Migration and Refugee Division Commentary

Visa Refusal & Cancellation on Character Grounds

VISA CANCELLATION AND REFUSAL ON CHARACTER GROUNDS

(INCLUDING REVOCATION OF MANDATORY CANCELLATION)

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Overview[1]

The *Migration Act 1958* (Cth) (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.[2] 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] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] 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. Note, in making a decision under s 501A(3) and s 501BA(2), the Minister is not precluded from affording procedural fairness by inviting an applicant to provide submissions. See both *Ibrahim v MHA* [2019] FCAFC 89 at [63] and *Uriaere v MHA* [2019] FCAFC 235 at [18] where the Court considered s 501BA(2). Proceeding on the basis that an applicant could not be provided with an opportunity to be heard because s 501BA(2) (and thereby s 501A(3)) precludes the Minister from doing so is to misunderstand the nature of the power being exercised: see *Ibrahim* at [63]. Further, note there is nothing in *MIBP v Makasa* [2021] HCA 1 or s 501A, and the overall structure of decision-making on visa applications in the Act, to indicate that in exercising the power under s 501A(2) to override the Tribunal the Minister cannot rely on matters that were known to him at the time of the Tribunal hearing but not put by him to the Tribunal: *WCJS v MHA* [2021] FCA 1093 at [124]-[127]. Also note that under s 501A(2): the Minister has discretion, breach of non-refoulement obligations is not a mandatory consideration and compliance with international law obligations is an aspect of the national interest assessment: *Acting MICMSMA v CWY20* [2021] FCAFC 195 at [93], [155], [171]-[174]. Special leave refused: *Acting MICMSMA v CWY20* [2022] HCASL 93. Further, note that in *Tereva v MICMSMA* [2022] FCAFC 142 the Court rejected an argument based on the failure of the Minister to raise 'national interest' arguments in the Tribunal review, finding that considerations of the 'national interest' would be irrelevant considerations in the context of the Tribunal decision at [104].

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.[3] 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.[4]

The power to refuse a visa under s 501(1) can be used to refuse any visa, including a protection visa.[5] Previously, in *BAL19* the Court determined s 36(1C), being a specific character criterion applicable only to protection visa applicants, precluded the Minister using s 501 to refuse to grant a protection visa.[6] However, unanimously the Full Federal Court in *MICMSMA v BFW20; BGS20*[7] found that *BAL19*, insofar as it found s 501 did not apply to protection visas, was wrongly decided.[8] The Court considered textual indications in the Act and the legislative history of ss 501 and 36, including amendments in 2014 codifying Australia's interpretation of its Refugees Convention obligation, in concluding there was never any intention to make the statutory criteria for a protection visa an exhaustive test for the refusal of protection visas on character grounds.

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.[9] 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.[10] 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.[11]

The Minister or a delegate cannot re-exercise the power to cancel a visa under s 501(2), on the same factual basis, where that power has already been exercised, whether that previous exercise was by the delegate or the Tribunal on review.[12] The Minister or a delegate can re-exercise the

[3] s 501(1).
[4] See e.g. discussion in *SZLDG v MIAC* (2008) 166 FCR 230 about the interaction between s 65 and s 501. In *RVJB v MICMSMA* [2022] FCA 962 the Court considered whether the Act requires factual consistency in all decision making on a visa application and held that it does not on 'non-critical facts' within all the different levels of decision-making that may occur under s 65 at [46]-[48].
[5] *MICMSMA v BFW20; BGS20 v MICMSMA* [2020] FCAFC 121 at [8], [120], [121], [160] and *KDSP v MICMSMA* [2020] FCAFC 108 at [104] per Bromberg J, at [302] per O'Callaghan and Steward JJ. An application for special leave to appeal to the High Court was dismissed in *KDSP v MICMSMA* [2021] HCATras 20.
[6] *BAL19 v MHA* [2019] FCA 2189 at [88]. The Court's reasoning in *BAL19* turned on its interpretation of the impact of legislative amendments from 2014 codifying refugee provisions and inserting s 36(1C) into the Act. Section 36(1C) in general terms provides that a criterion for a protection visa is that the applicant is not a person who is a danger to Australia's security, or a person who having been convicted of a particularly serious crime, is a danger to the Australian community. After *BAL19,* a number of first instance Federal Court judgments, including *BFW20 v MICMSMA* [2020] FCA 562 at first instance, determined it was not "plainly wrong": see *AEM20 v MHA* [2020] FCA 623; *AFX17 v MHA* [2020] FCA 807; *AFX17 v MHA (No 2)* [2020] FCA 858. Note: *BAL19* is still under appeal before the Full Federal Court.
[7] *MICMSMA v BFW20; BGS20 v MICMSMA* [2020] FCAFC 121 at [8], [120], [121], [160].
[8] Similarly, in *KDSP v MICMSMA* [2020] FCAFC 108 another Full Court found that the Minister's personal power in s 501A (an analogue of s 501(1)) to refuse to grant a visa can apply to an application for a protection visa. Although there were differences in emphasis, there was considerable overlap between the reasons in *KDSP* and the reasons in *MICMSMA v BFW20; BGS20.* An application for special leave to appeal to the High Court was dismissed: *KDSP v MICMSMA* [2021] HCATras 20.
[9] See discussion of 'Reasonably Suspects' below.
[10] *NBMZ v MIBP* (2014) 220 FCR 1 at 204–205.
[11] *Lesuma v MIAC (No 2)* [2007] FCA 2106 at [23]–[33].
[12] *MIBP v Makasa* [2021] HCA 1 at [56]. It does not matter whether the exercise of the original cancellation power resulted in the visa being cancelled or not; a decision made under the cancellation power not to a cancel a visa is still a decision made under that power. The limitation on re-exercising the cancellation power for the same factual basis is subject only to ministerial override in the exercise of the specific power conferred by s 501A. In *Zyambo v MICMSMA* [2021] FCA 545, a s 501(3A) cancellation matter, the Court distinguished *Makasa* on the basis of the difference in the powers in s 501(2) and s 501(3A), where s 501(3A) requires the existence of two matters (satisfaction the person does not pass the character test due to substantial criminal record or sexual offences against a child, and serving a term of imprisonment on full-time basis) before the Minister is compelled to cancel a visa: at [37]-[47]. However, in *XJLR v MICMSMA* [2021] FCA 619 the Court disagreed and found *Makasa* did apply to cancellation under s501(3A): at [72], [83]. On appeal, the Full Court in *XJLR v MICMSMA* [2022] FCAFC 6 confirmed that a cancellation decision under s 501(3A) is legally ineffective

s 501(2) power if subsequent events or further information provide a different factual basis to form a reasonable suspicion that a visa holder does not pass the character test.[13]

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)[14], 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.[15] The person must be serving a 'sentence of imprisonment'[16], on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.[17] A decision by the Minister under s 501(3A) may not be retrospectively vitiated by subsequent events, such as for example where a sentence is reduced on appeal to less than 12 months.[18] If a visa is cancelled under s 501(3A), the Minister must, under s 501CA(3), 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.[19] The terms of s 501CA(3) requires notification to be given 'in the way Minister considers appropriate in the

where it is based on the same breach of the character test that formed the basis of a previous cancellation decision that was revoked, even where the former visa holder has been imprisoned on a different occasion at [39]. It also confirmed that a contrary intention arises in the *Migration Act* to prevent s 33(1) of the *Acts Interpretation Act* from applying to s 501(3A) at [78]. The majority disagreed with the judgment in *Zyambo v MICMSMA* [2021] FCA 545 at [74]. The Court in *PYDZ v MICMSMA* [2022] FCAFC 14 found no error with *XJLR v MICMSMA* [2022] FCAFC 6 and applied it to the circumstances before it at [17].

[13] *MIBP v Makasa* [2021] HCA 1 at [57].

[14] s 501(3A) does not apply retrospectively and does not impose additional punishment to that already imposed for criminal offences: see *Ketjan v AMIBP* [2019] FCAFC 207 at [5], [56]. Further, the power in s 501(3A) (and s 501CA(4)) applies to all persons who hold a visa or held a visa until its cancellation: see *Hopkins v MICMSMA* [2020] FCAFC 33 at [30]. In *Hopkins* the Court rejected claims that the ICCPR provided a basis in common law for finding that a 'person' in ss 501(3A) (and 501CA) does not include someone who is in 'their own country', such as a person who has been in Australia since they were a toddler.

[15] 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.

[16] This captures both the sentence that the non-citizen is serving at the time of the cancellation decision (for the purposes of s 501(3A)(b)) and any past sentence that founds the non-citizen's 'substantial criminal record' (for the purposes of s 501(3A)(a)): see *Ketjan v AMIBP* [2019] FCAFC 207 at [38], [39], [50]. For example, in *MICMSMA v Singh* [2020] FCA 1384 the Court found the Tribunal misconstrued s 501(3A) and there was no proper basis for the finding that the prison sentence giving rise to the "*substantial criminal record*" for the purposes of s 501(3A)(a)(i) needed to have any relation to the prison sentence being served for the purposes of s 501(3A)(b), let alone that they needed to be same sentence of imprisonment: at [15].

[17] For these purposes, periods of periodic detention and orders to participate in certain residential schemes or programs count as terms of imprisonment: ss 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: s 501(12).

[18] *BJT21 v MHA (No 2)* [2022] FCA 24 at [71]. The Court followed authority in *Parker v MIBP* (2016) 247 FCR 500, which was considering s501(2) not 501(3A), in finding that determining whether the relevant state of satisfaction was formed lawfully depended on the circumstances as at the time the decision was made.

[19] 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 Procedural Law Guide – Statutory duty to disclose adverse information. In *Picard v MIBP* [2015] FCA 1430 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].

circumstances'.[20] This is only concerned with the method of delivery and request rather than the content.[21]

Section 501CA(3) also requires representations to be made within the period and in the manner set out in the regulations.[22] Relevantly, reg 2.52(2)(b) stipulates a 28-day period within which representations must be made and this is calculated with reference to when the person is given the notice and the particulars of relevant information under s 501CA(3)(a).[23] Since representations are made in response to the invitation, time can only start to run once both (a) the notice of the decision and particulars of the relevant information and (b) the invitation to make representations have been given.[24] Where the 28 day period expires and a person has not made representations for revocation of the cancellation, the power to revoke the cancellation given by s 501CA is spent and cannot be revived by the lateness of submissions being overlooked or by the Minister giving another invitation.[25] If the power to revoke the cancellation is not engaged, because, for example, representations to revoke the cancellation were not made within the 28 day period, the cancellation cannot be revoked by the Minister.[26] Without the revocation power being properly engaged, there can be no AAT reviewable decision.[27] However, the revocation power under s 501CA(4) will be enlivened, and the Tribunal on review will have jurisdiction, if an applicant gives the relevant representations under s 501CA(4)(a) to prison authorities for dispatch within the 28-day period for making such representations, regardless of when the representations are received by the Minister.[28]

[20] This wording does not appear elsewhere in the Act, in relation to other decision notification provisions.
[21] *MIBP v EFX17* [2021] HCA 9 at [25]. The High Court found the majority of the Full Court in *EFX17 v MIBP* [2019] FCAFC 230 had erred in reasoning that the capacity of a person to understand the written notice, particulars, or invitation described in s 501CA(3) was relevant to whether the written notice and particulars had been given or whether the invitation to make representations had been made: at [31].
[22] See reg 2.52 for manner; reg 2.55 for deemed receipt. In *Sillars v MICMSMA* [2020] FCA 1313 the applicant contended he was in "immigration detention" and the relevant deemed receipt provision was reg 5.02, rather than reg 2.55, such that the invitation to make representations was defective. The Court held a person is not in immigration detention if they are in criminal detention like the applicant was: at [38]. A non-citizen only enters immigration detention as a result of an executive act taken pursuant to s 189 of the Act. If the non-citizen is being detained in a prison serving a sentence, there is no reason for such action to be taken: at [39]. Upheld on appeal: *Sillars v MICMSMA* [2021] FCAFC 174 at [39]. Special leave refused: *Sillars v MICMSMA* [2022] HCASL 9.
[23] In *MIBP v EFX17* [2021] HCA 9 the High Court held an invitation to make representations 'within the period … ascertained in accordance with the regulations' must crystallise the period either expressly or by reference to correct objective facts from which the period can be ascertained on the face of the invitation such as '28 days from the day that you are handed this document': at [42]. The Court accepted a submission by the Minister that s 501CA(3)(b) did not require the Minister to specify the date by which representations must be made and the period may be left to the recipient of the notice to determine, before stating there must be sufficient information to permit them to determine the period correctly: at [41].
[24] *BDS20 v MICMSMA* [2020] FCA 1176 at [43].
[25] *BDS20 v MICMSMA* [2020] FCA 1176 at [52]. In this case the Court found that once the invitation had been given and the time had commenced, the later sending of another invitation did not re-commence the timeframe: at [46]. The Court in *Sillars v MICMSMA* [2020] FCA 1313 followed *BDS20 v MICMSMA* [2020] FCA 1176, noting that it was not plainly wrong: at [74], [77]. On appeal in *BDS20 v MICMSMA* [2021] FCAFC 91 the Court upheld the judgment at first instance, finding the text of s 501CA expresses a contrary interpretation to the rule in s 23(b) of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) that words in the singular number include the plural and that the legislative intention not to permit an invitation complying with s 501CA(3) to be made more than once emerges with clarity, and displaces s 33 of the *AIA*, that a provision authorising power confers it to be exercised/ re-exercised from time to time: at [82]–[83], [114].
[26] *BDS20 v MICMSMA* [2020] FCA 1176 at [53].
[27] If the Minister erroneously makes a decision not to revoke the cancellation, consistent with reasoning in *MHA v CSH18* [2019] FCAFC 80 it could be reviewed by the AAT but potentially must be set aside as the Minister never had the power to make it. In *MHA v CSH18* the Full Federal Court held that by s 414(1) of the Act ([Part 7]**;** s 348(1) [Part 5]), the Tribunal must review a purported decision made by a person who lacked the requisite delegation if a valid application for review is made: at [63], [65], [67].
[28] *Stewart v MICMSMA* [2020] FCAFC 196 at [43], [50], [55]. The Court's reasons are confined to the terms 'makes' in s 501CA(4)(a) and 'made' in reg 2.52 and emphasised the statutory context of a person making representations under s 501CA necessarily being in custody and not at liberty to ensure their representations in favour of revocation are transmitted to the Minister, and the potential harshness of the mandatory consequences under s 501(3A) of a person's relevant offending and sentence of imprisonment. In *Law v MICMSMA* [2020] FCA 1726 the Minister accepted that in light of the construction of s 501CA(4)(a) and reg 2.52(2) by the Full Court in *Stewart* it must be concluded that the Tribunal's conclusion that the applicant failed to make representations within the prescribed period because the representations were not received by the Department during the period was wrong in law: at [28]. Contrast with *Hillman-McLean v Minister for Immigration (No 3)* [2020] FCCA 2546 where the Court had earlier held handing representations to a prison officer did not amount to giving it to the Minister: at [127]. The Court held a prison officer was an "officer" for the purposes of s 5(1) of the Migration Act, they were not a proxy or agent for the Minister; they did not stand in the shoes of the Minister such that the Minister was deemed to have received representations once it was accepted they were handed to a prison officer: at [128], [130]. Note unlike *Stewart* the Court found on the facts the applicant had never handed representations to a prison officer within the 28-day period. In *Sillars v MICMSMA* [2021] FCAFC

Where the Minister has issued an invalid invitation and representations were made out of time, the statutory pre-condition for the exercise of the power in s 501CA(4)(a) is never enlivened, and therefore the only relief possible is the setting aside of the delegate's decision (to refuse to consider the representations) by judicial review.[29] This denies the Tribunal jurisdiction to review the decision. However, the Tribunal may have "authority to review" an invalid decision where representations were in fact considered by the delegate.[30]

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.[31] The revocation decision under s 501CA(4)(b)(i) calls on the decision-maker to first decide whether the person passes the character test[32] and, only if satisfied they do not, go on to consider under s 501CA(4)(b)(ii) if there is 'another reason' why the cancellation should be revoked.[33] The decision maker considering whether there is 'another reason' under s 501CA(4)(b)(ii) must do so on the basis that the person has been convicted or sentenced in a manner that meant they did not pass the test in s 501CA(4)(b)(i), as approaching it in any other way would mean it was not 'another reason' and would undermine the s 501CA(4)(b)(i) finding, thereby allowing a person to claim that a visa cancellation should be revoked because the factual maters that necessarily underpinned the conviction or sentence were not true.[34]

It now seems incumbent on the Tribunal to consider the legal effectiveness of the s 501(3A) decision when reviewing a s 501CA non-revocation decision.[35] The majority of a Full Federal Court held that in circumstances where a primary decision maker has no power to make a cancellation decision under s 501(3A), because for example it is based on the same factual basis as an earlier s 501(3A) decision, s 501CA(1) will not be engaged and neither the primary decision maker nor the Tribunal will have any power or discretion under s 501CA to decide whether the legally ineffective cancellation decision should be revoked. This is because the jurisdictional fact of a s 501(3A)

174, where the notification incorrectly stated the Minister must receive submissions on revocation within 28 days, the Court rejected the Minister's challenge that *Stewart* was incorrect and applied it to find that notification must be dispatched within 28 days: at [48]-[49]. Special leave refused: *Sillars v MICMSMA* [2022] HCASL 9. See also *EPL20 v MICMSMA* [2021] FCAFC 173 at [41] (Special leave refused: *EPL20 v MICMSMA* [2022] HCASL 9).

[29] *CHVS v MICMSMA* [2022] FCA 34 at [71]–[74].

[30] In *CHVS v MICMSMA* [2022] FCA 34 at [75]–[79] the Court appeared to accept this, with reference to *EPL20 v MICMSMA* [2021] FCAFC 173 and *Sillars v MICMSMA* [2021] FCAFC 174 and the application of *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; 24 ALR 307. However, in *Lewis v MICMSMA* (No 2) [2022] FCA 521 at [16] the Court noted that there was an apparent inconsistency between *CVHS* and *EXT20 v MHA* [2022] FCAFC 75 where Justice Mortimer at [101]–[102] (with whom Wigney and Snaden JJ agreed on this point) expressly left unresolved the questions arising from *EPL20* and *Sillars* as to whether a valid notice and invitation under s 501CA(3) is a statutory pre-condition for the exercise of the power in s 501CA(4), particularly in circumstances where representations are made outside the time period prescribed by reg 2.52. The Court in *Lewis* noted it will be for the Tribunal to decide – although it cannot determine it finally – what it has power to do in the circumstances where the notice was invalid, but the visa holder made submissions and the delegate considered them at [17]. An application for special leave to appeal *EXT20 v MHA* [2022] FCAFC 75 was refused: *EXT20 v MHA* [2022] HCATrans 223.

[31] In *MICMSMA v ZRTY* [2022] FCA 1529, the Tribunal set aside and remitted the decision under review for further consideration, essentially identifying different types of information that could be obtained by the delegate to better consider the applicant's prospects, instead of determining whether there was 'another reason' the cancellation should be revoked and the Court found that while the Tribunal correctly identified the question before it, it failed to answer it and misconstrued its task at [42].

[32] In *CCU21 v MHA* [2022] FCA 28 the Minister's decision not to revoke a cancellation involved an adverse ASIO assessment, where the non-revocation decision was based on a different character ground from the original cancellation, and the Court followed existing authority in *Graham v MIBP* [2022] FCA 682 to find the decision was not invalid for relying on a different character ground from the original decision at [98].

[33] *HZCP v MIBP* [2019] FCAFC 202 at [66]. Special leave refused: *HZCP v MIBP* [2021] HCA Trans 168.

[34] *HZCP v MIBP* [2019] FCAFC 202 at [68], [194]. In that case the appellant's protection visa had been cancelled due to his substantial criminal record and the Tribunal determined the appellant did not pass the character test on the basis that he had been sentenced to a term of imprisonment greater than 12 months. The Court held the Tribunal was correct to conclude that evidence by which the appellant sought to impugn the facts found by the sentencing judge could not be taken into account when considering whether to exercise the discretion to revoke the cancellation as this could not have been the legislative intention (per McKerracher and Colvin JJ at [68], [76], [78]–[79] and [194]–[196], Derrington J dissenting). Special leave refused: *HZCP v MIBP* [2021] HCA Trans 168. See also *Singh v MICMSMA* [2020] FCA 55 where the Court found the Tribunal did not impugn the essential factual basis of the criminal sentence: at [40].

