amends 17/003.
Arrangements for Work and Holiday and Working Holidays Visa Applications 2017/101 (Items 1224A and 1225 and paragraph 462.221(c))	17/003	F2016L02011	01/01/17	30/06/17	-	16/101	yes	Signed 20/12/2016, registered 21/12/2016, commenced 01/01/2017
Arrangements for Work and Holiday and Working Holidays Visa Applications 2016/101 (Items 1224A and 1225 and paragraph 462.221(c))	16/101	F2016L01763	19/11/16	31/12/16	-	16/056	yes	Signed 14/11/16, registered 15/11/16; commenced immediately after the commencement of the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 (19/11/16)
Arrangements for Work and Holiday and Working Holidays Visa Applications 2016/056 (Items 1224A and 1225 and paragraph 462.221(c))	16/056	F2016L00676	01/06/16	18/11/16	-	15/146	yes	Signed 3/05/2016, registered 6/05/2016, commenced 1/06/2016
Arrangements for Work and Holiday and Working Holidays Visa Applications 2016 (Items 1224A and 1225 and paragraph 462.221(c))	15/146	F2015L02082	01/01/16	31/05/16	-	15/116	yes	Signed 16/12/2015; registered 18/12/2015; commenced 01/01/2016.
Arrangements for Work and Holiday and Working Holiday Visa Applications 2015 (Items 1224A and 1225 and paragraph 462.221(c))	15/116	F2015L01437	21/09/15	31/12/15	-	15/040	yes	Signed 09/09/2015; registered 15/09/2015; commenced 21/09/2015.
Arrangements for Work and Holiday and Working Holiday Visa Applications 2015 (Items 1224A and 1225 and paragraph 462.221(c))	15/040	F2015L00552	18/04/15	20/09/15	-	Various*	yes	Signed 16/04/2015; registered 17/04/2015; commenced 18/04/2015.

Notes

1. For visa applications made on or after 18/04/15, subitems 1224A(1) and 1225(1) of Schedule 1 to the Regulations specify that the approved form, manner and location for Work and Holiday (Temporary)(Class US)(Subclass 462 (Work and Holiday)) and for Working Holiday (Temporary)(Class TZ) (Subclass 417 (Working Holiday)) visas are to be specified in an instrument. In addition, this instrument specifies the countries that are considered to be working holiday or work and holiday visa eligible countries and any relevant conditions applying to nationals of those countries including required educational qualifications for an applicant and the maximum age of applicants from certain countries.

2. IMMI 15/040 revoked the following instruments: IMMI 07/084, IMMI 07/038 (see note 3 below), IMMI 09/008 (see note 4 below), IMMI 09/018 (see note 5 below), IMMI 07/085 (see note 6 below) and 14/098 (see note 7 below)

3. For instruments in force before 18/04/15 for the Work and Holiday Visa Eligible Passports(item 1224A(3)(c)(iii)) go to: sc 462 - persons (1224A(3)(c)(iii))
4. For instruments in force before 18/04/15 for the Working Holiday Visa Eligible Passports go to: sc 417 - Passport
5. For instruments in force before 18/04/2015 specifying PO Box Addresses for Working Holiday visa applications, go to: sc 417 - POBox
6. For instruments in force before 18/04/2015 specifying Work And Holiday Visa Applicants excluded from government support requriement go to: sc 462 - persons (1224A(3)(b)(iii))
7. For instruments in force before 18/04/2015 specifying qualifications for persons for Work and Holiday Visas go to: sc 462 - EdQuals

Class of Passports - Schedule 4, Part 1, Public Interest Criterion 4021

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Class of Passports (Schedule 4, Part 1, Public Interest Criterion 4021)	18/001	F2018L01043	20/07/18	current	14/073	Yes	signed 12/07/18; registered 19/07/18; commences 20/07/18
Class of Passports (Schedule 4, Part 1, Public Interest Criterion 4021)	14/073	F2014L01319	06/10/14	19/07/18	13/032	Yes	signed 25/09/14; registered 03/10/14; commences 06/10/2014
Class of Passports (Schedule 4, Part 1, Public Interest Criterion 4021)	13/032	F2013L00463	23/03/13	5/10/14	12/101	Yes	signed 04/03/13, commences 23/03/2013
Class of Passports (Schedule 4, Part 1, Public Interest Criterion 4021)	12/101	F2012L02241	24/11/12	23/03/13	-	Yes	signed 22/11/12; commences 24/11/12

Notes

for cl.4021(a): OR that it would be unreasonable to require the applicant to hold a passport.

Visas attracting a non-internet application charge (rr.2.12C(7)(a) and 2.12C(8))							
Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Visas attracting a non-internet application charge	13/145	F2013L1937	23/11/13	_	13/069	Yes	signed 7/11/2013, commences 23/11/13
Visas attracting a non-internet application charge	13/069	F2013L01048	01/07/13	22/11/13	n/a	Yes	signed 13/06/13, commences 01/07/13

Visas attracting a subsequent application charge (r.2.12C(5))

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
Visas attracting a subsequent temporary application charge	[illegible]	F2016L01791	24/11/16	current	n/a	yes	Signed 22/11/16. Registered 23/11/16. Commenced 24/11/16. Amends 16/098 and the reference to Subclass 408 to except from specification the visa applications which are exempt from a visa application charge or liable to a reduced visa application charge.
Visas attracting a subsequent temporary application charge	16/098	F2016L01784	19/11/16	current	16/012	yes	signed 16/11/16, registered 18/11/16, commenced 19/11/16.
Visas attracting a subsequent temporary application charge	16/012	F2016L00625	01/07/16	18/11/16	14/091	Yes	signed 29/04/2016, commenced 01/07/2016
Visas attracting a subsequent temporary application charge	14/091	F2014L01335	23/11/14	01/07/16	13/068	Yes	signed 30/9/14, commenced 23/11/14
Visas attracting a subsequent temporary application charge	13/068	F2013L01067	01/07/13	23/11/14	n/a	Yes	signed 13/06/13, commenced 01/07/13

											Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref	FRLI Reference	In force		Revokes	explanatory	Notes	Title	immi ref

Direction (s.499) - Character refusal, cancellation under s.501 and revocation of mandatory cancellation under s.501CA

Title	Number	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Direction No.79 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA	Direction No.79	n/a	28/02/19	current	No.65	n/a	Signed 20/12/19, commenced 28/02/19
Direction No.65 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA	Direction No.65	n/a	23/12/14	27/02/19	No.55	n/a	Signed 22/12/14, commenced 23/12/14.
Direction No.55 - Visa refusal and cancellation under s501	Direction No.55	n/a	01/09/12	22/12/14	No.41	n/a	Signed 25/07/2012, commenced 1/09/12

Resident Return Visa Application Arrangments							
Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (IMMI 17/031: Arrangements for Resident Return Visa Applications) Instrument 2017	17/031	F2017L00324	29/03/17	current	16/088	yes	Made 24/3/17; registered 28/3/17; commenced 29/3/17
Arrangments for Resident Return Visa Applications 2016/088 (Subregulation 2.07(5))	16/088	F2016L01405	10/09/16	28/03/17	16/042	yes	Made 5/9/16; registered 8/9/16; commenced 10/9/16
Arrangments for Resident Return Visa Applications 2016/042 (Items 1118A, 1128 and 1216 and subregulation 2.09(3))	16/042	F2016L00785	1/07/16	9/09/16	15/033	yes	Made 5/5/16; registered 12/5/16; commenced 1/7/16
Arrangments for Resident Return Visa Applications 2015 (Items 1118A, 1128 and 1216 and subregulation 2.09(3))	15/033	F2015L00550	18/04/15	30/06/16	11/018	Yes	Made 16/04/15; registered 17/04/15; commenced 18/04/15

Notes

1. Items 1118A, 1128 and 1216 of Schedule 1 to the Regulations require applications for subclass 151, 155, 157 and 159 visas be made on the form prescribed, at the place and in the manner specified by legislative instrument from 18/04/2015. In addition, for visa applications made before 10/9/16, r.2.09(3)(a) permits the making of oral applications for a Resident Return Visa to a telephone number during a time specified by legislative instrument.

2. Regulation 2.07(5) provides that, if Schedule 1 provides for a form, way, or place, in which an application may be made, the Minister may specify the requirement by legislative instrument.

New Zealand (Family Relationship) Visa Application Arrangements (Item 1214BA)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Arrangements for Family Visa Applications and New Zealand (Family Relationship) Visa Applications (items 1123A, 1123B and 1214BA)	17/016	F2017L00123	20/02/17	current	15/046, 15/034	yes	Dated 13/02/17; registered 16/02/17; commenced 20/02/2017
Arrangements for New Zealand (Family Relationship) Visa Applications 2015 - (Item 1214BA)	15/046	F2015L00568	18/04/15	19/02/17	11/018	Yes	Signed 16/04/15; registered 17/04/15; commenced 18/04/15.

Notes

1. For visa applications made on or after 18/04/15, subitems 1214BA(1) and (3) of Schedule 1 to the Regulations requires applications for New Zealand (Family Relationship) (Temporary)(Class UP) visas be made on the form prescribed, at the place and in the manner specified by legislative instrument.

Special Category Visa Application Arrangements (Item 1219)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (LIN 19/058: Arrangements for special category visa applications) Instrument 2019	19/058	F2019L00339	23/03/2019	current	15/039	Yes	Signed 15/03/19; registered 22/03/19; commenced 23/03/19
Arrangements for Special Category Visa Applications 2015 (Item 1219 – Special Category (Temporary)(Class TY), Subclass 444 (Special Category)	15/039	F2015L00560	18/04/15	22/03/19	11/018	Yes	Signed 16/04/15; registered 17/04/15; commenced 18/04/15

Notes

1. For visa applications made on or after 18/04/15, subitems 1219(1) and (3) of Schedule 1 to the Regulations requires applications for Special Category (Temporary)(Class TY) visas be made on the form prescribed, at the place and in the manner specified by legislative instrument.

Australian Values Statement for Public Interest Criterion 4019 - 2015 (Schedule 4, Part 3, Clause 3.1)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Australian Values Statement for Public Criterion 4019 – 2016/113 (Schedule 4, Part 3, Clause 3.1) - Compilation No. 1	16/113	F2018C00207	18/03/18	current	n/a - Compliation	–	This is a compilation of IMMI 16/113 as amended and in force on 18 March 2018 and incorporates IMMI 18/025.
Migration (Australian Values Statement for Public Criterion 4019 – 2016/113) Amendment Instrument 2018	18/025	F2018L00282	18/03/18	19/03/18	n/a	Yes	This amends IMMI 16/113 from 18/03/18 to approve a values statement for subclasses 808 and 482 . Made 15/03/18; registered 16/03/18; commenced 18/03/18.
Australian Values Statement for Public Interest Criterion 4019 - 2016/113 (Schedule 4, Part 3, Clause 3.1)	16/113	F2016L01783	19/11/16	current	16/011 & 15/065	Yes	Made 16/11/16; registered 18/11/16; commenced 19/11/16 (immediately after commencement of the Migration Amendment (Temporary Activity Visas) Regulation 2016).
Australian Values Statement for Public Interest Criterion 4019 - 2016/011 (Schedule 4, Part 3, Clause 3.1)	16/011	F2016L00552	01/07/16	15/11/19	-	Yes	Made 18/04/16; registered 21/04/16; commenced 01/07/2016 Specifies values statement for subclasses 500 and 590 only. IMMI15/065 continues to operate with respect to other subclasses.
Australian Values Statement for Public Interest Criterion 4019 - 2015 (Schedule 4, Part 3, Clause 3.1)	15/065	F2015L00896	01/07/15	15/11/19	Dec-81	Yes	Made 29/05/15; registered 23/06/15; commenced 01/07/15

Specification of United Nations Security Council Resolutions

Title	IMMI ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions (regulation 4 definition of 'Resolution')	14/034	F2014L00516	09/05/14	current	13/091	Yes	Made 28/04/14; registered 8/5/14; commenced 9/5/14.
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions (regulation 4 definition of 'Resolution')	13/091	F2013L01686	13/09/13	08/05/14	12/120	Yes	Made 2/09/13; registered 12/9/13 ; commenced 13/9/13.
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions (regulation 4 definition of 'Resolution')	12/120	F2013L00907	05/06/13	12/09/13	10/048	Yes	made 16/05/13; registered 4/6/13 ; commenced 5/6/13 .
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions (regulation 4 definition of 'Resolution')	10/048	F2010L02346	26/08/10	04/06/13	10/013	Yes	made 12/8/10; registered 25/8/10; commenced 26/8/10.
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification of United Nations Security Council Resolutions (regulation 4 definition of 'Resolution')	10/013	F2010L00758	01/04/10	25/08/10	09/144	Yes	made 19/3/10 ; registered 31/3/10 ; commenced 1/4/10.

For instruments in place before 1/4/10 contact MRD Legal Services.

Note 1: For the purposes of s.116(1)(g) of the Migration Act 1958, r.8(2) of the Migration (United Nations Security Council Resolutions) Regulations 2007 (UNSCR Regulations) enable the Minister to cancel a visa if the Minister is satisfied that the holder of the visa is a 'UNSC-designated' person. Under r.5 of the UNSCR Regulations, a person is a UNSC-designated person if, under a United Nations Security Council resolution, Australia is required to prevent the person entering or transiting through Australian territory. Regulation 4 defines 'resolution' to mean a UN Security Council Resolution specified by the Minister, by legislative instrument.
Note 2: For s.116(2), limited circumstances in which a visa must not be cancelled are prescribed in r.8(3) of the UNSCR Regulations Regulation 8(3) provides that a visa granted to a UNSC-designated person must not be cancelled if the Minister is satisfied one of the specified circumstances exists.

Areas and Kinds of Work specified for Subclass 462

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (LIN 18/197: Areas of Australia and Kinds of Specified Work for Subclass 462 (Work and Holiday) visas) Instrument 2018	18/197	F2018L01539	5/11/18	current	17/092	yes	Made 5/11/18; registered 5/11/18; commenced 5/11/18
Migration (IMMI 17/092: Areas of Australia and kinds of work - specified Subclass 462 work) Instrument 2017	17/092	F2017L01116	1/09/17	4/11/18	16/097	yes	Made 28/08/17; registered 31/08/17; commenced 1/09/17
Areas of work and kinds of work - Specified Subclass 462 Work 2016/097 (r.1.15FA)	16/097	F2016L01778	19/11/16	31/08/17	n/a	yes	Made 16/11/16; registered 18/11/16; commenced immediately after commencement of Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (19/11/16)

Notes

1. r.1.15FA provides that the Minister may, by legislative instrument specify areas of Australia and kinds of work for the purposes of the definition of 'specified Subclass 462 work' in r.1.03

2. 'specified Subclass 462 work' is defined in r.1.03 as work that: was carried out in one or more areas of Australia specified for the purposes of this definition by the Minister under r.1.15FA; and was of one or more kinds specified for the purposes of this definition by the Minister under r.1.15FA.

Access to Movement Records							
Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (LIN 18/068: Access to Movement Records) Instrument 2018	LIN18/068	F2018L01199	29/08/18	current	16/090	yes	Made 24/08/18; registered 28/08/18; commenced 29/08/18.
Access to Movement Records Amendment Instrument 2017	17/063	F2017L01710	23/12/17	24/12/17	N/A	yes	Amends IMMI 16/090.Made 21/12/17; registered 22/12/17; commenced 23/12/17
Access to Movement Records 2016/090	16/090	F2016L01404	8/09/16	28/08/18	16/052	yes	Made 2/09/16; registered 8/09/16; commenced 8/09/16. Should be read in conjunction with amendment made by IMMI 17/063.

Note:
A person must not read, examine, reproduce, use or disclose movement records: s.488(1) of the Migration Act. However, the Minister can authorise a prescribed employee of a prescribed agency of the Commonwealth, or a State or Territory, to perform one of those actions for a prescribed purpose: s.488(2)(g). Regulation 3.10A(2) provides that for the purposes of s.488(2)(g), an agency, employee of the agency, and purpose specified by the Minister in an instrument in writing is prescribed.

