# REFUGEE LAW PRINCIPLES

## Contents




Defending the rights of refugees.

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## Overview

This seminar proposes to provide a brief overview of the legal framework governing the processing of claims for protection in Australia.

Please note that this paper seeks only to address the post 16 December 2014 statutory definition of refugee.[1]

## Protection obligations

Australia has an obligation under the United Nations Refugee Convention of 1951 (as amended by the Refugee Protocol of 1967) (together, **the Refugee Convention**) not to return (*refoule*) a person who meets the definition of 'refugee'[2] to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[3]

Australia also has obligations under other international human rights instruments not to *refoule* persons to countries where they would be at risk of serious human rights abuses These instruments include: International Covenant on Civil and Political Rights (**ICCPR**); Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (**Second Optional Protocol**); and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**).

## Assessment of protection claims

*Statutory bars on visa applications*

The *Migration Act 1958* (**the Act**) contains a number of statutory bars that prevent persons in Australia from lodging valid visa applications and engaging a statutory decision-making process.[4] These bars include (but are not limited to):

- s.46A (unauthorised maritime arrival – arrived by boat without a visa);
- s.46B (transitory person – transferee from a regional processing country (Nauru/PNG));
- s.48A (previously been refused a protection visa and not departed Australia; and
- s.91P (dual nationals).

The Minister has a personal non-compellable discretion to lift these statutory bars if he or she finds that it would be in the public interest to do so.[5] For persons who can make a valid protection visa application, there are additional requirements for a valid application set out in Schedule 1 to the *Migration Regulations 1994* (**the Regulations**), including requirements concerning the form in which the visa

[1] Applicable to protection visa applications lodged on or after 16 December 2014. For guidance on the pre 16 December 2014 Refugee Convention definition of refugee, refer to *The Guide to Refugee Law* published by the Administrative Appeals Tribunal (Migration and Refugee Division) – available at: http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/guide-to-refugee-law [accessed 07/03/2016]
[2] Artcile 1A(2)
[3] Article 33(1)
[4] According statutory codes of procedure, access to merits review, and importantly, providing an exemption from the removal power in s.198 while that statutory process is on-foot.
[5] See: ss 46A(2), 46B(2), 48B(1) and 91Q.

application must be made.

*Statutory clients*

As a general rule, the way in which the Australian government considers whether a person is owed protection under Australian domestic law is through the claimant applying for a protection visa. By lodging a valid application for a protection visa the applicant engages a statutory process that governs the procedural and legal framework for that decision-making process.

Currently there are three categories of protection visa specified in the legislation:

- Permanent protection visa (PPV);
- Temporary protection visa (TPV); and
- Safe Haven Enterprise visa (SHEV).[6]

In order to meet the criteria for all of the above protection visas, among other things, the applicant must meet:

- The refugee criteria[7] OR complementary protection criteria[8];
- Identity requirements;
- Health requirements; and
- Character and national security criteria.

If, at the primary stage, the Department of Immigration and Border Protection (**the Department**) finds that the protection visa applicant does not meet one or more of the above criteria for the grant of the visa, a decision is made to refuse that application. Other than for Fast Track applicants[9], all protection visa applicants are generally eligible to apply to the Administrative Appeals Tribunal (Migration and Refugee Division) (**AAT**) for merits review of a decision to refuse to approve a protection visa on the basis that the applicant did not meet the refugee or complementary protection criteria.[10] Fast Track applicants found not to be an *excluded fast track review applicant*[11] are referred to the Immigration Assessment Authority (**the IAA**) for a limited form of merits review.[12]

*Non-statutory clients*

Where a person makes claims to engage Australia's protection obligations but is subject to a statutory bar on lodging a valid protection visa application,[13] and the Minister has not exercised his or her personal non-compellable discretion to permit them to apply for a protection visa[14], if the Department believes there is credible evidence to show the person may be at risk of serious human rights abuses in

[6] s.35A
[7] For s.36(2)(a)
[8] For s.36(2)(aa)
[9] Persons who arrived by boat without a valid visa between 13 August 2012 and 1 January 2014 and have been invited by the Minister to apply for a TPV or SHEV.
[10] See: Part 7 of the Act.
[11] As defined in s.5(1)
[12] See: Part 7AA of the Act.
[13] For example, if they had previously applied for a protection visa and that decision is finally determined.
[14] For example, under s.46A(2) (unauthorised maritime arrivals), s.46B(2) (transitory persons); s.48B(1) (previously provided for protection visa and not successful), s.91Q (dual nationals etc).

the destination country[15], under policy the Department may considers that person's protection claims through a non-statutory decision-making process.[16] Presently, these non-statutory protection assessment decision-making processes take the form of an International Treaties Obligations Assessment (**ITOA**).[17]

In the event the Department finds that the person is owed protection government policy is generally for the Minister to lift the statutory bar(s) and permit the person to apply for a protection visa and then assess the claimant through the statutory process. If they are found not to be owed protection through the non-statutory process then in the absence of a separate visa application (statutory processes) on-foot the Department would generally look to remove the person from Australia.[18] Currently there is no official merits review process for unsuccessful non-statutory clients.[19]

**Protection criteria**

When assessing the protection claims made by statutory and non-statutory clients decision-makers first assess whether the person meets the refugee criteria. If they are found not to be a refugee[20] then they are assessed against the complementary protection criteria.[21] In the event the person is found not to be a refugee or owed complementary protection then he or she can also meet the criteria for a protection visa in the event they are the member of the same family unit as a person who has been found to meet that criteria.[22]