[35] *XJLR v MICMSMA* [2022] FCAFC 6 at [58]-[59].

decision prescribed in s 501CA(1) is not satisfied and the visa remains in full force and in effect at all times.[36] The Tribunal would still appear to have jurisdiction in relation to a purported s 501CA decision even if the s 501(3A) decision was legally ineffective, however the Tribunal's powers on review would seem limited to setting aside the cancellation decision and substituting with a decision that the visa has not been cancelled.[37]

Judicial authority also indicates 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 rather is part of a single balancing exercise.[38] 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.[39] 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.[40]

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.[41]

If the decision-maker exercises the power in s 501CA(4) and in giving reasons makes a finding of fact, they must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the decision-maker's personal or specialised knowledge or by reference to that which is commonly known.[42] In that respect, the decision-maker is free to adopt both the accumulated knowledge of the Department and any draft written reasons for decision prepared by a departmental officer, provided that such reasons reflect the reasons why the decision-maker had reached her or his decision.[43] There is no express requirement that the decision-maker disclose whether a material finding is made from personal,

[36] *XJLR v MICMSMA* [2022] FCAFC 6 at [55], [58]-[59], [63].
[37] While both the dissenting and primary judgments in *XJLR v MICMSMA* [2022] FCAFC 6 are more in line with the legislation in s 500(4A)(c) that a s 501(3A) decision is not subject to merits review, the majority's characterisation of it as a jurisdictional fact is, subject to any further judicial consideration, the current state of the law.
[38] See *MHA v Buadromo* [2018] FCAFC 151, at [21], referring to *Gaspar v MIBP* [2016] FCA 1166 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]. See also *Tohi v MICMSMA* [2021] FCAFC 125 per Katzmann J at [3], confirming that the weight of authority is to the effect that s 501CA(4) does not involve a two-stage decision-making process. Special leave refused: *Tohi v MIMCMSA* [2022] HCASL 38. In *Au v MICMSMA* [2022] FCAFC 125, the Court again confirmed that the weight of the authority accords with the construction that there is no residual discretion once the criteria prescribed by ss 501CA(4)(a) and (b) are met (see O'Sullivan J at [82]–[96] for consideration of the authorities). However, Derrington J in *obiter* raised issues with that interpretation in the context of the Migration Act as a whole, which uses the words 'may' and 'must' throughout its provisions with deliberate legislative intention. His Honour noted that ss 501(1), (2) and (3) use the word 'may' to grant the Minister a discretionary power and s 501(3A) which partially initiates the operation of s 501CA(4), mandates the cancellation of a visa by use of the word 'must'. His Honour opined that given the judicious and deliberate use of the words 'may' and 'must' in s 501 which is closely associated with s 501CA(4), the assumed misuse of the word 'may' in s 501CA(4) is unlikely and would be significantly inconsistent (at [55]-[61]).
[39] *YNQY v MIBP* [2017] FCA 1466 at [59].
[40] *Gaspar v MIBP* [2016] FCA 1166 at [38]. See also *Au v MICMSMA* [2022] FCAFC 125.
[41] *Marzano v MIBP* (2017) 250 FCR 548 at 56–57, 59–60.
[42] *MICMSMA v Viane* [2021] HCA 41 at [17]. In *MICMSMA v Mukiza* [2022] FCAFC 89 the Court confirmed the Tribunal's task under s 501CA(4) is the same as the Minister's or the delegate's and that the principles as to fact finding for the purposes of s 501CA in *Viane* are plainly relevant to the Tribunal's task on review. In this case, it was permissible for the Tribunal to rely on its personal or specialised knowledge and on accumulated knowledge from the Department, including the delegate's decision. An application for special leave was refused by the High Court in *Mukiza v MICMSMA* [2022] HCASL 168.
[43] *MICMSMA v Viane* [2021] HCA 41 at [19].

specialised or accumulated knowledge and nor are they under any obligation to disclose their disagreement with bare assertions.[44]

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'.[45]

Jurisdiction

Reviewable decisions

Decisions by a delegate to refuse a visa under s 501(1)[46], 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.[47]

Current judicial authority in respect of s 501(1) indicates that where there are no relevant new facts emerging on review, the AAT cannot expand the review to consider aspects of the character test that were not the basis for the delegate's decision.[48] This limits s 501(1) reviews to those aspects of the character test that were considered by the delegate. However, it will be a matter for further judicial consideration to determine the extent to which this reasoning may be applied to AAT reviews of other matters.

As only decisions made by delegates are reviewable, decisions made by the Minister personally are not subject to merits review.[49] A reference to the Minister includes any one of the Ministers administering the relevant provisions, including, for example, an Assistant Minister appointed to administer the Act.[50]

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).[51] This time period cannot be extended.[52] If the applicant is outside the migration zone the review application must be lodged no later than 28 days after the

[44] *MICMSMA v Viane* [2021] HCA 41 at [18] and [32].
[45] See *Romanov v MHA* [2018] FCA 1494 at [20].
[46] This includes protection visa refusals under s 501: *MICMSMA v BFW20; BGS20 v MICMSMA* [2020] FCAFC 121 at [8], [120], [121], [160] and *KDSP v MICMSMA* [2020] FCAFC 108 at [104] per Bromberg J and at [302] per O'Callaghan and Steward JJ. An application for special leave to appeal to the High Court was dismissed in *KDSP v MICMSMA* [2021] HCATras 20.
[47] 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.
[48] *MICMSMA v CPJ16* [2019] FCA 2033 at [68], [70]–[71]. To some extent, the Court's finding in this case turned upon inferences drawn about the delegate's decision and application to other cases may depend upon how the delegate's decision is interpreted.
[49] The personal powers of the Minister to cancel or refuse visas under ss 500A(2)–(3), 501(3), 501A(2)–(3), 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: ss 500A(7), 338(2), 411(2)(aa), 501A(7), 501B(4), 501BA(5), 501C(11).
[50] Due to the effect of s 19A of the Acts Interpretation Act: see *Maxwell v MIBP* (2016) 249 FCR 275 at 20–21.
[51] s 500(6B).
[52] s 500(6B) provides that ss 29(7)–(10) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), which concern extensions of time, do not apply.

document setting out the terms of the decision is given to the applicant, but this time can be extended.[53]

Standing

Standing to apply to the AAT for review is ordinarily governed by s 27(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (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.[54]

This calls for consideration of the provisions about standing to apply for review in ss 347(2), (3) and (3A) (for general migration visas) and ss 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.[55] 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 Procedural Law Guide – Review applications.

Application fee

The application for review must be accompanied by the prescribed fee.[56] 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.[57] 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.[58]

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.[59] The character test deems individuals to be of bad character if they fit any of the criteria listed.

[53] AAT Act ss 29(1)(d), (2)(a), 29(7)–(10).
[54] s 500(3), which refers to s 500(1)(b); AAT Act s 27(1).
[55] See ss 338 and 347 (general migration visas) and 412 (protection visas).
[56] AAT Act s 29(1)(b).
[57] s 20(1)(a) and s 21 of the *Administrative Appeals Tribunal Regulation 2015* (Cth) (AAT Regulation) – 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.
[58] s 69C(1) of the AAT Act and s 24 of the AAT Regulation.
[59] 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, 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.

A person does not pass the character test only if one of the paragraphs in s 501(6) applies to that person.[60] 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,[61] 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.[62] In circumstances where the Minister is unsure whether a paragraph in s 501(6) applies, the Minister could not refuse or cancel the visa.[63]

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.[64] Section 501(6) provides: 'Otherwise, the person passes the character test'.

Consistent with judicial authorities, Direction No 90 says: 'Persons who are being considered under s 501 of the Act must satisfy the decision-maker that they pass the character test set out in s 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 s 501(6) of the Act'.[65]

Substantial criminal record

A person who has a substantial criminal record does not pass the character test.[66] For this purpose, the categories of sentences and detention in s 501(7) have been selected by the Parliament as objective, easily identified, criteria.[67]

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[68] 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

[60] *MIMIA v Godley* (2005) 141 FCR 552 at 54.
[61] *MIMIA v Godley* (2005) 141 FCR 552 at 34.
[62] *MIMIA v Godley* (2005) 141 FCR 552 at 48.
[63] See *MIMIA v Godley* (2005) 141 FCR 552 at 53–55.
[64] *MIMIA v Godley* (2005) 141 FCR 552 at 56.
[65] Direction No 90, Annex A, s 1, Discretionary visa cancellation or refusal, paragraph (2).
[66] s 501(6). In *Nafady v MICMSMA* [2022] FCA 1434 the Minister made a personal decision not to revoke the cancellation of the appellant's criminal justice visa under s 501C(4) as the appellant was convicted of a series of sexual offences, but those convictions were overturned on appeal. Having regard to those (since quashed) convictions, the Minister formed the view, on the basis of unarticulated 'analysis', that the appellant would not pass the character test. The Court found the unexposed analysis as to the alleged conduct the subject of the sexual offence charges affected the ultimate absence of satisfaction as to passing the character test at [38].
[67] See *Brown v MIAC* (2010) 183 FCR 113 at 10.
[68] 'Court' includes a court martial or similar military tribunal: s 501(12).

rehabilitation or a residential program for the mentally ill.[69] 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.[70] 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.[71]

When determining whether an applicant has been sentenced to a term of imprisonment of 12 months or more[72], 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.[73] This means that a sentence to a term of imprisonment which is suspended is still to be counted.[74] Further, a youth justice centre order is substantively a form of punitive detention as a consequence of a finding of criminal guilt and is therefore a sentence of "imprisonment" within the meaning of s 501 of the Act.[75] Sentences served concurrently (whether in whole or in part) must be totalled for the purposes of s 501(7).[76] An aggregate sentence of imprisonment does not engage s 501(7)(c).[77]

Conviction

A person who has been convicted of an offence also does not pass the character test.[78] Related to this, s 501(10) sets out circumstances for pardons. For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if the conviction concerned has been quashed or otherwise nullified; or the person has been pardoned in relation to the conviction concerned and the effect of that pardon is that the person is taken never to have been convicted of the offence.[79] Conviction applies to the formal act or judicial act or order of conviction, but extends to the finding of guilt.[80] A recording of guilt for an applicant as a minor may not be a relevant consideration or considered a 'conviction' for the purposes of the Migration Act.[81]

Association with/membership of groups involved in criminal conduct

A person also fails 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

[69] s 501(9).
[70] s 501(8).
[71] s 500(10).
[72] 'Sentenced to a term of imprisonment' in the s 501(7)(c) definition of 'substantial criminal record' includes a sentence of imprisonment imposed by a Australian and a foreign court: *MICMSMA v Darnia-Wilson* [2022] FCAFC 28 at [42].
[73] *Drake v MIEA* (1979) 76 FLR 409 at 415–418.
[74] *Brown v MIAC* [2010] FCAFC 33 at [11]–[12].
[75] *Nuon v MICMSMA* [2022] FCA 653 at [80]. Upheld on appeal in *Nuon v MICMSMA* [2022] FCAFC 197. In this case the applicant had argued that being detained in a Youth Detention Centre under the *Children, Youth and Families Act 2005* (Vic) was not being sentenced to 'imprisonment' within s501(7)(c).
[76] s 501(7A).
[77] *Pearson v MHA* [2022] FCAFC 203 at [40]-[49].
[78] s 501(6).
[79] s 501(10).
[80] *EVX20 v MICMSMA* [2021] FCA 1079 at [25]. The Court did not find it necessary in this case to consider whether or not the word would additionally extend to a plea of guilty.
[81] *Thornton v MICMSMA* [2022] FCAFC 23 at [36]-[37]. The Court accepted that the terms of s 184(2) of the *Youth Justice Act 1992* (Qld), which stipulates that a finding of guilt is not to be recorded as a conviction, falls within s 85ZR(2) of the *Crimes Act 1914* (Cth) (which provides for matters that cannot be considered in decisions under other legislation including the Migration Act), with the effect that a recording of guilt for an applicant as a minor under that provision of the Youth Justice Act is not a relevant consideration and offending that falls within the provisions of the Youth Justice Act is not to be considered as a 'conviction' for the purposes of the Migration Act.

reasonably suspects has been or is involved in criminal conduct. For this ground, criminal conduct is not limited to conduct in Australia.[82]

In order to have been a member of a group, 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.[83] 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.[84]

To have had an association, 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;[85] it does not refer to merely social, familial or professional relationships.[86] In establishing association, decision-makers are to consider the nature of the association; the degree and frequency of association; and its duration.

A person who fails this test may also pose a risk of harm to the Australian community.[87]

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.[88]

Whether a person is of 'good character' or not is primarily an issue of fact and there are no precise parameters to distinguish 'good character' from 'bad character'.[89] 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.[90] 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.[91] While 'good character' does not refer to a person's reputation and repute, 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.[92]

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

[82] *DVE18 v MHA* [2019] FCA 1389 at [69]–[79].
[83] *Roach v MIBP* [2016] FCA 750 at [133]–[149].
[84] *Roach v MIBP* [2016] FCA 750 at [144].
[85] Direction No 90, Annex A, s 2, para 3(5). This incorporates the principle from the Full Federal Court judgment in *Haneef v MIAC* (2007) 163 FCR 414 at 130.
[86] *Haneef v MIAC* (2007) 161 FCR 40 at 254.
[87] *Roach v MIBP* [2016] FCA 750 at [70].
[88] s 501(6)(c)
[89] *Irving v MILGEA* (1996) 68 FCR 422 at 427–428.
[90] *MIMIA v Godley* (2005) 141 FCR 552 at 34, citing with approval *Godley v MIMIA* [2004] FCA 774 at [51].
[91] *MIEA v Baker* (1997) 73 FCR 187 at 197.
[92] *Irving v MILGEA* (1996) 68 FCR 422 at 425.

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 them entry (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).[93]

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.[94] 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.[95]

Criminal conduct

The concepts of criminal and general conduct are not mutually exclusive.[96]

'Past criminal conduct' does not refer only to conduct the subject of criminal conviction.[97] In the absence of a prosecution and conviction, however, satisfaction that criminal conduct has occurred will not be attained on slight material.[98] 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.[99]

The task of determining a person's character in the context of their criminal conduct involves:[100]

- examining the conduct and assessing it 'as to its degree of moral culpability or turpitude'
- examining whether past and present criminal conduct is sufficient to establish that a person, at the time of decision, is not of good character
- if there is no recent criminal conduct, giving 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.[101] It could be error not to take an absence of evidence of 'present criminal conduct' into account, and to ask instead whether

[93] *Goldie v MIMA* [1999] FCA 1277 at [8].
[94] *MIMIA v Godley* (2005) 141 FCR 552 at 34, citing with approval *Godley v MIMIA* [2004] FCA 774 at [52].
[95] *Irving v MILGEA* (1996) 68 FCR 422 at 428.
[96] *Wong v MIMIA* [2002] FCAFC 440 at [33].
[97] *MIEA v Baker* (1997) 73 FCR 187 at 194.
[98] *MIEA v Baker* (1997) 73 FCR 187 at 194.
[99] See *Brown v MIAC* (2010) 183 FCR 113 at 128.
[100] *Godley v MIMIA* [2004] FCA 774 at [55].
[101] *Irving v MILGEA* (1996) 68 FCR 422 at 431–432.

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.[102]

General conduct

The Act and *Migration Regulations 1994* (Cth) (the 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 it is for the public good to refuse that person entry.[103] The absence of harm to the Australian community from the issue of a visa is relevant to the meaning of good character.[104]

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.[105] Whilst a person's beliefs may generate conduct, of itself, belief is not "conduct" because it does not involve any act or any omission.[106]

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.[107]

A deportation order is a matter that may be taken into account[108], although such orders do not of themselves throw much light upon the inherent qualities which a person may have.[109]

Risk in regard to future conduct

Whether there is a risk that a person would engage in specified conduct requires an evaluative judgment by the decision-maker. If the decision-maker is so satisfied, they have a discretion to refuse or cancel a visa, or revoke a visa cancellation.[110]

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

[102] *Mujedenovski v MIAC* [2009] FCAFC 149 at [48].
[103] *Irving v MILGEA* (1996) 68 FCR 422 at 432.
[104] *Irving v MILGEA* (1996) 68 FCR 422 at 433.
[105] *MIEA v Baker* (1997) 73 FCR 187 at 195.
[106] In *Khodr v MICMSMA* [2021] FCA 198 the Court held that conduct engaged in by a person may be indicative of a particular belief held by that person but the belief itself is not "conduct" in the ordinary meaning of that expression: at [33]. It found that a person's beliefs have not been included in s 501(6)(c) as a consideration that the Minister *must* have regard to: at [38].
[107] *Mujedenovski v MIAC* [2009] FCAFC 149 at [47].
[108] *MIEA v Baker* (1997) 73 FCR 187 at 196. In *Toki v MICMA* [2022] FCAFC 164 the Court considered the impact of a notice under s 254 of the Act in relation to a person in criminal detention who was also a 'forensic patient' and found that in practical terms it only takes effect when the person becomes entitled to be released from custody at [74].
[109] *Irving v MILGEA* (1996) 68 FCR 422 at 425–426.
[110] See *Sabharwal v MIBP* [2018] FCAFC 160 at [2]. The Court considered s 501(1), but the reasoning also applies to ss 501(2) and 501(3A).

second event will happen; and (b) that there is sufficient probability that the happening of the second event was triggered by the first.[111]

In some circumstances, it may be permissible to conclude that any type of continued offending increases the risk of further *violent* offending.[112]

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.[113] Direction No 90 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.[114]

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.[115]

Other grounds

The other character grounds in s 501(6) – immigration detention offences, sexually based offences involving a child, people smuggling and trafficking, crimes under International Humanitarian Law, national security risk, and certain Interpol notices – have not had as much judicial consideration as those discussed above.

In respect of people smuggling, s 501(6)(ba)(i) provides that a person does not pass the character test if the Minister reasonably suspects that the person has been or is involved in an offence under one or more of the people smuggling provisions under ss 233A to 234A. It is not open to the Minister to be reasonably satisfied that a person has been involved in conduct that does not constitute an offence at the time it occurred.[116] Further, to conclude that a person does not pass the character test by forming a suspicion on reasonable grounds, the Minister must identify what he suspects a person to have done and on what basis and then to consider which of the offences he suspects the person to have been involved in.[117]

[111] See *Sabharwal v MIBP* [2018] FCA 10 at [106]. The judgment was overturned on appeal in *MIBP v Sabharwal* [2018] FCAFC 160 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'.
[112] For example *Nepata v MHA* [2019] FCA 1197 at [30].
[113] See *Sabharwal v MIBP* [2018] FCA 10 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.
[114] Direction No 90, Annex A, s 2, para 6(3).
[115] Direction No 90, Annex A, s 2, para 6(2). In *BHL19 v MICMSMA* [2020] FCAFC 94 the Minister's evaluative finding in respect of s 501(6)(d) was that there was a low likelihood, but more than minimal or remote, of the threatened activity taking place in Australia, and the Minister found the possibility and thus risk of the activity taking place could not be excluded, and if it did occur it could result in significant harm to the Australian community. The Court held s 501(6)(d) has been cast by the legislature in wide terms, with low thresholds; that a person does not pass the character test if found to meet a threshold as low as "*a risk*" of representing a "*danger to the Australian community*"; and that s 501(6)(d) does not refer to any particular level of risk, be it high, low, remote or negligible, rather it is an evaluative exercise for the Minister to conduct as to whether any such risk exists, and if so, what the consequences might be: per Bromwich J (White J agreeing) at [324], [325], [337], [338].
[116] *AEM20 v MHA* [2020] FCA 623 at [70]. In that case, the conduct in which the applicant was suspected to have been involved in occurred before the commencement of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) which introduced the people smuggling offences in ss 233A to 234A.
[117] *AEM20 v MHA* [2020] FCA 623 at [81]. In that case, the Minister's failure to do this resulted in a constructive failure to exercise jurisdiction.