Subclass 417 - Working Holiday Visa Eligible Passport (Subitems 1225 (3)(b)(i) & (ii) and cl.417.111)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Class of persons (Subparagraph 1225(3)(b)(i))	09/008	F2009L01343	15/05/09	17/04/15	05/088	yes	Signed 6/4/09; Registered 22/4/09; Commenced 15/5/09; revoked by 15/040.
Persons Who May Apply for a Working Holiday Maker Visa (Regulation 1225(3)(b)(i) and (ii))	05/088	F2005L03295	01/11/05	14/05/09	05/039	yes	Signed 25/10/05; Registered 31/10/05; Commenced 01/11/05.
Specification of Class of Persons Who May Apply in any Foreign Country for a Working Holiday Visa	05/039	F2005L01623	1/07/05	31/10/05	-	yes	Signed 28/6/05; Registered 30/06/05; Commenced 1/7/05.

Notes

1 For instruments in force or after 18/04/2015, see the combined Subclass 417 and 462 instrument: WorkHolApp

2 If a gazette notice is required in relation to applications made prior to 1/7/05 please contact MRD Legal Services

Subclass 417 - Working Holiday visa - PO Box Addresses (item 1225(3)(a)(i))

Title	immi ref	FRLI Reference	In force		Revokes	explanatory statement	Notes
			from	until			
Working Holiday Visas - Post Office Box Addresses (subparagraph 1225(3)(1)(i))	09/018	F2009L01347	15/05/09	17/04/15	08/075	yes	signed 06/04/09; effective 15/05/09; revoked by 15/040.
Specification under paragraph 1225(3)(a) - Working Holiday Visa - Post Office Addresses	08/075	F2008L03432	10/09/08	14/05/09	05/089	yes	signed 2/09/08; commences day after registration; registered 09/09/2008
Specification under paragraph 1225(3)(a) of Schedule 1 - Working Holiday Maker Visa	05/089	F2005L03297	01/11/05	09/09/08	-	yes	signed 25/10/05

Notes

1 For instruments in forceon or after 18/04/15, see the combined Sublcass 417and 462 instrument: WorkHolApp

Subclass 462 - Class of persons (item 1224A(3)(b)(iii))							
Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Specified Work And Holiday Visa Applicants Excluded From Requirment To Provide Evidence Of Government Support (Subparagraph 1224A(3)(b)(iii))	07/085	F2007L04111	31/10/07	17/04/15	n/a	yes	signed 17/10/07, commenced 31/10/07; revoked by 15/040.

Notes

1 For instruments in force on or after 18/04/2015, see the combined Subclass 417 and 462 instrument: WorkHolApp

Subclass 462 - Class of persons (item 1224A(3)(c)(iii))

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Class of persons (1224A(3)(c)(iii))	07/038	F2007L02117	01/07/07	17/04/15	-	yes	signed 29/06/07; commenced 01/07/07; revoked by 15/040.

Notes

1 For instruments in force or after 18/04/2015, see the combined Subclass 417 and 462 instrument: WorkHolApp

Subclass 462 - educational qualifications & foreign countries (item 1224A(3)(a), (aa), (ab), cl.462.214, 221)

Title	immi ref	FRLI Reference	In force		Revokes	explanatory statement	Notes
			from	until			
Arrangements For Work And Holiday Visa applicants From Argentina, Bangladesh, Chile, Indonesia, Iran, Malaysia, Poland, Portugal, Spain, Thailand, Turkey, United States of America and Uruguay (Item 1224A and Paragraph 462.221(c))	14/098	F2014L01498	23/11/14	17/04/15	14/025	yes	signed 17/10/14, registered 10/11/14, commences 23/11/14; revoked by 15/040.
Arrangements For Work And Holiday Visa applicants From Argentina, Bangladesh, Chile, Indonesia, Iran, Malaysia, Poland, Thailand, Turkey, United States of America and Uruguay (Item 1224A and Paragraph 462.221(c))	14/025	F2014L01064	01/08/14	22/11/14	13/022	yes	signed 31/7/14, commences 1 August 2014
Arrangements For Work And Holiday Visa applicants From Thailand, Iran, Chile, Turkey, United States Of America, Malaysia, Indonesia, Bangladesh and Argentina (Item 1224A and Paragraph 462.221(c))	13/022	F2013L00174	01/03/13	31/07/14	11/053	yes	signed 23/1/13, commences 1 March 2013
Arrangements For Work And Holiday Visa applicants From Thailand, Iran, Chile, Turkey, United States Of America, Malaysia, Indonesia, Bangladesh and Argentina (Item 1224A and Paragraph 462.221(c))	11/053	F2012L00085	29/02/12	01/03/13	11/016	yes	signed 12/1/12, registered 25/1/12, commences 29/2/12
Arrangements For Work And Holiday Visa applicants From Thailand, Iran, Chile, Turkey, United States Of America, Malaysi, Indonesia and Bangladesh (Item 1224A and Paragraph 462.221(c))	11/016	F2011L00653	15/05/11	28/02/12	10/050	yes	signed 15/4/11, registered 28/4/11, commenced 15/5/11
Arrangements For Work And Holiday Visa applicants From Thailand, Iran, Chile, Turkey, United States Of America, Malaysi, Indonesia and Bangladesh (Item 1224A and Paragraph 462.221(c))	10/050	F2010L03167	31/12/10	14/05/11	09/065	yes	signed 2/12/10, registered15/12/10, commenced 31/12/10
Arrangements For Work And Holiday Visa applicants From Thailand, Iran, Chile, Turkey, United States Of America, Malaysia and Indonesia (Item 1224A and Paragraph 462.221(c))	09/065	F2009L02484	01/07/09	30/12/10	09/010	yes	signed 14/6/09, registered 24/6/09, commenced 1/7/09
Specification under item 1224A and paragraph 462.221(c) - Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey, United States of America And Malaysia	09/010	F2009L01345	15/05/09	30/06/09	09/004	yes	signed 6/04/09; effective 15/05/09
Arrangements For Work And Holiday Visa Applicants From Thailand, Iran, Chile, Turkey, United States Of America And Malaysia (Item 1224A And Paragraph 462.221(c))	09/004	F2009L00230	01/02/09	14/05/09	08/036	yes	signed 27/01/09
Specification under item 1224A and paragraph 462.221(c) - Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey and United States of America	08/036	F2008L02260	01/07/08	31/01/09	07/081	yes	signed 26/06/08
Specification under regulations 1224A and 462.221 - Arrangements for Work and Holiday Visa Applicants from Thailand, Iran, Chile, Turkey and United States of America	07/081	F2007L04108	31/10/07	30/06/08	07/047	yes	signed 17/10/07
Arrangements For Work And Holiday Visa Applicants From Thailand, Iran, Chile And Turkey (Regulations 1224A And 462.221)	07/047	F2007L02650	01/10/07	30/10/07	07/010	yes	signed 8/08/07
Arrangements For Work And Holiday Visa Applicants From Thailand, Iran, Chile And Turkey (Regulations 1224A And 462.221)	07/010	F2007L00887	31/03/07	30/09/07	06/074	yes	signed 29/03/07
Arrangements For Work And Holiday Visa Applicants From Thailand, Iran, Chile And Turkey (Regulations 1224A And 462.221)	06/074	F2006L03828	30/11/06	30/03/07	06/009	yes	signed 01/11/06
Arrangements For Work And Holiday Visa Applicants From Thailand, Iran And Chile (Regulations 1224A And 462.221)	06/009	F2006L00940	31/03/06	29/11/06	06/008	yes	signed 22/03/06
Arrangements For Work And Holiday Visa Applicants From Thailand and Iran (Regulations 1224A And 462.221)	06/008	F2006L00774	15/03/06	30/03/06	05/074	yes	signed 10/03/06; commences on registration; registered 15/03/06
Specification Of Foreign Countries And Addresses For The Purposes Of Paragraphs 1224A(3)(a) And 1224A(3)(aa) Of The Migration Regulations 1994	05/074	F2005L02368	31/08/05	14/03/06	05/050	yes	signed 24/08/05
Specification Of A Foreign Country And Addresses For The Purposes Of Paragraphs 1224a(3)(A) And 1224a(3)(Aa) Of The Migration Regulations 1994	05/050	F2005L01612	14/07/05	30/08/05	GN35	yes	signed 29/06/05

Specification under for paragraphs 1224A(3)(a) and 1224A(3)(aa) - Foreign Country and Addresses - August 2003	-	-	03/09/03	13/07/05	-	-	signed 18/08/03; effective from date of publication; published 03/09/03

Notes

1. For instruments in force after 18/04/201, see combined applications instrument for Subclass 417 and Subclass 462 visas: WorkHolApp

HEALTH CRITERIA - REGISTER OF GAZETTE NOTICES / WRITTEN INSTRUMENTS		
No.	**Tab name**	**Instrument type**
1	Index	
2	HealthAssess	Required Health Assessment for PIC 4005(1)(aa), 4006A(1)(aa) and 4007(1)(aa)
3	VisaSc	Visa subclasses for the health criteria (PIC 4005 (2)(b)(ii), 4006A(1A)(b)(ii) and 4007(1A)(b)(ii))
4	Country	Specified countries for r.2.25A(1)(b)
5	Services	Specification of Health Care and Community Services (4005(3), 4006A(1B), 4007(1B))
		last updated: 20/08/2018

Required Health Assessment (PIC 4005(1)(aa), 4006A(1)(aa) and 4007(1)(aa))

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Required Health Assessment (clauses 4005, 4006A and 4007)	15/144	F2015L01826	20/11/15	Current	15/119	yes	dated: 19/11/2015, commences 20/11/2015
Required Health Assessment (clauses 4005, 4006A and 4007)	15/119	F2015L01747	-	-	14/042	yes	signed 27/10/2015, commences 20/11/2015
Required Health Assessment (clauses 4005, 4006A and 4007)	14/042	F2014L00981	21/07/14	19/11/15	13/114*	yes	signed 2/07/2014, commences 21/07/2014. *Note: previous instrument (IMMI 13/114) revoked by IMMI 14/063 on 26/07/2014
Required Health Assessment (clauses 4005, 4006A and 4007)	13/114	F2013L01918	23/11/13	26/07/14	13/079	yes	signed 1/11/2013, commences 23/11/2013.
Required Health Assessment (clauses 4005, 4006A and 4007)	13/079	F2013L01033	01/07/13	22/11/13	13/047	yes	signed 11/06/2013, commences 1/07/2013.
Required Health Assessment (clauses 4005, 4006A and 4007)	13/047	F2013L00734	15/05/13	30/06/13	12/113	yes	signed 24/04/2013; commences 15/05/2013
Required Health Assessment (clauses 4005, 4006A and 4007)	12/113	F2012L02227	24/11/12	14/05/13	11/085	yes	signed 20/11/12; commences 24/11/12
Required Health Assessment (clauses 4005, 4006A and 4007)	11/085	F2012L00375	24/03/12	23/11/12	11/026	yes	Signed 13/2/12; Commences 24/3/12

Specification under clauses 4005, 4006A and 4007 - Required Health Assessment	11/026	F2011L01258	01/07/11	23/03/12	-	yes	Signed 21/06/11; Commences 01/07/11. Instrument for new provision introduced 01/07/11

Notes

1. PIC 4005(1)(aa), 4006A(1)(aa) and 4007(1)(aa) require that if a person is in a class of persons specified in a written instrument, s/he must undertake any medical assessment specified in the instrument and must be assessed by the person specified in the instrument unless a Medical Officer of the Commonwealth decides otherwise.
2. The relevant instrument is the one in force at the time of the decsion.

Visa subclasses for the health criteria (PIC 4005 (2)(b)(ii), (3), 4006A(1A)(b)(ii), (1B) and 4007(1A)(b)(ii), (1B))

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Visa Subclasses for the Purposes of the Health Requirement	16/067	-	F2016L01126	01/07/16	current	16/046	yes	Dated 29/6/16; registered 30/6/16; Commenced 01/07/16.
Visa Subclasses for the Purposes of the Health Requirement	16/046	-	F2016L00808			12/025	yes	Dated 05/05/16; Registered 17/05/16; Specified as commencing 01/07/16, never commenced. Clerical error in paras 2(b) and 3(b) referring to 4006A(1)(c)(i).
Specification under subparagraph 4005(2)(b)(ii), 4006A(1A)(b)(ii) and 4007(1A)(b)(ii) - Visa Subclasses for the Purposes of the Health Requirement	12/025	-	F2012L01291	01/07/12	30/06/16	11/032	yes	Dated 12/06/12; Commenced 01/07/12, immediately after the commencement of the Migration Amendment Regulation 2012 (No.2)
Specification under subparagraph 4005(2)(b)(ii), 4006A(1A)(b)(ii) and 4007(1A)(b)(ii) - Visa Subclasses for the Purposes of the Health Requirement	11/032	-	F2011L01268	01/07/11	30/06/12	-	yes	Dated 20/06/11; Commenced 01/07/11. Instrument for new provision introduced 01/07/11

Notes

1. PIC 4005(2)(b)(ii), 4006A(1A)(b)(ii) and 4007(1A)(b)(ii) provides that if a temporary visa is of a subclass specified by the Minister for those purposes, the period in which a person must be free from a disease or condition that is likely to require health care or community services is the period commencing when the application is made.

2. PIC 4005(3), 4006A(1B) and 4007(1B) provide that 4005(1)(c)(ii)(A) , 4006A(1)(c)(ii)(A) and 4007(1)(c)(ii)(A) do not apply if inter alia, the applicant has applied for temporary visa, the subclass of which is NOT specified in an instrument made under 4005(2)(b)(ii), 4006A(1A)(b)(ii) and 4007(1A)(b)(ii)

Specification of countries under r.2.25A(1)(b)

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Specification of Countries (Paragraph 2.25A(1)(b))	13/161	-	F2014L00322	22/03/14	current	11/072	yes	Dated 17/03/14; Revokes Immi 11/072 of 31/10/11; Commences on 22/03/14
Specified Countries (paragraph 2.25A(1)(b))	11/072	-	F2011L02243	05/11/11	21/03/14	08/013	yes	Dated 31/10/11; Revokes Immi 08/013 of 26/5/08; Commences on 5/11/11
Migration Regulations 1994 - Specification under paragraph 2.25A(1)(b) - Specification of Countries	08/013	-	F2008L01978	05/06/08	04/11/11	GN40	yes	Dated 26/05/08; Commences day after registration on FRLI; registered 04/06/08; revokes GN 40 of 11/10/00
Migration Regulations 1994 - Specification of Countries for purposes of regulation 2.25A	-	GN40	F2006B00555	11/10/00	04/06/08	GN 43	-	Dated 16/09/00; Commences on publication; published 11/10/00
Specification of countries for purposes of paragraph 2.25A	-	GN 43	-	01/11/95	10/10/00	-	-	Dated 24/10/95; Date of effect 1/11/95

Specification of Health Care and Community Services (4005(3), 4006A(1B), 4007(1B))

Title	immi ref	GN No.	FRLI ref	In force		Revokes	explanatory statement	Notes
				from	until			
Specification of Health Care and Community Services (Clauses 4005, 4006A, 4007)	11/073	-	F2011L02242	05/11/11	current	-	yes	Signed 3/11/11. Commences on 5/11/11, immediately after commencement of Migration Amendment Regulations 2011 (No.6). Applies only to visa applciations made on or after 5/11/11

Visa cancellation and refusal on character grounds
(including revocation of mandatory cancellation)

CONTENTS

- Decision to be made within 84 days
- Protected information
- Evidentiary matters

Common Issues

- Reasonably suspects
- Effect of conviction on exercise of discretion

Relevant case law and AAT decisions

Overview

The *Migration Act 1958* (the Act) provides special powers for the Minister to refuse or cancel visas on character grounds. In some circumstances where a visa is cancelled on character grounds, the Minister can revoke that cancellation decision.

These powers generally involve consideration of whether a person passes the character test, and if they do not, the exercise of a discretion about what decision should be made (whether the visa should be refused or cancelled, or whether the cancellation should be revoked).

The character test is set out in s 501(6) of the Act, which essentially deems individuals to be of bad character in the circumstances listed in that subsection.