*Refugee criteria*

On 15 December 2014 the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (**the RALC Act**) received The Royal Assent.[23] The RALC Act made extensive amendments to the statutory framework governing the processing of protection claims under the Act. Among other legislative reforms, were: a new codified definition of refugee[24]; new statutory process for the processing of protection claims for persons deemed to be *fast track applicants*[25], a new merits review statutory framework for selected fast track applicant (the IAA)[26], introduced Temporary Protection visas and Safe Haven Enterprise visas (two new categories of protection visa)[27] and provided for a new duty to remove persons from Australia irrespective of whether

[15] For example, due to a material and relevant change in that country (such as a civil war commenced) since his or her protection visa application was finally determined, or events occurred in Australia that may have given rise to a risk to that person (such as the Department's 'data breach')
[16] For example, see: *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (11 November 2010); and more recently *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125 (2 September 2015)
[17] Previously, many clients who arrived by boat without a visa prior to 2010 had their protection claims considered under the Department's non-statutory Refugee Status Assessment (RSA) process with non-statutory merits review provided by the Office of Independent Review (IMR).
[18] Under s.198. Note new removal duty in s.197C inserted by the RALC Act.
[19] But it is generally open to them to apply for judicial review of these decisions, see: *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (11 November 2010); and more recently *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125 (2 September 2015).
[20] s.36(2)(a)
[21] s.36(2)(aa)
[22] s.36(2)(b)
[23] Act no: 135 of 2014
[24] s.5H
[25] As defined in s.5(1) of the Act
[26] Part 7AA of the Act
[27] s.35A

it would be in breach of Australia's international *non-refoulement* obligations.[28]

The RALC Act provided for all protection visa applications lodged on or after 16 December 2014 to be subject to a new codified stand-alone statutory definition of refugee. Relevantly, the policy intent of this new codified definition of refugee was described in the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (**the RALC Bill**) as follows:

> *The Bill also removes most references to the Refugees Convention from the Migration Act and instead creates a new,* ***independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention****. It is not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention but rather to codify Australia's interpretation of these obligations within certain sections of the Migration Act. These amendments set out the criteria to be satisfied in order to meet the new statutory definition of a refugee. They also clarify those grounds which exclude a person from meeting the definition or which (where a person satisfies the definition of a refugee) render them ineligible for the grant of a Protection visa.*[29] [emphasis added]

For applications lodged prior to this date the previously applicable definition of refugee sourced from the Refugee Convention applies.[30] **Please note that this paper seeks only to address the post 16 December 2014 statutory definition of refugee.**[31]

*Statutory definition of refugee*

For applicants being considered against the post 16 December 2014 statutory definition of refugee, they will satisfy the refugee criterion for a protection visa if they meet the definition of 'refugee' in s.5H of the Act. This codified definition of the term 'refugee' borrows terms used in the Refugee Convention but is fundamentally different in scope.

Subsection 5(H)(1) provides that a person is a refugee if the person:

- in a case where the person has a nationality — is outside the country of his or her nationality and, owing to a well founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- in a case where the person does not have a nationality — is outside the country of his or her former habitual residence and owing to a well founded fear of persecution, is unable or unwilling to return to it.

The elements contained in the definition in s.5H are then further defined and qualified by the following:

- Section 5J - Meaning of 'well founded fear of persecution'
    - The person has a well founded fear of persecution if:

[28] s.197C
[29] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, p10.
[30] An applicant is found to meet the refugee criteria if they are "a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol", subject to a number of statutory qualifications (such as s.91R, s.36(3) etc).
[31] For guidance on the pre 16 December 2014 Refugee Convention definition of refugee, refer to *The Guide to Refugee Law* published by the Administrative Appeals Tribunal (Migration and Refugee Division) – available at: http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/guide-to-refugee-law [accessed 07/03/2016]

        - the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
        - there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned; and
        - the real chance of persecution relates to all areas of a receiving country.[32]
    - A person does not have a well founded fear of persecution if effective protection measures are available to the person in a receiving country.[33]
    - A person does not have a well founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification expressly refereed to (in s.5J(3);[34]
    - If a person fears persecution for one or more of the reasons mentioned above:
        - that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
        - the persecution must involve serious harm to the person; and
        - the persecution must involve systematic and discriminatory conduct.[35]
    - A non-exhaustive list of types of harm that are considered to be serious harm for this purpose.[36]
    - Any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister (delegate/review body) that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.[37]
- Section 5L – Membership of a particular social group other than family
    - A person is to be treated as a member of a particular social group (other than the person's family) if:
        - a characteristic is shared by each member of the group; and
        - the person shares, or is perceived as sharing, the characteristic; and
        - *any* of the following apply:
            - the characteristic is an innate or immutable characteristic;
            - the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
            - the characteristic distinguishes the group from society; and
        - the characteristic is not a fear of persecution.

