Migration and Refugee Division Commentary

Other

COMPELLING AND/OR COMPASSIONATE CIRCUMSTANCES/REASONS

Relevant case law

Overview[1]

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

- compelling or compassionate circumstances for not applying or waiving Partner visa criteria or sponsorship requirements;[2]
- compelling or compassionate reasons for absence or departure from Australia (Resident Return visas and Resolution of Status visas) (see below); and
- compelling or compassionate circumstances to waive the requirements of Public Interest Criterion (PIC) 4020 (see below).

Other references to compelling circumstances/reasons contained in the Regulations can be found in criterion 3003(d) and criterion 3004(d) of Schedule 3 (see below); PIC 4013 (see below); compelling reasons for granting a visa having regard to the degree of persecution (Refugee and Humanitarian visas) (see below); 'compelling personal reasons' to work in Australia (Visitor visas);[3] and 'compelling need to work' (Bridging visas).[4]

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

General principles

There is no specific definition of 'compelling' or 'compassionate' in either the *Migration Act 1958* (Cth) (the Act) or the Regulations. Whether a circumstance or reason is compelling and/or a compassionate ground is a question of fact and degree for the Tribunal and one which requires a subjective assessment which takes into account all of the circumstances.[5] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears (e.g. 'compelling reasons for the grant of the visa'; 'compelling reasons for the absence [from Australia]'; 'compelling circumstances affecting the nominator', etc.) and the purpose of the relevant provision. For example, in *Lui v MIBP*[6] the applicant argued that as there had been a decision that there were compelling and compassionate circumstances under reg 2.05(4) to waive condition 8503 on a business visa, this was enough to find compelling reasons for not applying the Schedule 3 criteria in

[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] 12-month rule for de facto visas (see below), compelling reasons for not applying the sch 3 criteria for onshore partner visas (see below) and 'waiver' of regs 1.20J, 1.20KA and 1.20KB sponsorship limitations (see below)
[3] cl 600.611(4)
[4] cls 050.212(6A)(c), 050.212(8)(b).
[5] *Anani v MIMAC* [2013] FCCA 1140 at [34]. While the Court's comments were made in relation to s 41(2A) and reg 2.05(4) in particular, they appear equally as applicable to where those terms appear elsewhere in the Act or Regulations. See also Whitlam J's comments in *McNamara v MIMIA* [2004] FCA 1096 at [10].
[6] *Lui v MIBP* [2015] FCA 1368.

relation to a subclass 820 visa application. The Court disagreed, commenting that the decision under reg 2.05(4) could not amount to a compelling reason for cl 820.211(2)(d)(ii) when considering whether there were compelling reasons for not applying the Schedule 3 criteria '… because the circumstances relevant to the waiver of condition 8503 was a different question from that raised by cl 820.211(2)(d).'[7]

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

- A determination as to whether a particular reason or reasons is compelling involves an evaluative judgment based on the circumstances of the case and with regard to the legislative context and any applicable policy.[8]
- To be 'compelling', the reasons in question must force or drive the decision-maker irresistibly to some end.[9] While the word 'compelling' may include reasons which are forceful, involve moral necessity or are convincing, it does not, by itself, necessarily require an involuntary element involving circumstances beyond a person's control.[10]
- It is relevant to take into account the purpose of the statutory provision in determining whether there are compelling reasons. However, circumstances which do not have a direct link to the purpose should not be excluded from consideration.[11]
- In assessing compelling and/or compassionate factors, the Tribunal should avoid applying any gloss, or using any policy interpretation, that would unduly fetter the scope of the discretion contained in the legislative expression. To do so could be to apply a higher test than the expressed words require and amount to jurisdictional error.[12]

The word 'compelling' is often, but not always, used together with the word 'compassionate' in the Regulations. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined as 'circumstances that invoke sympathy or pity',[13] where 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'. Where the words 'compelling' and 'compassionate' are used in conjunction with each other (i.e. 'compelling *and* compassionate circumstances') the requirement is cumulative in the sense that even if some of the circumstances are found to be compassionate, that will not

[7] *Lui v MIBP* [2015] FCA 1368 at [40].
[8] See *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [53]. See commentary below under Compelling Reasons for Refugee and Humanitarian Visa Grant.
[9] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31].
[10] *Paduano v MIMIA* (2005) 143 FCR 204 at [37]. Note certain regulations are worded, however, so as to specifically require such an 'involuntary element'. For example, reg 2.05(4) requires 'compelling and compassionate circumstances … over which the person had no control'. In considering reg 2.05(4), the Court in *Anani v MIMAC* [2013] FCCA 1140 found that the delegate's reference to policy to the effect that compelling circumstances generally referred to circumstances that were involuntary and characterised by necessity such that the visa holder was faced with a situation in which there was little or no alternative but to seek to remain in Australia, did not establish a misstatement or misunderstanding of the law (at [33]).
[11] *Al Souhmarani v MIBP* [2016] FCCA 2866, applying *Monakova v MIMIA* [2006] FMCA 849. In these cases, the relevant purpose was permitting the person to make an application for a partner visa in Australia.
[12] *Paduano v MIMIA* (2005) 143 FCR 204 at [37]. See also *Schaap v MIMIA* [2000] FCA 1408 which held that there is no requirement that a circumstance could not have been foreseen in reg 2.05, at [8]–[9].
[13] The ordinary meaning of 'compassionate' as found in dictionary meanings of the term, the Macquarie Dictionary (accessed 12 October 2022) defines compassionate as 'having or showing compassion' and 'compassion' as 'a feeling of sorrow or pity for the sufferings or misfortunes of another; sympathy'. This definition was considered in *Kaur v MIBP* [2018] FCCA 1614 at [24].

suffice if the circumstances are not also compelling.[14] Rather, what is required is an event or events that are far-reaching and most heavily persuasive.[15]

Issue arising in specific contexts

12-month rule for de facto visas

Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. One of the requirements is that the de facto relationship existed for a period of 12 months immediately before the date of the application, unless the applicant can establish 'compelling and compassionate circumstances for the grant of the visa'.[16]

An assessment of these circumstances is not confined to the time of application and may extend to relevant circumstances at the time of decision.[17] It should be noted that the emphasis is not on the ousting of the '12 month rule', but whether such circumstances exist for the grant of the visa sought.[18] Accordingly, the Tribunal's consideration should not cease at the question whether or not compelling and compassionate circumstances exist. The Tribunal must go on to consider, if compelling and compassionate circumstances are found to exist, whether or not those compelling and compassionate circumstances exist *for the grant of the visa*.

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

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

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

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

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

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

[18] *Antipova v MIMIA* (2006) 151 FCR 480 at [104], [106]–[107] citing *Neofotistou v MIMIA* [2005] FCA 919 at [24]–[25].

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

The policy goes on to state that the pregnancy of the sponsor or applicant at the time of application would not (of itself) amount to 'compelling and compassionate circumstances for the grant of the visa', but that there may be exceptional or unique circumstances relating to the pregnancy that may do so. It also states that the genuineness of the de facto relationship does not, in itself, constitute 'compelling and compassionate circumstances', given that reg 2.03A prescribes additional criteria that must be considered only after the applicant has satisfied the s 5CB requirements of a de facto relationship.[19]

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

In circumstances where the applicants have a dependent child of the relationship, the Federal Court has held that the child need not have been born of the relationship. The Tribunal should have regard not just to whether there is a child affected by the application, but whether compelling and compassionate circumstances arise out of the relationship between the applicant, sponsor and child.[20]

Compelling reasons for not applying Schedule 3 criteria for onshore partner visas

Certain onshore applications for partner visas are required to meet additional Schedule 3 criteria (including a requirement that the visa application be made within the period when the substantive visa was last held) unless 'the Minister is satisfied there are compelling reasons for not applying those criteria'.[21]

The Explanatory Statement[22] which accompanied the introduction of the provisions stated that the inclusion of a 'waiver'[23] provision was in recognition of the hardship that may result in circumstances where an unlawful non-citizen seeks to apply for a partner visa, but would otherwise be forced to leave Australia and apply offshore.

The Department's policy guides decision-makers to consider the circumstances that resulted in the applicant becoming unlawful and whether the circumstances are beyond the applicant's control in considering the provision.[24] However, while the circumstances highlighted in the Department's policy will often be relevant to the assessment of cl 820.211(2)(d)(ii), the Tribunal should ensure that consideration of an applicant's 'compelling reasons' are not limited to the circumstances surrounding their unlawful status. It

[19] Policy – Migration Regulations - Div 2.1/Reg 2.03A - Criteria applicable to de facto partners – About Regulation 2.03A – 'Compelling and compassionate circumstances' (re-issue date 10/10/2015).
[20] *Graham v MIMIA* [2003] FCA 1287. This was a concession by the Minister (at [8]) that the Court considered appropriate.
[21] cl 820.211(2)(d)(ii).
[22] Explanatory Statement to Statutory Rules 1996, No 75.
[23] Note that in *Singh v MHA* [2020] FCAFC 7, Derrington J commented in *obiter* at [61] that the language of 'waiver' in the Explanatory Statement is incongruous with the terms of cl 820.211(2)(d). The term 'waiver' implies a discretionary aspect to the assessment of the existence of compelling reasons; however cl 820.221(2)(d) requires the formation of a state of satisfaction.
[24] Policy - Migration Regulations - Sch2 Visa 820 - Partner - The UK-820 primary applicant – Eligibility at [8.7] (re-issue date: 19/11/2016). It identifies a list of matters decision-makers should have regard to, including any history of non-compliance by the applicant; the length of time the applicant has been unlawful; the reasons why the applicant became unlawful; the reasons why the applicant did not seek to regularise their status sooner and what steps, if any, the applicant has taken to regularise their status (other than applying for a partner visa).

is obliged to consider *all* the circumstances of the case including those arising after visa application and up to the time of decision[25] and any matters put forward by an applicant and determine on the evidence as a whole whether there are compelling reasons for not applying the Schedule 3 criteria.[26] Furthermore, it would appear to improperly limit the circumstances contemplated in cl 820.211(2)(d)(ii) to require that the circumstances are beyond the applicant's control.[27]

The Department's policy also indicates that, as a general rule, the existence of a genuine spouse or de facto relationship between the applicant and the sponsoring partner, and the hardship that may be suffered if the parties are separated and the applicant is forced to apply for a partner visa outside of Australia, should not of itself amount to compelling circumstances. There is some support for this position in the case law. For example, the Court has found no error in the Tribunal's finding that a particular circumstance, of itself, did not amount to compelling circumstances in relation to:

- a couple married for less than a year;[28]
- the existence of a long-term relationship;[29] and
- parties in a genuine relationship.[30]

However, the Tribunal should avoid reasoning which suggests that a genuine relationship (or other similar circumstance) can *never* amount to a compelling reason, as such reasoning could amount to a jurisdictional error for misapplying the test. Rather, the Tribunal should ensure that it assesses whether the circumstances as claimed by the applicant are a compelling reason.

Ultimately, whether the circumstances are 'compelling' will be a matter of fact and degree for the Tribunal to determine. In doing so, the Tribunal is required to apply 'his [or her] own mind to the issues raised', engage with the materials for him or herself, evaluate them and to give them genuine consideration. A cursory consideration will not suffice.[31] Further, the purpose

[25] *Waensila v MIBP* [2016] FCAFC 32 at [22], [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.
[26] *MZYPZ v MIAC* [2012] FCA 478 at [12]. See also *ATT20 v MIBP* [2020] FCCA 499 and *Daneshpour v MIBP* [2020] FCCA 879, where the courts applied the authority in *MZYPZ v MIAC* [2012] FCA 478 and found that the Tribunal erred by failing to consider all of the circumstances cumulatively in determining whether the matters raised in those cases amounted to compelling reasons to not apply the sch 3 criteria.
[27] See *Choi v MIBP* [2018] FCA 291 at [33] where the Court confirmed that the Tribunal should respond to arguments raised by the applicant, and made *obiter* comments implicitly warning of the risk of error for incorrectly requiring that compelling reasons must have an involuntary element.
[28] *Sidhu v MIBP* [2014] FCCA 167.
[29] *Chan v MIBP* [2017] FCCA 2883 at [14]. This finding was left undisturbed on appeal in *Chan v MIBP* [2018] FCA 1323, however the appeal was allowed in part on other grounds.
[30] *Nazir v MIBP* [2018] FCCA 861 at [29]–[30]. In *Choi v MIBP* [2018] FCA 291 at [34] the Court briefly addressed whether a genuine relationship is relevant to the waiver in cl 820.211(2)(d)(ii), stating 'since the existence of a genuine relationship is already a requirement for a partner visa, one must show additional impetus for the waiver of the relevant Sch 3 criteria'. See also *Hassan v MICMSMA* [2020] FCCA 2385 at [62]–[63] where the Court found that since one of the criteria for the grant of a partner visa is that the applicant be the spouse or de facto partner of the applicant, and the definitions of those terms in the Act require the parties' relationship to be genuine and continuing, consideration of the genuineness of the relationship is not an irrelevant consideration, but genuineness of the relationship *generally* will be insufficient to be compelling reasons. In *Wu v MICMSMA* [2021] FCCA 1091 at [32] the Court found in the context of the waiver of PIC 4020 in a partner visa refusal that satisfaction of one of the primary criteria will not, of itself, be sufficient to demonstrate that circumstances 'justifying the grant of the visa' arise. The Court in *Wu* also held at [36]–[37] that it is not open to assume the existence of a genuine spousal relationship for the purposes of the waiver assessment without giving full and proper consideration to the factors under reg 1.15A(3) as doing so may expose relevant compelling or compassionate reasons (discussed below). This reasoning could be applied to consideration of whether there are compelling reasons for not applying Sch 3 criteria in onshore partner visa applications, although this issue has not been the subject of judicial consideration in the context of cl 820.211(2)(d)(ii).
[31] *MZYPZ v MIAC* [2012] FCA 478 at [19]. The Court held that the process required by cl 820.211(2)(d)(ii) entails a duty to consider whether compelling reasons exist. It held that whether it was safe for the appellant to return to Sri Lanka, in the

of the provision is a relevant consideration for the Tribunal to take into account.[32] In the context of cl 820.211(2)(d)(ii), that purpose is to deal with cases where there are compelling reasons for not putting particular applicants to the hardship of having to leave Australia to apply for a partner visa.[33]

The Tribunal is not obliged to apply international treaty obligations, such as the United Nations Convention on the Rights of the Child, in ascertaining whether 'compelling reasons' exist for the purposes of cl 820.211(2)(d)(ii).[34]

Schedule 3 – Timing of Compelling Circumstances

In considering whether there are compelling reasons for not applying Schedule 3 requirements, the Tribunal is required to have regard to circumstances that existed at the time of application and circumstances that arose after the time of visa application.[35]

In *Waensila v MIBP*[36] the Full Federal Court held that Tribunal erred in failing to take into account events or circumstances that emerged after the date of the visa application in considering whether there were compelling reasons for not applying Schedule 3 criteria. The Court observed that the purpose of the provision is to provide greater flexibility to respond to compelling circumstances[37] and the text of the relevant provisions in cl 820.211(2)(d)(ii) do not contain any clear words that have the effect of confining that consideration to events which only existed at the time of the visa application.[38]

However the compelling reasons must exist at the time of decision. Future intentions are not relevant considerations in determining whether there are compelling reasons.[39]

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

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

Regulation 1.20J - Limitation on serial sponsorship

Regulation 1.20J is concerned with preventing serial sponsorship. It allows sponsorship approval in circumstances where a sponsor has successfully sponsored more than one

circumstances where there was some probative material indicating that it was unsafe for him to return, was an issue capable of grounding a finding that compelling reasons existed. The Court found that, by rejecting this material on the unstated assumption that because his previous RRT application had been rejected that the material before the Tribunal must also be rejected, the Tribunal failed to engage with this material and give it genuine consideration.

[32] *Al Souhmarani v MIBP* [2016] FCCA 2866 at [26]. In considering the principles in *Monakova v MIMA* [2006] FMCA 849, the Court held that to the extent that *Monakova* might be read as identifying a principle that the Tribunal should disregard circumstances of hardship unless a direct link is manifested of the applicant suffering hardship if required to leave Australia, that would be going beyond the statutory provision and might constitute a misconstruction of the relevant kind (at [32]).

[33] *Al Souhmarani v MIBP* [2016] FCCA 2866 at [18], citing Griffiths J in *Waensila v MIBP* [2016] FCFAC 32.

[34] *Singh v MHA* [2020] FCAFC 7 at [62]. The Court applied the principles in *Kaur v MIBP* [2017] FCAFC 184 (where the Court found that the Tribunal is not bound to apply international treaty obligations in the context of the PIC 4020 waiver).

[35] *Waensila v MIBP* [2016] FCAFC 32.

[36] *Waensila v MIBP* [2016] FCAFC 32 per Robertson J at [22] and Griffiths J at [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.

[37] *Waensila v MIBP* [2016] FCAFC 32 at [2], [18], [56].

[38] *Waensila v MIBP* [2016] FCAFC 32 at [2], [16], [58].

[39] In *Lan v MIBP* [2018] FCCA 1170, the Court rejected an argument that an intended future pregnancy qualified as a compelling reason in the circumstances of that case.

partner, only 'if the Minister is satisfied that there are compelling circumstances affecting the sponsor'.[40] In this provision the compelling circumstances must specifically affect the *sponsor*. For further detail on the nature of the sponsorship limitations, see: Limitation on Sponsorships.

The meaning of 'compelling circumstances' in the context of reg 1.20J was considered by the Full Federal Court in *Babicci v MIMIA*.[41] The Court held that 'on any view of the meaning of [compelling], the circumstances must be so powerful that they lead the decision-maker to make a positive finding that the [provision] should be waived'.[42]

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

- The genuineness of the relationship between the applicant and sponsor could not, in and of itself, constitute a compelling circumstance affecting a sponsor. The Court commented that, were it otherwise, every applicant who demonstrated that they were a spouse for the purposes of cl 820.211(2)(a) would fall within the exception in reg 1.20J(2).[43]
- An applicant's entitlement to fast-track the process of obtaining a Partner (Residence) visa on the basis of being in a partner relationship for three years or longer within the definition of 'long-term partner relationship' in reg 1.03, cannot amount to a compelling circumstance affecting the sponsor for reg 1.20J(2). The definition of long-term partner relationship in reg 1.03 has no statutory relevance or application for the purposes of reg 1.20J(2).[44]

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

Departmental policy provides the following examples of compelling circumstances affecting the interests of the sponsor:

- the previous partner has died;
- the previous partner has abandoned the sponsor, and there are children dependent on the sponsor requiring care and support;
- the new relationship is long-standing; or
- there are dependent children of the new relationship.[45]

[40] reg 1.20J(2).
[41] *Babicci v MIMIA* (2005) 141 FCR 285.
[42] *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The Court found no error in the approach taken by the Tribunal in considering whether each of the circumstances, alone or together, 'compelled' the exercise of the discretion or that it was 'forced or driven to waive the prohibition'. Contrast *Babicci v MIMIA* [2004] FCA 1645 at [16]–[17].
[43] *Nagaki v MIBP* [2016] FCCA 1070 at [58].
[44] *Nagaki v MIBP* [2016] FCCA 1070 at [69].
[45] Policy - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing reg 1.20J at [7.2] (re-issue date: 18/11/2016). The examples mirror those provided in the Explanatory Statement to SR 1996 No 211.

The policy also identifies the following as relevant when considering waiving the bar on repeat sponsorship:

- the nature of the hardship/detriment that would be suffered (by the sponsor) if the sponsorship were not approved; and
- the extent and importance of the ties the sponsor has to Australia, and the consequent hardship/detriment that would be suffered if the sponsorship were not approved and the sponsor were to feel compelled to leave Australia to maintain their relationship with the applicant.[46]

These examples are not exhaustive and the Tribunal should consider the individual circumstances of each case, taking into account that the purpose of the sponsorship limitation is to prevent abuse of the partner migration provisions.

Regulation 1.20KA - Limitation on 'split applications'

Regulation 1.20KA prevents persons who have been granted contributory parent or aged contributory parent visas from sponsoring a pre-existing spouse or de facto partner for a partner or prospective marriage visa for 5 years after the day when the person was granted the contributory parent visa.[47]

However, the sponsorship may be approved:

- if the visa applicant had *compelling reasons*, other than his or her financial circumstances, for not applying for a contributory parent visa at the same time as their spouse or de facto partner; or
- if the visa applicant applied for a contributory parent visa at the same time as the sponsor and withdrew the application before it was granted, the visa applicant had *compelling reasons*, other than his or her financial circumstances, for withdrawing the application for a contributory parent visa.

The purpose of this regulation is to prevent the practice known as 'split applications'. That is, where one member of a married or de facto couple applies for a contributory parent visa claiming that their partner is not migrating, and once he or she is granted a permanent contributory parent visa, he or she sponsors their partner for a partner or prospective marriage visa. The effect of this practice is that the person who migrates on a partner or prospective marriage visa avoids paying the higher visa application charge for a contributory parent visa.[48]

The Explanatory Statement and Departmental policy set out that *compelling reasons* may include where the visa applicant was unable to migrate with the proposed sponsor due to family illness or other obligations, other than financially-related obligations.[49]

[46] Policy - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing reg 1.20J at [7.2] (re-issue date: 18/11/2016).
[47] Introduced by *Migration Legislation Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 116), sch 2. It applies to a partner visa application made on or after 1 July 2009.
[48] Explanatory Statement to SLI 2009, No 116, sch 2.
[49] Explanatory Statement to SLI 2009, No 116, sch 2; Policy - Migration Regulations - Divisions - Div 1.4B - Limitation on Certain Sponsorships under Division 1.4 - Sponsorship Limitations - Partner (Provisional/Temporary) and Prospective Marriage Visas at [12.2] (re-issue date: 18/11/2016).

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

To achieve the stated purpose, the wording of the regulation specifically excludes the possibility of waiving the limitation on the basis that the applicant's financial circumstances presented a compelling reason not to apply or to withdraw at the relevant time. Consideration of the applicant's inability to pay the fee may therefore be construed as an irrelevant consideration when considering whether to waive the limitation.[50]

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

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

Regulation 1.20KB prevents persons[51] who have been charged or convicted of a child sex offence or similar serious offences from sponsoring a spouse or child[52] where any of the applicants are under 18 years at the time of the decision on the application for approval of the sponsorship.[53] The limitation applies to visa applications made on or after 27 March 2010.

The sponsorship limitation does not apply where:

- none of the applicants are under 18 years at the time of the decision for approval of the sponsorship; or
- the sponsor or their spouse or de facto partner was charged with a registrable offence, and that charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; or
- the sponsor or their spouse or de facto partner was convicted of a registrable offence, and the conviction has been quashed or otherwise set aside.[54]

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

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, and they have not been subsequently charged with a registrable

[50] While having regard to the sponsor's circumstances has not been specifically excluded, it will depend on the facts of the case whether the applicant and the spouse had intertwined their finances to the extent that regard to the sponsor's finances is inseparable from regard to the applicant's finances.
[51] For child visa applications only, this includes the sponsor or the sponsor's spouse or de facto partner.
[52] Specifically reg 1.20KB applies to sponsorships for the purposes of Child (Migrant) (Class AH), Child (Residence) (Class BT), Extended Eligibility (Temporary) (Class TK), Partner (Temporary) (Class UK), Prospective Marriage (Temporary) (Class TO) visas, and Partner (Provisional) (Class UF) visas.
[53] Introduced by SLI 2009, No 116, sch 1.
[54] regs 1.20KB(2), (7)–(8).

offence, and there are *compelling circumstances* affecting the sponsor or the applicant;[55] or

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, has subsequently been charged with a registrable offence but such charge has been withdrawn, dismissed or otherwise disposed of without the recording of the conviction, and there are *compelling circumstances* affecting the sponsor or the applicant.[56]

'Compelling circumstances' are not defined for the purpose of reg 1.20KB. The Explanatory Statement accompanying the Regulations introducing the provision does not provide any situations or examples which may be considered as compelling circumstances. Similarly, the Department's policy indicates that 'compelling' should be given its ordinary dictionary meaning, and does not provide examples or guidance, other than that it is for the sponsor or applicant to demonstrate compelling circumstances.[57] One important factor to note is that the compelling circumstances may affect the sponsor *or* the applicant for the visa. Other than this, the discussion above under General principles may assist.

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

Compelling reasons for absence from Australia for resident return visas

Eligibility for a Subclass 155 Resident Return visa[58] is tied to specific criteria requiring an applicant to not have been absent for a continuous period of, and/or periods that total, more than 5 years since the applicant last departed Australia, unless there are compelling reasons for that absence.[59]

In *Paduano v MIMIA*[60] the Court held that the expression 'compelling reasons for the absence' refers to the applicant's absence and it is the *applicant* who must have been 'compelled' by the reasons for his absence.[61] It is for the Tribunal, therefore, to make a judgment as to whether the reasons for the absence are forceful (and therefore convincing) by reference to some standard of reasonableness such as a reasonable person in the same circumstances as the applicant (as opposed to the Tribunal having to 'be compelled' by the compelling reasons).[62]

[55] regs 1.20KB(4), (9). Note the wording of reg 1.20KB(9)(b) which appears to refer to *the sponsor* having completed the sentence, rather than the spouse or de facto partner of the sponsor.
[56] regs 1.20KB(5), (10).
[57] See Policy – Migration Regulations - Div 1.4 - Form 40 sponsorship – Protection of children – Sponsors of concern – Assessing Sponsorship Applications against reg 1.20KB - Approving sponsorships under reg 1.20KB waiver provisions, at [29] (re-issue date: 9/5/2014).
[58] Subclass 155 (Five Year Resident Return) is part of the Return (Residence) Visa Class (Class BB). See item 1128, sch 1 to the Regulations.
[59] cls 155.212(3)(a) and (b) for applicants outside of Australia; cl 155.212(3A)(b) for applicants in Australia. For further detail about the applicable criteria, see: Resident Return Visas.
[60] *Paduano v MIMIA* (2005) 143 FCR 204.
[61] *Paduano v MIMIA* (2005) 143 FCR 204.
[62] *Paduano v MIMIA* (2005) 143 FCR 204 at [41]. See also *Cirillo v MIBP* [2015] FCCA 2137. In *Cirillo*, the applicant claimed that he was compelled to remain in Italy for 17 years due to strong family and cultural ties and various events involving close family members. The Court held that the Tribunal erred by finding that *it* was not satisfied the reasons for the applicant's absence from Australia were compelling, when it was *the applicant* who must be compelled. Further, the Tribunal erred in not applying the relevant standard of reasonableness as set out in *Paduano*.

In considering the meaning of 'compelling', the Court in *Paduano* held that it should not be read narrowly so as to exclude forceful reasons which raise moral necessity.[63] Departmental policy provides the below examples of compelling reasons for any continuous or cumulative absence of 5 years or more since last departing Australia. However, care must be taken in following these examples, as there is nothing in the terms of the legislation which confines 'compelling reasons' to reasons incorporating an involuntary element, involving circumstances beyond the applicant's control.

The examples under policy are:

- severe illness or death of an overseas family member;
- work or study commitments by the applicant or their partner that are of a professional nature, in circumstances where the acquired experience results in a benefit to Australia;
- the applicant is living overseas in an ongoing relationship with an Australian citizen partner;
- the applicant or the applicant's accompanying family members have been receiving complex or lengthy medical treatment preventing travel;
- the applicant has been involved in legal proceedings such as sale of property, custody, or contractual obligations and the timing was beyond the applicant's control;
- the applicant has been caught up in a natural disaster, political uprising or other similar event preventing them from travel; or
- the applicant can demonstrate they have been waiting for a significant personal event to occur that has prevented them from relocating to or returning to Australia.[64]

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

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

- For an applicant who has not, on or after 1 September 1994, been the holder of a substantive visa and, on 31 August 1994, was either an illegal entrant or the holder of an entry permit that was not valid beyond 31 August 1994, the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[65]
- For an applicant who ceased to hold a substantive or criminal justice visa on or after 1 September 1994, or who entered Australia unlawfully on or after 1 September 1994

[63] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[64] Policy – Migration Regulations - Sch2 RRV - Resident return visas - BB-155 – Five Year Resident Return – Absence for more than 5 years – compelling reasons for absence (re-issue date: 19/11/2016). In respect of this last dot point the policy goes further and suggests that the period of time for any such event would have to be reasonable in its context. For example, a 12-month delay while waiting for a dependent child to complete their schooling or a tertiary qualification is likely to be a decision that a reasonable person, facing the same set of circumstances would make, however waiting to relocate to Australia for several years would not generally be considered to be a decision a reasonable person would make.
[65] Criterion 3003(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions.

and had not subsequently been granted a substantive visa, then the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[66]

'Compelling reasons' are not defined for these purposes. However the general principles from the case law that has considered the meaning of the term 'compelling' (see above) would appear equally applicable in considering these criteria. Departmental policy states that 'compelling' in this context should be given its normal dictionary definition and then refers to that definition as 'brought about by moral necessity'.[67] However, restricting it to such situations which involve 'moral necessity' arguably imposes a more restrictive test than the ordinary meaning of 'compelling' otherwise does. Accordingly, the Tribunal should consider reasons which are forceful, are convincing, as well as those reasons which involve moral necessity in determining if they are compelling.

The Department's policy also notes that compelling reasons may stem from compassionate factors, the applicant's circumstances or those of another and circumstances beyond the applicant's control (such as serious accident or illness depending upon the circumstances).[68] However, again, the Tribunal should be mindful that the word 'compelling' does not, by itself, necessarily require any of these factors (such as an involuntary element involving circumstances beyond a person's control).[69] The policy suggests that all the circumstances of the case, individually and cumulatively, should be considered.

Once compelling reasons have been found to exist, there must be a link between their existence and the granting of the visa insofar as there must be 'compelling reasons for granting the visa'. In considering this, the Department's policy recommends that considering the likely consequences of not granting the visa might assist in this process.[70]

Waiver of Public Interest Criterion 4020

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

- compelling circumstances that affect the interests of Australia;[71] or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen[72]

that justify the granting of the visa. However, the waiver provisions do not apply to the identity requirements in PIC 4020(2A) and PIC 4020(2B).[73]

[66] Criterion 3004(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions. In *Su v MIMIA* [2005] FMCA 107, the Court rejected an argument that the Tribunal should have considered and explored the difficult recent birth of the applicants' son as a 'compelling circumstance' for cl 3004(d) in circumstances where the Tribunal had found the applicant did not satisfy cl 3004(c) relating to factors beyond the applicant's control.
[67] Policy - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).
[68] Policy - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).
[69] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[70] Policy - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).
[71] cl 4020(4)(a).
[72] cl 4020(4)(b).
[73] These provisions were inserted by *Migration Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI2014, No 32), sch 1, item 1.

The waiver is a two-staged inquiry:

1) first, the decision-maker needs to consider whether there are compelling circumstances within the meaning of cl 4020(4)(a) or compassionate or compelling circumstances within the meaning of cl 4020(4)(b), and, if so,

2) the decision-maker must then consider whether to exercise the discretion to waive the requirements of PIC 4020, having regard to those circumstances.[74]

Note, that when applying this inquiry, it will be an error for the Tribunal to consider the bogus and/or the misleading information during the first step of the process, rather than the second.[75]

The following principles extracted from case law provides guidance as to the operation of the waiver and how the phrases 'compelling' and 'compassionate' operate in the PIC 4020 context:

- General case law on the meaning of compelling circumstances might assist decision-making. For example, in *Singh v MIBP*, the Court commented that 'compelling circumstances' are limited to those which have a special or strong persuasive force,[76] and relied on earlier authorities referring to circumstances 'evoking interest, attention … in a powerfully irresistible way', that 'must be so powerful',[77] or force or drive the decision-maker 'irresistibly' to be satisfied.[78]

- When considering compassionate or compelling circumstances, the Tribunal should avoid adopting a comparative approach, that is, when considering circumstances of Australian citizens, Australian permanent residents or an eligible New Zealand citizens not comparing the circumstances to others in similar migration situations.[79] Further, the Tribunal should avoid imposing any requirement that the circumstances involve 'significant hardship' or 'irreparable harm and continuing hardship' when considering whether those circumstances are compelling or compassionate.[80]

- The Tribunal is not required to set out any authorities on the meaning of compelling, nor spell out its understanding of the word, but it must engage in an active intellectual process in relation to the matters put forward by the applicant as justifying waiver,

[74] *Kaur v MIBP* [2017] FCAFC 184 at [26].
[75] See *Gjecaj v MICMSMA* [2022] FedCFamC2G 936 at [56]. Although the judgment was focused on compassionate circumstances because that was the claim being advanced by the applicant, it appears that the Court's ratio would equally apply to the consideration of compelling circumstances.
[76] *Singh v MIBP* [2016] FCA 156 at [20].
[77] *Singh v MIBP* [2016] FCA 156 at [21]–[22], citing *Babicci v MIMIA* [2004] FCA 1645 and *Babicci v MIMIA* (2005) 141 FCR 285.
[78] *Singh v MIBP* [2016] FCA 156 at [23]–[24], citing *Plaintiff M64/2015 v MIBP* [2015] HCA 50.
[79] *Gjecaj v MICMSMA* [2022] FedCFamC2G 936 at [69] and [75]. The Tribunal had found the compassionate circumstances which affected the visa applicant's parents (who were Australian permanent residents) would not cause 'significant hardship over and above that caused to others caught in the same immigration circumstances'. The Court found error in this comparative approach as it was unnecessary to the determination of whether there were compassionate circumstances. Although the Court was focused on compassionate circumstances because that was the claim being advanced by the applicant, the Court's ratio would seem to be equally apply to the consideration of compelling circumstances.
[80] *Gjecaj v* MICMSMA [2022] FedCFamC2G 936 at [69] and [75]. Although the judgment was focused on compassionate circumstances because that was the claim being advanced by the applicant, it appears that the Court's ratio would equally apply to the consideration of compelling circumstances.

and weigh those matters in determining whether they reach the standard or level of compelling circumstances.[81]

- The term 'interests' in cl 4020(4)(b) refers to any present or future state of affairs that is or may be of benefit or to the advantage of the relevant person, and that 'circumstances that affect' requires a comparison between the position the relevant person will be in if the visa applicant is granted a visa, with the position the relevant person will be in if the visa applicant is not granted a visa.[82]
- The Tribunal is not obliged to apply international treaty obligations, such as the United Nations Convention on the Rights of the Child.[83]

In the following cases, the Court found no error in the Tribunal's reasoning addressing the following circumstances/claims:

- *The effect of not granting a visa on an employer*. In *Singh v MIBP*, the review applicant had provided a letter of support from the director of a business, referring to damage to the company that may result from not being able to employ him. The Court noted that the evidence did not address disadvantage to the director personally, or establish that he would suffer any detriment if the appellant were not employed, and the company was not an Australian citizen and found it was open to the Tribunal to conclude that the consequences to the company were speculative and not compelling.[84]
- *Separation from family members.* In *Vyas v MIMAC*, the Court found no error in the Tribunal's finding that, whilst it would be distressing for the applicant and her husband to be separated from their family members in Australia who would be saddened by their departure, it would not have such a 'deleterious' effect such that family members would 'totally break down'.[85]
- *Being a victim of fraud/worker exploitation.* In *Mudiyanselage v MIAC,* the Court found no error in the Tribunal's acceptance of the applicant's claims to have worked unpaid for over a year and to have been a victim of fraud and noted her position as a graphic pre-press tradesperson at Australia Post but, having regard to the ordinary meaning of the terms 'compassionate' and 'compelling' and relevant Departmental policy, found these factors did not constitute compelling and compassionate

[81] *Bi v MIBP* [2017] FCCA 2652 at [37], distinguishing *Sharma v MIBP* [2015] FCCA 2669, where the Court held the Tribunal had failed to actively engage with the claimed circumstances and give reasons for its failure to be satisfied that PIC 4020(1) should be waived. The Court did not consider whether *Sharma* was wrongly decided.
[82] *Singh v MIBP* [2017] FCCA 2461 at [29]–[32]. However, note that the reasoning in the judgment that the decision-maker is required to waive PIC 4020 once satisfied there were compelling or compassionate circumstances is not correct in light of the two staged inquiry in *Kaur v MIBP* [2017] FCAFC 184.
[83] *Kaur v MIBP* [2017] FCAFC 184 at [22].
[84] *Singh v MIBP* [2016] FCA 156. See also *Vyas v MIMAC* [2013] FCCA 1226, where the Court found no error in the Tribunal's findings that, whilst accepting that it would be disadvantageous to an Australian business to lose the applicant as an employee, it was not a compelling or compassionate circumstance as the cost to the business of recruiting, training and replacing a staff member was an ordinary aspect of the operation of almost all business which occurred on an ongoing basis.
[85] *Vyas v MIMAC* [2013] FCCA 1226. See also *Sharma v MIBP* [2016] FCCA 961. In that case, an elderly Australian couple had provided a statement regarding support received from the applicant that they would have to endure physical and emotional hardship if the applicant were to leave Australia. The Tribunal accepted the bond existed but found that the circumstances did not amount to compassionate or compelling circumstances, referring among other things to the judgment in *Vyas* and the circumstances identified in the Explanatory Statement to SLI 2011, No 13, which introduced PIC 4020. The Court found no error in the Tribunal's consideration of 'compassionate or compelling circumstances' in PIC 4020(4)(b) and found the Tribunal was entitled to have regard to the matters it did (at [53]).

circumstances that affected the interests of Australia or of an Australian citizen, permanent resident or eligible New Zealand citizen.[86]

- *Meeting a primary criterion for the grant of the visa*. In *Ibrahim v MIBP*, the Tribunal accepted that the review applicant wanted the visa applicants to join him in Australia where he could care for them, however this reason did not go beyond the requirements for the grant of the visa, which required that the visa applicants be the orphan relatives of the review applicant. The Court found no error in the Tribunal's finding that meeting one of the primary criteria for the grant of the visa will not, of itself, be sufficient to demonstrate compelling or compassionate circumstances that justify waiver of PIC 4020(1).[87] The Tribunal should, however, be wary of making statements that a certain circumstance could never be a compelling or compassionate circumstance and satisfaction of a primary criterion should not be ignored if it might be relevant to an assessment under PIC 4020(4).[88] For relevance of a spousal relationship in a partner visa refusal in particular, see discussion below.

Further guidance on circumstances that may amount to compelling or compassionate circumstances may be found in Department policy and in the Explanatory Statement to SLI 2011, No 13. Although not binding, the Tribunal may have regard to them.[89] Additional information on the Departmental Policy and the Explanatory Statement can be found in 'PIC 4020 and bogus documents/false or misleading information'.

Ultimately, whether a circumstance or reason is compelling and/or compassionate is a question of fact and degree for the Tribunal.[90] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in PIC 4020(4) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen. The Tribunal is obliged to consider all the circumstances of the case including *any* matters put forward by an applicant, engage in an active intellectual process in relation to these matters, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances. If satisfied that there are compelling and/or compassionate circumstances, only then can the Tribunal consider those circumstances in the application of the discretion to waive the requirements of PIC 4020(1) and (2) as the case may be.

[86] *Mudiyanselage v MIAC* [2012] FMCA 887 at [38]–[50], upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court on appeal did not consider exceptional circumstances in the waiver provisions.
[87] *Ibrahim v MIBP* [2017] FCCA 882 at [86], [98].
[88] In *Singh v MIBP* [2017] FCCA 2461 at [56] the Court found the Tribunal had erred by incorrectly construing PIC 4020(4)(b) as excluding from the notion of compassionate or compelling circumstances the emotional bonds and support the partner visa applicant and sponsor had for each other because it regarded these matters to be the hallmarks or usual incidents of a genuine partner relationship. In *Wu v MICMSMA* [2021] FCCA 1091 at [34], the Court held it is not open to assume the existence of a genuine relationship for the waiver assessment in relation to a partner visa application without first considering the factors in reg 1.15A(3), which may expose relevant compelling or compassionate circumstances (discussed below).
[89] *Mudiyanselage v MIAC* [2012] FMCA 887 at [43] where the Court noted it was open for the Tribunal to be guided by Department policy. This was upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court in this case did not have regard to the question of exceptional circumstances in the waiver provisions. See Policy - Migration Regulations - Schedules – [Sch4 4020] – Public Interest Criterion 4020 - The integrity PIC – 6.10 Discretion to Waive - PIC 4020(4) (re-issue date: 01/01/2018).
[90] See e.g. the comments in *Singh v MIBP* [2016] FCA 156 at [18] to the effect that the PIC 4020 waiver depends on the satisfaction of the Tribunal and the assessment of the facts is a matter for the Tribunal.

Waiver of PIC 4020 in partner visa refusals

Although numerous authorities have confirmed that compelling or compassionate circumstances to waive PIC 4020 generally requires something more than meeting criteria for the visa (discussed above), in relation to partner visa refusals in particular, the current authority suggests that the requirements in reg 1.15A(3) or 1.09A(3) must be considered where a compelling or compassionate circumstances is claimed to involve a genuine spousal relationship. In *Wu v MICMSMA,* where the applicant claimed that their Australian citizen sponsor would suffer financial and emotional hardship if the applicant was not granted the visa, the Court held that the 'overarching obligation' in a partner visa application to consider all of the circumstances of a relationship meant that it was not open to assess PIC 4020 on an assumption there was a genuine spousal relationship without considering each factor in reg 1.15A(3).[91] While it is not to say that the existence of a genuine spousal relationship is, in and of itself, a compelling or compassionate circumstance, it was the full and proper consideration of the factors in reg 1.15A(3) that might expose relevant compassionate or compelling circumstances for the purposes of PIC 4020(4)(b).[92] Having regard to the matters in reg 1.15A(3) or 1.09A(3) where there is a claimed genuine relationship will avoid overlooking a particular aspect of the relationship which could give rise to compelling or compassionate circumstances that may not be exposed if a relationship is only assumed to exist.

Compelling Reasons for Refugee and Humanitarian Visa Grant

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

In *Plaintiff M64/2015 v MIBP*,[93] the High Court was asked to consider the proper construction and operation of cl 202.222(2) and in particular, the role of the consideration of subparagraphs 202.222(a)–(d). Specifically, cl 202.222 requires that 'there are compelling reasons for giving special consideration to granting' the visa having regard to the four factors in cls 202.222(2)(a)–(d). The majority of the Court drew a distinction between the nature of the decision entrusted to the Minister as not being a 'determination' but, rather, 'satisfaction'. They held that state of satisfaction must be informed by the factors mentioned in paras (a) to (d), to which the Minister must have regard in making the single evaluation required in order to grant a Subclass 202 visa.[94] However, the state of mind required must be one reached by reference to 'reasons' that are 'compelling'. In outlining what this meant, the Court held that those reasons must 'force or drive the decision-maker' 'irresistibly' to be satisfied that 'special consideration' should be given to granting the particular application.[95]

[91] *Wu v MICMSMA* [2021] FCCA 1091 at [36].
[92] *Wu v MICMSMA* [2021] FCCA 1091 at [38]. The Tribunal found there were compassionate circumstances but they were insufficient to justify the grant of the visa and did not exercise the waiver in PIC 4020(4). In reaching its conclusion, the Tribunal acknowledged it had not assessed the nature of the parties' relationship in detail, noted there was information that cast doubt on the genuineness of the relationship but accepted there may be a genuine relationship for the purposes of considering if there were compassionate or compelling circumstances.
[93] *Plaintiff M64/2015 v MIBP* [2015] HCA 50.
[94] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [30].
[95] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31], citing *Babicci v MIMIA* (2005) 141 FCR 285 at 289 [21] ('force or drive the decision-maker') and *Paduano v MIMIA* (2005) 143 FCR 204 at 211 [32], 213 [37] ('irresistibly').

Public Interest Criterion 4013

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

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

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

There has been limited consideration of compelling circumstances affecting the interests of Australia in this context.[96] For a discussion of this provision, see: Public Interest Criterion 4013.

Other references to 'compelling and/or compassionate'

Most consideration of 'compelling and/or compassionate' circumstances is based on express provisions in the Act or the Regulations. However, there are circumstances where these considerations are implied in the Regulations, for example, in the proper approach to the exercise of some discretions. These include the discretion to waive the health criterion[97] (implied by case law), and the discretion to cancel a visa (implied by reference to case law and policy).[98]

Public Interest Criterion 4007 – health waiver

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

The Full Federal Court has held that 'over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play.'[99]

The Department's policy reflects that in assessing whether there is a basis to waive the 4007 health criteria, decision-makers should take into account any compelling and compassionate circumstances of the applicants, for example, close family links to Australia and/or reasons

[96] See *Anupama v MIAC* [2009] FMCA 817 at [31]. The Court held that the exercise of the discretion miscarried because the Tribunal asked itself the wrong question. In the circumstances of that case, the applicant had claimed to the Tribunal that she had been incorrectly advised by the Department, and the Tribunal's findings were open to be interpreted as an acceptance of that account.
[97] PIC 4007(2)(b)(i)–(ii).
[98] For further detail on considerations relevant to the discretion to cancel a visa see: Cancellation under s 109 and Cancellation under s 116.
[99] *Bui v MIMA* (1999) 85 FCR 134 at [47]: 'The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is 'undue' may import consideration of compassionate or other circumstances. It may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person will make some significant calls upon health or community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandates such an outcome. But over and above the consideration of the likelihood that the cost or prejudice will be "undue" there is the discretionary element of the Ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play.'

why the family would find it difficult to return to their home country.[100] For further information in relation to the health waiver, see: Health Criteria.

Cancellation of visas under s 116

The discretion to cancel a visa under s 116 of the Act arises if certain grounds for cancellation are found to exist. In some cases the grounds incorporate legislative considerations of 'compelling reasons', for example, s 116(1)(fa) permits the cancellation of a student visa if the visa holder is not or is likely not to be, a genuine student or is engaging in conduct not contemplated by the visa and the regulations provide that the decision-maker, in considering whether this ground exists, may have regard to matters including where the education-provider deferred enrolment because of compelling or compassionate circumstances, and the Minister is satisfied those circumstances have ceased to exist.[101]

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

Relevant case law

Judgment	Judgment summary
Al Souhmarani v MIBP [2016] FCCA 2866	Summary
Anani v MIMAC [2013] FCCA 1140	
Antipova v MIMIA [2006] FCA 584; (2006) 151 FCR 480	Summary
Anupama v MIAC [2009] FMCA 817	Summary
ATT20 v MIBP [2020] FCCA 499	Summary
Babicci v MIMIA [2005] FCAFC 77; (2005) 141 FCR 285	Summary
Babicci v MIMIA [2004] FCA 1645	Summary
Bi v MIBP [2017] FCCA 2652	
Boakye-Danquah v MIMIA [2002] FCA 438; (2002) 116 FCR 557	Summary

[100] Policy – Migration Regulations - Sch4/4005-4007 – The health requirement Waivers – Assessing PIC 4007 waivers for non-humanitarian visas – Compassionate and Compelling circumstances(re-issue date 26/9/2021).
[101] s 116(1A); regs 2.43(1C)–(1D).

Bojanovic v MIMIA [2002] FCA 113; (2002) 124 FCR 416	Summary
Bozanich v MIMIA [2002] FCA 81	Summary
Bui v MIMA [1999] FCA 118; (1999) 85 FCR 134	
Chan v MIBP [2015] FCCA 47	Summary
Chan v MIBP [2017] FCCA 2893	
Chan v MIBP [2018] FCA 1323	Summary
Choi v MIBP [2018] FCA 291	Summary
Cirillo v MIBP [2015] FCCA 2137	Summary
Daneshpour v MIBP [2020] FCCA 879	Summary
MIMA v Dunne [1999] FCA 204; (1999) 94 FCR 72	
Gayudan v MIAC [2010] FMCA 233	
Gjecaj v MICMSMA [2022] FedCFamC2G 936	Summary
Graham v MIMIA [2003] FCA 1287	Summary
Hamoud v MIBP [2015] FCCA 1087	
Hassan v MICMSMA [2020] FCCA 2385	Summary
Ho v MIMIA [2005] FMCA 1104	
Ibrahim v MIBP [2017] FCCA 882	Summary
Kaur v MIBP [2017] FCAFC 184	Summary
Kaur v MIBP [2018] FCCA 1614	Summary
Khanfer v MIMIA [2003] FMCA 238	Summary
Lan v MIBP [2018] FCCA 1170	
Liu v MIAC [2010] FMCA 60	Summary
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Plaintiff M64/2015 v MIBP [2015] HCA 50	
Mala v MIMIA [2005] FMCA 556; (2005) 189 FLR 341	

Mao v MIMIA [2005] FMCA 89	
McNamara v MIMIA [2004] FCA 1096	
Monakova v MIMIA [2006] FMCA 849	Summary
Mudiyanselage v MIAC [2012] FMCA 887	Summary
Mudiyanselage v MIAC [2013] FCA 266; (2013) 211 FCR 27	Summary
MZYPZ v MIAC [2012] FCA 478	Summary
MZYPZ v MIAC [2011] FMCA 531	Summary
Nagaki v MIBP [2016] FCCA 1070	Summary
Nazir v MIBP [2018] FCCA 861	Summary
Neofotistou v MIMIA [2005] FCA 919; (2005) 144 FCR 478	Summary
Paduano v MIMIA [2005] FCA 211; (2005) 143 FCR 204	Summary
Phan v MIAC [2007] FMCA 88	Summary
Schaap v MIMIA [2000] FCA 1408; (2000) 63 ALD 65	
Sharma v MIBP [2016] FCCA 961	Summary
Singh v MIBP [2016] FCA 156	
Singh v MIBP [2017] FCCA 2461	Summary
Singh v MHA [2020] FCAFC 7	Summary
Su v MIMIA [2005] FMCA 107	Summary
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Waensila v MIBP [2016] FCAFC 32	Summary
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Last updated / reviewed: 20 January 2023

PUBLIC INTEREST CRITERION 4001

Available Decision Precedents

Introduction[1]

Public Interest Criterion (PIC) 4001 refers to a character test under the *Migration Act 1958* (Cth) (the Act). Most visa subclasses provide that the Minister must be satisfied that the visa applicant meets the requirements of PIC 4001 as a criterion for the grant of the visa.[2] However, the requirements can also extend to a person other than a visa applicant. A number of visa subclasses require that each member of the family unit who is *not* an applicant for the visa must also satisfy PIC 4001.[3] In addition to the requirement in PIC 4001, applicants may also be required to satisfy additional criteria in reg 2.03AA of the *Migration Regulations 1994* (Cth) (the Regulations), relating to the provision of documents or information for the character test and security assessments.

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

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

Public Interest Criterion 4001 and related requirements

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

(a) the person satisfies the Minister that she/he passes the character test; or

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

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

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

[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 the Migration and Refugee Division (MRD) Legal Services.
[2] E.g. cl 051.213(a) provides that, to be granted a Bridging Visa E (Subclass 051), the Minister is satisfied that the applicant satisfies the public interest criteria (PIC) 4001, 4002 and 4003.
[3] E.g. cl 186.213 provides that each member of the family unit of the applicant who is not an applicant for a Subclass 186 visa satisfies certain PIC, including PIC 4001.
[4] The validity of PIC 4001 has not been judicially considered, unlike PIC 4002 which was found invalid: *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 at [71], [221], [399] and [459].

The PIC 4001 requirements

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

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

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

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

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

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

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

Where a person is required to satisfy PIC 4001, additional criteria are prescribed under reg 2.03AA that must also be met.[8] This additional criterion requires an applicant to provide requested documentation or information relating to the applicant's character and criminal history.[9]

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

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

(b) a completed approved Form 80.

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

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

Waiver of the requirement in reg 2.03AA

Under reg 2.03AA(3), the Minister (or the Tribunal) may waive the requirement to provide a statement from the appropriate authority where satisfied that it is not reasonable for the applicant to do so. What constitutes 'not reasonable' is a matter for the decision-maker to determine having regard to any relevant circumstances. One example of a situation where the waiver might be exercised provided in the Explanatory Statement to the Regulation that introduced reg 2.03AA is where the applicant's country is affected by a civil conflict and it may

[8] Inserted by the *Migration Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 199) to apply to applications made on or after 12 December 2014, as well as those made prior to, but not finally determined as at that date.
[9] It was indroduced to codify the Department's longstanding administrative practice of rquesting applicants to provide police clearance and criminal history checks from countries where they reside, or had previously resided, so that decision makers could assess applicants' ability to satisfiy PIC 4001. Explanatory Statement to SLI 2014, No 199 at p.10 - 11.
[10] For example, Criminal Records checks in Canada are administered by the Royal Canadian Mounted Police under the *Criminal Records Act* (R.S.C., 1985, c. C-47). Refer: http://www.rcmp-grc.gc.ca/cr-cj/index-eng.htm (accessed 14 December 2021).

not be reasonable to require the person to provide the statement.[11] It is important to highlight that while the 'statement' requirements in reg 2.03AA(2)(a) can be waived, the waiver does not extend to requests to provide the completed approved Form 80.[12]

The waiver also does not extend to consideration of whether the request for the statement was reasonable or otherwise ought to have been made. Regulation 2.03AA(2) applies where the Minister, delegate or Tribunal 'has requested' the statement. Although there has been no judicial consideration on this point, the Tribunal's power to exercise all the powers and functions of the decision-maker[13] (and by implication to revoke a request made by the Minister or delegate) does not appear to overcome the fact that the Minister or delegate has requested the statement. The waiver itself applies where it is not reasonable for the applicant to provide the document, but does not appear to extend to whether it is not reasonable to require the applicant to provide the document.[14] Accordingly, once an applicant has been requested to provide a statement under reg 2.03AA, they would not be able to satisfy the requirements for the visa unless the requested statement is provided.

The 'Character Test'

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

Section 501(6) is entitled 'Character Test'. It is discussed in more detail below, but in summary, s 501(6) provides that a person does not pass the character test if:[16]

- the person has a 'substantial criminal record'
- the person has been convicted of an offence related to their immigration detention
- the person has been convicted of escaping from immigration detention (s 197A)
- the Minister reasonably suspects:
  - that the person is a member of, or associated with, a group, organisation or person involved in crime, or
  - that the person has been or is involved in people smuggling, trafficking people, genocide or other serious international crimes

[11] Explanatory Statement to SLI 2014, No 199 at p.19.
[12] See reg 2.03AA(3). Departmental Form 80 'Personal particulars for assessment including character assessment'.
[13] s 349(1).
[14] The Explanatory Statement to SLI 2014, No 199 refers to whether or not it is reasonable to require the person to provide a statement in relation to an application for a visa. This is broader than the wording of the waiver provision itself and should be understood as referring only to the reasonableness of the applicant complying with the requirement, not the reasonableness of imposing the requirement itself.
[15] *Awa v MIMIA* (2002) 189 ALR 328 at [11] and *SZLDG v MIAC* (2008) 166 FCR 230 at [86]. Note also that expressions used in a legislative instrument have the same meaning as the enabling legislation unless the contrary intention appears: s 13(1)(b), *Legislative Instruments Act 2003* (Cth).
[16] The character test in s 501(6) was substantially amended by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (No 129, 2014). These amendments apply to a decision to grant or refuse a visa if the visa application was made on or after 11 December 2014, or if the visa application was made before, but not finally determined at that date. The changes also apply to a decision to cancel a visa on or after 11 December 2014.