This commentary focuses on the three types of visa decisions on character grounds which may be subject to review by the AAT: visa refusals under s 501(1), visa cancellations under s 501(2), and decisions under s 501CA not to revoke a mandatory cancellation.[1] It looks at the nature of each of these decision-making powers, the AAT's jurisdiction to review primary decisions, the application of the character test and the exercise of the discretion. It also looks at specific provisions governing the conduct of these reviews by the AAT and some common legal issues affecting decisions in this area.

The Powers

The character related visa powers are powers of the Minister under the Act. However, the powers are often exercised by officers in the Department of Home Affairs as delegates of the Minister under s 496 of the Act Unless otherwise indicated, references to the Minister in this commentary include the Minister's delegates.

[1] Other visa decisions on character grounds cannot be reviewed by the AAT – see for example the character-based powers in s 501A, 501B and 501BA. These are personal powers of the Minister and are not subject to AAT review.

Visa refusal under s 501(1) and cancellation under s 501(2)

Under s 501(1), the Minister may refuse to grant a visa if the person does not satisfy the Minister that the person passes the character test.[2] This special visa refusal power is related to the general power to grant or refuse to grant a visa in s 65 of the Act.[3]

Under s 501(2), a person's visa can be cancelled if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test.[4] If a person does not pass the character test, the decision-maker must then go on to consider the discretion to cancel or refuse the visa. Failure to pass the character test provides the occasion, but not the reason, for the exercise of that discretion. There is a need in each case to make an individual assessment of the visa application or cancellation.[5]

The discretion conferred by s 501(2) is a discretion to cancel; to approach it as a discretion *not to* cancel is a jurisdictional error.[6]

Although in their terms each of these powers may be exercised where the person does not satisfy the Minister that they *do* pass the character test, as explained below under 'The character test', in practice the powers operate when the Minister makes a finding that they *do not* pass the character test.

Revocation under s 501CA(4) of mandatory cancellation

Under s 501(3A), the Minister must cancel a visa of certain persons in prison who do not pass the character test because of sexually based offences involving a child, or because of a substantial criminal record as a result of being sentenced to death, life imprisonment, or a term of imprisonment more than 12 months.[7] The person must be serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.[8]

If a visa is cancelled under s 501(3A), the Minister must give the person a written notice setting out the decision and particulars of certain adverse information, and inviting the person to make representations about revocation of the original decision.[9]

If the person makes representations in accordance with the invitation, then under s 501CA(4), the Minister may revoke the original decision if satisfied the person passes character test or that there is another reason why the original decision should be revoked.

The judicial authorities indicate that although the provision says the decision-maker *may* revoke the cancellation if there is another reason to do so, this does not involve a separate exercise of a discretion but

[2] s 501(1).
[3] See e.g. discussion in *SZLDG v MIAC* (2008) 166 FCR 230 about the interaction between s 65 and s 501.
[4] See discussion of 'Reasonably Suspects' below
[5] *NBMZ v MIBP* (2014) 220 FCR 1 at [204]-[205].
[6] *Lesuma v MIAC (No 2)* [2007] FCA 2106 (Emmett J, 19 December 2007) at [23]-[33].
[7] Specifically, this applies to persons who fail the character test under paragraph (6)(e) or under (6)(a) due to a substantial criminal record as defined in paragraphs (7)(a), (b) or (c). See discussion of 'The Character Test' below.
[8] For these purposes, periods of periodic detention and orders to participate in certain residential schemes or programs count as terms of imprisonment: s 501(8) and (9). A 'sentence' includes any form of determination of the punishment for an offence and 'imprisonment' includes any form of punitive detention in a facility or institution and: s 501(12).
[9] s 501CA(3). The adverse information is referred to as 'relevant information' which is defined in s 501CA(2) as information that would be a reason or part of the reason for making the decision, and is specifically about an individual and not just a class of persons. Non-disclosable information as defined in s 5(1) is excluded from the definition of 'relevant information' and so need not be given under this provision. For a discussion of similarly worded adverse information provisions relating to MRD reviews, see Chapter 10 of the MRD Procedural Law Guide. In *Picard v MIBP* [2015] FCA 1430 (Tracey J, 16 December 2015) at [40], the Court observed that this was a somewhat strange provision as the obligation relates to information bearing on the decision to cancel, not information on which the Minister might rely in deciding whether or not to revoke the cancellation decision: at [40].

rather is part of a single balancing exercise.[10] In deciding whether there is 'another reason' why the decision should be revoked, the decision-maker must form a state of satisfaction about the existence of 'another reason' by forming a state of satisfaction about matters including the considerations in the Minister's Direction.[11] The Minister must assess and evaluate the factors for and against revocation, and if satisfied that the cancellation should be revoked, the Minister is obliged to act on that view – this is a single process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.[12]

In making a decision under s 501CA(4)(b), the decision-maker is not constrained to consider only 'relevant information' given at the time of formal notification of the cancellation decision and the representations made in response.[13]

In a decision not to revoke, it is preferable to express the conclusion in the terms used by the provision, that the decision-maker is neither satisfied that the person passes the character test, nor that there is 'another reason why the original decision should be revoked'.[14]

Jurisdiction

Reviewable decisions

Decisions by a delegate to refuse a visa under s 501(1), to cancel a visa under s 501(2), or not to revoke a mandatory visa cancellation under s 501CA(4), are reviewable by the AAT in its General Division.[15] As only decisions made by delegates are reviewable, decisions made by the Minister personally are not subject to merits review.[16] References to the Minister include any one of the Ministers administering the relevant provisions, including e.g. an Assistant Minister appointed to administer the Act.[17]

Statutory time limits

For decisions made under ss 501 and 501CA(4), where the person affected is in the migration zone, they must apply to the Tribunal for review within 9 days after the day on which they were notified of the decision in accordance with s 501G(1).[18] This time period cannot be extended.[19] If the applicant is outside the migration zone the review application must be lodged no later than 28 days after the document setting out the terms of the decision is given to the applicant, but this time can be extended.[20]

[10] See *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), at [21], referring to *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September, 2016) and *Marzano v MIBP* (2017) 250 FCR 548, but contrasting the emphasis Gageler and Gordon JJ placed on the word 'may' in *Falzon v MIBP* [2018] 9 HCA 2 at [74].
[11] *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [59].
[12] *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September 2016) at [38].
[13] *Marzano v MIBP* (2017) 250 FCR 548 at [56], [57], [59], [60].
[14] See *Romanov v MHA* [2018] FCA 1494 (Jagot J, 5 October 2018) at [20].
[15] s 500(1)(b), (ba). Mandatory visa cancellation decisions by delegates under s 501(3A) are not reviewable: s 500(4A). Character-based visa decisions under s 501 are not subject to review in the MRD: s 500(4)(b). See the President's Direction: Allocation of Business to Divisions of the AAT, 28 February 2019..
[16] The personal powers of the Minister to cancel or refuse visas under ss 500A(2) and (3), s 501(3), s 501A(2) and (3), s 501B(2) and 501BA(2), and the power to revoke a cancellation in s 501C(4) are not reviewable as they are not included in the list of reviewable decisions in s 500(1), and are also excluded from review by the MRD under Parts 5 or 7: s 500A(7), s 338(2), s 411(2)(aa), s 501A(7), s 501B(4), s 501BA(5), s 501C(11).
[17] Due to the effect of s 19A of the *Acts Interpretation Act 1901*: see *Maxwell v MIBP* (2016) 249 FCR 275 at [20]-[21].
[18] s 500(6B).
[19] s 500(6B) provides that s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*, which concern extensions of time, do not apply.
[20] s 29(1)(d) and (2)(a) and s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*.

Standing

Standing to apply to the AAT for review is ordinarily governed by s 27(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which provides for a person whose interests are affected by a decision to apply for a review. However, for visa cancellation and refusal decisions under s 501 (but not non-revocation decisions under s 501CA), a person is not entitled to make an application for review unless the person would be entitled to seek review of the decision under Part 5 or 7 of the Migration Act if the decision had been made on another ground.[21]

This calls for consideration of the provisions about standing to apply for review in s 347(2), (3) and (3A) (for general migration visas) and s 412(2) and (3) (for protection visas). For visa cancellations, it is generally the person whose visa was cancelled who has standing, and the person must be in the migration zone at the time of the cancellation decision. For visa refusals, the rules are more complicated, but in most cases for visas applied for onshore, the visa applicant has standing, while for offshore visas requiring sponsorship, the sponsor has standing.[22] For detailed discussion of the provisions about standing in Parts 5 and 7 of the Migration Act, including who may apply and where the review applicant must be located to apply, see Chapter 4 of the MRD Procedural Law Guide.

Application fee

The application for review must be accompanied by the prescribed fee.[23] Although the full fee $920 is payable if no concessional circumstance applies, in most onshore cases, the concessional $100 fee will apply as the applicant will be in prison or immigration detention.[24] The AAT can dismiss an application if the fee is not paid within 6 weeks of lodgement, and the AAT is not required to deal with the application until the fee is paid.[25]

The Character Test

The character test is defined in s 501(6) of the Migration Act. It is generally concerned with protection of the Australian community from the risk of harm.[26]

The character test deems individuals to be of bad character if they fit any of the criteria listed.

A person does not pass the character test only if one of the paragraphs in s 501(6) applies to that person.[27] While an applicant must satisfy the Minister in relation to factual matters relevant to the Minister's determination of whether a paragraph in s 501(6) applies, there will generally need to be a finding, or an opinion or suspicion based on reasonable grounds,[28] that one of these paragraphs applies. For example, whether or not a person has a substantial criminal record for s 501(6)(a) can only be determined by means of an objective finding by the Minister. Such a finding is therefore implicitly required.[29] In circumstances

[21] s 500(3), which refers to s 500(1)(b); *Administrative Appeals Tribunal Act 1975,* s 27(1).
[22] See ss 338 and 347 (general migration visas) and 412 (protection visas).
[23] s 29(1)(b), *Administrative Appeals Tribunal Act 1975.*
[24] s 20(1)(a) and s 21 of the *Administrative Appeals Tribunal Regulation 2015* – see in particular s 21(d), which applies where the applicant is an inmate of a prison or is otherwise lawfully detained in a public institution.
[25] s 69C(1) of the *Administrative Appeals Tribunal Act 1975* and s 24 of the *Administrative Appeals Tribunal Regulation 2015.*
[26] See, e.g., *Moana v MIBP* (2015) 230 FCR 367, at [52]-[56], where Rangiah J went through the various character grounds then in force and related them to protection of the community from harm; *Djalic v MIMA* (2004) 139 FCR 292 at [68] and [72]; *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg and Lander JJ, 25 March 2004) at [168]. Some judges, however, have expressed the view that it would not necessarily be error for the Minister acting personally not to consider the risk of harm: see *MIBP v Lesianawai* (2014) 227 FCR 562, at [26].
[27] *MIMIA v Godley* (2005) 141 FCR 552 at [54].
[28] *MIMIA v Godley* (2005) 141 FCR 552 at [34].
[29] *MIMIA v Godley* (2005) 141 FCR 552 at [48].

where the Minister is unsure whether a paragraph in s 501(6) applies, the Minister could not refuse or cancel the visa.[30]

Some paragraphs of s 501(6) require a reasonable suspicion or opinion. Section 501(6)(c), for example requires consideration of whether a person is of good character, having regard to past and present conduct.

In effect, s 501(6) provides a complete statement of how the person may satisfy the Minister. The effect of that statement is that, unless a paragraph in s 501(6) applies, the person is to be taken as having satisfied the Minister.[31] Section 501(6) provides: 'Otherwise, the person passes the character test'.

Consistent with judicial authorities, Direction No. 79 says: 'Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act'.[32]

Substantial criminal record

A person who has a substantial criminal record does not pass the character test.[33] For this purpose, the categories of sentences and detention in s 501(7) have been selected by the Parliament as objective, easily identified, criteria.[34]

Sentence

The phrase 'substantial criminal record' is defined to include having been sentenced to: death or life imprisonment; a term of imprisonment of 12 months or more; two or more terms of imprisonment totalling 2 or more years; or having been institutionalised after being acquitted on grounds of unsoundness of mind or insanity, or been found by a court[35] to not be fit to plead. The Act defines a 'term of imprisonment' broadly. It includes time that a court has ordered a person to spend in drug rehabilitation or a residential program for the mentally ill.[36] For sentences of periodic detention, the 'term of imprisonment' is calculated as the total number of days for which a person is required to be detained.[37] A sentence or conviction must be disregarded if the conviction has been quashed, or the person has been pardoned in relation to that conviction, and the effect is that the person is taken never to have been convicted.[38]

For the purposes of determining whether an applicant has been sentenced to a term of imprisonment of 12 months or more, or to two or more terms of imprisonment totalling two years or more within s 501(7), it is the term of imprisonment to which the applicant was sentenced, not the term actually served, that is relevant.[39] A sentence to a term of imprisonment which is suspended falls within the section.[40]

Sentences served concurrently must be totalled for the purposes of s 501(7).[41]

[30] See *MIMIA v Godley* (2005) 141 FCR 552 at [53]-[55].
[31] *MIMIA v Godley* (2005) 141 FCR 552 at [56].
[32] Direction No. 79, Annex A, Section 1, Discretionary visa cancellation or refusal, paragraph (2), p.22.
[33] s 5016).
[34] See *Brown v MIAC* (2010) 183 FCR 113 at [10].
[35] 'Court' includes a court martial or similar military tribunal: s 501(12).
[36] s 501(9)
[37] s 501(8).
[38] s 500(10).
[39] *Drake v MIEA* (1979) 76 FLR 409 at 415-418.
[40] *Brown v MIAC* [2010] FCAFC 33 (Moore, Rares, Nicholas JJ, 20 April 2010) at [11]-[12].
[41] s 501(7A).

Association with/membership of groups involved in criminal conduct

Individuals are also deemed to fail the character test if the Minister reasonably suspects that they have been a member of a group, or have had an association with, a person or a group who the Minister reasonably suspects has been or is involved in criminal conduct. For a person to fail the membership limb, there does not need to be an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation.[42] The evidence required will depend on the circumstances of the case. The Federal Court has said that membership implies at the very least a voluntary decision by the person to assume membership of the group and recognition by the group of the person as a member.[43]

To fail the association limb, the decision-maker must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself, sufficient. In order not to pass the character test on this ground, the association must have some negative bearing upon the person's character;[44] it does not refer to merely social, familial or professional relationships.[45] In establishing association, decision-makers are to consider the nature of the association; the degree and frequency of association; and its duration.

It has been said that it is implicit that a person who fails this test may pose a risk of harm to the Australian community.[46]

Good character, having regard to conduct

A person will not pass the character test if they are not of good character having regard to the person's past and present criminal conduct or past and present general conduct.[47]

The question whether a person is or is not of 'good character' is primarily an issue of fact and there are no precise parameters to distinguish 'good character' from 'bad character'.[48] 'Good character' does not refer to a person's reputation and repute however, a person's criminal record can assist decision makers, who should have regard to the nature of any crimes to determine whether they reflect adversely on the applicant's character as well as the applicant's evidence as to whether they have reformed and any character references.[49] 'Good character' refers to enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens.[50] Conduct may make those qualities visible, but it should never be confused with them. Having had regard to the conduct, the Minister must still come to a further conclusion, whether or not to be satisfied that the person is not of good character.[51]

Section 501 does not charge the decision-maker with the task of making a judgment, general in nature, about the character of a person, i.e, a judgment to which the statutory context is of no relevance. The concept of 'good character' in s 501 is not concerned with whether a person meets the highest standards of integrity, but with a less exacting standard than that. It is concerned with whether the person's character in the sense of their enduring moral qualities, is so deficient as to show it is for the public good to refuse entry

[42] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [133]-[149].
[43] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [144].
[44] Direction No. 79, Annex A, Section 2, 3(5), p.25. This incorporates the principle from the Full Federal Court judgment in *Haneef v MIAC* (2007) 163 FCR 414 at [130].
[45] *Haneef v MIAC* (2007) 161 FCR 40 at [254].
[46] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016), at [70].
[47] s 501(6)(c.)
[48] *Irving v MILGEA* (1996) 68 FCR 422 at 427-428.
[49] *Irving v MILGEA* (1996) 68 FCR 422 at 425.
[50] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [51].
[51] *MIEA v Baker* (1997) 73 FCR 187, at 197.