In respect of Interpol notices, s 501(6)(h) stipulates a person does not pass the character test if an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.[118] The starting point in any inquiry as to the power exercised pursuant to s 501(6)(h) must always be the Interpol notice.[119] The Minister may reasonably infer that a person would present a risk to the Australian community or a segment of it from the Interpol notice itself, however, the reasonableness of the inference, will ultimately depend on the facts of the individual case.[120] Weight needs to be given to information, where it exists, which goes to confirming or denying, or bearing upon the credibility or reliability of, the information contained in the notice.[121]

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 with legal unreasonableness. The subject matter, scope and purpose of the Act may also require that certain considerations be taken into account.[122] 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.[123] Over time, the Minister has issued various directions for people or bodies exercising powers under ss 501 and 501CA.[124]

The purpose of a Ministerial 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 Ministerial Direction can constitute jurisdictional error.[125] A 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.[126] 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

[118] The proper construction of s 501(6)(h) was considered in *MICMSMA* v *ERY19* [2021] FCAFC 133 where the Court found that the prospective use of the word "would" in the phrase "would present a risk" leaves the word "risk" to require no more than a *possibility* of harm: at [78]. See also *FUD18 v MHA* [2021] FCAFC 132 at [145]. The Court also noted in *obiter* that the better view was that s 501(6)(h) poses an *objective* question; the consequence being that any inference drawn by the Minister must be based on the existence of facts which are sufficient to induce that state of mind in a reasonable person: at [52], [62]. See also *FUD18 v MHA* [2021] FCAFC 132 at [145].
[119] *MICMSMA* v *ERY19* [2021] FCAFC 133 at [108] and *FUD18 v MHA* [2021] FCAFC 132 at [156].
[120] *MICMSMA* v *ERY19* [2021] FCAFC 133 at [108] and *FUD18 v MHA* [2021] FCAFC 132 at [156].
[121] *MICMSMA* v *ERY19* [2021] FCAFC 133 at [110].
[122] *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.
[123] s 499.
[124] Direction No 90 is the direction currently in force.
[125] See *Williams v MIBP* (2014) 226 FCR 112 at 34–35. In *YNQY v MIBP* [2017] FCA 1466, 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].
[126] *MIBP v Lesianawai* (2014) 227 FCR 562 at 80–81.

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.[127]

A Direction 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.[128]

Direction No 90

Various Directions have been issued by the Minister under s 499 from time to time. Direction No 90 is the most current and commenced on 15 April 2021,[129] revoking previous Direction No 79 with effect from that date[130]. Direction No 90 differs significantly from the previous Direction No 79, setting out the primary considerations and other considerations in a single part[131], which covers all types of decisions (refusal, cancellation and non-revocation) to which the Direction applies, and introduces among other things, new considerations in relation to family violence, forced marriage, expectations of the Australian community and balancing serious character concerns against strong countervailing circumstances. Where judgments and Tribunal decisions discussed in this commentary have considered a previous Direction, the reasoning applies equally to Direction No 90, unless indicated otherwise.

Part 1 of Direction No 90 includes interpretation provisions and a preamble about its objectives and principles.[132]

The interpretation provisions set out new definitions for 'decision maker', 'family violence', 'forced marriage' and 'serious conduct', and includes new examples for 'serious conduct'. Notes to the interpretation section provide that a number of expressions used in Direction No 90 are defined in s 5 of the Act, such as 'immigration detention', 'minor', 'non-citizen', 'remove', 'substantive visa', 'visa applicant' and 'visa holder',[133] while the expressions 'character test' and 'visa' have the same meaning as in the Act.[134]

Specifically, family violence is defined to mean violent, threatening or other behavior by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful. A non-exhaustive list of behavior that may constitute family violence is also included.

Direction No 90 also defines when a 'forced marriage' is taken to have occurred, being where a party to marriage (the victim) entered into the marriage without freely and fully consenting either: because

[127] *MIBP v Lesianawai* (2014) 227 FCR 562 at 83. The Court was discussing Direction No 55, but the reasoning applies equally to Direction No 90.
[128] *Uelese v MIBP* [2016] FCA 348 at [50].
[129] Direction No 90, pt 1, para 2.
[130] Direction No 90, pt 1, para 3.
[131] Part 2. Whereas in Direction No 79, primary considerations and other considerations were set out in separate parts for cancellations under s 501(2) (Part A), refusals under s 501(1) (Part B) and revocations under s 501CA(4) of the Act (Part C).
[132] Direction No 90, pt 1, para 4 and 5. The general guidance which was in the preamble to Direction No 79 is now incorporated throughout Direction No 90 and the interpretation provisions previously in Annex B of Direction No 79 are part of the interpretation provisions at the beginning of Part 1 of Direction No 90.
[133] Note 1 to para 4.
[134] Note 2 to para 4.

of coercion, threat or deception against the victim or another person or because the victim was incapable of understanding the nature and effect of the marriage ceremony; or because the victim was under 16 years of age when the marriage was entered into.

The term 'serious conduct' in Direction No 90 has a non-exhaustive definition which includes behaviour or conduct of concern that does not constitute any criminal offence. Examples of serious conduct in the Direction include a public act that could incite hatred towards a group of people who have a particular characteristic, such as race; intimidatory behaviour or behaviour that represents a danger to the Australian community; involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law.[135]

The preamble sets out the objectives[136] and the overarching principles[137] that provide the framework within which decision-makers should approach their task under ss 501 and 501CA. The principles include:

para 5.2(2), which expands consideration from those who 'commit serious crimes', as appeared in Direction No 79, to those who 'engage or have engaged in criminal or other serious conduct':

> "Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia."

para 5.2(3), which states the government's view in relation to community expectations:

> "The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community."

and para 5.2(5), which is intended to guide decision-makers to balance serious character concerns against strong countervailing circumstances. It expands consideration from 'criminal offending or other conduct', as appeared in Direction No 79, to 'the nature of the non-citizen's conduct', replaces consideration of offending conduct 'and' harm with the nature of the non-citizen's conduct 'or' the harm that would be caused if the conduct were to be repeated, and no longer expressly refers to the 'risk 'of similar conduct in the future [being] unacceptable'. It further provides:

> "…In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community."

In addition, para 5.2(4) of Direction No 90 now combines principles reflecting Australia's low tolerance of any criminal or serious conduct by visa applicants or those holding a limited stay visa

[135] This differs from the previous definition of 'serious conduct' in Annex B to Direction No 79 which defined it 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, and included, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law, and conduct which may be considered under s 501(6)(c) and/or (6)(d).
[136] Direction No 90, pt 1, para 5.1.
[137] Direction No 90, pt 1, para 5.2.

or other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time, and that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.[138] The previous principle in Direction No 79 about the length of time making a positive contribution and consequences for minor children and immediate family members has not been carried over into Direction 90.

Part 2 of Direction No 90, titled 'Exercising the discretion', stipulates that, informed by the principles in the preamble, decision-makers must take into account the primary considerations at para 8 of Direction No 90 and the other considerations at para 9 of Direction No 90 where relevant to the decision.[139] Paragraph 8 of Direction No 90 retains the same three primary considerations from Direction No 79 (protection of the Australian community, bests interests of minor children and expectations of the Australian community), but also adds a new primary consideration, being conduct constituting family violence. Paragraph 9 of Direction No 90 retain the same other considerations from Direction No 79 including, international non-refoulement obligations, extent of impediments if removed and impact on victims, but considerations relating to strength, nature and duration of ties in Australia and impact on business interests now come under a new umbrella consideration relating to links to the Australian community.

While a decision-maker is bound to take into account certain considerations, they are not limited to those set out in the Direction.[140] 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.[141]

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.[142] 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.[143] 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.[144] Evidence relating to one factor under the Direction may also be relevant to another factor.[145]

[138] In *Shrestha v MICMSMA* [2021] FCA 801 the Court rejected the applicant's submission that 'most of their life' in cl 6.3(5) of Direction No 79 (equivalent to para 5.2(4) of Direction No 90) means 'most of their adult life': at [32]. That is, that the meaning is plain and that a higher level of tolerance may be afforded to non-citizens who have spent most of their life in Australia, not 'most of their adult life'.
[139] Direction No 90, pt 2, para 6.
[140] For example, in *GBV18 v MHA* [2020] FCAFC 17 the Court found the Tribunal adopted too rigid an approach by seeking to structure its reasons for decision so as to reflect the particular headings of Direction No 65 whereby this caused it to overlook the fact that the appellant had also raised as 'another reason' for revocation the risk of harm from physical violence, independently of any other 'impediments' which he would face at [42].
[141] See *MIBP v Lesianawai* (2014) 227 FCR 562 at 21.
[142] *Howells v MIMIA* (2004) 139 FCR 580 at 127.
[143] *MIBP v Lesianawai* (2014) 227 FCR 562 at 83.
[144] *Jagroop v MIBP* (2016) 241 FCR 461 at 78.
[145] *Anees v MIBH* [2020] FCAFC 28 at [31]. In that case the Tribunal considered character evidence as relevant to an assessment of the impact on family members and friends, however this evidence was also relevant to an evaluation of the risk of the appellant reoffending.

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.[146] For more information, see Other considerations not set out in Direction No 90. Where the Direction purports to interpret a statutory 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.[147]

Discretion – Weighing up relevant considerations

As well as setting out relevant considerations, Direction No 90 gives guidance on how they should be weighed and applied in the exercise of the discretion. Direction No 90 says that in taking the relevant considerations into account information and evidence from independent and authoritative sources should be given appropriate weight; that primary considerations should generally be given greater weight than other considerations; and that one or more primary considerations may outweigh other primary considerations.[148]

Direction No 90 provides 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 90 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'. This in effect, 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.[149]

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.[150]

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.[151]

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.[152]

[146] *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.
[147] 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.
[148] Direction No 90, pt 2, para 7.
[149] *Suleiman v MIBP* [2018] FCA 594 at [23] considering para 8(4) of Direction No 79, the equivalent to para 7(2) of Direction No 90. In *FHHM v MICMSMA* [2022] FCAFC 19 the Full Court endorsed this interpretation at [34], overruling the judgment at first instance in *FHHM v MICMSMA* [2021] FCA 775. The Court held that the reference in *Suleiman* to an inquiry as to whether the case is outside the circumstances that generally apply should not be read as requiring an inquiry as to whether there was something about the nature of the case that was unusual or uncommon or out of the ordinary. Rather, the question was whether there was some reason why the general circumstance where the primary considerations should be given greater weight than the other considerations should not apply when it came to weighing the various considerations that were relevant to the particular case at [34].
[150] *Rokobatini v MIMA* 90 FCR 583 at 23. The issue in that case was the hardship to the applicant if removed.
[151] *Hong v MIMA* [1999] FCA 1567 at [20].
[152] *Green v MIAC* [2008] FCA 125 at [22]–[28].

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",[153] 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.[154]

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-maker did not have regard to that factor at all.[155] 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.[156]

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.[157] 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.[158]

On judicial review, a Court will assess whether the decision-maker has as a matter of substance had regard to the representations put.[159] The fact that a decision-maker says they have had regard to a

[153] A decision-maker should avoid value laden findings. See for example, *YKSB v MHA* [2020] FCA 476 where the Court commented on the apparent value laden and moralistic nature of some of the Tribunal's findings in the written statement of reasons but ultimately found that the views as expressed did not give rise to any error: at [54]-[55].
[154] *NBMZ v MIBP* (2014) 220 FCR 1 at 16, citing s 25D of the Acts Interpretation Act, 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.
[155] *MIAC v Khadgi* (2010) 190 FCR 248 at 58. That judgment concerned prescribed circumstances in reg 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.
[156] *MIAC v Khadgi* (2010) 190 FCR 248 at 59. That judgment concerned prescribed circumstances in reg 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 at [41] and [45].
[157] *MIBP v Maioha* [2018] FCAFC 216 at [41]. In that judgment, the Court noted that in *MHA v Buadromo* [2018] FCAFC 151, 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.
[158] *Goldie v MIMA* (2001) 111 FCR 378.
[159] For example, *Guclukol v MHA* [2020] FCA 61 where the Court held the Minister was not obliged to use identical language to an applicant's claim in coming to its findings and found that the Minister had considered and accepted the applicant's contention but did not consider it as 'another reason' why the cancellation decision should be revoked at [30]–[31]. See also *Nguyen v MICMSMA* [2020] FCA 985, a s 501CA non-revocation decision which followed O*mar* to find that the Tribunal failed to engage with the applicant's representations about the extent of impediments in relation to access to antiviral medication and treatment for his heroin addiction upon return to Vietnam and the consequences for him if he could not access those treatments: at [52]-[60].

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.[160]

Some factual claims may be so serious and of such central significance that the decision-maker has to make findings of fact one way or the other to engage with them properly.[161] In these circumstances, it is not sufficient to merely 'note' these claims or say they have been taken into consideration.[162] Even where a decision-maker accepts the broader proposition which particular factual claims support, it may be necessary to make findings on those narrower factual claims to demonstrate consideration of the gravity and veracity of those claims.

Primary considerations

Protection of the Australian community

Protection of the Australian community from criminal or other serious conduct form the first primary consideration in Direction No 90.

Direction No 90 sets out the government's commitment to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens, and states that decision makers should have particular regard to the principle that entering or remaining in Australia is a privilege that is conferred, and comes with expectations that a person has been, and will be, laws abiding, respect institutions and will not cause or threaten harm to individuals or the Australian community.[163] It indicates decision-makers should also 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 further offences or engage in other serious conduct.[164]

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

[160] *MIBP v Maioha* [2018] FCAFC 216 at [45].
[161] For example, *DQM18 v MHA* [2020] FCAFC 110 where the majority found that despite the appellant's representation being general, with both South Sudan and Sudan referred to in submissions, the failure to determine whether the country of reference was Sudan or South Sudan was such that it was not possible to have any active intellectual engagement with what was likely to happen to a person on return if the country to which the person was to be returned was not identified: at [68], [92].
[162] For example, *MHA v Omar* [2019] FCAFC 188, which concerned the Assistant Minister's decision under s 501CA not to revoke a visa cancellation, the Assistant Minister accepted there would be harm, but found that in the exercise of the discretion, other factors outweighed whatever harm the applicant might suffer. He had noted Mr Omar's medical conditions and said it took into consideration submissions about the treatment of persons with mental illness in Somalia and found that returning to Somalia would cause Mr Omar significant difficulties. The Full Federal Court concluded that the Assistant Minister had failed to consider Mr Omar's representations on the issue of harm he faced in Somalia. The Court said that because the Assistant Minister did not make findings of fact on specific factual matters (such as evidence of Somalians with mental illness being contained with chains) which were serious and of central significance, he could not assess the veracity and gravity of the risks of harm. Such deficiencies in the decision-making process are not overcome by broad statements such as 'I considered all relevant matters': at [22], [27], [34], [43], [45]. See also *XMBQ v MHA* [2019] FCA 2134 where the Court held the Tribunal failed to meaningfully engage with the applicant's claims as to the risks of harm he would face due to his mental health conditions. The Minister argued the case was distinguishable from *MHA v Omar* because the Tribunal did not merely 'note' or 'acknowledge' the applicant's representations but had rather accepted the applicant's claims. However, the Court found the Tribunal had simply recorded its acceptance that there was a real risk of harm without engaging with the nature and probability of the risk of harm: at [11]. See also *Ahmed v MICMA* [2020] FCA 557 at [118]. In contrast, see *Guclukol v MHA* [2020] FCA 61 where on the basis of the applicant's speculative and imprecise contention that he would struggle to subsist in Turkey the Court found it was open to the Minister to deal with it by deciding whether the factual assertion was made out on the evidence but that just as permissibly for the Minister to proceed on the basis that even assuming the applicant would struggle to subsist, that was still not 'another reason' why the cancellation decision should be revoked at [29].
[163] Direction No 90, pt 2, para 8.1(1).
[164] Direction No 90, pt 2, para 8.1(2).

the non-citizen commit further offences or engage in other serious conduct.[165] 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.[166] The Direction goes on to explain and provide guidance about 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.

In considering the nature and seriousness of the conduct, Direction No 90 requires decision-makers to consider acts of family violence as very serious conduct and forced marriage as serious conduct.[167] This is regardless of whether there is a conviction for an offence, or a sentence imposed.[168] For example, evidence relating to a charge or an allegation of family violence or forced marriage that has not led to a conviction or sentence being imposed appears caught by this provision and may need to be considered. How decision-makers weigh up such evidence will depend upon the circumstances of each case.

In considering the need to protect the Australian community from harm, Direction No 90 states decision-makers should have regard to the government's view that the Australian community's tolerance of any risk of future harm becomes lower as the seriousness of the potential harm increases and that some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.[169]

In assessing the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct, Direction No 90 requires decision-makers to have regard to the nature of the harm to individuals or the Australian community and the likelihood of the non-citizen engaging in further criminal or other serious conduct taking into account information and evidence on the risk of the non-citizen re-offending and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence.[170] Further, where consideration is being given to whether to refuse to grant a visa, it requires decision-makers to have regard to whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong compassionate reasons for granting a short stay visa.[171]

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

[165] Direction No 90, para 8.1.1 and 8.1.2. For example, in *MHA v Stowers* [2020] FCA 407 the Court found the Tribunal did not undertake the task that the previous Direction No 79 required it to undertake: at [58]. The Court held cl 13.1.2(1)(a) of Direction No 79 (the equivalent provision to para 8.1.2(2)(a) of Direction No 90) required the Tribunal to turn its mind to, and identify, further criminal or other serious conduct that the respondent might engage in having regard to circumstances existing at the time of the decision, to evaluate the nature of the harm that might be suffered by relevant individuals or members of the Australian community should the respondent engage in *that* conduct. Clause 13.1.2(1)(b) (the equivalent provision to para 8.1.2(2)(b) of Direction No 90) then required it to form an assessment of the likelihood of *that* criminal or other serious conduct occurring: see at [58].
[166] See *LCNB and MIBP* [2015] AATA 463 at [38].
[167] Direction No 90, pt.2, para 8.1.1. The remaining considerations in para 8.1.1 of Direction No 90 (the nature and seriousness of the conduct) are the same as para 9.1.1, 11.1.1 and 13.1.1 of Direction No 79, except for para 9.1.1(1)(k), 11.1.1(1)(k) and 13.1.1(1)(k) of Direction No 79 (where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia) which have now been removed.
[168] Direction No 90, pt 2, para 8.1.1(1)(a)(iii) and (b)(i).
[169] Direction No 90, pt 2, para 8.1.2(1).
[170] Direction No 90, pt 2, para 8.1.2(2)(a) and (b).
[171] Direction No 90, pt 2, para 8.1.2(2)(c). Previously para 11.1.2(4), as a consideration for visa refusals under Part B of Direction No 79, only required decision-makers to 'consider the risk of harm in the context of the purpose of the intended stay, and the type of visa being applied for, including whether there are strong compassionate reasons for granting a short stay visa'.

'in any particular way or to ascribe any particular characterisation to the quality of the risk' or conduct.[172] 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[173] 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.[174] 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.[175] 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.[176]

Evaluation of whether a risk of harm is 'unacceptable' does not discharge the function of the decision-maker,[177] 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.[178]

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.[179] The bare recital of convictions and sentences in and of themselves, without examination of mitigating circumstances or the circumstances leading to each conviction, may not be sufficient to rationally support a finding that there is an unacceptable risk of harm.[180]

[172] *Brown v MIAC* (2010) 183 FCR 113 at 41.
[173] For example, in *MHA v Stowers* [2020] FCA 407 the Court found the Tribunal did not follow the direction given in cl 13.1.1(1)(b) of Direction No 79 (the equivalent provision to para 8.1.1(1)(a)(ii) of Direction No 90) which required it to view offences against the respondent's former partner, very seriously. There was no discretion reposed in the Tribunal to view the offences in some lesser or different light, but this is what the Tribunal did: at [45].
[174] See *DND v MHA* [2018] AATA 2716 at [26]–[27]. The decision considered this consideration as described in Part C of Direction No 65, dealing with revocation requests.
[175] See *NBMZ v MIBP* (2014) 220 FCR 1 at 202.
[176] *BSJ16 v MIBP* [2016] FCA 1181 at [68].
[177] *MIBP v Lesianawai* (2014) 227 FCR 562 at 31.
[178] *MIBP v Lesianawai* (2014) 227 FCR 562 at 39. This judgment considered 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 Direction No 90, but the concept of unacceptable risk remains, e.g. in para 8.1(2), as an element of the primary consideration 'Protection of the Australian community'.
[179] *Muggeridge v MIBP* (2017) 255 FCR 81 at 46–47, 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.
[180] *Splendido v AMIBP (No 2)* [2018] FCA 1158 at [32].

