Administrative Review Tribunal

A Guide to Refugee Law in Australia

Chapter 1 – Protection visas

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Administrative Review Tribunal

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Chapter 1 – Protection visas

The statutory context

The Australian Constitution gives the Commonwealth Parliament power to make laws with respect to 'naturalisation and aliens'.[1] Pursuant to this power, the *Migration Act 1958* (Cth) (the Act), together with the *Migration Regulations 1994* (Cth) (the Regulations), regulates the entry into, and presence in, Australia of aliens, or non-citizens.[2]

Under s 29 of Act, the Minister may grant a non-citizen permission, known as a visa, to either travel to and enter Australia or remain in Australia. Section 30 of the Act provides that visas to remain in Australia may be permanent or temporary. A permanent visa allows the recipient to remain in Australia indefinitely.[3] A temporary visa allows the recipient to remain in Australia for a specified period, until a specified event occurs, or while the holder has a specified status.[4]

Section 31(1) of the Act provides that there are to be prescribed classes of visas. These are set out in Schedule 1 to the Regulations.[5] In addition, there are visa classes provided for in the Act, including protection visas.[6]

Section 31(3) of the Act provides that the Regulations may prescribe criteria for the grant of the various classes of visa. These criteria are set out in Schedule 2 to the Regulations, and are additional to those provided for in the Act (including relevantly, s 36).[7] Some criteria are common to a range of visa classes, for instance criteria relating to health, public interest and national interest. Other criteria are specific to particular visa classes.

Section 45 of the Act provides that subject to the Act and Regulations, a non-citizen who wants a visa must apply for a visa of a particular class. The requirements for a valid visa application are provided for in s 46 of the Act and reg 2.07 of the Regulations, and set out in Schedule 1 to the Regulations. The Minister, and the Tribunal on review, can only consider a valid visa application.[8]

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1 *Constitution* s 51(xix). Section 51 of the *Constitution* enumerates the matters with respect to which the Commonwealth Parliament may make laws 'for the peace, order and good government of the Commonwealth'.

2 The long title of the Act describes it as 'an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons'. Its object, as set out in s 4(1), is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. A majority of the High Court has held that 'non-citizens' are 'aliens' for the purposes of s 51(xix) of the Constitution: *Shaw v MIMA* (2003) 218 CLR 28, apart from Aboriginal Australians who are not within the reach of the 'aliens' power and not subject to those parts of the Act made upon reliance of that power: *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (*Love*). Note that as a result of the *Migration Amendment (Resolution of Status Visa Additional Cohort) Regulations 2023* (Cth) (F2023L01706), Aboriginal or Torres Strait Islanders persons affected by the judgment in *Love* who have accepted an offer of permanent stay in Australia made by the Australian Government may be granted a permanent Subclass 851 (Resolution of Status) visa.

3 Section 30(1).

4 Section 30(2).

5 Regulation 2.01. Schedule 1 is in 4 parts, dealing with permanent visas, temporary visas, bridging visas, and protection, refugee and humanitarian visas respectively. Schedule 1 also identifies subclasses for each visa class, and sets out the specific ways in which a non-citizen may apply for a visa of a particular class: regs 2.02, 2.07.

6 Section 31(2). As discussed below, the protection visa is also one of the prescribed visa classes.

7 Regulation 2.03. Schedule 2 also sets out the circumstances in which a visa may be granted and visa conditions, for the purposes of ss 40 and 41 of the Act respectively: regs 2.04 and 2.05.

8 Sections 47, 415(1).

If, after considering a valid visa application, the Minister is satisfied that the criteria for the visa and certain other matters are satisfied, the Minister is required to grant the visa; if not, the visa must be refused.[9] There are also provisions in the Act concerning the number of visas of specified classes that may be granted in each financial year.[10]

The protection visa scheme

Section 35A of the Act establishes the classes of visas known as protection visas, which include permanent Protection visas, Temporary Protection visas and Safe Haven Enterprise visas.[11] Part 4 of Schedule 1 to the Regulations - 'Protection, Refugee and Humanitarian visas' - prescribes three classes of protection visa – Protection Class XA, Temporary Protection Class XD and Safe Haven Enterprise Class XE.[12] Each of these visas currently contain one subclass each: 866 (Protection), 785 (Temporary Protection) and 790 (Safe Haven Enterprise) respectively.