(or cancel their visa). The standard is not fixed but elastic, in the sense that identified deficiencies in the moral qualities of an applicant for a short-term visa may not justify a conclusion that a person is 'not of good character' within s 501(2), while similar deficiencies may suffice to justify that conclusion, where the person seeks long-term entry (or stay).[52]

It is for the administrative decision-maker to arrive at a decision whether a person is of good character. An applicant must satisfy the Minister in relation to factual matters relevant to that determination, but the Minister must make a supervening determination, having had regard to those matters of past and present conduct, that a person is of bad character before the visa can be refused or cancelled. The consideration of past and present conduct provides indicia as to the presence or absence of good character but does not in itself answer the question. The decision-maker must look at the totality of the circumstances and determine whether the person is distinguishable from others as a person not of good character.[53] Once the decision has been made, it matters not that another decision-maker may have concluded differently. The decision will stand unless an error of law is established, e.g. that the decision was such that no reasonable decision-maker could have arrived at it.[54]

Criminal conduct

The concepts of criminal and general conduct are not mutually exclusive.[55]

'Past criminal conduct' does not refer only to conduct the subject of criminal conviction.[56] In the absence of a prosecution and conviction, however, satisfaction that criminal conduct has occurred will not be attained on slight material.[57] In determining whether a person's conduct has been criminal, the weight to be attached to evidence such as police intelligence reports will be a matter for the Tribunal.[58]

It is necessary when finding that a person is not of good character due to their criminal conduct to:[59]

- examine the conduct and assess it 'as to its degree of moral culpability or turpitude'
- examine past and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character
- if there is no recent criminal conduct, give due weight to that fact before concluding that the person is not of 'good character'. A person of ill repute due to past criminal conduct may nonetheless reform into a person of good character.[60] It could be error not to take an absence of evidence of 'present criminal conduct' into account, and to ask instead whether there has been an affirmative demonstration of facts occurring since the relevant conduct sufficient to displace the conclusion, otherwise compelled by past conduct, that a person is not of good character.[61]

General conduct

The Act and regulations are not concerned with infractions or patterns of conduct that show weakness or blemishes in character but with ensuring that the exercise of a sovereign power to prevent a non-citizen entering Australia is only invoked when the non-citizen is a person whose lack of good character is such that

[52] *Goldie v MIMA* [1999] FCA 1277 (Spender, Drummond, Mansfield JJ, 14 September 1999) at [8].
[53] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [52],
[54] *Irving v MILGEA* (1996) 68 FCR 422, at 428.
[55] *Wong v MIMIA* [2002] FCAFC 440 (Black CJ, Hill and Hely JJ, 20 December 2002) at [33].
[56] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[57] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[58] See *Brown v MIAC* (2010) 183 FCR 113 at [128].
[59] *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [55].
[60] *Irving v MILGEA* (1996) 68 FCR 422 at 431-432.

it is for the public good to refuse entry.[62] The absence of harm to the Australian community from the issue of a visa is relevant to the meaning of good character.[63]

Conduct other than prevalent or usual conduct may be regarded as 'general conduct'. Just as a person's criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, displayed but once or twice, may lay character bare very tellingly.[64]

It is not necessary that in every circumstance there must be past general bad conduct and present bad conduct. Past bad conduct may, in certain circumstances, outweigh recent general good conduct so as to compel or favour a conclusion that the person continues to lack moral worth.[65]

A deportation order is a matter that may be taken into account[66], although such orders do not of themselves throw much light upon the inherent qualities which a person may have.[67]

Risk in regard to future conduct

This section requires an evaluative judgment by the decision-maker as to whether they are satisfied that there is a risk that a person would engage in conduct of the kinds specified. Then, if the decision-maker is so satisfied, they have a discretion to refuse or cancel a visa, or revoke a visa cancellation.[68]

A conditional finding positing that there is a risk that a person would engage in certain conduct should a second circumstance (e.g. drinking to excess) occur is not necessarily disqualified from serving as a finding of risk. However, it has been said that as a matter of logic, such a conditional conclusion can only do so if there are express, or implied, findings (a) that there is sufficient probability that the second event will happen; and (b) that that there is sufficient probability that the happening of the second event was triggered by the first.[69]

Abstract propensity reasoning (i.e. that a person who has offended once will have a propensity to reoffend) may not be permissible reasoning to reach a conclusion regarding the jurisdictional fact of whether someone passes the character test because of the risk of future conduct.[70] Direction No. 79 says that it is not enough that the person has committed relevant conduct in the past, there must be a risk that they would engage in such conduct in the future.[71]

According to the Direction, the level of risk requires that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in the relevant conduct.[72]

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[61] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [48].
[62] *Irving v MILGEA* (1996) 68 FCR 422, at 432.
[63] *Irving v MILGEA* (1996) 68 FCR 422, at 433.
[64] *MIEA v Baker* (1997) 73 FCR 187, at 195.
[65] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [47].
[66] *MIEA v Baker* (1997) 73 FCR 187, at 196.
[67] *Irving v MILGEA* (1996) 68 FCR 422, at 425-6.
[68] See *Sabharwal v MIBP* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018) at [2]. The Court considered s.501(1), but the reasoning also applies to s.501(2) and s.501(3A).
[69] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]. The judgment was overturned on appeal in *MIBP v Sabharwal* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018), at [59]-[65] because the Full Federal Court did not agree that the Minister's finding was conditional upon the probability of the applicant again drinking to excess. In these circumstances, the Full Court did not consider whether it was error to make a conditional finding without making the relevant findings on the 'triggering event'.
[70] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]-[112]. Kerr J distinguished the use of such reasoning in determining whether a person passes the character test, from cases such as *Muggeridge v MIBP* (2017) FCR 255 81, where it would not be inconsistent with the exercise of the discretion to cancel a visa if the Minister was to address the question of the likelihood of reoffending in this way, *after* the ground (in that case a 'substantial criminal record') had been made out.
[71] Direction No. 79, Annex A, Section 2, cl 6.(3), pp.28-9.
[72] Direction No. 79, Annex A, Section 2, cl 6.(2).

Other grounds

The other character grounds in s 501(6) – immigration detention offences, sexually based offences involving a child, crimes under International Humanitarian Law, national security risk, and certain Interpol notices – have not had as much judicial consideration as those discussed above.

Minister's Directions and Discretion

The discretions under ss 501 and 501CA are unfettered in their terms. Nevertheless, the law imposes certain limits on the exercise of the discretions. Decision-makers may not act arbitrarily, capriciously or legally unreasonably. The subject matter, scope and purpose of the Act may also require that certain considerations be taken into account.[73] The Minister also has the ability to provide some guidance and framework to the exercise of these discretions by way of Directions issued under s 499 of the Act.

Directions and how they should be applied

The Minister may give written directions to a person or body exercising powers under the Act if those directions are about the performance of those functions or the exercise of those powers.[74] The Minister has issued such a direction for people or bodies exercising powers under ss 501 and 501CA.[75]

The purpose of the Direction is to *guide* decision-makers exercising powers under the Act. Delegates and the Tribunal must generally follow the Minister's Direction. Non-compliance with a s 499 Ministerial Direction can constitute jurisdictional error.[76] Compliance with the Direction does not involve dictating the way in which the discretion is to be exercised; rather it creates a framework within which the discretion vested in the decision-maker is lawfully to be exercised. It identifies certain principles which provide a framework within which decision-makers should approach their task.[77] It prescribes relevant considerations which must be taken into account, but provides guidance only as to the manner in which they are to be balanced. It equips decision-makers with a width of discretion that enables them to take into account the myriad of different circumstances and different combinations of circumstances that may arise and thereby to reach a result that is fair and rational in all the circumstances, while ensuring that account is had to crucial considerations.[78]

Direction No. 79

Direction No. 79 does not determine rules of general application but gives directions to the Tribunal as to the policy it must apply in the exercise of the discretion conferred on it by s 43 of the AAT Act in exercising the power conferred by ss 501 and 501CA of the *Migration Act*. The Direction does not derogate from the Tribunal's duty to reach the preferable decision in the particular case before it. Indeed, the Direction has that end as its purpose.[79]

[73] *NBMZ v MIBP* (2014) 220 FCR 1, at [6]. The Court was discussing s 501(1), but the reasoning also applies to s 501(2) and s 501(3A). These types of considerations are discussed further below.
[74] s 499, *Migration Act 1958*.
[75] Direction No. 79 is the direction currently in force.
[76] See *Williams v MIBP* (2014) 226 FCR 112 at [34]-[35]. In *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017), the Court distinguished such non-compliance from failure to take into account a relevant consideration, assuming (but not deciding) that s 499 Directions are capable of imposing on decision-makers the kind of mandatory obligations it purports to do: at [35]-[40].
[77] *MIBP v Lesianawai* (2014) 227 FCR 562, at [80]-[81].
[78] *MIBP v Lesianawai* (2014) 227 FCR 562, at [83]. The Court was discussing Direction No. 55, but the reasoning applies equally to Direction No. 79.
[79] *Uelese v MIBP* [2016] FCA 348 (Robertson J, 12 April 2016) at [50].

Direction No. 79 revoked Direction No. 65 and commenced on 28 February 2019.[80] It is substantially the same as Direction No. 65, except with regards to the consideration of violence against women and children and in the assessment of risk and consideration of the best interests of children for non-revocation decisions.[81] Where judgments and Tribunal decisions discussed in this commentary have considered Direction No. 65 or previous Directions, the reasoning applies equally to Direction No. 79, unless indicated otherwise.

Section 1 of the Direction includes a preamble which contains statements about its objectives, general guidance and principles.

Section 2, titled 'Exercising the discretion', says that decision-makers must take into account the mandatory considerations in Parts A, B, and C of the Direction where they are relevant, and in doing so they are to be informed by the principles.[82]

Section 2 identifies primary and other considerations for each of the three types of decision - visa refusal, visa cancellation and non-revocation of mandatory visa cancellation. The primary considerations are the same for all.[83] The other considerations are generally the same for the three types of decision. The exceptions are that the strength, nature and duration of ties and extent of impediments if removed are stated considerations for cancellations and revocations,[84] but not for visa refusals. Impact on family members is an express consideration for visa refusals, but not for cancellations and non-revocations.[85]

While a decision-maker is bound to take into account certain considerations, they are not limited to those set out in the Direction. The Direction specifies the relative, but not the actual, weight to be given to those considerations. To that extent, it imposes requirements on the exercise of the Tribunal's discretion, but the Tribunal is obliged to examine the merits of the case and decide for itself whether to affirm the decision.[86]

The weight to be given to any particular matter is a matter for the decision-maker and cannot be the subject of some ritualistic formula.[87] Phrases such as 'should generally be given greater weight than the other considerations' and 'one or more primary considerations may outweigh other primary considerations' have been interpreted as provisions that are intended to provide guidance to the decision maker as to how the balancing exercise required by the Direction should be approached, while leaving it open to the decision-maker to adopt a different approach in the exercise of discretion in the individual case.[88] It is not the content of the Direction which determines the outcome of the exercise of the discretion, but rather its application by a decision-maker to the evidence and material in an individual case.[89]

As well as the considerations identified in the Direction, the Tribunal must have regard to all relevant considerations, both in determining the ground and exercising the discretion.[90] For more information, see Other considerations not set out in Direction No. 79. Where the Direction purports to interpret a statutory

[80] Direction No. 79, Section 1, p.1.
[81] Clauses 6.3(3), 9.1.1, 11.1.1, 13.1.1, 13.1.2, and 13.2(1) differ from provisions in Direction No.65. The overall effect is that decision-makers no longer need to have regard to the sentence imposed, in considering the nature and seriousness of crimes of a violent nature against women and children, that they no longer need to have regard to the principle that the community's tolerance for any risk of harm becomes lower as the seriousness of potential harm increases, in considering whether someone represents an unacceptable risk for non-revocation decisions, and they must make a determination about whether revocation 'is in the best interests of the child' instead of about whether it 'is, or is not, in the best interests of the child'.
[82] Direction No. 79, Clauses 7 and 8.
[83] Direction No. 79, Section 2, Part A, 9, p.5; Section 2, Part B, 11, p.11; Section 2, Part C, 13, p.16.
[84] Direction No. 79, Section 2, Part A, 10, p.8; Section 2, Part C, 14, p.19.
[85] Direction No. 79, Section 2, Part B, 12, p.14.
[86] See *MIBP v Lesianawai* (2014) 227 FCR 562, at [21].
[87] *Howells v MIMIA* (2004) 139 FCR 580, at [127].
[88] *MIBP v Lesianawai* (2014) 227 FCR 562 at [83].
[89] *Jagroop v MIBP* (2016) 241 FCR 461 at [78].
[90] *Craig v South Australia* (1995) 184 CLR 163, at 179, *MIAC v Li* (2013) 249 CLR 332 at [10], [26], [71], [72], [110], *MIMA v Yusuf* (2001) 206 CLR 323 at [82].

term or describe a legal requirement, a decision-maker may only apply it where the interpretation or requirement is consistent with the legislation and judicial authority.[91]

Discretion - Weighing up relevant considerations

As well as setting out relevant considerations, Direction No. 79 gives guidance on how they should be weighed and applied in the exercise of the discretion. Direction No. 79 says that in taking the relevant considerations into account both primary and other considerations may weigh in favour of, or against, refusal, cancellation, or non-revocation; that primary considerations should generally be given greater weight than other considerations; and that one or more primary considerations may outweigh other primary considerations.[92]

It makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction No. 79 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that, absent some factor that takes the case out of that which pertains 'generally', they are to be given greater weight. However, Direction No. 79 does not require that the other considerations be treated as secondary in all cases, nor does it provide that primary considerations are 'normally' given greater weight. Rather, it concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.[93]

In weighing up a consideration, the Tribunal must make a conclusion on it and, having done so, put its conclusion on that issue on the scales in the manner provided for by the Direction.[94]

When applying the discretion the Tribunal must genuinely weigh factors leading to opposite conclusions and not artificially limit the weight to be given to any of the factors.[95]

The discussion of any mitigating factors advanced by the applicant must relate the factors to a person's overall conduct, not just to the most serious parts of it.[96]

Demonstrating consideration

Courts will generally treat the written statement of reasons as a statement of the matters that a decision-maker "adverted to, considered and [took] into account", unless there is probative evidence to the contrary; and if something is not mentioned, it may be inferred that it has not been adverted to, considered or taken into account.[97]

The failure to give any weight to a factor to which a decision-maker is bound to have regard in circumstances where that factor is of great importance in the particular case may support an inference that the decision-

[91] See e.g. *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375 and *MIAC v Anochie* (2012) 209 FCR 497 at [36]. More generally, see Legal Services commentary Application of Policy.
[92] Direction No. 79, Section 2, 8(3)-(5), p.5.
[93] *Suleiman v MIBP* [2018] FCA 594 (Colvin J, 2 May 2018) at [23].
[94] *Rokobatini v MIMA* 90 FCR 583 at [23]. The issue in that case was the hardship to the applicant if removed.
[95] *Hong v MIMA* [1999] FCA 1567 (Madgwick J, 10 November 1999) at [20].
[96] *Green v MIAC* [2008] FCA 125 (Tamberlin J, 20 February 2008) at [22]-[28].
[97] *NBMZ v MIBP* (2014) 220 FCR 1 at [16], citing s 25D of the *Acts Interpretation Act 1901* (Cth.), s 501G of the Migration Act, *MIMIA v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [89] and [133]. This judgment considered a decision made by the Minister personally, but the principle is drawn from authorities applying to administrative decision-makers generally.

maker did not have regard to that factor at all.[98] Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant. On the other hand, it does not follow that a decision-maker who genuinely considers a factor only to dismiss it as having no application or significance in the circumstances of the particular case will have committed an error. A decision-maker is entitled to be brief in their consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. Whether that inference should be drawn will depend on the circumstances of the particular case.[99]