'Offending' does not include acts committed at a time when a person could not, by law, be attributed with criminal responsibility.[181] 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.[182]

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,[183] and its significance so far as the risk of recidivism is concerned.[184]

Serious Conduct

'Serious conduct' is not defined in the Act or Regulations, but as noted above is defined in the interpretation provisions at para 4 of Direction 90. It is a non-exhaustive definition which includes behaviour or conduct of concern that does not constitute any criminal offence. Examples of serious conduct include a public act that could incite hatred towards a group of people who have a particular characteristic, such as race; intimidatory behaviour or behaviour that represents a danger to the Australian community; involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law.[185]

As noted above, the Direction also provides guidance on what types of conduct are viewed by the government as 'serious conduct' and 'very serious conduct'.[186]

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. Simply giving a person a copy of their own record of criminal convictions may not be sufficient to discharge that obligation.[187]

Family Violence

Direction No 90 contains a new primary consideration relating to family violence and is said to reflect the government's serious concern about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia.[188] The government's concerns in this regard are said to be proportionate to the seriousness of the family violence engaged in by a non-citizen.[189]

[181] *CVN17 v MIBP* [2019] FCA 13 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.
[182] *CVN17 v MIBP* [2019] FCA 13 at [99].
[183] *MIEA v Daniele* (1981) 61 FLR 354 at 358.
[184] *MIMA v Ali* (2000) 106 FCR 313 at 45.
[185] This differs from the previous definition of 'serious conduct' in Annex B to Direction No 79 which defined it 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, and included, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law, and conduct which may be considered under s 501(6)(c) and/or (6)(d).
[186] Direction No 90, pt 2, para 8.1.1(1)(a) and (b).
[187] See *Stowers v MIBP* [2018] FCAFC 174 at [54].
[188] Direction No 90, pt 2, para 8.2.
[189] Direction No 90, pt 2, para 8.2(1).

This primary consideration is relevant where a non-citizen has been convicted, found guilty or had charges proven (however described) that involve family violence and/or there is information or evidence from an independent and authoritative source indicating they are or have been involved in the perpetration of family violence.[190] However, Direction No 90 does not contain any guidance about who or what is an 'independent and authoritative source', or what information or evidence is intended to be considered under this provision. It is unclear, for example, whether it would apply to an uncontested family violence intervention order (FVIO) or an apprehended violence order (AVO) issued by a court, or to a witness statement taken by State or Territory police about an alleged family violence incident. Issues of privacy or confidentiality may also arise in respect of certain information or evidence. Ultimately it will be for the decision-maker to consider and determine having regard to the circumstances of each case.

Several factors must be taken into account when considering the seriousness of family violence, including frequency of the conduct, cumulative effect of repeated acts, rehabilitation achieved, and reoffending after formal warnings about the consequences of further acts.[191]

The expression "a member of the person's family" in the definition of family violence in paragraph 4(1) of Direction No 90 is to be construed having regard to its text, context and purpose, including the indicia of family violence in paragraphs 4.1 and 8.2 of Direction No 90 and the definitions of "family members" and "de facto partners" in ss 5G and 5CB of the Act.[192] It should not be narrowly construed and limited to close relatives and de facto partners, rather the expression captures persons that might be living together in a household, providing companionship and emotional support to each other, sharing expenses or otherwise being financially dependent upon each other and in a relationship of mutual affection and obligation.[193]

The best interests of minor children in Australia

The best interests of minor children[194] in Australia form the third of the primary considerations outlined in the Direction.[195]

[190] Direction No 90, pt 2, para 8.2(2).
[191] Direction No 90, pt 2, para 8.2(3). An applicant's denial of guilt can also be a relevant consideration: *DTR21 v MICMSMA* [2022] FCA 12 37 at [71].
[192] *Deng v MICMSMA* [2021] FCA 1456 at [157] and *Deng v MICMSMA* [2022] FCAFC 115 at [123]. Note that on appeal in *Deng v MICMSMA* [2022] FCAFC 115, although the Full Court agreed with the primary judge's interpretation of 'member of the person's family' (at [123]–[124]), it found that the Tribunal erred by proceeding on the basis that because Ms S was the appellant's intimate partner she was a member of his family and the violence against her was 'family violence' but not expressly considering the question for the purposes of the definition of 'family violence' in para 4(1) of Direction 90. The Court held that whether an 'intimate partner' was a member of the person's family for the purposes of the 'family violence' definition in Direction 90 was a contestable issue that needed to be determined: see [123]–[130].
[193] *Deng v MICMSMA* [2021] FCA 1456 at [156]. For example, it could extend to a child living with an uncle or an aunt for an extended period or to persons who are in an intimate relationship that are living together but do not satisfy all of the criteria of a de facto relationship for the purposes of s 5CB of the Act and reg 1.09 of the Regulations, with such persons being particularly vulnerable to coercion or control by the non-citizen or fearful of behaviour of the non-citizen. However, whether a person is a member of another person's family for the purposes of the definition of 'family violence' in para 4(1) of Direction 90 is a contestable issue that needed to be considered: *Deng v MICMSMA* [2022] FCAFC 115 at [126].
[194] This can include stepchildren. In *Downes v MHA* [2020] FCA 54 the Court found in light of evidence before the Tribunal that it had erred in failing to recognise stepchildren as persons whose interests were relevant to the individual case: at [53], [56].
[195] Direction No 90, pt 2, para 8.3. Note also that while most considerations in para 8.3 are broadly similar to para 9.2, 11.2 and 13.2 of Direction No 79 and reflect consolidation of visa refusals, cancellations and non-revocation decisions, para 8.3(4)(g) of Direction No 90 has changed from considering 'evidence that the non-citizen has abused or neglected the children in any way, including physical, sexual and/or mental abuse or neglect' (para 9.2(4)(g), 11.2(4)(g) and 13.2(4)(g) in Direction No 79) to 'evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way whether physically, sexually or mentally'.

Direction No 90 says that decision-makers must make a determination about whether cancellation/refusal/revocation is, or is not, in the best interests of the child.[196] It is not enough merely to have regard to those interests.[197] 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 consideration (where it is relevant) unless this determination has first been made.[198] 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.[199] The approach to this determination is to:

- identify what are the best interests of the child or children[200] 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.[201]

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.[202]

Expectations of the Australian community

Expectations of the Australian community form the fourth primary consideration in the Direction and are substantially different from the previous Direction No 79.[203]

Direction No 90 emphasizes that the Australian community expects non-citizens to obey Australian laws while in Australia and that where a non-citizen has engaged in serious conduct in breach of

[196] Direction No 90, pt 2, para 8.3(1).
[197] *Spruill v MIAC* [2012] FCA 1401 at [18].
[198] *Paerau v MIBP* (2014) 219 FCR 504 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.'
[199] *Nigam v MIBP* (2017) 254 FCR 295 at 43, *CVN17 v MIBP* [2019] FCA 13 at [47].
[200] For example, in *MHA v Stowers* [2020] FCA 407 the Court found the Tribunal failed to comply with cl 13.2 (para 8.3 of Direction No 90) when it treated the respondent's children's interests uniformly, without discussing possible differences in their interests: at [63]. See also *GCRM v MICMSMA* [2020] FCA 678 where the Court found the Tribunal reached its conclusion that the children's best interests should be given neutral weight without making any determination about where those interests lay: at [31]. Further, see *Guruge v MICMSMA* [2021] FCA 630 where the Court rejected the applicant's contention that reference in cl 13.2(4)(a) of Direction No 79 (para 8.3(4)(a) of Direction No 90) was directed only to considering periods of voluntary absence from the life of minor child: at [41]. The Court held the paragraph directs the decision-maker to have regard "the nature and duration of the relationship between the child and the non-citizen" and directs that less weight should generally be given where "there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact)": at [41]. The Tribunal is therefore required to consider the relationship between a non-citizen and child taking into account whether there has been less contact, including by reason of a court order: at [41]. In *Healey v MICMSMA* [2022] FCAFC 188 where in relation to para 8.3(4)(a) of Direction 90 and the specification of lesser weight given to the consideration of the nature and duration of the relationship between the child and the applicant where there have been long periods of absence, the Full Court rejected the applicant's submission that the Tribunal could not apply the lesser weight if the absence was due to incarceration and did not accept that the Tribunal had erred in considering it was bound to do so at [36]-[38].
[201] *Wan v MIMA* [2001] 107 FCR 133 at 32.
[202] *Wan v MIMA* [2001] 107 FCR 133 at 32.
[203] In *PYDZ v MICMSMA* [2021] FCA 1050 the Court found the Tribunal erred in its application of para 8.4 of Direction 90 when it included reference to para 9.4, noting that the Direction has been structured so that the primary and other considerations are distinct steps in the decision-maker's analysis and in the ultimate balancing act of weighing up the various considerations against each other at [85]-[86].

this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the government to not allow them to enter or remain in Australia.[204]

In addition, Direction No 90 indicates visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa and that the Australian community expects that the Australian government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere.[205] To provide additional guidance, specific kinds of conduct considered to raise serious character concerns are listed as follows:

a) acts of family violence; or
b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;
c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;
d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or
e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or
f) worker exploitation.[206]

Accordingly, the Direction expressly states that the Australian community expects two things: first, that *non-citizens* will obey the law in Australia, and second, that the *Government* should refuse or cancel visas of persons who raise serious character concerns.[207] The first concerns norms of conduct to be expected of non-citizens, and the second expresses an expectation about the outcome of the exercise of the power conferred by s 501 in respect of a particular person who has not fulfilled the first expectation.[208]

[204] Direction No 90, pt 2, para 8.4(1).
[205] Direction No 90, pt 2, para 8.4(2).
[206] Direction No 90, pt 2, para 8.4(2).
[207] Direction No 90, pt 2, para 8.4(1) and (2). See also *FYBR v MHA* [2019] FCAFC 185 at [75], [96]. Charlesworth J said of the equivalent provisions in cl 11.3 of Direction No 79 that it should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused (at [75]), and Stewart J said the expectation set out in cl 11.3(1) of Direction No 79, that the community may expect that when a person has broken laws it may be appropriate to refuse their visa application, was consistent with the principles in cls 6.3 (2) of Direction No 79 (the Australian community expects that the Government should refuse or cancel visas to people who have committed serious crimes) and 6.3(3) of Direction No 79 (non-citizens who have committed a serious crime should generally expect to be denied the privilege of coming to or staying in Australia) (at [96]). Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[208] See *FYBR v MHA* [2019] FCAFC 185 at [69]–[72], [75], [95]–[96], [100]–[101]. The majority focussed on the words in cl 11.3 of Direction No 79. Charlesworth J said that the clause expressed two expectations (at [69]), while Stewart J said it had three (at [100]). Both agreed that the first expectation was that non-citizens will obey laws when in Australia (at [69] and [100]). Stewart J said the second expectation was expressed in the second sentence of cl 11.3 of Direction No 79 (it may be appropriate to refuse a visa application where a non-citizen has breached, or where there is an unacceptable risk that they will breach, the expectation that they will obey the law or where they have been convicted of offences in Australia or elsewhere) and the third in the third sentence (in a particular case, the refusal of a visa may be appropriate simply because the nature of the character concerns or offences is such that they should not be granted a visa) (at [100]). Charlesworth J, however, saw these as combined in one (second) expectation (at [71]). Charlesworth J added that cl 11.3 of Direction No 79 should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused (at [75]), and Stewart J said this expectation set out in the second sentence of cl 11.3(1) of Direction No 79 was consistent with the principles in cls 6.3 (2) of Direction No 79 (the Australian community expects that the Government should refuse or cancel visas to people who have committed serious crimes) and 6.3(3) (non-citizens who have committed a serious crime should generally expect to be denied the privilege of coming to or staying in Australia) (at [96]). Special leave refused: *FYBR v MHA* [2020] HCATrans 056.

Direction No 90 also indicates the above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.[209] It further states that the primary consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case, a consideration which appears consistent with Full Federal Court authority in *FYBR v MHA* [2019] FCAFC 185.[210]

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 articulate community expectations, whether or not there is any objective basis for that belief.[211] It imputes or ascribes to the whole of the Australian community an expectation that wholly aligns with the expectation of the executive government of the day in respect of its subject matter.[212] The enquiry does not concern what the Australian community expects in fact (assuming such expectations could be objectively ascertained), but rather concerns what the government has deemed the community's expectations to be. The content of the deemed expectation is to be discerned by construing the relevant provision itself.[213] Given that the community expectations are not expressed in relation to any particular case, it would be wrong for the decision-maker to ask themselves a question along the lines of 'what would the community expect in this case?'[214] The Direction does not ascribe to the Australian community a relevant expectation with regard to the outcome in the particular case.[215] References to the AAT's own opinion or belief are best avoided because of the risk of it leading to error.[216] 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.

Where a person raises serious character concerns, 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).[217] It has been said that it is difficult to conceive of a case where an unfavourable character assessment will be other than against the grant of a visa.[218] 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. A decision-maker's assessment as to whether a visa should be refused or cancelled may differ from the expectations of the Australian community, as the government has deemed those expectations to be.[219] The question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine in the ultimate exercise

[209] Direction No 90, pt 2, para 8.4(3).
[210] Direction No 90, pt 2, para 8.4(4) and *FYBR v MHA* [2019] FCAFC 185 at [103]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[211] *Uelese v MIBP* (2016) 248 FCR 296 at 23.
[212] *FYBR v MHA* [2019] FCAFC 185 at [67]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[213] *FYBR v MHA* [2019] FCAFC 185 at [68]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[214] *FYBR v MHA* [2019] FCAFC 185 at [103]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[215] *FYBR v MHA* [2019] FCAFC 185 at [97], [100]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[216] See *Ali v MHA* [2018] FCA 1895 at [38].
[217] See *FYBR v MHA* [2019] FCAFC 185 at [75]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[218] *FYBR v MHA* [2019] FCAFC 185 at [102]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[219] *FYBR v MHA* [2019] FCAFC 185 at [73], [92]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.

of the discretion.[220] Flexibility in the decision-making process is reinforced by the Direction which requires no more than that primary considerations should 'generally' be afforded greater weight than other considerations.[221] In any particular case, the weight to be attached because of the particular circumstances of the character assessment may be slight. In another case, because of the severity of the character assessment, the weight may be substantial.[222]

Other considerations

Direction No 90 indicates 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).[223] 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[224] 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.[225] Where an applicant raises evidence which is relevant to the extent of impediments if removed, and the decision-maker makes a positive finding in favour of the applicant without considering all of that evidence, that may not be enough to reflect consideration of the extent of the impediments claimed.[226] Direction No 90 provides that the relevant considerations that must be taken into account

[220] In *Kelly v MICMSMA* [2022] FCA 396 the Court held, in respect of the Minister's personal decision not to revoke a cancellation under s 501CA, that while the Minister has a broad decisional freedom as to the relative weight to be given to different considerations, he did not give active intellectual consideration to the applicant's representation about his specific circumstances in the context of the weight to be given to the community expectations at [112].
[221] Direction No 90, pt 2, para 7.(2).
[222] *FYBR v MHA* [2019] FCAFC 185 at [102]. Special leave refused: *FYBR v MHA* [2020] HCATrans 056.
[223] Direction No 90, pt 2, para 9.(1)(a) and (b).
[224] See, e.g., *Ogbonna v MIBP* [2018] FCA 620 at [62].
[225] See, e.g. *BCR16 v MIBP* (2017) 248 FCR 456.
[226] *Flores v MHA* [2019] FCA 1043 at [64]–[65]. In considering the extent of impediments if removed, the Tribunal referred to the fact that it could be supposed that the applicant would experience difficulties in re-establishing himself given his absence, without addressing the impediments he claimed he would or might suffer by reason of his substance abuse problem. In finding the Tribunal failed to exercise its jurisdiction, the Court held that the nature and extent of the finding in the applicant's favour, and whether aspects of the applicant's claimed impediments were likely to have had a material effect on the exercise of the discretion, are important. See also *MHA v Omar* [2019] FCAFC 188, which concerned the Assistant Minister's decision under s 501CA not to revoke a visa cancellation. The Assistant Minister accepted there would be harm, but found that in the exercise of the discretion, other factors outweighed whatever harm the applicant might suffer. He had noted Mr Omar's medical conditions and said it took into consideration submissions about the treatment of persons with mental illness in Somalia and found that returning to Somalia would cause Mr Omar significant difficulties. The Full Federal Court concluded that the Assistant Minister had failed to consider Mr Omar's representations on the issue of harm he faced in Somalia. The Court said that because the Assistant Minister did not make findings of fact on specific factual matters which were serious and of central significance (such as Somalians with mental illness being contained with chains), he could not assess the veracity and gravity of the risks of harm. Such deficiencies in the decision-making process are not overcome by broad statements such as 'I considered all relevant matters': at [22], [27], [34], [43], [45]. See also *CTB19 v MICMSMA* [2019] FCA 2128 at [45], [48] (upheld on appeal in *MICMSMA v CTB19* [2020] FCAFC 166 at [34]); *AIJ19 v MICMSMA* [2019] FCA 2205 at [71] and *XMBQ v MHA* [2019] FCA 2134 at [11] which applies *MHA v Omar*.

in relation to the extent of impediment if removed are the non-citizen's age and health, language or cultural barriers and the availability of any social, medical and/or economic support in their home country must be taken into account.[227] In considering health, it is not limited to diagnosed health or medical conditions.[228]

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.