The Temporary Protection visa regime prevents certain people from being eligible to apply for, or being granted, a permanent Protection visa, including those who are 'unauthorised maritime arrivals', or otherwise arrive in Australia without a visa, or are not immigration cleared on their last arrival in Australia, or already hold a Temporary Protection visa.[13] Such persons may, however, apply for a Safe Haven Enterprise visa. While also a temporary visa, the Safe Haven Enterprise visa provides a 'pathway' to obtaining eventual permanent residency.[14]

The protection visa is, in part, a mechanism by which Australia provides protection from situations which engage its *non-refoulement* obligations under the 1951 *Convention relating to the Status of Refugees*[15] ('Convention') and 1967 *Protocol relating to the Status of Refugees*[16] ('Protocol') as

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9 Section 65(1).

10 Section 85 of the Act includes a power for the Minister to determine the maximum number of visas of a specified class that may be granted in a specified financial year, but this does not apply to Temporary Protection visas: see Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) at [1449]–[1450]. Section 39A also requires the Minister to take all reasonably practicable measures to ensure the grant of at least a specified number of protection and humanitarian visas each financial year. The minimum number of visas for each financial year starting from 1 July 2015 to the year starting 1 July 2018 is specified in the Determination of Protection (Class XA) and Refugee Humanitarian (Class XB) Visas 2014 – IMMI 14/117 (22 December 2014).

11 Section 31 of the Act provides that there are to be prescribed classes of visas, as well as the classes provided for in sections of the Act, including ss 35A(2), (3) and (3A). The definition of protection visa in s 5(1) provides that 'protection visa' has the meaning given in s 35A. Before this time, protection visas were established in s 36(1) and by operation of s 35A(5), such classes continue to be a class of protection visas.

12 Items 1401, 1403 and 1404 of sch 1 to the Regulations. The Refugee and Humanitarian Class XB visa in Item 1402 is not a 'protection visa' as defined. The Class XA Subclass 866 visa is a permanent visa which permits the holder to remain in Australia indefinitely and to travel to and enter Australia for a period of 5 years from the date of grant: cl.866.511. The Class XD Subclass 785 visa is a temporary visa, permitting the holder to remain in Australia for a period of 3 years (or longer pending the determination of a subsequent application for a Temporary Protection visa or Resolution of Status visa): cl 785.511. The Class XE Subclass 790 visa is a temporary visa, permitting the holder to remain in Australia for a period of 5 years (or longer pending the determination of a subsequent application for a Safe Haven Enterprise visa or a Resolution of Status visa): cl 790.511. The purpose of the Subclass 790 visa is to provide protection and to encourage enterprise through earning and learning while strengthening regional Australia: s 35(3B).

13 Item 1401(3)(d) of sch 1 to the Regulations. A child born in Australia, to a parent who did not hold a visa but held one upon their last entry to Australia, is not prevented from applying for a Protection (Class XA) visa: item 1401(3A) of sch 1, as inserted by the *Migration Legislation Amendment (2017 Measures No 1) Regulations 2017* (Cth) (F2017L00437).

14 See s 46A(1A) and reg 2.06AAB which provide circumstances in which a holder or former holder of a Safe Haven Enterprise visa may validly make an application for certain prescribed visas.

15 *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Convention').