[32] s.5J(1)
[33] s.5J(2)
[34] s.5J(3). This statutory qualification purports to codify a modified version of the test espoused by the High Court in *Appellant S395/2002 v MIMA* (2003) 216 CLR 473
[35] s.5J(4) (mirroring s.91R(1) for the pre 16 December 2014 Refugee Convention definition)
[36] s.5J(5) (mirroring s.91R(2) for the pre 16 December 2014 Refugee Convention definition)
[37] s.5J(6) (mirroring s.91R(3) for the pre 16 December 2014 Refugee Convention definition)

- Section 5K – Membership of a particular social group consisting of family
    - In determining whether the first person has a well founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:
        - disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
        - disregard any fear of persecution, or any persecution, that:
            - the first person has ever experienced; or
            - any other member or former member (whether alive or dead) of the family has ever experienced;

          where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the disregarded fear or persecution mentioned in the previous bullet point had never existed.[38]

- Section 5LA – Effective protection measures
    - Effective protection measures are available to the person in a receiving country if:
        - protection against persecution could be provided to the person by:
            - the relevant State; or
            - a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
        - the relevant State, party or organisation is willing and able to offer such protection.
    - A relevant State, party or organisation is taken to be able to offer protection against persecution to a person if:
        - the person can access the protection; and
        - the protection is durable; and
        - in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

Real chance

The statutory definition requires there to be a real chance that the persecution would occur before the applicant's fear can be considered well founded for s.5H.[39] Just as for the pre 16 December 2014 Refugee Convention definition of refugee, this 'real chance' requirement imposes an objective requirement that not only must the person hold a subjective fear of persecution, there must be a real and

[38] Mirroring s.91S for the Refugee Convention definition
[39] s.5J(1)(b)

appreciable risk that this fear would be realised now or in the reasonably foreseeable future in that country.

There has not yet been any judicial authority in relation to how the real chance element of s.5J is to be construed. However, it is reasonably clear from the Explanatory Memorandum to the RALC Bill, that Parliament intended that the same risk threshold be used to assess claims under the new statutory definition of refugee.[40]

With respect of the former Refugee Convention definition, Australian case law states that a real chance equates to a risk that is more than remote, being a risk that could not be described as being remote, far-fetched or fanciful.[41] The High Court and Federal Court have also consistently held that a fear of persecution may be well-founded for the purpose of the Convention even though persecution is unlikely to occur.[42] The courts have also repeatedly emphasised that a risk that is said to be 'low' or 'unlikely' *is* still consistent with a real chance/real risk.[43]

Case law further states that it is wrong to simply consider the individual risks of harm in isolation of the others and in determining whether there is a more than remote chance of persecution, all the relevant Convention risks of harm must be considered cumulatively.[44] An assessment of whether there is a real chance of a person suffering persecution the decision maker must have regard to the totality of the circumstances. This includes, having regard to the cumulative effect of any number of:

- individual risks of serious harm or persecution, even if they would amount to a less than remote risk on their own;[45] and

- types of harm that would not on their own amount to serious harm or persecution (i.e. consideration of *all* sources of harm – which may when considered *cumulatively* amount to serious harm, if not individually).[46]

The High Court has held that "[p]ast events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence"[47] and "[e]vidence that the applicant had been persecuted in the past would give powerful support to the conclusion that the claimed fear is well-founded".[48]

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[40] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.171 at [1180].
[41] *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429
[42] *i* (1989) 169 CLR 379 at 429; see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ; and *MILGEA v Che Guang Xiang* (unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994) where the Court stated at 17: "The delegate may have thought it was unlikely that [the applicant's] fears would be realised but the question to be answered was whether the prospect of persecution was so remote as to demonstrate the fear to be groundless."
[43] *Chan v MIEA* (1989) 169 CLR 379 at 429; see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ; and *MILGEA v Che Guang Xiang* (unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994) where the Court stated at [17]: "The delegate may have thought it was unlikely that [the applicant's] fears would be realised but the question to be answered was whether the prospect of persecution was so remote as to demonstrate the fear to be groundless".
[44] For example, see *WAFH v MIMIA* [2002] FCAFC 429 (Lee, Hill and Tamberlin JJ, 20 December 2002) at [50].
[45] *WAFH v MIMIA* [2002] FCAFC 429 (Lee, Hill and Tamberlin JJ, 20 December 2002) at [50].
[46] *MILGEA v Che Guang Xiang*, unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994 at [17].
[47] *MIEA v Guo* (1997) 191 CLR 559 at 574.
[48] *Abebe v The Commonwealth* (1999) 197 CLR 510 per Gleeson CJ and McHugh J at [82].

Reasonably foreseeable future

Again, in respect of the pre 16 December 2014 Refugee Convention definition of refugee, Australian case law states that the process of establishing whether an applicant's fear is well-founded will involve making findings of fact based on an assessment of the applicant's claims and relevant country information, speculation as to the reasonably foreseeable future.[49] The High Court has also consistently held that if a decision-maker deciding protection claims is not able to make a finding as to the 'real chance in the reasonably foreseeable future' with sufficient confidence, he or she must then have regard to the possibility that that finding is incorrect when determining whether an applicant has a well-founded fear (that is, when applying the real chance test).[50]

Serious harm

Subsection 5J(5) contains a *non-exhaustive* list of examples of kinds of harm that do amount to serious harm for the purposes of the Act. This list mirrors that for the Refugee Convention definition.[51]

Even if it is found that instances of those types of harm identified above would not individually amount to serious harm for the purposes of s.5J(4)(b), having regard to the non-exhaustive list of examples in s.5J(5), and those other kinds contemplated in case law, decision-makers are required to consider a claim that ongoing instances of lesser harm would nonetheless *cumulatively* amount to serious harm now or in the reasonably foreseeable future.[52]

Certain kinds of harm can affect some victims different than others depending on personal attributes such as age and mental and physical frailty. For example, a degree of physical exertion or distress may result in serious harm to someone who is elderly and physically more vulnerable to physical harm even if it would not in respect of a person who is young and physically healthy. In *SZBBP*[53] the Court held that in concluding that harm in the form of threats did not constitute serious harm, the Tribunal had erred in failing to take into account the applicant's age and frailty. Following this, in considering whether some of the categories of harm (such as threats of harm where the applicant would perceive them to be likely carried out, and cumulative ongoing significant harassment and discrimination), it is necessary for the decision-maker to have regard to the applicant's physical and mental vulnerabilities before considering whether it would amount to serious harm for s.5J(4)(b).