- having regard to past and present criminal and general conduct, the person is not of good character
- there is a risk that the person would engage in certain criminal conduct, harass, vilify or incite discord in the Australian community or a segment of that community, or be disruptive or violent
- the person has been convicted or found guilty of sexually based offences involving a child
- the person has, in Australia or a foreign country, been charged with or indicted for one or more crimes against international humanitarian law
- the person has been assessed by the Australian Secuirty Intelligence Organisation (ASIO) as a risk to security, or
- an Interpol notice in relation to the person is in force and it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community.

Unless there is an express finding of one or more grounds in ss 501(6)(a) to (h) applying, a person is otherwise taken to have passed the character test.[17]

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

Mandatory policy considerations for s 501 decisions - Direction 90

Further guidance on the interpretation of s 501 is also contained within Direction No 90 (Direction made under s 499 of the Act), 'Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA'. The Direction is made up of: Part 1 (preliminary matters, including defined terms and a Preamble setting out the objectives and principles of the Direction) and Part 2 (which provides guidance on the exercise of the discretion, including relevant and primary considerations). The primary considerations decision-makers must have regard to under Part 2 are: the protection of the Australian community from criminal or other serious conduct; whether the conduct engaged in constituted family violence; the best interests of minor children in Australia; and the expectations of the Australian community. Other relevant considerations contemplated by Part 2 are: any international non-refoulement obligations applicable to the person; the extent of impediments a person may face if removed from Australia (in relation to establishing themselves and maintaining basic living standards assessed by reference to the general conditions in their home country); the impact on the victims of a person's criminal conduct (including the family members of victims); and any links to the Australian community, including the strength, nature and duration of a person's ties

[17] Section 501(6); *Godley v MIMIA* (2004) 83 ALD 411 at [78] - [80]. This effectively reverses the onus intended by s 501(1) for the person to satisfy the Tribunal that they pass the character test.
[18] See ss 501(7) - (10), (12).

to Australia and any impact on Australia's business interests. Direction No 90 also includes Annex A (overview of the character test, application of the character test).

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

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

The grounds in detail

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

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

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

A person has a substantial criminal record if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more;[19] *or*

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

(f) the person has:

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

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

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

Whether a person has a 'substantial criminal record' is largely a question of fact. The meaning relies primarily on criminal convictions and sentences which can be established from external

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

records. In relation to terms of imprisonment, ss 501(7)(c) and (d) are concerned with the sentence that has been imposed, rather than the term of imprisonment actually served.[21]

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

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

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

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

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

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

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

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

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

[21] *Seyfarth v MIMI*A (2005) 142 FCR 580 at [27] and the cases cited therein. Although the Court's reasoning on this point relates only to s 501(7)(c), it is equally applicable to s 501(7)(d). See also *Brown v MIAC* (2010) FCR 113 at [68] - [74] and [114], where the person was sentenced to a term of imprisonment of 12 months or more within the meaning of s 501(7)(c) notwithstanding that execution of her sentences was suspended.
[22] s 501(7A) as inserted by No 129, 2014. The amended version applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.
[23] Introduced by the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (No 81, 2011), to strengthen the consequences of criminal behaviour by persons in immigration detention and provide an additional basis for refusing to grant or cancelling a visa on character grounds: Explanatory Memorandum to the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* at pp.5 - 6. These provisions apply to decisions made on or after 26 April 2011, whether the conviction or offence occurred before, on or after that date.
[24] The penalty is five years imprisonment.
[25] See s 5.

organisation or person, and that group, organisation or person has been or is involved in criminal conduct.

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

Reasonably suspects

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

Direction No 90 is broadly consistent with this interpretation, indicating that a suspicion in this context is less than a certainty or belief, but more than speculation or idle wondering. For a suspicion to be reasonable, the Direction states that it should be a suspicion that a reasonable person could hold in the particular circumstances and based on an objective consideration of relevant material.[29]

Meaning of association

The term 'association' to which s 501(6)(b) refers is not defined in the Act, but it requires an association involving some sympathy with, support for or involvement in the criminal conduct of the person, group or organisation with whom the person is said to have associated with.[30] Under Direction No 90, mere knowledge of a group would not be enough to demonstrate an association. The association must be such as to have *some negative* bearing upon the person's character.[31] In establishing an 'association', Direction No 90 also refers to the nature of the association and its degree, frequency and duration.[32]

Meaning of membership

Section 501(6)(b) currently refers not only to criminal association, but also membership of such groups or organisations.[33] The term 'membership' contemplates a person belonging to or being

[26] Explanatory Memorandum to *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth) at [41]. See also *Roach v MIBP* [2016] FCA 750 at [136] and [140].
[27] *Goldie v Commonwealth* (2002) 117 FCR 566.
[28] *Goldie v Commonwealth* (2002) 117 FCR 566 at [4]–[6].
[29] Direction No 90, Annex A, Section 2, at [3].
[30] *MIAC v Haneef* (2007) 163 FCR 414 at [130]. While the Court's comments were made in the context of s 501(6)(b) as it previously stood prior to the amendments made by No 129, 2014, the comments on the meaning of association are still relevant.
[31] Direction No 90, Annex A, Section 2, at [3]. See also *MIAC v Haneef* (2007) 163 FCR 414 at [127] -[130].
[32] Direction No 90, Annex A, Section 2, at [3].
[33] s 501(6)(b) as amended by No 129, 2014.

a part of that group or organisation and does not require sympathy with, support for or involvement in criminal conduct.[34]

Meaning of involved in criminal conduct

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

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

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

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

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

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

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

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

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

The first limb in s 501(6)(c) provides that a person does not pass the character test if, having regard to their 'past and present *criminal* conduct', they are not of good character. This subparagraph refers to conduct as distinct from convictions for which s 501(6)(a) may also apply if they have a substantial criminal record. The expression 'past and present criminal conduct'

[34] *Roach v MIBP* [2016] FCA 750 at [136]–[142].
[35] *Roach v MIBP* [2016] FCA 750 at [171].
[36] Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth) at [43].

should be read compendiously; it would be an error to only look at the applicant's past *or* present conduct.[37]

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

Section 2 of Annex A of Direction No 90 identifies some factors that the Tribunal may take into account when considering s 501(6)(c)(i) in the context of PIC 4001, including: the nature, severity and frequency of the person's criminal conduct; material which may place the conduct in context such as judicial commentary or parole reports; as well as any conduct indicating character reform.[39]

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

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

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

Direction No 90 identifies some factors that the Tribunal may take into account when considering s 501(6)(c)(ii) in the context of PIC 4001 including: the person's history of serious breaches of migration laws in Australia or another country, including any circumstances that led to removal or deportation; dishonourable or premature discharge from the armed forces as a result of serious conduct; and the person's contempt or disregard of law and human rights, including involvement in terrorist activities; trafficking or possession of trafficable quantities of proscribed substances; political extremism; extortion; fraud; or involvement in war crimes or crimes against humanity.[43]

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

[37] *Mujedenovski v MIAC* (2009) 112 ALD 10 at [41] - [43].
[38] See further *Godley v MIMIA* (2004) 83 ALD 411 at [56].
[39] Direction No 90, Annex A, Section 2, at [5.1].
[40] Examples of this can be found in *Re Li and MIMIA* [2005] AATA 841; *Re Sorensen and MIMIA* [2006] AATA 96; *Zou and MIAC* [2008] AATA 538 and *Still and MIAC* [2008] AATA 759.
[41] In *Godley v MIMIA* (2004) 83 ALD 411, Lee J stated at [56] that: 'before past and present general conduct may be taken to reveal indicia that a visa applicant is not of good character continuing conduct must be demonstrated that shows a lack of enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct there must be due regard given to recent good conduct'. This judgment is also cited in Direction No 90, Annex A, Section 2, at [5].
[42] *Mujedenovski v MIAC* (2009) 112 ALD 10 at [41] - [43].
[43] Direction No 90, Annex A, Section 2, at [5.2].

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

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

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

Under Direction No 90 there will be a 'risk' if there is evidence suggesting more than a minimal or remote chance of the person engaging in the type of conduct specified in s 501(6)(d).[44]

The test posed by s 501(6)(d) is a forward looking one. While past conduct may be a relevant consideration in assessing s 501(6), Direction No 90 provides that it would not be sufficient to merely find that the person has engaged in conduct specified in s 501(6)(d) in the past. For a person to fail the character test on this basis, there must be a risk that the person would engage in the future in the specified conduct set out in s 501(6)(d)(i)–(v).[45]

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

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

Whilst under s 2 of Annex A of Direction No 90 the reference to 'criminal conduct' should be read as conduct for which a criminal conviction could be recorded, the Tribunal is not bound by this Direction and should turn its own mind to the question to avoid an error of law.[47]

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

Section 501(6)(d)(ii) currently provides that a person does not pass the character test if, in the event the person was allowed to enter or remain in Australia, there is a risk that they would harass, molest, intimidate or stalk another person in Australia. For the purposes of the character test, conduct may amount to harassment or molestation even though it does not involve

[44] See Direction No 90, Annex A, Section 2, at [6].
[45] See Direction No 90, Annex A, Section 2, at [6].
[46] See eg *Re Mack and MIMIA* [2004] AATA 42 and *Re Hand, MILGEA v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 667 dealing with similar provisions.
[47] Direction No 90, Annex A, Section 2, at [6.1].

violence or threatened violence to the person[48] or consists only of damage, or threatened damage, to property belonging to or in the possession of or used by the person.[49]

Examples provided in section 2 of Annex A of Direction No 90 of relevant conduct include: breaching the terms of an Apprehended or Domestic Violence (or similar) Order; conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches to children, including via electronic media; and conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed in response to a person's behaviour towards them, another individual, or their own or another individual's property.[50]

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

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

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

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

Direction No 90 also provides some guidance on these issues with relevant factors listed as including, but not limited to a person: holding or advocating extremist views such as the use of violence as a legitimate means of political expression; vilifying a part of the community; having a record of encouraging disregard for law and order (such as in the course of addressing public rallies); engaging or threatening to engage in conduct likely to be incompatible with the smooth operation of a multicultural society; participating in, or being active in promotion of, politically motivated violence or criminal violence and/or being likely to propagate or encourage such action in Australia; and provoking civil unrest in Australia via the person's intended activities and

[48] s 501(11)(a).
[49] s 501(11)(b).
[50] Direction No 90, Annex A, Section 2, at [6.2].
[51] *Irving v MILGEA* (1993) 44 FCR 540. The Court was considering whether holocaust-denying speeches could attract violent or seriously disruptive behaviour by the applicant's supporters and opponents.
[52] *Irving v MILGEA* (1993) 44 FCR 540 at [6].
[53] *Irving v MILGEA* (1993) 44 FCR 540 at [30]. See also Drummond J at [15] - [16] where he endorsed the findings of the primary judge that "[t]aken together the words "activities disruptive of the Australian community…refer to some acute division or conflict within the community taken as a whole or within some community group".

proposed timing of their presence in Australia in relation to the presence of another individual group or organisation holding opposing views.[54]

Under Direction No 90 the operation of s 501(6)(d)(iii), (iv) and (v) should be balanced against Australia's well established tradition of free expression and are not intended to provide a charter for denying entry or continued stay based merely upon the expression of unpopular opinions. The Direction does say, however, that where these opinions may attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.[55]

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

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

The term 'sexually based offences involving a child' is not elsewhere defined. Direction No 90 indicates that it would include, but not be limited to, offences such as child sexual abuse, indecent dealings with a child, possession or distribution of child pornography, internet grooming, and other non-contact carriage services offences. Direction No 90 further states that a person captured by this provision fails the character test irrespective of the level of penalty or orders made in relation to the offence.[57]

Crimes under international humanitarian law - s 501(6)(f)

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

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

[54] Direction No 90, Annex A, Section 2, at [6.3].
[55] Direction No 90, Annex A, Section 2, at [6.3].
[56] s 501(6)(e) as inserted by No 129, 2014.
[57] Direction No 90, Annex A, Section 2, at [6.3].
[58] s 501(6)(f) as inserted by No 129, 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014. According to the Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* at [52], the purpose of the provision is to ensure that where a person has been charged with or indicted for one of these serious offences, the person objectively does not pass the character test regardless of whether the person also fails the 'substantial criminal record' limb of the character test in s 501(7).

ASIO assessments and Interpol notices - ss 501(6)(g) and (h)

Under s 501(6)(g)[59] a person will not meet the character test where they have been assessed by the ASIO to be directly or indirectly a risk to security (within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).[60] Under s 501(6)(h)[61] a person will alternatively not meet the character test where an Interpol notice in relation to the person is in force, and it is reasonable to infer from that notice that the person would present a risk to the Australian community or a segment of that community.

According to the Explanatory Memorandum that introduced these grounds in 2014, the purpose of ss 501(6)(g) and (h) is to acknowledge that a person who is the subject of an adverse ASIO assessment or Interpol notice is likely to represent a threat to the security of the Australian community or a segment of that community.[62]

Section 501(6)(g) does not contain an evaluative element as the decision-maker's role is confined to identifying whether the person has been relevantly assessed by ASIO as a risk to security.[63]

In contrast s 501(6)(h) requires the decision-maker to determine whether there is an Interpol notice in force, and then decide whether it is reasonable to infer from the notice that the person would be a risk to the Australian community (or a segment thereof). The latter element would be a question of fact for the decision-maker, having regard to information (such as charges and past convictions) referred to in the notice.

The Tribunal's Jurisdiction and Powers

The MRD of the Tribunal has the power to review a decision that the applicant does not satisfy PIC 4001, as it forms part of the exercise of the power under s 65 of the Act (to grant or refuse a visa).[64] This may require assessing whether the person passes the character test (see above).

[59] Section 501(6)(h) was inserted by No 129, 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to a decision to cancel a visa on or after 11 December 2014.
[60] Under s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth), 'security' is defined as (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: espionage; sabotage; politically motivated violence; promotion of communal violence; attacks on Australia's defence system; or acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in (aa).
[61] Section 501(6)(h) was inserted by No 129, 2014. It applies to decisions to grant or refuse a visa where the application was made on or after 11 December 2014 as well as those made prior to, but not finally determined at that date; and to decisions to cancel a visa on or after 11 December 2014.
[62] Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth) at [55].
[63] An applicant who is subject to an adverse ASIO security assessment may challenge the assessment before a court. If the challenge succeeds and a court quashes the adverse assessment, it is then a nullity and it would be a jurisdictional error for the Minister (or the Tribunal on review) to rely on the quashed assessment for the purposes of s 501(6)(g). See *BSX15 v MIBP* (2017) 249 FCR 1 at [63]–[65]. While no final order was in effect at the time of writing, the Court indicated that it would quash the ASIO assessment on the basis of failure to afford the applicant procedural fairness. An issue which may arise for the Tribunal is whether it should delay its decision at the request of an applicant on the basis that the relevant ASIO assessment is being challenged.
[64] Section 65(1) relevantly requires that 'the other criteria for [the visa] prescribed by…the regulations have been satisfied' before the visa is granted. A decision to refuse a visa because the applicant does not meet PIC 4001 under s 65 is a Part 5-reviewable decision under s 338 and a Part 7-reviewable decision under s 411. Note that a decision to refuse to grant a protection visa because of exclusion under art 1F (or ss 5H(2) or 36(1C)) or 36(2C)) is reviewable by the Tribunal in its General Division: s 500(1)(c).

The Tribunal can also consider whether the applicant has satisfied the additional criteria in reg 2.03AA.

Although the MRD of the Tribunal does not have jurisdiction to review a decision to refuse or cancel a visa under s 501 on character grounds,[65] a decision that a person does not meet the requirements of PIC 4001 is not a decision made under that section.[66]

The Tribunal conducting a review in the MRD cannot remit a matter to the Department on the basis that it should consider the application of s 501. The Tribunal may only remit a matter in accordance with such directions or recommendations that are prescribed for that Division and not matters relating to character as prescribed by the relevant provision in the Regulations.[67]

Where the Tribunal decides to waive the requirement to provide a statement under reg 2.03AA(2)(a), it can remit the matter with a direction that the applicant must be taken to have satisfied reg 2.03AA(2).[68] However, if a completed Form 80 has been requested and not provided, the applicant will not be able to meet reg 2.03AA(2).

The Tribunal may remit a matter with a direction that the applicant satisfies reg 2.03AA(2) even though the applicant, on the basis of the material before the Tribunal, would not satisfy PIC 4001. Ordinarily, the Tribunal would be required to consider any issues squarely arising on the material before it relating to whether the applicant meets the criteria for the visa in exercising the power to grant or refuse to grant a visa under s 65 as part of the review for the purposes of review under ss 349 and 415.[69] However, the requirement to provide a statement or Form 80 under reg 2.03AA(2) is a preliminary step to the assessment of matters relevant to the decisions in PIC 4001(c) and (d) and the power to refuse to grant a visa under s 501, which are matters in relation to which the Tribunal does not have jurisdiction. It therefore will not be appropriate to consider whether the applicant satisfies PIC 4001 in cases where an assessment should be made under s 501 and a permissible direction is available.

Relevant Case Law

Judgment	Judgment summary
Awa v MIMIA (2002) 189 ALR 328	Summary
Brown v MIAC [2010] FCAFC 33; (2010) FCR 113	

[65] While s 500 provides that a decision of a delegate to refuse or cancel a visa under s 501 is reviewable by the Administrative Appeals Tribunal, such review is conducted in the General Division, not the MRD which is limited to reviews under pts 5 and 7 of the Act. See s 17B of the *Administrative Appeals Tribunal Act 1975* (Cth) and the President's General Practice Direction 'Allocation of Business to Divisions of the AAT. Decisions made personally by the Minister are not subject to merits review and may only be challenged in the Federal Court.

[66] Note that a delegate making a decision under s 65 will not necessarily have the delegated authority to make a decision under s 501: see *SZLDG v MIAC* (2008) 166 FCR 230 at [51] - [54].

[67] See s 349(2)(c) and reg 4.15(1) and s 415(2)(c) and reg 4.33.

[68] For more information on permissible directions see Chapter 3 – Powers and functions of the Tribunal in the Procedural Law Guide.

[69] See Chapter 3 – Powers and functions of the Tribunal in the Procedural Law Guide and *Dhanoa v MIAC* (2009) 109 ALD 373.

BSX15 v MIBP [2017] FCAFC 104	
Godley v MIMIA [2004] FCA 774; (2004) 83 ALD 411	
Goldie v Commonwealth of Australia [2002] FCA 433	
Hand v Hell's Angels Motorcycle Club (1991) 25 ALD 667	
MIAC v Haneef [2007] FCAFC 203; (2007) 163 FCR 414	
Irving v MILGEA (1993) 44 FCR 540	
Plaintiff M47/2012 v Director General of Security [2012] HCA 46	Summary
Mujedenovski v MIAC [2009] FCAFC 149; (2009) 112 ALD 10	
Roach v MIBP [2016] FCA 750	
Seyfarth v MIMIA [2004] FCA 1713	
Seyfarth v MIMIA [2005] FCAFC 105; (2005) 142 FCR 580	
SZLDG v MIAC [2008] FCA 11; (2008) 166 FCR 230	

Relevant Legislative Amendments

Migration Amendment Regulations 2009 (No 12) (Cth)	SLI 2009, No 273
Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011 (Cth)	No 81, 2011
Migration Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 199
Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)	No 129, 2014
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)	No 135, 2014

Available Decision Precedents

There is one precedent designed specifically for decisions relating to reg 2.03AA:

- **Regulation 2.03AA:** This template is designed for use in any visa refusal where the delegate has made a finding that the applicant does not satisfy reg 2.03AA(2) and also requested that the applicant provide a statement from a relevant authority under reg 2.03AA(2)(a) and/or a completed Form 80 under reg 2.03AA(2)(b). Users can select from multiple options: form 80; or statement from a relevant authority.

There are no decision precedents or optional paragraphs designed specifically for decisions relating to PIC 4001. If PIC 4001 is the only issue in dispute, the Generic Decision precedent can be used. Please contact MRD Legal Services for further assistance.

Last updated/reviewed: 10 January 2022

HEALTH CRITERIA – PIC 4005, 4006A AND 4007

Overview[1]

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

Similar to circumstances relating to the determination of certain claims of domestic/family violence, some health criteria requirements are substantively determined by an expert, not by the Minister's delegate or Tribunal. Where the matter arises as an issue, the decision-maker must seek the opinion of a Medical Officer of the Commonwealth (MOC) in relation to whether a person suffers a disease or condition.[5] Where a MOC opinion is properly made, the Tribunal must take that opinion to be correct for the purposes of deciding whether a person meets the requirements or satisfies the criterion for grant of a visa.[6]

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

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

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

Key requirements

The health criteria 4005–4007

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

- an applicant who is in a class of persons specified in a written instrument, must undertake any medical assessment specified and be assessed by the person specified[7]
- the applicant must comply with any request by a MOC to undertake a medical assessment[8]
- the applicant is free from tuberculosis[9]
- the applicant is free from a disease/condition that is, or may result in the applicant being, a threat to public health or danger to the Australian community[10]
- the applicant is free from a disease/condition in relation to which a person who has it would be likely to require health care or community services or meet the medical criteria for provision of a community service during the specified period; and provision of the health care or community services relating to the disease/condition (regardless of whether the health care or services will actually be used in connection with the applicant) would be likely to:
  - result in a significant cost to the Australian community in the areas of health care and community services;[11] or
  - prejudice access of an Australian citizen or permanent resident to health care or community services;[12] and
  - If the MOC has requested a signed undertaking that the applicant present himself/herself to health authorities for a follow-up medical assessment in the place of residence in Australia, the applicant has provided such undertaking.[13]

[7] PIC 4005(1)(aa), 4006A(1)(aa), 4007(1)(aa) as inserted by *Migration Legislation Amendment Regulations 2011 (No 1)* (Cth) (SLI 2011, No 105), sch 4. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: reg 6.
[8] PIC 4005(1)(ab), 4006A(1)(ab), 4007(1)(ab) as inserted by (SLI 2011, No 105). These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: reg 6
[9] PIC 4005(1)(a), 4006A(1)(a), 4007(1)(a).
[10] PIC 4005(1)(b), 4006A(1)(b), 4007(1)(b).
[11] reg 1.03 defines "community services" as including provision of an Australian social security benefit, allowance or pension.
[12] PIC 4005(1)(c), 4006A(1)(c), 4007(1)(c) as inserted by SLI 2011, No 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: reg 6.
[13] PIC 4005(1)(d), 4006A(1)(d), 4007(1)(d) as inserted by SLI 2011, No 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: reg 6.

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

- for permanent visas and temporary visas specified in a written instrument – the period commencing when the application is made,
- for all other temporary visas[14] – the period for which the Minister intends to grant the visa.[15]

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

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

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

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

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

Special provisions relating to certain health criteria

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

[14] Generally speaking, this means a temporary visa which is not a provisional visa expected to be a pathway to permanent residence.
[15] PIC 4005(2), 4006A(1A), 4007(1A). For the relevant instrument, see 'VisaSc' tab of the Register of Instruments: Health Criteria
[16] PIC 4006A(2). PIC 4006A only applies to Subclass 457 Temporary Work (Skilled) visas made before 18 March 2018. PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the repeal of Subclass 457 (the only subclass to which it applied) from that date: F2018L00262, items 37 and 171 of sch 1, pt 1, and cls 6702(1) & (2) of pt 67, sch 13 of the Regulations, as inserted by item 178, sch 1 pt 1 of the amending regulation.
[17] reg 2.25A(1).
[18] PIC 4006A was repealed for visa applications made on or after 18 March 2018: F2018L00262, items 37 and 171 of sch 1, pt 1 and cls 6702(1) & (2) of pt 67, sch 13 of the Regulations, as inserted by item 178, sch 1 pt 1 of the amending regulation.
[19] reg 2.25A(3).

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

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

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

For information relating to seeking the opinion of a MOC, see below Opinion of the Medical Officer of the Commonwealth.

Key issues

Required and requested medical assessments

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

Assessment required by written instrument

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

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

[20] reg 2.25A(1)(a).
[21] For the relevant instrument, see the 'Country' tab of the Register of Instruments: Health Criteria.
[22] reg 2.25A(1)(b).
[23] PIC 4005(1)(aa), 4006(1A)(aa), 4007(1)(aa), inserted by SLI 2011, No 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: reg 6. For the relevant instrument see "HealthAssess" tab in the Register of Instruments – Health Criteria. The relevant instrument appears to be the one in place at the time of decision. See *Sarabia v MIBP* [2017] FCCA 2642 (Judge Dowdy, 31 October 2017), where the Court held the Tribunal had incorrectly identified a revoked instrument as the relevant instrument, rather than the instrument which applied at the time of its decision: at [22].
[24] For the relevant instrument, see "HealthAssess" tab in the Register of Instruments – Health Criteria.

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

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

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

Exemption from medical assessment

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

> *… to provide for a discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.*[25]

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

Assessment requested by MOC

PIC 4005(1)(ab), 4006A(1)(ab) and 4007(1)(ab) require that an applicant must comply with any request by a MOC to undertake a medical assessment.[26] This request may be in addition to any other medical assessments already required by PIC 4005(1)(aa), 4006A(1)(aa) and 4007(1)(aa).

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

> *… to require the applicant to comply with the Medical Officer of the Commonwealth's request to undertake a medical assessment. This would help:*
>
> - *protect the Australian community from public health and safety risks;*

[25] Explanatory Statement to F2011L01098, SLI 2011, No 105, p.11.[26] Inserted by SLI 2011, No 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: reg 6.
[26] Inserted by SLI 2011, No 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: reg 6.

- *contain public expenditure on health care and community services; and*
- *safeguard the access of Australian citizens and permanent residents to heath care and community services in short supply.*[27]

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

Free from a disease or condition

PIC 4005, 4006A and 4007 require that an applicant is free from:

- tuberculosis[28]
- a disease or condition that is, or may result in a threat to a public health in Australia or danger to the Australian community [29]
- a disease or condition, during *the relevant period*, where a person who has it would be likely to require health care or community services or meet the medical criteria for the provision of community services, and the provision of the health care or community services would be likely to:
  - result in a significant cost to the Australian community in the areas of health care and community services, or
  - prejudice the access of an Australian citizen, or permanent resident to health care or community services.[30]

The relevant period

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

For all permanent visa applicants and applicants for a temporary visa of a subclass specified in a written instrument (generally provisional visas), the relevant period is the period commencing when the application is made.[31] No end date is specified.

[27] Explanatory Statement to (SLI 2011, No 105).
[28] PIC 4005(1)(a), 4006A(1)(a) and 4007(1)(a).
[29] PIC 4005(1)(b), 4006A(1)(b) and 4007(1)(b).
[30] PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c).
[31] PIC 4005(1)(c)(i), 4005(2), 4006A(1)(c)(i), 4006A(1A), 4007(1)(c)(i), 4007(1A). For the relevant instrument see "VisaSc" tab in Register of Instruments – Health Criteria.

For all other temporary visa applicants, the relevant period is the period for which the Minister intends to grant the visa.[32] That is, the duration of the visa, commencing on the date the Minister intends to grant that visa.

Access to health care or community services or significant cost

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

- result in a significant cost to the Australian community in the areas of health care and community services; OR
- prejudice the access of an Australian citizen or permanent resident to health or community services.[33]

Unless the application is for a temporary visa and there is no information known to Immigration to the effect that the person may not meet the health criteria, or is for a permanent visa that is made from a specified country, the decision maker *must* seek an opinion of a MOC on whether a person meets these criteria and must take that opinion to be correct.[34] The decision maker's role is limited to ensuring the MOC opinion is valid.[35]

Exemption to the 'no significant cost' requirement

Visa applications made on or after 5 November 2011

For visa applications made on or after 5 November 2011, if a person applies for a temporary visa, the subclass of which is not specified by the Minister in an instrument, then the health care and community services assessed under the 'no significant cost' requirement will not include health care and community services specified by the Minister.[36] Persons who have applied for a temporary visa of a type specified in the instrument are required to be assessed in relation to the full range of health care and community services.

According to the Explanatory Statement that accompanied the introduction of this requirement, the criterion reflects the position that despite restriction on access to health related services, some temporary visa holders may have access to some health care or community services which would result in a cost to the community (for example, a hospital would not refuse to provide medical treatment to a person). However, it acknowledges that there are certain health care or community services that cannot be accessed by temporary visa applicants such as social security payments.[37]

[32] PIC 4005(2), PIC 4006A(1A), 4007(1A).
[33] PIC 4005(1)(c)(ii), 4006A(1)(c)(ii), 4007(1)(c)(ii).
[34] Regulation 2.25A. See Opinion of the Medical Officer of the Commonwealth.
[35] See Assessing Validity of a MOC opinion.
[36] PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011, No 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the Register of Instruments: Health Criteria.
[37] Explanatory Statement to SLI 2011, No 199, pp.28–9.

Visa applications made before 5 November 2011

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

- who are applying for a temporary visa; AND
- who would not be eligible for the provision of health care or community services due to applying for or holding that temporary visa subclass; AND
- that visa subclass is of a type not specified in a written instrument.[38]

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

For queries relating to pre-5 November 2011 requirements please contact MRD Legal Services.

Opinion of the Medical Officer of the Commonwealth

Regulation 2.25A requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4005(1)(a), 4005(1)(b), 4005(1)(c), 4006A(1)(a), 4006A(1)(b) 4006A(1)(c), 4007(1)(a), 4007(1)(b), or 4007(1)(c).[39] However, there is no requirement to seek a MOC opinion if:

- the application is for a temporary visa and there is no information indicating that the person may not meet any of those requirements;[40] or
- the application is for a permanent visa that is made from a country specified by the relevant instrument[41] for these purposes and there is no information indicating that the person may not meet any of those requirements.[42]

The Tribunal is to take the MOC opinion to be correct.[43] However, this only applies where the MOC opinion is of a kind authorised by the Regulations.[44]

[38] PIC 4005(3), 4006A(1B), and 4007(1B) were introduced by SLI 2011, No 105 and applied to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: reg 6. Those provisions were repealed and substituted for visa applications made on or after 5 November 2011: SLI 2011, No 199: reg 5, sch 3. For the relevant instrument see "VisaSc" tab in Health Criteria – Register of Instruments.
[39] reg 2.25A(1).
[40] reg 2.25A(1)(a).
[41] For the relevant instrument, see the 'Country' tab of the Register of Instruments: Health Criteria.
[42] reg 2.25A(1)(b).
[43] reg 2.25A(3).
[44] *MIMA v Seligman* (1999) 85 FCR 115 at [66].

Is a MOC, or a further MOC, opinion required?

Circumstances may arise where the Tribunal considers it necessary for a MOC opinion to be obtained; for example, because the applicant has never undertaken the relevant medical assessments or because an opinion that is before the Tribunal is not valid.[45]

No previous MOC opinion

Where the Tribunal is considering the health criterion and no MOC opinion has been obtained, the Tribunal should first consider whether a MOC opinion is required. If the matter falls within one of the exceptions in reg 2.25A(1)(a) or (b) and there is no information known to the Tribunal that the person may not meet any of the health requirements, a MOC opinion may not be required. If there is insufficient information about an exception in reg 2.25A(1) applying and more information about an applicant's health is required, the Tribunal may request that the Department arrange for the applicant to attend a panel doctor for assessment.[46] The Tribunal may then make a decision in relation to the health criteria or seek the opinion of a MOC as required depending upon the results of that medical assessment.

Further MOC opinion is required

A further MOC opinion may be required where an earlier opinion is no longer current or appears to have asked the wrong question or misapplied the correct legal test. It may also be prudent to invite the applicant to obtain a new MOC opinion if there are reasonable grounds to believe the applicant's circumstances have changed, such that a different health result may be achieved. The MOC opinion must address satisfaction of the health criterion requirements *at the time of the Tribunal's decision*.[47] If a MOC opinion was obtained at primary level, depending on the nature of the evidence to the Tribunal, it may no longer be an opinion that the applicant satisfies the requirements at the time of decision (see Currency of the MOC opinion below). If that opinion does not amount to an assessment of the relevant health criterion in accordance with the Regulations as at the time of the Tribunal's decision, the Tribunal will need to obtain a valid MOC opinion.[48]

Whether a fee is payable in these circumstances depends upon whether reg 5.41 applies. See below about Fees for a MOC, or a further MOC, Opinion.

[45] Except where there has never been a MOC opinion given, a further MOC opinion in these circumstances has previously been described as a Review MOC opinion or RMOC opinion. However, there is no position provided for in the Regulations called a Review Medical Officer of the Commonwealth (RMOC).
[46] Section 363(1)(d) authorises the Tribunal to require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. In addition, s 60 provides that the Minister may require the applicant to visit and be examined by a person qualified to determine the applicant's health, physical or mental condition at a reasonable time and place, if the health, physical or mental condition of the applicant is relevant to the grant of a visa. In these circumstances an applicant must make every reasonable effort to attend such examination. Following *obiter dicta* by the High Court in *MIAC v SZKTI* (2009) 238 CLR 489 at [33], it appears that the Tribunal may also have this power.
[47] *Applicant Y v MIAC* [2008] FCA 367 at [18] citing *MIMA v Seligman* (1999) 85 FCR 115.
[48] *Applicant Y v MIAC* [2008] FCA 367 at [18]–[20], citing *MIMA v Seligman* (1999) 85 FCR 115.

Procedure for obtaining a MOC, or a further MOC, opinion

If the Tribunal considers that a MOC opinion is required, it generally asks an applicant if they wish the Tribunal to arrange for a MOC opinion to be obtained. Where the applicant elects to have a MOC opinion, the Tribunal will request they pay any applicable fee (see Fees for a MOC,or a further MOC, Opinion below), and provide any additional information (such as medical reports) for the MOC to consider.

If the applicant elects to undertake a MOC opinion, the Tribunal will arrange for the opinion to be obtained by forwarding all relevant material, including material previously submitted to the department and any new material submitted to the Tribunal, to a MOC for an opinion. There is no process for seeking a MOC opinion prescribed or specified in the Act or Regulations, and nor is the Tribunal required to specify an individual MOC when an opinion is being sought.[49] The applicant is also responsible for arranging and paying for any medical examinations or tests that an MOC requires. [50]

An applicant may also elect not to obtain a MOC opinion. An applicant will not satisfy the health criteria if they are required to provide a MOC's opinion but do not. However, it would first be necessary to determine that a MOC opinion is, in fact, required because the application did not fall within one of the exceptions in reg 2.25A(1)(a) or (b), or there is information known to the Tribunal that the person may not meet any of the health requirements.

Separate procedures, guidelines and letter templates have been developed relating to the process of referral of an applicant to a MOC. See the National Registry Procedures - Investigations.

Fees for a MOC, or a further MOC, opinion

There is no prescribed fee for an applicant's first MOC opinion, however an applicant is responsible for paying any fees that are associated with the MOC's examination.

If a MOC opinion has previously been given but a further opinion is required, reg 5.41 provides that a fee of $520 is payable if:

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

It is implicit in reg 5.41 that the opinion of the MOC that led to delegate refusing the visa must have been a valid MOC opinion at the time it was given. This means that a MOC

[49] *Reynolds v MIAC* [2010] FMCA 6 at [63].
[50] reg 5.41

opinion that asked the wrong question or misapplied the correct test would not be an opinion validly made, in which case a MOC opinion being sought after that would not properly be characterised as a 'further' opinion. Similarly, an opinion that further medical evidence is required to determine whether a person meets a health criterion (often referred to as a 'deferred opinion') is not an opinion that a person did not satisfy a health criterion, in which case reg 5.41 would also not apply.

However, reg 5.41 will apply if a MOC opinion was valid at the time it was made, even if a further opinion needs to be sought because of the passage of time since the earlier opinion was given. In these circumstances, it is the Tribunal's policy that the fee is payable by the applicant. If an applicant is unwilling or unable to pay the fee for a further MOC opinion, the Tribunal may wish to consider requiring the Secretary of the Department to obtain a further MOC and provide the opinion to the Tribunal.[51]

Assessing validity of a MOC opinion

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

- an opinion[52]
- by a Medical Officer of the Commonwealth (defined in reg 1.03 to mean a medical practitioner appointed by the Minister in writing under reg 1.16AA to be a Medical Officer of the Commonwealth for the purposes of the Regulations)[53]
- the opinion is on a matter referred to in reg 2.25A(1) or (2) (for the purposes of (1) an opinion on whether a person meets certain health requirements); and
- the opinion addresses satisfaction of these requirements at the time of the Minister's decision.[54]

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

- whether the opinion refers to the correct criterion. For example, if the opinion refers to PIC 4005 when the applicable criterion is 4007, this should be referred back to the MOC for clarification
- whether the opinion correctly reflects assessment of costs and access to health care or community services during the relevant period

[51] s 363(1)(d). For the purposes of the review of a decision, the Tribunal may require the Secretary of the Department to arrange for the making of any investigation, or any medical examination, the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.
[52] There is a standard form prepared by the Department titled "Medical Opinion of an Officer of the Commonwealth" (form 884) or the opinion may be in a document with a heading of "Medical Opinion". If the document contains a heading such as "Deferred Opinion", there may be some question as to whether that amounts to an opinion for the purposes of reg 2.25A.
[53] In *Reynolds v MIAC* [2010] FMCA 6, the Court found that the Tribunal was entitled to presume that the MOC was a MOC without referring to any evidence, until the appointment was challenged (at [127]).
[54] *Blair v MIMA* [2001] FCA 1014 at [19] citing *MIMA v Seligman* (1999) 85 FCR 115 at [48]–[49].

- whether the opinion has assessed a temporary visa applicant against the "no significant cost" requirement, where the applicant is exempted from the requirement.

The MOC is entitled to differ in his/her opinion from reports put to him/her and is not obliged to give reasons for why any medical report or opinion was rejected. As a result of this it is difficult to successfully challenge a MOC opinion on the basis of an imputed rejection of expert medical evidence.[55]

The MOC is required to form his or her own opinion about whether the relevant PIC is satisfied after taking into account all material logically probative of that opinion before him or her. In so doing, the MOC is required to act reasonably and there must be a logical basis for the opinion. In *Haque* the Court considered an RMOC opinion for an applicant with learning difficulties.[56] The Court held that the opinion lacked an evidentiary basis and accordingly the Tribunal was not bound to accept it. As the Tribunal considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

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

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

In *Traill v MIAC*[57] the Court considered the delegate's application of PIC 4005(1)(c) and found that the delegate constructively failed to exercise his jurisdiction because he relied upon the MOC's opinion which did not properly address the visa criterion upon which it bore and failed to meet the minimum standard for such an opinion. The Court noted that the report contained no opinion on whether the applicant had the capacity to function in his daily life without support; and that the MOC failed to properly ascertain the form or level of the condition suffered by the second applicant and then proceeded to make an assessment at a

[55] *Ramlu v MIMIA* [2005] FMCA 1735 at [14], citing *Blair v MIMA* [2001] FCA 1014 at [32]–[37].
[56] *Haque v MIBP* [2015] FCCA 1765. In this case, the MOC obtained a specialist pediatrician's report which stated that the applicant 'suffers from autistic spectrum disorder with moderate developmental delay and behavioural problem. She is functioning fairly well and attending to all her personal hygiene and activities of daily living.' Upon review the applicant sought a new opinion, providing the Tribunal with a number of expert medical reports which suggested varying degrees of independence of applicant. The RMOC opinion found the applicant did not satisfy PIC 4005 as she was a person with 'severe cognitive impairment' and was 'totally dependent in all of her activities of daily living'. The RMOC did not personally examine applicant, but rather based the opinion on information including the medical reports. However, none of the reports supported the conclusion the applicant was totally dependent on others in all of her activities of daily life. The Court concluded that as the RMOC opinion was based upon a fact for which there was no evidence or any other logical basis, the opinion was not one formed according to law. That being so, the Tribunal was not bound to accept it and, because it considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.
[57] *Traill v MIAC* [2013] FCCA 2.

higher level of generality by reference to a generic form of an unidentified condition. The Court was further concerned that the report was simply a template statement drawn from a precedent used by the MOC. Taking these matters into account, the Court concluded that the report was so uninformative so as to be unreliable.[58] However, while it is well settled that for reg 2.25A(3) to apply the MOC opinion must be one that is authorised by the Regulations, aspects of the Court's criticism of the opinion in this case may be misleading as to what the Regulations require, including, for example, the reference to whether the applicant had the capacity to function in his daily life without support. To the extent that the opinion in question follows a 'template' (as the Court suggested) the Tribunal may need to consider whether an MOC opinion before them is affected. The Tribunal should also be careful to ensure it considers the terms of the relevant regulations.

Importantly, the MOC opinion must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[59] Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that, in order to meet this requirement at time of decision, the Tribunal will need to obtain a further opinion (see below Currency of the MOC opinion).

Where the MOC opinion relates to PIC 4005(1)(c)(ii)(A), 4006A(1)(c)(ii)(A) or 4007(1)(c)(ii)(A), i.e. that provision of health care or community services relating to the disease or condition would be likely to result in significant cost to the Australian community, the MOC is not obliged to state what the significant costs would be in order for the MOC opinion to be valid.[60] It is for the MOC to determine whether a cost is significant based on his or her medical judgment.[61] Nor is the MOC obliged to explain why a particular cost is considered to be a significant cost.[62] However, information about the breakdown of costs by the MOC may be relevant to deciding whether to waive the requirements in PIC 4007(1)(c) (see Breakdown of significant costs for further discussion).

The 'hypothetical person' test'

The provisions of PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require the MOC to consider whether or not the relevant disease or condition is such that a hypothetical person with it would be likely to require health care or community services or meet the medical criteria for the provision of a community service; and whether that provision of health care or community services would be likely to result in significant cost to the Australian community; or would be likely to prejudice access of Australian residents to health care or community services. The person referred to in these provisions is not the applicant, but a hypothetical person who suffers from the disease or condition which the applicant has.[63] It is not a

[58] *Traill v MIAC* [2013] FCCA 2 [45]–[47].
[59] *Applicant Y v MIAC* [2008] FCA 367 at [18]–[20], citing *MIMA v Seligman* (1999) 85 FCR 115. The Court in *Applicant Y* was considering PIC 4007(1)(c).
[60] *JP1 & Ors v MIAC* [2008] FMCA 970 at [13], citing *Blair v MIMA* [2001] FCA 1014 at [46]. The Court in JP1 was considering a MOC opinion in relation to (then) PIC 4005(c) for an applicant with HIV.
[61] *JP1 & Ors v MIAC* [2008] FMCA 970 at [33] referring to *MIMA v Seligman* (1999) 85 FCR 115 at [53].
[62] *JP1 & Ors v MIAC* [2008] FMCA 970 at [57].
[63] *Imad v MIMA* [2001] FCA 1011 at [13]. The Court was considering a challenge to the validity of PIC 4005(c) following amendments made after the decision in *MIMA v Seligman* (1999) 85 FCR 115 which found reg 2.25B as it then was to be

prediction of whether the particular applicant will in fact require such health care or community services.[64]

The test is for a hypothetical person because the MOC could reasonably be expected to be able to assess the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care. However, one would not necessarily expect a MOC to inquire into the financial circumstances of a particular applicant or any family members or other sources of financial assistance.[65]

The test is for a hypothetical person who suffers from the form or level of condition suffered by the applicant. In *Robinson v MIMIA*[66] Siopis J found that the MOC opinion was not valid and the Tribunal erred in taking it to be correct, as it did not make the assessment based on the relevant level of the condition held by the applicant. In particular his Honour held:

> *A proper construction of Public Interest Criterion 4005 of the Regulations, requires the MOC to* ***ascertain the form or level of condition suffered by the applicant*** *in question and then to apply the statutory criteria by reference to* ***a hypothetical person who suffers from that form or level of the condition.*** *It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.[67] (emphasis added)*

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

As the legislation requires the MOC to consider a hypothetical person with the form or level of the disease or condition suffered by a particular applicant, there is no requirement to consider other details of a particular applicant's circumstances. The legislation does not require the MOC to examine personal factors of the applicant such as age, degree of compliance with medical regimes or ability to work, pay taxes and contribute to the community in order for the opinion to be valid.[68]

The opinion must be clear on its face as to what is the disease or condition to which the relevant PIC relates.[69] In *Ramlu v MIMIA*[70] the Court found jurisdictional error in the Tribunal decision on the basis that the Tribunal failed to turn its mind to issues relevant to assessing

invalid. The Court in *Imad* found the amended 4005 was valid. Justice Heerey followed his own decision in *Inguanti v MIMA* (2001) FCA 1046 at [10].

[64] *Imad v MIMA* [2001] FCA 1011 at [13]. See also *Blair v MIMA* [2001] FCA 1014 at [44] and *Triandafillidou v MIMIA* [2004] FMCA 20 at [57]–[58].

[65] *Imad v MIMA* [2001] FCA 1011 at [14].

[66] *Robinson v MIMIA* (2005) 148 FCR 182.

[67] *Robinson v MIMIA* (2005) 148 FCR 182 at [43]. This case involved a visa application refused on the basis that the primary applicant's son, who had Down's Syndrome, failed to satisfy (then) 4005(c). The child only had a mild version of the condition. The Court, in concluding the MOC opinion was invalid and the Tribunal decision subject to jurisdictional error followed authorities including *Seligman* (where the Full Court at [83] made reference to "his level of impairment'), *Imad* at [14] and *Inguanti*, and expressly declined to follow the views of Finkelstein J at first instance in *X v MIMIA* [2005] FCA 429 on this issue.

[68] *JP1 & Ors v MIAC* [2008] FMCA 970 at [41]–[47].

[69] *Ramlu v MIMIA* [2005] FMCA 1735 at [22].

[70] *Ramlu v MIMIA* [2005] FMCA 1735.

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

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

Currency of the MOC opinion

A MOC opinion must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[71] Where there has been a passage of time since a MOC opinion was given, the Tribunal should consider whether a further, up-to-date, opinion is required. If the Tribunal considers that a more current MOC opinion is required, it should take appropriate steps. This will be so even where the applicant has refused the invitation to obtain a further MOC opinion, as the primary obligation is upon the Minister or the Tribunal to obtain an opinion which would enable the making of a determination.

Where the Tribunal consults an out of date report, it risks taking into account irrelevant considerations in the form of medical opinions which no longer apply to an applicant.[72] Whether the Tribunal will need to obtain a further MOC opinion will depend on the circumstances of the case. Considerations relevant to whether further investigation is required by the Tribunal include:

- the amount of time that has elapsed between the issue of the MOC's report and the Tribunal's decision
- any evidence of change (and, in particular, improvements) in the applicant's health; and
- the degree to which any other medical opinions demonstrate a lack of currency and reliability in the MOC opinion.[73]

[71] *Applicant Y v MIAC* [2008] FCA 367 at [18]–[20], citing *MIMA v Seligman* (1999) 85 FCR 115.
[72] *Applicant Y v MIAC* [2008] FCA 367 at [22].
[73] *Applicant Y v MIAC* [2008] FCA 367 at [20]. In *Applicant Y* the MOC opinion relied upon by the Tribunal was almost 2 years old as at the time of the Tribunal decision, the applicant having refused the invitation to obtain a further MOC opinion upon review. The applicant had submitted recent reports from the applicant's doctor to the Tribunal indicating an improvement in the applicant's condition since her initial diagnosis as HIV positive and that her prognosis was generally good. The medical evidence indicated that the applicant would not require hospitalisation in the reasonably foreseeable future, while the MOC opinion implied hospitalisation and significant inpatient management as the basis for its assessment of 'significant cost'. In *JP1 & Ors v MIAC* [2008] FMCA 970 the Court rejected submissions based on *Applicant Y* in circumstances where the MOC opinion was only 4 months old and the applicant was arguing not that the MOC opinion itself was out of date, but rather that it was based on out of date guidelines.

Evidence of change in the ability to test or establish the level or severity of a condition due to the applicant's age at the time of decision may also indicate that a MOC opinion is no longer valid.[74]

Where the applicant has refused an invitation to obtain a further MOC opinion at review stage and, on the basis of the above considerations, the original MOC opinion is no longer current and cannot be taken to be correct, the Tribunal will need to obtain a further MOC opinion.[75] The Tribunal can still require the Secretary of the Department to arrange a further MOC opinion in accordance with s 363(1)(d) of the Act where the applicant has declined to seek a new opinion (see 'Is a MOC, or a further MOC, opinion required?' for further discussion). By requiring the Secretary of the Department to obtain an updated, current MOC opinion, which takes account of the applicant's condition and level of illness and provides an updated opinion on the cost to the Australian community in the areas of health care or community services (in line with current policy), the Tribunal will be able to satisfy its obligations under reg 2.25A.

Change in Department's policy for Medical Officers of the Commonwealth (MOC) assessing health criteria

Where a MOC opinion has been provided and changes are subsequently made to the Department's policy that would be more favourable to the applicant (e.g. increase in the threshold level for significant costs), the Tribunal may need to consider whether it may be appropriate to seek a new MOC opinion or seek further clarification from the MOC about the basis of or calculations used for the opinion. This is because the health criteria are a time of decision requirement and an adverse MOC opinion based on the older and less favourable policy may no longer be current. If an applicant declines to seek a new one, the Tribunal may, depending on the circumstances, be obliged under reg 2.25A to seek a MOC opinion to enable the making of a determination on whether the health criteria is met at the time of decision. Generally, where it appears that a person may meet the health criteria based on the new policy, a new opinion would be required. Where the new policy is unlikely to affect a person's ability to meet the health criteria, the Tribunal may not need to seek a new opinion.

An applicant who requests to undergo a medical assessment because of changes to the Department's policy can be referred for a MOC opinion under the Tribunal's existing processes (see 'Is a MOC, or a further MOC, opinion required?' above and the National Registry Procedures – 'Investigations').

[74] See *Pokharel v MIBP* [2016] FCCA 3295. In *Pokharel* the MOC opinions were based on a medical report that had been prepared when the applicant was only 3 months and 16 days old and the medical report noted that the degree of intellectual impairment for the condition was highly variable. The Court held that the Tribunal had asked itself a wrong question by failing to consider whether either of the opinions reflected the level or severity of the condition as at the date of decision (when the applicant was two years old).

[75] *Applicant Y v MIAC* [2008] FCA 367 at [28]. In *Applicant Y*, despite the fact the applicant declined the Tribunal's invitation to obtain a new opinion from a RMOC, it did not displace the Tribunal's error of relying on a MOC opinion that was 23 months old at the time of the Tribunal's decision.

Changes to the Department's policy on 1 September 2021

On 1 September 2021, the Department updated its policy for MOC assessing the health criteria as follows:

- raised the threshold level for 'significant costs' from AUD 49,000 to AUD 51,000.

While MOC opinions provided after 1 September 2021 should reflect the new threshold, all MOC opinions (including further MOC opinions issued during Tribunal proceedings) made before 1 September 2021 will be based on the old policy. The change means that an applicant who previously failed the health criteria because of a MOC opinion made prior to 1 September 2021 may, in certain circumstances, meet the health criteria under the more favourable policy. For an adverse opinion obtained prior to 1 September 2021 (or where no opinion has ever been given), the Tribunal should consider inviting the applicant to obtain a new MOC opinion. As the health criteria are a time of decision requirement, an adverse MOC opinion based on the older and less favourable policy may no longer be current, and it may be appropriate to seek a new MOC opinion or seek further clarification from the MOC about how the significant cost was calculated. This may not, however, be necessary if it is evident the new policy would not affect a person's ability to meet the criteria.

An opinion that the applicant is medically 'cleared', or an opinion made on or after 1 September 2021, does not appear to be affected by the 1 September 2021 policy change.

The following table summarises the cases which are and are not likely to be affected, and the suggested approach.

No MOC opinion obtained	MOC opinion dated **pre-1 Sept 2021** that assessed applicant as 'significant cost'	MOC opinion dated **pre-1 Sept 2021** that applicant was health 'cleared'	MOC opinion dated **post-1 Sept 2021** that assessed applicant as 'significant cost'	MOC opinion dated **post-1 Sept 2021** that applicant was health 'cleared'
Not affected but consider inviting applicant to obtain a MOC opinion under new policy.	**Potentially affected.** Consider inviting applicant to obtain a new MOC opinion under new policy.	Not affected. No further MOC opinion required.	Not affected. Further MOC opinion only required if not current and reliable for other reasons.	Not affected. No further MOC opinion required.

Changes to the Department's policy on 1 July 2019

On 1 July 2019, the Department updated its policy for MOC assessing the health criteria as follows:

- raised the threshold level for 'significant costs' from AUD 40,000 to AUD 49,000 for all cases; and,

- for permanent and provisional visa applicants only who have a permanent condition, reduced the assessment period from lifelong costs to costs for a maximum of ten years.[76]

For an adverse opinion obtained prior to 1 July 2019 (or where no opinion has ever been given), the Tribunal should consider inviting the applicant to obtain a new MOC opinion. This may not, however, be necessary if it is evident that the policy appliable at the time of the Tribunal's decision would not affect a person's ability to meet the criteria.