16 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

well as under other international treaties, namely, the *International Covenant on Civil and Political Rights*[17] ('ICCPR'), the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*[18] ('Second Optional Protocol'), the *Convention on the Rights of the Child*[19] ('CROC') and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[20] ('CAT').[21]

Australia acceded to the Convention in 1954 and the Protocol in 1973, thereby undertaking to apply their substantive provisions.[22] However, those provisions do not form part of Australian law unless and to the extent that they have been validly incorporated into municipal law by statute.[23] For protection visa applications made prior to 16 December 2014, s 36(2)(a) of the Act effectively draws into municipal law the Convention definition of 'refugee' contained in art 1. However, for applications made on or after that date, the Act does not refer to the Convention, but instead defines 'refugee' for the purpose of s 36(2)(a), drawing on concepts from the Convention definition.[24] Despite this 'de-linking' of protection visas from the Convention, the protection visa remains the principal mechanism by which Australia offers protection to persons who are 'refugees'.[25]

Similarly, Australia ratified the ICCPR in 1980,[26] the Second Optional Protocol in 1990,[27] the CAT in 1989[28] and the CROC in 1990.[29] Like the Convention, these instruments have not been formally incorporated into Australia's migration legislation. The ICCPR is referenced in the Act in relation to 'significant harm' for the purposes of the complementary protection criterion, but generally

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17 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

18 *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('Second Optional Protocol').

19 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC').

20 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

21 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 1.

22 Reservations by Australia to Art 28(1) and Art 32 were withdrawn in 1971 and 1967 respectively: UNTS, Convention Relating to the Status of Refugees, Geneva, 28 July 1951, note 14. See *NAGV v MIMIA* (2003) 130 FCR 46, Addendum. On 13 December 2001 the *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees* was adopted in Geneva at the Ministerial Meeting of the States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees. The Declaration was signed by all the member States to the Convention, including Australia, and reaffirms their 'commitment to implement [their] obligations under 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments': HCR/MMSP/2001/09, 16 January 2002.

23 *MIEA v Teoh* (1995) 183 CLR 273 at 286–7, 304, 298, 301. See also *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [34]–[35].

24 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth) (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. 'Refugee' is defined in s 5H, with related definitions and qualifications in ss 5(1) and 5J–5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s 2 and item 28 of sch 5 and Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation dated 16 April 2015 (F2015L00543).

25 See Explanatory Memorandum, Migration Reform Bill 1992 (Cth) at [26] and also *SAAP v MIMIA* (2005) 228 CLR 294 at [143].

26 The Covenant was signed for Australia on 18 December 1972, and ratified on 13 August 1980, subject to a number of reservations in relation to arts 2 and 50, 10, 14, 17, 19, 20, and 25: Australian Treaty Series 1980, No 23. See http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html.

27 2 October 1990.

28 Signed for Australia on 10 December 1985 and ratified on 8 August 1989: Australian Treaty Series 1989, No 21. See http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1989/21.html.

29 Signed for Australia on 22 August 1990 and ratified on 17 December 1990 subject to a reservation in respect of art 37: Australian Treaty Series 1991, No 4. See http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html.

speaking, its provisions have not been drawn into the Act. Section 36(2)(aa) is designed to establish 'complementary' grounds for protection for persons who are not 'refugees' under the Convention and Protocol but nevertheless are at risk of the most serious forms of human rights abuses.[30] Whilst it may assist Australia in discharging its *non-refoulement* obligations under the ICCPR and the other instruments listed above, it does not serve to directly import those obligations into the Act. The focus therefore is on the requirements of the migration legislation.

Requirements for a valid protection visa application

There are a number of statutory 'bars' that prevent a person from making a valid protection visa application, including those in s 46A (unauthorised maritime arrival) and s 46B (transitory person), s 48A (non-citizen has been refused a protection visa while in the migration zone), s 91E (Comprehensive Plan of Action and safe third countries), and s 91K (Temporary Safe Haven visa).[31] Non-citizens to whom those provisions apply are unable to apply for a protection visa.[32]

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 Regulations, including requirements concerning the form in which the visa application must be made. The statutory bars and these additional requirements are discussed below.

Unauthorised maritime arrivals and transitory persons

With limited exceptions, ss 46A and 46B prevent persons who are 'unauthorised maritime arrivals' and 'transitory persons' respectively from making a valid application for a visa, including a protection visa.[33] This bar applies to such persons who are in Australia who are either an unlawful non-citizen or hold a bridging visa, Temporary Protection visa or other prescribed temporary visa.[34]

A person is an 'unauthorised maritime arrival'[35] if the person 'entered Australia by sea' (i.e. not on an aircraft)[36] at an 'excised offshore place'[37] such as Christmas Island, at any time after the

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30 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 1.