*Complementary protection*

As stated above, in the event a person is found not to meet the refugee criteria for s.36(2)(a) then the decision-maker must then consider whether the meet the complementary protection test specified in s.36(2)(aa). The complementary protection statutory framework was not amended by the RALC Act but presently there is a Bill before the Senate which proposes to closer align the complementary

[49] *Mok Gek Bouy v MILGEA* (1993) 47 FCR 1 at 66; see also *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Brennan CJ, Toohey, McHugh and Gummow JJ at 279 where the High Court referred with approval to the 'reasonably foreseeable future' test that the Tribunal had applied in *Chen Ru Mei v MIEA* (1995) 58 FCR 96. See Chand v MIMA [2001] FCA 1285 (Branson J, 29 August 2001) for an application of the 'reasonably foreseeable future' principle.
[50] See *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220.
[51] In s.91R(1)
[52] *SCAT v MIMIA* (2004) 76 ALD 625 at [23] and [25] where a majority of the Full Federal Court held that a claim of discrimination including highly offensive treatment was apparent and the Tribunal had a legal duty to consider it, including whether cumulatively such treatment might produce serious psychological harm.
[53] *v MIMIA* [2005] FMCA 5 (Driver FM, 18 January 2005), at [35]

protection criteria test with that for the refugee criteria.[54] The complementary protection statutory framework applies to all protection visa applications lodged on or after 24 March 2012 *and* all protection visa applications not finally determined as at that date.[55]

A person will be taken to be owed complementary under the Act if the following is met:

> *the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.*[56]

This composite test contains three components:

- the delegate/AAT/IAA must have substantial grounds for believing;
- that as a necessary and foreseeable consequence of the non-citizen being removed from Australia;
- there is a real risk that the non-citizen will suffer significant harm.

In practice, the determinative issue is whether the applicant meets the last limb, whether there is a real risk that he or she would suffer significant harm in the receiving country.

Real risk

The Full Federal Court held in *MIAC v SZQRB* [2013][57] that the 'real risk' test for s.36(2)(aa) imposes the same standard as the 'real chance' test for refugee claims for 36(2)(a).[58] Following this, the above-referred judicial authority concerning real chance is equally applicable for s.36(2)(aa).

As for refugee claims, in determining whether there is a real risk of significant harm decision-makers are also required to having regard to the cumulative effect of any number of individual risks of significant harm, even if they would amount to a less than remote risk on their own.[59]

Significant harm

The term 'significant harm' is exhaustively defined in s.36(2A) to include the following instances of harm:

- the non-citizen will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the non-citizen; or
- the non-citizen will be subjected to 'torture'[60]; or
- the non-citizen will be subjected to 'cruel or inhuman treatment or punishment'[61]; or

[54] See: Migration Amendment (Complementary Protection and Other Measures) Bill 2015
[55] s.2; Schedule 1, item 12, and Proclamation, *Migration Amendment (Complementary Protection) Act 2011* dated 21 March 2012 (FRLI F2012L00650) fixing date of commencement as 24 March 2012.
[56] s.36(2)(aa)
[57] FCAFC 33
[58] See [246], [297] and [342].
[59] *WAFH v MIMIA* [2002] FCAFC 429 (Lee, Hill and Tamberlin JJ, 20 December 2002) at [50].
[60] As defined in s.5(1)
[61] As defined in s.5(1)

- the non-citizen will be subjected to 'degrading treatment or punishment'[62].

As for serious harm and the refugee criteria, in considering whether a particular kind of harm would meet the definition of significant harm, it is necessary for the decision-maker to have regard to the following:

- the visa applicant's age and personal circumstances (such as physical and mental frailty);[63] and
- whether any such cumulative instances of harm may collectively meet the requisite threshold (even if not individually).[64]

Taken not to be a real risk

Subsection 36(2B) specifies three circumstances where there is taken not to be a real risk of significant harm for s.36(2)(aa):

- it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm;[65] or
- the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm;[66] or
- the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.[67]

The Federal Court has held that these factors must be contemplated at the same time as the risk assessment and are not subsequent considerations.[68]

Case law states that the legal test to be applied when considering whether "it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm", is the same as that which applied to the pre 16 December 2014 Refugee Convention definition of refugee.[69] This test requires the decision-maker to firstly consider whether there is an area of the country where, objectively, there would not be a real risk that the applicant will suffer significant harm. If it is found that there is such an area then they must consider whether it would be reasonable in the sense of practicable for the applicant to relocate there in all of his or her personal circumstances.[70]