Breakdown of significant costs

Where the MOC opinion relates to PIC 4005(1)(c)(ii)(A), 4006A(1)(c)(ii)(A) or 4007(1)(c)(ii)(A), i.e. that provision of health care or community services relating to the disease or condition would be likely to result in significant cost to the Australian community, the MOC is not obliged to state what the significant costs would be, or explain why a particular cost is considered to be a significant cost, in order for the MOC opinion to be valid.[77]

However, access to information about the breakdown of the estimated costs could potentially impact on an applicant's ability to present their case, for example it may assist an applicant make submissions about the validity of the MOC opinion or in relation to the waiver of PIC 4007(1)(c). The Tribunal should therefore carefully consider any requests by applicants to provide the costing breakdown, as the failure to provide this information where it is material to the applicant's case could give rise to jurisdictional error for breach of procedural fairness or a breach of s 360.[78]

Where the Tribunal does not have does not have the information about the costing breakdown before it, it is well established that there is no general duty on the Tribunal to obtain information in order to assist the applicant present their case.[79] However, a failure to make an obvious inquiry about a critical fact, the existence of which is readily ascertained, could, in some circumstances constitute a failure to review and therefore give rise to jurisdictional error.[80] Where the information about the costing breakdown is likely to be of critical importance in relation to a central issue for determination, the Tribunal may be obliged to use its powers to obtain that information. The question of whether the information is of critical importance in relation to a central issue for determination will depend on all of

[76] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - The MOC Assessment - Significant costs (re-issued 26/09/2021).
[77] *JP1 & Ors v MIAC* [2008] FMCA 970 at [13], [57].
[78] In *Dang v AAT* [2019] FCAFC 220, the Court found that the Tribunal's failure to disclose the existence of a non-disclosure certificate, which covered a detailed breakdown of the estimated cost to the Australian community of the likely services required by the appellant's son, was a material denial of procedural fairness. The Court found the appellant could have used that information to make possible inquiries to challenge the costings, potentially resulting in a different outcome as to the waiver of PIC 4007(1)(c) (at [73]).
[79] See for example *MIAC v SZIAI* (2009) 111 ALD 15 at [25].
[80] *MIAC v SZIAI* (2009) 111 ALD 15 at [25]. For further discussion about the duty to inquire, see Chapter 11 of the Procedural Law Guide – Power to obtain information.

the circumstances of the case and the applicant's claims. If the Tribunal forms the view that the costing breakdown should be provided to the applicant, it can request that information from the Department via Tribunal Liaison.

Health care

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

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

> *It is not necessary to mark the outer limit of the concept of the term "health care" in the context of the Regulations or to define exhaustively what kinds of persons might qualify as providers or the means by which provision might be made. The term must at least include, in our opinion, the prescription of medication by a legally qualified medical practitioner and the dispensing of that medication by a pharmacist. The fact that a particular medication is self-administered by the person, even if some considerable time after the prescription or the dispensing, cannot sensibly be isolated from the total process. Moreover, in the present case the prescription and dispensing is linked with the monitoring, which is unarguably health care.*[81]

Procedural obligations for a MOC opinion

Regulation 2.25A(3) provides that the Minister (or the Tribunal on review) must take a MOC opinion to be correct for the purposes of whether the applicant satisfies the prescribed health criteria.[82] Once the Tribunal has determined that a MOC opinion is of a kind authorised by the Regulations, it is bound to accept it and find in accordance with it.[83]

[81] *MIMIA v X* (2005) 146 FCR 408 at [12]. The Full Court also held at [13] that the term "health care" is used in the same sense in 4005(c)(i)(A) and in the opening words of 4005(c)(ii). The Full Court disagreed with Finkelstein J at first instance who had held that health care necessarily requires an element of personal attention or activity by the provider and that the term 'health care' did not extend to the mere provision of prescription medication that is self administered: *X v MIMIA* [2005] FCA 429 at [24].
[82] reg 2.25A(3).
[83] *MIMA v Seligman* (1999) 85 FCR 115 at [66].

If the MOC opinion before the Tribunal does not comply with the Regulations, the Tribunal must seek a fresh opinion or make enquiries of the MOC in order to clarify concerns regarding the opinion until it is satisfied it has a valid MOC opinion. The Tribunal cannot determine the requirements of the health criteria for itself.

Where the Tribunal has sought and received a further MOC opinion that is adverse to the applicant, s 359A/AA requires the Tribunal to invite the applicant to comment or respond to the opinion. While in most cases the Tribunal may ask an applicant whether they want a further opinion and require the applicant to pay any relevant fees, it is the Tribunal that actually obtains the MOC opinion. Therefore, the MOC opinion cannot be said to be information provided by the applicant for the purposes of the application and does not fall under any exemptions in s 359A(4) of the Act.[84]

In addition, where the Tribunal has received a further MOC opinion after it has already held a hearing, the Tribunal is required to invite an applicant to another hearing under s 360 of the Act where the further MOC opinion raises a new dispositive issue. In *Haque v MIBP*,[85] the Court held that the further MOC opinion was itself a relevant issue for the purposes of s 360, and the Tribunal had erred in not holding another hearing. The Court found that the further MOC opinion was not simply additional evidence but an entirely new opinion based upon different evidence that, if formed according to the requirements of the legislation, the Tribunal was required to accept as correct.[86]

Whether the MOC opinion raises a new dispositive issue that requires a further hearing will include circumstances where the further MOC opinion can be considered an entirely new opinion based on new or different evidence. That may arise where an applicant provides new medical reports after the last MOC opinion was obtained, or where there have been changes in the department's policy on the health criteria since the last MOC opinion, or where the applicant contests the validity of the MOC opinion.

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

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

[84] *Antoon v MICMSMA* [2021] FedCFamC2G 224.
[85] *Haque v MIBP* [2015] FCCA 1765.
[86] *Haque v MIBP* [2015] FCCA 1765 at [24]. In SYG765/2020, the Court remitted by consent a judicial review application of a Tribunal decision where the Tribunal failed to invite an applicant to an additional hearing to give evidence and present arguments in relation to a further MOC opinion obtained after the applicant had already attended a hearing.

Waiver of the health criterion

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

PIC 4007

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

Further, the waiver provision in PIC 4007(2) is only available if the Minister is satisfied that the granting of the visa would be unlikely to result in 'undue cost' to the Australian community or 'undue prejudice' to the access to health care or community services of an Australian citizen or permanent resident. The consideration of these points relates back to the assessment in the adverse MOC opinion.[87]

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

1. the applicant must satisfy all other criteria for the grant of the visa: PIC 4007(2)(a)

2. the decision maker must be satisfied that grant of the visa would be unlikely to result in:

   (a) undue cost to the Australian community: PIC 4007(2)(b)(i); **or**

   (b) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident: PIC 4007(2)(b)(ii).

In the absence of any case law to guide the Tribunal on the correct construction of PIC 4007(2)(b), it would appear that there are three alternative interpretations as to how the Tribunal approaches the waiver provisions in PIC 4007(2)(b):

- That the two 'alternative' circumstances in PIC 4007(2)(b) refer back to the alternatives noted in PIC 4007(1)(c)(ii). This approach suggests that if the MOC found that PIC 4007(1)(c)(ii)(A) was applicable to the applicant's condition, the relevant matter to consider for the purposes of the exercise of the waiver is likely to be the similarly worded PIC 4007(2)(b)(i). The Full Court of the Federal Court in *Bui v MIMIA,* took this approach and considered the relationship between the element of

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

'significant cost' in PIC 4007(1)(c)(ii)(A) and 'undue cost' in PIC 4007(2)(b)(i).[88] That is, if the MOC has found that the applicant's condition would lead to a significant cost, the Tribunal is limited to considering whether this cost is 'undue'. Similarly, where the MOC considered the 'prejudice to access' in PIC 4007(1)(c)(ii)(B), the relevant waiver criterion for consideration will be whether that prejudice to access will be 'undue' (PIC 4007(2)(b)(ii)). This interpretation is also consistent with departmental policy, which identifies consideration of the costs or prejudice to access that has been identified by the MOC as a factor that needs to be considered in deciding whether to exercise the waiver (in addition to various other factors, depending on what 'cost' or 'prejudice to access' has been identified by the MOC); or

- That, on a plain reading, the use of the conjunction 'or' in PIC 4007(2)(b) suggests that an applicant need only satisfy *one* of the criterion's two limbs to enliven the exercise of the waiver. That is, the Minister (or Tribunal) may waive the criterion if satisfied that granting the visa would be unlikely to result in undue cost 'or' undue prejudice to access. Under this approach, an applicant need only satisfy the Minister, or the Tribunal, that either PIC 4007(2)(b)(i) or PIC4007(2)(b)(ii) is met; or

- That an applicant must satisfy the Minister, or the Tribunal, that their condition would not result in either undue cost to the Australia community *and* undue prejudice to an Australian citizen or permanent resident's access to health care. Under this approach, an applicant would need to satisfy that neither PIC 4007(2)(b)(i) or (ii) would apply in the circumstances.

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

Strictly speaking, the task of determining whether costs or prejudice are "undue" is more accurately characterised as one of interpretation and fact-finding than as the exercise of a discretion.[89] Nevertheless, the Tribunal may have regard to any guidance that may be available in relation to legislative provisions containing such terms, such as may be given in Departmental policy, but it must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.[90]

[88] *Bui v MIMA* (1999) 85 FCR 134 at [46], the Full Court read together the criteria in PIC 4007(1)(c)(i) and the criterion for waiver in PIC 4007(2)(b)(i) and noted that 'it is apparent that the occasion for the exercise of the waiver will only arise where it is already established that the cost to Australia, if the visa is granted, is likely to be "significant". The Minister will therefore need to be satisfied that a likely "significant" cost will nevertheless not be "undue".'

[89] See, Application of policy, "Use of Policy and Guidelines in Exercise of Non-Discretionary Power"

[90] In *Xue Fan v MIAC* [2010] FMCA 490 at [22], the Court observed that Departmental policy (formally known as 'PAMs') are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s 15AB *Acts Interpretation Act 1901* (Cth), that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that "if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Section 15AB(2) then provides that, "[w]ithout limiting the generality of

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

> ***What does 'undue' mean***
>
> *Although 'undue' is not defined in migration law, the dictionary definition of undue is "unwarranted; excessive; too great", and a broad range of discretionary considerations may be taken into account in determining whether costs or prejudice to access are 'undue'.*
>
> *...*
>
> ***What to take into account***
>
> *Given the broad range of discretionary considerations that can be taken into account, the individual circumstances of the visa applicant need to be considered in coming to a conclusion about whether the granting of the visa would be unlikely to result in undue cost or undue prejudice to access.*
>
> *Each health waiver case must be considered on its merits, with all relevant factors taken into account, including the capacity to mitigate the potential costs or prejudice to access identified, and the strength of any compelling and/or compassionate circumstances.*
>
> *When making a waiver decision, section 65 delegates should consider the following policy guidelines for the relevant type of visa being processed, as the nature of the individual circumstances involved are likely to vary depending on the type of visa that has been applied for (even though the same PIC applies) ....*[91]

The policy states relevant factors which are afforded significant weight for non-humanitarian visas,[92] and also set out factors to be considered and given particular weight in relation to humanitarian visas[93] and Foreign Affairs or Defence Sector students.[94]

Compelling and compassionate circumstances may be relevant to the consideration of the waiver; however, considerations are not restricted to such circumstances. The Full Court of the Federal Court considered the operation of the health waiver in the case of *Bui v MIMA*.[95] The Court held that the evaluation of whether an identified significant cost would be 'undue'

subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes" materials such as explanatory memoranda and relevant reports laid down before either House of Parliament.

[91] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Waivers (re-issued 26/09/2021).

[92] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Waivers – Assessing PIC4007 waivers for a non-humanitarian visa (re-issued 26/09/2021).

[93] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Waivers – PIC 4007 waivers for Humanitarian visas (re-issued 26/09/2021).

[94] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Waivers - PIC 4007 waivers for Foreign Affairs or Defence Sector students (re-issued 26/09/2021).

[95] *Bui v MIMA* (1999) 85 FCR 134. This case involved judicial review of a decision of a delegate that the applicant did not meet PIC 4007 in the form prior to the amendments of 1 July 1999. The waiver was not exercised. The Full Court held at [49] that a request to the applicant to provide information on "compelling and compassionate circumstances" did not demonstrate an unduly restrictive approach to the exercise of the waiver. The delegate's decision was overturned following *MIMA v Seligman* (1999) 85 FCR 115 and the invalidity of reg 2.25B.

may import consideration of compassionate or other circumstances and commented that it may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person would make some significant call upon health and community services. There may be circumstances of a 'compelling' character, not included in the 'compassionate' category, that mandate such an outcome.'[96] For further information please see 'Compelling and/or Compassionate Circumstances/Reasons'.

PIC 4006A

PIC 4006A only applies to Subclass 457 (Temporary Work (Skilled)) visas made before 18 March 2018.[97]

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

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

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

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

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

- be written
- be given by the relevant nominator
- be given to the Minister

[96] *Bui v MIMA* (1999) 85 FCR 134 at [47].
[97] PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which it applied) from that date. The amendments do not affect visa applications made before 18 March 2018: F2018L00262, items 37 and 171 of sch 1, pt 1, and cls 6702(1) & (2) of pt 67, sch 13 of the Regulations, as inserted by item 178, sch 1 pt 1 of the amending regulation. The Subclass 457 visa was replaced with the Class GK Subclass 482 (Temporary Skills Shortage) visa and applicants for Subclass 482 must satisfy health criterion 4007.

- and be an undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).[98]

In the absence of a statutory definition, the word 'undertaking' is to be given its ordinary meaning. The Macquarie Dictionary Online relevantly defines the word as 'a promise; pledge; guarantee'.[99] Where there is persuasive evidence that a purported undertaking cannot be met, there is some doubt that the term 'undertaking' can meaningfully be applied. As discussed below, consideration of whether a nominator can meet the purported undertaking may also be a relevant factor in considering whether to exercise the waiver.

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

> *…if the 'relevant nominator' is a company, the undertaking must have been 'executed' by the company.*
>
> *Under s 127 of the Corporations Act 2001, a company may execute a document:*
>
> - *without using a common seal if the document has been signed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director*
> - *using a common seal if the affixing of the seal has been witnessed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director.*[100]

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

[98] PIC 4006A(2).
[99] Macquarie Dictionary Online, accessed 3 February 2022.
[100] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers - PIC 4006A (UC-457 Only) (re-issued 01/01/18 - please refer to the 17/01/18 - 17/03/18 stack in Legend). Under ss 128 and 129 of the *Corporations Act 2001* (Cth), a person is, broadly speaking, entitled to assume that a document executed in this manner has been executed by someone authorised to act for the company in any dealings with that company.

PIC 4006A(2) is ambiguous as to whether, for the undertaking to have been given to the Minister, it is necessary that it have been addressed to the Minister, or whether it is sufficient that an unaddressed undertaking be provided to the Minister (or Tribunal). On the one hand, it is arguable that the undertaking must be addressed to the Minister (or Tribunal), based on a view of an undertaking as a promise, pledge or guarantee addressed specifically to a person or group of persons, who may act in reliance on that promise. On the other hand, it is arguable that a breach of the undertaking is unenforceable by the Minister, and that there is no clear policy purpose to be served by making the discretion to exercise the power conditional upon an undertaking being specifically addressed to the Minister. On either construction, the relevant nominator must consider and express a commitment to meet the undertaking, and the Minister will have a record of the undertaking and whether it was honoured available when considering applications relating to the nominator in future. The Explanatory Statement which introduced the waiver for PIC 4005A (later renumbered as PIC 4006A in a technical amendment[101]) provides little if any guidance on this point.[102]

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

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

> *The relevant nominator must undertake to meet all of the costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c).*
>
> *The undertaking must therefore, include the assessed estimated costs.*
>
> *…*
>
> *In most cases, the MOC's opinion that the applicant fails to satisfy the health requirement will be based on the likely cost of health care and community services in Australia….*
>
> *… generally, it would be reasonable to expect that a larger organisation would be able to meet a higher level of costs than a smaller organisation or an employer who is an individual. However, each case must be considered on its own merits.*

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

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

> *If there is doubt about the capacity of the relevant nominator to be able to meet the potential costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c), s 65 delegates should request suitable documentary evidence (such as a letter from an auditor or accountant) confirming the capacity of the relevant nominator to meet those costs.*[103]

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

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

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

> *Under policy, before the s 65 delegate makes a decision to exercise a PIC 4006A(2) health waiver, they must assess whether the undertaking must be capable of being honoured.*
>
> *Consideration should be given to:*
>
> - *whether the relevant nominator has dishonoured previous undertakings*
> - *whether the relevant nominator has the capacity to meet the estimated costs involved and*
> - *if the 'relevant nominator' is a company, the undertaking must have been executed by the company.*[104]

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

[103] Policy – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement >-Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 01/01/18please refer to the 17/01/18 - 17/03/18 stack in Legend).
[104] Policy – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement >-Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 01/01/2018 please refer to the 17/01/18 - 17/03/18 stack in Legend).

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

'One fails all fail' visa criteria

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

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

In considering this question, the person must first be a member of the family unit of the visa applicant/s. 'Member of the family unit' is defined in reg 1.12 of the Regulations[105].

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

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

It is not possible for the Tribunal to be satisfied that it would be unreasonable to require a person to undergo assessment where the person has already undergone assessment. The exempting power does not exist to undo an assessment actually completed.[106] The power does not exist to be exercised when it is known that a person is unable to satisfy the specified health criteria, even when the applicant has not yet undergone assessment.

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

[106] *MIMA v Ma* (1998) 82 FCR 455 at 460. The case concerned a Parent visa application. The daughter of the visa applicants was originally included in the visa application, underwent a health examination and was found by the MOC not to meet PIC 4005(c). The parents then withdrew her from the visa application. The Tribunal remitted the matter, finding that it could not see any good reason for requiring the daughter to undergo assessment. The Court set aside the Tribunal decision for legal error as it had no power to exercise the exemption. See also *Satya Nand v MIEA* (1996) 71 FCR 52 at 55-56

Departmental policy indicates that non-migrating family members are not ordinarily required to complete health examinations, but provides examples of circumstances where it may be reasonable to require an examination.[107] However, ultimately the question of whether it is 'unreasonable' to require the person to undergo assessment is a matter for the decision maker, having regard to all of the individual circumstances of the case.

Assessment of non-applicant family members

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

One question that may arise in such cases relates to the fact that both PIC 4005 or 4007 refer to an assessment of 'the applicant'. The concern with this terminology is that non-applicant (non-migrating) family members are not 'applicants' in any ordinary sense. While the use of the term may suggest some uncertainty about how the PIC operate with respect to non-applicants, no such ambiguity arises in the Schedule 2 criteria that require non-applicants be assessed against the health criteria.[108] For this reason, non-applicant family members should be assessed against PIC 4005 and 4007, notwithstanding that perceived ambiguity.

To construe the provisions as applying to anyone other than the non-applicant family member would result in a criterion such as cl 801.224(2)(b) having no utility.[109] It would also undermine the clear purpose of such a provision which is to ensure a decision-maker or MOC can properly consider any disease or condition (and any associated costs) that may affect a non-applicant family member, and the impact those matters may have on the potential grant of the visa.

When assessing the waiver in PIC 4007(2) in this context, the decision-maker is required to consider the case put by the applicant in terms of the *likelihood* of the visa grant to the non-applicant family member resulting in undue cost or undue prejudice to access to services, in the sense of whether the decision-maker is satisfied that it is unlikely.[110]

[107] Policy – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement - Waivers – Non-migrating family members (re-issued 26/09/2021). The examples include where the non-migrating family member is a young child remaining in their country of origin without parental support; where the non-migrating family member is remaining in their country of origin where there is ongoing conflict and stability and where there is evidence that the non-migrating family member will ultimately seek to migrate to Australia.

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

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

[110] See *Gella v MIBP* [2018] FCCA 2647 where the Court found at [38]–[39] that the Tribunal constructively failed to exercise its jurisdiction by entirely focussing its analysis on the possibility that the applicant would apply for her son (the non-applicant family member) to migrate to Australia. The Court found that possibility, however, was insufficient to address the question posed by PIC 4007(2) which is directed at the question of "likelihood", even though it is framed in the negative. The Court held

Remittal power

If the Tribunal is satisfied that an applicant meets a discrete part of PIC 4005, 4006A or 4007 then it is permissible to remit with a direction that the applicant satisfies the particular sub criterion for the purpose of the relevant Schedule 2 clause (e.g. remit with direction that applicant meets PIC 4007(2)(b) for the purpose of cl 309.225 of Schedule 2 to the Regulations).[111] See Chapter 3 of the Procedural Law Guide – Powers and functions of the Tribunal for more detail about the remittal power.

Relevant case law

Judgment	Judgment summary
Antoon v MICMSMA [2021] FedCFamC2G 224	Summary
Applicant Y v MIAC [2008] FCA 367	Summary
Blair v MIMA [2001] FCA 1014	Summary
Bui v MIMA [1999] FCA 118	
Dang v AAT [2019] FCAFC 220	Summary
Gella v MIBP [2018] FCCA 2647	Summary
Haque v MIBP [2015] FCCA 1765	Summary
Imad v MIMA [2001] FCA 1011	Summary
JP1 & Ors v MIAC [2008] FMCA 970	Summary
MIMA v Ma [1998] 82 FCR 455	
Pokharel v MIBP [2016] FCCA 3295	Summary
Sarabia v MIBP [2017] FCCA 2642	
Satya Nand v MIEA [1996] FCA 1057	
Ramlu v MIMIA [2005] FMCA 1735	Summary
Reynolds v MIAC [2010] FMCA 6	Summary
Robinson v MIMIA (2005) 148 FCR 182	Summary

that Tribunal had to determine the probabilities first, of the applicant's son applying for a visa and, second, that he would be granted the visa. The possibility of the former was a necessary, but insufficient, step in the required analysis.

[111] s 349(2)(c), regs 4.15(1)(b), 2.03.

MIMA v Seligman (1999) 85 FCR 115	
Traill v MIAC [2013] FCCA 2	Summary
Triandafillidou v MIMIA [2004] FMCA 20	Summary
MIAC v Wainwright [2010] FMCA 29	Summary
MIMIA v X [2005] FCAFC 209	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Legislation Amendment Regulations 2008 (No 1) (Cth)	SLI 2008, No 91	No 3/2008
Migration Amendment Regulations 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2009
Migration Amendment Regulations 2011 (No 6) (Cth)	SLI 2011, No 199	No 7/2011
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No 3/2011
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment Regulation (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No 4/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018

Available decision templates/precedents

There are two decision precedents available on CaseMate. These are:

- **Health criterion – PIC 4005 –** suitable for a review of a visa refusal on the basis of PIC 4005
- **Health criterion – PIC 4007** – suitable for a review of a visa refusal on the basis of PIC 4007

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PUBLIC INTEREST CRITERION 4013

Introduction[1]

A number of temporary visas include criteria intended to prevent persons who have previously been the subject of certain adverse migration action from obtaining a further visa for a certain period (or in some cases at all).[2] Such criteria are prescribed in Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) and set out in Schedules 4 and 5.[3]

The relevant criteria which are of this 'exclusionary' nature are:

- public interest criteria (PIC) 4013 and 4014 (Schedule 4 to the Regulations); and
- special return criteria (SRC) 5001, 5002 and 5010 (Schedule 5 to the Regulations).

The criteria specify that particular persons cannot be granted certain visas to travel to, enter, and remain in Australia for a certain period (exclusion period),[4] unless certain exceptions apply.

The general purpose of such exclusion periods is to:

- demonstrate the seriousness with which breaches of migration or other Australian laws are viewed
- deter people from breaching migration laws; and
- maintain the integrity of migration policies.[5]

Exclusion periods do not prevent a person from applying for a visa. A person potentially subject to an exclusion period can validly apply for a visa, however, they must satisfy the criteria prescribed in Schedule 2 for the relevant visa subclass, including PIC 4013 or 4014 or prescribed special return criteria.

This commentary only considers PIC 4013, which most commonly arises in student visa refusals where a previous student visa of the visa applicant has been cancelled.

For information about special return criteria, see: Special Return Criteria.

[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] They include (but are not limited to) student, business, skilled and visitor visas, but not bridging, partner or protection visas.
[3] Section 31(3) of the Act gives the power to prescribe criteria for visas or classes of visa and reg 2.03(1) of the Regulations states that the prescribed criteria for the grant of a visa are set out in a relevant Part of sch 2. If a criterion in sch 2 refers to a sch 4 criterion by number, that criterion must be satisfied as if set out in full in sch 2: reg 2.03(2).
[4] The term 'exclusion periods' is not defined in the legislation. It is a generic term that refers to the periods of time specified in PIC 4013, 4014 and SRC 5001, 5002 and 5010.
[5] Explanatory Statement to SR2002, No 10.

The requirements of Public Interest Criterion 4013

Public Interest Criterion 4013 is set out in Schedule 4 to the Regulations. Where an applicant for a visa is affected by a 'risk factor' as set out in that criterion, he or she is required to satisfy one of the two alternate criteria set out in PIC 4013(1).

Relevantly, PIC 4013(1)(a) requires that the visa application has been made more than 3 years after the date of the relevant visa cancellation or the relevant Ministerial decision. Or, in the alternative, PIC 4013(1)(b) requires that the decision maker be satisfied that in the particular case there are:

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

that justify granting the visa within 3 years after the date of the visa cancellation or determination.

The risk factors

PIC 4013(1A), (2), (2A) and, from 12 December 2014, (3) specify the current circumstances in which a person is affected by a risk factor.[6] For visa applications made prior to 22 March 2014 where the delegate's decision to refuse to grant the visa was made before 12 December 2014, a previous version of PIC 4013(3) applies and additional risk factors prescribed in PIC 4013(4)–(5) apply.[7]

PIC 4013(1A): visa cancelled due to incorrect information/bogus documents or identity

The risk factors in PIC 4013(1A) vary depending on the date a decision is made to grant or refuse the visa under which PIC 4013 is being considered.[8]

Where a decision is made to refuse a visa *on or after* 12 December 2014 a person is affected by a risk factor if a visa previously held by the person was cancelled under:

[6] PIC 4013(1A), (2) were amended and (3) was inserted with effect from 12 December 2014 by *Migration Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 199). The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. The transitional that applies to these amendments is worded atypically to other recent transitionals. While not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies to new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

[7] PIC 4013(3)–(5) were repealed with effect from 22 March 2014 by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30). They continue to apply in limited circumstances to visa applications made before, on, or after 22 March 2014 where the visa application is taken to have been made in accordance with reg 2.08, 2.08A or 2.08B and the non-citizen mentioned in reg 2.08(1)(a) (with respect to an application made in accordance with reg 2.08), or the original applicant mentioned in reg 2.08A(1)(a) or 2.08B(1)(a) (with respect to an application made in accordance with reg 2.08A or 2.08B), applied for his or her visa *before* 22 March 2014.

[8] PIC 4013(1A) was amended with effect from 12 December 2014 by SLI 2014, No 199. The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. For discussion of the operation of this transitional, see fn.5.

- ss 109, 116(1)(d), 116(1AA) or (1AB) or 133A of the *Migration Act 1958* (Cth) (the Act); or
- s 128 of the Act because the Minister was satisfied s 116(1)(d) of the Act [visa could have been cancelled under s 109] applied to the person; or
- s 133C of the Act because the Minister was satisfied that ss 116(1)(d), or 116(1AA) [identity] or (1AB) [incorrect information] of the Act applied to the person.

These cancellation decisions broadly include where the applicant provided incorrect information or bogus documents, where the Minister is not satisfied as to the applicant's identity, or in the exercise of the Minister's personal powers to cancel a visa.

Where a decision is made to refuse a visa *prior to* 12 December 2014, the circumstances are more limited. Prior to this date, a person is affected by the risk factor specified in PIC 4013(1A) if their previous visa was cancelled under:

- ss 109, or 116(1)(d); or
- s 128 (because the ground in s 116(1)(d) applied).

What if the visa cancellation has been reversed?

If a visa cancellation decision under s 109 has been set aside by a Court or Tribunal, PIC 4013(1A) is not engaged, because in those circumstances s 114(1) provides that the visa is taken never to have been cancelled. Similarly, where the Minister revokes a decision to a cancel a visa under ss 133A(3) or 133C(3), the original cancellation decision is taken not to have been made.[9]

However, there is no equivalent provision in respect of decisions made under ss 116(1)(d), (1AA) or (1AB) or 128 (on the basis of the ground in s 116(1)(d)).

Whether PIC 4013 is engaged where a decision under ss 116 or 128 has been set aside or revoked arises more generally in the context of PIC 4013(2) and is discussed below. If this arises as an issue, advice may be sought from MRD Legal Services.

PIC 4013(2): visa cancelled on specified grounds

The risk factors in PIC 4013(2) vary depending on the date the visa application was lodged, and the date a decision is made to refuse the visa under which PIC 4013 is being considered.

A person is affected by the risk factor specified in PIC 4013(2) if their *previous* visa was cancelled under s 116 or s 128 of the Act on any of the grounds listed in PIC 4013(2)(a)–(d), namely:

[9] s 133F(6).

- the person was found by Immigration to have worked without authority[10]

- in relation to certain visa holders – the person breached specified visa condition(s) for that visa[11]

- for former Subclass 773 (Border) visa holders who were apparently eligible for certain substantive visas at the time the Border visa was granted – the person breached a specified condition[12]

- for former student visa holders – the visa cancellation decision maker was satisfied that s 116(1)(fa) applied, namely the visa holder:

  - was not, or was not likely to be, a genuine student; or

  - engaged, was engaging, or was likely to engage, while in Australia, in conduct not contemplated by the visa[13]

- *for all visa applications made on or after 14 December 2021,* the Minister was satisfied that reg 2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (na), (o), (oa), (ob), (s) or (t) applied to the person[14]

- *for all visa applications made on or after 17 April 2019 and before 14 December 2021,* the Minister was satisfied that reg 2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (o), (oa), (ob), (s) or (t) applied to the person[15]

- *for visa applications made on or after 18 March 2018 and before 17 April 2019,* the Minister was satisfied that reg 2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (o), (oa) or (ob) applied to the person[16]

- *for visa applications made on or after 23 March 2013 and before 18 March 2018, where the decision to refuse the visa under PIC 4013 was made on or after 12 December 2014,* the Minister was satisfied that reg 2.43(1)(ea), (i), (ia), (j), (k),

[10] PIC 4013(2)(a).
[11] PIC 4013(2)(b). Part 2 of sch 4 to the Regulations includes a table of conditions applicable to certain subclasses of visas for the purposes of PIC 4013(2). It lists the applicable visa subclasses and the specified conditions. For example, under item 4058C, the specified visa conditions for a Subclass 572 (Vocational Education and Training Sector) visa are conditions 8101, 8104, 8105, 8202, 8501, 8517 or 8518.
[12] PIC 4013(2)(c). Part 2 of sch 4 to the Regulations includes a table of specified conditions applicable to certain subclasses of visas which, for the purposes of PIC 4013(2)(c), the Subclass 773 (Border) visa holder may have been eligible for.
[13] PIC 4013(2)(ca).
[14] PIC 4013(2)(d) as amended by sch 1, item 3 of the *Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021* (Cth) (F2021L01772). The amendments inserted reg 2.43(1)(na), which provides for cancellation in circumstances where a visa holder, or a person in charge of the holder on a relevant flight or voyage, has provided incorrect information in a digital passenger declaration.
[15] PIC 4013(2)(d) as amended by sch 1, item 2 of the *Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019* (Cth) (F2019L00575). These amendments inserted regs 2.43(1)(s) and (t). Regulation 2.43(1)(s) provides that Subclass 600, 601, 651, 676 and 771 visa holders who are in Australia and who have not been immigration cleared may have their visas cancelled where the Minister reasonably believes that the person has contravened ss 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (Cth). Regulation 2.43(1)(t) broadly provides that a temporary visa may be cancelled where the Minister reasonably believes that the person has imported goods to which reg 4A of the *Customs (Prohibited Imports) Regulations 1956* (Cth) applies and for which permission to import has not been given.
[16] PIC 4013(2)(d) as amended by sch 1, item 172 of the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262). These amendments inserted reg 2.43(1)(kc) which broadly provides that a Subclass 482 (Temporary Skill Shortage) visa can be cancelled if the visa holder did not have, or ceased to have, a genuine intention to perform the nominated occupation, or if the position associated with the occupation is not genuine.

(ka), (kb), (m), (o), (oa) or (ob) applied to the person[17]

- *for visa applications made on or after 23 March 2013 and before 18 March 2018, and where the decision to grant or refuse the visa on the basis of PIC 4013 was made before 12 December 2014*, the Minister was satisfied that reg 2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (m) or (o) applied to the person[18]

- *for visa applications lodged before 23 March 2013*, *where the decision to refuse the visa on the basis of PIC 4013 was made prior to 12 December 2014*, the visa cancellation decision-maker was satisfied that reg 2.43(1)(i), (ia), (j), (k), (ka), (kb), (m) or (o) applied to the person.[19] In broad terms, the specified grounds relate to the visa holder not having, or ceasing to have, a genuine intention to stay in Australia for relevant purposes, such as visiting temporarily, tourism, business, working or other activities for which the visa was granted, or the Minister reasonably suspects the person has committed certain offences under the Act, or that the visa was obtained as a result of fraudulent conduct.

What if the visa cancellation has been reversed?

Where a visa cancellation decision under ss 116 or 128 has been reversed (e.g. set aside or revoked), the operation of PIC 4013(2) is unclear as there is no equivalent to s 114, to the effect that in these circumstances the visa is taken never to have been cancelled, and the question has not been the subject of specific judicial consideration. However, if such a decision is set aside by a Court on the basis that it involved jurisdictional error, the general principle is that it is no decision at all,[20] and on that basis the visa may therefore be regarded as having never been cancelled.[21]

[17] PIC 4013(2)(d) as amended by SLI 2014, No 199, sch 4, item 3803. These amendments inserted reg 2.43(1)(oa) and (ob), which provide grounds for cancellation where the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State or Territory (whether or not the holder held the visa at the time of the conviction and regardless of the penalty imposed (if any)); or that the Minister is satisfied that the holder is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning or intelligence that: the holder has committed an offence against a law of another country and is likely to commit a similar offence; or the holder is a serious and immediate threat to public safety. PIC 4013(2)(d) was amended with effect from 12 December 2014 by SLI 2014, No 199. As discussed above, the transitional that applies to the amendments in SLI 2014, No 199 is worded atypically to other recent transitionals. While not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies to new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

[18] PIC 4013(2)(d) as amended by *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32) sch 6 item 300. These amendments inserted the cancellation ground in reg 2.43(1)(ea) which provides that the case of a Subclass 601 (Electronic Travel Authority) visa — that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted; or has ceased to have that intention.

[19] PIC 4013(2)(d). Regulations 2.43(1)(i),(j),(k) and (ka) apply to circumstances where the person is the holder of a visitor visa as specified in the relevant subclause and the Minister is satisfied that, despite the grant of the visa, the visa holder did not have or has ceased to have an intention only to visit, or stay in Australia temporarily; reg 2.43(1)(ia) and (kb) relate to certain temporary visa holders who the Minister is satisfied did not have at the time of visa grant, or have ceased to have, a genuine intention to stay temporarily in Australia to carry out the proposed work , activity or occupation in relation to which the visa was granted, or a nomination made: inserted by *Migration Legislation Amendment Regulations 2011 (No 1)* (Cth) (SLI 2011, No 105)and applying to visa applications made but not finally determined before 1 July 2011, and made on or after 1 July 2011; reg 2.43(1)(m) relates to where the Minister reasonably suspects that the visa holder has committed an offence under certain sections of the Act relating to people smuggling; reg 2.43(1)(o) applies where the Minister reasonably suspects the visa has been obtained as a result of fraudulent conduct of any person – this regulation only applies to visa applications made on or after 1 July 2004.

[20] *MIAC v Bhardwaj* (2002) 209 CLR 597 at [33].

[21] For example, *Sukhera v MIMIA* [2004] FCA 1427 where the Court declared that the purported cancellation under s 116 was of no effect and had no effect in law on the then existing visa held by the applicant.

If a decision made under s 116(1)(d) is set aside by a Tribunal, the Tribunal's decision operates prospectively in the absence of the exercise of any power to back-date the decision.[22] Similarly, it would appear that where a cancellation decision under s 128 is revoked pursuant to s 131, the revocation would be operative from the date it is made.[23]

On one view, because Tribunal decisions operate prospectively, it would remain the case that the visa 'was cancelled' and PIC 4013(2) would be engaged, even though the cancellation was subsequently reversed.

The alternative and preferable view is that once the cancellation is set aside or revoked, it could not be said that the visa 'was cancelled' and PIC 4013(2) would have no operation. The decision in *Al Tekriti v MIMIA*[24] provides strong support for this view. The issue before the Court in that case was whether s 48 of the Act prevented the applicant from making a spouse visa application in circumstances where a decision to refuse a protection visa had been set aside by the Tribunal.[25] Section 48 operates if a non-citizen 'was refused a visa' or, like PIC 4013(2), 'held a visa that was cancelled'. Justice Mansfield held that the 'refusal' to which s 48 refers was not intended to be the event of the delegate's decision irrespective of whether it is subsequently set aside, whether by a form of review under the Act or by judicial determination, and therefore that the applicant's spouse visa application was not prohibited by s 48 because the applicant had not been refused a protection visa.[26] In reaching that conclusion, his Honour considered the effect of ss 349(3) and 415(3), and expressed the view that it would do violence to the plain language of those provisions to treat a decision of a delegate which has been set aside by a tribunal under Part 5 or Part 7 as a decision refusing the visa, and further, that there was no apparent reason why the legislature would intend s 48 to operate when the delegate's decision has been set aside by a reviewing Tribunal.[27] While that case was concerned with the expression 'was refused' in s 48(1)(b)(i) where a visa refusal was set aside by the Tribunal in what is now its General Division, the Court's reasoning would appear to be equally applicable to the expression 'was cancelled' in s 48(1)(b)(ii) and to the same expression in PIC 4013(2), where a visa cancellation is set aside by the Tribunal in relation to an application for review made under Parts 5 or 7 of the Act. On that view, where a decision to cancel a visa has been reversed by the Tribunal, PIC 4013(2) would not be engaged.

PIC 4013(2A): automatic cancellation under s 137J

A person is affected by the risk factor specified in PIC 4013(2A) if they previously held a student visa that was automatically cancelled under s 137J of the Act.[28] Whether the previous visa was cancelled under s 137J is a question of fact for the Tribunal.

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[22] *Kim v MIAC* (2008) 167 FCR 51 at [33].
[23] See s 133.
[24] *Al Tekriti v MIMIA* (2004) 138 FCR 60.
[25] Section 48 prevents non-citizens from applying for a visa, other than a visa of a class prescribed for the purposes of the section.
[26] *Al Tekriti v MIMIA* (2004) 138 FCR 60 at [35]–[36].
[27] *Al Tekriti v MIMIA* (2004) 138 FCR 60 at [28].
[28] Section 137J applies if a notice was sent under s 20 of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) and provides for automatic cancellation 28 days after the date of the notice unless the non-citizen complies with the notice or attends an office of immigration for the purposes of explaining the alleged breach. The automatic cancellation process was effectively abolished by amendments to s 20 of the ESOS Act made by *Migration Legislation Amendment (Student Visas) Act*

What if the automatic cancellation was revoked?

The risk factor in PIC 4013(2A) does not apply if the automatic cancellation was subsequently revoked under ss 137L or 137N of the Act. This is because, in these circumstances, s 137P provides that the student visa is taken never to have been cancelled.

Similarly, evidence of a judicial declaration that the visa in question was not automatically cancelled[29] would support a conclusion that the visa was not cancelled for the purposes of the risk factor in PIC 4013(2A).

PIC 4013(3) (current version): visa cancellation under s 116(1)(e)

There are two versions of the risk factor in PIC 4013(3), one that applies to pre 23 March 2014 visa applications (previous version) where the delegate refused to grant the visa prior to 12 December 2014, and the current version which applies to a decision of the delegate to refuse to grant a visa on or after 12 December 2014.[30]

The current version of this risk factor as it applies to a decision to refuse to grant a visa on or after 12 December 2014, arises where a visa previously held by the person was cancelled because the Minister was satisfied that a ground mentioned in s 116(1)(e) of the Act applied to the person. Section 116(1)(e), which applies to visas held on or after 11 December 2014 subject to one exception,[31] provides grounds for cancelling a visa where the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community; or the health or safety of an individual or individuals.

2012 (Cth) (No 192, 2012), which prevents the issuing of a s 20 notice after 13 April 2013.Consequently the automatic cancellation (and revocation) process has effectively ceased from that date: ESOS Act, s 20(4A) as inserted by No 192, 2012 with effect from 13 April 2013.

[29] For example, *Uddin v MIMIA* [2005] FMCA 841 (declaration that the applicant's student visa was not cancelled by operation of law under s 137J); *Hossain v MIAC No 2* [2010] FCA 306 (declarations that the notice sent to the applicant was ineffective for the purposes of s 20 of the *ESOS Act 2000* and s 137J of the Migration Act, and that the applicant did not cease to be the holder of a Subclass 571 visa consequent upon the issue of the purported notice sent to the applicant).

[30] Note that between 12 December 2014 and 18 April 2015, PIC 4013(1) only referred to risk factors mentioned in subclauses (1A), (2) or (2A), and not the risk factor mentioned in subclause (3). As a result, for decisions to refuse a visa for non-satisfaction of PIC 4013 in this period the risk factor in PIC 4013(3) was not relevant and as a consequence, subclause (3) falls out of the operation of the temporary exclusion period scheme. This omission was rectified by a technical amendment made by Item 2 of sch 3 of the *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34) and applies to all visa applications made but not finally determined before 18 April 2015, and visa applications made on or after 18 April 2015to ensure that subclause (3) is captured.

[31] s 116(1)(e) as amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (No 129 of 2014). These amendments apply to a visa held on or after 11 December 2014, except where the visa holder was issued a notice under s 119 (notice of proposed cancellation under s 116) prior to that date. PIC 4013(3) itself was amended with effect from 12 December 2014 by SLI 2014, No 199. The amendments apply in relation to a decision to grant or not to grant a visa, or to cancel a visa, made on or after 12 December 2014. As discussed above, the transitional that applies to the amendments in SLI 2014, No 199 is worded atypically to other recent transitionals. And while not free from doubt, it is most likely that the transitional operates in the same way as a transitional that applies new applications and applications that are not finally determined by a certain date – in this instance any decision to grant or refuse a visa made on or after 12 December 2014.

PIC 4013(3), (4) and (5): cancellation or cessation of temporary entry permits (pre 22 March 2014 visa applications decided prior to 12 December 2014)

The risk factors in PIC 4013(3), (4) and (5) as they apply to visa applications lodged *prior to* 22 March 2014[32] concern persons whose temporary entry permit was cancelled on certain grounds, or whose holder was the subject of certain determinations that there had been a failure to comply with a terminating condition of the permit or a condition of entry of the permit. These 3 provisions are very unlikely to arise for consideration as the risk factors to which they relate must have occurred prior to 1 September 1994, and will in all likelihood have occurred more than 3 years before the date of the visa application being considered. If this does arise as an issue, advice may be sought from MRD Legal Services.

Satisfying PIC 4013 when affected by a risk factor

If a person is affected by one of the risk factors in PIC 4013, they may meet PIC 4013 in one of 2 alternative ways, namely:

- if the visa application under consideration is made more than 3 years after the relevant visa cancellation / Ministerial determination; or
- the Minister is satisfied that there are compelling circumstances that affect the interest of Australia, or compassionate or compelling circumstances that affect the interests of an Australia citizen, permanent resident or eligible New Zealand citizen that justify the granting of the visa within the 3 year period.

Application made more than 3 years after the relevant cancellation

PIC 4013(1)(a) sets a minimum period that must have elapsed before a person who is affected by a prescribed risk factor can be granted a visa. To satisfy PIC 4013 under this limb, the current visa application under consideration must have been made more than 3 years after the relevant cancellation decision that gave rise to the risk factor.

Where the relevant cancellation decision has been affirmed by the Tribunal, the 3 year preclusion period runs from the date of the delegate's decision and not the date of the Tribunal's decision affirming it.[33]

Cancellation of previous visa after the lodgement of current visa application

Circumstances may arise where a visa held by someone is cancelled *after* they had already applied for the new visa that is the subject of the review. Where this happens, that cancellation decision means that the risk factor will apply. Because, as a matter of timing,

[32] PIC 4013(3)–(5) were repealed with effect from 22 March 2014 by SLI 2014, No 30 for visa applications made on or after that date.
[33] *Xiong v MICMSMA* [2021] FCCA 1075 at [81]. The Court found at [79] that an affirmation of a cancellation decision leaves the delegate's decision in place and is not a 'new decision'. Any consequences which arise from the cancellation therefore operate from the date of the delegate's decision.

the cancellation decision will have occurred after the visa application was made, it could never be said that the visa application was made three years after the cancellation decision. In these circumstances, a person could never satisfy PIC 4013(1)(a). In *Wang v MIAC,*[34] the applicant's previously held student visa was cancelled after the application for a new visa was made. The Court rejected the argument that the risk factors in PIC 4013(2) did not apply in these circumstances, holding that PIC 4013(1)(a) did not cover the applicant, and that it was open for the Tribunal to find that the overlap of visa application and cancellation of his previous visa did not amount to compelling or compassionate circumstances that would impact on any other institution or person beyond the applicant himself. The Court came to this conclusion without express consideration of the terms of PIC 4013(1)(a), however, applying the ordinary or natural meaning of the word 'after' in accordance with general principles of statutory interpretation, it appears PIC 4013(1)(a) can only be satisfied where the visa application has been made *after* the cancellation of the previous visa.[35] In these circumstances, though, consideration would still need to be given to PIC 4013(1)(b) and whether there are compelling circumstances affecting the interests of Australia; or compassionate or compelling circumstances affecting the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, which justify the granting of the visa within 3 years after the cancellation.

Compassionate or compelling circumstances

PIC 4013(1)(b) provides an alternative to the 3 year exclusion period specified in PIC 4013(1)(a) if compassionate or compelling circumstances can be established.

Under PIC 4013(1)(b), a person who is affected by a risk factor other than that mentioned in the current PIC 4013(3), will satisfy PIC 4013 if the Minister is satisfied that, in the particular case there are:

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

that justify the granting of the visa within 3 years after the cancellation or determination.

Where an applicant meets the requirements of PIC 4013 on the basis of PIC 4013(1)(b), a finding on this basis will only extend to the particular visa application being considered. Where a person makes a further visa application before the exclusion period has elapsed,

[34] *Wang v MIAC* [2009] FMCA 865 at [19].
[35] In support of this view, where the requirement to satisfy PIC 4013 is contained in a criterion to be satisfied at the time of decision (see e.g. cls 500.217 and 500.317) this would suggest that it is open to the decision-maker to consider the circumstances at time of decision and not be constrained to considering the situation at the time of application (when there was no cancellation decision). Note that departmental policy suggests that while usually the exclusion criteria that must be satisfied will be assessed based on an applicant's circumstances at the time of decision, they may be assessed based on circumstances at the time of application: see Policy – Migration Act – Visa cancellation instructions – Exclusion periods – 3.1 Purpose of exclusion periods (reissued 01/07/2020). However, the policy considers exclusion periods generally and the wording of the policy suggests that this statement is not concerned with whether the applicant is caught or is affected by a risk factor in PIC 4013, but rather is concerned with the assessment of their circumstances in PIC 4013(1)(b).

they will again have to satisfy the decision maker that there are again the relevant kind of circumstances that justify the granting of the visa for PIC 4013(1)(b).

PIC 4013(1)(b) requires consideration of:

- whether there are compelling or compassionate circumstances of the relevant kind in the particular case and, if so
- whether those circumstances justify granting the visa.

There are no definitions of compelling or compassionate circumstances in the Act or Regulations, and there is limited judicial consideration of this provision in the context of PIC 4013. Whether a circumstance or reason is compelling and/or compassionate is a question of fact and degree for the decision maker. In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in PIC 4013(1)(b) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen. See also Compelling and/or Compassionate Circumstances.

Departmental policy also provides some guidance on what may amount to compelling or compassionate circumstances, while making it clear that whether there are compelling or compassionate circumstances depend on the circumstances of the individual case.[36] Whilst not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances. However, the Tribunal should avoid elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the provision in PIC 4013(1)(b) and consider the individual circumstances of the case.

Compelling circumstances that affect the interests of Australia

Whether there are compelling circumstances that affect the interests of Australia is a question of fact and degree for the Tribunal. Departmental policy suggests such circumstances may exist if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa;
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special

[36] Policy - Migration Act - Visa cancellation instructions - Exclusion periods – Assessing and deciding visa applications - Grounds for exercising discretion (reissued 01/07/2020).

skill that is highly sought after in Australia) if the person was not granted the visa. [37]

Departmental policy states that compelling circumstances affecting the interests of Australia would not include circumstances if the non-citizen merely claims that, if granted the visa, they would:

- work and pay taxes;
- pay fees to an education provider; or
- spend money in Australia.[38]

Departmental policy indicates that compelling circumstances may arise where the exclusion period has arisen from either a Departmental error or as an unintended consequence of the exclusion provisions.[39] The policy states that exclusion provisions may be regarded as having an unintended effect if the person previously made every effort to leave Australia whilst a lawful non-citizen (e.g. while holding a bridging visa) but did not leave before the visa ceased due to factors beyond their control, such as:

- health issues;
- unavoidable delays by airlines;
- delays associated with travel documents; or
- they were a minor at the time their visa ceased and it can be demonstrated that they were not responsible for their own departure arrangements.[40]

Generally, the exclusion provisions should not be regarded as having an unintended effect in cases if, for example:

- the person claims they inadvertently breached a condition of the Electronic Travel Authority (ETA) because the travel agent failed to inform of the conditions of the ETA; or
- the person claims they inadvertently became an unlawful non-citizen because they did not receive a visa label when their visa was granted and were therefore unaware of their visa expiry date; or
- the person claims the Department wrongly cancelled a previous visa but:

[37] Policy - Migration Act – Visa cancellation instructions - Exclusion periods – Assessing and deciding visa applications - Compelling circumstances (reissued 01/07/2020).
[38] Policy - Migration Act – Visa cancellation instructions - Exclusion periods – Assessing and deciding visa applications - Compelling circumstances (reissued 01/07/2020).
[39] In *Anupama v MIAC* [2009] FMCA 817, the Court held that the exercise of the discretion miscarried because the Tribunal asked itself the wrong question. In that case, the applicant had claimed to the Tribunal that she had been incorrectly advised by the Department, and it appeared the Tribunal accepted that claim. The Court held that, in those circumstances, the Tribunal should have considered whether the Department had committed a civil wrong by giving negligent advice to the applicant and, if so, whether it was a compelling circumstance affecting the interests of Australia to remedy that wrong.
[40] Policy - Migration Act – Visa cancellation instructions - Exclusion periods - Assessing and deciding visa applications – Unintended consequences (reissued 01/07/2020).

- although they applied for the cancellation to be revoked or reviewed the decision maker decided not to revoke or set aside the cancellation; or

- they failed to apply for the cancellation decision to be revoked or reviewed, even though they were able to do so.[41]

Nevertheless, if it appears that the cancellation was incorrect at law (for example, as a result of the principles established in *Dai v MIAC,*[42] *Uddin v MIMIA,*[43] or *Hossain v MIAC*[44] and *Mo v MIAC,*[45] – see discussion below) that may amount to a compelling circumstance that affects the interest of Australia, justifying the granting of the visa within 3 years after the cancellation.

Further, Departmental policy also states that there may be compelling circumstances affecting the interests of Australia in the case of persons whose last substantive visa was a Student visa and who are applying for a new Student visa. In particular, where the applicant's circumstances, including previous study history in Australia, clearly demonstrate that they have been a genuine student in Australia, and there is no evidence that they have actively or intentionally abused or sought to circumvent immigration laws, decision makers may accept that compelling and compassionate circumstances exist.[46]

See also Compelling and/or compassionate circumstances.

Compassionate or compelling circumstances affecting interests of an Australian citizen, permanent resident or eligible New Zealand citizen

Whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen is a question of fact and degree for the decision maker. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined in the dictionary as 'circumstances that invoke sympathy or pity' whereas 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'.

Departmental policy also suggests circumstances that may be regarded as compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen.[47] Under the policy, such circumstances may exist if the visa applicant was not granted the visa and, as a result:

- family members in Australia would be left without financial or emotional support;

[41] Policy - Migration Act – Visa cancellation instructions - Exclusion periods - Assessing and deciding visa applications - – Unintended consequences (reissued 01/07/2020).
[42] *Dai v MIAC* (2007) 165 FCR 458.
[43] *Uddin v MIMIA* [2005] FMCA 841.
[44] *Hossain v MIAC* (2010) 183 FCR 157.
[45] *Mo v MIAC* [2010] FCA 162.
[46] Policy - Migration Act – Visa cancellation instructions - Exclusion periods - Assessing and deciding visa applications– Former Student visa holders (reissued 01/07/2020).
[47] Policy - Migration Act – Visa cancellation instructions - Exclusion periods –Assessing and deciding visa applications - Compassionate circumstances (reissued 01/07/2020).

- family members in Australia would be unable to properly arrange a relative's funeral in Australia; or

- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and is therefore subject to an exclusion period).

The policy also suggests that there may be compelling circumstances affecting the interests of such person/s if the visa applicant was not granted the visa and, as a result:[48]

- a business operated by an Australian citizen would have to close down because it lacked the specialist skills required to carry out the business;

- civil proceedings instigated by an Australian permanent resident would be jeopardised by the absence of the non-citizen witness; oran eligible New Zealand citizen would be unable to finalise legal and property matters associated with divorce proceedings without the physical presence of the non-citizen in Australia.

For further information, see: Compelling and/or compassionate circumstances.

Other Issues arising in the consideration of PIC 4013

Operation of PIC 4013 where cancellation appears or is alleged to be invalid

In considering the operation of PIC 4013, a question may arise as to whether an earlier visa cancellation, which was not set aside or revoked by a Court or Tribunal, was nevertheless invalid, for example as a result of *Dai v MIAC,*[49] *Uddin v MIMIA,*[50] or *Hossain v MIAC*[51] and *Mo v MIAC.*[52]

The validity of certain cancellations has most commonly arisen in the context of student visas, with the Courts, in a number of cases referred to below, finding that during certain periods, and in certain circumstances, cancellation of students visas were invalid:

- *Dai affected cases*[53] – where breach of condition 8202(3)(b) occurred pre-1 July 2007

- *Uddin affected cases*[54] – s 20 notices issued between 4 June 2001 and 25 January 2007

- *Hossain*[55] and *Mo*[56] affected cases – s 20 notices issued between 1 July 2007 and 16 December 2009.

[48] Policy - Migration Act – Visa cancellation instructions - Exclusion periods - Assessing and deciding visa applications- - Affecting interests of an Australian citizen/resident(reissued 01/07/2020).
[49] *Dai v MIAC* (2007) 165 FCR 458.
[50] *Uddin v MIMIA* [2005] FMCA 841.
[51] *Hossain v MIAC* (2010) 183 FCR 157.
[52] *Mo v MIAC* [2010] FCA 162.
[53] *Dai v MIAC* (2007) 165 FCR 458.