31 See section 46(1)(d) and 46(1)(e), as amended and inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014). Prior to 24 June 2023, Subdivision AK of Division 3 of Part 2 (ss 91M–91Q) provided that non-citizens who were either nationals of two or more countries, or who had a right of residence in a third country, had previously continuously resided there and the Minister had made a declaration in relation to such countries, were unable to make a valid protection visa application. This Subdivision was repealed by Schedule 2 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) (No 26 of 2023).

32 Each of these bars can be lifted by the exercise of a personal, non-compellable ministerial discretion: ss 46A, 46B, 48B, 91F, and 91L, respectively. The statutory bars which prevent a valid protection visa application need to be distinguished from other statutory exclusions, which prevent a non-citizen who has made a valid visa application from being able to satisfy the criteria for the visa. Those exclusions are discussed later in this Chapter and also in Chapter 7 – Exclusion and cessation and Chapter 9 – Third country protection of this Guide.

33 Sections 46A(1), 46B(1).

34 Sections 46A(1)(b), 46B(1)(b). The prescribed temporary visas are Temporary Safe Haven (Class UJ), Temporary (Humanitarian Concern) (Class UO), Subclass 785 visas granted before 2 December 2013 and Safe Haven Enterprise visas: regs 2.11A and 2.11B.

35 Section 5AA(1).

36 Section 5AA(2) provides that a person 'entered Australia by sea' if the person entered the migration zone except on an aircraft that landed in the migration zone; or entered the migration zone as a result of being found on a ship detained under s 245F and being dealt with under s 245F(9); or entered the migration zone as a result of exercise of certain powers under the *Maritime Powers Act 2013* (Cth); or entered the migration zone after being rescued at sea.

37 'Excised offshore place' is defined in s 5(1) to mean Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, any prescribed external Territories or islands, and Australian sea or resource installations. The Coral Sea Islands Territory and all Queensland islands that are north of latitude 21°, all Western Australian islands north of latitude 23°, and all Northern Territory islands north of latitude 16° are prescribed in reg 5.15C of the Regulations.

excision time for that place,[38] or at any other place at any time on or after 1 June 2013; and became an unlawful non-citizen because of that entry; and is not an 'excluded maritime arrival'.[39] A child born to an 'unauthorised maritime arrival' in the migration zone or a regional processing country, and who is not an Australian citizen at birth, is also an 'unauthorised maritime arrival'.[40]

If a person arrived in Australia by sea at the Territory of Ashmore and Cartier Islands, they will not be an unauthorised maritime arrival due to this arrival method.[41] However, it appears that if such a person then entered Australia by sea (i.e. entered the migration zone not on an aircraft) by being taken to an 'excised offshore place' (such as Christmas Island) at any time after the excision time for that place, or any other place at any time on or after 1 June 2013,[42] they will be an unauthorised maritime arrival due to that method of entry.[43] Conversely, it appears that if a person who arrived at the Ashmore and Cartier Islands then entered Australia by sea by being taken to an 'excised offshore place' prior to the excision time for that place or by being taken to any other place prior to 1 June 2013, or were taken by aircraft to another place at any time, they will not be an unauthorised maritime arrival.[44]

A 'transitory person' is: a person taken to a place outside Australia under the repealed s 198A; a person who was taken to a regional processing country under s 198AD; a person taken to a place outside Australia under s 245F(9)(b) of the Act or under certain provisions of the *Maritime Powers Act 2013* (Cth); or a person who, while a non-citizen and during a particular period was transferred from the *MV Tampa* or *MV Aceng* to the *MV Manoora* and taken to another country, and disembarked in that other country.[45] A child born to a 'transitory person' in the migration zone or a regional processing country, and who is not an Australian citizen at birth, is also a 'transitory person'.[46]

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38 The excision time for an excised offshore place is defined in s 5(1) of the Act.