A decision-maker is not required to make a finding of fact with respect to every claim made or raised by an applicant. A finding of fact may not be required if a claim or issue is irrelevant or if it is subsumed within a claim or issue of greater generality.[100] Nor is a failure to mention every element in the process of reasoning that led to a conclusion necessarily an indication that it failed to take some matter into account.[101]

On judicial review, a Court will assess whether the decision-maker has as a matter of substance had regard to the representations put. The fact that a decision-maker says they have had regard to a representation does not by itself establish that they have, as a matter of substance, had that regard. Neither does the Court ignore such a statement.[102]

Primary considerations

(A) Protection of the Australian community

Direction No. 79 says that when considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity *or* other serious conduct by non-citizens.[103] It adds that there is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct,[104] and that remaining in Australia is a privilege conferred in the expectation that non-citizens are and have been law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.[105] These principles appear to reinforce one of the principles set out in the Preamble, the low tolerance of such conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.[106]

In addressing this consideration, decision-makers should give consideration to the nature and seriousness of the non-citizen's conduct to date, and the risk to the Australian community should the non-citizen commit

[98] *MIAC v Khadgi* (2010) 190 FCR 248 at [58]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principle applies to administrative decisions generally.
[99] *MIAC v Khadgi* (2010) 190 FCR 248 at [59]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principles apply to administrative decisions generally. See also *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41] and [45].
[100] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41].In that judgment, the Court noted that in *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), the Full Court said at [58]-[60] that although the decision-maker did not make an express finding that Mr Buadromo would or would not find it impossible to obtain work in Fiji, they addressed whether he was likely to find employment in Fiji or sufficient employment to provide for his family. The decision-maker was not required to make a precise finding about his prospects of finding employment. The decision-maker addressed the issue, finding that Mr Buadromo had work skills which might help him gain employment and expressly found that his children would suffer hardship.
[101] *Goldie v MIMA* (2001) 111 FCR 378 at
[102] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [45]
[103] Direction No. 79, cll.9.1(1), 11.1(1), 13.1(1).
[104] Direction No. 79, cl 11.1(1)
[105] Direction No. 79, cll 9.1(1), 13.1(1).
[106] Direction No. 79, cl 6.3(6).

further offences or engage in other serious conduct.[107] It has been said that these considerations help a decision-maker to gauge how low the community's level of tolerance towards non-citizens who have engaged in criminal or serious conduct would be in the particular circumstances of a case.[108] The Direction goes on to explain and provide guidance about the concepts of the nature and seriousness of conduct and the risk to the community, including matters to which decision-makers must, or should, have regard in coming to a view on the primary consideration of protection of the Australian community. Decision-makers should, however, be careful not to inadvertently elevate any of these matters into primary considerations.[109]

While the Direction provides guidance on what conduct or offences are considered serious and how risk should be assessed, a decision-maker has no duty to evaluate the risk of harm to the community 'in any particular way or to ascribe any particular characterisation to the quality of the risk' or conduct.[110] While statements about types of conduct considered serious point to the likelihood that 'serious crime' includes violent and sexual crimes, particularly against women or children or vulnerable members of the community, they ought not be regarded as the sole, or even necessarily determinative, source of information relevant to the characterisation.[111] The Direction also requires decision-makers to consider other types of evidence, such as the sentence imposed, which can serve as a guide to the objective seriousness of conduct.[112] There is no statutory constraint on the way that the decision-maker assesses risk or characterises conduct, save that whatever they take into account must be logical and rational.[113]

Evaluation of whether a risk of harm is 'unacceptable' does not discharge the function of the decision-maker,[114] it must go on to consider whether other considerations outweigh that risk. It is not possible to say that the required evaluation is subsumed in a conclusion about whether a perceived risk of future harm is unacceptable.[115]

Likelihood of engaging in further criminal or other serious conduct

To say that the statute implicitly recognises that all persons who have previously committed an offence are more likely to offend in the future is to state the implication too highly. The fact of prior offending will, in most if not all cases, invite consideration of the question of whether the person in question in fact presents some risk to the Australian community and the starting point in that consideration will invariably be the fact of the prior offending. But that is all. The statute does not, of itself, supply an answer to the factual question of whether a particular visa holder has a propensity, however slight, to re-offend. The decision-maker is not required to evaluate the risk of a person re-offending in any particular way, but if they do in fact embark upon an evaluation of a person's prospects of re-offending in a way that is acutely fact dependent (e.g. that someone is likely to re-offend if they join a motorcycle club or drink alcohol), there needs to be an evident rational connection between the conclusion and the particular materials relied on.[116] The bare recital of convictions and sentences in and of themselves, without examination of mitigating circumstances or the

[107] Direction No. 79, cll 9.1(2), 11.1, 13.1(2).
[108] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [38].
[109] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [43].
[110] *Brown v MIAC* (2010) 183 FCR 113, at [41]
[111] See *DND v MHA* [2018] AATA 2716 (Taylor SM, 9 August 2018), at [26]-[27]. The decision considered this consideration as described in part C of Direction No. 65, dealing with revocation requests. This consideration is explained in substantially similar terms in Parts A and B, which deal with cancellation and refusals, and part C, of Direction No. 79.
[112] See *NBMZ v MIBP* (2014) 220 FCR 1 at [202].
[113] *BSJ16 v MIBP* [2016] FCA 1181 (Moshinsky J, 6 October 2016) at [68].
[114] *MIBP v Lesianawai* (2014) 227 FCR 562, at [31].
[115] *MIBP v Lesianawai* (2014) 227 FCR 562, at [39]. This judgment considered Minister's Direction No. 55, which directed decision-makers to take into account the primary considerations *and* determine whether the risk of future harm was unacceptable in cl 7, 'How to exercise the discretion'. The second step, determining unacceptable risk of harm, does not appear in cl 7 of Direction No. 79, but the concept of unacceptable risk remains, e.g. in cl 9.1.2, as an element of the primary consideration 'Protection of the Australian community'.
[116] *Muggeridge v MIBP* (2017) 255 FCR 81, at [46]-[47], and [54]-[56]. The Court could not reconcile the exercise of the discretion with the Minister's express findings concerning the applicant's demonstrated rehabilitation, his serious physical debilitation and the absence of evidence that he had had any connections with like motorcycle clubs for more than two decades.

circumstances leading to each conviction, may not be sufficient to rationally support a finding that there is an unacceptable risk of harm.[117]

'Offending' does not include acts committed at a time when a person could not, by law, be attributed with criminal responsibility.[118] This does not mean that the Tribunal cannot take into account evidence about a person's conduct as a child. However, the evidence of that conduct must have some relevance to an issue that properly arises in the course of the Tribunal's decision-making and there must be some logical connection with the inferences or conclusions that the Tribunal then draws from that evidence.[119]

The Tribunal may examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[120] and its significance so far as the risk of recidivism is concerned.[121]

Serious Conduct

'Serious conduct' is not defined in the Act or Regulations, but is defined in Appendix B of Direction No. 79:

> *Behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence.*
>
> *Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s501(6)(c) and/or s501(6)(d).*[122]

Further, for cancellations and refusals, any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is considered to be serious.[123]

If a person's 'serious conduct', for which a conviction has not been recorded, is relevant to the risk of a person reoffending and the risk they pose to the Australian community, a person may need to be put on notice of that issue. Giving a person their record of criminal convictions may not be sufficient.[124]

B) The best interests of minor children in Australia

The best interests of minor children in Australia form the second of the primary considerations outlined in the Direction.

Direction No. 79 says that decision-makers must make a determination about whether cancellation/refusal/ revocation is, or is not, in the best interests of the child.[125] It is not enough merely to have regard to those interests.[126] It has been held that, at least where the decision-maker has relevant information or evidence, the balancing and weighing exercise cannot be undertaken in relation to the best interests of the child

[117] *Splendido v AMIBP (No 2)* [2018] FCA 1158 (Steward J, 8 August 2018) at [32].
[118] *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [99]. The Court said that evidence of the applicant's conduct at nine years of age was incapable of providing a logical basis for the Tribunal's statement that the applicant's 'history of offending' began at this young age.
[119] *CVN17 v MIBP* [2019] FCA 13 (Kenny, 16 January 2019) at [99].
[120] *MIEA v Daniele* (1981) 61 FLR 354 at 358
[121] *MIMA v Ali* (2000) 106 FCR 313, at [45].
[122] Direction No. 79, Appendix B, pp.32-33..
[123] Direction No. 79, cll.9.1.1(1)(d), 11.1.1(1)(d),
[124] See *Stowers v MIBP* [2018] FCAFC 174 (Flick, Griffiths and Derrington JJ, 12 October 2018) at [54].
[125] Direction No. 79, cll 9.2(1), 11.2(1), 13.2(1).
[126] *Spruill v MIAC* [2012] FCA 1401 (Robertson J, 10 December 2012) at [18].

consideration (where it is relevant) unless this determination has first been made.[127] A determination *about* whether a decision is or is not in the best interests of a child includes a finding that the decision is a neutral factor so far as the child's best interests are concerned, or that the evidence before it is insufficient to show whether or not it is in a child's best interests.[128]

The approach to this determination is to:

- identify what are the best interests of the child or children with respect to the exercise of the discretion, and

- assess whether the strength of any other considerations, or the cumulative effect of other considerations, outweigh the consideration of the best interests of the child or children understood as a primary consideration.[129]

Provided that the Tribunal does not treat any other consideration as inherently more significant than the child's best interests, it is entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweigh the best interests of the children.[130]

(C) Expectations of the Australian community

Expectations of the Australian community form the third primary consideration in the Direction. This consideration provides:[131]

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to [cancel the visa held by/refuse the visa application of/not revoke the mandatory visa cancellation of] such a person. [Visa cancellation/visa refusal/non-revocation] may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not [continue to hold/be granted/hold] a visa. Decision-makers should have due regard to the Government's views in this respect.*

The decision maker is also to be informed by the principle that 'The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere'.[132]

Accordingly, the Direction expressly states that the Australian community expects two things: first, that the Government should refuse or cancel visas of persons who commit serious crimes in Australia;[133] and second, that non-citizens will obey the law in Australia.[134] While the Direction also refers to other expectations, privileges, values and standards, none of these are described as expectations of the Australian community.

This consideration does not deal with any objective or ascertainable expectations of the Australian community; rather, it is a kind of deeming provision by the Minister about how the Government wishes to

[127] *Paerau v MIBP Protection* (2014) 219 FCR 504, per Barker J at [52]-[54]. See also Buchanan J at [27]: 'there could be no objection to the AAT concluding that the best interests of the child did not weigh either for or against the cancellation of a visa, so long as the available material was assessed conscientiously.'
[128] *Nigam v MIBP* (2017) 254 FCR 295 at [43], *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [47].
[129] *Wan v MIMA* [2001] 107 FCR 133 at [32]..
[130] *Wan v MIMA* [2001] 107 FCR 133 at [32].
[131] Direction No. 79, cll 9.3 (Part A, for visa cancellation under s 501), 11.3 (Part B, for visa refusal under s 501) and 13.3 (Part C, for revocation under s 501CA of mandatory visa cancellation).
[132] Direction No. 79, cll 6.3(2) and 7.1.
[133] Direction No. 79, cl 6.3(2).
[134] Direction No. 79, cll 9.3, 11.3 and 13.3.

articulate community expectations, whether or not there is any objective basis for that belief. [135] Given the difficulties in obtaining evidence about and assessing community expectations (or standards or values),[136] inquiries about what is meant about community expectations are unnecessary – the Direction sets out the Government's view of what the community expects, and it does not require decision-makers to have regard to any expectations of the community not stated in the Direction. Indeed, the deeming nature of the consideration may mean that doing so could create a risk of error on the basis of a misapplication of the Direction, taking into account an irrelevant consideration, or making findings based on no evidence.[137] References to the AAT's own opinion or belief are best avoided because of the risk of it leading to error.[138] Considerations such as expectations of a 'fair go' or sympathy arising out of the length of time in the community, compassionate or mitigating circumstances, prospects for rehabilitation, and community standards and values, could be dealt with either under considerations in the Direction expressly referring to these matters or under 'other considerations', which are non-exhaustive.[139]

It is also clear from the authorities that where a person has committed serious crimes, the deeming effect is that it weighs adversely for the applicant (i.e. in favour of cancelling or refusing the visa, or against revoking a cancellation). The Direction describes the following as serious crimes, which would be relevant in determining the application of this consideration: violent and or sexual crimes, crimes against vulnerable members of the community (such as minors, the elderly or disabled), and certain offences relating to immigration detention.[140]

The application of this consideration in cases not involving serious crimes is less clear. Where a non-citizen has not obeyed Australian laws while in Australia, that person has not met the community's expectations, but unlike the expectation in relation to serious crimes (that the person should not hold a visa), the Direction does not tie any consequence to a breach of that expectation. Additionally, while the Direction states that the nature of some character concerns or offences are such that the Australian community would expect that the relevant person should not hold a visa, it does not indicate what kinds of concerns or offences these are, beyond saying that if a person has committed a serious crime, the community expects that they should not hold a visa. While the principles do refer to a 'low tolerance of any criminal or other serious conduct[141] by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia,'[142] on a plain reading, what is referred to here is not a deemed expectation of the Australian community, but the absence of an expectation. In sum, where there are character concerns which are not serious crimes, the Direction does not appear to go so far as to articulate an expectation by the community that a visa be cancelled or refused.

[135] *Uelese v MIBP* (2016) 248 FCR 296 at [23]

[136] See e.g. *Visa Cancellation Applicant and MIAC* [2011] AATA 690 (Downes J and McCabe SM, 6 October 2011) at [73]-[83]. That case was more about the role of community standards and values in discretionary administrative decision-making, as the Direction in force at that time (Direction no. 41), did not require decision-makers to consider community expectations. The Minister's submissions in *Uelese* at [43] referred to paragraph [77] of *Visa Cancellation Applicant and MIAC*, which in turn refers to a lecture by Sir Anthony Mason stating that it 'scarcely seems sensible' to require proof of public opinion by evidence. See also *LCNB and Minister for Immigration and Border Protection* [2015] AATA 463 (Frost DP, 30 June 2015) at [80].

[137] See *Uelese v MIBP* (2016) 248 FCR 296 at [23], [64]-[66], *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [76]-[77], and *Afu v MHA* [2018] FCA 1311 (Bromwich J, 29 August 2018) at [85].

[138] See *Ali v MHA* [2018] FCA 1895 (Bromwich J, 30 November 2018) at [38].

[139] Each of clauses 10(1), 12(1) and 14(1) lists 5 categories of 'other considerations' to be taken into account where relevant, but notes that the other considerations are not limited to those categories. Expectations around compliance with international non-refoulement obligations, ties to Australia and other matters specifically referred to could be addressed under those expressly stated considerations in the Direction.

[140] Direction No. 79, cll 9.1.1(1)(a), (c) and (d); 11.1.1(1)(a), (c) and (d); and 13.1.1(1)(a), c) and (i).

[141] Annex B of Direction No. 79, titled 'Interpretation', defines 'serious conduct' as 'behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence. Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s 501(6)(c) [past and present criminal and general conduct] and/or s 501(6)(d) [harassment/vilification/inciting discord]'. The Direction , in the context of the primary consideration of protection to the community, also provides the principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test under s 501(6)(c) is serious, for refusals and cancellations under s 501: cll 9.1.1(1)(e) and 11.1.1(1)(e).

[142] Direction No. 79, cl 6.3(6).

Accordingly, this consideration is more likely to be neutral in the absence of a serious crime, but in most cases it is unlikely to be favourable to the applicant.[143]

Whatever assessment is made of this consideration (whether adverse or neutral), it is not necessarily fatal as it needs to be weighed alongside findings on other considerations in making the correct or preferable decision on review.

Other considerations

Other considerations which must be taken into account where relevant include international non-refoulement obligations (for former visa holders and applicants), and the extent of impediments if removed (for former visa holders only).[144] Information suggesting that a former visa holder may face harm if removed could be relevant to both of these considerations. The level of detail necessary for these considerations will depend, among other things, on the likelihood of a person being removed and the level of generality or specificity of the information[145] suggesting harm. Generally speaking, less detailed consideration will suffice where a person is not at immediate risk of removal as a result of the particular power being exercised, or suggestions of harm are vague and general.