The Federal Court has previously held that the legal test applied when determining if "the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm", requires the decision-maker to consider whether the level of protection offered by the receiving country would be sufficient to reduce the risk of significant harm

[62] As defined in s.5(1)
[63] See: *SZBBP v MIMIA* [2005] FMCA 5 (Driver FM, 18 January 2005) at [35]
[64] See: *SCAT v MIMIA* (2004) 76 ALD 625 at [23] and [25], and also s.23(b) of the *Acts Interpretation Act 1901*.
[65] s.36(2B)(a)
[66] s.36(2B)(b)
[67] s.36(2B)(c)
[68] *MIAC v MZYYL* (2012) 207 FCR 211 at [36], where the Court stated that the section must be read as a whole, and that the enquiry provided for in s.36(2)(aa) necessarily involves consideration of the matters referred to in s.36(2B).
[69] *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013) at [37], followed in *MZZAD v MIMAC* [2013] FCA 879 (DoddsStreeton J, 30 August 2013) at [65]-[66]
[70] *SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* (2007) 233 CLR 51.

to something less than a real one.[71]

In determining whether "the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally", the courts have found that the reference to a person facing a risk 'personally' refers to an individual facing a risk which is particular to him/her and which is not attributable to his or her membership of the population or shared by that population group in general.[72]

Modification of behaviour

The principle espoused by the High Court in *Appellant S395/2002*[73] that a person should not be expected to modify certain kinds of conduct to avoid persecution, in the context of the pre 16 December 2014 Refugee Convention definition of refugee, has been found by the courts to extend to complementary protection.[74]

*Sur place claims*

The assessment of protection claims for the refugee and complementary protection criteria is not limited to considering events occurring in the applicant's home country prior to their arrival in Australia. A risk of harm may arise as a result of actions or events which have occurred since his or her departure from the country. This may be due to changing circumstances in the receiving country, or the applicant's own actions, or those of a third party.

For the purposes of the refugee criteria, s.5J(6) provides that in determining whether a person has a well-founded fear of persecution, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the decision-maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.[75] There is no such equivalent provision or the complementary protection criteria.

*Receiving country*

For protection visa applications lodged on or after 16 December 2014 the term 'receiving country' is defined in s.5(1) for the purposes of the refugee and complementary protection criteria as:

- a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

*Third country protection*

The Act provides that Australia is taken not to have protection obligations in respect of a non-citizen

[71] *MIAC v MZYYL* (2012) 207 FCR 211 at [40].
[72] *SZTES v MIBP* [2014] FCCA 1765 at [23]-[24], citing *SZSRY v MIBP* [2013] FCCA 1284.
[73] *v MIMA* (2003) 216 CLR 473
[74] See: *MZAIV v MIBP* [2015] FCCA 2782 where Judge Harland, agreeing with the reasoning of Judge Driver in *SZSWB v MIBP* [2014] FCCA 765, held at [21] that the Tribunal erred in its assessment of the applicant against the complementary protection criteria by continuously telling him during the hearing that if he did not raise a particular issue he would not be at any risk and by not turning its mind to what he would do in the future.
[75] For pre-16 December 2014 applications subject to the Refugee Convention definition of refugee, see s.91R(3). In relation to this equivalent provision, the courts have stated that it must be the 'sole purpose' for the conduct (see: *SZIMY v MIAC* [2007] FCA 249).

"who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national".[76]

However, this does not apply in the following circumstances:

- The applicant has a well-founded fear of persecution in that third country[77]; or
- There is a real risk the applicant would suffer significant harm in that third country[78]; or
- The applicant has a well-founded fear that the third country would return them to another country where he or she would be persecuted[79] or suffer significant harm[80].

**Exclusion criteria**

The Act provides for a number of circumstances where a person is deemed not to meet the refugee or complementary protection criteria if they fail to meet specified criteria.

*Refugee exclusion*

For the post 16 December 2014 statutory definition of refugee, visa applicants are required to not only meet s.5H(1) (definition of refugee), but also s.5H(2) that excludes specified persons from otherwise meeting the definition in s.5H(1). These grounds for exclusion include where the Minister has serious reasons for considering that the applicant:

- has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- has committed a serious non-political crime before entering Australia; or
- has been guilty of acts contrary to the purposes and principles of the United Nations.[81]

*Complementary protection exclusion*

Similarly, s.36(2C) provides that a person will be taken not to satisfy the complementary protection criterion in s.36(2)(aa) if:

- the Minister has serious reasons for considering that the applicant:
    - has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations;
    - has committed a serious non-political crime before entering Australia; or
    - has been guilty of acts contrary to the purposes and principles of the United Nations; or
- the Minister considers, on reasonable grounds, that the non-citizen:

[76] s.36(3)
[77] s.36(4)(a)
[78] s.36(4)(b)
[79] s.36(5)
[80] s.36(5A)
[81] These grounds are substantively the same as those in Article 1F of the Refugee Convention.

- is a danger to Australia's security; or
- is a danger to the Australian community, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence).