39 Section 5AA(3) defines a person who is an 'excluded maritime arrival' as a person who is a New Zealand citizen who holds and provides a New Zealand passport that is in force; or is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or is included in a prescribed class of persons. Regulation 1.15J prescribes classes of persons for s 5AA(3)(c) of the definition of 'excluded maritime arrival.' The classes prescribed are persons who enter Australia on or after 1 June 2013 and hold and produce an ETA-eligible passport, or at the time of entry into Australia are accompanied by another person who holds and produces an ETA-eligible passport in which they are included.

40 Sections 5AA(1A), 5AA(1AA).

41 *DBB16 v MIBP* (2018) 260 FCR 447 at [37]. The Court declared that the Minister had no power to appoint the Western Lagoon of Ashmore Island to be a port, as it is not a port as the term is used in s 5(5) of the Act. Section 5AA provides that a person becomes an 'unauthorised maritime arrival' if they entered Australia by sea, and to have entered Australia by sea requires a person to enter the migration zone which is defined in s 5(1) to include a 'port' but does not include sea within the limits of a State or Territory but not in a port. 'Port' is defined in s 5(1) to mean a 'proclaimed port' or 'proclaimed airport'. As the area described was not a 'port' within the meaning of the Act, the instrument made under s 5(5) declaring it as a 'proclaimed port' was not valid. This means that as DBB16 had not 'entered Australia by sea' as defined, he was not an unauthorised maritime arrival on the basis of entering Australia via the excised offshore place of Ashmore and Cartier Islands.

42 Section 5AA(1), as inserted by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) (No 35 of 2013), which commenced on 1 June 2013.

43 This is because a person who arrives at the Ashmore and Cartier Islands has not 'entered Australia by sea' and has not entered the migration zone, but a subsequent entrance by sea at a place which satisfies s 5AA(1)(a) would render a person an unauthorised maritime arrival. Note that *DBB16 v MIBP* (2018) 260 FCR 447 dealt with an applicant who arrived at the Western Lagoon within the Ashmore Reef on 7 November 2012 and was then taken to Darwin. Section 5AA(1)(a)(ii), which provides that a person is an unauthorised maritime arrival if they enter Australia at any other place (such as Darwin) at any time on or after the commencement of this section, was not applicable as this section commenced on 1 June 2013.

44 This is because these methods of entry do not fall within s 5AA(1)(a).

45 Section 5(1).

46 Section 5(1) definition paragraphs (d) and (e).

Although there is a general prohibition on persons who are unauthorised maritime arrivals and transitory persons making a valid visa application, the Minister retains a non-compellable discretion to determine that these restrictions do not apply to a person of either class, if he or she considers it is in the public interest.[47] This power may only be exercised by the Minister personally.[48] In addition, s 46A will not prevent an unauthorised maritime arrival from applying for a prescribed class of visa if that person holds or has held a Class XE Safe Haven Enterprise visa and satisfies prescribed employment, educational or social security requirements.[49]

Previous refusal of protection visa

Section 48A of the Act applies to a non-citizen who has made a valid application for a protection visa, where the grant of the visa has been refused.[50] It prevents the non-citizen from making a further application for a protection visa while in the migration zone; although this bar generally does not apply to a non-citizen who has been refused a protection visa, has departed Australia and then returned to the migration zone.[51]

A person in the migration zone whose protection visa has been cancelled is also not permitted to make a further application for a protection visa while in the migration zone.[52]

If the Minister thinks it is in the public interest to do so, he or she may determine that the restriction on applying for a visa in s 48A does not apply to a person.[53]

In addition to operating differently for applications made on behalf of another person at different points in time, s 48A also applies differently depending on when the further application for a protection visa was made.[54]

Further application made on or after 28 May 2014

For further protection visa applications made on or after 28 May 2014, s 48A(2) defines an 'application for a protection visa' to include any application for a visa of the class known as

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47 Sections 46A(2)–(7), 46B(2)–(7).