In addressing these considerations, decision-makers must properly understand and consider the legal consequences of the decision being made (in particular detention and removal). What the legal consequences are is a question of fact. To avoid error in this consideration, decision-makers must address and properly understand the direct and immediate consequences of their decision, as well as other (possibly less direct) consequences raised by an applicant.

Decision-makers must also consider the adverse impact of removal upon an applicant, including the impact of harm which does not engage Australia's non-refoulement obligations.[146]

In practice, consideration of the consequences of a decision, including detention and removal, international non-refoulement obligations, the risk of harm and other difficulties in a person's home country may need to be considered together, particularly where removal is a direct consequence of the decision. The more direct removal and detention are as consequences of a decision, the more detailed the consideration of any resulting harm or other hardship needs to be.

<u>International non-refoulement obligations</u>

Direction No. 79 describes 'international non-refoulement obligations' as obligations not to forcibly return a person to a place where they will be at risk of harm from which persons are protected under international agreements such as the Refugees Convention, the Convention Against Torture, and the International Covenant on Civil and Political Rights.[147] The term is defined in the Act to include non-refoulement obligations that may arise because Australia is a party to one of these instruments, or any obligations accorded by customary international law that are of a similar kind.[148]

The Direction states that:

[143] Clause 8(3) of Direction No. 79 states that both primary and other considerations may weigh in favour of, or against an applicant. The community expectations consideration could weigh in an applicant's favour, if for example, they have complied with Australian laws while in Australia, but are being considered for refusal on another basis (e.g. a non-serious crime committed overseas).
[144] Cll. 10, 12, 14. The other considerations are the impact on Australian business interests; the impact on victims; the impact on family members (visa applicants only) and the strength, nature and duration of ties (visa holders only). They are not discussed further in this commentary.
[145] See, e.g., *Ogbonna v MIBP* [2018] FCA 620 (Thawley J, 7 May 2018) at [62].
[146] See, e.g. *BCR16 v MIBP* (2017) 248 FCR 456.
[147] Direction No. 79, cll 10.1 (visa cancellations), 12.1 (visa refusals) and 14.1 (decisions about whether to revoke a visa cancellation). See also *BKS18 v MHA* [2018] FCA 1731 (Barker J, 13 November 2018) at [86].
[148] s 5(1), *Migration Act 1958*.

- Australia will not remove a person to a country in respect of which there is a non-refoulement obligation

- if the person could apply for another visa, then for the purposes of the decision it is unnecessary to decide whether non-refoulement obligations are owed

- if the decision relates to a protection visa, the person is generally barred from applying for a further protection visa, and in these circumstances the decision-maker should seek an assessment of international obligations and weigh any such obligation against the seriousness of the criminal offending, noting the person would face the prospect of indefinite detention.

The terms of the Direction and judicial authority suggest that the key question in this consideration is whether a decision is likely to result in a breach of Australia's international non-refoulement obligations. This enquiry involves two questions:

- Will the decision result in a person's removal to a country where they face a risk of harm?

- Does the person face a real risk of serious or significant harm if removed to their home country? If a person does not face such a risk, it may be unnecessary to address the likelihood of removal for this consideration.

On the other hand, it has been held that the question (at least for s 501CA, and on the facts in that particular case) was whether Australia's non-refoulement obligations are **engaged** in respect of a particular individual.[149] On this approach, it may be necessary to determine whether a person faces a real risk of significant risk of serious or significant harm, even if there is little or no likelihood of their being returned to the relevant country.

Will the decision result in removal?

On one view, if a person is unlikely to be removed, it may not be strictly necessary to assess the risk of harm in a person's home country. Even if a person is owed non-refoulement obligations, those obligations will not be breached if the person is not removed. On this view, a key issue which arises when considering non-refoulement obligations is the extent to which a decision-maker can rely on the ability of the person to apply in Australia for a protection visa.

Several judgments have taken this approach. They suggest that it is not necessarily error to reason on the basis that non-refoulement obligations will be considered in the course of processing a future protection visa application.[150] On this view, it is not necessarily error to look to what would in fact be the future course of decision-making if a person makes a valid application for a protection visa, and to conclude that the existence or otherwise of non-refoulement obligations will be fully considered in the course of processing the application.[151] Removal is not a direct and immediate consequence of a decision, where a person has a right

[149] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [36].
[150] See, e.g., *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Turay v AMHA* [2018] FCA 1487 (Farrell J, 31 October 2018) at [41]; *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [32] – [35], upheld on appeal in *DOB18 v MHA* [2018] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019) at [193] per Robertson J, Logan J agreeing at [38]; *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27], upheld on appeal in *Sowa v MHA* [2019] FCAFC 111 (Jagot, Bromwich, Thawley JJ, 28 June 2019). In *DOB18 v MHA* [2018] FCAFC 63, the appellant submitted at [109] that *Ali Greene* and *Turay* were wrongly decided. Logan J at [67] did not regard them as wrongly decided, and Robertson J did not expressly reject that submission, but found no error in the primary judgment, which relied on those cases: at [9] and [47]. In *Sowa v MHA* [2019] FCAFC 111, the appellant submitted at [8] that *Ali* and the cases that had followed it had been incorrectly decided. Although the Court did not expressly reject that submission, it found no error in the primary judgment, which relied on those cases: at [9] and [47].
[151] *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan, Robertson JJ, 18 April 2019), per Robertson J at [164] - [173].

to apply for another visa in Australia[152], and at the time of exercising the discretion, it is unclear what decision will be made in relation to any future visa application.[153]

On the other hand, some judgments have found error, such as misunderstanding the legal consequences of its decision or failure to consider representations, in this approach.[154] It is error, for example, to assume that non-refoulement obligations will necessarily, as a matter of law, be assessed in the course of any future protection visa application.[155] It will also reveal error if it amounts to a refusal to take into account claims of harm or non-refoulement obligations.[156]

While the position is unsettled, it therefore appears that consideration of non-refoulement obligations for s 501 or s 501CA may not require a determination as to whether non-refoulement obligations are owed, as long as the factual claims of the harm which potentially engages those obligations are considered. In *GBV18 v MHA*, the Federal Court reviewed the authorities on this issue and, while noting that they are not aligned in every respect, said that the weight of authority favours the conclusion that decision-makers do not fall into jurisdictional error by relying on Direction No. 75 to defer consideration of Australia's international non-refoulement obligations until such time as a protection visa application is made[157]

Key judgments

In *BCR16 v MIBP* (2017) 248 FCR 456, a Full Court of the Federal Court held in a judicial review of a personal Ministerial decision under s 501CA that a decision-maker may fall into error if they decline to consider whether there is a real possibility of harm befalling an applicant if they are returned to their home country based on the mistaken assumption that non-refoulement obligations would necessarily be considered during the determination of a protection visa application, if one was made. In that case, the Assistant Minister had stated that it was 'unnecessary to determine' whether non-refoulement obligations were owed*, because* the applicant could make a protection visa application. It was the linkage between her refusal to consider the 'reason' put to her by the applicant, and the way the Act would operate if a protection visa were made, which revealed the error. Her expression of her understanding about the operation of the Act and the consideration of a protection visa was incorrect, or at least incomplete.[158] She formed a view she did not have to address, or turn her mind to, the risk of serious or significant harm that might be faced by the applicant on return to his home country because that could be dealt with through another process, if the applicant chose to apply for a protection visa. This was a failure to carry out the task of considering whether there was 'another reason' to revoke the visa cancellation required by s 501CA(4).[159] At that time, nothing in the decision-making scheme required non-refoulement obligations to be considered. The visa could be refused on character criteria which would mean that considerations of the risk of harm might never be reached.[160] On this reasoning, whether non-refoulement obligations were owed had to be determined in all cases, regardless of whether the person could subsequently apply for a protection visa.

Since the decision in *BCR16*, the Minister has made a further s 499 Direction requiring departmental delegates to assess protection claims before assessing character considerations in making decisions on

[152] See, e.g., *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27].
[153] *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [42]; upheld in *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan, Robertson JJ, 18 April 2019).
[154] See, e.g., *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [36].
[155] See *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan, Robertson JJ, 18 April 2019), per Robertson J at [166].
[156] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019), at [26] – [27] and [34]; *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan, Robertson JJ, 18 April 2019), per Robertson J at [183] – [184].
[157] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019) at [182].
[158] *BCR16 v MIBP* (2017) 248 FCR 456. at [60].
[159] *BCR16 v MIBP* (2017) 248 FCR 456. at [62]-[63].
[160] *BCR16 v MIBP* (2017) 248 FCR 456, at [68]. This concerned a non-revocation, but in *Steyn v MIBP* [2017] FCA 1131 (Jagot J, 25 September 2017) the court held that the same principles apply to the refusal and cancellation powers under s 501(1) and (2).

protection visa applications.[161] A line of Federal Court judgments has held, or implied, that this direction has addressed the misunderstanding as to the sequence in which claims would be considered which was identified in *BCR16*.[162] These judgments have upheld decisions stating that it was unnecessary to determine whether the applicant was owed non-refoulement obligations as it was considered that the applicant was able to make a valid application for a protection (or other) visa. A decision on another visa application would be made at some point of time in the future, but the discretion for the particular character decision needs to be exercised by reference the facts and circumstances prevailing at the time that decision is made.[163]

These cases were distinguished, however, in *Omar v MHA* [2019] FCA 279, another Federal Court judgment at first instance.[164] In *Omar*, the Court did not consider those other judgments to be incompatible with its own conclusions. On the facts of the case before it, however, including the representations made to the Assistant Minister, which included submissions about the effect of continued detention on the applicant's mental health, and the prospect of spending considerable time in detention until any future application was decided, and of indefinite detention afterwards, the Assistant Minister was not authorised to simply carve out aspects of the representations made and particular reasons for revoking the cancellation, hive them off to any (as yet) non-existent protection visa application process, and decline to deal with them.[165]

In *GBV18 v MHA*[166], Anderson J reviewed the authorities on this issue. While the Court noted that they were not aligned in every respect,[167] it considered the approach in *Omar* to be contrary to the weight of authority.[168] As a notice of appeal has been lodged against *Omar* and the matter will be considered by a Full Court, the Court did not express an opinion on whether it was wrongly decided.[169] In general terms, the Court said that where a person makes representations that Australia's non-refoulement obligations may be engaged, and it remains open for the applicant to make an application for a protection visa, and it is at least highly likely that those obligations, as expressed in s.36(2)(a) and s.36(2)(aa) of the Act, will be considered, the decision-maker will not err by deferring consideration of such non-refoulement obligations until the determination of any application for a protection visa. Justice Anderson stated that a decision-maker nevertheless *may* consider those obligations, and if doing so, they must give active intellectual consideration to those matters, although they need not engage in the same level of analysis as would be expected in a protection visa application.[170]

In light of the line of cases following *Ali*, and the distinction drawn between those cases and *Omar*,[171] the following principles appear to apply in cases where a person may make another visa application in Australia:

[161] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No.75 Directions, para 1. See also *Applicant in WAD531/2016 v MIBP* [2018] FCAFC 213 (White, Moshinsky and Colvin JJ, 30 November 2018) at [99].

[162] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Turay v AMHA* [2018] FCA 1487 (Farrell J, 3 October 2018) at [40]-[41]; *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [35], upheld in *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019)**;** *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27], upheld in *Sowa v MHA* [2019] FCAFC 111 (Jagot, Bromwich, Thawley JJ, 28 June 2019).

[163] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [33].

[164] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019)

[165] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [27], [33]-[35], [38], [51], [81].

[166] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019)

[167] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019) at [60].

[168] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019) at [79].

[169] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019) at [184].

[170] *GBV18 v MHA* [2019] FCA 1132 (Anderson J, 29 July 2019) at [82] – [87].

[171] In *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019), Robertson J (Logan J) distinguished that case from *Omar* on the basis of the nature and content of submissions made to the Minister in *Omar* (at [190]). His Honour appears to have accepted the reasoning in *Omar* at [46] that a decision-maker is generally not authorised to carve out aspects of representations made and decline to deal with them (at [189]), but did not accept the premise that it is a jurisdictional error in all circumstances to reason that whether non-refoulement obligations are owed would be fully considered in the course of processing an application for a valid protection visa (at [193]. In the decision he was considering, the Minister had accepted the factual basis said to engage non-refoulement obligations and taken it into account (at [193]). In *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) said it was unnecessary to consider the Minister's submission that *Omar* was wrongly decided, as the representations in *Sowa* were not analogous

- It is generally permissible to have regard to the fact that a person may make another visa application in Australia in considering non-refoulement obligations for the exercise of the discretion in character decisions, but using a formulation such as "It is not necessary to determine whether the applicant is owed non-refoulement obligations" could be interpreted as a failure to undertake the required statutory task. There may be circumstances, where it is necessary based on the reasoning in *Omar* to determine whether non-refoulement obligations are engaged in relation to a person, regardless of whether or not a person may be returned in breach of those obligations.[172]

- Where a person may be owed non-refoulement obligations or there is some other significant obstacle to a person's removal, the prospect of detention until a further visa application is decided will need to be considered at the time the discretion is exercised. It cannot be disposed of by reference to a decision to be made on a future visa application. Where there are no significant obstacles to a person returning to their home country, detention is not necessarily a consequence of an adverse decision.

If a decision-maker does rely on the ability of an applicant to apply for a further visa, they should not assume that other matters, such as the prospect of indefinite detention, will be considered in a separate visa decision to refuse or grant a visa. This is because there is no requirement to consider other matters in deciding a protection visa application if it is found that a person is not owed protection obligations.[173] Nor is there a requirement to consider other matters if a person does not satisfy the criteria in s 36(1C) or (2C) (ineligibility because of involvement in crimes/security risk). Direction No. 75 states that its purpose is to direct decision-makers to refuse protection visa applications using s 36(1C) or 36(2C)(b) rather than to refer the case for consideration under s 501.[174] A general discretion to consider other matters is enlivened, however, if refusal is considered under s 501 because a person does not meet the character test. Direction No. 75 says that if the decision-maker finds that s 36(1C) or (2C)(b) do not apply to an applicant, the decision-maker may consider whether any residual character concerns justify referral of the application for consideration under s 501.[175]

Another issue which often arises in the context of non-refoulement obligations concerns the decision-maker's understanding of the consequences of a decision to refuse or cancel a visa in light of ss 197C and 198. In particular, in circumstances where non-refoulement obligations are owed, the person will not necessarily be indefinitely detained because the person must be removed irrespective of any such obligations.[176] Accordingly, it may be a jurisdictional error to fail to recognise in an appropriate case that, subject to consideration of alternative management options such as those outlined in s 195A, ss 197C and 198 require the person to be removed from Australia. Statements in paragraphs 10.1(6), 12.1(6) and 14.1(6) of Direction No. 79 that 'Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of ss 189 and 196 of the Act means that, if the person's Protection visa [were cancelled/ were refused/remains cancelled], they would face the prospect of indefinite immigration detention' may reflect a misunderstanding of the legal consequences of a decision, and should not be applied.[177] Nevertheless, it will not necessarily be an error to

to those considered in *Omar*; in *Sowa*, the representations were about the appellant's fear of harm if returned, which the Assistant minister expressly considered, and made no reference to non-refoulement obligations (at [43] and [46].

[172] See *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[59], [66]. At [10] and [38], the Court referred to the applicant's 'relatively unique circumstances', including schizophrenia, intellectual disability and developmental trauma, a requirement for intensive care and support, and the likelihood of prolonged detention even if he did apply for a protection visa.

[173] See, e.g., *EAO17 v MIBP* [2018] FCCA 3319 (Judge Neville, 6 December 2018), at [41].

[174] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, 4. Preamble, Objectives, Item 6.

[175] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No. 75 – Directions, Item 4.

[176] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30], *NKWF v MIBP* [2018] FCA 409 (Siopis J, 27 March 2018) at [41]-[44].

[177] See, e.g., *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576. See *PRHR* at [158], for an example of the Tribunal's consideration of non-refoulement obligations and the consequences of the decision to refuse to grant a temporary protection visa, taking account of s 197C.

consider the potential for indefinite detention, as long as the legal effect of s 501CA is properly understood.[178]

The legal consequences of the decision more broadly, including mandatory detention and removal, are discussed in more detail under Detention and removal.