Where this issue arises, the Tribunal will need to consider the impact of the cancellation decision on the PIC 4013 assessment.[57] However, the scope of the enquiry in these circumstances is unclear, and in particular to what extent the Tribunal is required to consider the validity of the cancellation, or, if it forms the view that the cancellation was invalid, whether it should proceed on the basis that the visa was nevertheless cancelled, or on the basis that the visa was never cancelled.[58]

Given that the cancellation or non-revocation decision itself is not the decision under review, the better view is that if the visa was in fact cancelled, and the cancellation has not been reversed or found by a Court *in that particular case* to be invalid, the Tribunal should proceed on the basis that the visa 'was cancelled' for the purposes of PIC 4013.

On that approach, the applicant would be affected by the risk factor but the validity of the cancellation would be relevant to the consideration under PIC 4013(1)(b) of whether there are compelling/compassionate circumstances justifying the grant of the visa.

Relevant case law

Judgment	Judgment summary
Al Teriki v MIMIA [2004] FCA 772	Summary
Anupama v MIAC [2009] FMCA 817	Summary
Bui v MIMA [1999] FCA 118	
Chintala v MIMA [2006] FMCA 999	
Dai v MIAC [2007] FCAFC 199; (2007) 165 FCR 458	Summary
Hossain v MIAC [2010] FCA 161; (2010) 183 FCR 157	Summary
Hossain v MIAC No 2 [2010] FCA 306	
Kim v MIAC [2008] FCAFC 73; (2008) 167 FCR 51	Summary
Mo v MIAC [2010] FCA 162	Summary

[54] *Uddin v MIMIA* [2005] FMCA 841.
[55] *Hossain v MIAC* (2010) 183 FCR 157.
[56] *Mo v MIAC* [2010] FCA 162.
[57] See *Chintala v MIAC* [2006] FMCA 999, where the Court held that in the context of a visa refusal because PIC 4013 was not satisfied, the Tribunal was *not* required to consider whether the cancellation in question was valid *where that was not an issue raised by the applicant or otherwise squarely raised on the material*. The Court held at [62] that "although the cancellation may have been invalid [as a result of *Uddin*], where that was not an issue before the Tribunal raised by the Applicant or his solicitor, the Tribunal was entitled to proceed on the basis of being satisfied in respect of the criteria as to whether or not the Applicant's student visa had been cancelled. The Tribunal was not required to further consider whether such cancellation was invalid where no such issue was raised by the Applicant and was not otherwise squarely raised on the material before the Tribunal". The Court's reasons suggest that where the issue as to the validity of the cancellation *is* raised by either the applicant or the material, the Tribunal would need to consider that question.
[58] While the reasons in *Chintala v MIAC* [2006] FMCA 999, suggest that the Tribunal would need to consider the question of the validity of the cancellation if raised as an issue, the Court was not called upon to consider what approach the Tribunal should take in those circumstances, and the judgment provides no guidance on that question.

Sukhera v MIMIA [2004] FCA 1427	Summary
Uddin v MIMIA [2005] FMCA 841	Summary
Wang v MIAC [2009] FMCA 865	

Relevant legislative amendments

Migration Amendment Regulations 2002 (No 1) (Cth)	SR 2002, No 10
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30
Migration Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 199
Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)	SLI 2014, No 129
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262
Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019 (Cth)	F2019L00575
Home Affairs Legislation Amendment (Digital Passesnger Declaration) Regulations 2021	F2021L01772

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PIC 4020, BOGUS DOCUMENTS AND FALSE OR MISLEADING INFORMATION

Overview[1]

The terms 'bogus document' and 'information that is false or misleading' are used in the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (the Regulations) in a number of contexts - as criteria for the grant of a range of visas, as the basis for cancellation of visas, and as the basis for cancelling or barring a sponsor. Specifically:

- For a broad range of skilled, business, student, family and partner visas, public interest criterion (PIC) 4020 is a basis for visa refusal in certain circumstances where there is evidence that bogus documents or information that is false or misleading in a material particular have been provided;
- Visas can be cancelled under:
  - section 109 of the Act where a visa applicant gave incorrect information (including information that is false or misleading) or a bogus document; and
  - section 116 and the prescribed ground in reg 2.43(1)(l) where a sponsor for a Subclass 457, 482 or 494 visa holder has given false or misleading information to Immigration or the Tribunal;[2]
- In the context of sponsorship bars and cancellation, reg 2.90 provides for the cancellation or barring of the approval of a sponsor where the sponsor has provided false or misleading information to Immigration or to the Tribunal.

PIC 4020 is now the most common context in which the issue of bogus documents or false or misleading information arises.

For guidance on cancelling under ss 109 and 116 and cancelling/barring under reg 2.90 see: Cancellation of Visas under Section 109, Cancellation of Visas under s 116 and Business Sponsorship Bars and Cancellation.

PIC 4020

Operation of PIC 4020

PIC 4020 is a primary and secondary criterion for the grant of a wide range of family, partner, skilled, business and student visas. It provides a ground to refuse a visa in certain circumstances where bogus documents or false or misleading information have been provided in relation to the visa application, or a recent visa grant. It was introduced initially in April 2011 to address some deficiencies in the existing time of decision criteria of certain skilled visas and was then extended to some business visas.[3] It is now a requirement for the grant of most visa subclasses (see below).

[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] reg 2.43(1)(l)(ii).
[3] PIC 4020 inserted by *Migration Amendment Regulations 2011 (No 1)* (Cth) (SLI 2011, No 13). See Explanatory Statement to SLI 2011, No 13, at p.18. Prior to 2 April 2011, there was no provision of general application in the migration legislation that allowed the Minister to refuse a visa where an applicant had provided bogus documents or false or misleading information. The

Broadly speaking, PIC 4020(1) and (2) require that:

- there is no evidence that the applicant has given a bogus document or information that is false or misleading in a material particular for the current visa application or a recently held visa;[4] and
- in the period starting 3 years before the application was made and ending when the decision on the visa is made, the applicant and their family members have not been refused a visa for giving bogus documents or false or misleading information[5] (unless the person was under 18 at the time the application for the refused visa was made[6]).

The above requirements apply whether or not the Minister became aware of the bogus document or false or misleading information because of information given by the applicant.[7] Further, these requirements may be waived in some circumstances.[8]

Additionally, PIC 4020(2A) and (2B) broadly require that:

- the applicant meets the identity requirement;[9] and
- in the period starting 10 years before the application was made and ending when the decision on the visa is made, the applicant and their family members have not been refused a visa for failing to meet the identity requirement[10] (unless the person was under 18 at the time the application for the refused visa was made).[11]

The waiver provisions do not apply to the above requirements relating to identity.[12]

Each of the elements of PIC 4020, as well as the waiver provisions, is discussed in more detail below.

Visas subject to PIC 4020

PIC 4020 is a criterion for the grant of a broad range of visas. For some visas, the criterion applies to all live applications,[13] whereas for others - including student visas, some business,

power to refuse a visa on that basis was limited to circumstances where the primary visa applicant did not satisfy the 'false or misleading information' time of decision criteria specific to skilled visas, for example cl 880.224.

[4] That is, a visa held in the period of 12 months before the application was made: cl 4020(1). For visa applications made between 18 November 2017 and 5.56pm on 5 December 2017, this requirement applied in relation to visas that the applicant held or applied for (whether or not the visa was granted), in the 10 years before the application was made, rather than only visas held in the previous 12 months: PIC 4020(1)(b) as amended by the *Migration Legislation Amendment (2017 Measures No 4) Regulations 2017* (Cth) (F2017L01425). This amending regulation was disallowed by the Senate at 5.56pm on 5 December 2017: Commonwealth, *Parliamentary Debates*, Senate Hansard, 5 December 2017, 96-97. Disallowance had the effect of repealing the amending regulation from that time: ss 42(1) and 45(1) of the *Legislation Act 2003* (Cth).

[5] PIC 4020(2).

[6] PIC 4020(2AA) was inserted by *Migration Legislation Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 163) for all applications made on or after 23 November 2014 and to applications not finally determined as at that date for all applications to which PIC 4020 applies.

[7] PIC 4020(3).

[8] PIC 4020(4).

[9] PIC 4020(2A) was inserted into PIC 4020 by *Migration Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 32) for all applications made on or after 22 March 2014 and to applications not finally determined as at that date to which PIC 4020 applies.

[10] PIC 4020(2B) was inserted into PIC 4020 by SLI 2014, No 32 for all applications made on or after 22 March 2014 and applications not finally determined as at that date to which PIC 4020 applies.

[11] PIC 4020(2BA) was inserted by SLI 2014, No 163 for all applications made on or after 23 November 2014 and to applications not finally determined as at that date to which PIC 4020 applies.

[12] PIC 4020(4).

[13] A challenge to the validity of PIC 4020 as a criterion for 'live' applications was rejected in *Kaur v MIBP* [2014] FCA 281 at [50]. See also *Kaur v MIBP* [2013] FCCA 1162 at [58] where the Court agreed with the Minister's submission that the introduction of PIC 4020 provided a benefit to applicants by allowing for the waiver of PIC 4020(1) and (2) in compassionate or compelling circumstances. Such a change could in no meaningful sense be described as unreasonable, oppressive or unjust.

skilled, partner and family visa subclasses - the criterion only applies to visa applications made on or after a certain date.

In the case of a range of these visa subclasses, legislative amendments designed to include PIC 4020 as a criterion for the particular subclass were seemingly intended to apply to all unresolved visa applications as at the date of introduction. However, as a result of technical drafting issues, these amendments appear to have a more limited operation. The Attachment to this Commentary provides details of the visa applications to which PIC 4020 applies.

'No evidence before the Minister…'

PIC 4020 requires that there be no evidence before the Minister that the applicant has given a bogus document *or* information that is false or misleading in a material particular. The use of the disjunctive 'or' between the words 'bogus document' and 'information' sets up two discrete categories and makes it clear that evidence of one or the other will suffice, and it is unnecessary that there be evidence of both in order to attract the provisions of PIC 4020(1).[14]

When considering this element of PIC 4020(1), regard should be had to the following principles:

- The word 'evidence' is used to impose a requirement that the facts conveyed by the material must be sufficiently probative to lead to the conclusion that information given in connection with the application for a visa was false or misleading in a material particular.[15] The consideration of 'evidence' requires an assessment of the quality of the evidence being relied on by the Tribunal before finding whether an applicant fails to satisfy the criterion,[16] and satisfaction that there is 'evidence' is to be formed reasonably upon the material before it.[17]
- There is a distinction between the evidence of giving 'information that is false or misleading in a material particular' and evidence of the giving of a 'bogus document'. Whilst PIC 4020 implies the need for 'probative evidence', PIC 4020 only requires evidence that a bogus document has been submitted, not that a document that has been submitted is bogus. Therefore, if a document which is found to be bogus under the 'relatively undemanding test' of 'reasonable suspicion' has been submitted in

[14] *Thind v MIBP* [2013] FCCA 1438 at [20]. Appeal dismissed: *Thind v MIBP* [2014] FCA 207.
[15] *Sharma v MIMAC* [2013] FCCA 1280 at [33]–[37]. The Court expressly endorsed the decision in *Talukder v MIAC* [2009] FCA 916 as relevant to the proper construction of the word 'evidence' as it appears in PIC 4020, notwithstanding that the decision in *Talukder* was concerned with a version of cl 886.224 ('false and misleading information' criterion) which contained different words and had since been repealed.
[16] *Talukder v MIAC* [2009] FMCA 223, cited with approval in the context of PIC 4020 in *Sandhu v MIMAC* [2013] FCCA 491 (appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842). The Court in *Talukder* stated that the use of the word 'evidence' in cl 880.224 (as it was prior to 2 April 2011) 'establishes that the clause requires something more than mere existence of information suggestive of falsity. It requires some probative information. In other words, a decision maker cannot simply take any information suggestive of falsity as sufficient for the purposes of the clause. The decision maker must satisfy himself or herself that the information is acceptable as evidence pointing to false or misleading information having been given for the purposes of establishing the validity of the visa application and that the falsity or misleading information was material to the visa application' (at [18]–[21]). Appeal dismissed in *Talukder v MIAC* [2009] FCA 916 at [19]–[21].
[17] *Sharma v MIMAC* [2013] FCCA 1280 at [39].

connection with a visa application, no more is needed to show that there is 'evidence' of the sort referred to in PIC 4020(1).[18]

- There is no limitation by reference to its source, on the information which may comprise 'evidence'.[19] In this respect, information may come from sources other than the applicant. This is reflected in the terms of PIC 4020(3) that makes clear that the requirements in PIC 4020 apply whether or not the Minister became aware of the document or information because of information given by the applicant.

These principles were applied in the following cases:

- In *Sandhu v MIMA* the Court found that the source of information in that case (a person having personal knowledge of fraudulent activity) and its content (a plea of guilty on the part of the person involved in producing fraudulent references and his possession of documents identical to that submitted to the relevant assessing authority) was sufficiently probative of the document in question being one to which the definition of 'bogus document' applied.[20]
- In *Sharma v MIMAC* the Court found that it was reasonably open to the Tribunal to regard the applicant's evidence that his alleged employer had '…provided [reference] letters to so many other people who have not worked there', together with information obtained by the Department concerning the authenticity of his reference letter, as constituting material that was sufficiently probative to lead to the conclusion that the alleged employer's reference letter contained a statement that was false and misleading.[21]
- In *Verma v MIBP* the Court confirmed that an opinion may constitute evidence sufficiently probative to lead to the conclusion that a document provided was bogus or that information given was false or misleading in a material particular. It was reasonably open for the Tribunal to regard as probative the opinion of an IELTS test provider that an imposter had undertaken an IELTS test in circumstances where there was material before the Tribunal which enabled it to assess whether the opinion expressed was itself based on probative material.[22]
- In *Patel v MIBP* the Court found that there is no requirement for the evidence to be 'direct evidence of fact' and it is open to the Tribunal to rely upon information which it finds through its own research. [23] It was open to the Tribunal to suspect that the difference between information it had found itself by using the IELTS online

[18] *Singh v MIMAC* [2013] FCCA 1435 at [25]; cited with approval in *Sun v MIBP* [2015] FCCA 2479 at [27]. Judge Jarrett's reasoning in *Sun* was approved on appeal: *Sun v MIBP* [2016] FCAFC 52 per Logan J at [21]. In *Sun* the Full Court rejected an argument that the requirement that there be 'no evidence' imposed an onus or burden on the Tribunal of proving that a document was bogus, per Flick and Rangiah JJ at [73]–[75], Logan J agreeing.

[19] *Luthra v MIAC* [2009] FCA 575 at [27]. See also *Luthra v MIAC* [2009] FMCA 170. Those cases concerned the construction of cl 880.224 (as it was prior to 2 April 2011).

[20] *Sandhu v MIMAC* [2013] FCCA 491 at [39]; appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842.

[21] *Sharma v MIMAC* [2013] FCCA 1280 at [43].

[22] *Verma v MIBP* [2017] FCCA 2079 at [88]. The Court also inferred the Tribunal had doubts about whether photographs of a person undertaking two different tests were of the one person, as the applicant claimed, or two, as the IELTS provider claimed: at [89]. Undisturbed on appeal: *Verma v MIBP* [2018] FCAFC 87. Special leave to appeal from this judgment was dismissed: *Verma v MIBP* [2018] HCASL 298.

[23] *Patel v MIBP* [2014] FCCA 2059 at [26], undisturbed on appeal: *Patel v MIBP* [2015] FCAFC 22. In the Federal Circuit Court no error was found in the Tribunal's reasoning that information on the IELTS online verification system was sufficiently probative to lead to a reasonable suspicion that the IELTS test result form provided by the applicant was a bogus document. It was open to the Tribunal to trust the information it obtained from the IELTS online verification system and to not believe that the test centre would inflate the applicant's results (at [26]).

verification system and information in a document submitted by the applicant was explained by the latter being a bogus document.

- The Court in *Palikhe v MIBP* rejected arguments that the Tribunal should not consider evidence that has arisen out of a fraud committed upon the applicant or evidence obtained pursuant to a search warrant issued under s 3E of the *Crimes Act 1914* (Cth).[24] It held that the Tribunal was not required to disregard the skills assessment even if a nullity at law, and nor was it prevented from using information obtained under warrant.[25]

Bogus document

The phrase 'bogus document' for the purpose of PIC 4020(1) is defined in s 5(1) of the Act.[26] Under s 5(1), a bogus document is one that the Minister *reasonably suspects*:

- purports to have been, but was not, issued in respect of the person; or
- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.[27]

What amounts to a 'bogus document' is determined separately from the overall consideration of PIC 4020[28] and is a question of fact for the Tribunal to determine.[29] The Federal Court has commented that the Tribunal should first determine whether a document is a 'bogus document' as defined in s 5(1) of the Act, and then go on to consider whether there is no evidence that an applicant has given or caused it to be given to a party listed in 4020(1).[30]

Reasonably suspects

To meet the definition of 'bogus document', there need only be a 'reasonable suspicion' of a document being bogus, not probative evidence. The relevant test is whether the Tribunal reasonably suspects the document is a document that falls within one of the three limbs as set out above, not whether one or more of the three limbs is satisfied as a matter of fact.[31] A reasonable suspicion in this context requires objective circumstances (which are not mere surmise or conjecture) upon which the reasonable suspicion of the decision-maker is

[24] *Palikhe v MIBP* [2014] FCCA 1875.
[25] *Palikhe v MIBP* [2014] FCCA 1875 at [30]–[32], [37]–[40]. See also *Dhillon v MIBP* [2014] FCCA 552.
[26] s 5(1) as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015). Section 97 was repealed by that Act from 18 April 2015 and replaced by the identical definition in s 5(1).
[27] In *AIB16 v MIBP* [2017] FCAFC 163 it was held that there is no relevant distinction, for the purposes of the definition of 'bogus document', between an 'original' and a copy of the same document: at [76]. This judgment was in the context of s 91W; however the Court's findings would apply equally in the context of PIC 4020.
[28] *Singh v MIMAC* [2013] FCCA 1435 at [24].
[29] *Palikhe v MIBP* [2014] FCCA 1875 at [30]–[32] and [37]–[40].
[30] *Salopal v MIBP* [2018] FCA 1308 at [88]. While the Court's comments were *obiter*, they would be treated by lower courts as persuasive in regards to the approach to assessing cl 4020(1) and would presumably be followed.
[31] See for example *Sun v MIBP* [2015] FCCA 2479 at [45] where the Court stated that the primary issue in terms of a person's authority to alter documents under paragraph (b) of the definition of 'bogus document' is whether the decision maker reasonably suspects there was a lack of authority, not whether that authority was lacking as a matter of fact.

founded.[32] For example, when the definition in paragraph (c) of the definition of bogus document is read in conjunction with PIC 4020(1), the criterion requires that there is *no evidence* before the Minister (or Tribunal) that the applicant *has given*, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a document that the Minister *reasonably suspects* is a document that was *obtained* because of a false or misleading statement.[33]

Addressing the elements of the definition

It is necessary to address the elements of the definition in s 5(1) and identify which paragraph applies. References to the non-genuineness of a document, or statements that the document appears to be falsified, do not amount to a finding that a document is a bogus document as defined.[34] The distinction should also be drawn between a document reasonably suspected of being a 'bogus document' within the meaning of s 5(1), and any false information or misleading statements which are given and which may lead to a 'bogus document' being obtained. For example, a work reference submitted to a relevant assessing authority for a 'skills assessment' which contained statements that were false or misleading is not a 'bogus document' within the meaning of paragraph (c) of the definition as the work reference was not *obtained* because of a false or misleading statement, rather the skills assessment (obtained on the basis of the work reference) constitutes the 'bogus document'.[35]

Must the bogus document be relevant to the visa criteria?

There is no requirement that the falsity of a bogus document should be relevant to the criteria being considered.[36] The definition of 'bogus document', unlike the definition of 'false or misleading in a material particular' in PIC 4020(5), does not contain any reference to visa criteria, and so is not affected by the limitations imposed by the definition of 'false and misleading in a material particular' (discussed below).[37]

While a bogus document is not required to be relevant to the visa criteria, PIC 4020(1) does require the document to have been given 'in relation to' a application for a visa. The phrase 'in relation to' should be given a broad meaning as it refers to the *purpose* for which the

[32] *Sun v MIBP* [2016] FCAFC 52 at [86], citing *George v Rockett* (1990) 170 CLR 104 at 115–116, see also Logan J at [21]*; cf Rani v MIBP* [2015] FCCA 455 at [18], stating the evidence must be sufficient to induce a suspicion of the kind a reasonable person may apprehend, applying *George v Rockett* (1990) 170 CLR 104 at 112–113.
[33] *Sandhu v MIMAC* [2013] FCCA 491 at [44]; appeal dismissed: *Sandhu v MIMAC* [2013] FCA 842.
[34] *Shu v MIMIA* [2003] FCA 791 at [33]–[35]. The Court held in the context of cancellation under s 109 for breach of s 103 of the Act (not to provide bogus documents) that findings about a work reference variously referring to it as 'a false work reference'; 'a document that is false and misleading'; and 'a document that purports to be a genuine employment reference' but that 'the content of this document is not genuine' did not reflect consideration of the correct question for the definition of *bogus document* and s 103; *cf Maharjan v MIBP* [2016] FCCA 3029 at [17] where the Court inferred that the Tribunal had directed its mind to the definition, and in particular, to whether bank statements given by the applicant were counterfeit, when it found they were 'not genuine' based on information from the bank that the statements were 'fraudulent' without identifying for which of the three reasons the document was bogus. The judgment was overturned on appeal, however this aspect was not the subject of consideration: *Maharjan v MIBP* [2017] FCAFC 213. Similarly in *FRS17 v MIBP* [2022] FedCFamC2G 808 where the applicants admitted to having provided false identity documents, the Court found that the IAA correctly described the identity documents as 'counterfeit' having regard to the word's ordinary dictionary meanings (for example in the Macquarie dictionary) which included 'not genuine' and 'pretended': at [9]–[10].
[35] *Singh v MIMAC* [2013] FCCA 1435 at [27]–[29]. See also *Sharma v MIMAC* [2013] FCCA 1280 where the Court at [29]–[30] was satisfied that false work reference letters themselves did not fall within any of the categories of *bogus document* as defined, but that a TRA skills assessment which was obtained by relying upon work reference letters which contained false and misleading information did.
[36] *Arora v MIBP* [2016] FCAFC 35 at [15].
[37] *Arora v MIBP* [2016] FCAFC 35 at [15] and [17]. See also *Batra v MIAC* (2013) 212 FCR 84; *Thind v MIBP* [2014] FCA 207 and *Mudiyanselage v MIAC* (2013) 211 FCR 27 at [23]–[31].

document or information is given to the identified person.[38] It does not have the narrower restricted meaning of 'relevant to' or 'probative of' in the sense that the document or information provided is capable of being logically probative of the criteria to be satisfied for the grant of a visa; nor is its meaning informed by the definition of 'information that is false or misleading in a material particular'.[39] For example, a bogus document submitted as part of a visa application would plainly be 'in relation to' the visa application.[40] This would appear to be the case even in circumstances where the bogus document was not directly relevant to the visa application.[41]

Information that is false or misleading in a material particular

For the purposes of PIC 4020, the phrase 'information that is false or misleading in a material particular' is defined in PIC 4020(5) to mean information that is:

- false or misleading at the time it is given; and
- relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

False or misleading information

The question of what constitutes false or misleading information involves several considerations. Most importantly, PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake).[42] While it is not necessary for a visa applicant to know of, or be directly involved in, any falsehood for PIC 4020 to be engaged, there must have been knowledge or intention on somebody's part.[43]

In order to be misleading, the information must convey or contain a misrepresentation. Such a view is consistent with the interpretation of false or misleading representations about goods or services under the Australian Consumer Law.[44] The representation may be about an existing state of facts or a future state of affairs such as in circumstances where an applicant must satisfy a criterion with a prospective aspect. For example, the nature of cl 572.223(2)(c), which requires the Minister to be satisfied that an applicant *will have access* to certain funds, requires that the information must form a type of representation as to a future state of affairs.[45] While no direct 'representation' is required, the submission of evidence of a loan, the funds of which were completely withdrawn shortly after the date of application, could be information that was false or misleading in respect of the requirement that the funds be available for the period of the visa.[46]

[38] *Nanre v MIBP* [2015] FCA 528 at [27].
[39] *Nanre v MIBP* [2015] FCA 528 at [27], [31].
[40] *Nanre v MIBP* [2015] FCA 528 at [27]. See also the discussion in *Nanre v MIBP* [2015] FCCA 134 at [54].
[41] In *Nanre v MIBP* [2015] FCCA 134, the applicant argued that as TRA was not a valid assessing authority at the time the bogus reference letter was provided, the bogus document given to TRA by the applicant was not given 'in relation to' the application for the visa. The Court rejected this argument finding that it was plainly given in relation to the visa application, even though the application was deficient in the sense that TRA was not specified as an assessing authority at the time it was given: at [54].
[42] *Trivedi v MIBP* (2014) 220 FCR 169 at [32], [54].
[43] *Trivedi v MIBP* (2014) 220 FCR 169 at [28], [33] and [49].
[44] *Kaur v MIMAC* [2013] FCCA 933 at [63]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281.
[45] *Kaur v MIBP* [2015] FCCA 2568 at [29]. Appeal dismissed: *Kaur v MIBP* [2016] FCA 540 at [13]–[14].
[46] *Kaur v MIBP* [2015] FCCA 2568 at [29]. Appeal dismissed: *Kaur v MIBP* [2016] FCA 540 at [13]–[14].

What constitutes false or misleading information is a question of fact for the decision maker to determine having regard to the circumstances of the case.[47] However it is important to correctly characterise the purported false or misleading information when considering whether PIC 4020 is satisfied. Failure to do so may result in jurisdictional error.[48]

There is no requirement that the information in question has in fact misled anybody and it may be the case that the information is 'objectively' false or misleading.[49] However, an element of fraud or deception by somebody is also necessary in order to attract the operation of PIC 4020.[50] Accordingly, to focus only on whether information is objectively false, without considering whether the information is purposefully false or misleading, would give rise to jurisdictional error.[51]

An omission is also capable of amounting to false or misleading information, for example failure to answer a question on a visa application form about previous visa applications.[52]

At the time it is given

The definition of 'information that is false and misleading in a material particular' in PIC 4020(5)(a) requires the information to be false or misleading *at the time it is given*. It is clear from the express terms of PIC 4020(5)(a) that this question must be addressed at the time the information is given.[53] The effect of PIC 4020(5)(a) is that something which may have been given at a particular time, but later becomes false because of different information or a change in circumstances, does not fall within the meaning of false or misleading for the purposes of PIC 4020.[54] In contrast, the question of relevance or materiality in PIC 4020(5)(b) can, depending on the criterion, apply at the time of application or decision.

Relevant to any criteria

For information to be 'false or misleading in a material particular' in the context of PIC 4020, there must be a visa criterion upon which the allegedly false information could materially bear.[55] The definition in PIC 4020(5)(b) focuses upon the materiality of the information. It applies to information which goes to something which will or might determine the visa

[47] *Kaur v MIMAC* [2013] FCCA 933 at [63]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281.
[48] See for example *Larney v MHA* [2019] FCA 700. In that case, the Court found that the Tribunal asked itself a wrong question by focussing not on whether the information the appellant had provided by answering the question asked of him in the application form "No" (in response to the question *'[h]as the applicant been in any previous relationships with persons other than the sponsor?*') was false or misleading in a material circumstance, but on the quite different questions that arose from the Tribunal's misunderstanding of the information he had provided. The Court held that by asking itself the wrong question, the Tribunal fell into jurisdictional error.
[49] *Kaur v MIMAC* [2013] FCCA 933 at [65]. Undisturbed on appeal: *Kaur v MIBP* [2014] FCA 281. In *Singh v MIBP* [2014] FCCA 510 the applicant provided a letter of reference to TRA which was found to have erroneously stated that the applicant worked 900 hours. In these circumstances the Court held it was open for the Tribunal to find that the applicant did not satisfy PIC 4020(1)(a) on the basis the letter of reference submitted to TRA was false and misleading.
[50] *Trivedi v MIBP* (2014) 220 FCR 169 at [33].
[51] For instance, in *Kaur v MIBP* [2014] FCA 1276 at [57]–[61], the Court held that the Tribunal erred when it asked whether the information was objectively false or misleading and did not consider the question of whether the information had the necessary quality of 'purposeful falsity' required of PIC 4020.
[52] *Umer v MIBP* [2017] FCCA 2934 at [46]–[47], which held that the Tribunal was correct to find that the review applicant's failure to answer a question on a visa application form about previous visa applications was misleading in circumstances where the review applicant knew that there was a previous visa refusal, knew he had not provided the correct information, and made no effort to correct the omission.
[53] *Kaur v MIBP* [2014] FCA 281 at [45].
[54] *Kaur v MIBP* [2014] FCCA 1264 at [79].
[55] *Singh v MIAC* [2012] FMCA 145 at [68].

application and is not concerned with information that is irrelevant to the visa requirements.[56] However, the referable criterion cannot be PIC 4020 itself.[57]

In most instances this will not present any difficulties. However the requirement has raised issues in the context of certain skilled visa applications made before 1 October 2011 where the time of application criteria relates to obtaining a skills assessment by a relevant assessing authority.

Before 1 October 2011, bodies such as Trades Recognition Australia (TRA) were not validly specified as relevant assessing authorities, meaning that time of application criteria relating to obtaining a skills assessment by a relevant assessing authority (e.g. cl 485.214) do not apply.[58] Therefore, false or misleading information cannot be regarded as 'relevant' to such criteria.[59] Accordingly, where the relevant skills assessment criterion for the purpose of PIC 4020(5) is a time of application criterion and relates to a pre-1 October 2011 visa application, it would not be open to conclude that the information in question was 'false or misleading in a material particular'.[60]

The problem with the specification of relevant assessing authorities was remedied from 1 October 2011.[61] Therefore, where the skills assessment forms part of a time of decision criterion (e.g. cl 485.221(1)), including for pre-1 October 2011 visa applications, it would be open to conclude that the information was 'false or misleading in a material particular' at the time of decision.[62]

The approval of a relevant assessing authority is immaterial to the question of whether an applicant has given a bogus document (see discussion above).[63]

Further, while the specification of relevant assessing authorities resolves the question of whether information is false or misleading in a material particular, at least in terms of time of decision criteria, where a relevant assessing authority was not validly specified at the time the information was given to it, then PIC 4020 may not be enlivened. See discussion below.

Given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth

PIC 4020 requires that there be no evidence that the information or bogus document was given, or caused to be given, *to* any of the specific entities or persons provided - namely the

[56] *Kaur v MIBP* [2014] FCCA 1264 at [80]–[81]. See also *Singh v MIBP* [2018] FCCA 1136.
[57] *Singh v MIBP* [2015] FCCA 1939 at [63]. In considering the materiality requirement in PIC 4020(5), the Court held that '[i]t was a misconstruction and misunderstanding of the applicable law for the Tribunal to determine the relevance of the information given by the applicant about the nature of his employment for the purposes of PIC 4020(1) by reference to the applicable version of cl 485.224 which simply required him to satisfy public interest criteria, including PIC 4020'. This overcomes the reasoning in *Bari v MIAC* [2013] FMCA 14, which appeared to accept a submission that information will be false or misleading 'in a material particular' if it is relevant to the criterion which requires satisfaction of PIC 4020, which would arguably mean that any false or misleading information would be false or misleading information 'in a material particular' even if otherwise irrelevant to all other visa criteria.
[58] See *Singh v MIAC* [2012] FMCA 145.
[59] *Singh v MIAC* [2012] FMCA 145.
[60] *Singh v MIAC* [2012] FMCA 145. The approach in *Singh* was followed in a number of cases: *Dhiman v MIAC* [2012] FMCA 646 at [37]–[39] (Subclass 485 visa refusal) and *Brar v MIAC* [2012] FMCA 519 at [71] (cancellation under s 109).
[61] An instrument, IMMI 11/068, was made in October 2011 specifying TRA as a relevant assessing authority. The validity of that instrument was upheld in *Zhang v MIAC* [2012] FMCA 1011, insofar as it was relevant to time of decision criteria. The Court's reasoning in *Zhang* as to the validity of IMMI 11/068 would be equally applicable to subsequent instruments that have since replaced 11/068, in relation to applications for General Skilled Migration visas which require a suitable skills assessment at time of decision (e.g. cls 485.221(1), 885.222(1)).
[62] *Kaur v MIBP* [2014] FCA 281.
[63] *Arora v MIBP* [2016] FCAFC 35 at [14]; *Mudiyanselage v MIAC* (2013) 211 FCR 27 at [38].

Minister, an officer, the Tribunal,[64] a relevant assessing authority[65] or a Medical Officer of the Commonwealth.

For information or a document to engage the operation of PIC 4020 it must be given to a person when the person is the holder of the statutory office or the performer of the statutory role.[66] Thus, a decision maker will not only need to identify the persons or entities that received the information or document, they will also need to be satisfied these persons or entities held the relevant position or office, or – in the case of relevant assessing authority – were properly specified, *at the time the information or document was provided*.

Relevant assessing authority

In many instances, there will be no issue identifying that the entity or person(s) who received the information or document are of a kind provided for under PIC 4020. However, there will be instances where the person or body is not of a type provided for under PIC 4020 and this may be determinative of the PIC 4020 assessment.

In the case of a 'relevant assessing authority', the Regulations require that a body is a relevant assessing authority if it has been specified as such by the Minister in a written instrument.[67] There is uncertainty as to whether a document or information given to a body such as Trades Recognition Australia (TRA) before it was specified as a relevant assessing authority is caught by PIC 4020(1) due to the conflicting authority on this issue.[68] Please contact MRD Legal Services if this issue arises.

The provision of false or misleading information or a bogus document to a body that was not *specified* as a relevant assessing authority at the relevant time may be immaterial if the information or document was also given to any of the other persons or entities provided for under PIC 4020, such as the Minister or the Tribunal on review.[69]

[64] PIC 4020(1) was amended by SLI 2015, No.103 to remove reference to the Migration Review Tribunal and replace it with the 'Tribunal during the review of a Part 5-reviewable decision' as a result of the MRT's amalgamation with the Administrative Appeals Tribunal (AAT) from 1 July 2015. Any records or documents that were in the possession of the MRT immediately before 1 July 2015 are, from that day, taken to have been transferred to the AAT: item 15DB of sch 9 to the *Tribunals Amalgamation Act 2015* (Cth).
[65] as defined in regs 1.03, 2.26B.
[66] *Sharma v MIBP* [2014] FCCA 2821 at [30].
[67] reg 2.26B.
[68] In *Sharma v MIBP* [2014] FCCA 2821, Judge Cameron found that information given to TRA before it was specified as a relevant assessing authority was not 'given to a relevant assessing authority' and the Tribunal erred in finding that PIC 4020 was engaged. However, in *Fan v MIBP* [2015] FCCA 505 his Honour stated that he no longer holds this view and found that it was of no significance that TRA was not a relevant assessing authority at the time the information was given as long as it was a relevant assessing authority at the time of decision. However *Fan* should be treated with caution as his Honour considered the correct and binding view on the issue to be as set out in *Kaur v MIBP* [2014] FCA 281. As *Kaur* turned on the construction of cl 4020(5)(b) (i.e. 'relevant to any criteria'), it is not clear why his Honour considered it 'binding' in relation to the separate question of whether the information or document had been 'given to a relevant assessing authority' at a time prior to that body being properly specified as such.
[69] In *Batra v MIAC* [2012] FMCA 544 the Court considered the provision of a bogus document in the context of a visa cancellation under s 109. The Tribunal found that a TRA skills assessment, obtained on the basis of a false work reference, was a bogus document provided to the Minister. The fact that TRA was not at the material time specified as a 'relevant assessing authority' was immaterial. Appeal dismissed: *Batra v MIAC* (2013) 212 FCR 84 at [60]–[61]. See also *Mudiyanselage v MIAC* [2012] FMCA 887 where the Court considered whether a TRA skills assessment also obtained on the basis of a false work reference, was a 'bogus document' for the purpose of PIC 4020. Consistently with *Batra,* the Court held that although TRA had not been validly appointed as a relevant assessing authority, this was not relevant to whether the applicant *gave the Minister* a bogus document and that it was open for the Tribunal to conclude the applicant had provided such a document to the Minister. Upheld on appeal: *Mudiyanselage v MIAC* (2013) 211 FCR 27. See also *Bajwa v MIBP* [2014] FCCA 2890 and *Sekhon v MIBP* [2014] FCCA 2834.

Purposeful falsity

The principle of 'knowing falsehood' applies to the provision of information that is false or misleading in a material particular and to the provision of a 'bogus document' within the meaning of paragraphs (a) and (b) of the definition of *bogus document*[70] (it is less clear whether it applies to paragraph (c) of the definition of *bogus document* which dictates that a document may be a bogus document if obtained because of a false or misleading statement *'whether or not made knowingly)'.*[71] While making a positive finding that the information or document was purposefully false or contained purposefully false or misleading information is not strictly necessary, as the test is satisfaction that there is no evidence to the contrary,[72] including a statement to this effect within a decision record can make clear that a decision maker turned their mind to this question.

For the requirements in PIC 4020(1) and (2) to be engaged, it is not necessary to show knowing complicity by the visa applicant.[73] The words 'given or caused to be given' do not import a mental element such that an applicant needs to know that the documents or information they are providing are defective in the relevant sense.[74] All that is necessary is that the information provided was purposefully false.[75]

Given or caused to be given

It will be uncontroversial where the applicant has given the bogus document or the false or misleading information personally (for example, it is the applicant's own evidence that a particular document or piece of information was given to a Departmental officer by them). What may be less clear though is where the bogus document or false or misleading information has been given by somebody else (for example, a migration agent assisting the applicant with their application for a visa).

While it is not necessary to show that the bogus document or the false or misleading information was provided by somebody else with the visa applicant's knowledge and complicity, the document or information must still be 'given or caused to be given' by the visa applicant. This does not mean that the applicant needs to be aware that false information has been given by that other person, or that the applicant gave instructions to that other person for the bogus document or false or misleading information to be provided though.[76]

If the applicant is complicit in the provision of false information or 'indifferent' to a third party acting unlawfully or dishonestly, it can be said that the applicant caused it to be given.

[70] *Patel v MIBP* [2015] FCAFC 22, applying *Trivedi v MIBP* (2014) 220 FCR 169. See also *Chopra v MIBP* [2014] FCCA 2064.
[71] Neither *Patel v MIBP* [2015] FCAFC 22 nor *Trivedi v MIBP* (2014) 220 FCR 169 expressly considered the scope and effect of paragraph (c) as the facts in those cases did not give rise to such consideration.
[72] *Faruque v MIBP* [2015] FCA 1198 at [26].
[73] *Trivedi v MIBP* (2014) 220 FCR 169 at [43]–[44]. Cited with approval in *Singh v MIBP* [2018] FCAFC 52 at [144].
[74] *Vyas v MIAC* [2012] FMCA 92 at [68]. This view was endorsed in *Sran v MIBP* [2013] FCCA 37.
[75] *Trivedi v MIBP* (2014) 220 FCR 169. See also *Chung v MIBP* [2015] FCA 163 at [25]. In that case the Court found that the inclusion of a skills assessment reference of which the assessing authority had no record, and evidence that the assessing authority had no skills assessment reference referable to the appellants was sufficient for the Tribunal to find there was information associated with the visa application which had the necessary quality of purposeful falsity. It was not necessary for the Tribunal to go further and determine whether the visa applicants had knowingly been involved in the provision of that false information or document before finding that there has been a failure to comply with PIC 4020.
[76] See *Singh v MIBP* [2018] FCAFC 52 at [152] where the Court held that it was reasonably open to the Tribunal to find that the applicant had caused the bogus document to be given to the Department because he was content to have his brother-in-law act as his intermediary, and that in such circumstances it is not necessary to determine whether or not the visa applicant had knowledge of or was complicit in the fraudulent conduct. See also *Singh v MIBP* [2015] FCCA 2776 at [49] and *Dhanuka v MICMSMA* [2019] FCCA 2849.

Indifference in this context means to be recklessly indifferent as to the truth of the representation, which is said to be deliberately false.[77] In *Kaur v MIBP*,[78] the Federal Court held that to find an applicant was indifferent requires a finding close to dishonesty, based on probative evidence as to the subjective state of mind of the person affected by the fraud of a third party.

Whether an applicant can be said to be complicit in or indifferent to the provision of false information will depend on the facts of the case. Evidence as to the third party's relationship with the applicant and the scope of any authority given to them either expressly or impliedly may be relevant in establishing whether an applicant is complicit in or indifferent to any relevant conduct. In *Gill v MIBP*,[79] the Full Federal Court held that there is a relevant distinction between indifference as to how a migration agent, acting lawfully and properly, can achieve a visa applicant's desired outcome and indifference as to whether that outcome is achieved acting unlawfully or dishonestly. The Court concluded that, in order for there to be a finding that the applicant was complicit in the migration agent's fraud, the applicant must be indifferent to that agent acting unlawfully or dishonestly.

In *Kaur v MIBP,* the Federal Court held that primary judge had erred in finding that the applicant had not demonstrated that she was not indifferent to the fraud perpetuated by her representative. It found that the primary judge had made several erroneous factual findings including an incorrect inference that applicant was indifferent to the fraud because of her preparedness to engage a lawyer without investigating their bona fides and to pay for their services upfront although this is how many services are procured,[80] and that the applicant's failure to notify the Department of the false information was indicative of her indifference to the fraud, when the evidence suggested that the applicant was acting on the advice of three migration agents who told her to instead address her previous migration agent's actions with the Tribunal on review.[81]

Conversely, in *Sran v MIBP*[82] the Court found that an agency agreement for the purpose of lodging a visa application was established, in circumstances where the applicant instructed the agent to make an application on his behalf, a fee was discussed, and the applicant was aware the application was to be made. The Court further found that the applicant's indifference to the detail of the application was such as to make the scope of the authority broad enough to include the provision of false or misleading information to the Department in relation to the applicant's skills assessment. As such, the validity of the visa application was found not to be vitiated by the agent's conduct.

Therefore, even where an applicant did not fill out an application form or physically give the relevant information or documents, they may be found to have caused a bogus document or

[77] *Kaur v MIBP* [2019] FCAFC 53 at [134]. In this case, the Federal Court found that the factual findings of the Federal Circuit Court did not rise to a level which could justify a description of the appellant as being "recklessly indifferent" to the truth of the claims and material put forward by the migration agent in the visa application form (at [141]).
[78] *Kaur v MIBP* [2021] FCA 1026 at [60].
[79] *Gill v MIBP* [2016] FCAFC 142 at [42], [48]–[49].
[80] *Kaur v MIBP* [2021] FCA 1026 at [61].
[81] *Kaur v MIBP* [2021] FCA 1026 at [77]–[78].
[82] *Sran v MIBP* [2014] FCCA 37. Similarly, in *Koirala v MIBP* [2014] FCCA 842 at [6]–[7], the Court concluded that it was open to the Tribunal to find that the applicant's lack of involvement or failure to take any interest in the visa application demonstrated that the applicant had instructed the agent to lodge the application and that he was indifferent as to how that agent went about that task. See also *Singh v MIBP* [2014] FCCA 1816, where the Court found it was open for the Tribunal to conclude that the applicant was indifferent to the contents of their visa application. The Court found that the applicant provided 'flimsy' evidence of their interaction with the agent and if the applicant not been indifferent to the way in which the visa obtained, a detailed account of would be expected (at [33]–[35]).

false or misleading information to be given to a specified person, and thus not to have complied with PIC 4020, despite allegations of fraud by their representative or a third party.[83] However, there may be a distinction between complicity, indifference and fraud. While the first two may still mean that a bogus document or false or misleading information was caused to be given by an applicant, the latter case of fraud (for example, by a person purporting to be a registered migration agent who had been de-registered) may operate to invalidate an entire visa application (see discussion below). In those circumstances, it may not be open to find that a document or information was given or caused to be given by an applicant.

Effect of fraud on the visa application

A visa application may be invalid where fraud has prevented the primary decision-maker from carrying out their functions or has stultified the visa application process.[84] Where it is alleged that third party fraud has resulted in an invalid visa application, the validity of the application is a jurisdictional fact to be determined by the decision-maker.[85] Failure to do so is likely to result in jurisdictional error. In *Maharjan v MIBP*[86] the Federal Court found that the Federal Circuit Court erred by not deciding the jurisdictional fact of whether the alleged fraud in that case had invalidated the visa application or the visa application process. The Court's reasoning would apply equally to the Tribunal's assessment of any claims of third party fraud.

Where an applicant claims that their migration agent or a third party engaged in fraudulent conduct and provided in support of the person's visa application a bogus document, or information that is false or misleading in a material particular, and the visa applicant claims that their visa application is therefore a nullity, matters that the Tribunal may need to consider include, whether:

- the migration agent or third party was responsible for the fraudulent conduct;
- at the relevant times, the applicant had no knowledge of and was not complicit in the fraudulent conduct carried out by the migration agent or third party;
- the visa applicant was not indifferent as to whether the migration agent or third party engaged in the fraudulent conduct in the visa application process; and
- the fraud affected decision-making under the Act.[87]

Whether a visa application is invalidated as a result of third party fraud will depend upon the facts of each case, including the role of the applicant and the precise nature of the agency relationship between the parties. If the applicant is complicit in the fraud or 'indifferent' to a third party acting unlawfully or dishonestly, the visa application will not be invalidated by the third party's conduct. Indifference in this context means to be recklessly indifferent as to the

[83] For example, in *Singh v MIBP* [2015] FCCA 2776, the Court found at [56] that '[i]t is consistent with the conclusions of Buchanan J in *Trivedi* that the provisions of s 98 of the Act should apply to PIC 4020 and that an applicant should be deemed to have completed an application form where he or she causes a form to be filled out or his/her behalf'.
[84] *Maharjan v MIBP* [2017] FCAFC 213 at [113].
[85] *Maharjan v MIBP* [2017] FCAFC 213.
[86] *Maharjan v MIBP* [2017] FCAFC 213.
[87] *Singh v MIBP [*2017] FCCA 2198 at [144]. While, in that case, the Court considered that the visa applicant had the onus of establishing these matters in a judicial review case, the reasoning would appear equally applicable to the Tribunal's assessment, noting that there is no standard of proof for Tribunal reviews. In addition, the Court conducted a detailed analysis of the caselaw on given or caused to be given including fraud on the visa application (see [78]–[143]).

truth of the representation, which is said to be deliberately false,[88] and requires a state of mind that is close to dishonesty.[89] Evidence as to the third party's relationship with the applicant and the scope of any authority given to them either expressly or impliedly may be relevant in establishing whether an applicant is complicit in or indifferent to any relevant conduct. See the above discussion on complicity and indifference.

Therefore, in cases where it is claimed that a bogus document or false or misleading information was given as a result of third party fraud, making findings of fact on the scope of the agent's authority to act on the applicant's behalf in relation to the visa application could avoid a jurisdictional error of the kind found in *Maharjan*.

If the decision-maker is satisfied on the evidence that the agent was responsible for the fraud and the applicant was neither complicit nor indifferent to it, the next question to be determined is how, if at all, the fraud affected the decision-making processes under the Act. Where fraud stultifies the decision-making process, the application is in law no application at all.[90] An invalid application cannot be considered.[91] Therefore if the Tribunal were to find that a visa application is not valid, the appropriate decision would be to set the decision aside and substitute a new decision pursuant to s 349(2)(d) of the Act that the visa application was not valid an cannot be considered.[92]

Waiver of PIC 4020

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

- compelling circumstances that affect the interests of Australia;[93] or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, and Australian permanent resident or an eligible New Zealand citizen[94]

that justify the granting of the visa.

This waiver does not apply to the identity criteria in PIC 4020(2A) and (2B).[95]

The waiver is a two-staged inquiry:

1) first, the decision-maker needs to consider whether there are compelling circumstances within the meaning of PIC 4020(4)(a) or compassionate or compelling circumstances within the meaning of PIC 4020(4)(b), and, if so,
2) the decision-maker must then consider whether to exercise the discretion to waive the requirements of PIC 4020, having regard to those circumstances.[96]

[88] *Kaur v MIBP* [2019] FCAFC 53 at [134]. In this case, the Federal Court found that the factual findings of the Federal Circuit Court did not rise to a level which could justify a description of the appellant as being "recklessly indifferent" to the truth of the claims and material put forward by the migration agent in the visa application form (at [141]).
[89] *Kaur v MIBP* [2021] FCA 1026 at [60].
[90] *Maharjan v MIBP* [2017] FCAFC 213 at [102]–[103].
[91] s 47(3).
[92] *SZANA v MIMIA* [2004] FCA 203 at [26] agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407.
[93] cl 4020(4)(a).
[94] cl 4020(4)(b).
[95] cl 4020(4).
[96] *Kaur v MIBP* [2017] FCAFC 184 at [26]. See also *Singh v MICMSMA* [2021] FedCFamC2G 109 where the Court held the Tribunal was required by PIC 4020(4) to, first, inquire as to whether there were 'compelling circumstances' within the meaning of PIC 4020(4)(a) or 'compassionate or compelling circumstances' within the meaning of PIC 4020(4)(b) and only then consider whether those circumstances weighed against the severity of the applicant's fraudulent conduct in considering whether to

Note, that when applying this inquiry, it will be an error for the Tribunal to consider the bogus and/or the misleading information during the first step of the process, rather than the second.[97]

'Compelling' or 'compassionate' circumstances

The terms 'compelling' or 'compassionate' are not defined in the Act or Regulations. The determination of whether circumstances are compelling or compassionate is essentially one of subjective judgement[98] and is a question of fact and degree for the decision maker.

It is not sufficient for the purposes of the waiver that there are compelling or compassionate circumstances alone. The circumstances must affect the interests of Australia, an Australian citizen, permanent resident or an eligible New Zealand citizen.[99] A company is not an Australian citizen for the purposes of PIC 4020(4)(b).[100]

Guidance on circumstances that may amount to compelling or compassionate circumstances may be found in the Explanatory Statement to SLI 2011, No 13 which introduced PIC 4020, and the Department policy.[101] While not binding, the Tribunal may have regard to the department's interpretation and examples of what may constitute compelling or compassionate circumstances.[102]

According to the Explanatory Statement it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant.[103] The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:

exercise the discretion to waive the requirements of PIC 4020. In that case, the Court found that the Tribunal erred by conflating the two inquiries required by PIC 4020(4) by from the outset weighing the evidence of compassionate or compelling circumstance against the severity of the applicant's fraudulent conduct in considering its discretion to waive the PIC 4020.

[97] See *Gjecaj v MICMSMA* [2022] FedCFamC2G 936 at [56]. Although the judgment was focused on compassionate circumstances because that was the claim being advanced by the applicant, it appears that the Court's ratio would equally apply to the consideration of compelling circumstances. Although the judgment was focused on compassionate circumstances because that was the claim being advanced by the applicant, it appears that the Court's ratio would equally apply to the consideration of compelling circumstances.

[98] *Kandel v MIBP* [2015] FCCA 2093 at [32]. However, while a subjective judgment may quite properly be explained simply by a bald statement of conclusion (*Kandel* at [32]), decision makers are nonetheless required to engage in an active intellectual process of considering the applicant's evidence and giving reasons for failing to waive PIC 4020(1) where argued to avoid acting unreasonably (see *Sharma v MIBP* [2015] FCCA 2669 at [47]). Indeed, overly brief reasons for such a conclusion may indicate the Tribunal did not perform its function of review according to the law: *MIAC v SZLSP* [2010] FCAFC 108 at [91].

[99] *Vyas v MIMAC* [2013] FCCA 1226. The Court, at [14], found the Explanatory Statement of assistance in considering the plain words of the waiver provision, such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause. Aspects of the Court's reasoning appear to leave open the possibility that it would be sufficient for the applicant to be the subject of the compassionate or compelling circumstances as long as a relevant person or the interests of Australia would also be affected, however the Court did not have to resolve this question.

[100] *Singh v MIBP* [2016] FCA 156 at [16]–[17]. The Court noted that the evidence of the director of the trucking company that was before the Tribunal referred to damage to the company and did not address disadvantage to the director personally.

[101] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances (re-issue date 1/1/18).

[102] *Mudiyanselage v MIAC* [2012] FMCA 887 where the Court noted it was open for the Tribunal to be guided by Department policy; appeal dismissed in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court in this case did not consider the waiver provisions.

[103] Explanatory Statement to SLI 2011, No 13, at 19. The Court in *Vyas v MIMAC* [2013] FCCA 1226 found the ES to be of assistance in considering the plain words of the waiver provision such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause (at [14]).

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
- that family members in Australia would be left without financial or emotional support; and
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period.[104]

In addition, the Departmental policy suggests that there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.[105]

The policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.[106]

Various judgments have considered claims based on employment in Australia and the 'interests of Australia'. The judgments considering the meaning of this connote more significant, objective and public interest than that associated with mere employment in Australia.[107] While it is not the case that employment in a business in Australia could never amount to compelling circumstances affecting the interests of Australia, there is a distinction between the disadvantage to an Australian business in 'losing' an employee, and circumstances which affect Australia.[108] It is a question of fact and evidence for the Tribunal as to whether the claimed circumstances relating to employment in a particular case constitute compelling circumstances affecting Australia.

While the above examples may or may not constitute compassionate or compelling reasons in an individual case, the Tribunal is obliged to consider all the circumstances of the case including any matters put forward by an applicant in relation to the waiver, and determine on the evidence as a whole whether there are compelling or compassionate circumstances.[109]

[104] Explanatory Statement to SLI 2011, No 13, at 19-20.
[105] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances – Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).
[106] Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).
[107] *Deb v MIBP* [2016] FCCA 3351 at [45], citing various other cases including *Raza v MIBP* [2015] FCCA 1623 and *Kandel v MIBP* [2014] FCCA 1479.
[108] *Deb v MIBP* [2016] FCCA 3351 at [56].
[109] See for e.g. *Kaur v MIBP* [2013] FCCA 1162. The Court rejected an argument that the Tribunal's statement that it was '…not satisfied that [the] circumstances [were] of the kind contemplated in the Explanatory Statement' demonstrated a fettering of its

For the avoidance of doubt, the Tribunal's consideration of all claims relevant to the waiver should be expressly set out in the decision record.[110] When determining whether the circumstances are compassionate or compelling, the Tribunal should avoid taking a comparative approach, that is comparing the immigration circumstances of the affected parties to others in a similar situation.[111]

The discretionary matters in PIC 4020(4) are unrelated to the content and the reasons for any breaches of PIC 4020(1) and (2).[112] Accordingly, claims made by an applicant in relation to PIC 4020(1) or (2) would not need to be considered in relation to compelling or compassionate circumstances in the absence of relevant claims in relation to PIC 4020(4). This does not mean that circumstances falling under PIC 4020(1) or (2) could never be relevant to the waiver, rather the obligation is to consider the case as put by the applicant in relation to the waiver.