48 Sections 46A(3), 46B(3).

49 Section 46A(1A). The visas for which such a person may apply and the relevant requirements are specified in reg 2.06AAB and related legislative instruments (currently IMMI 15/070, 15/071, 15/072 and 18/081). The relevant requirements must be satisfied for a period of 42 months (whether or not continuous) while the applicant holds the visa: reg 2.06AAB(2). For visa applications made on or after 19 September 2020 the 42 months includes any period of time during a 'concession period' (as defined in reg 1.15N) relating to the Covid-19 pandemic that an applicant spent receiving social security benefits (as determined by the Minister), was unemployed or employed in an essential service (as specified by the Minister): reg 2.06AAB(4), as inserted by the *Migration Amendment (COVID-19 Concessions) Regulations 2020* (F2020L01181).

50 *SZGME v MIA*C (2008) 168 FCR 487 at [4], [7]–[14].

51 The bar will continue to apply in circumstances where removal of a person from the migration zone under s 198 has occurred, or has been attempted but not completed, and the person has returned under the circumstances specified in s 42(2A)(d), (da) or (e): ss 48A(1AB) and (1A), as amended by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (No 3 of 2019). In such circumstances that person is taken to have been continuously in the migration zone. See for example *SZVEB v MIBP* [2016] FCCA 1300 at [14], where the Court held the applicant was taken to have been continuously in the migration zone despite removal under s 198 as he was refused entry by the other country and as a consequence travelled back to Australia.

52 Section 48A(1B).

53 Section 48B. The power in s 48B is a personal, non-compellable discretion: ss 48B(2), (6).

54 The relevant provisions of the *Migration Amendment Act 2014* (Cth) (No 30 of 2014) were designed to overcome the effect of the judgment in *SZGIZ v MIAC* (2013) 212 FCR 235, referred to below: Explanatory Memorandum, Migration Amendment Bill 2013 (Cth). Section 48A, as amended by that Act, applies to prevent applicants from making a further protection visa application on or after 28 May 2014 (item 4 of sch 2 retains the effect of the amendment in item 3 of sch 2 in the event of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2013* (Cth) coming into effect at a later time). The amendments are prospective in the sense that they prevent further applications made after commencement of the relevant provisions: item 5 of sch 2.

protection visas, under the Act or Regulations in force at any time.[55] Section 48A(1C) clarifies that the bar to making a further application applies regardless of the grounds or criteria for applying (or for the visa grant, in the case of a cancelled visa), or whether the grounds or criteria existed earlier.[56]

Further application made before 28 May 2014

Where a further application for a protection visa was made before 28 May 2014, s 48A applies as it was before amendment by the *Migration Amendment Act 2014* (Cth). Before this amendment, s 48A(2) provided that an 'application for a protection visa' included 'an application for a visa, a criterion of which is mentioned in ss 36(2)(a), (aa), (b) or (c)', which respectively relate to being either a person in respect of whom Australia has protection obligations under the Convention, a person in respect of whom Australia has protection obligations under the 'complementary protection' criterion, or a member of the same family unit of either such person.

In *SZGIZ v MIAC*, the Full Federal Court held that the operation of the statutory bar in s 48A was confined to a further application which duplicated the same essential criterion for the grant of the visa as in the earlier unsuccessful application.[57] That is, it did not prevent a non-citizen who had made a valid application on the basis of the refugee criterion in s 36(2)(a) from making a further application on the basis of the complementary protection criterion in s 36(2)(aa) or the family membership criteria in s 36(2)(b) or (c) while he or she remained in the migration zone.[58] Similarly, it appears that a person who made an application only on the family membership criteria in s 36(2)(b) or (c) could make a further application with claims against the refugee or complementary protection criteria in their own right before 28 May 2014.[59] Where an applicant has already been assessed against the refugee criterion, neither the delegate nor the Tribunal has any jurisdiction to

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55 Section 48A(2)(aa) as amended by the *Migration Amendment Act 2014* (Cth) (No 30 of 2014).