**Identity criteria / mandatory refusal**

Section 91W of the Act provides the Minister (delegate) with a discretionary power to request documentary evidence of a protection visa applicant's identity, nationality or citizenship. This provision further provides that the Minister (delegate, IAA and AAT) *must* refuse to grant the protection visa if the applicant:

- refuses to comply with request; or
- in response to the request, produces a *bogus document*[82];

UNLESS the the Minister (delegate) is satisfied that the applicant has a *reasonable explanation* for refusing or failing to comply with the request or producing the bogus document; and either:

- produces documentary evidence of his or her identity, nationality or citizenship; or
- has taken reasonable steps to produce such evidence.[83]

Further, under s.91WA the Minister (delegate, AAT and IAA) *must* refuse to grant a protection visa if:

- the applicant provides[84] a *bogus document* as evidence of his or her identity, nationality or citizenship; or
- the Minister is satisfied that the applicant has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship, or has caused such documentary evidence to be destroyed or disposed of.

UNLESS the Minister (delegate, IAA and AAT) is satisfied that the applicant has a *reasonable explanation* for providing the bogus document or for the destruction or disposal of the documentary evidence; and either:

- provides documentary evidence of his or her identity, nationality or citizenship; or
- has taken reasonable steps to provide such evidence.[85]

**Character and national security criteria**

Despite being found to be owed protection on refugee or complementary protection grounds, in order to be eligible for the grant of a protection visa the applicant must also meet additional character and

[82] As defined in s.5(1). Please note s.91W(3) provides that a person is taken to produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.
[83] s.91W(3)
[84] s.91WA(3) provides that for the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.
[85] s.91WA(2)

national security criteria.[86]

**Section 499 Ministerial Directions**

Subsection 499(1) provides the Minister with a discretionary power to make written directions that apply to delegates, the AAT and the IAA.

The Minister has specified *Ministerial Direction No.56 - Consideration of Protection Visa applications* for this purpose. This direction provides that all delegates and the AAT tasked with deciding refugee and complementary protection claims must take account of:

- PAM3: Refugee and humanitarian – Refugee Law Guidelines;
- PAM3: Refugee and humanitarian – Complementary Protection Guidelines; and
- DFAT country information assessments expressly prepared for protection status determination purposes.

Note: s.499(2) provides that s.499(1) does not empower the Minister to give directions that would be inconsistent with the Act or the regulations.

**Judicial review**

For decisions made under statutory processes, such those by the Minister (delegates), AAT and the IAA, in order to be eligible for relief from a court it must be shown that the decision-maker committed a *jurisdictional error*. That is, it is not sufficient that the decision was merely affected by a legal error, it must be a legal error that led to it failing to exercise its jurisdiction under the Act.[87]

For non-statutory processes, such as for an ITOA, the decision-makers are not performing a statutory function so the error need only be a *legal error*, which is generally limited to a breach of common law procedural fairness.[88]

Note: for decisions made under a statutory process (such as for the AAT-MR), only some legal errors will lead to jurisdictional error and whether one does will depend on the facts of the matter.

[86] See: ss 36(1B) and 36(1C), and s.501
[87] For example, for AAT decisions relating to protection visas, the relevant provision would be s.414 of the Act (which provides that the AAT-MR *must* review a decision where a valid application for review of an Part 7-reviewable decision was made).
[88] See: *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (11 November 2010)

## Legislation

### 5H Meaning of *refugee*

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a ***refugee*** if the person:

(a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

(b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

(2) Subsection (1) does not apply if the Minister has serious reasons for considering that:

(a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(b) the person committed a serious non-political crime before entering Australia; or

(c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

### 5J Meaning of *well-founded fear of persecution*

(1) For the purposes of the application of this Act and the regulations to a particular person, the person has a ***well-founded fear of persecution*** if:

(a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and

(b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and

(c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.

(2) A person does not have a ***well-founded fear of persecution*** if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.

(3) A person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

(a) conflict with a characteristic that is fundamental to the person's identity or conscience; or

(b) conceal an innate or immutable characteristic of the person; or

(c) without limiting paragraph (a) or (b), require the person to do any of the following:

(i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;

(ii) conceal his or her true race, ethnicity, nationality or country of origin;

(iii) alter his or her political beliefs or conceal his or her true political beliefs;

(iv) conceal a physical, psychological or intellectual disability;

(v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;

(vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

(4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  (b) the persecution must involve serious harm to the person; and
  (c) the persecution must involve systematic and discriminatory conduct.

(5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
  (a) a threat to the person's life or liberty;
  (b) significant physical harassment of the person;
  (c) significant physical ill-treatment of the person;
  (d) significant economic hardship that threatens the person's capacity to subsist;
  (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(6) In determining whether the person has a ***well-founded fear of persecution*** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

**5K Membership of a particular social group consisting of family**

For the purposes of the application of this Act and the regulations to a particular person (the ***first person***), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:
  (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
  (b) disregard any fear of persecution, or any persecution, that:
    (i) the first person has ever experienced; or
    (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

  where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

**5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:
  (a) a characteristic is shared by each member of the group; and

(b) the person shares, or is perceived as sharing, the characteristic; and

(c) any of the following apply:

(i) the characteristic is an innate or immutable characteristic;

(ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;

(iii) the characteristic distinguishes the group from society; and

(d) the characteristic is not a fear of persecution.

**5LA Effective protection measures**

(1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:

(a) protection against persecution could be provided to the person by:

(i) the relevant State; or

(ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and

(b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.

(2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:

(a) the person can access the protection; and

(b) the protection is durable; and

(c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

[…]

## 35A Protection visas—classes of visas

(1) A ***protection visa*** is a visa of a class provided for by this section.

(2) There is a class of permanent visas to be known as permanent protection visas.

Note: These visas were classified by the *Migration Regulations 1994* as Protection (Class XA) visas when this section commenced.