For further detail and discussion of 'compelling' or 'compassionate circumstances' in general and in the context of PIC 4020(4) see: Compelling and/or compassionate circumstances.

Past refusals on the basis of PIC 4020

With limited exception, PIC 4020(2) requires the decision-maker to be satisfied that in the relevant period, the applicant and any family unit members have not been refused a visa because of a failure to satisfy PIC 4020(1) (provision of false or misleading information / bogus documents). The exception is where the applicant was under 18 at the time the application for the refused visa was made – see below.[113]

Consideration of PIC 4020(2) is not restricted to members of the family unit who are included in the visa application but applies if any member of the applicant's family unit had been refused a visa on the basis of not satisfying PIC 4020(1) in the relevant period.

In circumstances where the primary decision is that the applicant does not satisfy PIC 4020(2) the matters that may arise on review are whether the decision on the earlier visa application was in fact 'because of' the provision of a bogus document or false or misleading information, or was for some other reason; whether the visa applicant is a member of the family unit of the person; and whether compelling/compassionate circumstances exist and the requirements of PIC 4020(2) should be waived.[114]

enquiry limited to the parameters cited in the Explanatory Statement. See also *Fernando v MIBP* [2016] FCCA 409 where the Tribunal fell into jurisdictional error by failing to consider aspects of the applicant's claims that the impact upon his Australian citizen sponsor and the sponsoring business if he had to cease employment amounted to compelling reasons per cl 4020(4).

[110] See for e.g. *Sarkar v MIBP* [2016] FCCA 2435 at [21]–[24]. The Court found that a reference in the decision record to a claim put forward in support of exercising the waiver provision in cl 4020(4) was insufficient to show that the Tribunal had, on balance, considered the claim. The Court held that there must be some mental process attached to the document which contained the relevant claim.

[111] *Gjecaj v MICMSMA* [2022] FedCFamC2G 936 at [69] and [75]. The Tribunal had found the compassionate circumstances which affected the visa applicant's parents (who were Australian permanent residents) would not cause 'significant hardship over and above that caused to others caught in the same immigration circumstances'. The Court found error in this comparative approach as it was unnecessary to the determination of whether there were compassionate circumstances. Although the judgment was focused on compassionate circumstances because that was the claim being advanced by the applicant, it appears that the Court's ratio would equally apply to the consideration of compelling circumstances.

[112] *Singh v MIBP* [2016] FCCA 774 at [60]. The applicant had made express claims in relation to cl 4020(1) that the provision of incorrect information was a mistake and unintentional which the Tribunal had not considered. The Court found the error in relation to cl 4020(1) would not have materially affected the consideration of cl 4020(4) in the circumstances of the case and, based on the Tribunal decision, rejected that the Tribunal's refusal to waive was a result of cumulative consideration of the information in cl 4020(1) and bogus documents given by the applicant.

[113] cl 4020(2AA).

[114] *Thakur v MIBP* [2016] FCA 473 at [32].

The relevant period

The relevant period in PIC 4020(2) starts 3 years before the current visa application was made.[115] The relevant period ends when the Minister makes a decision to grant or refuse the visa under consideration,[116] meaning the decision of the delegate and not the Tribunal on review.[117]

Past refusal

Whether the applicant or any family members have been refused a visa in the past on the basis of PIC 4020(1) is a question of fact for the decision maker. To assist with the enquiry, information may be sought from the Department about the previous refusal decision.

A conclusion by the primary decision-maker that an applicant does not meet PIC 4020(1) does not mean that they have a past refusal for the purpose of PIC 4020(2) when the Tribunal is considering that same visa application.[118]

Where a primary decision of a delegate refusing to grant a visa on the basis of PIC 4020(1) has been affirmed by the Tribunal, it seems like it is still the delegate's primary decision which is the operative one for determining when the period in PIC 4020(2) ends. In *Josan v MIBP* the Court found the reference in PIC 4020(2)(b) to "the Minister making a decision to grant or refuse [to grant] the [application]" to be a reference to the decision of the delegate and not the Tribunal.[119] The Court considered this interpretation consistent with *Prodduturi v MIBP*[120] and *Kim v MIAC*,[121] where they had held that an affirmation of a decision of the delegate by the Tribunal has the effect that the decision of the delegate is the original decision which continues to operate and is not substituted by the later decision of the Tribunal.

However, the Court's consideration in *Josan* occurred in the context of arguments relating to the utility of the Court granting relief, rather than whether the decision-maker correctly applied or interpreted PIC 4020(2). Further, it also makes unclear what the effect of a Tribunal decision to affirm a visa refusal on the basis that the applicant did not satisfy PIC 4020(1) where the delegate did not refuse on the basis of PIC 4020 would be. In these circumstances, the delegate's decision would not involve a decision refusing to grant the visa on the basis of PIC 4020(1), and nor would a Tribunal decision affirming that, even if the Tribunal had affirmed the decision on the basis that PIC 4020(1) was not met. However, there has not been any direct judicial consideration of this and the implications of the interpretation in *Josan* have not been further considered by a Court.

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[115] cl 4020(2)(a).
[116] cl 4020(2)(b).
[117] *Josan v MIBP* [2016] FCCA 493 at [58]. Appeal dismissed in *Josan v MIBP* [2017] FCA 1418. Special leave to appeal from this judgment was dismissed: *Josan v MIBP* [2018] HCASL 31.
[118] This is because Tribunal conducts a *de novo* merits review in which it stands in the shoes of the primary decision-maker in considering the visa application afresh: *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [16]; *Re MIMA; Ex parte Miah* (2001) 206 CLR 57.
[119] *Josan v MIBP* [2016] FCCA 493 at [58]. Appeal dismissed in *Josan v MIBP* [2017] FCA 1418, however the Federal Court expressly did not consider it necessary to address the question as to whether the 3 year period would run from the delegate's decision or the Tribunal decision. Special leave to appeal dismissed: *Josan v MIBP* [2018] HCASL 31 (14 March 2018). See also *SZRNJ v MIBP* [2014] FCCA 782 where Judge Cameron considered similar wording in s 48A of the Act and found that 'a Tribunal affirmation of a delegate's decision to refuse a visa is not itself a refusal, but only a confirmation or ratification of the original decision, which is left undisturbed'. This view is favoured by the Department.
[120] *Prodduturi v MIBP* [2015] FCAFC 5 at [30]–[32] and [36]–[38].
[121] *Kim v MIAC* (2008) 167 FCR 578 at [23]

Exception to the exclusion period – applicant under 18 at time refused visa application was made

The exclusion period in PIC 4020(2) (discussed above) does not apply to any applicant that was under 18 at the time the application for the refused visa was made (i.e. the previous visa application refused on the basis of PIC 4020(1)).[122]

According to the Explanatory Statement to the Regulation that introduced these exceptions, the purpose of these exceptions is to ensure that a person is not disadvantaged by an application made when they were a minor because they would not be held accountable for the actions of a parent/guardian.[123]

The identity requirement

PIC 4020 also requires that the decision maker must be satisfied as to the applicant's identity (PIC 4020(2A)). Further, the decision maker must be satisfied that in the period starting 10 years before the application was made and ending when there is a decision on the visa, the applicant and any family unit member must not have been refused a visa because of a failure to satisfy this identity requirement (PIC 4020(2B)).[124] See the above discussion about past refusals on the basis of PIC 4020, which also applies to PIC 4020(2B).

These provisions were introduced because identity fraud was considered a matter of serious concern given that a person's identity is the foundation of all checks, including national security and character checks; and as entitlements, such as a driver's licence or Medicare card, are dependent on the accurate identification of an applicant.[125]

The Explanatory Statement to the Regulation that introduced this requirement suggests that in considering this criterion, decision-makers may have regard to a range of identity documents, including a person's passport but will need to consider to the applicant's individual circumstances, including whether they have access to identity documents, when determining if the identity requirements are satisfied.[126]

The exclusion period in PIC 4020(2B) does not apply to any applicant that was under 18 at the time the application for the refused visa was made (i.e. the previous visa application refused on the basis of PIC 4020(2A)).[127] According to the Explanatory Statement to the Regulation that introduced these exceptions, their purpose is to ensure that a person is not disadvantaged by an application made when they were a minor because they would not be held accountable for the actions of a parent/guardian.[128]

[122] Clause 4020(2AA) inserted by SLI 2014, No 163 for visa applications made on or after 23 November 2014 and applications made prior to, but not finally determined as at that date.
[123] Explanatory Statement to SLI 2014, No 163 at p.16.
[124] These provisions were inserted by SLI 2014, 32 and apply to visa applications not finally determined at 22 March 2014 and visa applications made on or after that date.
[125] Explanatory Statement to SLI 2014, No 32, at 3.
[126] Explanatory Statement to SLI 2014, No 32, at 3.
[127] Clause 4020(2BA) inserted by SLI 2014, No 163 for visa applications made on or after 23 November 2014 and applications made prior to, but not finally determined as at that date.
[128] Explanatory Statement to SLI 2014, No 163 at p.16.

Secondary applicants

PIC 4020 is prescribed as a secondary criterion for the grant of a broad range of visas. Where a primary visa applicant has been refused a visa on the basis of failing to satisfy PIC 4020(1) (provision of false or misleading information / bogus documents) or (2A) (identity fraud), a question may arise as to what the implications are for the secondary applicant and whether they themselves satisfy PIC 4020.

Generally speaking, if the Tribunal finds that the primary applicant does not satisfy the criteria for the grant of the visa and is affirming the decision, it would be open to find that the secondary applicant does not satisfy the relevant secondary criterion in Schedule 2 of the Regulations which requires them to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of the relevant visa.

Alternatively, the Tribunal may find that the secondary applicant does not satisfy PIC 4020 - in particular PIC 4020(2) or (2B), which relevantly require that the applicant (being the secondary applicant) and each member of the family unit has not been refused a visa because of PIC 4020(1) or (2A). However, before such a finding could be reached the Tribunal would need to have made the decision on the primary applicant. This is because, as discussed above, the primary applicant has not been refused a visa on the relevant basis until the Tribunal has affirmed the primary decision.[129]

Where the Tribunal finds that the primary applicant meets PIC 4020(1) and 4020(2A), or waives the requirements of PIC 4020(1), the secondary applicant may satisfy PIC 4020(2) or (2B), providing there are no other family unit members who have been refused a visa for a failure to satisfy PIC 4020(1) or (2A) in the relevant period, including members of the family unit who are not included in the application.

Affirming a decision on a different criterion where the delegate refused the visa application because PIC 4020(1) was not met

Circumstances may arise where a visa is refused by a delegate on the basis of PIC 4020(1), but the Tribunal considers a different issue is determinative of the review. This may present an issue for the Tribunal where it is satisfied that PIC 4020(1) is, or would be, met but also considers that the decision under review should be affirmed because another criteria is not.

In *Hossain (Migration)* [2019] AATA 6911 (14 October 2019), the application for the visa was refused by the delegate because they were not satisfied the applicant met PIC 4020(1). On review, the applicant conceded that a different crition was not met, but still requested the Tribunal to consider PIC 4020(1) to avoid the bar applying to a future visa application. The Tribunal affirmed the decision on the basis of the other criteria not being met, but, on an assumption that it would overcome the bar applying, also made a favourable finding about PIC 4020(1).

At first instrance, the Federal Circuit Court upheld the Tribunal's decision, finding that once the Tribunal determined that a primary criteria was not met the decision under review should

[129] This is because Tribunal conducts a *de novo* merits review in which it stands in the shoes of the primary decision-maker in considering the visa application afresh: *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [16]; *Re MIMA; Ex parte Miah* (2001) 206 CLR 57.

be affirmed, and that consideration of other issues was an unnecessary distraction from that task.[130]

On appeal, however, the Federal Court remitted the matter back to the Tribunal by consent.[131] In doing so, the Federal Court accepted that the Tribunal had the power to remit the application with the direction that PIC 4020(1) was satisfied, and that the Tribunal, in making a finding of fact about PIC 4020, had incorrectly considered the bar in PIC 4020(2) would be overcome. Because of the Tribunal's misunderstanding about PIC 4020(2), the Tribunal did not consider whether to exercise the power to remit or misunderstood the scope of the power. This error was material as it could have deprived the applicant of a possible favourable outcome in relation to the PIC 4020(2) bar as the three year bar had not yet expired in this case.

Accordingly, in circumstances where PIC 4020(1) was the reason for the delegate's refusal, the period of the bar has not expired and the applicant expressly requests the Tribunal to consider it, it may not be open for the Tribunal to affirm the decision on a different criterion without considering whether PIC 4020(1) is met and whether the matter should be remitted to the Department for reconsideration if it is.

Relevant case law

Judgment	Judgment summary
AIB16 v MIBP [2017] FCAFC 163	Summary
Arora v MIBP [2016] FCAFC 35	
Bajwa v MIBP [2014] FCCA 2890	Summary
Bari v MIAC [2013] FMCA 14	Summary
Batra v MIAC [2012] FMCA 544	Summary
Batra v MIAC [2013] FCA 274; (2013) 212 FCR 84	Summary
Brar v MIAC [2012] FMCA 519	Summary
Chopra v MIBP [2014] FCCA 2064	
Chung v MIBP [2015] FCA 163	Summary
Dhanuka v MICMSMA [2019] FCCA 2849	Summary
Dhiman v MIAC [2012] FMCA 646	Summary
Fan v MIBP [2015] FCCA 505	Summary

[130] *Hossain v MICMSMA* [2021] FCCA 247 at [44].
[131] See consent orders in the matter of [redacted]

Faruque v MIBP [2015] FCA 1198	Summary
Fernando v MIBP [2016] FCCA 409	Summary
FRS17 v MIBP [2022] FedCFamC2G 808	
Gill v MIBP [2016] FCAFC 142	Summary
Gill v MIBP [2015] FCCA 1	Summary
Gjecaj v MICMSMA [2022] FedCFamC2G 936	Summary
Hossain (Migration) [2019] AATA 6911	
Hossain v MICMSMA [2021] FCCA 247 (judgment set aside by [redacted])	Summary
Josan v MIBP [2016] FCCA 493	Summary
Josan v MIBP [2017] FCA 1418	
Kandel v MIBP [2015] FCCA 2093	
Kandel v MIBP [2015] FCA 706	Summary
Kaur v MIBP; Prodduturi v MIBP [2013] FCCA 1805	Summary
Kaur v MIBP [2013] FCCA 1162	Summary
Kaur v MIMAC [2013] FCCA 933	Summary
Kaur v MIBP [2014] FCCA 1264	Summary
Kaur v MIBP [2014] FCA 281	Summary
Kaur v MIBP [2014] FCA 1276	Summary
Kaur v MIBP [2015] FCCA 2568	Summary
Kaur v MIBP [2016] FCA 540	
Kaur v MIBP [2017] FCAFC 184	Summary
Kaur v MIBP [2019] FCAFC 53	Summary
Kaur v MIBP [2021] FCA 1026	
Kim v MIAC (2008) 167 FCR 578	Summary

Koirala v MIBP [2014] FCCA 842	Summary
Larney v MHA [2019] FCA 700	Summary
Luthra v MIAC [2009] FCA 575; (2009) 109 ALD 492	Summary
Luthra v MIAC [2009] FMCA 170	Summary
Maharjan v MIBP [2016] FCCA 3029	
Maharjan v MIBP [2017] FCAFC 213	Summary
Mudiyanselage v MIAC [2012] FMCA 887	Summary
Mudiyanselage v MIAC [2013] FCA 266; (2013) 211 FCR 27	Summary
Nanre v MIBP [2015] FCCA 134	Summary
Nanre v MIBP [2015] FCA 528	Summary
Palikhe v MIBP [2014] FCCA 1875	Summary
Patel v MIBP [2014] FCCA 2059	
Patel v MIBP [2015] FCAFC 22	Summary
Prodduturi v MIBP [2014] FCA 624	
Prodduturi v MIBP [2015] FCAFC 5	Summary
Rani v MIBP [2015] FCCA 455	
Salopal v MIBP [2018] FCA 1308	Summary
Sandhu v MIMIA [2013] FCCA 491	Summary
Sandhu v MIMAC [2013] FCA 842	Summary
Sarkar v MIBP [2016] FCCA 2435	Summary
Sekhon v MIBP [2014] FCCA 2834	Summary
Sharma v MIMAC [2013] FCCA 1280	Summary
Sharma v MIBP [2014] FCCA 2821	Summary
Sharma v MIBP [2015] FCCA 2669	Summary
Singh v MIAC [2012] FMCA 145	Summary

Singh v MIMAC [2013] FCCA 1435	Summary
Singh v MIBP [2014] FCCA 510	
Singh v MIBP [2014] FCCA 1816	Summary
Singh v MIBP [2015] FCCA 1939	Summary
Singh v MIBP [2015] FCCA 2776	
Singh v MIBP [2016] FCA 156	
Singh v MIBP [2016] FCCA 774	Summary
Singh v MIBP [2018] FCAFC 52	Summary
Singh v MIBP [2018] FCCA 1136	Summary
Singh v MICMSMA [2021] FedCFamC2G 109	Summary
Shu v MIMIA [2003] FCA 791	
Sran v MIBP [2014] FCCA 37	Summary
Sun v MIBP [2016] FCAFC 52	
Sun v MIBP [2015] FCCA 2479	
SZGGS v MIMIA [2006] FCA 378	
SZRNJ v MIBP [2014] FCCA 782	Summary
Talukder v MIAC [2009] FCA 916	Summary
Talukder v MIAC [2009] FMCA 223; (2009) 108 ALD 583	
Thakur v MIBP [2016] FCA 473	Summary
Thind v MIBP [2013] FCCA 1438	Summary
Thind v MIBP [2014] FCA 207	
Trivedi v MIAC [2013] FCCA 400	Summary
Trivedi v MIBP [2014] FCAFC 42; (2014) 220 FCR 169	Summary
Umer v MIBP [2017] FCCA 2934	Summary
Verma v MIBP [2017] FCCA 2079	Summary

Verma v MIBP [2018] FCAFC 87	
Vyas v MIAC [2012] FMCA 92	Summary
Vyas v MIMAC [2013] FCCA 1226	Summary
Zhang v MIAC [2012] FMCA 1011	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2006 (No 5) (Cth)	SLI 2006, No 238
Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314
Migration Amendment Regulations 2009 (No 5) (Cth)	SLI 2009, No 115
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13
Migration Amendment Regulations 2011 (No 6) (Cth)	SLI 2011, No 199
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82
Migration Legislation Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 33
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30
Migration Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 32
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth)	SLI 2014, No 65
Migration Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 163
Migration Amendment (Protection and Other Measures) Act 2015 (Cth)	No 35, 2015
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103
Tribunals Amalgamation Act 2015 (Cth)	No 60 of 2015

Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743
Migration Legislation Amendment (2017 Measures No 4) Regulations 2017 (Cth) (NB: Disallowed (and repealed) from 17:56 5 December 2017)	F2017L01425
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulation 2018 (Cth)	F2018L00262
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578

Available decision templates / precedents

There is one template/precedent designed specifically for decisions relating to PIC 4020:

- **Public Interest Criterion 4020:** This template is designed for use in any Tribunal visa refusal review where the issue in dispute is whether the applicant satisfies PIC 4020. The template uses CaseMate data on the visa type to incorporate relevant background information in the decision.

There are also optional paragraphs available relating to PIC 4020:

- **Optional Standard Paragraphs - Public Interest Criteria:** These are additional standard paragraphs that can be inserted into visa refusal decisions if required (and where applicable).

Last updated/reviewed: 20 January 2023

Attachment

Schedule of applicability of PIC 4020 amendments		
Subclass	**Criteria**	**Visa application date range**
Partner Visas		
100	cls 100.222(a), 100.224(1)(a), 100.322(a).	Visa applications made on or after 15 October 2007.[1]
300	cl 300.223	Visa applications made on or after 1 July 2013.[2]
	cl 300.226	Visa applications from at least 1 November 1995.[3]
	cl 300.323	Visa applications made on or after 15 October 2007.[1]
309	cls 309.225(a), 309.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl 309.228(1)(a)	All live applications.[4]
801	cls 801.226, 801.325	Visa applications made on or after 24 November 2012.[5]
	cl 801.224(1)	Visa applications made on or after 15 October 2007.[1]
820	cls 820.226, 820.326	Visa applications made on or after 24 November 2012.[5]
	cl 820.224(1)	Visa applications made on or after 15 October 2007.[1]
Family Visas		
101	cls 101.223(a), 101.227(1)(a), 101.323(1)	Applications made on or after 15 October 2007.[1]
102	cls 102.223,102.323	All live applications.[4]
	cl 102.226(1)	Visa applications made on or after 1 August 1996.[6]
103	cls 103.224(a) and 103.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl 103.227(1)(a)	All live applications.[4]
114	cl 114.223, 114.323	Visa applications made on or after 15 October 2007.[1]
	cl 114.226	All live applications.[4]
115	cls.115.223, 115.323	Visa applications made on or after 15 October 2007.[1]
	cl 115.226	All live applications.[4]

116	cls 116.223, 116.323	Visa applications made on or after 15 October 2007.[1]
	cl 116.226	All live applications.[4]
117	cls 117.223, 117.225(1), 117.323	All live applications.[4]
143	cls 143.224(a), 143.323(a)	Visa applications made on or after 15 October 2007.[1]
	cl 143.225A	All live applications.[4]
173	cl 173.224(a)	Visa applications made on or after 15 October 2007.[1]
	cl 173.328	Visa applications made on or after 24 November 2012.[5]
	cl 173.226(a)	All live applications.[4]
445	cls 445.225(a), 445.227(1)(a), 445.324(a)	Visa applications made on or after 15 October 2007.[1]
461	cl 461.223(a)	
802	cls 802.223(a), 802.224(1)(a)	
	cl 802.226A(2)(a)(ii)	Visa applications made on or after 26 April 2008.[7]
	cl 802.326	Visa applications made on or after 24 November 2012.[5]
804	cls 804.225, 804.226(1), 804.322	Visa applications made on or after 15 October 2007.[1]
835	cls 835.223(a), 835.224(1)(a), 835.322(a)	
836	cls 836.223(a), 836.224(1)(a), 836.322(a)	
837	cls 837.223, 837.224(1), 837.322	All live applications.[4]
838	cls 838.223, 838.224(1)(a), 838.322(a),	Visa applications made on or after 15 October 2007.[1]
864	cls 864.223, 864.323(a)	Visa applications made on or after 15 October 2007.[1]
	cls 864.224(a), 864 224A	All live applications.[4]
884	cls 884.224, 884.226	Visa applications made on or after 15 October 2007.[1]
	cl 884.328	Visa applications made on or after 24 November 2012.[5]
Business visas		
119	cls 119.223(a), 119.225(1)(a), 119.322(a),	All live applications.[8]
121	cls 121.224(a), 121.226(1)(a), 121.322(a)	
132 (pre 1 July	cls 132.222(a), 132.322(2)	Visa applications made on or after 15

2012)		October 2007.[9]
132 (post 1 July 2012)	cls 132.213, 132.312	All live applications.[10]
160	cls 160.222(a), 160.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 160.224	All live applications.[11]
161	cls 161.222(a), 161.322(a)	Visa applications made on or after 15 October 2007.[9]
	161.224	All live applications.[11]
162	cls 162.223(a), 162.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 162.225	All live applications.[11]
163	cls 163.223(a), 163.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 163.225	All live applications.[11]
164	cls 164.223(a), 164.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 164.225	All live applications.[11]
165	cls 165.225(a), 165.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 163.223(a)	All live applications.[11]
186	cls 186.213, 186.313	All live applications.[10]
187	cls 187.213, 187.313	
188	cls 188.213, 188.312	
191	cls 191.211(1), 191.211(3), 191.312(1)	Visa applications made on or after 16 November 2019.[12]
401	cls 401.216, 401.316,	All live applications.[13]
402	cls 402.216, 402.316,	
403	cls 403.216, 403.316	
405	cls 405.227(6), 405.228(6), 405.329(3)(a), 405.330(3)(a), 405.227(7)(a) and 405.228(6A)(a)	Visa applications made on or after15 October 2007.[14]
407	cls 407.219A(1), 407.317(1)	Visa applications made on or after 19 November 2016.[15]
408	cls 408.216(1), 408.317(1)	Visa applications made on or after 19 November 2016.[15]
416	cls 416.223(a), 416.323(a)	All live applications.[13]
420 (post 24 Nov 2012)	cls 420.216 and 420.316	All live applications.[13]

457	cls 457.224(a), 457.227(1)(a), 457.325(a)	All live applications.[8]
482	cls 482.217, 482.317	Visa applications made on or after 18 March 2018.[16]
488	cl 488.223	All live applications.[17]
491	cls 491.211(1), 491.211(3), 491.312(1)	Visa applications made on or after 16 November 2019.[18]
494	cls 494.211(1), 494.211(3), 494.312(1)	Visa applications made on or after 16 November 2019.[18]
845	cls 845.223(a), 845.224(1)(a), 845.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 845.224(2)(a)	All live applications.[11]
846	cls 846.224(a), 846.225(1)(a), 846.322(a)	Visa applications made on or after 15 October 2007.[9]
	cl 846.225(2)(a)	Visa applications on or after 1 October 2006.[19]
856	cls 856.223(1)(a), 856.225(1)(a), 856.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
857	cls 857.223(1)(a), 857.225(1)(a), 857.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
888	cls 888.215 and 888.312	All live applications.[10]
890	cls 890.222(a), 890.223(1)(a), 890.322(1)(a)	Visa applications made on or after 15 October 2007.[9]
891	cls 891.223(a), 891.224(1)(a), 891.322(1)(a)	
892	cls 892.223(a), 892.224(1)(a), 892.322(1)(a)	
893	cls 893.224(a), 893.225(1)(a), 893.322(1)(a)	
Skilled visas		
124	cls 124.228, 124.327	All live applications.[20]
175	cls 175.223(a), 175.322(a),	Visa applications made on or after 15 October 2007.[21]
	cl 175.225(d)	All live applications.[8]
176	cls 176.224(a), 176.322(a)	Visa applications made on or after 15 October 2007. [20]
	cl 176.226(d),	All live applications.[8]
189	cls 189.215, 189.312	All live applications.[10]
190	cls 190.216, 190.312	
475	cls 475.224(a), 475.322(a)	Visa applications made on or after 15 October 2007.[20]

	cl 475.226(d)	All live applications.[8]
476	cls 476.222(a), 476.322(a)	Visa applications made on or after 15 October 2007.[20]
	cl 476.224(d)	All live applications.[8]
485	cls 485.224(a), 485.322(a)	Visa applications made on or after 15 October 2007 and before 23 March 2013.[22]
	cl 485.226(d)	Visa applications made before 23 March 2013.[23]
485 (post 23 Mar 2012)	cls 485.216(1), 485.216(3), 485.313(1)	Visa applications made on or after 23 March 2013.[24]
487	cls 487.228(a), 487.324(a)	Visa applications made on or after 26 April 2008.[25]
	cl 487.230(d)	All live applications.[8]
489	cls 489.211, 489.312	All live applications.[10]
495	cls 495.225, 495.322, 495.229(a)	All live applications.[8]
496	cls 496.228, 496.231(a), 496.324	
858	cls 858.227, 858.326	All live applications.[19]
880	cls 880.225, 880.227(1), 880.322	All live applications.[8]
881	cls 881.228, 881.229(1), 881.324	
882	cls 882.228, 882.229, 882.324	
883	cls 883.225, 883.228(a)(i) and (ii), 883.324(a)(i) and (ii)	
885	cls 885.224(a), 885.322(a).	Visa applications made on or after 15 October 2007. [21]
	cl 885.226(d)	All live applications.[8]
886	cls 886.225(a), 886.322(a),	Visa applications made on or after 15 October 2007. [21]
	cl 886.227(d)	All live applications.[8]
887	cls 887.223(a), and 887.322(a).	Visa applications made on or after 15 October 2007.[21]
	cl 887.225(a)	All live applications.[8]
Student visas		
500	cls 500.217(1), 500.317(1)	Visa applications made on or after 1 July 2016.[26]
570	cls 570.224(a) , 570.323(a)	Visa applications made on or after 5 November 2011.[11]
571	cls 571.224(a), 571.323(a)	
572	cl 572.224(a), 572.323(a)	
573	cls 573.224(a), 573.323(a)	

574	cls 574.224(a), 574.323(a)	
575	cls 575.224(a), 575.323(a)	
576	cls 576.223(a), 576.323(a)	
580	cls 580.223(3)(a), 580.324	
590	cls 590.218, 590.314	Visa applications made on or after 1 July 2016.[26]
Visitor visas		
600	cl 600.213(1)	Visa applications made on or after 23 March 2013.[27]
602	cls 602.218, 602.312(1)	Visa applications made on or after 23 March 2013.[27]
Other visas		
410	cls 410.221(8)(a), 410.321(3)(a)(i)	Visa applications made on or after15 October 2007.[14]
417	cl 417.221(2)(b)	All live applications.[16]
462	cl 462.221(b)	
771	cl 771.222	All live applications.[19]
988	cls 988.222, 988.322	All live applications.[19]

ENDNOTES - KEY

[1] *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146). The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.

[2] SLI 2013, No 146, commencing 1 July 2013.

[3] SLI 2013, No 146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 1 November 1995 version of the criteria.

[4] SLI 2013, No 146, commencing 1 July 2013.

[5] SLI 2013, No.146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 24 November 2012 version of the criteria.

[6] SLI 2013, No 146. The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 1 August 1996 version of the criteria.

[7] SLI 2013, No 146 The amendments purport to apply to all unresolved applications as at 1 July 2013, but due to drafting technicalities, were not compatible with the form of the pre 26 April 2008 version of the criteria.

[8] SLI 2011, No 13, commencing 2 April 2011.

[9] *Migration Amendment Regulations 2011 (No 6)* (Cth) (SLI 2011, No 199). The amendments purport to apply to all unresolved applications as at 5 November 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.

[10] *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82), commencing 1 July 2012.

[11] SLI 2011, No 199, commencing 5 November 2011.

[12] *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578). New visa subclass, amendments commencing 16 November 2022.

[13] SLI 2012, No 238, commencing 24 November 2012.

[14] *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184). The amendments purport to apply to all unresolved applications as at 21 November 2015 but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.

[15] *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743). New visa subclass, amendments commencing 19 November 2016.

[16] *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulation 2018* (Cth) (F2018L00262). New visa subclass, amendments apply to an application for a visa made on or after 18 March 2018.

[17] SLI 2014, No 32, commencing 22 March 2014.

[18] *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578). New visa subclass, amendments commencing 16 November 2019.

[19] SLI 2011, No 199. The amendments purport to apply to all unresolved applications as at 5 November 2011, but due to drafting technicalities, were not compatible with the form of the pre 1 October 2006 version of the criteria.

[20] SLI 2015, No 184, commencing 21 November 2015.

[21] SLI 2011, No 13. The amendments purport to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria.

[22] SLI 2011, No 13. The amendments purported to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 15 October 2007 version of the criteria. Part 485 was repealed and substituted by SLI 2013, No 33, commencing 23 March 2013.

[23] SLI 2011, No 13. Part 485 was repealed and substituted by SLI 2013, No 33, commencing 23 March 2013.

[24] SLI 2013, No 33, commencing 23 March 2013.

[25] SLI 2011, No 13. The amendments purport to apply to all unresolved applications as at 2 April 2011, but due to drafting technicalities, were not compatible with the form of the pre 26 April 2008 version of the criteria.

[26] *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth). New visa subclass, amendments apply to an application for a visa made on or after 1 July 2016.

[27] *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32). New visa subclass, amendments apply to an application for a visa made on or after 23 March 2013.

ABSORBED PERSON VISAS

Overview[1]

Section 34 of the *Migration Act 1958* (Cth) (the Act) provides criteria by which a person is deemed to have been granted a permanent visa known as an absorbed person visa.[2] If the requirements in s 34(2) are met, the visa is taken to have been granted on 1 September 1994. The visa has a 'stay' component only and does not allow for travel, including re-entry, into Australia.[3]

The visa is granted by operation of law. Consequently there is no 'decision' in respect of an absorbed person visa and therefore no reviewable decision on which a person can apply for review to the Tribunal.[4] The issue of whether a person was deemed to have been granted an absorbed person visa typically arises for the Tribunal in relation to review of decisions to refuse to grant Return (Residence) (Class BB) visas (Subclasses 155 and 157) a criterion of which requires the visa applicant to be an Australian permanent resident or former Australian permanent resident.[5] In this context the applicant would ordinarily be seeking to establish that they hold an absorbed person visa.

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

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

Visa application requirements

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

[1] 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] The current version of s 34 was inserted into the Act by s 8 of the *Migration Legislation Amendment Act 1994* (Cth) (No 60 of 1994) as s 26AB. It was renumbered and became s 34 pursuant to s 83 of No 60 of 1994.
[3] s 34(1).
[4] See *Gunawan v MIAC* [2007] FMCA 805, considering the Court's jurisdiction.
[5] reg 1.03 of the Regulations defines Australian permanent resident, in relation to an applicant for a Return (Residence) (Class BB) or Resident Return (Temporary) (Class TP) visa, as 'a non-citizen who is the holder of a permanent visa' and in any other case, as 'a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.'

Visa criteria

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

- on 2 April 1984, was in Australia;[6] and
- before that date, had ceased to be an immigrant;[7] and
- on or after that date has not left Australia;[8] and
- immediately before 1 September 1994, was not a person to whom s 20 of the Act as then in force then applied.[9]

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

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

The question of absorption is only relevant to the person's circumstances before 2 April 1984, as after that date, the concept of absorption as it applied to immigrants became irrelevant to the operation of the Act (i.e. it no longer referred to 'immigrants', instead referring to non-citizens, see Legislative Background below).

The Courts have identified a number of factors that should be taken into account in determining whether a person has been absorbed into the Australian community. These include:

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

[6] s 34(2)(a).
[7] s 34(2)(b).
[8] s 34(2)(c), which provides that the term 'left Australia' has the meaning it had in the Act prior to 1 September 1994.
[9] s 34(2)(d). Section 20 of the Act as it was in force before 1 September 1994 dealt with circumstances where a non-citizen's entry was obtained by evasion or false or misleading statements.

- any criminal record.[10]

In making this judgment, it is permissible to consider a person's or family's history after 2 April 1984 to the extent that it may inform an assessment of their pre-existing degree of commitment to Australia.[11] The following principles may also be extracted from the cases:

- even if a person's parents retained a foreign cultural heritage, this would not be inconsistent with absorption into a multicultural Australian society;[12] and
- family circumstances which may show a total disregard for acceptance of Australian standards and laws are only part of the 'evaluative metaphor' which is required to be carried out, and don't of themselves preclude a finding of absorption.[13]

A number of cases have recognised a broad principle that absorption may be precluded by community non-acceptance, which can be effected by statute.[14] On this basis, regardless of the person's circumstances in relation to the above factors, a person is precluded from being absorbed into the community if, as at 2 April 1984:

- the person held a temporary entry permit[15] or
- the person was a prohibited immigrant.[16]

'Immigrant' – Legislative Background

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

[10] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [46] citing *Potter v Minahan* (1908) 7 CLR 277. In *Johnson*, French J made clear that this list was not exhaustive: at [46]. See also *Toia v MIAC* (2009) 177 FCR 125 and *Moore v MIAC* (2007) 161 FCR 236 at [53] and the cases referred to therein on the concept of absorption.
[11] *Toia v MIAC* (2009) 177 FCR 125 at [34]; *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [60].
[12] *Toia v MIAC* (2009) 177 FCR 125 at [68]; *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [47].
[13] *Toia v MIAC* (2009) 177 FCR 125 at [69]–[71]. In *Johnson v MIMIA (No 3)* (2004) 136 FCR 494, French J stated at [45]: 'The word "absorption" is an evaluative metaphor which invites consideration of a variety of factors relevant to its application. It is important to bear in mind also that it is a metaphor used in aid of the resolution of a question of constitutional fact, namely whether the person to whom it is applied has ceased to be an immigrant. The metaphor must not obscure the primary question.'
[14] See *Johnson v MIMIA (No 3)* (2004) 136 FCR 494; *Yong v MIEA* (1996) 67 FCR 566; *Tjandra v MIEA* (1996) 67 FCR 577; *Rooney v MIEA* (1996) 67 FCR 590; *Chee v MIMIA* [1997]) FCA 46 ; and *Sharma v MIMIA* (1997) 78 FCR 586.
[15] See *R v Forbes; Ex Parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172–173. An immigrant who held a valid temporary entry permit which authorised entry or further stay for a specified period could not become a member of the Australian community during that period. The authority to stay rested with the person being a holder of a temporary entry permit. The definition of 'temporary entry permit' in reg 1.03 meant 'an entry permit whose effect was subject to a limitation as to time'. That definition was removed by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30), sch 1, pt 1, item 1 with effect from 22 March 2014.
[16] See discussion under *'Immigrant'* – Legislative Background.
[17] s 5(1) of the Act as in force immediately before 2 April 1984 defined an immigrant as 'a person intending to enter, or who had entered, Australia for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, Australia for the purpose of staying permanently.'
[18] The Act as in force at that time provided for three types of entry permits: an entry permit for a temporary stay (s 6(6)), an entry permit to enter or remain, or both (i.e. enter and remain) (s 6(3)).
[19] Exemptions were provided under s 8 of the Act as in force at that time.

immigrant', unless another entry permit was issued.[20] The Minister had absolute discretion to cancel a temporary entry permit at any time.[21] This was subject to s 7(4) which provided that a person ceased to be a 'prohibited immigrant' at the expiration of a period of 5 years from the time their temporary entry permit was cancelled or expired, unless at the expiration of that period, a deportation order was in force.[22] In effect, the temporary entry scheme prior to 1984, meant that only 'immigrants' needed to hold an entry permit to enter and remain in Australia. The only way an 'immigrant' could have 'ceased to be an immigrant' was to become a member of the Australian community by way of being absorbed.[23]

The *Migration Amendment Act 1983* (Cth) (1983 Amendment Act), which came into effect on 2 April 1984, shifted the Constitutional foundation of the Migration Act from s 51(xxvii) (immigration and emigration) to s 51(xix) (naturalisation and aliens). It substituted in the Act the terms 'non-citizen' for 'immigrant' and 'prohibited non-citizen' for 'prohibited immigrant'. Importantly, s 7(4) was repealed and s 8(2) of the 1983 Amendment Act rendered, as prohibited non-citizens, those persons whose status of 'prohibited immigrant' had been removed by s 7(4) of the Act. The repeal of s 7(4) and the associated amendments had the consequence that it was no longer possible for a prohibited immigrant to cease to hold that status merely by the passing of time without detection.[24] A possible unintended effect of these changes was that s 8(2) captured all persons who had benefited from s 7(4), regardless of whether they had been absorbed and therefore had ceased to be immigrants. Non-citizens, unlike immigrants, cannot cease to be a non-citizen and therefore be absorbed into the Australian community.

To overcome the injustice caused by the application of s 8(2) of the 1983 Amendment Act to the persons who had benefited from s 7(4) and been absorbed, s 16 of the *Migration Laws Amendment Act (No 2) 1992* (Cth) was introduced and came into effect on 1 January 1993. This provided that s 8(2) of the 1983 Amendment Act 'does not apply, and never has applied' to a person who was in Australia on 2 April 1984 (the commencement of the 1983 Amendment Act); and before that date had ceased to be an immigrant and since that date has not left Australia.[25]

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

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

Key Issues

Ceased to be an immigrant

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

There are a series of cases considering absorbed person visas in relation to the question of whether a person who was a 'prohibited immigrant' can have 'ceased to be an immigrant' prior to 2 April 1984 under s 34(2)(b) of the Act. The Courts have held that a person who was a 'prohibited immigrant' as at 2 April 1984 could not have ceased to be an immigrant on or before that date, and therefore could not satisfy s 34(2)(b) of the Act.[26] 'Prohibited immigrant' has been held to be a subclass of 'immigrants'.[27]

As noted in the Legislative Background section above, before the 1983 Amendment Act, under s 7(4) a person could cease to be a prohibited immigrant 5 years after the expiry or cancellation of the last temporary entry permit held. This does not mean upon the expiry of the 5 year period a person who ceased to be a 'prohibited immigrant' automatically ceased to be an immigrant – they merely ceased to be liable for deportation as a prohibited immigrant.[28] A finding of fact must still be made that a person had subsequently been absorbed and thereby ceased to be an immigrant by 2 April 1984. As s 34(2)(b) requires that a person ceased to be an immigrant prior to 2 April 1984, the person's last Temporary Entry Permit (TEP) must have expired or been cancelled prior to 2 April 1979 for there to be a possibility that they ceased to be an immigrant and were absorbed on or before 2 April 1984.

Children and absorption

There is a question of whether a child immigrant may be absorbed into the Australian community and therefore has 'ceased to be an immigrant'. The Courts have expressed different views on whether a child can be absorbed into the community in their own right, or whether they can only become absorbed by virtue of the absorption of their parents.[29] It appears that the issue may also turn on whether the child came as a member of a family unit, or as an unaccompanied minor.

Case law suggests that absorption of the parents will result in the absorption of the child.[30] In *Johnson v MIMIA (No 3)*,[31] the Court suggested that where a child comes into Australia as part

[26] *Sit v MIMIA* [2003] FCAFC 40; *Boon Yin Chee v MIEA* (Lockhart, Heerey and Sundberg JJ, 13 June 1997) following *Tjandra v MIEA* (1996) 67 FCR 577. See also *Yong v MIEA* (1996) 67 FCR 566 and *Rooney v MIEA* (1996) 67 FCR 590.
[27] *Yong v MIEA* (1996) 67 FCR 566 at 573, citing Barwick CJ in *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172–173; *Tjandra v MIEA* (1996) 67 FCR 577 at 584–585 noting that Stephen J's view in *Salemi v Mackellar (No 2)* (1977) 137 CLR 396 at 429–431 lends some support to the proposition that 'prohibited immigrant' is a subclass of 'immigrant'.
[28] See *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172–173.
[29] In *Moore v* MIAC (2007) 161 FCR 236 at [53] the Court held that the absorption of children into the Australian community will be very much influenced by the absorption or otherwise of their parents although at [57] it also held that the lack of absorption of adults into the Australian community would not necessarily deny a finding that their children had been absorbed.
[30] When considering whether the child has left Australia, however, the focus is on the child. Section 34(2)(c) 'is directed at the non-citizen in respect of whom consideration is being given under s 34, and to that person alone, whether that person is an adult or a

of a family unit, it is necessary to apply the judgment about membership of the community to the child's parents or other adult guardian or carers with whom the child lives.[32] In that case, as the applicant was 9 years of age when he entered Australia, the Court considered it necessary to have regard to evidence about his parents' migration to, and settlement in Australia and their position in 1984. Having regard to these factors, the Court held that the family had become part of the Australian community as at 2 April 1984 and that the applicant was therefore deemed to have been granted an absorbed persons visa on 1 September 1994.[33]

The required approach in relation to unaccompanied minors is less clear as the Courts have not made a determinative finding on this matter. In *R v Director-General of Social Welfare (Vic); Ex parte Henry*, the majority of the High Court contemplated that a child could be absorbed into the Australian community in their own right before reaching adulthood, but ultimately did not reach a conclusion on the issue.[34] Justice Stephen, in dissent on the outcome of the case, doubted that an unaccompanied minor could be absorbed into the Australian community before reaching adulthood. He considered that without legal capacity, a child could not form an intention of absorption into and resultant membership of the Australian community.[35] Unlike those children who arrived with their parents, unaccompanied minors could not acquire membership of the community as part of a family unit.[36] Although Justice Stephen's reasoning is in dissent, it is the only direct consideration on the issue of the ability of unaccompanied minors to be absorbed into the community and may be treated as persuasive by another Court.

British Subjects who entered Australia prior to 1 June 1959

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

Prior to the commencement of the *Migration Act 1958* on 1 June 1959, British subjects had a common law right to enter and reside in Australia.[37] This right was not abrogated by the Act or the entry permit regime. British subjects who arrived before 1 June 1959 belong to a class of

minor.' There is no 'warrant to import into a consideration of s 34(2)(c) the kind of reasoning which has been deployed in the authorities in respect of the requirement set out in s 34(2)(b). The concept of *leaving Australia* is clear enough. There is no room for subjective or qualitative judgments. Either the person in question left Australia or he/she did not. The expression "… *ceased to be an immigrant*…" involves vastly different considerations': *Toia v MIAC* [2009] FCA 166 at [192].

[31] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494.

[32] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [47].

[33] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [61].

[34] *R v Director-General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 at 374, at 382, 385. The issue in this case was whether s 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth), which confers upon the Minister for Immigration guardianship of unaccompanied minors, could be validly enacted under the Immigration power as conferred by s 51(xxvii) of the Constitution. The majority (Barwick CJ, Mason, Jacobs, McTiernan and Gibbs JJ) held that s 6 was a law with respect to immigration, as it operates to confer guardianship on the Minister for only as long as a child is an immigrant or remains under 18 years of age. It was held per Barwick CJ, McTiernan, Gibbs and Mason JJ, contra Stephen and Murphy JJ, that s 6 did not apply to children who, having been absorbed, have ceased to be immigrants. It left open the question of whether guardianship subsists after the child reaches 18 or whether it was possible for a child to have been absorbed into the Australian community before the age of 18. See also *Shaw v MIMIA* (2003) 218 CLR 28 per Callinan J at [183]; and the discussion on *R v Director-General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 in *Johnson v MIMIA (No 3)* (2004) 136 FCR 494 at [38].

[35] *R v Director – General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 at 377.

[36] *R v Director – General of Social Welfare (Vic) ex parte Henry* (1975) 133 CLR 369 at 378.

[37] See *Manatiy v MIMA* [2007] FCA 28 at [2] citing *Potter v Minahan* (1908) 7 CLR 277 at 305 that under the *Immigration Act 1901–1949* (Cth) British Subjects had the right to enter and reside in 'any part of the King's Dominion except insofar as the right has been modified or abolished by positive law'.

persons lawfully in Australia who stood outside the entry permit regime for so long as they continued to remain in Australia.[38] Such a person who has remained in Australia over a long period of time is likely to have been absorbed into the community, having regard to factors identified in *Johnson v MIMIA (No 3)*[39] (see above under Visa Criteria).

Examples

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

Scenario

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

Discussion

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

For the purposes of s 34(2)(b), the fact that a person is no longer a 'prohibited immigrant' does not automatically mean that he has 'ceased to be an immigrant'. Decision makers would have to consider whether it could be said that, by 2 April 1984, X had been absorbed into the Australian community, having regard to the factors in *Johnson v MIMIA (No 3).*[40]

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

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

Scenario

Y entered Australia with his wife and child on a TEP which expired on 12 December 1983. The family settled and have remained in Australia since then. Y now seeks a Subclass 155 visa for

[38] See *Manatiy v MIMA* [2007] FCA 28 at [28].
[39] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494.
[40] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494. See discussion above in the Visa Criteria section.

travel and re-entry into Australia. At issue is whether he can meet s 34(2)(b) by virtue of having 'ceased to be an immigrant on or before 2 April 1984'.

Discussion

Upon the expiry of the TEP on 12 December 1983, Y and his family members became 'prohibited immigrants'. They remained so until 2 April 1984, when s 8(2) of the 1983 Amendment Act made them 'prohibited non-citizens'. On the construction of the relevant legislative provisions as applied in *Tjandra v MIEA,*[41] if a person became a 'prohibited immigrant' before 2 April 1984 and had not ceased to be a 'prohibited immigrant' as at that date, they could not cease to be an immigrant after that date and could not meet s 34(2)(b). This is because a 'prohibited immigrant' is a subclass of 'immigrant' and the statutory provisions have effectively precluded absorption by the community prior to 2 April 1984.

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

Scenario

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

Discussion

Following the view taken in *Johnson v MIMIA (No 3),*[42] whether Z has been absorbed into the Australian community turns on an assessment of the parent's circumstances as at 2 April 1984. Z may be absorbed by virtue of the absorption of her parents. This is a finding of fact for the Tribunal.

Relevant case law

Judgment	Judgment summary
Boon Yin Chee (unreported, Lockhart, Heerey and Sundberg JJ, 13 June 1997)	
Chee v MIMIA [1997] FCA 46	
Gunawan v MIAC [2007] FMCA 805	
Johnson v MIMIA (No 3) [2004] FCA 137; (2004) 136 FCR 494	

[41] *Tjandra v MIEA* (1996) 67 FCR 577. See above under Ceased to be an immigrant.
[42] *Johnson v MIMIA (No 3)* (2004) 136 FCR 494.

Manatiy v MIMA [2007] FCA 28	
Moore v MIAC [2007] FCAFC 134: (2007) 161 FCR 236	
Potter v Minahan [1908] HCA 63; (1908) 7 CLR 277	
R v Director General of Social Welfare (Vic); ex parte Henry [1975] HCA 62; (1975) 133 CLR 369	
R v Forbes; Ex Parte Kwok Kwan Lee [1971] HCA 14; (1971) 124 CLR 168	
Rooney v MIEA [1996] FCA 1645; (1996) 67 FCR 590	
Salemi v Mackellar (No 2) [1977] HCA 26; (1977) 137 CLR 396	
Sharma v MIMIA [1997] FCA 1050; (1997) 78 FCR 586	
Shaw v MIMIA [2003] HCA 72; (2003) 218 CLR 28	
Sit v MIMIA [2003] FCAFC 40	
Tjandra v MIEA [1996] FCA 1638; (1996) 67 FCR 577	
Toia v MIAC [2009] FCA 166	
Toia v MIAC [2009] FCAFC 79; (2009) 177 FCR 125	
Yong v MIEA [1996] FCA 572; (1996) 67 FCR 566	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Immigration Act 1901–1949 (Cth)	No 17 of 1901	
Migration Amendment Act 1983 (Cth)	No 112 of 1983	
Migration Laws Amendment Act (No 2) 1992 (Cth)	No 175 of 1992	
Migration Legislation Amendment Act 1994 (Cth)	No 60 of 1994	
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 02/2014

Available Decision Precedents

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

Last updated/reviewed: November 2022

APPLICATION OF POLICY

Overview[1]

Policy can be relevantly defined as 'a course or line of action adopted and pursued by a government, ruler, political party, or the like'.[2] All legislation has an underlying policy. Its proper application to legislation will promote values of consistency and rationality in decision-making, especially in areas of high volume decision-making. It provides guidance to those making decisions which are subjective and evaluative and so diminishes the importance of any individual predilections.[3] In the migration context, while each application is determined on its merits, policy provides the framework for consideration of an individual's circumstances in the context of many other such applications. In these situations the High Court has observed policy is important as 'the merits of an application cannot always adequately be considered by reference to the circumstances of the applicant alone.'[4]

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

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

The precise part which government policy should play is a matter for the Tribunal to determine in the context of the particular case and in light of the need for compromise between the desirability of consistency and the ideal of justice in the individual case.[5] The Tribunal is not entitled to abdicate its function of determining whether the decision made was, on the material before it, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with relevant government policy.[6] Slavish adherence to policy or reliance on interpretative guidelines that may be narrower or broader than the legislative requirements may lead to jurisdictional error, in particular, a failure to constructively exercise jurisdiction, and/or the Tribunal asking itself the wrong question.[7]

[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] *Macquarie Dictionary*, 3rd Edition, 2003.
[3] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [54].
[4] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [68].
[5] *Drake v MIEA* (1979) 24 ALR 577 at 590–591. Regarding the 'correct or preferable' decision, Kiefel J stated in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [140]: "'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense."
[6] *Drake v MIEA* (1979) 24 ALR 577 at 589–591.
[7] *Lobo v MIMIA* [2003] FCAFC 168 at [63]–[64]; *Jaravaza v MIAC* [2013] FCCA 68.

General principles

The Tribunal must make an independent assessment of the material before it with a view to reaching the correct or (in the case of the exercise of a discretionary power) preferable decision.[8] While policy is clearly relevant to such determinations, it is not desirable to frame a general statement of the part which government policy should ordinarily play in the determinations of the Tribunal.[9] That is a matter for the Tribunal to determine in the context of any particular case, informed by considerations of the desirability of consistency of administrative decisions but balanced against the ideal of justice in the individual case.[10]

Where the Tribunal considers that the correct or preferable decision results from the application of a policy, it should make it clear that it has considered the propriety of the particular policy and expressly indicate the considerations which have led it to that conclusion.[11] This requires consideration of the lawfulness of the policy, the role the policy plays in the determination being influenced by the nature of the power, and other considerations such as the nature of the policy. For example, policy contained in documents such as Explanatory Memoranda or other extrinsic aids in interpreting the policy intentions of Parliament should be distinguished from high level ministerial policy or policy contained in the Procedural Instructions, which represents policy made at the departmental level or a set of administrative guidelines, whose contents cannot be elevated into legally relevant considerations or binding representations.[12]

Lawfulness of policy

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

In this regard, a policy which is more narrow or restrictive than the legislation permits will not be a lawful policy and reliance on it is likely to result in a jurisdictional error.[13] As made clear by Brennan J in *Re Drake and MIEA (No 2)* (*Re Drake (No 2)),* the policy should not be one in which its application would result in the Tribunal depriving itself of its freedom to give no weight to a policy in a particular case.[14]

For example, in *Zhu v MIBP*[15] the Federal Circuit Court found the Department's policy on exceptional circumstances for cls 857.213(b)(ii)(A) and (B) of Schedule 2 to the *Migration*

[8] See *Hneidi v MIAC* (2010) 182 FCR 115 at [34].
[9] *Drake v MIEA* (1979) 24 ALR 577 at 590; see also *Hneidi v MIAC* (2010) 182 FCR 115at [43].
[10] *Hneidi v MIAC* (2010) 182 FCR 115 at [43].
[11] See *Hneidi v MIAC* (2010) 182 FCR 115 at [44], *Drake v MIEA* (1979) 24 ALR 577 at 591. In *Hneidi v MIAC* [2009] FCA 983, his Honour stated at [55]: "… where a policy is lawful, the Tribunal would not normally consider the propriety of the policy as a policy. It would consider the propriety of applying the policy to the facts of the particular case."
[12] *Moller v MIAC* [2007] FMCA 168 at [14]; *He v MIAC* [2009] FMCA 1142 at [95] – [104]. See also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1978) 52 ALJR 254.
[13] *Lobo v MIMIA* [2003] FCAFC 168 at [63]–[64]; *Jaravaza v MIAC* [2013] FCCA 68.
[14] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 645.
[15] *Zhu v MIBP* [2013] FCCA 1490.