56 In *MIBP v CTW17* (2019) 271 FCR 173, the Full Federal Court confirmed that the 28 May 2014 amendment to s 48A(2)(aa) had the effect that the statutory bar in s 48A applies to prevent all further onshore protection visa applications made on or after 28 May 2014 by a non-citizen who had previously been refused a protection visa while in the migration zone, regardless of whether the further application is based on a different criterion to the previous unsuccessful application, or a criterion or grounds that did not exist earlier: at [32], [37]–[39]; application for special leave to appeal dismissed: *CTW17 (By his litigation guardian FFV17) v MIBP* [2020] HCASL 120). In *AZABF v MIBP* (2015) 235 FCR 150, the Court confirmed the efficacy of the 28 May 2014 amendments to s 48A: per North ACJ, Collier and Flick JJ at [26]. In *SZVKH v MIBP* [2016] FCCA 1032, the applicant argued that the original application was invalid because of the introduction of the criterion in s 36(2)(aa) prior to that application being determined (see [3]). The Court followed *SZUZM v MIBP* [2015] FCCA 1202, on the effect of the amending provisions that introduced the CP criterion, holding the original application retained its character as a valid application and s 48A(1) prevented the further application (at [20]–[21]).

57 *SZGIZ v MIAC* (2013) 212 FCR 235 at [38].

58 *SZGIZ v MIAC* (2013) 212 FCR 235 at [43]–[47]. In *SZRSN v MIBP* [2014] FCA 527, the Federal Court appeared to accept that a further protection visa application was barred because it was not 'materially different' from the earlier application made on the same criteria. To the extent that this might suggest that a further application made in respect of the same criterion as an earlier application could be valid where there is a material difference in the claims, it is difficult to reconcile with the reasoning in *SZGIZ*.

59 In *EEJ16 v MIBP* [2019] FCCA 3359 a husband applicant first applied for protection on the basis that he met the refugee criterion (s 36(2)(a)) and his wife on the basis that she was a member of her husband's family unit (s 36(2)(b)). Following *SZGIZ*, the applicants applied again for protection visas on the basis that the husband satisfied the complementary protection criterion (s 36(2)(aa)) and the wife being a member of his family unit (s 36(2)(c)). As part of this application a claim was advanced by the husband that his wife would suffer discrimination as a Tamil woman in Malaysia. This claim was considered by the Tribunal under s 36(2)(aa) but not under s 36(2)(a). The Federal Circuit Court held that the Tribunal would have erred by failing to address the wife's discrimination claim under s 36(2)(a) if she had advanced the claim as an individual applicant under that criterion. However, as the husband had advanced the discrimination claim, it could only be assessed by the Tribunal under s 36(2)(aa) and therefore the Tribunal did not err (see [34]–[38]). This judgment should be treated with caution as the Court's reasoning as to why the discrimination claim could only be considered under s 36(2)(aa) but not s 36(2)(a) is unclear, and it appears contrary to established authority that any claims unarticulated by an applicant but which arise tolerably clearly from the material needs to be considered: see *NAVK v MIMA* [2004] FCA 1695 at [15].

consider a further application made on the basis of the complementary protection criterion against the refugee criterion.[60]

Where an application made on the basis of the refugee criterion was refused by the Department without considering complementary protection, the applicant could still apply again on the basis of the complementary protection criterion, even if the Tribunal considered the complementary protection criteria in affirming the refusal.[61] However, where the earlier application was made before s 36(2)(aa) was introduced, but the delegate's decision was made after that time and considered that criterion, s 48A prevents the applicant from making a further application against s 36(2)(aa).[62]

Previous application made on a person's behalf

Section 48A does not bar any 'further' protection visa application made prior to 25 September 2014 by a person who, as a question of fact, lacked capacity (e.g. because they were a child or had a mental impairment) to make an earlier purported application.[63]

For minors and those with a mental impairment who have had a previous protection visa application made on their behalf, if a 'further' application is made on or after 25 September 2014, s 48A(1AA) extends the operation of the s 48A bar to the making of further onshore protection visa applications for minors and those with a mental impairment.[64]

Comprehensive Plan of Action and safe third countries

Subdivision AI of Part 2 Division 3 of the Act applies to non-citizens who are covered by either the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva in 1989 (CPA) or an agreement between Australia and a country that is, at the relevant time, a safe third country in relation to the non-citizen seeking asylum, and prevents such non-citizens from making a valid protection visa application.[65] The Subdivision was enacted because the Parliament considered that 'certain non-citizens who are covered by the CPA or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa'.[66]

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60 *MIBP v SZVCH* (2016) 244 FCR 366 at [44], [97]; application for special leave to appeal dismissed: *SZVCH v MIBP* [2017] HCASL 78. See also *AMA15 v MIBP* (2015) 244 FCR 131 at [48].