The other considerations which Direction No 90 stipulates must be taken into account are impact on victims and links to the Australian community which includes strength, nature and duration of ties to Australia and the impact on Australian business interests.[229] In considering impact on victims, the views of the victim should be taken into account, whether they are adverse to or consistent with, the interests of the offender.[230] In considering the strength, nature and duration of ties to Australia, decision-makers are required to 'consider any impact of the decision on the non-citizen's immediate family members in Australia' and 'the strength, nature and duration of any other ties that the non-citizen has to the Australian community' and in doing so they must have regard to how long the non-citizen has resided in Australia[231], including whether they arrived as a young child; and the strength, duration and nature of any family or social links with Australian citizens, permanent residents and/or people who have an indefinite right to remain in Australia.[232] Reasons for a lack of contribution to the Australian community are not a relevant consideration.[233] Where a person raises matters which

[227] Direction No 90, pt 2, para 9.2. In *Fehoko v MICMSMA* [2022] FCA 1471 the Court found the Tribunal erred for failing to consider whether a claim about the applicant's mental health was 'another reason' for revoking the cancellation after the Tribunal noted that it could not be taken into account in the context of para 9.2 of Direction 90.
[228] *Deng v MICMSMA* [2022] FCAFC 115 at [109].
[229] Direction No 90, pt 2, para 9.(1)(c) and (d). Considerations relating to strength, nature and duration of ties in Australia and impact on business interests which were separate considerations under Direction No 79 now come under a new umbrella consideration relating to links to the Australian community in Direction No 90. In considering if there was any impact on business interests, by misconstruing para 9.4.2 of Direction No 90 as only applying to an impact upon a "major project" or "important service", the Tribunal in *Arachchi v MICMSMA* [2022] FCA 1311 precluded itself from considering the applicant's claim concerning the impact of his removal upon his partner's interest in their pizza business at [71]. The Court held the requirement is to consider *any* impact on Australian business interests, it is not confined to business interests of a particular scale or importance at [68].
[230] *PGDX v MICMSMA* [2021] FCA 1235 at [11] and [33].
[231] In *CWRG v MICMSMA* [2022] FCA 1382 the Court held that whether a person fits within the description of a person who has lived in the Australian community for most of their life is not determined simply by counting months spent in different places, rather in describing a place as being the place where a person has spent most of their life, the meaning conveyed would be that a clear majority of the person's life has been spent in that place at [51].
[232] Direction No 90, pt 2, para 9.4.1(1) and (2). With respect to para 9.4.1 the Court in *BOE21 v MICMSMA* [2022] FCAFC 99 held that it is within the decisional freedom of the decision-maker under s 501CA(4) to regard a non-citizen's offending soon after arrival as a weighty consideration which diminishes the impact of any and all other factors at [39]. In relation to the strength, nature and duration of ties, the Court in *FCFY v MHA* (No 2) [2019] FCA 1990 found the Tribunal misunderstood cl 14.2(1)(a)(ii) of Direction No 79 (the equivalent provision to para 9.4.1(2)((a)(ii) of Direction No 90) in circumstances where it thought the paragraph required it to give less weight to how long a non-citizen has resided in Australia if there had been limited positive contribution to the Australian community: at [59]. Rather, what the paragraph provides is that where there is positive contribution to the Australian community, there should be an increase in the weight given to 'how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child': at [59]. The paragraph does not require a decrease in the weight to be given to the length of residence where a positive contribution is limited or absent: at [59]. Contrast with the Court's finding in *Vaokakala v MHA* [2019] FCA 1979 (Burnley J, 26 November 2019) where no error was found with the Tribunal placing not much weight on the circumstances in cl 14.2(1)(a)(i) of Direction No 79 (the equivalent provision to para 9.4.1(2)(a)(i) of Direction No 90),which relates to less weight being given to 'how long the non-citizen has resided in Australia including whether the non-citizen arrived as a young child', for reason of prolonged offending as an adult. See also *Downes v MHA* [2020] FCA 54, where the Court found the Tribunal misconstrued cl 14.2(1)(b) of Direction No 79 (the equivalent provision to para 9.4.1(2)(b) of Direction No 90) in placing less weight on the matters referred within it, when the consideration in cl 14.2.(1)(b) was not subject to such a requirement. In *FCFY v MHA* (No 2) [2019] FCA 1990 the Court also found the Tribunal failed to consider 'another reason' for revocation raised on the material, by assessing contribution to family but not impact on family of cancellation: at [81], [87].
[233] See *Benrabah v MICMSMA* [2020] FCAFC 4 at [44]–[45] where the Court held that in respect of cl 14.1(2)(a)(ii) of Direction No 79 (the equivalent provision to para 9.4.1(2)((a)(ii) of Direction No 90) the Tribunal is not required to consider an applicant's will to be productive or reasons why the applicant was not productive.

are related to, but different from, matters specified in the Direction, a decision-maker should consider those other matters as well.[234]

International non-refoulement obligations

Direction No 90 describes 'international non-refoulement obligations' as obligations not to forcibly return, deport or expel 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.[235] 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.[236]

Direction No 90 contains several changes, from the previous Direction No 79, when considering Australia's international non-refoulement obligations. Specifically, it requires decision-makers to carefully weigh any non-refoulement obligations against the seriousness of criminal offending or other serious conduct, and, in doing so, to be mindful that unlawful non-citizens are, in accordance with s 198 of the Act, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under s 189 of the Act, noting also that s 197C of the Act provides that for the purposes of s 198, it is irrelevant whether Australia has non-refoulement obligations in respect of a non-citizen.[237] This now aligns with existing Federal Court authority.[238]

Direction No 90 further provides that a non-refoulement obligation does not preclude refusal, cancellation or non-revocation of a visa because, as options such as the Minister exercising his or her personal discretion under s 195A to grant another visa or the applicant applying for a protection visa may still be available, such decisions would not necessarily result in that person's removal.[239] The expanded explanation and use of the words 'will not necessarily result in removal,' are new to Direction No 90 and replace the phrase 'Australia will not remove a non-citizen' as it appeared in Direction No 79.

Direction No 90 also provides that international non-refoulement obligations will generally not be relevant to the consideration of the refusal, cancellation or non-revocation of a visa that is not a protection visa, where the person does not raise such obligations for considerations and the person is later able to apply for a protection visa.[240] It also states that it may not be possible at the ss 501/501CA stage to consider non-refoulement issues in the same level of detail as would be considered in protection visa applications and that decision-makers are not required in every case to make a positive finding about whether the claimed harm will occur but may assume in appropriate cases that the claimed harm will occur and make a finding on that basis.[241]

[234] For example, in *PQSM v MHA* [2019] FCA 1540, the Court inferred that the Tribunal failed to have regard to the separate consideration of the effect on the applicant's partner and his adult children if the cancellation of his visa was not revoked. Rather, it only took account of the extent of his ties to those people and thereby confined its consideration to the effects upon him. However, the Court held that in this case, it was not established that the failure to comply with the Direction was material: at [49] and [67]. Upheld on appeal (by majority) in *PQSM v MHA* [2020] FCAFC 125 at [152]–[156]. An application for special leave to appeal to the High Court was dismissed: *PQSM v MHA* [2021] HCATrans 31.
[235] Direction No 90, pt 2, para 9.1(1). See also *BKS18 v MHA* [2018] FCA 1731 at [86].
[236] s 5(1).
[237] Direction No 90, pt 2, para 9.1(2).
[238] See for example *DMH16 v MIBP* (2017) 253 FCR 576, *NKWF v MIBP* [2018] FCA 409.
[239] Direction No 90, pt 2, para 9.1(3).
[240] Direction No 90, pt 2, para 9.1(5).
[241] Direction No 90, pt 2, para 9.1(6).

Having regard to the new terms in Direction No 90, and High Court authority[242], it is clear that, in relation to a non-protection visa, non-refoulement obligations do not need to be considered if no claims are made, but would need to be considered at a later stage, though, if and when a protection visa application was made.[243]

Where a non-refoulement claim is made or arises on the facts, the High Court has also clarified that consideration of non-refoulement obligations can be deferred if a valid application for a protection visa can be made.[244] Federal Court authority on this issue had previously been unsettled – see below.

While it is permissible to have regard to the fact that a person may make a protection visa application,[245] as a starting point Tribunal reasons should demonstrate that non-refoulement claims have been read, identified, understood and evaluated.[246] Further, even where the non-refoulement obligation assessment is deferred on the basis of a potential protection visa application by the applicant, it may be necessary to take account of the alleged facts underpinning those claims where those facts are relied upon for "another reason" why the cancellation decision under s 510CA should be revoked or where they are relied upon as any other matter that is relevant to the exercise of discretion to cancel a visa under s 501.[247] The same may also apply for claims that fall outside of the protection visa framework, for example claims about generalised violence, inadequate healthcare, homelessness or harm that is not serious or significant harm.

Where a non-refoulement claim has been made, the requisite level of engagement – the degree of effort needed by the decision-maker – will vary according to the circumstances of the case and the length, clarity and degree of relevance of the representations made about the harm.[248] Claims may relate to protection obligations enacted under Australian domestic law, such as by setting out certain criteria for a protection visa in s 36 of the Act, or they may relate to non-refoulement obligations more broadly contained in international instruments and treaties but that have not been enacted domestically. Where the claims include, or the circumstances suggest, a non-refoulement claim by reference to international non-refoulement obligations *unenacted* in domestic law, those obligations are not mandatory considerations.[249] If unenacted international non-refoulement obligations are considered, an error in that exercise cannot give rise to jurisdictional error.[250] If a decision-maker elects to defer assessment of whether non-refoulement obligations are owed on the basis that it is open for an applicant to apply for a protection visa, the decision should disclose why it was considered appropriate to defer the determination of the non-refoulement claim to the protection visa application process to avoid any inference that the claim was overlooked or regarded as irrelevant.[251]

[242] *Applicant S270/2019 v MIBP* [2020] HCA 32 at [33], [36] and *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [28].
[243] This approach is consistent with *Applicant S270/2019 v MIBP* [2020] HCA 32 and *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[244] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [9], [30] and [42].
[245] As found in *COT15 v MIBP (No 1)* [2015] FCAFC 190.
[246] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [9] and [42].
[247] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [39].
[248] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [25].
[249] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [29]. See also *HRZN v MICMSMA* [2022] FCAFC 133 at [67]. Application for special leave to appeal dismissed: *HRZN v MICMSMA* [2022] HCASL 211.
[250] *HRZN v MICMSMA* [2022] FCAFC 133 at [67] suggests that while the Tribunal must 'read, identify, understand and evaluate' all claims clearly articulated and apparent on the material, where the claim raises a potential breach of Australia's unenacted international non-refoulement obligations, an error of law such as misapplying the test will not be a jurisdictional error. Application for special leave to appeal dismissed: *HRZN v MICMSMA* [2022] HCASL 211.
[251] *CKT20 v MICMSMA* [2022] FCAFC 124 at [132]–[135].

Direction No 90 further provides that where claims of international non-refoulement obligations arise, and a person is able to make a valid application for a protection visa, those claims will be assessed in that protection visa application before consideration is given to any character or security concerns associated with the person.[252] This aligns with s 36A of the Act[253] and the now revoked Direction 75,[254] relating to the refusal of certain protection visas, which itself requires departmental delegates to assess protection claims before assessing character considerations in making decisions on protection visa applications.

Direction 90 also sets out the parameters of Australia's non-refoulement obligations, indicates that claims which give rise to international non-refoulement obligations can be raised by a person or can be clear from the facts of the case and indicates that if the visa under consideration is a protection visa then decision-makers should seek an assessment of Australia's international non-refoulement obligations.[255]

Whereas previously reference was made to taking into account the prospect of a person facing 'indefinite immigration detention' as a result of Australia's non-refoulement obligations and the operation of ss 189 and 196 of the Act in Direction No 79, this reference no longer appears in Direction No 90. However in certain circumstances, such as for those in respect of whom non-refoulement obligations are found, for whom there is no prospect of any future visa grant because of character issues or because they cannot apply for any further visas, regardless of whether the visa being cancelled is a protection visa or another visa, the Tribunal will nonetheless need to consider indefinite detention as a prospect when considering the legal consequences of cancellation despite the lack of reference to considering the prospect of a person facing 'indefinite immigration detention' in Direction No 90.[256]

The terms of the Direction and judicial authority both suggest that the key question in the consideration of international non-refoulement obligations is whether a decision is likely to result in a breach of Australia's international non-refoulement obligations.[257] 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.

Will the decision result in removal?

[252] Direction No 90, pt 2, para 9.1(7).
[253] Section 36A of the Act, in effect from 25 May 2021, stipulates that in considering a valid application for a protection visa, decision-makers must assess whether the refugee and complementary protection criteria are met before considering any other criteria.
[254] Paragraph 1 of Part 2 of Direction No 75 - Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017. Direction 75 was made in response to *BCR16 v MIBP* (2017) 248 FCR 456 where the Court found decision-makers may err if they decline to consider whether there is a real possibility of harm based on the mistaken assumption that non-refoulement obligations would necessarily be considered during the determination of a protection visa application, if made. Direction 75 was revoked on 8 February 2022.
[255] Direction No 90, pt 2, para 9.1(1), (4) and (8).
[256] See *WKMZ v MICMSMA* [2021] FCAFC 55.
[257] See *BCR16 v MIBP* (2017) 248 FCR 456 at [48]: 'The revocation power is discretionary, and the risk of significant harm to the appellant in Lebanon (whether for a Convention reason or otherwise, both may be relevant) would be a matter to be weighed in the balance by the Assistant Minister. That returning an individual to a country where there is a real possibility of significant harm, or a real chance of persecution, may contravene Australia's non-refoulement obligations, is also a matter to be weighed in the balance of deciding whether to revoke a mandatory visa cancellation.'

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. 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, including the High Court in *Plaintiff M1/2021*[258], have taken this approach. They indicate that it is not an error to reason that non-refoulement obligations will be considered in the course of processing a future protection visa application.[259] Therefore it is not an 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.[260] Removal is not a direct and immediate consequence of a decision, where a person has a right to apply for another visa in Australia[261], and at the time of exercising the discretion, it is unclear what decision will be made in relation to any future visa application.[262]

Some Federal Court judgments found error with this approach, such as misunderstanding the legal consequences of its decision or failing to consider representations[263], assuming non-refoulement obligations will necessarily, as a matter of law, be assessed in the course of any future protection visa application[264] and refusing to take into account claims of harm or non-refoulement obligations.[265]

The High Court in *Plaintiff M1/2021*[266] has however now made clear that to the extent Australia's international non-refoulement obligations are given effect in the Act, one available outcome for a decision maker, where a non-refoulement claim is made or arises on the facts, is to defer assessment of whether an applicant is owed non-refoulement obligations on the basis that it is open for them to apply for a protection visa.[267]

Plaintiff M1/2021[268] also overruled particular lines of reasoning in certain Federal Court judgments.[269] Where previously error was found on the basis the decision-maker conflated the concept of Australia's non-refoulement obligations under international law with protection obligations under the

[258] *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[259] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [9], [30] and [42]. See, also previous Federal Court authority in *Ali v MIBP* [2018] FCA 650 at [34]; *Greene v AMHA* [2018] FCA 919 at [19]; *Turay v AMHA* [2018] FCA 1487 at [41]; *DOB18 v MHA* [2018] FCA 1523 at [32]–[35], upheld on appeal in *DOB18 v MHA* [2018] FCAFC 63 at [193] per Robertson J, Logan J agreeing at [38]; *Sowa v MHA* [2018] FCA 1999 at [19]–[27], upheld on appeal in *Sowa v MHA* [2019] FCAFC 111. 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]. In *Ali v MHA* [2020] FCAFC 109 while reviewing the authorities the Court distinguished *DOB18* and *Sowa* principally on the basis that the issue of non-refoulement was not raised before the Minister in those cases: at [71], [73], [97].
[260] *DOB18 v MHA* [2019] FCAFC 63 at [164]–[173].
[261] See, e.g., *Ali v MIBP* [2018] FCA 650 at [34]; *Greene v AMHA* [2018] FCA 919 at [19]; *Sowa v MHA* [2018] FCA 1999 at [19]–[27].
[262] *DOB18 v MHA* [2018] FCA 1523 at [42]; upheld in *DOB18 v MHA* [2019] FCAFC 63.
[263] See, e.g., *Omar v MHA* [2019] FCA 279 at [36].
[264] See *DOB18 v MHA* [2019] FCAFC 63 at [166].
[265] *Omar v MHA* [2019] FCA 279 at [26]–[27], [34]; *DOB18 v MHA* [2019] FCAFC 63 at [183]–[184].
[266] *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[267] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [30].
[268] *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[269] For example, such as in *BCR16 v MIBP* (2017) 248 FCR 456, *Ibrahim v MHA* (2019) 270 FCR 12, *Omar v MHA* [2019] FCA 279, *Ali v MHA* [2020] FCAFC 109, *Hernandez v MHA* [2020] FCA 415 and *MICMSMA v FAK19* [2021] FCAFC 153. However, note that the Court did not overrule these judgments in their entirety, only the specified aspects of reasoning within them.

Act[270] (the first path), failed to appreciate the qualitative differences in the manner in which Australia's non-refoulement obligations may be considered for s 501CA(4) and the protection visa process[271] (the second path), or misunderstood that the protection visa process does not call for full exploration of whether Australia is in breach of non-refoulement obligations *under international law*[272] (the third path), those judgments overlooked that Parliament made a choice about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the Act.[273] To the extent these reasons were relied on to conclude it was not open to defer consideration of non-refoulement obligations, they should not be adopted.[274] Where previously error was found on the basis a decision-maker failed adequately to consider representations or claims arising squarely from the materials about non-refoulement obligations by deferring assessment to a potential protection visa application[275] (the fourth path), this is inconsistent with the statutory scheme and, regarding unenacted international non-refoulement obligations, contrary to constitutional principle.[276] To the extent this reasoning focused on decision-makers failing to properly consider *the consequences*, both to a former visa holder and to Australia (for example, the impact on Australia's reputation and standing in the global community), which would flow from removing a former visa holder *contrary to* non-refoulement obligations under international law,[277] they ignored the choice Parliament made about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the Act.[278] Where previously error was found on the basis a decision-maker misunderstood the likely course of decision-making under the Act because of an erroneous assumption non-refoulement obligations would *necessarily* be considered in the protection visa process[279] (the fifth path), this has been addressed by s 36A of the Act and previously by the now revoked Direction 75 as when considering a valid application for a protection visa, decision-makers must assess whether the refugee and complementary protection criteria are met before considering any other criteria.[280]

The High Court has also previously made clear that if a non-refoulement claim is not made, non-refoulement obligations would not need to be considered and would only need to be considered later, if an application for a protection visa was made.[281]

Key judgments

In *MIBP v Le*[282] the Full Federal Court held Australia's obligation not to refoule Ms Le was not a mandatory relevant consideration under s 501(2) in circumstances where it remained open to Ms Le

[270] For example, such as in *Ibrahim v MHA* (2019) 270 FCR 12 at [106]-[117]; *MICMSMA v FAK19* [2021] FCAFC 153 at [110]-[111], [117]-[124], [148].
[271] For example, such as in *BCR16 v MIBP* (2017) 248 FCR 456 at [48]-[49]; *Omar v MHA* [2019] FCA 279 at [43]-[46]; *Hernandez v MHA* [2020] FCA 415 at [61]-[64]; *Ali v MHA* [2020] FCAFC 109 at [107]-[112]; *MICMSMA v FAK19* [2021] FCAFC 153 at [114], [139]-[142].
[272] For example, such as in *Hernandez v MHA* [2020] FCA 415 at [58]-[59]; *Ali v MHA* [2020] FCAFC 109 at [113]-[118].
[273] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [32].
[274] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [32].
[275] For example, such as in *Omar v MHA* [2019] FCA 279 at [66]-[67], [77]-[78], [82]; *Hernandez v MHA* [2020] FCA 415 at [56], [61]-[64], [68]; *Ahmed v MICMA* [2020] FCA 557 at [142]-[149]; *Ali v MHA* [2020] FCAFC 109 at [45]-[49], [101]-[103]; *MICMSMA v CTB19* (2020) 280 FCR 178 at [29]-[39].
[276] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [33].
[277] For example, such as in *Hernandez v MHA* [2020] FCA 415 [2020] FCA 415 at [63]; *Ali v MHA* [2020] FCAFC 109 at [91], [99], [101], [103], [115], [117]; *MICMSMA v FAK19* [2021] FCAFC 153 at [124], [156]-[159]; *Omar v MHA* [2019] FCA 279 [2019] FCA 279 at [58], [66].
[278] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [34].
[279] For example, such as in *BCR16* (2017) 248 FCR 456 at [62], [66]-[68]; *MICMSMA v FAK19* [2021] FCAFC 153 at [129]-[138].
[280] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [35].
[281] *Applicant S270/2019 v MIBP* [2020] HCA 32 at [33], [36]. Note that at [97] in *MICMSMA v FAK19* [2021] FCAFC 153 the Court found nothing in *Applicant S270/2019 v MIBP* [2020] HCA 32 overrules *Ali v MHA* [2020] FCAFC 109 and *BCR16 v MIBP* (2017) 248 FCR 456. Certain lines of reasoning in all three of these judgments have now been overruled by *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[282] *MIBP v Le* (2016) 244 FCR 56.

to make an application in Australia for a protection visa, at which point compliance with Australia's non-refoulement obligations (and the prospect of her indefinite detention) would have to be considered.[283]

In *BCR16 v MIBP*[284] another Full 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. 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.[285] Following *BCR16*, the Minister made a s 499 Direction requiring departmental delegates to assess protection claims before assessing character considerations in making decisions on protection visa applications.[286] The High Court has since found that previously Direction 75[287] and now s 36A of the Act addresses the *BCR16* issue and when considering a valid application for a protection visa, decision-makers must assess whether the refugee and complementary protection criteria are met before considering any other criteria.[288]

In *Omar v MHA*[289], a Federal Court judgment at first instance, the Court held 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.[290] The Court said that a conclusion that Australia's non-