(3) There is a class of temporary visas to be known as temporary protection visas.

Note: These visas were classified by the *Migration Regulations 1994* as Temporary Protection (Class XD) visas when this section commenced.

(3A) There is a class of temporary visas to be known as safe haven enterprise visas.

(3B) The purpose of safe haven enterprise visas is both to provide protection and to encourage enterprise through earning and learning while strengthening regional Australia.

Note: If a person satisfies the requirements for working, study and accessing social security prescribed for the purposes of paragraph 46A(1A)(c), section 46A will not bar the person from making a valid application for any of the onshore visas prescribed for the purposes of paragraph 46A(1A)(b). This does not include permanent protection visas.

(4) Regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas.

(5) A class of visas that was formerly provided for by subsection 36(1), as that subsection was in force before the commencement of this section, is also a class of protection visas for the purposes of this Act and the regulations.

Example: An example of a class of visas for subsection (5) is the class of visas formerly classified by the *Migration Regulations 1994* as Protection (Class AZ) visas. These visas can no longer be granted.

Note: This section commenced, and subsection 36(1) was repealed, on the commencement of Part 1 of Schedule 2 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

(6) The criteria for a class of protection visas are:

(a) the criteria set out in section 36; and

(b) any other relevant criteria prescribed by regulation for the purposes of section 31.

Note: See also Subdivision AL.

## 36 Protection visas—criteria provided for by this Act

(1A) An applicant for a protection visa must satisfy:

(a) both of the criteria in subsections (1B) and (1C); and

(b) at least one of the criteria in subsection (2).

(1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

(a) is a danger to Australia's security; or

(b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

Note: For paragraph (b), see section 5M.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa of the same class as that applied for by the applicant; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa of the same class as that applied for by the applicant.

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or
(c) the non-citizen will be subjected to torture; or
(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

*Ineligibility for grant of a protection visa*

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:
(a) the Minister has serious reasons for considering that:
(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
(ii) the non-citizen committed a serious non-political crime before entering Australia; or
(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or
(b) the Minister considers, on reasonable grounds, that:
(i) the non-citizen is a danger to Australia's security; or
(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

*Protection obligations*

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:
(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

[…]

## 46A Visa applications by unauthorised maritime arrivals

(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) either:

(i) is an unlawful non-citizen; or

(ii) holds a bridging visa or a temporary protection visa, or a temporary visa of a kind (however described) prescribed for the purposes of this subparagraph.

Note: Temporary protection visas are provided for by subsection 35A(3).

(1A) Subsection (1) does not apply in relation to an application for a visa if:

(a) either:

(i) the applicant holds a safe haven enterprise visa (see subsection 35A(3A)); or

(ii) the applicant is a lawful non-citizen who has ever held a safe haven enterprise visa; and

(b) the application is for a visa prescribed for the purposes of this paragraph; and

(c) the applicant satisfies any employment, educational or social security benefit requirements prescribed in relation to the safe haven enterprise visa for the purposes of this paragraph.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

(2A) A determination under subsection (2) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

(2B) The period specified in a determination may be different for different classes of unauthorised maritime arrivals.

(2C) The Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.

(3) The power under subsection (2) or (2C) may only be exercised by the Minister personally.

(4) If the Minister makes, varies or revokes a determination under this section, the Minister must cause to be laid before each House of the Parliament a statement that:
  (a) sets out the determination, the determination as varied or the instrument of revocation; and
  (b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:
  (a) the name of the unauthorised maritime arrival; or
  (b) any information that may identify the unauthorised maritime arrival; or
  (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
  (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) or (2C) in respect of any unauthorised maritime arrival whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

[…]

### 476 Jurisdiction of the Federal Circuit Court

(1) Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.

(2) The Federal Circuit Court has no jurisdiction in relation to the following decisions:
  (a) a primary decision;
  (b) a privative clause decision, or purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500;
  (c) a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C;
  (d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7).

(3) Nothing in this section affects any jurisdiction the Federal Circuit Court may have in relation to non-privative clause decisions under section 8 of the *Administrative Decisions (Judicial Review) Act 1977* or section 44AA of the *Administrative Appeals Tribunal Act 1975*.

(4) In this section:

***primary decision*** means a privative clause decision or purported privative clause decision:

(a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or

(b) that would have been so reviewable if an application for such review had been made within a specified period; or

(c) that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).

## 476A Limited jurisdiction of the Federal Court

(1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:

(a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or

(b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

Note: An appeal in relation to any of the following migration decisions cannot be made to the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975*:

(a) a privative clause decision;

(b) a purported privative clause decision;

(c) an AAT Act migration decision.

In addition, reference of a question of law arising in relation to a review of any of the proceedings mentioned in paragraph (a), (b) or (c) cannot be made by the Tribunal to the Federal Court under section 45 of the *Administrative Appeals Tribunal Act 1975*.

The only migration decisions in relation to which an appeal under section 44 of that Act, or a referral under section 45 of that Act, can be made to the Federal Court are non-privative clause decisions.

(2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.

(3) Despite section 24 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the Federal Court from:

(a) a judgment of the Federal Circuit Court that makes an order or refuses to make an order under subsection 477(2); or

(b) a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(4) Despite section 33 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the High Court from a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(5) In this section:

***judgment*** has the same meaning as in the *Federal Court of Australia Act 1976*.

## 476B Remittal by the High Court

(1) Subject to subsection (3), the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Circuit Court.