Is there a real chance that a person will be harmed if removed?

In determining whether non-refoulement obligations are engaged, a decision-maker must apply the real risk/real chance standard.[179] For further information on the real chance test, see MRD Legal Services Guide to Refugee Law, Chapter 3.

Where there are claims of harm, decision-makers should also be careful to consider harm which might not necessarily enliven international non-refoulement obligations.[180]

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[181] In some cases, it may be sufficient to make a general finding on the risk of harm without deciding whether non-refoulement obligations are engaged.[182] A conclusion that a consequence of the decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.[183]

Other considerations not set out in Direction No. 79

The matters set out in the Direction are not exhaustive.[184] Other matters that may be relevant include submissions by the applicant and factors referred to in Ministerial or policy guidelines.[185] Some factors, such as detention and removal, are so closely related to the scheme of the Act that they may need to be

[178] See, e.g. *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[57], where the Court said that if non-refoulement obligations are engaged, and if the Minister decides not to revoke a visa cancellation, the likely alternative is indefinite detention. It gave *DMH16v MIBP* [201] FCA 448 as an example of a case where the Minister did consider indefinite detention as a possible outcome. In *DMH16*, the Minister, immediately after rejecting a protection visa application, agreed to consider alternative management options. The applicant could be detained until the Minister completed that consideration. However, once the Minister refused to consider, or did consider and rejected, the exercise of power under s 195A, then s 197C required that he be removed to Syria, notwithstanding the fact that Australia had been found to owe non-refoulement obligations in respect of him: *DMH16*, at [22].

[179] *MIAC v SZQRB* (2013) 210 FCR 505 at [246]-[247].

[180] *Goundar v MIBP* [2016] FCA 1203 (Robertson J, 12 October 2016) at [53]-[56], *BCR16 v MIBP* (2017) 248 FCR 456 at [70]-[72].

[181] *Ayoub v MIBP* (2015) 231 FCR 513 at [28]. For examples, see *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576; and *CZCV and MHA (Migration)* [2019] AATA 91 (Evans SM, 6 February 2019) at [145]-[152] and [164]-[167].

[182] For example, the following decisions were upheld by Courts. In *Sowa v MHA* [2019] FCAFC 111 (Jagot, Bromwich, Thawley JJ, 28 June 2019), the Assistant Minister said, 'I accept that regardless of whether Mr SOWA's claims are such as to engage non-refoulement obligations, Mr SOWA would face hardship arising from unstable country conditions, including generalised violence and poverty, as well as his fears of revenge killings, were he to return to Sierra Leone', but that he was able to make a valid protection visa application (at [6]). In *DFW18 v MHA* [2019] FCA 599 (Steward J, 2 May 2019), the AAT accepted that the applicant's life would be more difficult in Turkey. It said there was no evidence of a risk of persecution on Refugee Convention grounds, and that the evidence did not suggest that he would suffer a real risk of significant harm if returned. It said: 'In any event, and with regard to all the submissions put on behalf of DGPZ I find on the evidence in this proceeding and given the conviction history of DGPZ, the primary considerations outweigh the secondary considerations of any claims concerning non-refoulement obligations owed or in combination with the other secondary considerations.' (at [11]). In *DKXY v MHA (Migration)* [2018] AATA 3779 (Raif SM, 10 October 2018), the AAT said that non-refoulement obligations would not be breached as a result of its decision because the applicant could make a protection visa application. It went on to state that his claims of harm were minimal, and that there was insufficient evidence to enable it to be satisfied that protection obligations arose. It nevertheless gave him the benefit of the doubt and accepted that Australia may owe him protection obligations, but found that reasons not to revoke the cancellation outweighed the reasons to revoke it (at [40] – [53], [64]); upheld in *DKXY v MHA* [2019] FCA 495 (Griffiths J, 11 April 2019).

[183] For an example, in *CWGF and MHA (Migration)* [2019] AATA 179 (Illingworth SM, 19 February 2019) at [92]-[103], the AAT found that the applicant was a person to whom Australia had non-refoulement obligations, but affirmed the decision not to revoke the cancellation because this was outweighed by other considerations.

[184] See *SZRTN* [2014] FCA 303 (Katzmann J, 31 March 2014) at [86].

[185] Generally speaking, the Tribunal should have regard to Departmental guidelines when exercising a discretion, but not for interpreting a term, or determining the relevant legal test: see MRD Legal Services Commentary Application of Policy.

considered, whether raised by an applicant or in guidelines or not.[186] What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the relevant factors are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.[187]

In short, any matter that would move the Minister to allow a person of proven bad character (as is defined in the Act) to travel to or remain in Australia, notwithstanding that proven bad character, would be relevant.[188]

Consequences of character cancellation/refusal

In determining whether or not to exercise the powers in ss 501(1), 501(2) and 501CA(4) of the Act, the decision-maker must take into account the legal consequences of the decision.[189] The reason it must do so has been described as being necessary because the subject matter, scope and purpose of the Act require that they be taken into account,[190] and because consequences such as becoming subject to detention or refoulement are the most up to date material before the decision-maker relevant to consideration of the detriment to the applicant from the exercise of the power.[191] The legal framework which must be taken into account includes the direct and immediate statutorily prescribed consequences of the decision in contemplation.[192]

In the case of a decision under s 501CA(4), there is also an obligation to consider matters raised in representations made in response to the statutorily mandated invitation.[193]

The consequences of a visa refusal or cancellation under s 501 or related provisions include:

- unlawful status
- the likelihood of becoming subject to detention and/or removal[194]
- refusal of other visa applications and cancellation of other visas[195]
- a prohibition on applying for other visas[196]
- periods of exclusion and special return criteria may apply[197]

Unlawful status

Where a visa application is refused or a visa is cancelled under s 501, any other non-protection visa held by that person is taken to have been cancelled.[198] Generally, if a visa is cancelled its former holder becomes an unlawful non-citizen immediately after cancellation.[199] Under s 189 of the Act, an immigration officer who reasonably suspects that a person in Australia is an unlawful non-citizen must detain that person and, in the

[186] See *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky and Bromwich JJ, 4 May 2018) at [135]-[139].
[187] See *Tanielu v MIBP* (2014) 225 FCR 424 at [122].
[188] *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg, Lander JJ, 25 March 2004) at [107].
[189] *NBMZ v MIBP* (2014) 220 FCR 1 at [6]. *MIBP v Le* (2016) 244 FCR 56 at [61].
[190] *NBMZ v MIBP* (2014) 220 FCR 1 at [6], for s.501; *DLJ18 v MHA* [2018] FCA 1650 (Thawley J, 6 November 2018) at [43].
[191] *FRH18 v MHA* [2018] FCA 1769 (Rares J, 16 November 2018) at [45].
[192] *Taulahi v MIBP* (2016) 246 FCR 146 at [84]. See also *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky, Bromwich JJ, 4 May 2018) at [136].
[193] *Hay v MHA* [2018] FCAFC 149 (White, Moshinsky, Colvin JJ, 5 September 2018) at [9]-[15].
[194] ss.189, 196, 197C, 198.
[195] s 501F.
[196] s 501E.
[197] s 503, SRC 5001.
[198] s.5F.
[199] s.15.

absence of a visa application or other specified circumstances, must remove them as soon as reasonably practicable under s 198.

Detention and removal

The legal consequences may include the prospect of the affected person being held in indefinite (or indeterminate) detention because of the operation of ss 189, 196 and 198 of the Act.[200] The test is whether, on the basis of all the material which is before the decision-maker at the time of considering whether or not to exercise the powers, there is at least a real possibility that the person's removal from Australia would not be reasonably practicable, with the consequence that the person faces the prospect of indefinite detention.[201] The factual circumstances which can give rise to the prospect of indefinite detention can vary considerably – for example, the state of the person's health,[202] or the unwillingness of their country of reference to accept them.

The key features of the detention and removal scheme are as follows:

- Section 189, which requires departmental officers to detain any suspected unlawful non-citizen (person without a visa);

- Section 198, which requires officers to remove an unlawful non-citizen as soon as reasonably practicable in certain circumstances. These relevantly include if an unlawful-non citizen's visa was cancelled under s 501(3A), they do not have a valid substantive visa application on foot, and they either did not make representations about revocation, or they did so and the cancellation was not revoked; and

- Section 197C, which provides that for the purposes of removal under s 198, it is irrelevant whether Australia has non-refoulement obligations, and the duty to remove the unlawful non-citizen arises irrespective of whether such obligations have been assessed.

The Minister also has personal, non-compellable, discretionary powers that can ameliorate the consequences of the mandatory detention and removal regime, including the ability to grant a detainee a visa of any kind under s 195A, and making a 'residence determination' under s 197AB, that a person reside at a place other than an immigration detention centre in what is often referred to as 'community detention'. Under a residence determination the person remains a detainee under the law, but instead of being detained they must reside at a specific place in the community. Because these powers are non-compellable, their relevance in a given case is unlikely to be significant, unless there is evidence that the Minister intends to exercise them to grant a visa.[203]

Where a person may make a further visa application

In determining whether or not to exercise powers under s 501 or s 501CA, Australia's non-refoulement obligations and the prospect of indefinite detention are, in the absence of representations that they be considered, not mandatory considerations in circumstances where it is open to the person whose visa has been refused or cancelled on character grounds to apply in Australia for a protection visa or some other visa (which visa application the decision-maker is legally bound to consider and determine). This position is generally unaffected by the presence in the Act of various provisions which confer personal powers on the Minister to 'lift the bar' (such as s 48B) or to grant a visa to a detainee which would have the effect of changing the detainee's status from being an unlawful non-citizen (such as s 195A). As there is no legal duty

[200] *MIBP v Le* (2016) 244 FCR 56 at [61].
[201] *MIBP v Le* (2016) 244 FCR 56 at [61].
[202] See, e.g. *Sach v MHA* [2018] FCA 1658 (Barker J, 12 December 2018).
[203] See, e.g., *MIBP v Le* (2016) 244 FCR 56 at [61].

on the Minister to consider whether to exercise such a personal power, there is no assurance that any consideration will be given in a relevant case to Australia's non-refoulement obligations or the prospect of indefinite detention.[204]

In these circumstances, removal and its consequences are not necessarily direct and immediate consequences of the AAT's decision. The legal consequences in these circumstances may include a period of detention until a person's visa application is decided. In terms of harm and other impediments in an applicant's home country, these should be considered, but the reasoning does not need to assume that an applicant will be removed. Nevertheless, where there is strong evidence that a person would face a real risk of harm or other difficulties *if* removed it could necessary to assess the risk of harm. For example, in *Omar v MHA* [2019] FCA 279, the Federal Court held that, at least where non-refoulement obligations are raised in response to a s.501CA(3)(b) (mandatory cancellation) invitation, it is an error to decline to determine those factual matters by reference to a different statutory process, which is non-existent at the time of the exercise of the power.[205]

Where a person may not make a further visa application

Where a person is prevented by the Act from applying in Australia for a protection visa, the Minister's obligation to consider the legal consequences of a decision under s 501 will include consideration of Australia's non-refoulement obligations and the prospect of indefinite detention, where those matters are relevant to the person's particular circumstances.[206] However, decision-makers should be careful not to assume a person will be indefinitely detained because Australia owes them non-refoulement obligations, due to the terms of s 197C.[207]

In these circumstances, detention and/or removal will generally be direct and immediate consequences of the AAT's decision. Detention is a consequence because the effect of ss 189, 197C and 198 of the Act is that an unlawful non-citizen must be removed as soon as reasonably practicable, and detained until then. Prolonged detention might occur because, for example, a person's health prevents them travelling, or because there is no country which will accept them. Under the legislation, indefinite detention will *not* occur on the basis that removal would result in a breach of non-refoulement obligations, and it would be error for the AAT to assume that it would.[208]

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[209]. A conclusion that a consequence of the decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.

Prohibition on applying for other visas

Under s 501E, a person cannot apply for another visa while they remain in Australia if:

- they have been subject to a visa refusal or cancellation under s 501 and
- the decision has not been set aside or revoked prior to their making the visa application.

[204] *MIBP v Le* (2016) 244 FCR 56 at [61]
[205] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [81]. The Court distinguished *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) and *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) on the basis that the grounds of review and the basis on which the Courts considered the applicant's arguments were different.
[206] *MIBP v Le* (2016) 244 FCR 56 at [61]
[207] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30].
[208] *DMH16 v MIBP* (2017) 253 FCR 576 at [30].
[209] *Ayoub v MIBP* (2015) 231 FCR 513 at [28].

Such an application is not a valid application for a visa.[210] The only exceptions are an application for a protection visa or a visa specified in the Regulations (i.e. r 2.12AA).[211]

Deemed refusal and cancellation

If a decision to refuse to grant or to cancel a visa is made under s 501, any other visa application made by that person is taken to have been refused and all other visas held by the person are taken to have been cancelled.[212] The only exceptions relate to protection visas and visas prescribed in the Regulations. There are currently no visas prescribed in the Regulations.

If the original decision made under s 501 is set aside or revoked, any refused visa applications or cancelled visas are revived.[213]

Periods of exclusion/special return criteria

Certain visas are subject to special return criteria (SRCs). For the visa subclasses to which SRCs apply, the SRC is prescribed in Schedule 2 to the Regulations as a criterion for visa grant.

Relevantly, SRC 5001(c) provides for permanent exclusion if the visa applicant has previously had a visa cancelled under s 501 and there was no revocation of the decision under s 501CA. There is no provision for a visa applicant to whom SRC 5001 applies to request a waiver of the permanent exclusion.

SRC 5001 ceases to apply if the Minister acts personally to grant a permanent visa to a person whose visa was cancelled under s 501.

Conduct of the review

The Tribunal must not hold a hearing or make a decision under s 43 of the AAT Act until at least 14 days after the day on which the Minister was notified that the application had been made.[214]

Decision to be made within 84 days

Where the applicant is in the migration zone, the Tribunal must make a decision within the period of 84 days after the day on which the person was notified of the decision otherwise the decision will be taken to have been affirmed.[215] The Tribunal's obligation is to deliver a decision within 84 days, but not necessarily express reasons within that time.[216]

The 84 day limit does not, however, apply in circumstances where a court has quashed a decision of the Tribunal, nor where the Tribunal dismisses a review application and subsequently reinstates it. Section 500(6L)(c) provides that a decision is taken to have been affirmed if 'the Tribunal has not made a decision under section 42A, 42B, 42C or 43… in relation to the decision under review' within the 84 day period. In *Somba v MHA* [2019] FCAFC 150, the Full Court held that the 'decision' for the purposes of s 500(6L)(c) is one which has been in fact made, so that once the Tribunal has made a decision to dismiss an application

[210] s 46(1)(d).
[211] s 501E(2).
[212] s 501F.
[213] s 501F(4).
[214] s 500(6G).
[215] s 500(6L)(c).
[216] *Khalil v MHA* [2019] FCAFC 151 (Logan, Steward, Jackson JJ, 30 August 2019) at [48].

for review under s 42A, the condition in s 500(6L)(c) is no longer engaged.[217] It therefore would not be futile to reinstate an application under s 42A(9)[218] of the AAT Act after the 84-day period has elapsed. Further, in *Khalil v MHA* [2019] FCAFC 151, the Full Court, drawing on the construction of s 500(6L) in *Somba*, confirmed that the quashing of the Tribunal's decision in that case would not result in s 500(6L) being engaged or re-engaged, and no deemed affirmation would arise.[219] While *Khalil* concerned a misdirection as to when the Tribunal was required to produce reasons for its decision, there does not appear to be any basis upon which the Court's reasons would not extend to other circumstances in which a decision is quashed.