[283] The Court noted that this analysis was consistent with its approach in both *Ayoub v MIBP* (2015) 231 FCR 513 and *COT15 v MIBP (No 1)* (2015) 236 FCR 148: see *MIBP v Le* (2016) 244 FCR 56 at 41–42.
[284] *BCR16 v MIBP* (2017) 248 FCR 456.
[285] *BCR16 v MIBP* (2017) 248 FCR 456 at 68. This concerned a non-revocation, but in *Steyn v MIBP* [2017] FCA 1131 the Court held that the same principles apply to the refusal and cancellation powers under ss 501(1) and (2).
[286] 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 at [99].
[287] Direction 75 was revoked on 8 February 2022.
[288] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [35]. See also in relation to Direction 75 specifically: *Ali v MIBP* [2018] FCA 650 at [34]; *Greene v AMHA* [2018] FCA 919 at [19]; *Turay v AMHA* [2018] FCA 1487 at [40]–[41]; *DOB18 v MHA* [2018] FCA 1523 at [35], upheld in *DOB18 v MHA* [2019] FCAFC 63**;** *Sowa v MHA* [2018] FCA 1999 at [19]–[27], upheld in *Sowa v MHA* [2019] FCAFC 111. Although in *Ali v MHA* [2020] FCAFC 109 the Court doubted the correctness of *DOB18* to the extent it stood for a more general proposition that Direction 75 necessarily remedies the *BCR16* issue, that is, assuming non-refoulement obligations would be considered in the event of a protection visa application, this aspect of *Ali v MHA* is now overruled by *Plaintiff M1/2021 v MHA* [2022] HCA 17. Direction 75 was revoked on 8 February 2022.
[289] *Omar v MHA* [2019] FCA 279. In this case, representations made to the Assistant Minister included submissions about the effect of continued detention on the applicant's mental health, the prospect of spending considerable time in detention until any future application was decided, and of indefinite detention afterwards.
[290] *Omar v MHA* [2019] FCA 279 at [27], [33]–[35], [38], [51], [81]. In *DOB18 v MHA* [2019] FCAFC 63, Robertson J (Logan J) distinguished that case from *Omar* at first instance 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]). However, in *Ahmed v MICMA* [2020] FCA 557 the Court was of the view that Robertson J's reasoning in *DOB18* was to be viewed through the lens of materiality: at [143]. The Court took his Honour to have concluded that an error made by the Minister in deferring the question of Australia's non-refoulement obligations to a future protection visa application will not be material if (but only if) every aspect of a representation advanced as a being relevant to those obligations has been fully taken into account, the issue of non-refoulement aside: at [143]. In *Sowa v MHA* [2018] FCA 1999 the Court said it was unnecessary to consider the Minister's submission that *Omar* at first instance was wrongly decided, as the representations in *Sowa* were not analogous 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]). In *Ali v MHA* [2020] FCAFC 109 the Court distinguished *DOB18* and *Sowa* principally on the basis that the issue of non-refoulement was not raised before the Minister in those cases: at [71], [73], [97]. *Plaintiff M1/2021 v MHA* [2022] HCA 17 now clarifies that consideration of non-refoulement

refoulement obligations are engaged in respect of a person may be a distinct, and very different kind of conclusion, to the question of whether a person should be granted a protection visa.[291] The High Court has now held that Parliament made a choice about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the Act[292] and that error of the kind identified in *Omar* is inconsistent with the statutory scheme and to the extent of unenacted international non-refoulement obligations, contrary to constitutional principle.[293]

In *GBV18 v MHA*[294] Anderson J reviewed the authorities on this issue. While the Court noted that they were not aligned in every respect,[295] it considered the approach in *Omar* to be contrary to the weight of authority.[296] As a notice of appeal had been lodged against *Omar* and the matter was to be considered by a Full Court, the Court did not express an opinion on whether it was wrongly decided.[297] 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 ss 36(2)(a) and 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[298] to those matters, although they need not engage in the same level of analysis as would be expected in a protection visa application.[299]

In *AXT19 v MHA* Logan J opined that *Omar* could not be reconciled with the Full Federal Court judgment of *MIBP v Le* and was clearly wrong.[300] On appeal, the Court found it unnecessary to determine whether *Omar* was decided correctly but noted that the greater the degree of clarity in which a non-refoulement claim has been made and advanced for consideration, the greater may be the need for the Tribunal to consider it in clear terms and that the more obscure and less certain such a claim is said to have been made, the less may be the need for the Tribunal to consider it.[301]

obligations can be deferred where a non-refoulement claim is made or arises on the facts and the person is able to make a valid application for a protection visa.
[291] *Omar v MHA* [2019] FCA 279 at [51].
[292] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [32].
[293] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [33].
[294] *GBV18 v MHA* [2019] FCA 1132. On appeal in *GBV18 v MHA* [2020] FCAFC 17 the Court did not reconsider the issues from the matter at first instance as it found jurisdictional error on the basis that the Tribunal had failed to address claims made in respect of reasons for revoking the visa cancellation: at [2]–[3].
[295] *GBV18 v MHA* [2019] FCA 1132 at [60]. On appeal in *GBV18 v MHA* [2020] FCAFC 17 the Court did not reconsider the issues from the matter at first instance as it found jurisdictional error on the basis that the Tribunal had failed to address claims made in respect of reasons for revoking the visa cancellation: at [2]–[3].
[296] *GBV18 v MHA* [2019] FCA 1132 at [79]. On appeal in *GBV18 v MHA* [2020] FCAFC 17 the Court did not reconsider the issues from the matter at first instance as it found jurisdictional error on the basis that the Tribunal had failed to address claims made in respect of reasons for revoking the visa cancellation: at [2]–[3].
[297] *GBV18 v MHA* [2019] FCA 1132 at [184]. On appeal in *GBV18 v MHA* [2020] FCAFC 17 the Court did not reconsider the issues from the matter at first instance as it found jurisdictional error on the basis that the Tribunal had failed to address claims made in respect of reasons for revoking the visa cancellation: at [2]–[3].
[298] See for example, *CPJ16 v MICMSMA* [2020] FCA 980 where the Court found the Minister's reasons did not engage in an active intellectual process in respect of the non-refoulement obligations that he had said he accepted were owed to the applicant: at [38], [42].
[299] *GBV18 v MHA* [2019] FCA 1132 at [82]–[87]. On appeal in *GBV18 v MHA* [2020] FCAFC 17 the Court did not reconsider the issues from the matter at first instance as it found jurisdictional error on the basis that the Tribunal had failed to address claims made in respect of reasons for revoking the visa cancellation: at [2]–[3]. While deferring consideration of non-refoulement obligations to a protection visa application, if one can be made, is one option under *Plaintiff M1/2021 v MHA* [2022] HCA 17 if a decision-maker chooses not to do so, Justice Anderson's comments at [82]–[87] continues to be relevant to the consideration of non-refoulement claims.
[300] *AXT19 v MHA* [2019] FCA 1423 at [27].
[301] *AXT19 v MHA* [2020] FCAFC 32 at [56]. This is now qualified by *Plaintiff M1/2021 v MHA* [2022] HCA 17.

On appeal, in *MHA v Omar* [302] the Full Federal Court identified that the key issues which potentially arose included whether the primary judge erred in finding that the Assistant Minister fell into jurisdictional error by deferring consideration of non-refoulement obligations to a future protection visa application, whether Direction No 75 reversed the effect of *BCR16*, and whether the primary judge erred in not holding that the Assistant Minister had made a jurisdictional error by failing to consider certain matters in representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision. As the Court found that the primary judge erred in finding in effect that Mr Omar's representations concerning the risk of harm in Somalia arising from his mental illness and intellectual disability had been considered by the Assistant Minister, it did not need to determine the other issues.[303]

In *Hernandez v MHA*[304], when finding the Minister had erred in not considering the applicant's non-refoulement claims on the basis it would be considered in any protection visa application, the Court was of the view at the very least, as 'another reason' why the cancellation decision should be revoked under s 501CA(4), it would have been open to the Minister to conclude Australia's reputational interests may be adversely affected by a decision resulting in the deportation of a person in contravention of Australia's non-refoulement obligations.[305] Whereas, any identification of non-refoulement obligations in the course of determining a visa application could not affect the outcome of a decision under s 65 as a decision-maker would be compelled under s 65(1)(b) to refuse to grant the visa if not satisfied the requirements of s 65(1)(a) were met.[306] Further, non-refoulement obligations in determining character related criteria in s 36 and deportation under s 197C in contravention of Australia's non-refoulement obligations would both be irrelevant in determining whether a protection visa should or should not be granted under s 65.[307] The High Court has now held reasoning, such as in *Hernandez,* that has focused on decision-makers failing to properly consider *the consequences*, both to former visa holders and to Australia, which would flow from removing a former visa holder *contrary to* non-refoulement obligations, ignored the choice Parliament made about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the Act.[308]

In *Ali v MHA*[309] the Full Federal Court was of the view that the issue of what was likely to happen if a revocation decision under s 501CA(4) was not made could not be ignored or sidestepped by raising a hypothetical proposition that a protection visa application might be made and non-refoulement obligations might be dealt with then.[310] This is particularly so where factual findings by

[302] *MHA v Omar* [2019] FCAFC 188.
[303] *MHA v Omar* [2019] FCAFC 188 at [3]–[5], [29].
[304] In *Hernandez v MHA* [2020] FCA 415 Counsel for Mr Hernandez identified differences between the statutory definition 'refugee' and the definition 'refugee' for the purposes of the Convention, however the Court did not consider these on the basis that the difference was not one upon which the outcome of the judicial review turned on.
[305] *Hernandez v MHA* [2020] FCA 415 at [63]. In *Ali v MHA* [2020] FCAFC 109 the Court followed *Hernandez* to further emphasise the impact of non-compliance with Australia's treaty obligations upon its reputation and standing in the global community, and not only on the person who might be returned to their home country: at [117].
[306] *Hernandez v MHA* [2020] FCA 415 at [64].
[307] *Hernandez v MHA* [2020] FCA 415 at [65].
[308] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [34].
[309] The characterisation of the error in *Ali v MHA* [2020] FCAFC 109 at [109], [119] as resulting in the power to exercise the discretion to revoke never arising is different to the way similar errors have been conceptualised in the earlier authorities of *Omar v MHA* [2019] FCA 279 and *BCR16 v MIBP* [2017] FCAFC 96. Those judgments focussed on the exercise of the discretion, rather than the requirements for enlivening the discretion. Nevertheless, the analysis of s 501CA(4) is consistent with that of the more recent Full Federal Court judgment in *GBV18 v MHA* [2020] FCAFC 17.
[310] Nevertheless, the Court in *Ali v MHA* [2020] FCAFC 109 appeared to accept that a decision-maker could properly take into consideration a ground which involved a hypothetical scenario by assessing the likelihood of its occurrence: at [101]. However, the Court did not accept that is how the Minister's reasons in the case before it could be construed, and noted in any event, genuine consideration of that type would require some degree of analysis of the probability of the occurrence of future events: at [101].

a decision-maker, such as in this case, indicate a person would be persecuted or face serious harm. On the facts before it[311] the Court found the Minister did not consider a clearly articulated non-refoulement claim, whether Australia owed non-refoulement obligations, whether they arose under s 36(2), the Convention or otherwise[312] and whether those obligations would be breached, and the consequences for Australia of that breach.[313] The Court also found the Minister proceeded on an erroneous assumption of law as to the manner in which Australia's non-refoulement obligations would be considered in the different statutory processes in ss 501CA(4) and 65 (as that applies to whether protection visa criteria in s 36(2) are met), with the standard inherent in the concept of 'another reason' why the cancellation decision should be revoked involving matters of opinion, value judgment and policy which accord a degree of decisional freedom to the decision-maker that does not exist in s 36(2) criteria.[314] Further, the Court found the Minister assumed a protection visa application, limited to the criteria in s 36(2)(a), would consider all of Australia's non-refoulement obligations at international law, however, although those obligations would partially be ascertained by considering the criteria in s 36(2) there would be no consideration of the impact of the non-fulfilment of those obligations in relation to Australia's reputation or otherwise.[315] The High Court has now found that Parliament made a choice about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the Act[316] and that the error identified in *Ali* was inconsistent with the statutory scheme and, to the extent of unenacted international non-refoulement obligations, contrary to constitutional principle.[317]

In *Applicant S270 v MIBP*[318] special leave to the High Court was granted on the ground that, when exercising the power under s 501CA(4), the Minister was obliged to, and failed to, consider whether non-refoulement obligations were owed to the appellant. The questions for the appeal were: did the material before the Minister raise the issue of whether Australia owed any non-refoulement obligations to the appellant; if so, did the Minister decide to defer consideration of that issue because any such obligations could be considered if the appellant made an application for a protection visa; and, whether the Minister was required to consider Australia's non-refoulement obligations in making a decision under s 501CA(4). The majority was of the view that there was nothing in the text of s 501CA, or its subject matter, scope or purpose, that required the Minister to take account of any non-refoulement obligations when deciding whether to revoke cancellation of any visa that is not a protection visa where the materials do not include, or the circumstances do not suggest, a non-refoulement claim.[319] As a consequence, the majority found it unnecessary to decide whether

[311] In *Ali v MHA* [2020] FCAFC 109 the claims included the entirety of Australia's non-refoulement obligations as well as the consequences of not complying with them. In *FAK19 v MICMSMA* [2020] FCA 1124 the Court found Tribunal had failed to consider an express reason advanced for revoking the cancellation, namely that the consequence of not revoking the cancellation would give rise to a breach by Australia of its non-refoulement obligation, which related to the consequence for Australia, separate and distinct from the consequence for the applicant in respect of claims of fear of harm on return: at [56]. Upheld on appeal: *MICMSMA v FAK19* [2021] FCAFC 153 at [75]-[80] with the Court finding that the reasoning of the Court in *Ali v MHA* [2020] FCAFC 109 was correct.
[312] In *Applicant S270 v MIBP* [2020] HCA 32 the majority's *obiter* comments refer to consideration of Australia's international non-refoulement obligations being confined to those obligations which have been codified in the Act: at [34], [35]. However, the majority did not undertake any further analysis or, for example, refer to the definition of *non-refoulement obligations* in s 5 which has been held to be broader than the codified obligations. This issue remains for another Court to consider in a suitable case.
[313] *Ali v MHA* [2020] FCAFC 109 at [103]. In *Guruge v MICMSMA* [2021] FCAFC 233 the applicant sought to extend *MICMSMA v FAK19* [2021] FCAFC 153 in relation to the best interests of the child, but the Court found there was no obligation to consider it (it was not a mandatory consideration), it was not raised, and *FAK19* was distinguishable at [25]-[26], [39].
[314] *Ali v MHA* [2020] FCAFC 109 at [108], [110], [111]. In *KYMM v MICMSMA* [2020] FCA 1069 the Court noted this is the issue that has been addressed and settled by *GVB18 v MHA* [2020] FCAFC 17 and *Ali v MHA* [2020] FCAFC 109: at [51].
[315] *Ali v MHA* [2020] FCAFC 109 at [117].
[316] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [32].
[317] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [33].
[318] *Applicant S270 v MIBP* [2020] HCA 32.
[319] *Applicant S270 v MIBP* [2020] HCA 32 at [33], [36]. In this case, after reviewing the evidence the Court found the appellant made no claim to fear persecution or serious harm to raise the issue of whether Australia owed any non-refoulement obligations: at [28]. See also *Maryvan v MICMSMA* [2022] FCA 977 at [72], [83].

consideration of non-refoulement obligations can be deferred where a non-refoulement claim is made or arises on the facts.

As noted above, in *Plaintiff M1/2021*[320] the High Court held where a person can apply for a protection visa, and their representations include, or the circumstances suggest, a claim of non-refoulement *under domestic law*, such as under the Migration Act, one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.[321] The existence or otherwise of non-refoulement obligations would then be fully assessed in the course of processing such an application.[322] The High Court also clarified the mandatory consideration of Australia's international non-refoulement obligations, such as under Ministerial Direction 90, is confined to those obligations which have been enacted into Australia's domestic law.[323] The High Court did not appear to indicate unenacted aspects of international agreements could not be considered, and the Federal Court in *HRZN v MICMSMA*[324] has subsequently clarified that while the Tribunal must 'read, identify, understand and evaluate' all claims clearly articulated and apparent on the material, where the claim raises a potential breach of Australia's unenacted international non-refoulement obligations, an error of law such as misapplying the test will not be a jurisdictional error.[325]

In light of the line of cases above, the following principles apply in cases where a person may make another visa application in Australia:

- It is 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.[326] However, before doing so the Tribunal must 'read, identify, understand and evaluate' claims that raise a potential breach of Australia's enacted international non-refoulement obligations.[327] It may be necessary to take account of the alleged facts underpinning non-refoulement claims for the exercise of discretion in character decisions[328] and claims that fall outside of the protection visa framework, such as claims of generalised violence, inadequate healthcare, homelessness, harm that is not serious or significant harm. Australia's international non-refoulement obligations unenacted in domestic law are not a mandatory relevant consideration.[329] If a non-refoulement claim is not made, non-refoulement obligations would not need to be considered and would only need to be considered later, if a protection visa application was made.[330]

[320] *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[321] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [30]. In *Plaintiff M1/2021*, the applicant claimed that he would face persecution, torture and death if returned to South Sudan. The delegate in their decision not to revoke the cancellation under s 501CA stated that they had considered the claim of harm 'outside the concept of non-refoulement and the international obligations framework' and although accepting the applicant would face hardship arising from tribal conflicts if returned to South Sudan, they were not satisfied there was another reason to revoke the cancellation decision. The Court held that the delegate was not required to determine whether the applicant was owed non-refoulement obligations by conducting an assessment of the merits of the applicant's claims of harm in the same manner, or to the same extent, as would be called for by a direct application of the international instruments to which Australia is a party or by reference to the domestic implementation of those obligations: at [37].
[322] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [36]–[37].
[323] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [29].
[324] *HRZN v MICMSMA* [2022] FCAFC 133. Application for special leave to appeal dismissed: *HRZN v MICMSMA* [2022] HCASL 211.
[325] *HRZN v MICMSMA* [2022] FCAFC 133 at [67]. Application for special leave to appeal dismissed: *HRZN v MICMSMA* [2022] HCASL 211.
[326] *Plaintiff M1/2021 v MHA* [2022] HCA 17.
[327] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [9] and [42].
[328] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [39].
[329] *Plaintiff M1/2021 v MHA* [2022] HCA 17 at [29].
[330] *Applicant S270/2019 v MIBP* [2020] HCA 32 at [33], [36].

- 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.[331] 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, indefinite 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 or prolonged 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.[332] 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.[333] 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.[334]

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 under s 197C(1) the person must be removed irrespective of any such obligations.[335] 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 ss 195A, 197C and 198, subject to the matters discussed below, require the person to be removed from Australia.

Decision-makers can in the absence of any or stronger evidence that the executive does refoule people, find that the risk of refoulement is low based on any relevant evidence of executive policy which may indicate that Australia will not return a person to a country in breach of its non-refoulement obligations.[336] Direction No 90, does not have equivalent wording to such a policy statement which

[331] The changes to Direction No 90 do not alter this.
[332] See, e.g., *EAO17 v MIBP* [2018] FCCA 3319 at [41].
[333] 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.
[334] 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.
[335] *DMH16 v MIBP* (2017) 253 FCR 576 at 26–30, *NKWF v MIBP* [2018] FCA 409 at [41]–[44], *MNLR v MICMSMA* [2021] FCAFC 35 at [96]-[97]. Special leave refused: *MNLR v MICMSMA* [2021] HCASL 208.
[336] In *WKMZ v MICMSMA* [2021] FCAFC 55 the Court found no inconsistency between executive policy in Direction No 79 that Australia will not return a person to a country in breach of its non-refoulement obligations and s 198, read with s 197C: at [152]. The Court held the executive policy in Direction No 79 was applied by decision-makers in the circumstances of considering whether to grant, refuse or restore a visa, and not at any later stage of decision making in relation to what might happen to an individual and that after all visa processes are exhausted, the concept of 'reasonably practicable' can allow for the timely and genuine exploration of options which might avoid breach of Australia's non-refoulement obligations: at [151]. *WKMZ* reconciled the authority in *DMH16 v MIBP* (2017) 253 FCR 576, with the executive's policy of non-refoulement. *DMH16* held the Minister's consideration that the applicant might be detained indefinitely reflected a misunderstanding of the effect of the refusal of the protection visa because of the operation of s 197C. See however also Wigney J's comments in *MNLR v MICMSMA* [2021] FCAFC 35 that the Tribunal in that matter was not required to comply with the executive policy to the extent that it could be read as meaning that, irrespective of the terms of s 197C and s 198 of the Act, Australia would not remove someone who was owed non-refoulement obligations: at [108]. Special leave refused: *MNLR v MICMSMA* [2021] HCASL 208.

was previously in Direction No 79. Therefore, to support such a finding, decision-makers would need to consider whether anything in Direction No 90, or in any other evidence before it about an existing executive policy, reflects a policy that Australia would not breach non-refoulement obligations. If so, conclusions on non-refoulement can be based on that finding and may not need to be as detailed as they would need to be if refoulement were a consequence of cancellation. Relevant to that consideration, para 9.1(2) in Direction No 90 requires decision-makers to carefully weigh any non-refoulement obligations against the seriousness of criminal offending or other serious conduct, and, in doing so, to be mindful that unlawful non-citizens are liable to detention pending removal as soon as reasonably practicable under ss 189 and 198 the Act, also noting the terms of s 197C[337]; para 9.1(3) refers to the fact that cancellation or refusal of a visa 'will not necessarily result in removal … to the country in respect of which the non-refoulement obligation exists'; and para 9.1(8) has omitted reference to Australia not returning a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations.