Regulations 1994 (Cth) (the Regulations) was inconsistent with the applicable Regulations. In this event, reliance on that policy, without taking into account the applicant's relevant circumstances amounted to jurisdictional error.

Similarly, in *Jaravaza v MIAC*[16] the Federal Circuit Court found the Tribunal erred in applying departmental guidelines in its consideration of a Subclass 857 visa, which were clearly more restrictive than the legislative provisions. This was because they contained a section on assessing exceptional circumstances for age distinguishing between applicants 45 to under 60 years, and applicants 60 years and older in such a way not available under the Regulations. Again, the Tribunal's reliance on a policy which was inconsistent with the Regulations resulted in jurisdictional error.

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

In the ordinary case, policy is a relevant factor for the Tribunal to take into account.[17] How the Tribunal should treat the policy, for example whether it should *apply* or *have regard to* that policy in a particular case will depend on a range of factors, including whether it is exercising a discretionary or non-discretionary power and whether the nature of the power suggests an emphasis on consistency or a focus on the circumstances of the individual case.[18]

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

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

When exercising a discretionary power the Tribunal should have *regard* to policy, as a relevant consideration.[19] However, whether exercising a discretionary or non-discretionary power, policy is not *binding* on the Tribunal.[20] This was supported in *Re Drake No 2* in which

[16] *Jaravaza v MIAC* [2013] FCCA 68.
[17] See *Hneidi v MIAC* [2009] FCA 983 at [37].
[18] The distinction of whether the decision maker is exercising a discretionary or non-discretionary power to the role of policy in the exercise of that power is one often missed. For example, in *He v MIBP* [2015] FCCA 2915, both the Tribunal's reasons and the Minister's submissions failed to identify that policy was not relevant to the determination of that matter as the case concerned the interpretation of a statutory provision, not the exercise of a discretion.
[19] See for example *Mohammed v MIBP* [2018] FCA 887 where the Court proceeded on the basis that applicable government policy can be a relevant consideration for the Tribunal as per the principle enunciated in *MILGEA v Gray* (1994) 50 FCR 189. However in this case the Court found that the policy did not apply to the appellant and could not be said to be a 'relevant' policy, which negated the application of the principles in *Gray's* case to the appellant's circumstances (at [23]).
[20] See, for example, *Qiao v MIAC* [2008] FMCA 380 at [29] and *Skoljarev v Australian Fisheries Management Authority* [1995] FCA 1732.

Brennan J stated, that 'the Tribunal ought not, indeed cannot, deprive itself of its freedom to give no weight to a Minister's policy in a particular case'.[21] Importantly, where policy goes beyond the requirements of the relevant legislation, reliance on that policy would likely constitute jurisdictional error,[22] as would the inflexible application of an otherwise lawful policy.[23]

Use of policy in the exercise of discretionary power

Where exercising a discretionary power the Tribunal should have regard to any relevant lawful policy. In *Re Drake No 2*[24] the Tribunal was exercising a discretionary power (deportation). Justice Brennan, sitting as the President of that Tribunal, stated:

> *In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.*[25]

While the Tribunal cannot deprive itself of the freedom to give policy no weight when exercising a discretionary power in a particular case, there are substantial reasons which favour cautious and sparing departure from Ministerial policy, particularly if Parliament had scrutinised and approved the policy.[26] As Brennan J stated in *Re Drake No 2*:

> *Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.*[27]

Departure from policy may also, in some circumstances, be a relevant consideration in assessing the reasonableness of a discretionary decision. For example, in *Zhang v MIBP*,[28] the Court found departmental guidelines to be a relevant consideration in the Tribunal's assessment of an applicant's request for additional time to make a complying investment for the purposes of a Subclass 188 visa. The Court held it was unreasonable for the Tribunal not to have at least partially applied the policy and given the applicant extra time in circumstances where that had not been the determinative issue before the delegate and the Tribunal had stated there was no cogent reason to not depart from the policy.[29]

However, the Tribunal must not determine an issue simply by resolving whether or not it conforms to policy. The Tribunal is not entitled 'to abdicate its function of determining a correct or preferable decision in favour of a function of merely determining whether the

[21] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 644.
[22] See for example *Lobo v MIMIA* [2003] FCAFC 168 at [63]–[64]; *Jaravaza v MIAC* [2013] FCCA 68.
[23] See *SZSKR v MIBP* [2014] FCCA 2.
[24] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634.
[25] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 642.
[26] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 644.
[27] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 639. In *Hneidi v MIAC* (2010) 182 FCR 115, the Court stated at [49] that these remarks were confined to a discussion of the place of *Ministerial* policy in the review of administrative action.
[28] *Zhang v MIBP* [2017] FCCA 134.
[29] *Zhang v MIBP* [2017] FCCA 134 at [42]. Other reasons for the Court's finding were that the Tribunal did not identify any harm in giving the applicant a few weeks to make the complying investment, the Tribunal decided the case on the same day as the hearing, and the policy was a rational approach in assessing the relevant clause.

decision made conformed with whatever the relevant general government policy might be'.[30] The application of policy assumes that, in the absence of any reason to the contrary, its standards and values are an appropriate guide in the particular case.[31] But where the policy is more narrow or restrictive than the legislation it will not be a lawful policy and reliance on it is likely to result in a jurisdictional error.[32]

The Tribunal should consider the totality of the circumstances in deciding whether to apply or depart from policy. The test is not to ascertain some particular factor or 'cogent reason' for not applying the policy, the Tribunal must consider whether the circumstances as a whole justify a conclusion that the policy is or is not appropriate in the circumstances of the particular case. The Tribunal is required to balance the demands of policy against the need for individual justice.[33] Indeed, as made clear by Brennan J in *Re Drake (No 2),* if the application of policy would work injustice in a particular case, that of itself would provide a cogent and sufficient reason to depart from a policy as 'consistency is not preferable to justice'.[34] Therefore, when exercising discretionary power, the existence of a policy will be a relevant consideration which should be taken into account, but the decision whether to apply the policy is one for the Tribunal having regard to all the circumstances of the case.

Use of policy in exercise of non-discretionary power

When exercising a non-discretionary power the Tribunal may consider departmental policy regarding the interpretation of a legislative provision. However, it should not treat the Department's opinion as determinative in such matters. In *Port of Brisbane Corporation v DCT*[35] Moore J found that it was wrong to suggest the construction of relevant legislation and its application to the facts should be influenced by departmental policy as it is no more than an expression of opinion about what the relevant legislation meant after it was enacted. His Honour pointed out that the *Drake* cases were a discussion of policy in the exercise of discretionary power and it would be an error of law for the Tribunal to state it must follow what policy says concerning the scope or meaning of a provision in the *Migration Act 1958* (Cth) or Regulations.[36] When exercising a non-discretionary power, it is the duty of the decision maker to apply the statutory test.[37] Accordingly, while the Tribunal is not bound to consider policy, if it does have regard to it, the Tribunal must be mindful to bring its consideration back to the terms of the legislation; a failure to do so would likely result in a jurisdictional error.

[30] *Drake v MIEA* (1979) 24 ALR 577 at 590.
[31] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 642.
[32] *Lobo v MIMIA* [2003] FCAFC 168 at [63]–[64]; *Jaravaza v MIAC* [2013] FCCA 68.
[33] *Skoljarev v Australian Fisheries Management Authority* [1995] FCA 1732.
[34] *Re Drake and MIEA (No 2)* (1979) 2 ALD 634 at 645.
[35] *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375.
[36] *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375 at 386; [2004] FCA 1232 at [25]–[26].
[37] *Su & Anor v MIMIA* [2005] FCA 655. The Court stated that "a decision as to whether the appellant was not the holder of a substantive visa when he applied for the visa in question because of factors beyond his control is a factual question, which requires neither the consideration of 'policy' nor the exercise of a discretion" (at [10]). Hely J found that the tribunal mechanically applied policy guidelines, rather than the statutory test, and thereby addressed the wrong question (at [14] and [17]).

Non-discretionary powers containing discretionary elements

On occasion the relevant legislative provision uses terms which suggest a discretionary or evaluative element, such as 'reasonable period', 'compelling circumstances' or 'undue costs'. In those circumstances, the High Court has noted that policy plays a significant role. In *Plaintiff M64/2015*, the High Court held that 'the subjectivity of the evaluation [of "compelling reasons for giving special consideration" to a matter] highlights the importance of guidelines. The importance of avoiding individual predilection and inconsistency in making choices between a large number of generally qualified candidates by the application of the open-textured criterion of "compelling reasons for giving special consideration" is readily apparent.'[38]

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

> *… minds may, without legal error, differ on the question whether facts that are at law capable of doing so, fall within or outside words that are used in a statute according to their ordinary or common understanding. Whether they do so will be a question of fact… Prime examples are ordinary English words that betoken evaluation according to current community standards, such as "offensive", "unreasonable", "oppressive", "unfair" and "unjust".*
>
> *The word "exceptional" is a simple non-technical word. It means "unusual" or "out of the ordinary" and is used in that sense in Sch 2, cl 856.213(c) of the Migration Regulations 1994 (Cth) (the Regulations). The word is not, however, of the obviously evaluative kind referred to above. It is necessary to carry out the legal task of exploring the meaning of the word in the particular regulatory context in which it occurs with a view to identifying, if it can be done, what is the "usual" or "ordinary" case that was in contemplation against which exceptionality is to be measured.*[39]

Importantly, this is not to suggest that the scope or meaning of legislation set out in departmental guidelines cannot be used as a tool or aid in construing that legislation. There appears to be no error in the Tribunal having regard to any guidance that may be available in relation to legislative provisions containing such terms, including that provided in the Procedural Instructions but, as noted above, it is clear that the Tribunal must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.[40]

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[38] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [54].
[39] *An v MIAC* (2007) 160 FCR 480 at 481–482.
[40] In *Xue Fan v MIAC* [2010] FMCA 490 at [22], the Court observed that the Department's policy instructions are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s 15AB *Acts Interpretation Act 1901* (Cth), that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that "if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Section 15AB(2) then provides that, "[w]ithout limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes" materials such as explanatory memoranda and relevant reports laid down before either House of Parliament. See also

Application of policy

Flexible application

Just as a decision-maker should not apply an unlawful policy, he or she may fall into error by applying an otherwise lawful policy in an inflexible manner.[41] It is important that decision makers not only state that they have not applied policy rigidly without regard to the particular circumstances of the case, but do so in substance.

For example, *Jaravaza*[42] illustrates that a statement by the Tribunal to the effect that the departmental guidelines are 'a guide only' and that it is 'mindful that it must consider all of the circumstances of the case' will not necessarily prevent a finding of jurisdictional error if its reasoning suggests that it has not in fact asked the right question. In this case, the Court found that notwithstanding the Tribunal's statement to the contrary, the reasoning demonstrated that it did not consider 'all of the circumstances of the case' as required by the Regulations.[43]

Similarly, in *Zhu v MIBP*[44] the Federal Circuit Court held that the Tribunal had erroneously narrowed its consideration of an applicant's circumstances according to the departmental policy with respect to 'exceptional circumstances' in cl 857.213(b)(ii) which was inconsistent with the Regulations. In that case, the Tribunal had relied on departmental policy and excluded from its consideration the circumstance that nobody in the workplace spoke English, whereas the ordinary definition of 'exceptional circumstances' did not preclude that consideration.

Even in circumstances where the Tribunal has been careful to state it will not rigidly apply departmental policy, but seeks to accord the words of the legislation with that policy, it may be a possible jurisdictional error. For example, in *He v MIBP*,[45] the Federal Circuit Court found departmental policy relating to when loans could be considered assets in a main business went beyond the plain words of cl 890.212. The Court found that the Tribunal's reasoning in that case, while acknowledging the policy went further than the legislative requirements, was 'an attempt to reconcile the words of the legislation with the policy'.[46] Such a reconciliation was impossible in that case and jurisdictional error was found.

In contrast, the decision in *Shi v MIBP*[47] provides an example of where the Tribunal's consideration of departmental policy with respect to 'exceptional circumstances' in

Jaravaza v MIAC [2013] FCCA 68 and *SZSKR v MIBP* [2013] FCCA 2. In *SZSKR* the Court held at [46] – [48] that a delegate had made a jurisdictional error in treating policy guidance as a substitute for the statutory test in determining whether 'compelling and compassionate circumstances' had developed to justify waiver of a 'no further stay' visa condition.

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

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

[43] *Jaravaza v MIAC* [2013] FCCA 68 at [90].

[44] *Zhu v MIBP* [2013] FCCA 1490.

[45] *He v MIBP* [2015] FCCA 2915.

[46] *He v MIBP* [2015] FCCA 2915 at [22].

[47] *Shi v MIBP* [2015] FCA 131. This was an appeal from *Shi v MIBP* [2014] FCCA 1278.

cls 857.213(b)(ii)(A) and (B) did not demonstrate jurisdictional error. In this case, the Federal Court found that the Tribunal had made clear early in its reasons that it understood that the guidelines in the policy did not have the status of legislative requirements, had instructed itself as to the meaning of 'exceptional circumstances' in a manner which made clear that it was not rigidly applying the policy and, most importantly, had expressed its conclusions in a way that made clear it conducted a balancing exercise, rather than one involving the mechanical application of the requirements of the policy.[48]

Which version of the policy applies and the status of defunct policy

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

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

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

Ministerial and departmental policy

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

Different considerations may apply to the application of each different kind of policy, but the weight to be placed on them is a matter for the Tribunal, having regard to the need to make an independent assessment of the material before it with a view to making the correct or preferable decision. While 'great weight' ought to be given by the Tribunal to policies developed in the political arena, it does not follow that lesser weight must be given, regardless of the factual circumstances, to statements of departmental policy.[49]

[48] *Shi v MIBP* [2015] FCA 131 at [52].
[49] *Hneidi v MIAC* (2010) 182 FCR 115 at [58].

Ministerial Directions under s 499

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

The difference between departmental policy guidelines and policy directions under s 499 was considered by Emmett J in *Rokobatini v MIMA.*[50] His Honour saw the significant difference between the two documents as being that the ministerial direction imposed an obligation on a person performing a function or exercising a power to which s 499 applies, whereas policy, at best, was a matter which should have been taken into account by the Tribunal.[51] A majority of the Full Court of the Federal Court (Whitlam and Gyles JJ) similarly noted*:*

> *The most obvious difference between the two [Policy and a Direction] is that the Direction must be followed by reason of s 499 of the Act, whereas the Policy might be taken into account in the manner discussed in various decisions of the Court.*[52]

Accordingly, the Tribunal is obliged to follow a lawful direction, i.e. a direction that is not inconsistent with the Act or Regulations. A direction that is inconsistent with the Act or Regulations, for example one that purports to fetter an unfettered discretion, is not lawful: see *Howells v MIMIA.*[53]

The status of the Department's policy

The Department's policy includes the Procedural Instructions and executive policy documents, such as guides prepared to outline the documents required for a particular visa application.[54] Information available on the Department's website could also be described as policy.[55]

The Procedural Instructions issued by the Department contains guidelines to the Department's interpretation and application of the Act and Regulations as well as procedures to be followed by departmental officers. Much of the Procedural Instructions can properly be categorised as an opinion as to the interpretation of the legislation, rather than as 'policy'. Unlike directions made under s 499 of the Act, the Procedural Instructions are not a

[50] *Rokobatini v MIMA* [1999] FCA 492.
[51] *Rokobatini v MIMA* [1999] FCA 492 at [27].
[52] *Rokobatini v MIMA* [1999] FCA 1238 at [17].
[53] *Howells v MIMIA* [2004] FCAFC 327.
[54] *Han v MICMSMA* [2019] FCCA 3558. The Court at [84]–[116] rejected the argument that the Departmental delegate had impermissibly fettered their power to assess the criteria for a Subclass 188 visa by relying upon the executive policy guidance in the 'Guide to Documentation Requirements for Business Innovation and Investment Visa Applications from the People's Republic of China'. The Court referred to authority considering the role of executive policy in administrative decision-making at [76]–[82].
[55] *Baker v Commissioner of the Australian Border Force* [2020] FCA 836. The Court accepted at [36] that information available on the Department's website about the kinds of circumstances that may be considered for exemption to the COVID-19 travel restrictions, and information and guidance on how the exemption power would be exercised, could be correctly described as policy even though it was not formally promoted as such.

legislative instrument and do not have the force of ministerial direction given under s 499. As discussed above, the Tribunal should apply the most recent version of the Procedural Instructions that is in force at the time of the Tribunal's decision.

In *He v MIAC,*[56] the Federal Magistrates Court considered the use of departmental policy (then known as PAM3) in determining what is 'a reasonable period' in the context of the definition of remaining relative in reg 1.15 of the Regulations. The Court stated that:

> *A distinction may be drawn between a policy made at the level of government, that is at the political level, and a policy made at the departmental level (see Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158 at 163, and Hneidi v Minister for Immigration & Citizenship [2009] FCA 983 ("Hneidi") at [41] per Besanko J. His Honour also said:*
>
> > "Different considerations may apply to the review of each kind of policy…"
>
> *…*
>
> *… [PAM3 as current in 2000] is at least, as its name suggests, intended to provide advice about procedures.*
>
> *The advice appears to be directed to "officers" (in context presumably officers of the Minister's Department). It is not directed to Tribunal members (see s 396 of the Act).*
>
> *But, ultimately, nothing turns on this point because the Tribunal is entitled to have regard to "policy", both government (at the political level) and administrative (departmental).*
>
> *Further, there is no dispute that, while a policy (as distinct from a policy expressed in, or as, a regulation) is not binding on a decision maker, a policy applicable to the case is a relevant consideration ….. In Hneidi at [37] the Court said: "… In the ordinary case, a policy is a relevant factor for the Tribunal to take into account."*[57]

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

> *PAM3 is simply a document which brings a number of relevant facts to the attention of the decision maker to which the decision maker may or may not have regard in considering whether an applicant has brought himself or herself within the criteria required in reg 1.15. It has no legislative effect. It does not construe reg 1.15. A decision maker is not bound to have regard to it or if a decision maker has regard to it the decision maker commits no error.* [58]

This view was restated in *Moller v MIAC*:

[56] *He v MIAC* [2009] FMCA 1142.
[57] *He v MIAC* [2009] FMCA 1142 at [95]–[104].
[58] *Durzi v MIMIA* [2006] FCA 1767 at [49].

> *[PAM3's] status is merely a set of administrative guidelines, and its contents cannot be elevated into legally relevant considerations or binding representations (see Vishnumolakala v Minister for Immigration & Anor [2006] FMCA 1209 at [27]–[29] and cases there cited). Nor can its legal interpretations or restatements be applied by the Migration Review Tribunal or this Court as substitutes for the regulations, which must be construed according to their own language under principles of statutory interpretation.*[59]

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

> *… policy, [no] matter how clearly set out, in the Procedures Advice Manual 3 of the department cannot change or amend the migration regulations, if what is set out in the policy document is not in accordance with the migration regulations, then it is wrong. It is the regulation that must be preferred to the policy document.*[60]

Where the 'policy' in the Procedural Instructions is not consistent with, or does not accurately reflect the Regulations, the policy is unlawful and the regulation must prevail.[61] This is discussed in more detail above. There is thus a need for caution in applying the Procedural Instructions. The decision-maker must be satisfied that it is not inconsistent with or does not go beyond the Regulations. In short, the decision-maker must bring his or her consideration back to the terms of the Regulations. Where the existence and content of a policy is regarded as a relevant fact by the Tribunal, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant consideration and for that reason may result in an improper exercise of the statutory power.[62] If a decision-maker, not bound to apply policy, purports to apply it as a proper basis for disposing of the case in hand but misconstrues or misunderstands it so that what is applied is not the policy but something else, then there may be reviewable error.[63] Furthermore, as noted above, the inflexible application of an otherwise lawful policy in the Procedural Instructions can lead to a jurisdictional error.[64]

Similarly, while it is clear that departmental interpretative *guidelines* do not have legislative effect, there have been cases where the Courts have, seemingly contrary to established principles, found the Tribunal committed jurisdictional error for purporting to follow departmental guidelines and then misapplying the guidelines.[65] These cases did not involve the exercise of discretionary powers, but rather the interpretation of certain legislative provisions. To the extent that these cases appear to raise the guidelines to the level of a legislative requirement, they are not in line with existing authority. However, they demonstrate the risk to Tribunal decisions of, firstly, applying guidelines to the task of

[59] *Moller v MIAC* [2007] FMCA 168 at [14].
[60] *Sakhno v MIAC* [2007] FMCA 1492 at [55].
[61] See *Alimi v MIAC* [2007] FMCA 1520, *Total Eye Care Australia Pty Ltd v MIAC* [2007] FMCA 281, *Feng v MIAC* [2011] FMCA 576 at [70] – [72], *Jaravaza v MIAC* [2013] FCCA 68.
[62] *MILGEA v Gray* (1994) 50 FCR 189 at 208.
[63] *MILGEA v Gray* (1994) 50 FCR 189 at 208.
[64] *SZSKR v MIBP* [2014] FCCA 2 at [46]–[48]. In *SZSKR*, the Court considered that a delegate inflexibly applied policy guidance in finding that 'compassionate and compelling circumstances' had developed such as to justify waiver of a 'no further stay' visa condition. The delegate had found that the waiver policy in relation to the medical condition of close family members required that the officer be satisfied that the family member requires care and that the applicant is the only person who can provide that care. In applying the policy as a requirement and not as a guide, the delegate had "applied the policy inflexibly without regard to the merits of the case and thus unlawfully circumscribed his discretion" (at [48]).
[65] *Elbrow v MIMIA* [2004] FCA 595; *Elliott v MIMA* (2007) 156 FCR 559.

statutory interpretation as they would be applied in the exercise of a discretion and secondly, referring to policy or departmental guidelines inaccurately, without clearly identifying the relevant question and bringing consideration of a matter relating to statutory interpretation back to the terms of the relevant legislative provisions. Consistent with authority, interpreting a regulation on the basis only of the Department's opinion of what the term means and nothing more could constitute a misapplication or misconstruction of the relevant regulation.

Relevant case law

Judgment	Judgment summary
Alimi v MIAC [2007] FMCA 1520	Summary
An v MIAC [2007] FCAFC 97; (2007) 160 FCR 480	Summary
Baker v Commissioner of the Australian Border Force [2020] FCA 836	
Drake v MIEA (1979) 24 ALR 577	
Re Drake and MIEA (No 2) [1979] AATA 179; (1979) 2 ALD 634	
Durzi v MIMIA [2006] FCA 1767	
Elbrow v MIMA [2004] FCA 595	Summary
Elliott v MIMA [2007] FCAFC 22; (2007) 156 FCR 559	Summary
Feng v MIAC [2011] FMCA 576	Summary
MILGEA v Gray [1994] FCA 1052; (1994) 50 FCR 189	
Han v MICMSMA [2019] FCCA 3558	
He v MIAC [2009] FMCA 1142	Summary
He v MIBP [2015] FCCA 2915	Summary
Hneidi v MIAC [2009] FCA 983	
Hneidi v MIAC [2010] FCAFC 20; (2010) 182 FCR 115	
Howells v MIMIA [2004] FCAFC 327	
Jaravaza v MIAC [2013] FCCA 68	Summary
Lobo v MIMIA [2003] FCAFC 168	Summary
Plaintiff M64 /2015 v MIBP [2015] HCA 50 (17 December 2015)	

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

Last updated/reviewed: 16 August 2022

ASSURANCE OF SUPPORT CASES – POST 1 JULY 2004

Last updated/reviewed: 25 February 2022

Overview[1]

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

Some visa criteria include a requirement for an AoS.[2] Where an AoS is required, the assurance must be accepted by the Secretary of Social Services.[3] The *Social Security Act 1991* (Cth) (Social Security Act) provides for an AoS to be given and accepted or rejected.[4]

Since 1 February 2020, Services Australia (which includes Centrelink) has been responsible for processing all AoS applications.[5] Decisions not to accept an AoS are reviewable under the *Social Security (Administration) Act 1999* (Cth) (Social Security (Administration) Act).[6] The review provisions provide for internal review as well as review by the Tribunal in its Social Security and General divisions but not in the Migration and Refugee Division (MRD).[7] However, where a decision to refuse to grant a visa is reviewable by the MRD, the review may require consideration of whether an AoS has been accepted or, where an AoS is a discretionary requirement, whether an AoS should be required.

[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] See cls 101.225, 102.225, 103.226, 114.225, 115.225, 117.224, 143.228, 151.229B, 802.222, 804.224, 835.222, 837.222, 864.226 of sch 2 to the Regulations. The Discretionary AoS criterion for Subclass 100, 300, 309, 801 and 820 was omitted by *Migration Legislation Amendment Regulations 2011 (No 2)* (Cth) (SLI 2011, No 250), effective 1 January 2012.
[3] In practice, this power is delegated under s 234 of the *Social Security (Administration) Act 1999* (Cth) (Social Security (Administration) Act) by the Secretary to DSS employees. Prior to 22 March 2014, sch 2 AoS criteria referred to the Secretary of the Department of Family and Community Services rather than the Secretary of Social Services. However, the former reference was taken to apply to the various names of that Department. Section 19B of the *Acts Interpretation Act 1901* (Cth) provides for an amending order where the names of portfolios or departments are changed. An AoS accepted by the Secretary of the Department of Social Services or the Department of Social Services at the relevant time will satisfy the sch 2 criteria. See sch 3, pt 5, item 1 (13 March 2006) and sch 3, pt 7, item 10 (18 December 2007) and sch 3, pt 14, item 1 (12 November 2013) of the Acts Interpretation (Substituted References – Section 19B) Order 1997. From 22 March 2014, the sch 2 AoS criteria were amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) to refer directly to the 'Secretary of Social Services'. A new definition of 'Secretary of Social Services' was also inserted into reg 1.03 of the Regulations. The ES to SLI 2014, No 30 stated 'For the purposes of the Principal regulations, the term 'Secretary of Social Services' is defined to mean the Secretary of the Department that is administered by the Minister administering s 1061ZZGD of the *Social Security Act 1991* (Cth) (Social Security Act). As there are multiple Ministers that administer the Social Security Act it is necessary to refer to the relevant provision relating to Assurances of Support. The defined term remains current irrespective of the name of the portfolio of that Minister or any future changes in the name of the portfolio. The purpose of the amendment is to update the reference and avoid further amendments each time the portfolio name changes'. SLI 2014, No 30 amended a total of 42 provisions in sch 2 to the Regulations, to omit the words 'the Department of Family and Community Services' and substitute the words 'Social Services': sch 1, pt 3, items [71] and [75].
[4] Social Security Act s 1061ZZGD. The definition of *Secretary of Social Services* under reg 1.03 of the Regulations is also relevant, which is defined as the Secretary of the Department that is administered by the Minister administering s 1061ZZGD of the Social Security Act. See note [3] above.
[5] Services Australia (formerly known as the Department of Human Services) was established as a new Executive Agency, within the Social Services Portfolio by the Administrative Arrangements Order made on 5 December 2019 with effect from 1 February 2020.
[6] Social Security (Administration) Act ss 3, 126.
[7] Social Security (Administration) Act ss 3, 126, 140, 142, 178, 179.

Key issues

Definition of Assurance of Support

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

For visa applications made before 22 March 2014, reg 1.03 states that an 'assurance of support':

> *in relation to an application for the grant of a visa, means:*
>
> *(a) for an assurance of support accepted by the Minister before 1 July 2004 — an assurance of support under Division 2.7; and*
>
> *(b) in any other case — an assurance of support under Chapter 2C of the Social Security Act 1991.*

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

> *in relation to an application for the grant of a visa, means an assurance of support under Chapter 2C of the Social Security Act 1991.*[8]

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

> *... an undertaking by a person under this Chapter that the person will pay the Commonwealth an amount equal to the amount of social security payments that are:*
>
> *(a) received in respect of a period by another person who:*
>
> *(i) is identified in the undertaking; and*
>
> *(ii) becomes the holder under the Migration Act 1958 of a visa granted in connection with the undertaking (whether or not the person continues to hold the visa throughout the period); and*
>
> *(b) specified in a determination in force under section 1061ZZGH when the payments are received.*[9]

An Assurance of Support (AoS) is, then, a legal undertaking by the assurer to repay to the Australian Government certain security payments paid by Services Australia to the person covered by the AoS. The assurer must be an Australian resident.[10] There is no requirement

[8] Regulation 1.03, as amended by SLI 2014, No 30, sch 1, pt 7, item [143] and applying to visa applications made on or after 22 March 2014: SLI 2014, No 30, pt 28, item [2801]. The amendment to reg 1.03 omitted the redundant reference to assurances of support accepted by the Minister before 1 July 2004.
[9] Social Security Act s 1061ZZGA, Social Security (Assurances of Support) Determination 2018.
[10] Social Security Act s 1061ZZGH; Social Security (Assurances of Support) Determination 2018, para 8.

that the assurer be related to the visa applicant. In most cases, the AoS operates for 2 years.[11] The exception applies to Contributory Parent visas, where the AoS operates for 10 years. The AoS commences at the later time of either the:

- date of the relevant visa grant if the visa is granted to an applicant in Australia; or the
- date the visa holder first arrives in Australia holding the relevant visa.[12]

Assurance of support as a visa criterion

Acceptance of an AoS is prescribed in Schedule 2 as a time of decision criterion for the grant of certain visa subclasses (generally, permanent visas or temporary (provisional) visas likely to lead to the grant of a permanent visa).[13] The Schedule 2 criteria specify whether an AoS is mandatory or discretionary. Where an AoS is discretionary, the decision maker must decide whether to request an AoS. If an AoS is not requested, then the Schedule 2 criterion requiring acceptance of an AoS for that visa application does not apply.

A mandatory AoS criterion typically states:

> *The Minister is satisfied that an assurance of support in relation to the applicant has been accepted by the Secretary of the Social Services.*[14]

An AoS is a mandatory requirement for a Parent (Subclass 103), Aged Dependent Relative (Subclass 114 and 838), Remaining Relative (Subclass 115 and 835), Contributory Parent (Subclass 143), Aged Parent (Subclass 804) and Contributory Aged Parent (Subclass 864) visas.[15] The AoS is a discretionary requirement for other visa subclasses, including for example, Child (Subclass 101 and 802), Orphan Relative (Subclass 117 and 837) and Adoption (Subclass 102) visas.[16]

A discretionary AoS criterion typically states:

> *If the Minister has requested an assurance of support in relation to the applicant, the Minister is satisfied that the assurance has been accepted by the Secretary of Social Services.*[17]

[11] Social Security Act s 1061ZZGH; Social Security (Assurances of Support) Determination 2018, para 24.
[12] Social Security Act s 1061ZZGF(1).
[13] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.1 AoS as a Schedule 2 criterion] (re-issue date:01/01/2022).
[14] Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No 30, sch 1, pt 3, item [75]. For a discussion of this change, see note [3].
[15] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.1.2 Mandatory or discretionary AoS (re-issue date: 01/01/2022). For matters decided on or before 1 January 2008, an AoS was also a mandatory requirement for Subclass 116 and 836 carer visas and the pre 1 September 2007 skilled migration visas (i.e. subclasses 134, 136, 137, 138, 139, 861, 862, 863, 880, 881, 882 and 883). However, this requirement was removed with effect from 1 January 2008, in respect of visa applications made but not finally determined prior to 1 January 2008 and visa applications made on or after 1 January 2008: *Migration Amendment Regulations 2007 (No 14)* (Cth) (SLI 2007, No 356) and *Migration Amendment Regulations 2007 (No 7)* (Cth) (SLI 2007, No 257).
[16] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.1.2 Mandatory or discretionary AoS (re-issue date: 01/01/2022).Note that there were AoS criteria for partner visas, but they were removed for visa applications not finally determined as at 1 January 2012, as well as visa applications made on or after that date: SLI 2011, No 250, reg 7 and sch 5, item [1].
[17] Prior to 22 March 2014, these provisions referred to the 'Secretary of the Department of Family and Community Services'. These provisions were amended by SLI 2014, No 30, sch 1, pt 3, item [75]. For a discussion of this change, see note [3].

Merits Review

As discussed above, decisions to reject an AoS are reviewable under the Social Security (Administration) Act. The review provisions provide for internal review as well as review by the Tribunal in its Social Security and General divisions.[18] The MRD does not have jurisdiction to review the decision to reject the AoS as this is not a Part 5 or Part 7 reviewable decision under the *Migration Act 1958* (Cth) (the Act).

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

In some cases, the visa refusal decision is solely made on the basis of the criteria requiring that an assurance of support has been accepted by the Secretary of the Department of Social Services. Where an AoS is mandatory, or has been requested (and the Tribunal agrees that it should be requested), the Tribunal may defer consideration of the matter while the applicant is referred to Services Australia to obtain the AoS assessment. If the assessment is favourable, the Tribunal can remit with a permissible direction relating to this AoS criterion. Where an AoS is rejected by Services Australia, the Tribunal may need to consider whether it should delay its decision pending the assurer availing him/herself of the available review process. Relevant matters for consideration may include whether the applicant is taking reasonable steps to progress the review. Ultimately, if an AoS is not approved, the Tribunal must affirm the decision under review.

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

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

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

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

[18] Social Security (Administration) Act ss 3, 126, 140, 142, 178, 179.
[19] *Esteron v MIEA* (1995) 57 FCR 126.

opposed to the Tribunal exercising its power to review the Minister's decision on the merits.[20]

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

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

In accordance with Departmental guidelines, relevant considerations may include the sponsor's financial status and the visa applicant's skills, education, employment history, English language ability and age. It may also be appropriate to seek information about a sponsor's social security payment history.[23] Other circumstances, including those relating to the sponsor's background, social support, medical and psychological conditions and impact of delay in processing of the visa on her/his wellbeing and future prospects, are also all potentially relevant circumstances to the exercise of the discretion to request an assurance of support. However, in the end the Tribunal's task is to make 'the correct or preferable decision' on the available material and the Tribunal should take into account all of the relevant claims and evidence in undertaking its consideration.

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

[20] *Esteron v MIEA* (1995) 57 FCR 126.
[21] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.3.5 Consideration of a discretionary AoS (re-issue date: 01/01/2022).
[22] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.3.5 Consideration of a discretionary AoS (re-issue date: 01/01/2022).
[23] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.3.5 Consideration of a discretionary AoS (re-issue date: 01/01/2022).
[24] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.3.5 Consideration of a discretionary AoS (re-issue date: 01/01/2022).

compassionate circumstances affecting the interests of the applicant and/or sponsor may also warrant a withdrawal.[25]

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

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

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2007 (No 7) (Cth)	SLI 2007, No 257	No 9/2007
Migration Amendment Regulations 2007 (No 14) (Cth)	SLI 2007, No 356	No 16/2007
Migration Legislation Amendment Regulations 2011 (No 2) (Cth)	SLI 2011, No 250	No 1/2012
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014

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[25] See Policy – Migration Regulations > Div 1.2 - Interpretation > Reg 1.03 - Assurance of support > 3.5.3.5 Consideration of a discretionary AoS (re-issue date:01/01/2022).
[26] Under s 349(2)(c) of the Act the Tribunal has the power to remit a matter for reconsideration in accordance with such directions as permitted by the Regulations. Regulation 4.15(1)(b) prescribes a permissible direction as that the applicant must be taken to have satisfied a specified criterion for the visa. It will be necessary for the Tribunal to identify a criterion of the visa which the applicant satisfies in order to be able to remit the matter for reconsideration in accordance with the Act.

SUBSTANTIAL COMPLIANCE WITH VISA CONDITIONS

Overview[1]

Certain visa criteria in the *Migration Regulations 1994* (Cth) (the Regulations) require that the applicant has complied substantially with the conditions of a previously or currently held visa.

For some visa criteria, such as cl 482.211, the 'complied substantially' requirement is a discrete requirement. For others it forms part of a broader assessment as, for example, in cl 600.211 where the question of whether the applicant has complied substantially with visa conditions is relevant to the broader question of whether an applicant genuinely intends to stay temporarily in Australia.

In addition to being a Schedule 2 visa requirement, the consideration also arises in the context of certain Schedule 3 criteria. Both cls 3003(e) and 3004(e), for example, require the decision maker to be satisfied that the applicant has complied substantially with the conditions that applied to their last visa (if any), including any subsequent bridging visa.

While some 'complied substantially' criteria only arise where the applicant is in Australia at the time of application or assessment,[2] other criteria are not so limited.[3]

Prior to March 2014, it was a requirement for student visas that the applicant had complied substantially with visa conditions that applied to their last visa. While it has since been removed as a criterion for student visas, much of the case law derives from the student visa context and is relevant to the assessment of complied substantially requirements in other contexts.

'Complied substantially' criteria

The requirement to comply substantially with visa conditions

While a number of visa subclasses contain primary and secondary criteria requiring that the applicant has complied substantially with the visa conditions that applied to their last held visa(s), the wording, structure and precise requirements of each criterion varies across the subclasses.

Discrete requirement

For example, the complied substantially requirement in cl 482.211 of the Subclass 482 Temporary Skill Shortage visa arises as a discrete requirement:

[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] See cls 405.223; 410.221(6); 416.226; 457.221; and 461.225.
[3] See cl 417.222(a) which enlivens if the applicant is, or has previously been, in Australia as the holder of a Subclass 417 visa. Refer also to the broader complied substantially criteria in cls 400.213; 403.212; 420.214; 600.211; and 602.215.

> *If the applicant is in Australia, the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant, and to any subsequent bridging visa.*

In this context, the focus of the criterion is on the applicant's substantial compliance with the conditions attached to their last substantive visa and any subsequent bridging visas. It requires a retrospective assessment, identifying the relevant visa(s), the conditions (if any) that apply or applied to those visa(s) and the extent to which those conditions have been complied with.

Discrete 'complied substantially' requirements may be assessed by reference to the last of any substantive visa an applicant holds (or held) or it may apply only in relation to applicants who hold (or held) specific visa classes and/or subclasses. For these more specific criteria, compliance with the conditions that attached to those particular visas is the only relevant consideration. Where an applicant does not hold (or has not held) a visa of the specified kind, the question of non-compliance with the conditions of any other type of visa would not be relevant to the assessment of the criterion.

Part of broader requirement

In other circumstances, the 'complied substantially' requirement may form part of a broader assessment of the applicant's circumstances.[4] For example, the Subclass 600 Visitor Visa requires consideration of the applicant's past compliance with visa conditions as part of an overall assessment of the genuineness of the applicant's intention to stay in Australia temporarily. Clause 600.211 relevantly provides:

> *The applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to:*
>
> *(a) whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject; and*
>
> *…*

Unlike with the discrete 'complied substantially' criteria, the assessment of the applicant's past compliance with visa conditions is not the sole focus of this assessment. Rather, it is a relevant consideration that informs the broader question of the applicant's intention to stay temporarily in Australia. In this context, a finding that an applicant had not complied substantially with a condition which applied to their last substantive visa would not necessarily be fatal to the applicant satisfying this criterion, although that non-compliance would be relevant in assessing whether the applicant is a genuine temporary entrant.

[4] Provisions such as this currently arise in the following subclasses: Subclass 400 Temporary Work (Short Stay Activity) (cls 400.213, 400.313); Subclass 403 Temporary Work (International Relations) (cls 403.212, 403.314); Subclass 407 Training (cls 407.217, 407.315); Subclass 408 Temporary Activity (cls 408.213, 408.315); Subclass 420 Temporary Work (Entertainment) (cls 420.214, 420.314); Subclass 600 Visitor (cl 600.211); and Subclass 602 Medical Treatment (cl 602.215).

Key Issues

Which visa is relevant to the assessment?

Most commonly, the complied substantially requirements relate to those conditions which were attached to an applicant's last substantive visa and/or any subsequent bridging visas held. The use of the term 'last substantive visa' clearly excludes from consideration any non-compliance that occurred in relation to any substantive visa(s) held *prior to the last* substantive visa held.[5] The term '*any subsequent* bridging visa' broadens the consideration to any and all bridging visas held by an applicant, provided the bridging visa(s) were held subsequent to the last substantive visa. The term 'substantive visa' is defined in s 5 of the *Migration Act 1958* (Cth) (the Act) to mean a visa other than a bridging visa, criminal justice visa,[6] or an enforcement visa.[7]

One variation that arises in complied substantially criteria across the various subclasses is whether the requirement applies to "…*the last of any substantive visas held by the applicant,* ***and*** *to any subsequent bridging visa*", or "…*the last substantive visa, or any subsequent bridging visa, held by the applicant…*".

The use of the word 'and' as a conjunctive between the substantive and bridging visas requires the applicant to have complied substantially with the conditions of their last substantive visa *as well as* all subsequent bridging visas. An applicant, for example, who held two subsequent bridging visas after their last substantive visa ceased would, in these circumstances, need to have complied substantially with the conditions of each of those visas.

In other forms of the criterion, however, the complied substantially requirement is expressed as applying to the last substantive visa '*or*' any subsequent bridging visas. The use of 'or' in this context creates some uncertainty as to the scope of the consideration and which visa (or visas) must be assessed for substantial compliance. On one view, if emphasis is placed solely on the word 'or', consideration is directed to substantial compliance with *either* the last substantive visa *or* any subsequent bridging visa(s), but not necessarily both. On a second view, if emphasis is placed on the words"… *or any subsequent bridging visa…",* where a substantive visa has been followed by subsequent bridging visa(s), the consideration is only directed towards substantial compliance with the conditions of the subsequent bridging visa(s). On a third view, the use of the word 'or' effectively acts as a conjunction conditional on the relevant circumstance arising, such that consideration of substantial compliance is directed to the last substantive visa and any subsequent bridging visas *where applicable*.

Where this wording arises in Schedule 2, it is invariably part of a broader assessment (e.g. as in cl 600.211 as part of genuine temporary entrant assessment)[8] and not part of a

[5] However, where the assessment forms part of a broader 'having regard to' criterion such as in cl 600.211, consideration of conduct on an earlier substantive visa could be relevant under 'any other relevant matter'.
[6] s 38.
[7] s 38A.
[8] Refer to cls 400.213; 403.212; 407.217; 407.315; 408.213; 408.315; 420.214; 600.211; 602.215.

discrete complied substantially criterion such as cl 482.211.[9] These broader provisions also include the option for the decision maker to have regard to 'any other relevant matter' which would also allow the decision maker to consider the applicant's compliance with visa conditions attached to any previous visa. In this context, the third interpretation, which would incorporate consideration of substantial compliance with conditions of the last substantive visa held along with any applicable subsequent bridging visas, would appear to be the preferable interpretation as it is consistent with the context in which the issue of substantial compliance is being considered.[10]

Identifying visa conditions

Consideration of the complied substantially criteria necessarily requires the identification of the relevant conditions which apply (or applied) to the relevant visa(s) before considering whether or not an applicant has substantially complied with those conditions.

Generally speaking, the conditions that apply to the grant of a visa of a particular subclass are identified in the corresponding Part of Schedule 2 to the Regulations.[11] Some conditions apply by operation of law, others are discretionary.[12] Ascertaining which mandatory conditions apply (or applied) will usually be a straightforward consideration of the relevant provisions in Schedule 2 under 'xxx.6 – Conditions'. However, whether a particular discretionary condition was actually applied to the visa is a finding of fact on the evidence that must be made prior to assessing an applicant's compliance with that condition. Evidence may be in the form of movement records, notification of visa grant or other Departmental records.

Caution should be applied when considering conditions that were attached to multiple bridging visas. While typically the applicable conditions on successive bridging visas would be the same, a change in the bridging visa applicant's circumstances may result in different conditions being imposed and in some cases a bridging visa holder subject to work restrictions (condition 8101 – no work) can apply for a bridging visa without work restrictions.[13] Therefore, it cannot be assumed that conditions on successive bridging visas will be the same.

The requirements of the conditions themselves are set out in Schedule 8.

[9] For example, cls 405.223; 410.221(6); 416.226; 457.221; 461.225.
[10] Departmental guidelines on visas with the substantial compliance element as part of the genuine intention criterion refer to the general guidelines on 'Substantial compliance with visa conditions' in Policy - Sch8 - Visa conditions - About visa conditions. However, these guidelines state that it 'does not deal with the Schedule 2 'genuine intention' primary/secondary criterion for certain temporary work visas that includes 'substantial compliance' as a factor in assessing that 'genuine intention' criterion. Nothing in this Part is to be regarded as relevant in assessing those various Schedule 2 'genuine intention' criteria': Policy - Sch8 - Visa conditions - About visa conditions at [6] (re-issue date 18/4/15).
[11] For example, cl 500.611(1)(a) requires that an applicant who satisfies the primary criteria is subject to the mandatory conditions 8105, 8202, 8501, 8516, 8517, 8532 and 8533. Depending upon certain circumstances, conditions 8303, 8534 and 8535 may, as a matter of discretion, also be imposed (cl 500.611(2)).
[12] Section 41 of the Act provides that visas may be issued subject to conditions, and these may take the form of mandatory conditions (i.e. those to which a visa is automatically subject by operation of law: s 41 and reg 2.05(1)) or discretionary conditions (i.e. those which apply due to the exercise of discretion by a decision maker).
[13] See for example cls 050.212(6A), (8); 050.613.

Relevant considerations when determining whether an applicant has complied substantially

The issue of substantial compliance will only arise in relation to those conditions which have been breached[14] and to which the concept can logically apply (see discussion below). In determining whether an applicant has complied substantially with a condition, decision makers may take into account a range of matters according to the evidence in the particular case, including subjective matters such as the applicant's reasons for failing to satisfy the condition.[15]

For example, in *Kim v Witton* Sackville J considered the relevant circumstances in that case as including:

- the nature of the breach of condition;
- the significance of the breach, especially by reference to the purposes for which the visa or entry permit was granted;
- whether or not the applicant deliberately flouted the condition; and
- if the applicant failed to appreciate that he or she was in breach of the condition, what, if anything, contributed to that failure and, in particular, whether the Department misled the applicant.[16]

However, it should be emphasised that there is no rigid test to be applied and these considerations should not be elevated to the status of relevant considerations in every case.[17] His Honour made it clear that the factors listed were not intended to be exhaustive and that in general it is a matter for decision makers to assess the weight to be accorded to such factors, having regard to the circumstances of the case.[18]

As Grey J observed in *Shrestha v MIMA,* the factors listed by Sackville J were merely matters that, as a matter of logic, would have been relevant in the circumstances of the case before him.[19] Although in many cases those considerations or similar ones will be logically relevant to a determination whether there has been substantial compliance with a visa condition, this does not mean that, in every case, there is an obligation to take into account every one of those factors. The circumstances of the case will determine what is relevant.[20]

Ultimately, whether or not an applicant has complied substantially with a condition will depend on the circumstances of the case, and will be a question of fact for the decision maker having regard to the wording of the condition itself, the applicant's conduct and any other relevant considerations (including the factors identified in *Kim v Witton*).

[14] *Chowdhury v MIMIA* [2005] FMCA 1243 at [37].
[15] See *Kim v Witton* (1995) 59 FCR 258 at [271], *Baidakova v MIMA* [1998] FCA 1436, *Shrestha v MIMA* [2001] FCA 1578, *Soegianto v MIMA* [2001] FCA 1612; *MIMA v Modi* (2001) 116 FCR 496 at [18].
[16] *Kim v Witton* (1995) 59 FCR 258 at 271.
[17] See *Shrestha v MIMA* [2001] FCA 1578 at [17]; *MIMA v Modi* (2001) 116 FCR 496 at [23].
[18] *Kim v Witton* (1995) 59 FCR 258 at 271.
[19] *Shrestha v MIMA* [2001] FCA 1578 at [17].
[20] *Shrestha v MIMA* [2001] FCA 1578 at [17].

What conditions are capable of substantial compliance?

The concept of substantial compliance has been expressly found to have application in relation to the 'no work' requirement in condition 8101[21] and in relation to condition 8516,[22] which requires the visa holder to continue to be a person who would satisfy the primary or secondary criteria for visa grant. The concept of substantial compliance has also been found to have application in the context of the enrolment requirement in condition 8202(2), which applies to student visas.[23]

Are there any conditions to which the concept of substantial compliance has no application?

In limited instances, the Courts have found that there are some conditions to which the concept of substantial compliance has no logical application. In such cases, the Regulations are to be read as not admitting any qualification of substantial compliance.

One such condition is condition 8202(3), which applied to certain student visa holders. The Court in *Jayasekara* found that the requirements in the pre-1 July 2007 version of condition 8202(3), which turned on certification (or the absence of certification) of a breach by education providers, were matters to which substantial compliance has no relevance – either the breach occurred or it did not.[24] The reasoning in that case was held to be equally applicable to the post 1 July 2007 version of condition 8202(3), under which a student visa holder complies with the provision unless an education provider has certified a lack of satisfactory course progress or attendance.[25]

Certain other visa conditions also appear to be conditions to which the concept of substantial compliance has no application, although only in limited cases. For example, condition 8519, which applies to Subclass 300 Prospective Marriage visa holders, provides that the holder must enter into the marriage in relation to which the visa was granted within the visa period of the visa. This condition turns on the occurrence of a discrete event and is difficult to reconcile with the idea of substantial compliance.

[21] In *Poskus v MIMIA* [2005] FCAFC 156, the Full Federal Court found no error in the Tribunal's finding that the applicant had not complied substantially with condition 8101 in circumstances where he had worked over a three month period, and was aware that he was prohibited from working.
[22] In *Haq v MIMAC* [2013] FCA 880, the Federal Court found no error in the Tribunal's finding that as the applicant had failed to maintain enrolment and undertake study during an eight month period from the time his last student visa was granted, he had not complied substantially with condition 8516. While the Tribunal accepted that the applicant had suffered depression, it considered he had not been so severely affected as to stop work or seek medical or counselling services, and considered the breach of the condition to be significant given the purpose for which the student visa was granted.
[23] In *Hadiyoal v MIBP* [2013] FCCA 2070, the Court found no error in the Tribunal's conclusion that as the applicant had not been enrolled in a registered course for over a year, she had not substantially complied with condition 8202(2) which attached to her last held visa. See also *Fwati v MIMIA* [2003] FCA 1478, which was conducted on the basis that the concept of substantial compliance could apply to the enrolment requirement in condition 8202(2).
[24] In *Weerasinghe v MIMIA* [2004] FCA 261, Ryan J held that there was no scope for operation of the distinction between strict compliance and substantial compliance on the academic results component of condition 8202(3) (as it stood prior to 1 July 2007) which required student visa holders to achieve 'an academic result that is certified by the education provider to be at least satisfactory' for a specified period: either the education provider has certified that the applicant's academic results for the relevant period have been at least satisfactory or it has not. That case was referred to with approval in *Jayasekara v MIMIA* (2006) 156 FCR 199 at [15] where Heerey and Sundberg JJ held that where there was no certificate there was no compliance, let alone substantial compliance. Their Honours added '[s]till less could reasons or explanations for non-compliance amount to compliance, substantial or otherwise'.
[25] *Ahmed v MIBP* (2015) 233 FCR 485 at [13].

Where a condition to which the concept of substantial compliance cannot apply is breached, the question of whether the applicant *substantially* complied with the condition does not arise. The only consideration is whether the breach occurred. Thus, where the breach is established, there is no room for consideration of the kinds of factors referred to in *Kim v Witton* (see discussion above).

Is the applicant required to substantially comply with each condition individually or all conditions as a whole?

Where the question of the applicant's compliance with visa conditions arises as a discrete criterion (e.g. cl 457.221), it is necessary to consider whether the applicant has substantially complied with each and every condition individually.[26] It is not permissible to make a global assessment of the applicant's 'overall compliance' with visa conditions, balancing compliance with one condition against non-compliance with another, so as to arrive at an overall conclusion about 'substantial compliance'.[27]

Once a finding is made that an applicant has not 'complied substantially' with any one of the conditions attaching to their last or current visa, it is not necessary for the decision maker to then address compliance with any of the remaining conditions attaching to the visa. In the context of a discrete complied substantially criterion, a failure to comply substantially with one condition means the criterion as a whole is not satisfied.[28]

Similarly, where the condition itself contains discrete cumulative elements, the substantial compliance criterion requires substantial compliance with each element of the condition individually. Thus, if it is found that there has not been substantial compliance with one element of a condition, it will not be necessary to address any of the other elements of the condition.[29]

For example, to comply with condition 8107(3), certain Subclass 457 visa holders must, among other things, commence work within 90 days of arriving in Australia; not cease employment for more than 90 or 60 consecutive days (depending upon when the visa was granted);[30] and, where applicable, maintain and hold any licence, registration or membership that is mandatory to perform that occupation.[31] If it were established that the applicant had not complied substantially with the requirement to commence employment within 90 days of

[26] *Peng v MIMA* (2000) 105 FCR 63 at [16]; *Weerasinghe v MIMIA* [2004] FCA 261 at [12]; *Chowdhury v MIMIA* [2005] FMCA 1243 at [32]–[34]; *Musapeta v MIAC* [2007] FMCA 729 at [29]–[31], referring to cls 560.213, 573.212, 572.212 and 573.235 respectively. This view was also confirmed in the context of the sch 3 requirement in cl 3004(e): *Montero v MIBP* [2014] FCCA 946 upheld on appeal in *Montero v MIBP* [2014] FCAFC 170. See also *Grewal v MIBP* [2016] FCA 1229 at [30]–[31] in which the Court followed *Montero v MIBP* [2014] FCAFC 170 in the context of cl 572.235.
[27] *Musapeta v MIAC* [2007] FMCA 729 at [29]–[30]; *Chen v MIAC* [2011] FMCA 177 at [19]–[20].
[28] *Chowdhury v MIMIA* [2005] FMCA 1243 at [33] and *Musapeta v MIAC* [2007] FMCA 729 at [31], referring to *Weerasinghe v MIMIA* [2004] FCA 261 at [12].
[29] See *Shang v MIMA* [2006] FCA 1453 at [26]. That observation was made in the context of visa cancellation under s 116(1)(b) of the Act for breach of a visa condition. However the same point has been made in the context of the substantial compliance criterion. In that context, Tamberlin J in *Gurung v MIMIA* [2002] FCA 772 at [16] referred to the fact that the individual requirements of condition 8202 were cumulative, and Ryan J in *Weerasinghe v MIMIA* [2004] FCA 261 at [11]–[12] applied that reasoning in finding that as one of the requirements of condition 8202 was not met the substantial compliance criterion was not satisfied.
[30] cl 8107(3)(b) was amended to change the period which a visa holder can cease employment from 90 days to 60 days by sch 1 to *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696). It applies to visas granted on or after 19 November 2016.
[31] cls 8107(3)(aa), (b), (c).

arriving in Australia, it would not be necessary to consider the other requirements of condition 8107, as the applicant will have failed to comply substantially with condition 8107 and will be unable to satisfy the substantial compliance criterion.