(2) The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the Federal Circuit Court unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476.

(3) The High Court may remit a matter, or part of a matter, that relates to a migration decision in relation to which the Federal Court has jurisdiction under paragraph 476A(1)(b) or (c) to that court.

(4) Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*.

## 477 Time limits on applications to the Federal Circuit Court

(1) An application to the Federal Circuit Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The Federal Circuit Court may, by order, extend that 35 day period as the Federal Circuit Court considers appropriate if:

(a) an application for that order has been made in writing to the Federal Circuit Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Circuit Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

***date of the migration decision*** means:

(a) in the case of a migration decision made under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*—the date of the written decision under that subsection; or

(b) in the case of a migration decision made by the Administrative Appeals Tribunal in the exercise of its powers under Part 5—the day the decision is taken to have been made under subsection 362C(3), 368(2) or 368D(1); or

(c) in the case of a migration decision made by the Administrative Appeals Tribunal in the exercise of its powers under Part 7—the day the decision is taken to have been made under subsection 426B(3), 430(2) or 430D(1); or

(ca) in the case of a migration decision made by the Immigration Assessment Authority—the date of the written statement under subsection 473EA(1); or

(d) in any other case—the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate.

(4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection (3).

(5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

### 477A Time limits on applications to the Federal Court

(1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
   (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
   (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

***date of the migration decision*** has the meaning given by subsection 477(3).

(4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection 477(3).

(5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

### 478 Persons who may make application

An application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary or Australian Border Force Commissioner, and:
   (a) if the migration decision concerned is made on review under Part 5 or 7 or section 500—the applicant in the review by the relevant Tribunal; or
   (aa) if the migration decision concerned is made on review under Part 7AA—the referred applicant in the review by the Immigration Assessment Authority; or
   (b) in any other case—the person who is the subject of the decision; or
   (c) in any case—a person prescribed by the regulations.

### 479 Parties to review

The parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary or Australian Border Force Commissioner, and:
   (a) if the migration decision concerned is made on review under Part 5 or 7 or section 500—the applicant in the review by the relevant Tribunal; or
   (aa) if the migration decision concerned is made on review under Part 7AA—the referred applicant in the review by the Immigration Assessment Authority; or
   (b) in any other case—the person who is the subject of the migration decision; or
   (c) in any case—a person prescribed by the regulations.

[…]

### 484 Exclusive jurisdiction of High Court, Federal Court and Federal Circuit Court

(1) Only the High Court, the Federal Court and the Federal Circuit Court have jurisdiction in relation to migration decisions.

(2) To avoid doubt, subsection (1) is not intended to confer jurisdiction on the High Court, the Federal Court or the Federal Circuit Court, but to exclude other courts from jurisdiction in relation to migration decisions.

(3) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the Supreme Court of the Northern Territory does not have jurisdiction in relation to migration decisions.

(4) To avoid doubt, jurisdiction in relation to migration decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

[…]

### 486A Time limit on applications to the High Court for judicial review

(1) An application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The High Court may, by order, extend that 35 day period as the High Court considers appropriate if:
   (a) an application for that order has been made in writing to the High Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
   (b) the High Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

***date of the migration decision*** has the meaning given by subsection 477(3).

(4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection 477(3).

(5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

[…]

### 499 Minister may give directions

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
   (a) the performance of those functions; or
   (b) the exercise of those powers.

(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

(4) Subsection (1) does not limit subsection 496(1A).

[…]

## 501 Refusal or cancellation of visa on character grounds

*Decision of Minister or delegate—natural justice applies*

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:
(a) the Minister reasonably suspects that the person does not pass the character test; and
(b) the person does not satisfy the Minister that the person passes the character test.

*Decision of Minister—natural justice does not apply*

(3) The Minister may:
(a) refuse to grant a visa to a person; or
(b) cancel a visa that has been granted to a person;
if:
(c) the Minister reasonably suspects that the person does not pass the character test; and
(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:
(a) the Minister is satisfied that the person does not pass the character test because of the operation of:
(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
(ii) paragraph (6)(e) (sexually based offences involving a child); and
(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(3B) Subsection (3A) does not limit subsections (2) and (3).

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

*Character test*

(6) For the purposes of this section, a person does not pass the ***character test*** if:
(a) the person has a substantial criminal record (as defined by subsection (7)); or
(aa) the person has been convicted of an offence that was committed:
(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

(ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

(i) an offence under one or more of sections 233A to 234A (people smuggling);

(ii) an offence of trafficking in persons;

(iii) 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;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that 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; or

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) 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; or

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

(i) the crime of genocide;

(ii) a crime against humanity;

(iii) a war crime;

(iv) a crime involving torture or slavery;

(v) a crime that is otherwise of serious international concern; or

(g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or

(h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the ***character test***.

*Substantial criminal record*

(7) For the purposes of the character test, 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; 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.

*Concurrent sentences*

(7A) For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

*Periodic detention*

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

*Residential schemes or programs*

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

*Pardons etc.*

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) both:

(i) the person has been pardoned in relation to the conviction concerned; and

(ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.

*Conduct amounting to harassment or molestation*

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

*Definitions*

(12) In this section:

***court*** includes a court martial or similar military tribunal.

***imprisonment*** includes any form of punitive detention in a facility or institution.

***sentence*** includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.