Also, s 197C(3) indicates that, despite s 197C(1) (which provides that for the purposes of removal it is irrelevant whether Australia has non-refoulement obligations) and s 197C(2) (which provides than an officer must remove an unlawful non-citizen as soon as reasonably practicable irrespective of whether there has been an assessment of Australia's non-refoulement obligations), s 198 does not require or authorise an officer to remove an unlawful non-citizen unless: (i) the decision finding that the non-citizen engages protection obligations has been set aside; (ii) the Minister, or his or her delegate, is satisfied that the non-citizen no longer engages protection obligations; or (iii) the non-citizen requests voluntary removal.[338] If any of these three matters do apply then s 198 requires or authorises an officer to remove that non-citizen.

However, the potential for indefinite detention should be taken into account as a relevant consideration, particularly for those in respect of whom non-refoulement obligations are found, for whom there is no prospect of any future visa grant because of character issues or because they cannot apply for any further visas, and regardless of whether the visa being cancelled or refused is a protection visa or another visa.[339]

The legal consequences of the decision more broadly, including mandatory detention and removal, are discussed in more detail under Detention and removal.

[337] In *VNPC v MICMSMA* [2022] FCA 921 the Court found an error in the application of para 9.1(2) of Direction 90. It accepted that it was open to the Tribunal to consider the significance or otherwise of a finding that there may be prolonged and indefinite detention as a legal and practical consequence of its decision, but it was erroneous to proceed on the basis that the Direction requires a comparison that weighs indefinite detention against the seriousness of past offending at [15]-[16].

[338] Section 197C was modified by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* with effect from 25 May 2021. Subject to three exceptions, the modification is to ensure s 197C does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process

[339] In *WKMZ v MICMSMA* [2021] FCAFC 55 the Court held that while executive options available for genuine consideration after a person has exhausted options to challenge a visa refusal or cancellation are being genuinely, promptly and reasonably considered and pursued, a person may suffer continued loss of liberty with no chronologically fixed endpoint, so that their detention is properly described as 'indefinite': at [136]. See also, e.g. *DGBK v MHA* [2019] FCA 1479, where the Court considered that the Tribunal had expressly acknowledged the applicant would be liable for return to Afghanistan as soon as was reasonably practicable and in the meantime would remain in detention, and in the context of the entirety of its reasons, the reference to the applicant facing the prospect of 'indefinite' detention simply meant until it is reasonably practicable: at [37]–[41].

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.[340] For further information on the real chance test, see the Guide to Refugee Law, Chapter 3 – Well-founded fear.

Where there are claims of harm, and consideration is not or cannot be deferred to a protection visa application, decision-makers should also be careful to consider harm which might not necessarily enliven international non-refoulement obligations.[341] For example, in *YNQY v MHA*[342] the Court found the Tribunal considered the applicant's claims only through the lens of Australia's non-refoulement obligations, which was apparent from its references to 'serious' and 'significant' harm, 'Convention related harm' and 'complementary protection', whereas some of the claims, such as those relating to destitution and famine, were put to the Tribunal on a wider basis.

Where there is nothing to prevent a person's removal, the Tribunal may 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.[343] 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.[344] 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.[345]

Other considerations not set out in Direction No 90

The matters set out in the Direction are not exhaustive.[346] Other matters that may be relevant include submissions by the applicant and factors referred to in Ministerial or policy guidelines.[347] Some

[340] *MIAC v SZQRB* (2013) 210 FCR 505 at 246–247.
[341] *Goundar v MIBP* [2016] FCA 1203 at [53]–[56], *BCR16 v MIBP* (2017) 248 FCR 456 at 70-72.
[342] *YNQY v MHA* [2020] FCA 56 at [47]–[53].
[343] *Ayoub v MIBP* (2015) 231 FCR 513 at 28. For examples, see *PRHR and MIBP* [2017] AATA 2782 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 at [145]–[152] and [164]–[167].
[344] For example, the following decisions were upheld by Courts. In *Sowa v MHA* [2019] FCAFC 111, 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, 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, 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. See also *BNN and MHA (Migration)* [2019] AATA 27 at [114]–[118], upheld in *AXT19 v MHA* [2019] FCA 1423 and extracted at [16]. On the other hand, in *Flores v MHA* [2019] FCA 1043, the applicant claimed that as a person with a criminal record of involvement with illicit substances, he would likely be subject to state sanctioned violence in the Philippines. The AAT said that in 'oral evidence, the Applicant really did not pursue with any vigour this aspect of his case. [His] assertions could not, on any level of assessment, ground a finding that Australia's non-refoulement obligations are engaged.' The Court held the Tribunal failed to engage with the applicant's claim as it was required to do. It said 'apart from noting the applicant's claim, it contains no reference whatsoever to the material on which the applicant relied in raising Australia's non-refoulement obligations; it does not deal with his discrete claims; and it does not contain any reasoning at all to support the conclusion… that Australia owed no such obligation': at [51]–[52].
[345] For an example, in *CWGF and MHA (Migration)* [2019] AATA 179 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.
[346] See *SZRTN* [2014] FCA 303 at [86].
[347] 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 Application of Policy.

factors, such as detention and removal, are so closely related to the scheme of the Act that they may need to be considered, whether raised by an applicant or in guidelines or not.[348] 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.[349]

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.[350]

Where a person raises matters which are related to, but different from, matters specified in the Direction, a decision-maker should consider those other matters as well.[351]

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.[352] 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,[353] 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.[354] The legal framework which must be taken into account includes the direct and immediate statutorily prescribed consequences of the decision in contemplation.[355]

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.[356]

The consequences of a visa refusal or cancellation under s 501 or related provisions include:

- unlawful status

[348] See *MIBP v BHA17* [2018] FCAFC 68 at [135]–[139].
[349] See *Tanielu v MIBP* (2014) 225 FCR 424 at 122.
[350] *Akpata v MIMIA* [2004] FCAFC 65 at [107].
[351] For example, in *PQSM v MHA* [2019] FCA 1540, the Court inferred the Tribunal failed to have regard to the separate consideration of the effect on the applicant's partner and his adult children if the cancellation of his visa was not revoked. Rather, it only took account of the extent of his ties to those people and thereby confined its consideration to the effects upon him. However, the Court held it was not established that, in the circumstances the failure to comply with the Direction was material: at [49] and [67]. Upheld on appeal (by majority) in *PQSM v MHA* [2020] FCAFC 125 at [152]–[156]. An application for special leave to appeal to the High Court was dismissed: *PQSM v MHA* [2021] HCATras 31.
[352] *NBMZ v MIBP* (2014) 220 FCR 1 at 6. *MIBP v Le* (2016) 244 FCR 56 at 61.
[353] *NBMZ v MIBP* (2014) 220 FCR 1 at 6, for s 501; *DLJ18 v MHA* [2018] FCA 1650 at [43].
[354] *FRH18 v MHA* [2018] FCA 1769 at [45].
[355] *Taulahi v MIBP* (2016) 246 FCR 146 at 84. See also *MIBP v BHA17* [2018] FCAFC 68 at [136]. In *DYY18 v MHA* [2019] FCA 1901, the Court said that 'neither *NBMZ* nor *Taulahi* stand for the proposition that the Minister must have regard to very conceivable legal consequence flowing from all possible factual outcomes… Rather, in making a decision under s 501CA(4), the Minister must take into account those legal consequences which will actually flow from his decision': at [22]. In *BNGP v MICMSMA* [2022] FCA 878, the Court at [51], citing *NBMZ*, held the legal consequences of the decision applies to the 'inevitable and direct legal consequences of the exercise of the statutory power in question', not 'a reasonably arguable but contestable legal consequence of the decision'. In that case, the Minister had exercised his personal power under s 501A(2) to set aside the Tribunal's favourable decision and refused to grant a protection visa to the applicant, and the applicant argued that it was legally unreasonable for the Minister not to have considered indefinite detention which would breach Australia's international obligations as a legal consequence of the decision. The Court rejected this argument on the basis that, among other things, the actual legal consequence of the decision to refuse the visa was not the certainty, but the likelihood, of indefinite detention and it was reasonably arguable but no means certain that such detention would place Australia in breach of its international obligations (see [42]–[43], [48], [68]–[70]).
[356] *Hay v MHA* [2018] FCAFC 149 at [9]–[15].

- the likelihood of becoming subject to detention and/or removal[357]
- refusal of other visa applications and cancellation of other visas[358]
- a prohibition on applying for other visas[359]
- periods of exclusion and special return criteria may apply[360]

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.[361] Generally, if a visa is cancelled its former holder becomes an unlawful non-citizen immediately after cancellation.[362] 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 absence of a visa application or other specified circumstances, must remove them as soon as reasonably practicable under s 198.[363]

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.[364] 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.[365] The factual circumstances which can give rise to the prospect of

[357] ss 189, 196, 197C, 198.
[358] s 501F.
[359] s 501E.
[360] s 503, SRC 5001.
[361] s 501F.
[362] s 15.
[363] The Court in *BHL19 v Commonwealth of Australia (No 2)* [2022] FCA 31 followed *AJL20 v Commonwealth of Australia* [2020] FCA 1305 to find the applicant's detention had at all times been lawful: at [112]-[122]. The Court considered the applicant's argument that officers of the Commonwealth had failed to discharge the duty in s 198 to remove him as soon as reasonably practicable, finding at [174] that in all the circumstances that from at least 22 February 2021 officers had done next to nothing to remove the applicant and that no reasonable attempt was made to explore the possibility of removing him to Syria (before the passing of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) after which he could not be removed to Syria because a 'protection finding' had been made in respect of him) or to a third country, either before or after the passing of the *Clarifying Act*.
[364] *MIBP v Le* (2016) 244 FCR 56 at 61. In *AJL20 v Commonwealth of Australia* [2020] FCA 1305, in an application for a writ of habeas corpus for the release of the applicant, the Court considered the limits on the power to detain an unlawful non-citizen under the Act, and held that departure from the permitted purpose through failure to remove from Australia 'as soon as reasonably practicable' will render the detention unlawful: at [75], [76]. The relevant inquiry for determining whether there has been a departure from the permissible purpose of the applicant's detention is whether the removal of the applicant from Australia has been 'undertaken' or has been 'carried into effect' as soon as reasonably practicable: at [89]. An objective assessment is to be made of all relevant circumstances including the steps in pursuance of removal which have been taken as well as those steps which were reasonably practicable but were not taken: at [89].
[365] *MIBP v Le* (2016) 244 FCR 56 at 61. In *DFTD v MHA* [2020] FCA 859 the Court found the prospect of the applicant being subjected to prolonged immigration detention was not a consideration of which the subject matter, scope or purpose of the Act required that the Tribunal take account before declining to exercise its power under s 501CA(4): at [54]. The Court further held that prolonged immigration detention is not a prospect that arises as a statutory or legal consequence of the Tribunal's decision: at [50], [54]. Rather, it exists contingently upon circumstances unrelated to the Tribunal's decision, such as, for example, if the applicant applied for a protection visa: at [50], [51]. Undisturbed in in *DFTD v MHA* [2020] FCAFC 207. In *RRFM v MICMSMA* [2021] FCA 1273 the Court expressed a view that there is tension in the authorities on whether the prospect of prolonged detention can properly be described as a legal consequence of a non-revocation of a character cancellation, and doubted the conclusions in *WKMZ* that an extended period of detention does qualify as a legal consequence (because there are a number of possible outcomes such that any prolonged detention is not a result of the Tribunal's decision) at [31]-[35]. This distinction, however, may not have much practical significance as the Tribunal will need to consider a lengthy period of detention where an applicant argues it.

indefinite detention can vary considerably – for example, the state of the person's health,[366] 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 196, which requires that an unlawful non-citizen detained under s 189 must be kept in immigration detention until one of the events listed in s 196(1), which includes removal from Australia under ss 198 or 199[367]

- 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

- 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.[368]

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'. In dealing with the possibility of the future grant of other visas under s 195A, consideration would need to be given to whether the consequence of an assessment of risk, for refusal to grant a visa under s 501(1), is that an applicant would have to be refouled as soon as reasonably practicable in accordance with ss 197C and 198 because there would be no reasonable basis on which the grant of any other visa could occur having regard to the assessment of risk.[369]

[366] See, e.g. *Sach v MHA* [2018] FCA 1658.
[367] In *AJL20 v Commonwealth of Australia* [2020] FCA 1305 the Commonwealth argued the duty to remove the applicant as soon as reasonably practicable under s 198 was not a condition of the lawfulness of his detention and, that s 196(1) made the applicant's detention lawful until he was in fact removed from Australia. The Court held that where there is a departure from the permissible purpose for the detention, the detention will no longer be lawful irrespective of whether one or other of the events specified in s 196(1) has in fact occurred because it is a condition of the lawfulness of a detention that the detention be for a permissible purpose: at [75]. In *CZCV v Commonwealth of Australia* [2020] FCA 1864 the Court followed existing authority on the interpretation of s 196(4) to find that as the applicant's visa was cancelled under s 501(3A), within s 196(4), he was detained "as a result of the cancellation of his…visa under section 501": at [16]. The fact that the applicant did not hold a visa for a second reason, namely, that his application for a protection visa was refused, did not remove the applicant's detention from that description. Section 196(4) requires that detention be "a result" of the cancellation under s 501, not that it be the sole reason: at [16].
[368] Section 197C was modified by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* with effect from 25 May 2021 to ensure it does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process unless the decision finding that the non-citizen engages protection obligations has been set aside; the Minister, or his or her delegate, is satisfied that the non-citizen no longer engages protection obligations; or the non-citizen requests voluntary removal. The purpose of the amendments are to restore s 197C to its intended effect, that is, to limit the opportunity for a person to obtain a court injunction to stop the removal process where the Minister had already found that unlawful non-citizen did not engage non-refoulement obligations. It was not intended to require the removal of an unlawful non-citizen who had been found to engage non-refoulement obligations: Revised Explanatory Memorandum to the Amending Act, pp 7-8.
[369] *BAL19 v MHA* [2019] FCA 2189 at [46]–[49], [54]. In this case, the Court found the Minister's reasons dealing with the possibility of the future grant of other visas, amounted to him taking into account an irrelevant consideration or constructively failing to exercise his power on a correct understanding of the law, as it did not engage with the immediate legal or practical consequence of his decision to refuse to grant the visa, namely, that the applicant had to be refouled under s 198A(2) as soon as reasonably practicable: at [44]. This aspect of *BAL19 v MHA* was not considered or overturned in *MICMSMA v BFW20; BGS20 v MICMSMA* [2020] FCAFC 121 or *KDSP v MICMSMA* [2020] FCAFC 108. An application for special leave to appeal to the High Court was dismissed: *KDSP v MICMSMA* [2021]

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. As 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.[370]

Where a person may make a further visa application

In determining whether or not to exercise powers under ss 501 or 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 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.[371]

In these circumstances, removal and its consequences are not necessarily direct and immediate consequences of the Tribunal's decision.[372] 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 can be considered, but the reasoning does not need to assume that an applicant will be removed.

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.[373] Whilst, it should not be assumed a person will be indefinitely detained because Australia owes them non-refoulement obligations, due to the terms of s 197C[374], in circumstances where non-refoulement obligations are found, there is no prospect of any future visa grant because of character issues or because any further visas cannot be applied for, decision-makers will need to consider indefinite detention as a prospect when considering the legal consequences of cancellation.[375]

HCATras 20. It may be subject to further consideration in the appeal of *BAL19 v MHA*. See also *DQM18 v MHA* [2020] FCAFC 110 where the Court found there was an error for failure to consider the claim of indefinite detention, noting the ability to make a visa application would not be sufficient given that character issues would likely to result in visa refusal: at [108]-[109], [168].

[370] See, e.g., *MIBP v Le* (2016) 244 FCR 56 at 61.

[371] *MIBP v Le* (2016) 244 FCR 56 at 61.

[372] See *CTB19 v MICMSMA* [2019] FCA 2128 at [58] where the Court noted the applicant had not yet applied for a protection visa and thus it would not be the consequence of the Tribunal's decision not to revoke the cancellation of his visa that he would be subject to imminent removal from Australia pursuant to ss 197C and 198. See also *RRFM v MICMSMA* [2022] FCAFC 27 at [31] where the Court found no error in circumstances where the Tribunal reasoned it was not prepared to speculate about future decision-making where the applicant had yet to apply for a protection visa at [31], [37].

[373] *MIBP v Le* (2016) 244 FCR 56 at 61.

[374] *DMH16 v MIBP* (2017) 253 FCR 576 at 26–30.

[375] *WKMZ v MICMSMA* [2021] FCAFC 55 at [153].

In these circumstances, detention and/or removal will generally be direct and immediate consequences of the Tribunal'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.

Where there is nothing to prevent a person's removal, the Tribunal may 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.[376] 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.

Such an application is not a valid application for a visa.[377] The only exceptions are an application for a protection visa or a visa specified in the Regulations (i.e. reg 2.12AA).[378]

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.[379] 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.[380]

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.[381] There

[376] *Ayoub v MIBP* (2015) 231 FCR 513 at 28.
[377] s 46(1)(d).
[378] s 501E(2).
[379] s 501F.
[380] s 501F(4).
[381] In *DLJ18 v MHA* [2019] FCAFC 236 considered whether permanent exclusion from Australia was a legal consequence of the Minister's decision under s.501CA(4). Flick J concluded that the effect of cl 5001(c) was not a legal consequence of the decision under s 501CA(4) because any future decision made pursuant to cl 5001(c) would be made pursuant to the Migration Regulations, dependent on a speculative future application and lacked legal proximity to a decision made under the Migration Act: at [15]. Bromberg J, on the other hand, concluded that the Minister had taken into account the appellant's preclusion from returning to Australia and it was immaterial whether that consequence had been recognised as a legal consequence referable to cl.5001(c): at [38]. Whereas, Snaden J concluded that the Minister had taken the effect of cl 5001(c) into account but was not obliged to do so as a legal consequence of the

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.[382]

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.[383] The Tribunal's obligation is to deliver a decision within 84 days, but not necessarily express reasons within that time.[384]

It is unclear whether this statutory time limit continues to apply to an applicant who has left the migration zone after the Minister's decision and before the review of that decision is completed. The phrase 'the decision that relates to a person in the migration zone', which defines the circumstance where the expedited review provisions in ss 500(6A)–(6L)[385] apply, has not been the subject of judicial consideration. Two alternative interpretations appear to be open on the text:

- The meaning of the phrase is determined by the location of the person at the time the Minister's decision was made. That is, if the person the subject of the Minister's decision under s 501 or 501CA(4) was in the migration zone at the time of the decision, the decision relates to a person in the migration zone;[386] or

non-revocation decision: at [57]. The Court also criticised the reasoning in *Tanielu v MIBP* (2014) 225 FCR 424 where Jessup J held the special return criteria was not a legal consequence of a cancellation decision because it lacked sufficient 'legal proximity' or 'practical immediacy' to the decision. Flick J was of the view that the process of statutory construction does not permit some consequences being more immediate than others at [15] and Bromberg J noted that 'legal proximity' is not extraneous to the requisite assessment but that 'practical immediacy' is not an appropriate lens through which the requisite process of statutory interpretation may be undertaken [at [24]. Snaden J, however, found Jessup J's observations were nothing more than a recognition that there will be some consequences that arise by operation of law from the exercise of a statutory power that are of such a nature that a failure to consider them won't invalidate that exercise and that consequences that lack 'legal proximity' or 'practical immediacy' are salient examples of such consequences: at [85].

[382] s 500(6G).

[383] s 500(6L)(c).

[384] *Khalil v MHA* [2019] FCAFC 151 at [48].

[385] These provisions were introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) to expedite the AAT's review process of decisions made under the character provisions, where the decision relates to a person who is in the migration zone, and to ensure that the review process is not used as a mechanism to prolong stay in Australia by people whose visa has been refused or cancelled under the character provisions: see the Explanatory Memorandum to the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth) at [37]–[39].