Relevant case law

Judgment	Judgment summary
Ahmed v MIBP [2015] FCA 1059; (2015) 233 FCR 485	
Baidakova v MIMA [1998] FCA 1436	Summary
Chen v MIAC [2011] FMCA 177	Summary
Chowdhury v MIMIA [2005] FMCA 1243	
Fwati v MIMIA [2003] FCA 1478	Summary
Gurung v MIMIA [2002] FCA 772	Summary
Hadiyoal v MIBP [2013] FCCA 2070	
Haq v MIMAC [2013] FCA 880	
Jayasekara v MIMIA [2006] FCAFC 167; (2006) 156 FCR 199	Summary
Kim v Witton [1995] FCA 1508; (1995) 59 FCR 258	
MIMA v Modi [2001] FCA 1656; (2001) 116 FCR 496	Summary
Modi v MIMA [2001] FCA 529	Summary
Montero v MIBP [2014] FCCA 946	Summary
Montero v MIBP [2014] FCAFC 170	Summary
Musapeta v MIAC [2007] FMCA 729	
Peng v MIMIA [2000] FCA 1672; (2000) 105 FCR 63	Summary
Poskus v MIMIA [2005] FCAFC 156	
Shang v MIMA [2006] FCA 1453	
Shrestha v MIMIA [2001] FCA 1578	Summary
Weerasinghe v MIMIA [2004] FCA 261	Summary

Available Decision Precedents

There are no decision templates or optional standard paragraphs specific to the various discrete criteria requiring substantial compliance with visa conditions of visas held. The Generic decision template may be used where a discrete substantial compliance criterion is in issue. The following templates contain complied substantially elements as part of a broader cumulative requirement:

- **Subclass 600 – Visitor visa – Genuine Visit –** This template can be used where the issue of substantial compliance with visa conditions arises in the context of cl 600.211 and the assessment of whether the applicant genuinely intends to stay in Australia temporarily for the purpose for which the visa is granted.
- **Subclass 602 – Visitor visa – Genuine Visit –** This template can be used where the issue of substantial compliance with visa conditions arises in the context of cl 602.215 and the assessment of whether the applicant genuinely intends to stay in Australia temporarily for the purpose for which the visa is granted.

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THE ‘CONTINUES TO SATISFY’ CRITERION

Overview[1]

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

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

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

The 'continues to satisfy' criterion and similar expressions

The expression 'continues to satisfy' is used in the context of a time of decision criterion for the grant of several visa subclasses.[2] The word 'continue' or 'continues' also arises in several other contexts in relation to visa criteria and visa conditions. The related form 'continuing' is used within the *Migration Act 1958* (the Act) and the *Migration Regulations 1994* (the Regulations)[3] as are synonyms such as 'throughout'.[4] Similarly, the phrase 'continues to meet' appears in the Act and Regulations,[5] and, in the absence of any contrary intention, the expression may be construed in the same manner as 'continues to satisfy', with no distinction being made in the ordinary meaning of the words 'meet' and 'satisfy'. The related expressions 'continue to be' and 'continues to be in force' are also used in relation to other statutory requirements such as visa conditions and nomination and sponsorship requirements.[6]

The expression 'continues to satisfy' is not defined in the Act or in the Regulations and the nature of the requirement will vary depending upon the particular grammatical form[7] and

[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] For example, an applicant 'continues to satisfy the criterion set out in clause 070.211': cl 070.221. Note also that several time of decision criteria apply where an applicant 'would continue to meet the requirements' of a time of application subclause except an acceptable intervening event occurred such as death or cessation of the relationship: cls 820.221(2)(a), (3)(a).
[3] For example, that a married relationship is 'genuine and continuing' (s 5F(2)(c)) or a carer must be willing and able to provide 'substantial and continuing' assistance (reg 1.15AA(1)(f)).
[4] The word 'throughout' in the expression 'throughout the period of 12 months immediately preceding the making of the application' of item 7170 then in force was interpreted to mean 'from the beginning to the end of': *Yu v MIAC* [2007] FMCA 153 at [22]. This required satisfying the specified tests over the full period of 12 months preceding the visa application and not satisfying those tests on each moment of time during that twelve month period.
[5] For example, cl 143.221 requires that the applicant 'continues to meet the requirements set out in clause 143.211'.
[6] For example, cl 309.222 requires that at the time of decision, the sponsorship of a spouse for a Partner visa must be 'still in force'. Similarly, condition 8516 requires that the holder must 'continue to be' a person who satisfied the primary or secondary criteria for the grant of the visa.
[7] This includes, for example matters such as tense. In *Opoku-Ware v MIBP* [2015] FCCA 1638 at [78] the Court held that the present tense of the verb 'continues' used in cl 101.221(2)(b) was relevant in determining that the applicant must be still undertaking studies at the time of decision.

context in which it arises.[8] Accordingly, as a starting point, regard should be had to the ordinary meaning of the words. In this regard, the *Macquarie Dictionary* defines the word 'continue' in part as follows:

> *Continue – 1. to go forwards or onwards in any course of action; keep on. 2. to go on after suspension or interruption. 3. to last or endure. 4. to remain in place; abide; stay. 5. to remain in a particular state or capacity …* [9]

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

However, it is important when considering the meaning of the particular expression in question, that the decision maker has regard to the statutory context and, where relevant, the purpose of the criteria in question to determine whether an applicant 'continues to satisfy' a particular criterion.[10] In this regard, when interpreting an Act or a Regulation, the construction that would promote the purpose or the object underlying the Act or Regulation is to be the preferred interpretation.[11] Reference could be made where permissible to the legislative intent behind the criteria evidenced in extrinsic materials such as explanatory memoranda.[12] Examples of the judicial approaches to the construction of this phrase are outlined below.

Judicial interpretations of the 'continues to satisfy' requirement

The expression 'continues to satisfy' has been judicially considered in different contexts, with the Courts emphasising that the meaning to be attributed to the phrase will depend upon the particular statutory context in which it appears.[13] Whether certain facts or circumstances must exist for a period leading up to and including the relevant time will depend on the wording of the particular criterion.

To that extent, it is necessary, as a starting point, to have regard to the criterion or criteria to which the phrase is directed. It will not be possible for the Tribunal to ask and answer the question to be posed by the 'continues to satisfy' criterion without determining the relevant criteria which the applicant is required to continue to satisfy. For example, in *Ismail v MIAC* the Court considered whether the Tribunal had correctly applied cl 421.230 which required

[8] For example, the expression 'continues to satisfy the criteria for approval' was considered in *Huang v MIBP* [2014] FCCA 1581 at [19] in the context of cl 856.221(1)(c), which required that, at the time the decision was made, the decision maker was satisfied that the appointment that had been previously approved 'continues to satisfy the criteria for approval'. In this case, a five year sponsorship bar had been imposed on the sponsoring employer pursuant to s 140M(2) between the date of application and the Tribunal's decision. This barred the sponsor from making future applications for approval as a sponsor in relation to prescribed visa classes. In considering whether the sponsor 'continued to satisfy the criteria for approval', the Court held that this meant that although the employer may have satisfied the criteria specified in reg 5.19(1C)(a) at the date of application, the employer must remain in a position to satisfy the same criteria at the time a decision is made to grant or not to grant an Employer Nomination visa. The employer was not, at the time the Tribunal made its decision, in a position to satisfy reg 5.19(1C)(a)(iii).

[9] *Macquarie Dictionary* (online at 12 January 2021).

[10] For example, in determining the meaning of the phrase 'continue to be a person who would satisfy the primary or secondary criteria' in condition 8516, the Court in *Singh v MIBP* [2015] FCCA 2998 found it helpful to understand the purpose of the overall condition, which is to ensure that a visa holder remains in Australia for the same purpose for which the visa was granted (which was, in that case, to undertake higher education studies): at [52]–[58]. Affirmed in *Singh v MIBP* [2016] FCA 679.

[11] s 15AA *Acts Interpretation Act 1901* (Cth)

[12] s 15AB *Acts Interpretation Act 1901* (Cth)

[13] See for example *Opoku-Ware v MIBP* [2015] FCCA 1638; *Liang v MIAC* (2009) 175 FCR 184 at [47]; and *Hussain v MIBP* [2017] FCCA 3247 at [80].

that 'there is no reason to believe that the applicant does not continue to satisfy the primary criteria for the grant of a Subclass 421 visa'. In finding the Tribunal had correctly focused on the criterion in cl 421.230, the Court observed that it was not possible for the Tribunal to ask and answer the question to be posed by cl 421.230 without determining the relevant primary criteria which the appellant continued to satisfy. In this case that criterion was that he had 'an established reputation in the field of sport'.[14]

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

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

It has been suggested that the first interpretation may apply where the word 'continues' refers to a status which has a temporal condition whereas the latter applies for an activity-based criterion carrying with it no temporal limitation.[15] The two constructions differentiate between focusing on a visa applicant's activities, which must continue at all times without interruption,[16] and focusing on a visa applicant's status at two different points in time.[17] However, no overarching rule is to be applied and the statutory context is not required to be determined by the concepts of status or activity.[18] As a result, although this may be a useful way of categorising some of the differences in the text of particular provisions, as discussed below courts have in practice had regard to several other considerations, such as the language, tense, purpose, drafting history and the overall context, including the presence of words such as 'maintained' or 'continuously' when determining their meaning.[19]

The first construction: satisfying criteria at two points in time

The most common approach reflected in the case law is to consider the 'continues to satisfy' requirement as meaning that applicants need only satisfy the relevant criteria at two points in time: first at the time of application and again at the time of decision. Any change in status, conditions or circumstances after the time of application is permitted provided the relevant criteria for the grant of the visa are satisfied at the time of decision. This construction has been applied to cls 806.221[20] and 840.221.[21]

For example, cl 806.221 required that at the time of decision the applicant 'continues to satisfy' the criteria in cl 806.213. Relevantly, cl 806.213 required that at the time of application the applicant was a special need relative of a settled Australian citizen, permanent resident or eligible New Zealand citizen. The Federal Court in *Xiang v MIMIA*

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

observed that the meaning of the word 'continues' could not be considered in isolation and its meaning must be gathered from the context:

> *The context is that a visa applicant must be a 'special need relative' both at the time of application, and at the time of decision, to satisfy that criteria. It will be remembered that a special need relative is defined as a relative who is willing and able to provide the requisite assistance to an Australian or New Zealand citizen or resident. The first point to note is that the word to be construed is the verb 'continues' and not the adjective 'continuing'. Second, it is plain that the word 'continues' is not concerned with any activity on the part of the visa applicant, but rather with the applicant's status; a status which has a temporal condition.*[22]

Accordingly, the relevant question was whether the applicant was (at the time of application) and still is (at the time of decision) a special need relative. That is to say, the applicant 'continues' that status if the applicant still is a special need relative at the time when the decision is made.[23] In that case, the Court found there was no legal requirement that a person who was a special need relative at the time of application and at the time of decision continued to be so in the intervening period.[24]

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

The second common construction of the 'continues to satisfy' requirement suggests that the relevant criteria must be satisfied at all relevant times from the date of application through to the date of decision without interruption. This interpretation has been found to be applicable, for example, to cls 560.227[25] and 845.221[26] as well as to condition 8516.[27]

For example, cl 560.227 specified that, if the application was made in Australia, the applicant 'continues to satisfy' the criterion in cl 560.213. Clause 560.213 provided that, for applications made in Australia, 'the applicant has complied substantially with the conditions to which the visa (if any) held, or last held, by the applicant is, or was, subject'. In *Rao v MIMA,* the Court considered that the perfect tense ('has complied')[28] in cl 560.213 could be imported into a time of decision criterion to allow an assessment of compliance at and *between* the times of application and decision concluding:

> *I do not think that the use of the word 'continues' was intended to limit the enquiry only to the precise date of decision (which might be a date beyond the reach of any material before the delegate or the Tribunal); nor do I think that the use of the word 'continues' was intended to restrict the enquiry to a visa held or which had been held at or before the time of application. No rational purpose consistent with the Act or*

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

> *regulations would be so advanced. Rather, the evident purpose of requiring substantial compliance with conditions attached to visas would be frustrated.*[29]

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

A similar approach has been adopted in some business visa cases. For example, cl 845.221 required at the time of decision that a visa applicant 'continues to satisfy' cl 845.213 to 845.218. Clause 845.213 required at the time of application, the applicant to have had an 'ownership interest' in one or more established main businesses in Australia for 18 months immediately preceding the application and 'continues to have an interest of that kind'. In *Liang v MIAC* the Federal Magistrates Court held that the visa applicant did not continue to have an ownership interest in a main business of the kind nominated *between* the time of application and time of decision.[30] Dismissing an appeal of this decision, Logan J noted in *obiter* that the intention, reflected in the language of cl 845.213(b), was that there should be no gap in the holding of an ownership interest.[31] This was because in addition to the temporal limitation in cl 845.213(a), which looks to the 18 months immediately preceding the application, there is a further and cumulative temporal limitation in cl 845.213(b) that the ownership interest is 'maintained'. Noting that the meaning of 'continues' depends upon context and whether it was used in relation to an activity or a status, the Court distinguished this from the situation in *Xiang v MIMIA* where the Court found 'continues' in that context was used in relation to a status (namely, being a special need relative) and did not require the status be held in the interval between application date and decision date. His Honour reasoned as follows:

> *If a visa criterion contains a temporal limitation in relation to possession of a particular status at the time of application, a visa applicant who then has that status and who also has that status at the time when the decision in respect of that application is made, necessarily 'continues' to have that status. Furthermore, the visa applicant will 'continue' to have that status at the time of decision irrespective of whatever his or her status may be in the period which elapses after the date of application and before the date of decision. On the other hand, in respect of an activity based criterion carrying with it no temporal limitation, satisfaction at the time of decision that the visa applicant 'continues to' meet that criterion will necessarily require scrutiny of whether that activity was maintained in the interval.*[32]

The Court in *Yang v MIBP*[33] also held that reg 1.11 requires that an applicant must continue to hold an ownership interest in the applicable main business/es over a period of two years. In considering this issue, the Court looked at the purpose and overall statutory context of reg 1.11 observing at [68]:

> *It is, in my view, clear that the regulation is intended to ensure continuity in the holding of an ownership interest. Such continuity is emphasised by the requirements in*

[29] *Rao v MIMA* [2001] FCA 1755 at [24].
[30] *Liang v MIAC* [2008] FMCA 966 at [64]–[66] and [83]–[85]. The applicant is this case did not maintain a direct and continuous involvement in the management of a 'main business' from the time of application to the time of decision because he ceased to have an interest in one main business and commenced involvement with another business two months later.
[31] *Liang v MIAC* (2009) 175 FCR 184 at [54].
[32] *Liang v MIAC* (2009) 175 FCR 184 at [47]. Logan J at [51] identified cl 845.217 (which requires a person to have overall had a successful business career) as an example of an activity-based criterion carrying no temporal limitation.
[33] *Yang v MIBP* [2014] FCCA 1576.

> *regulation 1.11(1)(b) to maintain a direct and continuous involvement in the day to day management of those businesses. The requirement in clause 890.221 that an applicant continue to satisfy clause 890.211 at the time of decision, requires the applicant to continue to satisfy the requirement in light of the limitation on the number of main businesses which can be nominated for the purpose of the Regulations at the time of application. There is nothing 'extreme' or 'arbitrary' in such a construction. Rather, such a construction is consistent with the regulatory requirement for ownership continuity over a two year period prior to application.*[34]

This construction has also been adopted in relation to compliance with condition 8516, which relevantly requires the applicant continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa.[35] In *Singh v MIBP*[36] the applicant argued that he could comply with condition 8516 where he had stopped complying with it at one point and had resumed complying with it at a later point in time. Smith J rejected this construction in the context of a Student (Temporary) (Class TU) higher education visa as it 'would have anomalous results' and be inconsistent with the purpose of the condition. The Court said:

> *The purpose of having and granting student visas is not simply to have non-citizens enrolling at the moment of being granted a visa but, rather, to continue that enrolment in order to attain a higher education.*
>
> *For those reasons, the Tribunal's use of the word "maintain" at [10] of its reasons does not reveal any error. It was correct to conclude that, because the applicant was no longer an eligible higher degree student after 8 April 2014, he no longer satisfied the criteria in sub-cl 537.223(1A). The words "maintain" and "no longer" are not contained in condition 8516 but they do bear the same meaning as "continue". Although decision-makers might risk error by failing to adhere to the statutory text, to do so does not necessarily mean that the wrong test has been applied: Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559 at 572.*[37]

'Continues to satisfy' a criterion containing multiple requirements

It may be a time of decision criteria that an applicant is required to continue to satisfy several time of application requirements. These requirements may be expressed as separate criteria or as a number of elements (including alternatives) of a single criterion. As considered below, the 'continues to satisfy' requirement does not mean that only one of the two possible interpretations set out above applies to every requirement in the same way.[38]

'… continues to satisfy the criteria…'

Where a time of decision criterion requires an applicant to continue to satisfy a number of time of application criteria,[39] it may be necessary to determine whether each time of

[34] *Yang v MIBP* [2014] FCCA 1576 at [68].
[35] *Kumar v MIBP* [2015] FCCA 728. At [6] the Court had regard to the words 'continue to be' and upheld the Tribunal's decision which gave condition 8516 a temporal requirement which required a continuous state of affairs.
[36] *Singh v MIBP* [2015] FCCA 2998.
[37] *Singh v MIBP* [2015] FCCA 2998 at [57]–[58]. Affirmed in *Singh v MIBP* [2016] FCA 679.
[38] See, for example *Shahi v MIAC* (2011) 246 CLR 163.
[39] For example, cl 050.221 requires an applicant for a Subclass 050 Bridging visa to continue to satisfy the criteria set out in (time of application) cls 050.211 and 050.212.

application requirement must continue to be satisfied at the time of decision. Some requirements (e.g. those requiring an applicant to have done something prior to the visa application) will by default continue to be satisfied at the time of decision because they are not capable of varying over time.

For example, in *Cheung v MRT*[40] the Court considered the requirement in cl 840.221 that at the time of decision the applicant 'continues to satisfy the criteria in clauses 840.211 to 840.218'. One of these criteria, cl 840.212, referred to a state of affairs which was maintained in two periods of time in the past. It required that the applicant 'has had' an ownership interest in the qualifying business throughout any two periods of one fiscal year in the four fiscal years immediately preceding the application. The Court found in this case that once these matters are shown to have occurred the criteria are satisfied. Contrasting cl 840.221 with a provision requiring an applicant to *have* an ownership interest at the time of application and for a period preceding that,[41] the Court observed that:

> *Clause 840.221 cannot be read as extending the periods up to and including the time of the making of the application. Although it refers to the criteria continuing to be satisfied, it must be taken to refer only to those criteria which require something to be maintained, for example, the holding of the visa referred to in cl 840.211 and the commitment to establish an eligible business in Australia referred to in cl 840.217.*[42]

'… continues to satisfy the criterion…'

It may be that a time of application 'criterion' - which an applicant is required to continue to satisfy at the time of decision - itself contains a number of requirements. For example, cl 101.221(b) requires certain Subclass 101 (Child) visa applicants to 'continue to satisfy the criterion in cl 101.213'. Clause 101.213 contains five requirements: that an applicant is not engaged to be married, does not have a spouse or de facto partner, has never had a spouse or de facto partner, is not engaged in full-time work, and has been undertaking full-time study. Some requirements by their language and nature imply a continuous requirement: for example, 'has never had a spouse or de facto partner'. In contrast, cl 101.213(1)(c) when read with cl 101.221(2)(b) does not require an applicant to have been 'continuously involved' in study from the time of commencement of their studies up until the time of decision.[43] The requirement not to be engaged to be married could logically be satisfied at two points in time, even though that requirement may not have been met all times throughout the period, and there is no obvious incongruence with the purpose of the scheme in construing the provision accordingly.

[40] *Cheung v MRT* (2004) 141 FCR 243.
[41] See, for an example of such a provision, *Lobo v MIMIA* (2003) 132 FCR 93 at 98, where the Court considered at [13] cl 845.213 which required an applicant to have an ownership interest in one or more established main businesses in Australia for a period of eighteen months immediately preceding the making of the application and it was necessary that the applicant 'continues to have an interest of that kind'.
[42] *Cheung v MRT* (2004) 141 FCR 243 at [21]. Clause 840.221 was contrasted with cl 845.213 considered in *Lobo v MIMIA* (2003) 132 FCR 93 which required an applicant to have an ownership interest in one or more established main businesses in Australia for a period of 18 months immediately preceding the making of the application and that he or she 'continues to have an interest of that kind'. *Cheung* was overturned on appeal in *Cheung v MIMIA* (2005) 143 FCR 117 on another point and the construction of 'continues to satisfy' was not considered.
[43] In *Hussain v MIBP* [2017] FCCA 3247 at [114] the Court found that the Tribunal misapplied these criteria by requiring the applicants to be involved in continuous study until the time of decision. For further discussion of *Hussain* and the study requirement for Subclass 101 and 802 visas, please refer to: 'Subclass 101 & 802 - Child visas'.

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

> *All of the requirements of cl 202.211(2), other than the requirement about membership of the immediate family of the proposer, are requirements that, if met at the time of application, cannot thereafter cease to be met. Or to put the same point positively, the only one of the requirements of cl 202.211(2) satisfaction of which can change over time is the requirement about membership of the immediate family. That requirement can cease to be met by the simple effluxion of time (because the person in question attains the age of 18 years). It can cease to be met because dependency ceases. It can cease to be met because of a change in marital status (by dissolution of a marriage). It can change because there is some change in the relationship between persons that makes one the ‘de facto partner’ of the other.*
>
> *…*
>
> *There is an evident textual awkwardness in reading the requirement of ‘continues to satisfy’ the criterion as engaging with only one of the several requirements that go to make up the relevant criterion. And that awkwardness is increased when the requirement in question is expressed as ‘continues to be’ a member of the immediate family. As the plaintiff submitted, the requirement would have to be read textually as being that the applicant ‘continues to continue to be’ a member of the immediate family of the proposer.*[44]

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

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

Relevant case law

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

Available decision templates

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

Last updated/reviewed: 12 April 2022

ELIGIBLE NEW ZEALAND CITIZEN

Overview[1]

In addition to Australian citizens and Australian permanent residents, certain New Zealand citizens, that is, 'eligible New Zealand citizens', are able to sponsor their family members for certain types of visas. The concept of 'eligible New Zealand citizen' is also relevant to other aspects of the migration scheme.[2]

The term 'eligible New Zealand citizen' is presently defined in reg 1.03 of the *Migration Regulations 1994* (Cth) (the Regulations) as a New Zealand citizen who is a protected SCV holder within the meaning of s 7 of the *Social Security Act 1991* (Cth) (Social Security Act). This definition, effective 1 July 2017, reflects the policy intention that eligible New Zealand citizens have the same entitlements as Australian citizens and permanent residents in relation to the sponsorship of family members for Australian visas.[3]

The July 2017 amendments addressed discrepancies between the definition of eligible New Zealand citizen and 'protected Special Category visa holder' under the Social Security Act. In particular, certain New Zealand citizens who commenced residing in Australia in the three months after 26 February 2001 were able to become protected Special Category visa holders but did not fall within the definition of eligible New Zealand citizen. Further, the requirement to meet certain health and character public interest criteria (PIC) at the time of last entry to Australia was not included in the definition of protected Special Category visa holder. By aligning the definition under the Regulations with the definition under the Social Security Act, any protected Special Category visa holders who were not also eligible New Zealand citizens acquired this status on 1 July 2017.[4]

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

This definition was substituted from 27 February 2001[5] to limit the group of New Zealand citizens who are able to sponsor family members to Australia without having first attained permanent residence in Australia. Before this amendment, New Zealand citizens who held a Special Category visa, were usually resident in Australia and met certain PIC at the time of last entry were eligible New Zealand citizens.[6] Most Schedule 2 visa criteria requiring

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

sponsorship before and since the 2001 amendment allow sponsorship by an eligible New Zealand citizen.[7] People who fell within this definition at the time of amendment have generally retained this status. However the definition of eligible New Zealand citizen was substantially narrowed. The amendments did not affect the ability of New Zealand citizens to travel to, live, stay and work in Australia under the Trans-Tasman Travel Arrangement, nor did they affect the issuing and processing of Special Category visas,[8] which are the primary means of New Zealand citizens entering Australia and staying on a temporary basis.[9]

Definition of eligible New Zealand citizen

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

(2A) A person is a protected SCV holder if:

(a) the person was in Australia on 26 February 2001, and was a special category visa holder on that day; or

(b) the person had been in Australia for a period of, or for periods totalling, 12 months during the period of 2 years immediately before 26 February 2001, and returned to Australia after that day.

(2B) A person is a protected SCV holder if the person:

(a) was residing in Australia on 26 February 2001; and

(b) was temporarily absent from Australia on 26 February 2001; and

(c) was a special category visa holder immediately before the beginning of the temporary absence; and

(d) was receiving a social security payment on 26 February 2001; and

(e) returned to Australia before the later of the following:

(i) the end of the period of 26 weeks beginning on 26 February 2001;

(ii) if the Secretary extended the person's portability period for the payment under section 1218C—the end of the extended period.

[7] See, for example, cl 116.212 (for a Carer visa) and cl 309.213 (for a Spouse (Provisional) visa) as in force before and after 27 February 2001.
[8] Created by s 32 of the Act. See Special Category (Temporary) (Class TY) at item 1219 of sch 1 to the Regulations, and Subclass 444 (Special Category) in sch 2 to the Regulations.
[9] These changes to the Regulations were introduced to support the bilateral social security arrangement between the Australian and New Zealand Governments of 1 July 2002. See Joint Prime Ministerial Communique on New Australia/New Zealand Social Security Arrangements, 26 February 2001. The agreement itself is set out in sch 4 of the *Social Security Act 1991* (Cth) (Social Security Act) – as in force at 1 July 2001.

(2C) A person who commenced, or recommenced, residing in Australia during the period of 3 months beginning on 26 February 2001 is a protected SCV holder at a particular time if:

(a) the time is during the period of 3 years beginning on 26 February 2001; or

(b) the time is after the end of that period, and either:

(i) a determination under subsection (2E) is in force in respect of the person; or

(ii) the person claimed a payment under the social security law during that period, and the claim was granted on the basis that the person was a protected SCV holder.

(2D) A person who, on 26 February 2001:

(a) was residing in Australia; and

(b) was temporarily absent from Australia; and

(c) was not receiving a social security payment;

is a protected SCV holder at a particular time if:

(d) the time is during the period of 12 months beginning on 26 February 2001; or

(e) the time is after the end of that period, and either:

(i) at that time, a determination under subsection (2E) is in force in respect of the person; or

(ii) the person claimed a payment under the social security law during that period, and the claim was granted on the basis that the person was a protected SCV holder.[10]

A determination can be made under s 7(2E), 7(2F) or 7(2G) of the Social Security Act that a person was *residing in Australia on 26 February 2001*, but was temporarily absent from Australia on that day,[11] or that they commenced or recommenced *residing in Australia* during the period of 3 months beginning *on 26 February 2001*.[12] Applications for determinations under s 7(2E) were required to be made by 26 February 2002.[13] For persons who commenced, or recommenced residing in Australia during the period of 3 months beginning 26 February 2001, applications for determinations were required to be made by 26 February 2004.[14]

[10] Social Security Act ss 7(2A)–(2D).
[11] Social Security Act ss 7(2E)(a), 7(2F)–7(2G).
[12] Social Security Act ss 7(2E)(b), 7(2F).
[13] Social Security Act s 7(2F)(b)(i).
[14] Social Security Act s 7(2F)(b)(ii).

For applications made before 1 July 2017, an eligible New Zealand citizen was defined in reg 1.03 as:[15]

a New Zealand citizen who:

(a) at the time of his or her last entry to Australia, would have satisfied public interest criteria 4001 to 4004 and 4007 to 4009; and

(b) either:

(i) was in Australia on 26 February 2001 as the holder of a Subclass 444 (Special Category) visa that was in force on that date; or

(ii) was in Australia as the holder of a Subclass 444 visa for a period of, or periods that total, not less than 1 year in the period of 2 years immediately before 26 February 2001; or

(iii) has a certificate, issued under the Social Security Act 1991, that states that the citizen was, for the purposes of that Act, residing in Australia on a particular date.[16]

The 'particular date' referred to in reg 1.03(b)(iii) is 26 February 2001.[17] A 'certificate' issued under the Social Security Act refers to a determination made under s 7(2E), 7(2F) or 7(2G) of that Act.

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

Sponsorship by eligible New Zealand citizen

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

[15] This version of the definition was inserted by the *Migration Amendment Regulations 2001 (No 4)* (Cth) (SR 2001, No 142) and applies to visa applications made on or after 1 July 2001: see reg 4(1). It made minor amendments to the definition inserted by the amendments of 27 February 2001 to correct the date in the equivalent to paragraph (b)(i) from 27 February 2001 to 26 February 2001 and re-ordered the paragraphs to ensure the definition correctly reflected the intention that PIC 4001 to 4004 and 4007 to 4009 apply to all New Zealand citizens seeking to come within the definition of eligible New Zealand citizen, not just those that come within the previous definition equivalents to paragraphs (b)(i) and (ii).

[16] The determination of whether a New Zealand citizen was residing in Australia on that date is made by Centrelink, the Department of Human Services, based on a range of criteria set out in the social security legislation associated with whether the person is 'residing in Australia'. Replaced Departmental policy stated that this was intended to cover New Zealand citizens who could demonstrate firm plans to relocate to Australia or who had prior residence and intended to return to Australia but who were not in Australia on 26 February 2001, perhaps, for example, due to work commitments: PAM3: Act – Identity, biometrics & immigration status – New Zealand citizens in Australia at [4] (issued 19/09/2008).

[17] Although 'particular date' is not expressly defined in the Regulations or in the Social Security Act, it is clearly ascertainable from s 7 of that Act, which sets out the circumstances in which a certificate will be issued stating that a person is 'residing in' Australia at the relevant time. Section 7(2) of the Social Security Act relevantly defines an 'Australian resident' as a person who is a 'protected SCV holder'. The term 'protected SCV holder' is further defined in ss 7(2A)–(2D), and includes a person in respect of whom a determination is made under s 7(2E), 7(2F) or 7(2G). Given that a determination issued under these provisions must state, among other things, that the person was *residing in Australia on 26 February 2001*, or commenced or recommenced *residing in Australia* during a specified period beginning *on 26 February 2001*, the 'particular date' referred to in reg 1.03(b)(iii) of the Regulations is 26 February 2001.

Most New Zealand citizens arriving in Australia from 27 February 2001 no longer fall into the definition of eligible New Zealand citizen. As most Schedule 2 visa criteria relating to sponsorship require the sponsor to be an eligible New Zealand citizen, an Australian permanent resident or an Australian citizen, the effect is that most New Zealand citizens arriving in Australia from 27 February 2001 can only sponsor people for immigration to Australia if they become Australian permanent residents or citizens.

Before 1 July 2017, Subclass 444 visa holders who were also eligible New Zealand citizens could sponsor non-New Zealand citizen family members for Subclass 461 (New Zealand Family Relationship) visas. The Subclass 461 criteria were amended on 1 July 2017 to remove this sponsorship ability[18] and align the sponsorship options for eligible New Zealand citizens with those available to Australian citizens and Australian permanent residents.[19]

Public interest criteria

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

The PIC which must be satisfied at the time of the sponsor's last entry to Australia pertain to character (4001); ASIO assessments (4002);[20] determinations by the Foreign Minister (4003 and 4003A); outstanding debts to the Commonwealth (4004); and health (4007). In addition, PIC 4009 requires the decision maker to consider whether the individual intended to live permanently in Australia and if they sought entry as a member of a family unit, whether they could obtain support in Australia from other members of their family.

In relation to PIC 4001 and 4004 Departmental policy advises that, whilst the New Zealand citizen must satisfy the decision maker that they would have satisfied the PIC at the time they last entered Australia, in effect the eligible New Zealand citizen seeking to be approved as a sponsor will need to provide current standard character checks when the form 40 (sponsorship for migration form) is lodged.[21] Whilst it is arguable that health and character checks may be indicative of the sponsor's ability to satisfy the relevant requirements at a time in the past, decision makers must ensure that they apply the correct test when considering this criterion and make findings as to whether the sponsor would have satisfied the relevant PIC at the time of their last entry to Australia. The relevant version of the public interest criterion which the Tribunal must be satisfied the person would have met is that in force at the time of the Tribunal's decision.

[18] cls 461.212(2)(a), (b) as amended by F2017L00816, sch 5 item 3.
[19] Explanatory Statement, F2017L00816 p.16.
[20] The prescription of PIC 4002 as a criterion for the grant of a protection visa is beyond the power conferred by s 31(3) of the Act and is therefore invalid: *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 at [71], [221], [399], [459]. However, the Court only considered PIC 4002 in the context of protection visa applications and it is not clear whether it would apply in the context of assessing whether a person is an Eligible New Zealand Citizen.
[21] Policy – Migration Regulations – Divisions – Div 1.4 – Form 40 sponsors and sponsorship – Requirements to be met by the Sponsor – Immigration status – New Zealand citizens – Eligible New Zealand citizens (re-issued September 2016).

Whether a person would have met a health criterion at the relevant time is a question of fact for the Tribunal. Whether an opinion of a Medical Officer of the Commonwealth (MOC) is necessary depends on whether the visa application before the Tribunal relates to a temporary or permanent visa, and whether there is information known to Immigration to the effect that the person may not meet any of those requirements.[22] Where the criterion requires sponsorship by an eligible New Zealand citizen, the relevant 'person' referred to in reg 2.25A (circumstances in which the Minister must seek the opinion of a MOC) may refer to either or both of the sponsor and the visa applicant.

For additional information relating to PIC 4001 and 4007 please refer to 'Public Interest Criterion 4001' and 'Health Criteria' commentaries respectively.

Relevant legislative amendments

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2001 (No 1) (Cth)	SR 2001, No 27	MRT Legal Summary
Migration Amendment Regulations 2001 (No 4) (Cth)	SR 2001, No 142	MRT Legal Summary
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth) (disallowed on 25 September 2014)	SLI 2014, No 65	No 04/2014
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 04/2017

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[22] reg 2.25A of the Regulations.

SPECIAL RETURN CRITERIA (SCHEDULE 5)

Introduction[1]

Special Return Criteria (SRC) 5001, 5002 and 5010 are set out in Schedule 5 to the *Migration Regulations 1994* (Cth) (the Regulations). These SRC place restrictions on the ability of certain people who have previously been in Australia to qualify for subsequent visas by excluding them from Australia, unless certain exceptions apply.

Exclusion periods do not prevent a person from applying for a visa. However, they may prevent a person from being granted a visa. This is because an applicant must satisfy the relevant criteria prescribed in Schedule 2 for the relevant visa subclass, which may include SRC 5001, 5002 and 5010.

The requirements of Special Return Criteria 5001, 5002 and 5010

Special Return Criterion 5001

Special Return Criterion (SRC) 5001 permanently excludes people who have previously been deported or have had their visa cancelled under character grounds from Australia. SRC 5001 does not apply if the visa was refused, rather than cancelled, on character grounds.

Deportation

SRC 5001(a) applies to visa applicants who left Australia while subject to a deportation order[2] under s 200 of the current Act or its equivalent in earlier versions of the *Migration Act 1958* (Cth) (the Act).[3]

Cancellation

SRC 5001(b) applies to a person whose visa has been cancelled under s 501 of the Act, *as in force before 1 June 1999*, wholly or partly because the Minister, having regard to the person's past criminal conduct, was satisfied that the person is not of good character.

SRC 5001(c) applies to a person whose visa has been cancelled under s 501, s 501A[4] or s 501B[5] of the current Act, on certain grounds. The range of relevant cancellation grounds differs depending on the date the decision to grant or refuse the visa is made:

[1] 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] This term is defined in s 5(1) as an order for the deportation of a person made under, or continued in force by, the Act.
[3] s 55, 56 or 57 of the Act as in force on and after 19 December 1989 but before 1 September 1994; or s 12, 13 or 14 of the Act as in force before 19 December 1989.
[4] Sections 501A(2)–(3) provide that the Minister personally can set aside an original decision of a delegate or the Tribunal (in its General Division) not to refuse/cancel the visa, and substitute their own decision to refuse to grant or cancel the visa, where the Minister reasonably suspects that the person does not pass the character test in s 501 and the Minister is satisfied that the refusal or cancellation is in the national interest.
[5] Under s 501B the Minister may intervene at any time before or during a review process; that is, after a delegate's decision has been made to refuse to grant or to cancel a visa, but before the Tribunal (in its General Division) has made a final decision on the

- Where the decision was made to grant or refuse the visa *prior to 12 December 2014*, the relevant visa cancellation under s 501, s 501A or s 501B must have been wholly or partly because:
  - the person did not pass the character test because he/she had a substantial criminal record;[6] or
  - having regard to their past and present criminal conduct they were not of good character;[7] or
  - having regard to their past and present criminal conduct and general conduct they were not of good character[8]
  - if the cancellation has not been revoked under s 501C(4).[9]
- Where the decision was made to grant or refuse the visa *from 12 December 2014*,[10] cl 5001(c) applies where the applicant is a person whose visa has been cancelled under s 501, s 501A or s 501B of the Act, if:
  - the cancellation has not been revoked under s 501C(4) or 501CA(4) of the Act;[11] or
  - after cancelling the visa, the Minister has not, acting personally, granted a permanent visa to the person.[12]

SRC 5001(d) applies to visa applications made *from 17 October 2015*[13] where a person whose visa has been cancelled under s 501BA of the Act if the Minister has not, acting personally, granted a permanent visa to the person after that cancellation.[14]

If the visa cancellation was made on the basis of grounds not specified in SRC 5001(a), (b), (c) or (d), the applicant will be able to satisfy SRC 5001.

matter. The Minister can then substitute a decision to refuse or cancel the visa in question in certain circumstances, including that the Minister is satisfied that the refusal or cancellation is in the national interest.

[6] ss 501(6)(a), 501(7).

[7] s 501(6)(c)(i).

[8] ss 501(6)(c)(i)–(ii).

[9] Under s 501C(4) the Minister may set aside a decision to refuse or cancel a visa under s 501(3) or 501A(3) in certain circumstances.

[10] Clause 5001(c) was substituted with effect from 12 December 2014 by *Migration Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 199). The amendment applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[11] cl 5001(c)(i) as inserted by SLI 2014, No 199. The amendment provision applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[12] cl 5001(c)(ii) as inserted by SLI 2014, No 199. The amendment provision applies in relation to a decision to grant or not to grant a visa, or cancel a visa, made on or after 12 December 2014.

[13] SRC 5001(d) applies to visa applications made on or after 17 October 2015, being the day the *Migration Amendment (Special Category Visas and Special Return Criterion 5001) Regulation 2015* (Cth) (SLI 2015, No 169) commenced.

[14] Section 501BA of the Act was inserted by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) to allow the Minister to personally set aside, in the national interest, a decision made under s 501CA by a delegate or the AAT in its General Division to revoke a decision to cancel a visa under s 501(3A): see Explanatory Statement to SLI 2015, No 169. The powers in s 501BA allow the Minister to personally cancel a person's visa in circumstances where: the person's visa was cancelled for failing to meet the character test due to having substantial criminal records or committing sexually based offences involving a child; and a decision was made to revoke the cancellation of this person's visa. In exercising his power under s 501BA, the Minister will be, in effect, cancelling the person's visa for the second time.

Where the decision was made to grant or refuse the visa *on or after 12 December 2014*, cl 5001(c) was amended to remove reference to specific cancellation grounds under s 501. The effect of this amendment is that a person cancelled under *any* ground in s 501 will be unable to satisfy SRC 5001 if the visa decision was made to grant or refuse the visa on or after 12 December 2014.

In contrast, where the decision was made to grant or refuse the visa *prior to 12 December 2014*, cl 5001(c) does not apply to applicants where their previous visa was cancelled on grounds other than those specifically provided for in cl 5001(c). For example, if the visa applicant has previously had their visa cancelled under s 501 because the person was convicted of an offence that was committed while the person was in immigration detention,[15] this will not bring them within cl 5001(c) and consequently they can satisfy SRC 5001.

It should be noted that there is no equivalent to the reference in cl 5001(c) or (d) regarding revocation of visa cancellation in relation to deportation orders. A deportation order under s 200 of the Act is not dependent upon the person's visa being cancelled, or the non-citizen being an unlawful non-citizen.[16] However, it may be inferred that the reference in cl 5001(a) is to a valid deportation order.[17] Whether the visa applicant left Australia while subject to a deportation order or their visa has been cancelled under the relevant provisions of s 501 will be a question of fact for the Tribunal, which may be established from Departmental records.

Period of exclusion

In the absence of a reference to a time period within which SRC 5001 operates and in the absence of any judicial authority or expression of any legislative intention to the contrary, the period of exclusion under SRC 5001 appears to be indefinite and there is no provision for a waiver of this criterion.[18]

Special Return Criterion 5002

Special Return Criterion 5002 provides that a visa applicant, who has been *removed* from Australia because they were an unlawful non-citizen or the dependent of an unlawful non-citizen under s 198, 199 or 205 of the Act, cannot be granted a visa within 12 months of the removal, unless there are certain compelling or compassionate circumstances to justify the grant of the visa.

Section 198 provides in various situation specific powers that permit the removal of unlawful non-citizens from Australia. Section 199 provides for the removal of dependants of unlawful non-citizens, where the removal is requested by the unlawful non-citizen or their spouse or de

[15] s 501(6)(aa)(i).
[16] Section 82(4) of the Act provides that a visa ceases to be in effect when the holder leaves Australia because of a deportation order made under s 200.
[17] See *Lesi v MIMIA* [2003] FCA 209; and *Lesi v MIMIA* (2003) 134 FCR 27. Decisions of the Minister to make deportation orders under s 200 of the Act because of circumstances in s 201 are reviewable by the Tribunal (in its General Division): s 500(1)(a). Ordinarily, any review rights will have been exercised before the person leaves Australia because of a deportation order.
[18] This is consistent with Departmental policy which states that if SRC 5001 applies, the person is subject to permanent exclusion from Australia: see Policy – Migration Act - Visa cancellation instructions - Exclusion periods – 3.3 Schedule 5 exclusion criteria – SRC 5001 About SRC 5001 (reissued 1 July 2020).

facto partner. Similarly, s 205 of the Act provides for the removal of the dependants of people who have been deported under s 200 of the Act, where this action is requested by the spouse or de facto partner or the person being deported.

Whether a person has been removed from Australia within the last 12 months is a question of fact for the Tribunal, to be established on the evidence before it. Similarly, the question of whether the applicant has applied for the visa within 12 months of being removed under s 198, 199 or 205 of the Act, will be established by having regard to the evidence before it. If the applicant has been removed from Australia, the applicant will be excluded from Australia for 12 months unless there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian Citizen, an Australian permanent resident or an eligible New Zealand citizen to justify granting the visa within that 12 month exclusion period (see below).

Special Return Criterion 5010

Special Return Criterion 5010 places a two year exclusion period on the ability of holders of Foreign Affairs (formerly AusAID)[19] student visa or certain student visas that are provided with financial support by the government of a foreign country to obtain further visas.[20] The two year exclusion period does not apply if the applicant meets the requirements of cl 5010(3) or 5010(5).

Through the operation of 'student visa',[21] SRC 5010 generally applies to holders and former holders of Subclass 500 (student) visa for those student visa applications made *on or after 1 July 2016* and the following Class TU student visas for student visa applications made *before 1 July 2016*:[22]

- 570 – Independent ELICOS (English Language Intensive Courses for Overseas Students) Sector
- 571 – Schools Sector
- 572 – Vocational Education and Training Sector
- 573 – Higher Education Sector
- 574 – Postgraduate Research Sector
- 575 – Non–Award Sector; and
- 576 – Foreign Affairs or Defence Sector.[23]

SRC 5010 does not apply to the holders of Subclass 580 Student Guardian visas.

[19] The Subclass 576 'Foreign Affairs or Defence Sector' visa was formerly named the 'AusAID or Defence Sector' visa. See: *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82), which amended references to this subclass to reflect that on 1 November 2013, AusAID ceased to exist as an executive agency and its functions were integrated into the Department of Foreign Affairs.
[20] cl 5010(4).
[21] 'Student visa' is defined in r 1.03.
[22] With effect from 1 July 2016, sch 5 exclusion criterion SRC 5010 was amended by sch 4 (Student visa simplification) of the *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523). The definition of 'student visa' was amended to insert (aa) Subclass 500 (Student) visa.
[23] Formally known as 'AusAID or Defence Sector' visa. See fn19.

Foreign Affairs student visa holders

Special Return Criterion 5010 places certain restrictions on the ability of holders of Foreign Affairs (formerly 'AusAID') student visas and former holders of Foreign Affairs (or AusAID) student visas to obtain further visas. This is to ensure that, generally, Foreign Affairs (AusAID) students return to their home country to put their skills and knowledge gained through education and training programs in Australia to use in the further development of their home country by working there for at least 2 years.

Before 1 July 2016, the term 'Foreign Affairs student visa' was defined in reg 1.04A(1) to mean either a Subclass 560, 562 or 576 visa granted to a primary applicant in a full time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister; or an equivalent former visa or entry permit[24] or equivalent transitional visa.[25]

From 1 July 2016, the term 'Foreign Affairs student visa' is defined in reg 1.04A(1) to mean a student visa granted to a primary applicant in a full time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister.[26]

For further discussion on Foreign Affairs student visas see: Subclasses 570 – 576: Various issues

Other Student Visa holders

SRC 5010 will apply to student visa holders and former student visas holders of the visas identified above, other than Foreign Affairs (or AusAID) student visa holders, if the visa was granted to an applicant who is or was provided financial support by the government of a foreign country. In determining if SRC 5010 applies to a visa applicant the Tribunal will first have to consider whether the applicant is the holder, or was the holder, of a student visa and whether the applicant received the financial support of a foreign government whilst they were holding that visa.

Financial Support

In order to make the finding that an applicant was 'provided financial support by the government of a foreign country' the Tribunal must find that: the applicant was receiving support; that the support was financial; and the support was provided by a foreign government.[27]

[24] From 1 March 1999 to 1 July 2016 ''equivalent former visa or entry permit'' was defined in r 1.04A(1) as a Group 2.2 (student) visa or entry permit, within the meaning of the Migration (1993) Regulations, granted to a person who, as an applicant, satisfied the primary criteria for the grant of the visa or entry permit and was a student in a full time course of study or training under a scholarship scheme or training program approved by AIDAB or AusAID.
[25] 'Equivalent transitional visa'' is defined in r 1.04A(1) to a mean a transitional (temporary) visa within the meaning of the *Migration Reform (Transitional provisions) Regulations* (Cth) that either: is, or was, held by a person because the person held an equivalent former visa or entry permit; or was granted on the basis that the person satisfied the criteria for the grant of an equivalent former visa or entry permit.
[26] The definition of 'Foreign Affairs student visa' was amended by F2016L00523. Specific references to Subclass 560 (Student), Subclass 562 (Iranian Postgraduate Student) and Subclass 576 (Foreign Affairs or Defence Sector) visas were removed from the definition. The new Subclass 500 (Student) visa was included by the definition of 'student visa' in r 1.03.
[27] *Ahmed v MIAC* [2008] FMCA 811 at [32].

The Court in *Ahmed v MIAC*[28] (*Ahmed*) considered the meaning of 'financial support' in the context of SRC 5010.[29] The Court interpreted 'support' according to its ordinary meaning of taking action to give a person assistance, countenance or backing or taking action of keeping from failing, exhaustion or perishing, namely the supplying of a living thing with what is necessary for subsistence.[30] This suggests that payment to cover general subsistence needs, such as food and shelter, would constitute 'financial support' within SRC 5010.

There is a distinction between payment for services rendered and 'financial support' for the purpose of SRC 5010. If the money provided to the visa applicant is only payment for services rendered, it would not be 'support'.[31] The Court in *Ahmed* made no criticism of the Tribunal's view that 'financial support' is not limited to scholarships or formal sponsorship arrangements between a visa holder and a foreign government; nor was it limited to the payment of course fees only or living expenses. *Ahmed* also suggests that in certain circumstances salary could be 'financial support'. However, if a case concerns payments to an applicant by a foreign government in the form of a salary, the Tribunal will have to consider whether the provision of salary was 'support' in the relevant sense for SRC 5010.

Exceptions to SRC 5010

If the applicant is subject to cl 5010(1) or (2) and has not been outside Australia for at least 2 years since ceasing the relevant course they will need to show one of the following to satisfy SRC 5010:

- that the last substantive visa held by the applicant related to a course that was designed to be undertaken over a period of less than 12 months[32]
- the Foreign Minister (or AusAID Minister) or the foreign government that provided the financial support for the course of study or training supports the grant of the visa;[33] or
- that the waiving of the requirement is justified by compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (see below).[34]

Whether the applicant satisfies the exemptions to the two year exclusion period set out in cl 5010(3) or 5010(5) is a finding of fact for the Tribunal.

Whether an applicant's previous course was one that was designed to be undertaken over a period of less than 12 months will also be a question of fact for the Tribunal, which can be established by having regard to information about the previous course undertaken.

[28] *Ahmed v MIAC* [2008] FMCA 811.
[29] *Ahmed v MIAC* [2008] FMCA 811 at [32]–[44].
[30] *Ahmed v MIAC* [2008] FMCA 811 at [35].
[31] *Ahmed v MIAC* [2008] FMCA 811 at [42].
[32] SRC 5010(3).
[33] SRC 5010(5)(a). This provision was amended to include reference to the 'Foreign Minister' by SLI 2014, No 82 with effect from 1 July 2014.
[34] SRC 5010(5)(b).

Similarly a letter of support or other relevant documentation from the Foreign (or AusAID) Minister, or the relevant foreign government that provided the financial support for the course of study or training, which demonstrates support for the grant of the visa, is likely to provide evidence that cl 5010(3) is satisfied.

Compassionate or compelling circumstances

Decision makers have discretion to waive the requirements of an exclusion period in SRC 5002 or 5010 that has not elapsed, if they are satisfied that certain circumstances exist to justify granting the visa.

Special Return Criterion 5002 relevantly provides that a visa applicant may still be granted the visa notwithstanding that they were removed from Australia within 12 months of the visa application under consideration if the Minister, or the Tribunal on review, is satisfied that in the particular case:

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

justify the granting of the visa within 12 months after their removal.

Similarly cl 5010(5) has the effect that a visa applicant may still be granted a visa notwithstanding that they have spent less than two years outside of Australia since ceasing their course if the Minister is satisfied that, in the particular case:

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

justify the waiver of the requirement that the visa grant be supported by the Foreign (or AusAID) Minister or the government of the foreign country that provided financial support to the applicant.

If the decision-maker is satisfied that such compelling and/or compassionate circumstances exist, the applicant satisfies the requirements of SRC 5002 or 5010 whether or not they have been outside Australia for the prescribed exclusion period. This is the case only in relation to the particular visa application being considered. If the person makes another visa application before the exclusion period has elapsed, they will again have to satisfy the exclusion criteria (if any) applicable to the visa.

There are no definitions of compelling or compassionate circumstances in the Act or Regulations, and there has been no direct guidance by way of judicial interpretation in the context of SRC 5002 or SRC 5010(5). Whether a circumstance or reason is compelling or a compassionate ground so as to justify the grant of visa or waiver of the relevant requirement is a question of fact and degree for the Tribunal.

In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in SRC 5002 and 5010(5) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen.

For a general discussion on compelling and compassionate circumstances, see: Compelling and/or compassionate circumstances and Public Interest Criterion 4013 (discussion on compassionate or compelling circumstances).[35]

Compelling circumstances that affect the interests of Australia

Whether there exist compelling circumstances that affect the interests of Australia is a question of fact and degree for the Tribunal. Departmental policy[36] suggests such circumstances may exist if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa;
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.

These considerations may be relevant in relation to a consideration of compelling circumstances affecting Australia in the context of either SRC 5002 or SRC 5010 depending on the circumstances of the applicant and the visa to which the criterion relates.

The Departmental policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen claims that, if granted the visa, they would:

- work and pay taxes
- pay fees to an education provider; or
- spend money in Australia.

The Departmental policy suggest that compelling circumstances may arise where the exclusion period has arisen from either a Departmental error or as an unintended consequence of the exclusion provisions.[37]

[35] Note the 'compassionate or compelling' clause in the context of SRC 5002 and 5010(5) is identical to the 'compassionate or compelling' clause in the context of Public Interest Criterion 4013.
[36] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – Procedural Instruction – 3.4 Assessing and deciding visa applications – Compelling circumstances (reissued 1 July 2020).
[37] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – Procedural Instruction – 3.4 Assessing and deciding visa applications – Compelling circumstances (reissued 1 July 2020).

It states that exclusion provisions may be regarded as having unintended consequences if the person previously made every effort to leave Australia whilst a lawful non-citizen (eg. while holding a bridging visa) but did not leave before the visa ceased due to factors beyond their control, such as:

- health issues
- unavoidable delays by airlines; or
- delays associated with the issue of travel documents; or
- they were a minor at the time their visa ceased and it can be demonstrated that they were not responsible for their own departure arrangements.[38]

The Departmental policy set out the view that generally the exclusion provisions should not be regarded as having unintended consequences in cases if, for example:

- the person claims they inadvertently breached a condition of the Electronic Travel Authority (ETA) because the travel agent failed to inform of the conditions of the ETA; or
- the person claims the Department wrongly cancelled a previous visa but:
  - although they applied for the cancellation to be revoked or reviewed the decision maker decided not to revoke or set aside the cancellation; or
  - they failed to apply for the cancellation decision to be revoked or reviewed, even though they were able to do so.[39]

These considerations appear to largely relate to SRC 5002, and only when the visa applicant became an unlawful non-citizen as a result of these actions and was subsequently removed from Australia.