The 2-day Rule

Where an applicant is in the migration zone, the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (except for a directions hearing) in relation to the decision under review.[220] If the oral evidence does not change the nature of the case and merely 'puts flesh on the bones', it may not be capable of being excluded from consideration.[221]

The restriction extends to oral evidence to be given by a witness for the applicant.[222] It only applies to information presented 'in support of the person's case', i.e., information that the applicant provides as part of their case-in-chief,[223] and not to submissions which an applicant may wish to make in respect of the evidence before the Tribunal.[224] An applicant's answer to a question asked of him or her or of one of his or her witnesses in the course of cross-examination is not excluded under these provisions. Such an answer is information elicited orally at the instance of the Minister with the aim of derogating from the applicant's case and thereby or otherwise supporting the Minister's case. Further, an oral submission to a matter raised by the AAT of its own motion is not excluded from consideration by s 500(6H).[225]

A witness could be called to speak to their statement, to correct any inaccuracies, to explain any ambiguities, or to elaborate upon certain matters as long as in doing so they do not stray outside the subject matter of the material covered in the statement.[226]

This restriction also applies to any documents submitted in support of the applicant's case (except for documents in the Minister's possession).[227]

These provisions are binding on the Tribunal and failure to comply with them would arguably amount to jurisdictional error.[228]

The purpose of these provisions is that the Minister is to be given an opportunity to answer the case to be put by the applicant for review without the necessity of an adjournment of the hearing. The purpose of the scheme in s 500 is that an applicant for review should not be able to change the nature of his or her case,

[217] *Somba v MHA (No 2)* [2019] FCAFC 150 (Logan, Steward, Jackson JJ, 30 August 2019) at [38], overturning the judgment in *Somba v MHA (No 2)* [2018] FCA 1537 (Barker J, 12 October 2018). In that case, the AAT dismissed the application for review on 8 January 2018, following the applicant's failure to appear at the hearing scheduled for that day. The 84th day after notification was 17 January 2018, and the applicant applied for reinstatement on 6 February 2018.
[218] Under s 42A(9) of the *Administrative Appeals Tribunal Act 1975* (Cth.), the Tribunal may reinstate an application and give such directions as it appears to be appropriate.
[219] *Khalil v MHA* [2019] FCAFC 151 (Logan, Steward, Jackson JJ, 30 August 2019) at [64].
[220] s 500(6H)
[221] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[222] *Demillo v MIBP* [2013] FCAFC 134 (Greenwood, Buchanan, McKerracher JJ, 21 November 2013) at [18].
[223] *Jagroop v MIBP* (2014) 225 FCR 482 at [94].
[224] *Jagroop v MIBP* (2014) 225 FCR 482 at [102].
[225] *Uelese v MIBP* (2015) 256 CLR 203 at [102].
[226] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[227] s 500(6J).
[228] *Milne v MIAC* [2010] FCA 495 (Gray J, 20 May 2010) at [40].

catching the Minister by surprise, and forcing the Tribunal into granting one or more adjournments to enable the Minister to meet the new case put. The expressed intention of the amending legislation was to prevent the use of the procedure of merits review to prolong the stay in Australia of a person denied a visa by the application of the character test.[229]

Section 500(6H) does not suggest an intention to fetter the power of the Tribunal to grant an adjournment where the fair conduct of the review hearing requires it and where the applicant has not sought to surprise the Minister with late changes to the applicant's case.[230] It does not limit the power of the Tribunal to conduct a review or authorise the Tribunal to give less than the 'proper consideration of the matters before it'.[231] Nothing in its text warrants the imposition of a rigid limit upon the otherwise flexible power of the Tribunal to ensure that the proceedings before it are conducted fairly to all parties.[232] The Tribunal may adjourn the hearing in order to hear more submissions and evidence from an applicant where they comply with the 2-day rule with respect to the new hearing date. The purpose of ensuring that reviews under s 500 are dealt with expeditiously does not require a blanket limitation on the Tribunal's power to adjourn a hearing.[233]

If either party seeks an adjournment on the ground that it is surprised and disadvantaged by new evidence and requires an adjournment of the hearing to meet that disadvantage, then the question whether or not the fair determination of the application for review could only be achieved by granting the adjournment would arise for the Tribunal to resolve. Delaying tactics such as of an applicant such as cynically withholding oral evidence in order to have it presented later in the course of a hearing so as to precipitate an adjournment would expose an applicant to the risk of a deemed affirmation of the decision by operation of s 500(6L). In exercising its discretion, the Tribunal must be mindful of the timeframe established by s 500(6L).[234]

Protected information

Section 503A is designed to protect intelligence about criminals and criminal activity. Sections 503A(2)(c) and 503A(6) can operate to override the natural justice requirement to provide information to a person whose visa has been cancelled where that information is credible, relevant and significant to the Minister's decision under s 501 or s 501CA.[235]

Evidentiary matters

The Tribunal is under no obligation to inquire into the provenance of unchallenged documents such as the record of convictions, bail reports, statements of facts before sentencing judges or parole officers' reports, or the qualifications of parole officers expressing opinions.[236]

[229] *Goldie v MIMA* (2001) 111 FCR 378 at [25], referring to the second reading speech to the bill that became the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth.)
[230] *Uelese v MIBP* (2015) 256 CLR 203 at [73] Nettle J agreeing at [105].
[231] *Uelese v MIBP* (2015) 256 CLR 203 at [54].
[232] *Uelese v MIBP* (2015) 256 CLR 203 at [74].
[233] *Uelese v MIBP* (2015) 256 CLR 203 at [77].
[234] *Uelese v MIBP* (2015) 256 CLR 203 at [74]-[77]. Section 500(6L) provides that, if the Tribunal has not made a decision upon the review within 84 days after the day on which the application was notified of the decision under review, the Tribunal is taken, at the end of that period, to have decided to affirm the decision under review. See Decision to be made within 84 days..
[235] *Vella v MIBP* [2015] FCAFC 53 (Buchanan, Flick and Wigney JJ, 21 April 2015), at [61] and [68].
[236] *Aporo v MIAC* [2009] FCA 79 (Bennett J, 12 February 2009) at [81]-[86].

Reasonably suspects

The cancellation power in s 501(2) is enlivened if the Minister 'reasonably suspects' that a person does not pass the character test. The character test also includes limbs where the Minister 'reasonably suspects' their membership of or association with a group or person involved in criminal conduct,[237] or involvement in certain criminal activities.[238] The meaning of the term 'reasonably suspects' has been judicially considered in relation to s 501(2), and the reasoning is probably applicable to s 501(6) as well.

A suspicion that a person does not pass the character test may be objectively reasonable even if the suspicion is subsequently discovered to be affected by a mistake of fact or law.[239] Whether or not the suspicion is reasonable at the relevant time will depend on the matters known or reasonably capable of being known by the decision-maker at the relevant time.[240]

Section 501(2) requires that the Minister, having first formed that reasonable suspicion, then go on to determine whether the person concerned has satisfied him or her that the person passes the character test. In that regard, the Act contemplates that the Minister will, in the exercise of the powers conferred under s 501(2) form a considered view as to whether the person passes the character test or not by reference not only to the material supporting the Minister's suspicion formed under s 501(2)(a), but also by reference to materials provided to the Minister by the visa holder for the purposes of s 501(2)(b).[241]

The Court's jurisdiction to determine whether an administrative decision is affected by legal unreasonableness (as explained in *Li*[242]) is properly to be exercised by reference to all of the materials before the Minister that properly bear upon that question. It is not to be exercised on a fiction that the Minister only had before him the disclosed materials and nothing else.[243]

The meaning of 'reasonably suspects' is discussed in Direction No. 79 in relation to the membership/association character ground, but not more generally. It is probably not an error to have regard to the meaning there when applying the term for other character grounds, but it could be an error to assume that a decision-maker is bound to apply that meaning.

Effect of conviction on exercise of discretion

It is impermissible in a decision on character grounds for the Tribunal to impugn the conviction on which the decision was based.[244] The decision-maker is entitled to receive evidence of a conviction and sentence and to treat it as probative of the factual matters upon which the conviction and sentence were necessarily based.[245] This principle applies to the substantial criminal record and immigration detention and child sex offence grounds.

[237] s 501(6)(b).
[238] s 501(6)(ba).
[239] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [14], citing *Ruddock v Taylor* (2005) 222 CLR 612.
[240] *Ruddock v Taylor* (2005) 222 CLR 612 at [40].
[241] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [56].
[242] *MIAC v Li* (2013) 249 CLR 332.
[243] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [109].
[244] *MIMA v SRT* (1991) 91 FCR 234. The judgment concerned the deportation power in s 200, but the reasoning applies equally to those character grounds which are enlivened by a conviction.
[245] *MIMA v Ali* (2000) 106 FCR 313 at [41].

For other grounds, where suspected criminal conduct may be relevant but no conviction is necessary, or for conviction grounds where there is another conviction that is not the basis for failing the character test, even a conviction or sentence which is not a precondition to the exercise of the relevant statutory power should be treated as strong prima facie evidence of the facts upon which it is necessarily based.[246] There is, however, no absolute rule that the Tribunal may not consider material which challenges the grounds upon which relevant convictions are based.[247] In these circumstances, the decision-maker is not obliged to make findings of guilt or innocence if there is no sufficient basis for such a finding or such an inquiry.[248]

The Tribunal may, however, examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[249] and its significance so far as the risk of recidivism is concerned.[250]

Relevant case law and AAT decisions

Afu v MHA [2018] FCA 1311
Akpata v MIMIA [2004] FCAFC 65; 139 FCR 292
Ali v MIBP [2018] FCA 650
Ali v MHA [2018] FCA 1895
Aporo v MIAC [2009] FCA 79
Ayoub v MIBP (2015) 231 FCR 513; [2015] FCAFC 83
BCR16 v MIBP [2017] FCAFC 96; (2017) 248 FCR 456
BKS18 v MHA [2018] FCA 1731
Brown v MIAC [2010] FCAFC 33; 183 FCR 113
BSJ16 v MIBP [2016] FCA 1181
Craig v South Australia (1995) 184 CLR 163; (1995) 184 CLR 163
CVN17 v MIBP [2019] FCA 13
CWGF and MHA (Migration) [2019] AATA 179
CZCV and MHA (Migration) [2019] AATA 91
Demillo v MIBP [2013] FCAFC 134
DFW18 v MHA [2019] FCA 599
Djalic v MIMA [2004] FCAFC 151
DKXY v MHA (Migration) [2018] AATA 3779
DKXY v MHA [2019] FCA 495
DMH16 v MIBP [2017] FCA 448; 253 FCR 576
DND and MHA [2018] AATA 2716
DOB18 v MHA [2018] FCA 1523
DOB18 v MHA [2019] FCAFC 63
Drake and MIEA [1979] AATA 179
Drake v MIEA (1979) 46 FLR 409
EAO17 v MIBP [2018] FCCA 3319
FRH18 v MHA [2018] FCA 1769
Gaspar v MIBP [2016] FCA 1166
GBV18 v MHA [2019] FCA 1132 (Summary)
Godley v MIMIA [2004] FCA 774
Goldie v MIMA [1999] FCA 1277
Goldie v MIMA (2001) 111 FCR 378; [2001] FCA 1318

[246] *MIMA v Ali* (2000) 106 FCR 313, at [43].
[247] *MIMA v Ali* (2000) 106 FCR 313, at [43]. At [44], however, the Court said that although a decision-maker in such a case may accept evidence which contradicts the facts essential to a conviction, they may not be entitled to reach or express a view that the person was wrongly convicted.
[248] *Tham v MIAC* (2012) 204 FCR 612, at [37].
[249] *MIEA v Daniele* (1981) 54 [1981] FCA 212 (Fisher, Davies, Lockhart JJ, 17 December 1981), (1981) 61 FLR 354at [358].
[250] *MIMA v Ali* (2000) 106 FCR 313, at [45].

Goundar v MIBP [2016] FCA 1203
Green v MIAC [2008] FCA 125
Greene v AMHA [2018] FCA 919
Haneef v MIAC [2007] FCA 1273
Hay v MHA [2018] FCAFC 149
Hong v MIMA [1999] FCA 1567
Howells v MIMA [2004] FCA 530; 139 FCR 580
Irving v MILGEA [1996] FCA 663; 68 FCR 422
Jagroop v MIBP (2016) 241 FCR 461; [2016] FCAFC 48
Karabay and MHA (Migration) [2019] AATA 167
Khalil v MHA [2019] FCAFC 151
Kumeroa and MHA [2018] AATA 3744
Lesuma v MIAC (No.2) [2007] FCA 2106
LNCB and MIBP [2015] AATA 463
Maxwell v MIBP [2016] FCA 47; FCR 275
MHA v Buadromo [2018] FCAFC 151
MIAC v Anochie [2012] FCA 1440; 209 FCR 497
MIAC v Khadgi (2010) 190 FCR 248; [2010] FCAFC 145
MIAC v Li (2013) 249 CLR 332; [2013] HCA 18
MIAC v SZQRB (2013) 210 FCR 505; [2013] FCAFC 33
MIBP v BHA17 [2018] FCAFC 68
MIBP v Le (2016) 244 FCR 56; [2016] FCAFC 120
MIBP v Lesianawai [2014] FCAFC 141; 227 FCR 562
MIBP v Maioha [2018] FCAFC 216
MIEA v Baker [1997] FCA 105; 73 FCR 187
MIEA v Daniele (1981) 39 ALR 649; 61 FLR 354
Milne v MIAC [2010] FCA 495
MIMA v Ali [2000] FCA 1385; 106 FCR 313
MIMA v SRT [1999] FCA 1197; 91 FCR 234
MIMIA v Godley [2005] FCAFC 10; (2005) 141 FCR 552
MIMIA v Huynh [2004] FCAFC 256; 139 FCR 505
MIMIA v Yusuf (2001) 206 CLR 323; [2001] HCA 30
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Misa and MHA [2018] AATA 1511
MNLR and MHA (Migration) [2019] AATA 61
Moana v MIBP [2014] FCA 1084; (2015) 230 FCR 367
Muggeridge v MIBP [2017] FCA 730; 255 FCR 81
Mujedenovski v MIAC [2009] FCAFC 149
NBMZ v MIBP [2014] FCAFC 38; 220 FCR 1
Nigam v MIBP (2017) 254 FCR 295; (2017) FCAFC 127
NKWF v MIBP [2018] FCA 409
Nweke v MIAC [2012] FCA 266
Ogbonna v MIBP [2018] FCA 620
Omar v MHA [2019] FCA 279
Paerau v MIBP [2014] FCAFC 28; (2014) 219 FCR 504
Port of Brisbane Corporation v Deputy Commissioner of Taxation [2004] FCA 1232; 140 FCR 375
PRHR and MIBP [2017] AATA 2782
Roach v MIBP [2016] FCA 750
Rokobatini v MIMA [1999] FCA 1238; 90 FCR 583
Romanov v MHA [2018] FCA 1494
Ruddock v Taylor (2005) 222 CLR 612
Sabharwal v MIBP [2018] FCA 10
Sabharwal v MIBP [2018] FCAFC 160
Sach v MHA [2018] FCA 1658
Shaw v MIMIA [2005] FCAFC 106; 142 FCR 402
Somba v MHA (No 2) [2018] FCA 1537
Somba v MHA (No 2) [2019] FCAFC 150
Sowa v MHA [2018] FCA 1999

Sowa v MHA [2019] FCAFC 111
Splendido v AMIBP (No 2) [2018] FCA 1158
Spruill v MIAC [2012] FCA 1401
Stevens v MIBP [2016] FCA 1280
Steyn v MIBP [2017] FCA 1131
Suleiman v MIBP [2018] FCA 594
SZRTN v MIBP [2014] FCA 303
Tanielu v MIBP [2014] FCA 673; 225 FCR 424
Taulahi v MIBP (2016) 246 FCR 146; [2016] FCAFC 177
Tham v MIAC [2012] FCA 234; 204 FCR 612
Turay v AMHA [2018] FCA 1487
Uelese v MIBP [2016] FCA 348; (2016) 248 FCR 296
Vella v MIBP [2015] FCAFC 53
Visa Cancellation Applicant and MIAC [2011] AATA 690
Waits and MIMIA [2003] AATA 1336
Wan v MIMA [2001] FCA 568; 107 FCR 133
Williams v MIBP (2014) 226 FCR 112; [2014] FCA 674
Wong v MIMIA [2002] FCAFC 440
YNQY v MIBP [2017] FCA 1466

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