[386] Three previous Tribunal decisions have applied this interpretation and found that ss 500(6H) and 500(6L) continue to apply to applicants who were in the migration zone at the time the decision the subject of the review was made but have subsequently left the migration zone: *Hao and MIMIA* [2005] AATA 1172 (see [18]–[26]); *Jagroop and MIBP* [2015] AATA 751 (see [60]–[63]); *Vaea and MICMSMA* [2021] AATA 2729 (see [11]–[26]). In these matters, the Tribunal favoured this interpretation on the basis that the reviewable decision is the operative circumstance in which the statutory expedited review process is triggered, nothing inherent in ss 500(6H) and 500(6L) require the applicant's presence in Australia for them to continue to have full effect, and for consistency in the processes applicable to persons who are in the migration zone when the decision under s 501 or 501CA is made.

- Having regard to the use of the present tense 'relates to', the meaning of the phrase is determined by the location of the person at the time the relevant provision in ss 500(6A)–(6L) is being applied. That is, if the person the subject of the Minister's decision under s 501 or 501CA(4) is not in the migration zone at the time of considering whether a provision under ss 500(6A)–(6L) applies, the decision is no longer one that relates to a person in the migration zone and the provision would not apply.[387] In these circumstances, the usual requirements under Part IV of the AAT Act would apply.

While the first interpretation promotes consistency in the review process for all affected applicants with a fixed temporal reference in relation to the application of the provisions (i.e., whether they are in the migration zone at the time of the Minister's decision), the second interpretation also does not appear to cause any fundamental inconsistencies in the application of the provisions to the extent they would apply. The second interpretation is also not inconsistent with the expedited review provisions' legislative intention to 'apply only to decisions regarding persons who are in the migration zone' to ensure that their review is completed in a timely manner and the review process is not used as a mechanism to prolong their stay in Australia.[388] This is because where the applicant has left the migration zone, the concern regarding whether they are using the review process to prolong their stay in Australia no longer arises.

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 s 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 for review under s 42A, the condition in s 500(6L)(c) is no longer engaged.[389] It therefore would not be futile to reinstate an application under s 42A(9)[390] 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.[391] 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.

[387] This interpretation would require the Tribunal to assess whether the applicant is still in the migration zone at each time the relevant provision arises to be applied: e.g. the review application requirements in ss 500(6B) and 500(6C) at the time the applicant applies for the review; the hearing related requirements in ss 500(6H) and 500(6J) at the time of the hearing or resumed hearing; s 500(6L) at the time the Tribunal makes its decision or on the 84th day after the day on which the applicant was notified of the Minister's decision, whichever is earlier.
[388] See the Explanatory Memorandum to the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth) at [37]–[39]
[389] *Somba v MHA (No 2)* [2019] FCAFC 150 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.
[390] Under s 42A(9) of the AAT Act, the Tribunal may reinstate an application and give such directions as it appears to be appropriate.
[391] *Khalil v MHA* [2019] FCAFC 151 at [64]. See also *Ikupu v MICMSMA* (No 2) [2020] FCA 234 at [4]–[6] where the Court applied *Khalil v MHA* and *Somba v MHA (No 2).*

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[392] 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.[393] 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.[394]

The restriction extends to oral evidence to be given by a witness for the applicant.[395] It only applies to information presented 'in support of the person's case'[396], i.e., information that the applicant provides as part of their case-in-chief,[397] and not to submissions which an applicant may wish to make in respect of the evidence before the Tribunal.[398] 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).[399]

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.[400]

This restriction also applies to any documents submitted in support of the applicant's case (except for documents in the Minister's possession).[401]

These provisions are binding on the Tribunal and failure to comply with them would arguably amount to jurisdictional error.[402]

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

[392] In *MICMSMA v DOM19* [2022] FCAFC 21, the Full Court unanimously overturned the primary judgment's very broad interpretation of 'written statement' and accepted the Minister's submission that it requires a document that records in writing the substance of what a person will say in oral testimony at [24]-[28].
[393] s 500(6H).
[394] *SZRTN v MIBP* [2014] FCA 303 at [70].
[395] *Demillo v MIBP* [2013] FCAFC 134 at [18].
[396] In *Holloway v MICMSMA* [2021] FCA 945 the Court found the Tribunal misunderstood s 500(6H) when it proceeded on the basis that it was precluded from considering *anything* which had not been provided in writing 48 hours before the hearing and declined to take evidence from the applicant's daughter, which may not necessarily have been in support of his case, and which might have been relevant to its assessment of her best interests: at [33], [45]. Contrast with *DCR19 v MICMSMA* [2021] FCAFC 229 where no error was found on the basis that the appellant was not precluded from calling any witnesses, nor was he prevented from giving oral evidence on the aspects of his claims relating to his fear of persecution and where that the Tribunal was cognisant that there was nuance as to what did or did not fall within s 500(6H): at [67], [69].
[397] *Jagroop v MIBP* (2014) 225 FCR 482 at 94.
[398] *Jagroop v MIBP* (2014) 225 FCR 482 at 102.
[399] *Uelese v MIBP* (2015) 256 CLR 203 at 102. See also *JSMJ v MICMSMA* [2022] FCA 718 at [69]. In this case the Tribunal mischaracterised the applicant's evidence about his citizenship, then finding it could not receive evidence on his citizenship because of s 500(6H) and the Court held the Tribunal's view was mistaken and it had made the same error as was made in *Uelese v MIBP* (2015) 256 CLR 203.
[400] *SZRTN v MIBP* [2014] FCA 303 at [70].
[401] s 500(6J).
[402] *Milne v MIAC* [2010] FCA 495 at [40].

nature of his or her case, 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.[403]

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.[404] 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'.[405] 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.[406] 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.[407]

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 by 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).[408]

Similar to the consideration above regarding whether the 84 day time limit applies to an applicant who subsequently departs the migration zone after the Minister's decision, two alternative interpretations appear to be open on the phrase 'the decision relates to a person in the migration zone' in s 500(6H)(b) which would determine whether the 2-day rule continues to apply to an applicant who is no longer in the migration zone. Under the first interpretation, which fixes the relevant temporal reference to the time of the Minister's decision, the 2-day rule would apply to all applicants who were in the migration zone at the time of the Minister's decision regardless of their location in or outside the migration zone thereafter. This interpretation has been applied in three previous Tribunal decisions, where each Tribunal found that the reviewable decision is the operative circumstance in which the statutory expedited review process under ss 500(6A)–(6L) is triggered and the provisions do not require the applicant's presence in order for them to continue to have full effect.[409] The second interpretation, which focuses on the use of the present tense 'relates to', would require the Tribunal to assess whether the applicant is in the migration zone at the time the 2-day rule is being applied. On this view, if the applicant departed the migration zone before a hearing, the

[403] *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).
[404] *Uelese v MIBP* (2015) 256 CLR 203 at 73, 105.
[405] *Uelese v MIBP* (2015) 256 CLR 203 at 54.
[406] *Uelese v MIBP* (2015) 256 CLR 203 at 74.
[407] *Uelese v MIBP* (2015) 256 CLR 203 at 77.
[408] *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.
[409] *Hao and MIMIA* [2005] AATA 1172 at [24]–[25]; *Jagroop and MIBP* [2015] AATA 751 at [62]–[63]; *Vaea and MICMSMA* [2021] AATA 2729 at [24]–[25] citing *Hao* and *Jagroop*.

decision which is the subject of the Tribunal's review no longer 'relates to a person in the migration zone' and therefore s 500(6H) would not apply.

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.[410]

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.[411]

Common issues

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,[412] or involvement in certain criminal activities.[413] 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.[414] 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.[415]

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).[416]

[410] *Vella v MIBP* [2015] FCAFC 53 at [61], [68].
[411] *Aporo v MIAC* [2009] FCA 79 at [81]–[86].
[412] s 501(6)(b).
[413] s 501(6)(ba).
[414] *Stevens v MIBP* [2016] FCA 1280 at [14], citing *Ruddock v Taylor* (2005) 222 CLR 612.
[415] *Ruddock v Taylor* (2005) 222 CLR 612 at 40.
[416] *Stevens v MIBP* [2016] FCA 1280 at [56].

The Court's jurisdiction to determine whether an administrative decision is affected by legal unreasonableness (as explained in *Li*[417]) 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.[418]

The term 'reasonably suspects' is explained in Direction No 90 as relating to a suspicion that is less than a certainty or a belief, but more than speculation or idle wondering. For a suspicion to be reasonable, Direction No 90 explains that it should be a suspicion that a reasonable person could hold in the particular circumstances and based on an objective consideration of relevant material.[419] While this is set out in the context of the membership/association character ground in s 501(6)(b) specifically it would seem open to have regard to this when applying the term for other character grounds, provided it was not elevated to being the statutory test.

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.[420] 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.[421] This principle applies to the substantial criminal record and immigration detention and child sex offence grounds.

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.[422] There is, however, no absolute rule that the Tribunal may not consider material which challenges the grounds upon which relevant convictions are based.[423] 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.[424] 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,[425] and its significance so far as the risk of recidivism is concerned.[426] This includes circumstances where no convictions are recorded.[427]

[417] *MIAC v Li* (2013) 249 CLR 332.
[418] *Stevens v MIBP* [2016] FCA 1280 at [109].
[419] Direction No 90, Annex A, s 2, para 3(2).
[420] *MIMA v SRT* (1999) 91 FCR 234 at 25. The judgment concerned the deportation power in s 200, but the reasoning applies equally to those character grounds which are enlivened by a conviction. The relevant authorities are reviewed in *HZCP v MIBP* [2018] FCA 1803 at [41]–[95].
[421] *MIMA v Ali* (2000) 106 FCR 313 at 41.
[422] *MIMA v Ali* (2000) 106 FCR 313 at 43.
[423] *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.
[424] *Tham v MIAC* (2012) 204 FCR 612 at 37.
[425] *MIEA v Daniele* (1981) 54 [1981] FCA 212; (1981) 61 FLR 354 at 358.
[426] *MIMA v Ali* (2000) 106 FCR 313 at 45.
[427] In *Thornton v MICMSMA* [2020] FCA 1500 the Court at first instance looked at whether it was open, in the context of considering whether to revoke a mandatory cancellation under s501CA(4), to take account of the applicant's convictions where the Court ordered that no conviction be recorded. The Court was considering s184(2) of the *Youth Justice Act* (Qld) and applied previous authority in *Hartwig v AAT* [2007] FCA 1039 which considered a similarly worded provision in s12(3)(a) of the *Penalties and Sentences Act* (Qld) and found that it was open to consider it, in terms of the overall consideration of whether there was a reason the cancellation should be

Ministerial Directions

Title	In Force		Revoked
	From	Until	
Direction No 90	15/4/21	Current	Direction No 79
Direction No 79	28/2/19	14/4/21	Direction No 65

Relevant case law and AAT decisions

AEM20 v MHA [2020] FCA 623
Ahmed v MICMA [2020] FCA 557
Afu v MHA [2018] FCA 1311
AIJ19 v MICMSMA [2019] FCA 2205
Akpata v MIMIA [2004] FCAFC 65; 139 FCR 292
Ali v MIBP [2018] FCA 650
Ali v MHA [2018] FCA 1895
Ali v MHA [2020] FCAFC 109
Anees v MIBP [2020] FCAFC 28
Aporo v MIAC [2009] FCA 79
Applicant S270/2019 v MIBP [2020] HCA 32
Arachchi v MICMSMA [2022] FCA 1311
Au v MICMSMA [2022] FCAFC 125
AXT19 v MHA [2019] FCA 1423
AXT19 v MHA [2019] FCAFC 32

revoked: at [32]. To the extend a finding of guilt, or acceptance of a plea of guilty, and the facts and circumstances of the offence were taken into account, this was not an irrelevant consideration: at [32]. Note that this is distinct from whether such convictions can be counted in determining whether the person passes the 'character test'. On appeal, in *Thornton v MICMSMA* [2022] FCAFC 23 at [36]-[37] the Court accepted that a recording of guilt for an applicant as a minor under the Youth Justice Act was not a relevant consideration and offending that falls within the provisions of the Youth Justice Act was not to be considered as a 'conviction' for the purposes of the Migration Act.

Ayoub v MIBP (2015) 231 FCR 513; [2015] FCAFC 83
BAL19 v MHA [2019] FCA 2189
BCR16 v MIBP [2017] FCAFC 96; (2017) 248 FCR 456
BDS20 v MICMSMA [2020] FCA 1176
BDS20 v MICMSMA [2021] FCAFC 91
Benrabah v MICMSMA [2020] FCAFC 4
BHL19 v MICMSMA [2020] FCAFC 94
BHL19 v Commonwealth of Australia (No 2) [2022] FCA 31
BJT21 v MHA (No 2) [2022] FCA
BNGP v MICMSMA [2022] FCA 878
BPL20 v MHA [2020] FCA 1207
BKS18 v MHA [2018] FCA 1731
BNN and MHA (Migration) [2019] AATA 27
BOE21 v MICMSMA [2022] FCAFC
Brown v MIAC [2010] FCAFC 33; 183 FCR 113
BSJ16 v MIBP [2016] FCA 1181
CCU21 v MHA [2022] FCA 28
CHVS v MICMSMA [2022] FCA 34
CKT20 v MICMSMA [2022] FCAFC 124
COT15 v MIBP (No 1) (2015) 236 FCR 148; [2015] FCAFC 190
CPJ16 v MICMSMA [2020] FCA 980
Craig v South Australia (1995) 184 CLR 163; (1995) 184 CLR 163
CTB19 v MICMSMA [2019] FCA 2128
CVN17 v MIBP [2019] FCA 13
CWGF and MHA (Migration) [2019] AATA 179

CWRG v MICMSMA [2022] FCA 1382
CZCV and MHA (Migration) [2019] AATA 91
CZCV v Commonwealth of Australia [2020] FCA 1864
DCR19 v MICMSMA [2021] FCAFC 229
Demillo v MIBP [2013] FCAFC 134
Deng v MICMSMA [2021] FCA 1456 (Summary)
Deng *v MICMSMA* [2022] FCAFC 115
DFTD v MHA [2020] FCA 859
DFW18 v MHA [2019] FCA 599
DGBK v MHA [2019] FCA 1479
Djalic v MIMA [2004] FCAFC 151
DKXY v MHA (Migration) [2018] AATA 3779
DKXY v MHA [2019] FCA 495
DLJ18 v MHA [2019] FCAFC 0236
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
Downes v MHA [2020] FCA 54
DQM18 v MHA [2020] FCAFC 110
Drake and MIEA [1979] AATA 179
Drake v MIEA (1979) 46 FLR 409
DTR21 v MICMA [2022] FCA 1237
DVE18 v MHA [2019] FCA 1389
DYY18 v MHA [2019] FCA 1901
EAO17 v MIBP [2018] FCCA 3319

EFX17 v MIBP [2019] FCAFC 230
EPL20 v MICMSMA [2021] FCAFC 173
ERY19 v MICMSMA [2020] FCA 569
EVX20 v MICMSMA [2021] FCA 1079
FAK19 v MICMSMA [2020] FCA 1124
Fehoko v MICMSMA [2022] FCA 1471
FHHM v MICMSMA [2021] FCA 775
FHHM v MICMSMA [2022] FCAFC 19
Flores v MHA [2019] FCA 1043
FRH18 v MHA [2018] FCA 1769
FUD18 v MHA [2020] FCA 48
FUD18 v MHA [2021] FCAFC 132
FYBR v MHA [2019] FCAFC 185
Gaspar v MIBP [2016] FCA 1166
GBV18 v MHA [2019] FCA 1132 (Summary)
GBV18 v MHA [2020] FCAFC 17
GCRM v MICMSMA [2020] FCA 678
Godley v MIMIA [2004] FCA 774
Goldie v MIMA [1999] FCA 1277
Goldie v MIMA (2001) 111 FCR 378; [2001] FCA 1318
Goundar v MIBP [2016] FCA 1203
Green v MIAC [2008] FCA 125
Greene v AMHA [2018] FCA 919
Guclukol v MHA [2020] FCA 61
Guruge v MICMSMA [2021] FCA 630

Guruge v MICMSMA [2021] FCAFC 233
Hao and MIMIA (Migration) [2005] AATA 1172
Hay v MHA [2018] FCAFC 149
Haneef v MIAC [2007] FCA 1273
Healey v MICMSMA [2022] FCAFC 188
Hernandez v MHA [2020] FCA 415
Hillman-McLean v Minister for Immigration (No.3) [2020] FCCA 2546
Holloway v MICMSMA [2021] FCA 945
Hong v MIMA [1999] FCA 1567
Hopkins v *MICMSMA* [2020] FCAFC 33
Howells v MIMA [2004] FCA 530; 139 FCR 580
HRZN v MICMSMA [2022] FCAFC 133
HZCP v MIBP [2018] FCA 1803
HZCP v MIBP [2019] FCAFC 202
Ikupu v MICMSMA (No.2) [2020] 2545
Irving v MILGEA [1996] FCA 663; 68 FCR 422
Jagroop and MIBP (Migration) [2015] AATA 751
Jagroop v MIBP (2016) 241 FCR 461; [2016] FCAFC 48
JSMJ v MICMSMA [2022] FCA 718
Karabay and MHA (Migration) [2019] AATA 167
KDSP v MICMSMA [2020] FCAFC 108
Kelly v MICMSMA [2022] FCA 396
Ketjan v AMIBP [2019] FCAFC 207
Khodr v MICMSMA FCA 198
Khalil v MHA [2019] FCAFC 151

Kumeroa and MHA [2018] AATA 3744
KYMM v MICMSMA [2020] FCA 1069
Law v MICMSMA [2020] FCA 1726
Lesuma v MIAC (No 2) [2007] FCA 2106
Lewis v MICMSMA (No 2) [2022] FCA 521
LGLH v MICMSMA [2021] FCA 1529
LNCB and MIBP [2015] AATA 463
Makasa v MIBP [2020] FCAFC 22
MIBP v Makasa [2021] HCA 1
Maryvan v MICMSMA [2022] FCA 977
Maxwell v MIBP [2016] FCA 47; FCR 275
MHA v Brown [2020] FCAFC 21
MHA v Buadromo [2018] FCAFC 151
MHA v Omar [2019] FCAFC 188
MHA v Stowers [2020] FCA 407
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
MICMSMA v BFW20 [2020] FCAFC 121
MICMSMA v CPJ16 [2019] FCA 2033
MICMSMA v CTB19 [2020] FCAFC 166
Acting MICMSMA v CWY20 [2021] FCAFC 195

MICMSMA v Darnia-Wilson [2022] FCAFC 28
MICMSMA v DOM19 [2022] FCAFC 21
MICMSMA v ERY19 [2021] FCAFC 133
MICMSMA v FAK19 [2021] FCAFC 153
MICMSMA v Mukiza [2022] FCAFC 89
MICMSMA v Singh [2020] FCA 1384
MICMSMA v Viane [2021] HCA 41
MICMSMA v ZRTY [2022] FCA 1529
MIBP v EFX17 [2021] HCA 9
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
MNLR v MICMSMA [2021] FCAFC 35
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

Nafady v MICMSMA [2022] FCA 1434
NBMZ v MIBP [2014] FCAFC 38; 220 FCR 1
Nepata v MHA [2019] FCA 1197
Nguyen v MICMSMA [2020] FCA 985
Nigam v MIBP (2017) 254 FCR 295; (2017) FCAFC 127
NKWF v MIBP [2018] FCA 409
Nuon v MICMSMA [2022] FCA 653
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
Pearson v MHA [2022] FCAFC 203
PGDX v MICMSMA [2021] FCA 1235
Plaintiff M1/2021 v MHA [2022] HCA 17
Port of Brisbane Corporation v Deputy Commissioner of Taxation [2004] FCA 1232; 140 FCR 375
PQSM v MHA [2019] FCA 1540
PQSM v MHA [2020] FCAFC 125
PRHR and MIBP [2017] AATA 2782
PYDZ v MICMSMA [2021] FCA 1050
PYDZ v MICMSMA [2022] FCAFC 14
Roach v MIBP [2016] FCA 750
Rokobatini v MIMA [1999] FCA 1238; 90 FCR 583
Romanov v MHA [2018] FCA 1494
RRFM v MICMSMA [2021] FCA 1273
RVJB v MICMSMA [2022] FCA 962

Ruddock v Taylor (2005) 222 CLR 612
Sabharwal v MIBP [2018] FCA 10
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