In relation to certain former student visa holders[40] who are applying for a new student visa, Departmental policy suggests that compelling circumstances affecting the interests of Australia may arise where the applicant's circumstances, including previous study history in Australia, clearly demonstrate that they have been a genuine student in Australia and there is no evidence that they have actively or intentionally abused or sought to circumvent immigration laws. The Departmental policy state that where a student wishes to apply for another student visa, significant weight may also be given where there is evidence of a clear continuing study intention.[41]

Whilst not binding, the Tribunal may have regard to the Department's interpretation of what may constitute compelling circumstances affecting Australia. However, the Tribunal should avoid

[38] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – Procedural Instruction – 3.4 Assessing and deciding visa applications – Unintended consequences (reissued 1 July 2020).
[39] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – Procedural Instruction – 3.4 Assessing and deciding visa applications – Unintended consequences (reissued 1 July 2020).
[40] Departmental Policy refers to persons whose last substantive visa was a student visa: see Policy – Migration Act - Visa cancellation instructions - Exclusion periods – 3 Procedural Instruction – 3.4 Assessing and deciding visa applications – Former Student visa holders (reissued 1 July 2020).
[41] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – 3 Procedural Instruction – 3.4 Assessing and deciding visa applications – Former Student visa holders (reissued 1 July 2020).

elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the relevant provision in SRC 5002 or 5010(5) and consider the individual circumstances of the case.

Compassionate or compelling circumstances affecting interests of an Australian citizen, permanent resident or Eligible New Zealand citizen

Whether there exist compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen is a question of fact and degree for the Tribunal. Generally, having regard to the ordinary meaning of those words, 'compassionate' is defined in the Oxford English Dictionary as 'circumstances that invoke sympathy or pity', whereas 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'.[42]

Departmental policy provide some examples as to what may be compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen. Departmental policy states such circumstances may exist if the visa applicant was not granted the visa and, as a result:

- family members in Australia would be left without financial or emotional support;
- family members in Australia would be unable to properly arrange a relative's funeral in Australia; or
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and is therefore subject to an exclusion period).[43]

There may be compelling circumstances affecting the interests of such person/s if the visa applicant was not granted the visa and, as a result:

- a business operated by an Australian citizen would have to close down because it lacked the specialist skills required to carry out the business;
- civil proceedings instigated by an Australian permanent resident would be jeopardised by the absence of the non-citizen witness; or
- an eligible New Zealand citizen would be unable to finalise legal and property matters associated with divorce proceedings without the physical presence of the non-citizen in Australia.[44]

[42] In *Bui v MIMA* [1999] FCA 118 at [47], in discussing the waiver in PIC 4007(2), the Court held at [47]: "There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandate such an outcome. But over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play."
[43] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – 3 Procedural Instruction – 3.4 Assessing and deciding visa applications – Compassionate circumstances (reissued 1 July 2020).
[44] Policy – Migration Act - Visa cancellation instructions - Exclusion periods – 3 Procedural Instruction – 3.4 Assessing and deciding visa applications – Affecting interests of an Australian citizen/resident (reissued 1 July 2020).

These are examples only. The Tribunal may have regard to the Department's interpretation of what may constitute compassionate or compelling circumstances affecting the interests of an Australian citizen, etc. However, the Tribunal should avoid elevating any such interpretation to a statutory requirement and should always bring its consideration back to the words of the relevant provision and the individual circumstances of the case.

Merits review

A refusal to grant a visa because the applicant does not meet the requirement of a prescribed visa criterion, including where applicable SRC 5001, 5002 or 5010, is a decision under s 65 of the Act.

A decision to refuse a visa on the basis that the applicant does not meet SRC 5001, 5002 or 5010 under s 65 could be a Part 5-reviewable decision within the meaning of s 338 of the Act, provided it falls under one of the specified categories of Part 5-reviewable decisions.

If the Tribunal is required to review a decision to refuse to grant a visa under s 65 of the Act on the basis that the applicant has not met the requirements of SRC 5001, 5002 or 5010, the Tribunal must assess for itself whether the applicant, in its view, satisfies that criterion.

Relevant case law

Judgment	Judgment summary
Ahmed v MIAC [2008] FMCA 811	Summary
Bui v MIMA [1999] FCA 118	
Lesi v MIMIA [2003] FCA 209	Summary
Lesi v MIMIA (2003) FCR 27	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment (AusAID) Regulation 2013 (Cth)	SLI 2013, No 268	
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 199	No 12/2014

Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)	No 129 of 2014	No 10/2014
Migration Amendment (Special Category Visas and Special Return Criterion 5001) Regulation 2015 (Cth)	SLI 2015, No 169	No 9/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 1/2016

Available precedents

Special Return Criteria 5001, 5002 and 5010 rarely arise for consideration in Tribunal review. For this reason there are no decision precedents or optional paragraphs in existence. If the SRC are the only issue in dispute, the Generic Decision template can be used. Please contact MRD Legal Services for further assistance as necessary.

Last updated/reviewed: 4 January 2023

SUBCLASS 151 (FORMER RESIDENT)

Overview[1]

The Subclass 151 (Former Resident) visa, which is the only subclass in Special Eligibility (Class CB), is a visa enabling persons who have spent most of their childhood as an Australian permanent resident to resume their permanent residence status or to return to Australia. It is available to both onshore and offshore applicants who are former residents. This commentary addresses applications for review in relation to Subclass 151 visas applied for on or after 1 November 2005.[2] For applications made before this date, contact MRD Legal Services.

Merits review

Subclass 151 (Former Resident) is a permanent visa available to both onshore and offshore applicants since 1 November 2005.[3] It caters for two specific applicant groups: 'long residence applicants' and 'defence service applicants'.

A decision to refuse to grant a Subclass 151 visa where the visa application was made on or after 1 November 2005 is a Part 5-reviewable decision under s 338(2) of the *Migration Act 1958* (Cth) (the Act) if the applicant is onshore at time of application. The applicant has standing to apply for review in such cases.[4] Alternatively, the decision will be reviewable under s 338(6) if the visa applicant is offshore at the time of application and has a parent, spouse, de facto partner, child, brother or sister who is an Australian citizen or Australian permanent resident. In the latter instance, such relatives have standing to seek review of the decision under s 347(2)(c) of the Act.

Requirements for making a valid application

The requirements for making a valid application for a Special Eligibility (Class CB) visa are contained in item 1118A of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations). An application is validly made if:

- it is made on the prescribed form[5]
- it is made at the prescribed place and in the prescribed manner;[6] and
- the visa application charge is met.[7]

An applicant for a Special Eligibility (Class CB) visa may combine the application with that of

[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] Amendments made on 1 November 2005 by the *Migration Amendment Regulations 2005 (No 9)* (Cth) (SLI 2005, No 240) collapsed the former Subclass 832 (Close Ties) visa and Subclass 151 (Former Resident) visas into the current Subclass 151 visa.
[3] SLI 2005, No 240 reg 12(1).
[4] s 347(2)(a).
[5] Item 1118A(1). For applications made on or after 18 April 2015, the approved form is that specified in an instrument under reg 2.07(5): *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). For applications made before that date, the approved form was specified in item 1118A(1) itself, namely 47SV.
[6] Item 1118A(3)(a). For applications made before 18 April 2015, the application must be posted or delivered to a specified address: 1118A(3)(a). For applications made on or after this date, the application must be made as specified in a legislative instrument for 1118A(3)(a) under reg 2.07(5) and the applicant may be in or outside Australia, but not in immigration clearance: see item 1118A(3)(aa) inserted by SLI 2015, No 34. For the applicable instrument see the RRV App tab in the: Register of Instruments – Miscellaneous and other visa classes.
[7] Item 1118A(2).

a member of a family unit.[8]

Key visa criteria

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

Time of application criteria

At the time of application, an applicant must qualify as either a 'long residence applicant' or a 'defence service applicant' as defined in Part 151.1.[9]

A *long residence applicant* means an applicant who:

- spent the greater part of his or her life before the age of 18 in the migration zone as an Australian permanent resident; and
- did not at any time acquire Australian citizenship; and
- has maintained business, cultural or personal ties with Australia; and
- has not turned 45 at the time of application.[10]

A *defence service applicant* means an applicant who:

- has completed at least 3 months continuous Australian defence service; or
- was discharged before completing 3 months service on grounds of medical fitness, where the applicant became medically unfit for service or further service because of the applicant's Australian defence service.[11]

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

Time of decision criteria

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

- any requested assurance of support has been accepted.[13] See: Assurance of Support
- certain public interest criteria – different criteria apply depending on whether the person applies in or outside Australia and whether he or she is a 'long residence applicant' or a 'defence service applicant'.[14] Other members of the applicant's family

[8] Item 1118A(3)(b).
[9] cl 151.212.
[10] cl 151.111.
[11] cl 151.111.
[12] cl 151.211.
[13] cl 151.229B.
[14] cls 151.221–151.224. Clause 151.221(a) was amended by item 52 of sch 2 to the *Migration Legislation Amendment*

unit (whether or not they are included in the application) must also satisfy various public interest criteria[15]

- special return criteria 5001 and 5002 – if the applicant has previously been in Australia.[16] An applicant who is outside Australia at time of decision must also satisfy special return criterion 5010.[17] Other members of the applicant's family unit (whether or not they are included in the application) must also satisfy various special return criteria[18]
- *for applications made from 1 November 2005 and before 24 November 2012* – certain passport requirements[19]

In relation to the public interest and special return criteria, the criteria that apply to an onshore 'long residence applicant' are the same as a 'defence service applicant'. For example, long residence applicants who are in Australia and defence service applicants must satisfy public interest criterion 4007 (the health criterion which includes the waiver provision).[20] This criterion must also be satisfied by members of their family unit, unless the family member is not an applicant for a Class CB visa in which case the Minister (or Tribunal on review) has discretion to require them to undergo assessment.[21]

However, long residence applicants who are *outside* Australia must satisfy public interest criterion 4005 (no waiver provision).[22] This criterion also applies to all their family members, unless the family member is not an applicant for a Class CB visa and the Minister (or Tribunal on review) exercises the discretion to not require the assessment.[23] For commentary on relevant public interest criteria, see Health Criteria – 4005, 4006A & 4007 and Public Interest Criterion 4001.

Key Issues

Long residence applicant

An alternate time of application criterion for the grant of a Subclass 151 visa is to be a 'long residence applicant'.[24] An applicant meets the requirements of being a 'long residence

Regulation (2012) (No 5) (Cth) (SLI 2012, No 256), to insert new PIC 4021 which mandates that the applicant meet certain passport requirements. Specifically, PIC 4021 requires either; that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an instrument in writing for cl 4021(a); OR that it would be unreasonable to require the applicant to hold a passport. A similar requirement was previously contained in cl 151.229C which was repealed with effect from 24 November 2012, see item 53 of sch 2 to SLI 2012, No 256. The amendment to cl 151.221(a) applies to all visa applications made on or after 24 November 2012.

[15] cls 151.225–228. PIC 4019 (values statement) was inserted by *Migration Amendment Regulations 2007 (No 12)* (Cth) (SLI 2007, No 314) to apply to visa applications made on or after 15 October 2007: reg 4 and sch 1.

[16] cls 151.229, 151.229A.

[17] cl 151.229A. SRC 5010 relates to holders and former holders of Foreign Affairs (or AusAID) student visas or former student visa holders who are supported financially by a foreign government.

[18] cls 151.225(c), 151.226(c), 151.227A, 151.227B. These provisions were inserted by *Migration Amendment Regulations 2005 (No 12)* (Cth) (SLI 2005, No 339) to apply to visa applications made on or after 20 December 2005 or applications made on or after 1 November 2005 that have not been finally determined: reg 4(2) and sch 3.

[19] For applications made between 1 November 2005 and 23 November 2012, this requirement is found in cl 151.229C. However, this clause was repealed with effect from 24 November 2012 by item 53 of sch 2 to SLI 2012, No 256. For applications made on or after 24 November 2012, the passport requirements for primary applicants are contained in PIC 4021 (cl 151.221(a) refers – see above).

[20] cl 151.223.

[21] cls 151.226, 151.227.

[22] cl 151.222.

[23] cl 151.225.

[24] A long residence applicant is defined in cl 151.111.

applicant' if the applicant:

- spent the greater part of his or her life before the age of 18 in the migration zone as a permanent resident[25]
- did not at any time acquire Australian citizenship
- has maintained business, cultural or personal ties with Australia; and
- has not turned 45 at the time of application.

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

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

Determining the period which represents the greater part of an applicant's life before the age of 18 requires the Tribunal to apply a simple arithmetic, quantitative assessment to conclude that the *greater part of [a person's] life before the age of 18* is at least half of the period from birth to 18 years of age, namely 9 years or more.[26]

Maintained personal, business or cultural ties

The definition of 'long residence applicant' requires an applicant to have 'business, cultural or personal ties' with Australia. What amounts to 'business, cultural or personal ties' is a question of fact for the Tribunal on the evidence before it.[27] The requirement that the applicant 'has *maintained'* such ties implies the forming of these ties prior to departing Australia.

Departmental guidelines provide some guidance with examples as to what may constitute evidence to satisfy this criterion.[28] This includes, but is not limited to:

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

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

Defence service applicant

An alternate time of application criterion for the grant of a Subclass 151 visa is to be a

[25] 'Migration zone' is defined under s 5.
[26] A similar requirement was found in reg 55 of the 1989 regulations and was considered in *Skea v MILGEA* (1994) 51 FCR 82.
[27] See *Ji v MIMA* [2001] FCA 904 at [5]–[6]. The Court considered a Resolution of Status (Temporary)(Class UH) Subclass 850 visa, which included a criterion cl 850.214(2)(a) which required an applicant to have "maintained close business, cultural or personal ties in Australia;". This reasoning of Merkel J was not disturbed on appeal, see *Ji v MIMA* [2002] FCA 166.
[28] Policy – Migration Regulations- Schedules - Sch2 Visa 151 – Former Resident – Long residence applicant - Has maintained ties with Australia (reissued 1/10/2019).

'defence service applicant'.[29] An applicant meets this requirement if they:

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

Although the Departmental guidelines indicate that eligibility under this stream is generally limited to members of the permanent Australian Defence Force, and that a member of the Reserve Defence Force or the Emergency Defence Force is not usually eligible, [30] ultimately this will be a finding of fact for the Tribunal.

Relevant case law

Judgment	Judgment summary
Ji v MIMA [2002] FCA 166	Summary
Ji v MIMA [2001] FCA 904	
Skea v MILGEA [1994] FCA 1151; (1994) 51 FCR 82	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2005 (No 9) (Cth)	SLI 2005, No 240	No 5/2005
Migration Amendment Regulations 2005 (No 12) (Cth)	SLI 2005, No 339	
Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314	No 15/2007
Migration Legislation Amendment Regulation (2012) (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 01/2015

[29] A 'defence service applicant' is defined in cl 151.111.
[30] Policy – Migration Regulations – Schedules - Sch2 Visa 151 – Former Resident - Defence service applicants (reissued 1/10/2019).

Available decision templates

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

Last updated/reviewed: 14 March 2022

RESIDENT RETURN VISAS

Overview[1]

The Return (Residence) (Class BB) visa is for Australian permanent residents and certain former Australian citizens or former Australian permanent residents who are seeking to return to Australia after a period of absence. This class of visa contains two subclasses: Subclass 155 (Five Year Resident Return) and Subclass 157 (Three Month Resident Return). There are also Subclass 159 (Provisional Resident Return) visas, which are temporary visas within Class TP, however these are rarely considered by the Tribunal and are therefore not referred to in this commentary.

According to the Departmental Procedural Instructions, the purpose of the Return (Residence) visa is to facilitate the re-entry into Australia of non-citizen permanent residents, former permanent residents and former citizens and ensure that only those people who have a genuine commitment to residing in Australia, or who are contributing to Australia's well-being, retain the eligibility to return to Australia as permanent residents.[2]

This commentary is based on the regulations relevant to all applications made on or after 1 July 1999 and includes the amending regulations which took effect on this date.[3]

Requirements for a valid visa application

The requirements for making a valid application for a Class BB Return (Residence) visa are set out in Item 1128 of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations). In general terms, those requirements are:

- **form and fee** – the application is made in the prescribed manner;[4] and the visa application charge paid at time of application[5]
- **location** – the application may be made in or outside Australia, but not in immigration clearance.[6] However for applications lodged pre 5 March 2022, in certain circumstances the applicant must be in Australia and the application must be made in Australia[7]

[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] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - Introduction - About resident return visas (RRVs) - Purpose (re-issue date 18/4/2017).
[3] *Migration Amendment Regulations 1999 (No 4)* (Cth) (SR 1999, No 68).
[4] Items 1128(1) and (3)(a). For applications made on or after 18 April 2015, the application must be made on an approved form specified by legislative instrument and in a manner specified by legislative instrument: see Items 1128(1) and 1128(3)(a) amended by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). For the applicable instrument see the 'RRVApp' tab in the Register of Instruments – Miscellaneous and other visa classes. For applications made before 18 April 2015, the application must be made on the prescribed form, otherwise in writing, or by oral application: Items 1128(1), (3)(a)(iii) and (3)(ba) of sch 1 to the *Migration Regulations 1994*. The option of making an oral application was removed for visa applications made on or after 10 September 2016: item 1128(3)(ba) omitted by item 3 of sch 1 to the *Migration Legislation Amendment (2016 Measures No 3) Regulation 2016* (Cth) (F2016L01390).
[5] Item 1128(2)(a) for the base application charge.
[6] Item 1128(3)(b) as amended by *Migration Amendment (2022 Measures No.1) Regulations 2022* (Cth) (F2022L00255).
[7] Items 1128(3)(a), (aa) and (b) for applications made before 5 March 2022. For written applications, the application may be made in or outside Australia, but not in immigration clearance, and the applicant must be in Australia to make an application in Australia: see items 1128(3)(a)(i) and (ii) for applications made before 18 April 2015; and Item 1128(3)(aa) and the approved

- **combined applications** – *for visa applications made before 1 July 2012*, an application by a person who is included in the passport of another applicant can be made at the same time and combined with the application by the other applicant[8]

- **visa status** – *for visa applications made on or after 1 July 2012*, the applicant must not hold a Transitional (Permanent) visa that is taken to have been granted under reg 9 of the *Migration Reform (Transitional Provisions) Regulations*[9]

- **exclusion of certain former visa holders** – an application may not be valid where the most recent permanent visa held by the person was the subject of a cancellation notice under s 135(1) of the *Migration Act 1958* (Cth) (the Act) or was the subject of a decision to cancel the visa under s 134.[10]

Visa criteria

All visa applicants for Return (Residence) visas must meet the primary criteria. There are no secondary criteria specified.

Criteria common to both Subclasses

There are some requirements that are common to both the Subclass 155 (Five Year Resident Return) and Subclass 157 (Three Month Resident Return) visas. At time of application, for both subclasses, the following requirements must be met:

- **residency status** – the applicant must:

  - be an Australian permanent resident; or

legislative instrument specified for this item in the 'RRVApp' tab in the Register of Instruments – Miscellaneous and other visa classes for applications made on or after that date: SLI 2015, No 34. For internet applications made before 1 July 2012, the applicant must be in Australia. For internet applications made on or after 1 July 2012, the applicant may be in or outside Australia: item 1128(3)(b) as amended by *Migration Legislation Amendment Regulation 2012 (No 3)* (Cth) (SLI 2012, No 106). For oral applications made before 10 September 2016, the application must be made in Australia as permitted by reg 2.09(2) or (3) and, for applications made before 18 April 2015, the applicant must be in Australia: Item 1128(3)(ba)(i) repealed from 18 April 2015 by SLI 2015, No 34; for applications made on or after 18 April 2015 and before 10 September 2016 see item 1128(1) and the relevant instrument: 'RRV App' tab in the Register of Instruments – Miscellaneous and other visa classes. The option of making an oral application was removed for visa applications made on or after 10 September 2016: see regs 2.09(2) and (3) and item 1128(3)(ba) of sch 1 omitted by sch 1 to the F2016L01390.

[8] Item 1128(3)(c). Item 1128(3)(c) was substituted by SLI 2012, No 106. This removed the ability of a person to lodge a combined application where s/he is included in the passport of another Class BB visa applicant if the visa application is made on or after 1 July 2012.

[9] Item 1128(3)(c) as amended by SLI 2012, No 106. Transitional (Permanent) visas are taken to have been granted under reg 9 of the *Migration Reform (Transitional Provisions) Regulations* to people who, immediately before 1 September 1994, held an Authority to Return or a Return Endorsement. It is intended that holders of Transitional (Permanent) visas retain their more beneficial 'travel and stay' arrangements, rather than be able to apply for and be granted a Class BB visa which has less beneficial 'travel and stay' arrangements: see Explanatory Statement to SLI 2012, No 106.

[10] Items 1128(3)(d) and (e). This requirement was introduced for visa applications made on or after 1 July 2004 to prevent certain business visa holders circumventing cancellation of their visas by applying for and being granted resident return visas: *Migration Amendment Regulations 2004 (No 2)* (Cth) (SR 2004, No 93) and Explanatory Statement to SR 2004, No 93. Note that for applications made on or after 18 November 2017, there was a brief period prior to disallowance of the *Migration Legislation Amendment (2017 Measures No 4) Regulations 2017* (Cth) (F2017L01425) at 17:56 on 5 December 2017 during which a different form of item 1128(3)(d) applied. The amending regulation broadened the scope of item 1128(3)(d) to cover cancellation under any section of the Migration Act and any notice of cancellation issued under the Migration Act. However the amending regulation was repealed from the time of disallowance: ss 42(1) and 45(1) of the *Legislation Act 2003* (Cth) (Legislation Act).

- have been an Australian citizen but subsequently lost or renounced Australian citizenship, or

- be a former Australian permanent resident, other than a former Australian permanent resident whose most recent permanent visa was cancelled.[11]

The time of decision criteria are identical for both subclasses, and require that:

- **special return criteria** –

  - for visa applications made prior to 1 July 2012, the applicant satisfies special return criterion 5001 if the visa application is made outside Australia[12]

  - for visa applications made on or after 1 July 2012, the applicant satisfies special return criterion 5001 if the applicant is outside Australia[13]

- **passport** –

  - for visa applications made from 1 July 2005 and prior to 24 November 2012, the applicant is the holder of a valid passport or it would be unreasonable to require the applicant to be the holder of a valid passport.[14]

  - for visa applications made on or after 24 November 2012, the applicant satisfies the passport requirements in public interest criterion 4021.[15]

For a brief period, applicants were prevented from being granted a Resident Return visa where their last permanent visa had been cancelled or was under consideration for cancellation.[16]

Which Subclass should the applicant be assessed against?

An applicant applies for a class of visa[17] and is entitled to be assessed against each subclass that is included in the class. When assessing an application for a Return (Residence) (Class BB) visa, the applicant is usually first considered against the criteria for a Subclass 155 visa as the more advantageous visa. If the applicant is not eligible for that subclass, they must be considered against the criteria for a Subclass 157 visa. A Subclass

[11] cls 155.211, 157.211.
[12] cls 155.221, 157.221. See amendments made by SLI 2012, No 106, which apply to visa applications made on or after 1 July 2012.
[13] cls 155.221, 157.221 as amended by SLI 2012, No 106, for visa applications made on or after 1 July 2012.
[14] cls 155.222, 157.222: applicable to visa applications made on or after 1 July 2005, inserted by *Migration Amendment Regulations 2005 (No 4)* (Cth) (SLI 2005, No 134). Note these provisions were omitted with effect from 24 November 2012 by *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) (SLI 2012, No 256).
[15] Clauses 155.222 and 157.222 were amended by SLI 2012, No 256 which introduced new Public Interest Criterion, PIC 4021. This requires either: that the applicant hold a valid passport that was issued by an official source; is in the form issued by that source; and is not in a class of passports specified by the Minister in an instrument in writing for cl 4021(a) (see the PIC '4021 Passports' tab in the Register of Instruments Miscellaneous and Other Visa Classes; or that it would be unreasonable to require the applicant to hold a passport. The amendment applies to visa applications made on or after 24 November 2012.
[16] For applications made on or after 18 November 2017, there was a brief period prior to disallowance of F2017L01425 at 17:56 on 5 December 2017 during which cls 155.223 and 157.223 applied. Disallowance had the effect of repealing the amending regulation from that time: ss 42(1) and 45(1) of the Legislation Act.
[17] s 45.

157 visa is only in effect for a period of three months from the date of the grant[18] and therefore has less stringent time of application criteria than the Subclass 155 visa, which may be granted for a period of up to five years.[19] If an applicant is eligible for both subclasses, the Departmental practice is to grant the Subclass 155 as the more advantageous visa.[20]

Criteria specific to Subclass 155

At time of application, an applicant for a Subclass 155 visa must meet one of four alternative requirements set out in cl 155.212.[21] These relate to: physical residence in Australia, substantial ties with Australia or being a member of a family unit of a Subclass 155 holder or someone who meets the requirements of cl 155.212.

Physical residence in Australia – cl 155.212(2)

The applicant will meet cl 155.212 if, at time of application, he or she was:

- lawfully present in Australia for a period of, or periods that total, not less than two years in the period of five years immediately before the application for the visa; and
- during that time, the applicant was the holder of a permanent visa or permanent entry permit or was an Australian citizen and was not the holder of a temporary visa (other than a kind specified and held concurrently with the permanent visa/entry permit), or of a bridging visa.[22]

Unlike some of the alternate criteria in cl 155.212, the applicant may be either in or outside Australia at time of application.

Substantial ties with Australia – cl 155.212(3), (3A)

If the applicant does not meet the physical residence criteria, he or she may still satisfy cl 155.212 based on the nature of their ties to Australia.[23] The requirements differ depending on whether the visa applicant is in or outside Australia at the time of application. According to Departmental guidelines, the policy intention of the 'substantial ties' provision is to allow

[18] cl 157.511.
[19] cl 155.511. For visa applications made prior to 1 July 2012, a Subclass 155 visa is generally granted for a period of five years from the date of grant; or a shorter period determined by the Minister. For visa applications made on or after 1 July 2012, only applicants who meet cls 155.212(2) and 155.211 at the time of application, i.e. lawfully present in Australia for period(s) of not less than two years in the period of five years immediately before the application, will be granted a Subclass 155 visa for a period of five years. Applicants who meet cl 155.212(3), (3A) or (4) will be granted a Subclass 155 visa for a lesser period depending on which of these criteria they meet: see SLI 2012, No 106.
[20] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - Assessing RRV Applications - Which subclass (re-issue date 18/4/2017).
[21] cl 155.212(1).
[22] cl 155.212(2). For visa applications made on or after 1 July 2002, the applicant may be the holder of a Subclass 601 (Electronic Travel Authority) visa, a Subclass 773 Border visa, Subclass 956 Electronic Travel Authority (Business Entrant - Long Validity) visa, Subclass 976 Electronic Travel Authority (Visitor) visa or Subclass 977 Electronic Travel Authority (Business Entrant - Short Validity) visa held concurrently with the permanent visa or the permanent entry permit: *Migration Amendment Regulations 2002 (No 2)* (Cth) (SR 2002, No 86), s 5(2) and *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32).
[23] cls 155.212(3)-(3A).

visas to be granted to people who have substantial ties with Australia and are contributing to Australia's well-being, but who have not spent sufficient time physically present in Australia in the past five years to satisfy the physical residence criterion.[24]

Offshore applicants

If the applicant is outside Australia at the time of application, the decision maker must be satisfied that the applicant has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and the applicant:

- has not been absent from Australia for a continuous period of five years or more immediately before the application for the visa, unless there are compelling reasons for the absence, and holds a permanent visa, or last departed Australia as an Australian permanent resident, or last departed Australia as an Australian citizen, but has subsequently lost or renounced Australian citizenship; or

- was an Australian citizen, or an Australian permanent resident, less than 10 years before the application, and has not been absent from Australia for a period of, or periods that total, more than five years in the period from the date that the applicant last departed Australia as an Australian citizen or Australian permanent resident to the date of application, unless there are compelling reasons for the absence.[25]

According to the Explanatory Statement to *Migration Amendment Regulations 1999 (No 6)* (Cth) (SR 81 of 1999), the second of these two alternatives:

> *…implements a policy change which enables former permanent residents, and former Australian citizens, who have travelled on temporary visas to Australia to regain their entitlement to permanent resident status in certain circumstances. Especially since the introduction of Electronic Travel Authorities, a large number of people have travelled on temporary visas without realising that this would mean loss of their resident status.*

Onshore applicants

If the applicant is in Australia at the time of application, the decision maker must be satisfied that the applicant:

- has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and

- has not been absent from Australia for a continuous period of five years or more since:

    - the date of grant of the applicant's most recent permanent visa, unless there are compelling reasons for the absence, or

[24] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 Five Year Resident Return - Substantial ties of benefit to Australia - About the 'substantial ties of benefit' provision (re-issue date 18/4/2017).
[25] cl 155.212(3).

- the date on which the applicant ceased to be a citizen, unless there are compelling reasons for the absence.[26]

Members of the family unit

An applicant will alternatively meet cl 155.212 if they are a member of the family unit of a person who: has been granted a Subclass 155 visa and that visa is still in effect, or meets the requirements in cl 155.212(2), (3) or (3A) and has lodged a separate application for a Return (Residence) (Class BB) visa.[27]

Further information as to the meaning of 'member of the family unit' is available from commentary: Member of a family unit.

Criteria specific to Subclass 157

The Subclass 157 visa only entitles the visa holder to a three month stay and thus the criteria which needs to be met have a lower threshold than the criteria relating to the Subclass 155 Five Year Resident Return Visa.

Subclass 157 visas are intended for permanent residents or former citizens who have less than two years' physical residence in Australia and have not yet established substantial ties of benefit to Australia.[28]

At time of application, an applicant for a Subclass 157 visa must meet one of two alternate requirements in cl 157.212.[29] The first requirement relates to physical presence and reasons for departure and the second to being a member of a family unit of a Subclass 157 visa holder.

Physical presence and reasons for departure

The requirements for physical presence in Australia for a Subclass 157 visa are less stringent than those for the Subclass 155 visa. The focus of the criterion is on the reasons for the applicant's departure from Australia. To meet this alternate criterion, the applicant must:

- be lawfully present in Australia for a period of, or periods that total, not less than one day but less than two years in the period of five years immediately before the application for the visa and during that time:

[26] cl 155.212(3A).
[27] cl 155.212(4). For visa applications made prior to 1 July 2012, an applicant who is a member of the family unit of a person who meets cl 155.212(2), (3) or (3A) and has lodged either a combined or separate Class BB visa application may satisfy the requirements of cl 155.212(4)(b). Clause 155.212(4)(b) was amended by SLI 2012, No 106 such that for visa applications made on or after 1 July 2012, only an applicant who is a member of the family unit of a person who meets cl 155.212(2), (3) or (3A) and has made a separate Class BB visa application can meet cl 155.212(4)(b).
[28] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 157 - Three Month Resident Return - About BB 157 - Purpose (re-issue date 18/4/2017).
[29] cl 157.212(1).

  - was the holder of a permanent visa or a permanent entry permit or an Australian citizen and
  - did not hold a temporary visa (other than a kind specified concurrently with the permanent visa/permit), or a bridging visa;[30] and

- either:
  - have compelling and compassionate reasons for departing Australia, or
  - if outside Australia, had compelling and compassionate reasons for his or her last departure from Australia.[31]

Member of the family unit

An applicant will alternatively satisfy cl 157.212 if he or she is a member of the family unit of a person who: has been granted a Subclass 157 visa and that visa is still in effect, or meets the requirements of cl 157.212(2) and has lodged a separate application for a Return (Residence) (Class BB) visa.[32]

Absence from Australia

If the applicant is outside Australia, there is an added requirement that the applicant has not been absent from Australia for a continuous period of more than three months immediately before making the application for the visa, unless the Minister is satisfied that there are compelling and compassionate reasons for the absence.[33]

Key issues

There is very little case law in relation to this visa class and its requirements. Decisions tend to turn on the issues of substantial ties which are of benefit to Australia and compelling reasons for absence from Australia. Departmental guidelines set out the Department's view as to what is meant by, and may be relevant to, these provisions.[34] While the Tribunal may have regard to these guidelines in forming its own view of the meaning of the legislation, it is not appropriate to apply them as if the interpretations and directions in them are binding on

[30] cl 157.212(2)(a). For applications made on or after 1 July 2002, the applicant may be the holder of a Subclass 601 (Electronic Travel Authority) visa, a Subclass 773 Border visa, Subclass 956 Electronic Travel Authority (Business Entrant — Long Validity) visa, Subclass 976 Electronic Travel Authority (Visitor) visa or Subclass 977 Electronic Travel Authority (Business Entrant — Short Validity) visa held concurrently with the permanent visa or the permanent entry permit: SR 2002, No 86, and SLI 2013, No 32.
[31] cl 157.212(2)(b).
[32] cl 157.212(3). For visa applications made prior to 1 July 2012, an applicant who is a member of the family unit of a person who meets cl 157.212(2) and has lodged either a combined or a separate Class BB visa application may satisfy the requirements of cl 157.212(3)(b). Clause 157.212(3)(b) was amended by SLI 2012, No 106 such that for visa applications made on or after 1 July 2012, only applicants who is a member of the family unit of a person who meets cl 157.212(2) and has made a separate Class BB visa application can meet cl 157.212(3)(b).
[33] cl 157.213.
[34] Policy - Migration Regulations - Schedules - Sch2 RRV - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia (re-issue date 18/4/2017).

the Tribunal. For further discussion on the application of policy generally, see: Application of policy.

Discussion of these issues, as well as compelling and compassionate reasons for departure from Australia and the case law, is set out below.

Substantial ties which are of benefit to Australia

One of the alternative time of application requirements for a Subclass 155 visa is that the applicant has substantial personal, cultural, business or employment ties with Australia which are of benefit to Australia.[35] Departmental guidelines state that decision makers should consider the whole of the applicant's relevant ties with Australia and determine whether cumulatively an applicant's substantial ties are of benefit to Australia.[36] The decision maker should have regard to all the circumstances of the case in determining whether the person has substantial ties of the relevant kind to Australia.

Business ties

The alternative requirement that the applicant have 'substantial business … ties with Australia which are of benefit to Australia' is not further defined in the Regulations. Departmental guidelines suggest that an applicant needs to have substantial ownership interests in a business and be involved in the management of the business. This business should be an Australian business or a branch of a business which has connections with Australia.[37] However, the legislation does not require an applicant to have substantial ownership interests and be involved in the management of the business, and to this extent the Departmental guideline is inconsistent with the legislation and caution should be exercised before relying upon it.

Examples of what may be relevant in determining if an applicant has substantial business ties to Australia set out in the guidelines include:

- if the activities of the business have led to the creation of employment in Australia, or offshore, for Australian citizens or permanent residents. Evidence of downstream creation of employment in Australia should also be taken into consideration if there is a direct connection with the applicant's business activities
- whether it generates revenue in or for Australia
- the size of the business
- if the business activity enhances links with other countries

[35] cls 155.212(3), (3A)(a).
[36] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident Return Visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - About the 'substantial ties of benefit' provision (re-issue date 18/4/2017).
[37] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial business ties of benefit to Australia (re-issue date 18/4/2017).

- whether the activity has led to production of goods or services in Australia of merchantable quantity
- whether the business is actively trading at the time of application
- evidence of recent taxation assessment of the business in Australia
- evidence of exporting Australian knowledge and technology
- evidence of introducing new technology into Australia.[38]

The guidelines also indicate that, for an applicant whose relationship with a family business in Australia is by means of ownership of shares, the shares would need to be sufficient to generate a substantial income for the applicant or be such that the business could not operate without them.[39] However, this interpretation appears to go beyond the language of the Regulations and while regard may be had to the guidelines, construction of the relevant legislation and application to the facts should not be determined by them. While the benefits to Australia of such a business may be potential, that is, may not be realised until some point in the future, the ties to the business must exist at time of application. The legislation requires that at time of application the applicant 'has' substantial business ties with Australia. It will not suffice if the applicant indicates an intention to acquire a financial interest in such a business at some point in the future, or did not acquire such an interest, or have some other tie (e.g. an agreement to purchase) to business until after the visa application.

Departmental guidelines do not limit the matters that may be relevant in assessing the benefit to Australia of substantial business ties. Generally speaking, regard should be had to the applicant's individual circumstances and the terms of the relevant criterion.

Cultural ties

The alternative requirement that the applicant have 'cultural … ties with Australia which are of benefit to Australia' is also not further defined in the Regulations. Departmental guidelines suggest that an applicant involved in intellectual, artistic, sporting or religious pursuits which are not strictly of a business or employment nature may also have a cultural tie with Australia. Further, a substantial cultural tie may exist if the applicant's cultural pursuits are conducted at a professional level or with a degree of public recognition.[40] This latter example does however seem to go beyond the actual wording of the Regulations.

Examples of 'cultural ties' provided in Departmental guidelines include:

- a person who is accepted as a member of a cultural community within Australia who is actively involved in traditional activities;

[38] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial business ties of benefit to Australia (re-issue date 18/4/2017).
[39] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial business ties of benefit to Australia (re-issue date 18/4/2017).
[40] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial cultural ties of benefit to Australia (re-issue date 18/4/2017).

- a person involved in the Arts at a professional level;
- members of religious communities in Australia; or
- sports persons or professional support staff who are members of Australian sporting associations.[41]

However, consideration should be given to any benefit to Australia which has been put forward by the applicant and care should be taken not to raise the examples in the guidelines to the level of a legislative requirement.

As with business ties, the relevant cultural ties must exist at time of application, although the benefit to Australia could be achieved in the future.

Employment ties

Similar to the 'business' and 'cultural ties' requirement, there is no further explanation in the Regulations as to what is required to establish that a person has 'substantial …employment … ties with Australia which are of benefit to Australia'. The Departmental guidelines state that an applicant who is currently employed in Australia, or who has accepted a formal offer of employment in Australia where the employment offer is consistent with their qualifications and experience, may have a substantial employment tie of benefit to Australia.[42]

Departmental guidelines state that an applicant employed outside Australia may also be considered to have employment ties with Australia if employed by:

- an Australian organisation (e.g. a company, university, college, religious organisation);
- a Commonwealth, state, territory or local government organisation (including a government business enterprise or a statutory authority/agency);
- the Australian office of an international charity organisation; or
- as a representative of Australia in an international organisation to which the *International Organisations (Privileges and Immunities) Act 1963* (Cth) applies within the meaning of s 3(1) of that Act.[43]

In assessing whether an employment tie is substantial and of benefit to Australia, Departmental guidelines suggests that a relevant consideration is whether the applicant is employed in a permanent, temporary or contract capacity, and whether an agreed wage or salary is paid to undertake the work. Casual work would not normally be considered to be a substantial tie unless the applicant had been living in Australia for a significant period in the

[41] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial cultural ties of benefit to Australia (re-issue date 18/4/2017).
[42] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial employment ties of benefit to Australia (re-issue date 18/4/2017).
[43] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial employment ties of benefit to Australia (re-issue date 18/4/2017).

last two years.[44] Further, Departmental guidelines suggests that if the applicant has not commenced work but has accepted an employment offer, consideration should be given to whether the employment offer is consistent with the applicant's qualifications and experience. In such cases, the immediacy of the commencement of employment would be an important factor. Other indicators of an intention to reside in Australia should also be considered, including tenancy agreements or home ownership documentation and enrolment of children in school.[45]

While these considerations may provide assistance as to the kinds of matters which could be taken into account, some of these guidelines are narrower than the actual wording of the legislation, and should not be raised to the level of a legislative requirement. The totality of the circumstances of the applicant should be considered in the context of the terms of the legislation.

Note that while the benefit to Australia of the relevant employment need not be realised until some point in the future, the relevant employment tie must exist at the time of application.

Personal ties

The alternative requirement that the applicant have 'personal ties with Australia which are of benefit to Australia' is also not further explained in the Regulations. Departmental guidelines provide examples of circumstances that the Department considers may indicate personal ties with Australia, including where the applicant has:

- a history of long term residence in Australia prior to the last five years, particularly, if the applicant has spent their formative years in Australia, or has spent a significant amount of time in Australia since first being granted a permanent visa;
- been living outside Australia with an Australian citizen partner or, in the case of a minor child, Australian citizen parent, who has previously lived in Australia;
- been living in Australia for more than 12 months in the last five years, including as a temporary resident;
- one or more Australian citizen minor children living in Australia (including at boarding school) where no legal impediment to access exists;
- been living overseas with their family unit, including Australian partners and minor children, and the applicant provides evidence of imminent plans to return to Australia with their family to live;
- personal assets in Australia, for example a family home or a single investment property – although whether there was a benefit to Australia will depend on whether it is occupied, for example by a close family member or actively being rented; or

[44] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial employment ties of benefit to Australia (re-issue date 18/4/2017).

- close family members (that is, of a type for which family reunion might be available under the Family Stream of the Migration Program) who have substantial residence in Australia and are Australian permanent residents or Australian citizens.[46]

The guidelines recognise that a person may have substantial ties to more than one country and the Regulations do not require an applicant to have greater ties to Australia. Whether an applicant regards Australia as home and intends to reside permanently are identified as relevant considerations in assessing whether a personal tie is substantial.[47]

Departmental guidelines also suggest that substantial personal ties may be of benefit to Australia in the sense that the applicant is, or has been, a participating member of the Australian community and economy, and that their ties enrich the lives of individual Australian residents and citizens. Moreover, enabling a family unit to remain together can be considered of benefit to Australia if there is evidence of an imminent intention for the family unit to domicile themselves in Australia.[48]

Whilst such matters may, in an individual case, be relevant to determining whether substantial personal ties with Australia which are of benefit to Australia exist, the decision maker should always ensure that the focus of their enquiry is on the terms of the legislation.

Compelling reasons for absence from Australia

Where an applicant for the Resident Return visa does not meet the physical residence requirements of the Subclass 155 visa, in addition to having substantial ties of benefit to Australia, the applicant must also have not been absent from Australia for a continuous period of five years or more unless there are 'compelling reasons for the absence'.

Whether a circumstance is a compelling reason is a question of fact, having regard to the proper meaning of 'compelling'. There is no definition of the term 'compelling reasons' in the Regulations.

The Federal Court considered the meaning of 'compelling' in the context of a Resident Return visa in *Paduano v MIMIA.*[49] The Court held that the expression 'compelling reasons for the absence' referred to the applicant's absence and it was the *applicant* who must have been 'compelled' by the reasons for his absence. It is for the decision maker, therefore, to

[45] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial employment ties of benefit to Australia (re-issue date 18/4/2017).
[46] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial personal ties of benefit to Australia (re-issue date 18/4/2017).
[47] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial personal ties of benefit to Australia (re-issue date 18/4/2017). In *Chen v MICMSMA* [2020] FCCA 781 (Judge Driver, 3 April 2020) the delegate considered the number of days spent by the applicant in Australia comparted to days spent overseas and ultimately concluded that the applicant had shown no intention to reside in Australia permanently since the grant of his permanent visa. While Court at [64]-[65] found that the delegate had not impermissibly imported a mathematical exercise in that case, it also observed at [68] that it was important for decision makers to examine all of the material circumstances in a case and not simply focus upon a temporal issue of time spent in Australia, as a temporal issue is inevitable because an applicant's extended absence from Australia is the reason they need the return visa.
[48] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Substantial ties of benefit to Australia - Substantial personal ties of benefit to Australia (re-issue date 18/4/2017). Also in *Chen* the Court at [39] and [62]-[63] considered an applicant's personal ties to Australia that included permanent resident parents and an Australian citizen sibling, but found no error in a delegate's decision that gave those matters less weight because the applicant lived and worked overseas with his own immediate family, being his wife and child.
[49] *Paduano v MIMIA* (2005) 143 FCR 204.

make a judgment as to whether the reasons for the absence are forceful (and therefore convincing) by reference to some standard of reasonableness such as a reasonable person in the same circumstances as the applicant.[50]

The Court in *Paduano v MIMIA* further held that 'compelling' should not be read narrowly so as to exclude forceful reasons which raise moral necessity.[51] Equally, there is nothing which confines it to reasons incorporating an involuntary element, involving circumstances beyond the applicant's control.[52]

Relevantly, the Court stated:

> *The ordinary meaning of the adjective 'compelling' is not confined to the meanings used by the Tribunal when it construed the legislative expression. The legislative expression is wide and unqualified. 'Compelling' in its wide, ordinary meaning means 'forceful'. Forceful reasons for an absence may involve physical, legal or moral necessity or may, by reason of their forcefulness, be convincing. There is nothing in the express wording of the relevant subclause which indicates that 'compelling', where it occurs, should be read narrowly so as to exclude forceful reasons which raise moral necessity or which are convincing. Equally, there is nothing in the express wording, or the context, which indicates that 'compelling reasons for the absence' must be confined to reasons incorporating an involuntary element, involving circumstances beyond a person's control, involving physical or legal necessity or cognate with the reasons given as examples in MSI 356.*[53]

The Departmental guidelines provide that although a compelling reason that is beyond the applicant's control will carry greater weight, there is no legal requirement for the absence to be beyond the applicant's control for it to be considered compelling. Departmental guidelines suggests that it would generally be reasonable to expect that for there to have been an absence, the applicant had been residing in Australia prior to the period of absence, and there would need to be evidence that the applicant had plans to live in Australia.[54] This latter consideration appears to go beyond the legislative requirement.

Moreover, Departmental guidelines suggests that when assessing compelling reasons for absence, it is reasonable for consideration to be given to the balance between the compelling reason for absence as well as any overarching benefit to Australia.[55] It also suggests that decision makers should consider the reasons in the context of the amount of time the applicant previously lived in Australia and their intentions of returning to Australia to

[50] *Paduano v MIMIA* (2005) 143 FCR 204 at [41]. See also *Cirillo v MIBP* [2015] FCCA 2137. In *Cirillo*, the applicant claimed that he was compelled to remain in Italy for 17 years due to strong family and cultural ties and various events involving close family members. The Court held that the Tribunal erred by finding that *it* was not satisfied the reasons for the applicant's absence from Australia were compelling, when it was *the applicant* who must be compelled. Further, the Tribunal erred in not applying the relevant standard of reasonableness as set out in *Paduano*.
[51] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[52] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[53] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].
[54] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Absence for more than 5 years - Compelling reasons for absence (re-issue date 18/4/2017).
[55] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Absence for more than 5 years - Compelling reasons for absence (re-issue date 18/4/2017).

live.[56] However, the actual wording of the legislation does not require a balance between the benefit to Australia and the compelling reason for the absence. The benefit to Australia and the compelling reasons for the absence are two separate requirements in the Regulations. Further, there is no legislative requirement for an intention to return to live in Australia. While the Tribunal may have regard to the guidelines, it should take care not to apply them as inflexible rules of universal application, and should bring its consideration back to the terms of the legislative criterion.

Departmental guidelines provide the following examples of compelling reasons:[57]

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

In sum, the meaning of 'compelling' in cl 155.212 is wide and unqualified;[58] and care should be taken not to artificially exclude meanings which conflict with the interpretation suggested by Departmental guidelines. While factors such as whether circumstances were beyond an applicant's control may be relevant in determining whether there were compelling reasons for the absence, decision makers should avoid giving the impression that an involuntary element is a requirement for reasons to be 'compelling'.

For further discussion on the term 'compelling' see 'Compelling and/or Compassionate Circumstances/Reasons'.

[56] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Absence for more than 5 years - Compelling reasons for absence (re-issue date 18/4/2017).
[57] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB 155 - Five Year Resident Return - Absence for more than 5 years - Compelling reasons for absence (re-issue date 18/4/2017).
[58] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

Compelling and compassionate reasons (Subclass 157)

As noted above, it is a criterion for a Subclass 157 visa that the applicant has compelling and compassionate reasons for departing Australia, or for his or her last departure from Australia.[59] Where the applicant is outside Australia, it is also a criterion for the visa that they have compelling and compassionate reasons for the absence.[60] 'Compelling and compassionate reasons' is not defined in the Regulations and it is for the decision maker to give the term its ordinary meaning.

The requirement for compelling and compassionate reasons could be viewed as more onerous than compelling circumstances. Departmental guidelines state that this is a strong test of the reasons for a person's absence because the applicant must demonstrate both components and a reason which is considered 'compelling' will not necessarily also be a 'compassionate' reason for departure/absence. The examples given include:

- unexpected severe illness or death of a family member; or
- the applicant is involved in custody proceedings for their child.[61]

Further information on the interpretation of 'compelling and/or compassionate reasons' in relation to other visa criteria can be found in: Compelling and/or Compassionate Circumstances/Reasons.

Member of Family Unit

As noted above, a person can also be granted a Subclass 155 or 157 visa as a 'member of a family unit'.[62] As there are no secondary criteria, member of the family unit is included as one of the alternative primary criteria for the visa. There is no requirement for the family members to apply at the same time as the family head,[63] but their eligibility for the visa will be linked to their family head's satisfaction of the criteria for the visa grant,[64] or the visa held by the family head, unless they can meet the residence and substantial ties criteria in their own right. Generally the family head will be the person required to satisfy the physical residence or substantial ties criteria. Further information on the requirements of reg 1.12 is available in: Member of the family unit.

[59] cl 157.212(2).
[60] cl 157.213.
[61] Policy - Migration Regulations - Schedules - Sch2 RRV - Resident return visas - BB-157 - Three Month Resident Return - Lawful presence in Australia and reasons for absence - Compassionate and compelling (re-issue date 18/4/2017).
[62] cls 155.212(4), 157.212(3).
[63] As noted above, for visa applications made on or after 1 July 2012, an applicant who is included in the passport of another applicant for a Class BB visa can no longer validly make a combined application at the same time and place with the other applicant under sch 1 to the Regulations: see SLI 2012, No 106.
[64] For visa applications made on or after 1 July 2012, the member of the family unit applicant must lodge a separate application for a Return (Residence) (Cass BB) visa to that of their family head: see cls 155.212(4)(b) and 157.212(3)(b) as amended by SLI 2012, No 106.

Merits review

There are two potential bases under s 338 of the Act by which a decision to refuse a Return (Residence) (Class BB) visa may be reviewable by the Tribunal, depending on the physical location of the applicant and where the application was made. These are:

- s 338(2) – where the visa application is made onshore
- s 338(7A) – where the visa application is made offshore

Before the amendments made by the *Migration Amendment (2022 Measures No.1) Regulations 2022*, review applications lodged before 5 March 2022 could also be reviewable by the Tribunal under s 338(6) for visa applications lodged offshore. For any queries about applications that fall into this category, please contact MRD Legal Services.

Onshore applications – s 338(2)

A decision to refuse a Return (Residence) (Class BB) visa is reviewable under s 338(2) of the Act if:

- the applicant was physically present in Australia at the time the visa application was made; and
- the visa application was made in Australia.

In these circumstances, the visa applicant is the person with standing to apply for review.[65] The review application must be lodged within 21 days after the notification of the primary decision is received by the applicant.[66] The applicant must be in the migration zone at the time the review application is made.[67]

Offshore applications – s 338(7A)

A decision to refuse a visa is reviewable under s 338(7A) of the Act if the application was made when the visa applicant was outside the migration zone and the visa could be granted while the visa applicant is either in or outside the migration zone.

If s 338(7A) applies, the visa applicant has standing to apply for review and the application must be lodged within 21 days after the notification of the primary decision is received.[68] While the applicant must be outside Australia at the time of making the visa application, he or she must be in Australia both at the time of the primary decision is made and at the time the review application is lodged.[69]

[65] s 347(2)(a).
[66] reg 4.10(1)(a).
[67] s 347(3).
[68] s 347(2)(a); reg 4.10(1)(a).
[69] s 347(3A).

Combined applications

Note that applicants may only combine their review applications in limited circumstances. For visa applications made on or after 1 July 2012, applications may be combined where the visa applications have been combined in a way permitted by reg 2.08 (new born child); and reg 2.08A (additional family members).[70] For visa applications made prior to 1 July 2012, an applicant who is included in the passport of another Class BB visa applicant can validly combine their application at the same time and place under item 1128(3)(c) of Schedule 1 to the Regulations.[71]

Relevant case law

Judgment	Judgment summary
Cirillo v MIBP [2015] FCCA 2137	Summary
Paduano v MIMIA (2005) 143 FCR 204	Summary
Mohammed v MIBP [2014] FCCA 139	Summary
Chen v MICMSMA [2020] FCCA 781	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 1999 (No 4) (Cth)	SR 1999, No 68	
Migration Amendment Regulations 2001 (No 5) (Cth)	SR 2001, No 162	
Migration Amendment Regulations 2002 (No 2) (Cth)	SR 2002, No 86	
Migration Amendment Regulations 2004 (No 2) (Cth)	SR 2004, No 93	
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No: 1/2005

[70] reg 4.12.
[71] For visa applications made on or after 1 July 2012, item 1128(3)(c) was substituted by SLI 2012, No 106. This removed the ability of a person to lodge a combined application where they are included in the passport of another Class BB visa applicant. See Chapter 4 of the Procedural Law Guide – Review applications for further information on adding family members to the visa application.

Migration Amendment Regulations 2011 (No 2) (Cth)	SLI 2011, No 33	
Migration Legislation Amendment Regulation 2012 (No 3) (Cth)	SLI 2012, No 106	No: 5/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No: 10/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No: 03/2013
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No: 1/2015
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	No: 3/2016
Migration Legislation Amendment (2017 Measures No 4) Regulations 2017 (Cth) (NB: Disallowed (and repealed) from 17:56 5 December 2017)	F2017L01425	No: 5/2017
Migration Amendment (2022 Measures No 1) Regulations 2022 (Cth)	F2022L00255	

Available decision precedents

There is one relevant precedent specific to Subclass 155 visa refusal decisions:

- **Subclass 155 general** – this template is suitable for visa applications made on or after 1 July 1999. This is a generic template and does not focus on any single issue. There are two versions available, one for onshore applicants and one for offshore applicants.

A sample of the template can be viewed on the Intranet.

There is no decision template specific to the Subclass 157 visa class. It is recommended that Members use the Generic decision template in these cases.

Last updated/reviewed: 18 March 2022