61 In *SZRNJ v MIAC* [2014] FCCA 782, the Federal Circuit Court held that a further protection visa application based on complementary protection was valid, notwithstanding that the Tribunal had addressed complementary protection in its review of the earlier decision. The Court drew a distinction between the delegate's decision and the Tribunal's decision for the purposes of s 48A, finding that the Tribunal's decision was irrelevant to the question of when an application has been 'refused': at [22]–[23].

62 *SZTTI v MIBP* [2015] FCCA 236. Consistent with the reasoning in *SZRNJ,* the Court considered the earlier protection visa application needed to be understood, as at the date of the introduction of the complementary protection criterion, as including an application for the protection visa based on that criterion; the delegate was obliged to consider the earlier application under both criteria in s 36(2): at [42].

63 *SZVBN v MIBP* (2017) 254 FCR 393.

64 Section 48A was amended to apply to applications on behalf of another person by the *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106 of 2014) with effect from 25 September 2014. In *MIBP v CTW17* (2019) 271 FCR 173 (, the Full Federal Court held that the definition of 'application for a protection visa' in ss 48A(2)(aa) and 48(1C) were directed to clarifying and reinforcing the operation of s 48A as a bar on making subsequent protection visa applications irrespective of whether the subsequent application was based on a different criterion to that which formed the basis for the previous application, or a criterion or ground that did not exist earlier: at [32]; application for special leave to appeal dismissed: *CTW17 (By his litigation guardian FFV17) v MIBP* [2020] HCASL 120.

65 See generally pt 2 div 3 sub-div AI of the Act and reg 2.12A of the Regulations and schs 11 and 12 to the Regulations.

66 Section 91A.

A 'safe third country' in this context means, in relation to a person, a country prescribed by the Regulations as a safe third country in relation to the person or a class of persons of which the person is a member, and he/she has a prescribed connection with that country.[67] For these purposes, only one country has been prescribed as a 'safe third country' in relation to a specific class of persons, namely, the People's Republic of China (PRC) in relation to certain Vietnamese refugees or their families covered by an agreement between Australia and the PRC.[68]

These restrictions on making a valid protection visa application may be waived by the Minister personally. The Minister, if he or she considers it is in the public interest to do so, may give written notice to the person that the provisions preventing the making of an application do not apply.[69]

Temporary Safe Haven visa

Except in limited circumstances,[70] a non-citizen in Australia who holds a Temporary Safe Haven visa or who has not left Australia since ceasing to hold a Temporary Safe Haven visa cannot make a valid application for anything other than a Temporary Safe Haven visa.[71] If the Minister thinks it is in the public interest to do so, however, he or she may give such a person written notice than an application for a visa may be made by them within the specified period.[72] The power may only be exercised by the Minister personally and there is no duty to consider exercising the power, even if specifically requested to do so.[73]

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67 Section 91D. The Regulations may provide that a person has a prescribed connection with a country if the person is/was present in the county at a particular time or period; or the person has a right to enter and reside in the country: s 91D(2). There are additional requirements on the Minister if a country is prescribed as a safe third country to table information about the country before Parliament: s 91D(3). A regulation prescribing safe third countries ceases to be in force 2 years after it commences: s 91D(4).

68 Regulation 2.12A, as substituted by *Migration Amendment Regulations 2011* (No 5) (Cth) (SLI 2011, No 147), which commenced on 15 August 2011 and ceased to be in force after 14 August 2013: s 91D(4).

69 Section 91F. The waiver is for a limited specified period starting when the notice is given. The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: ss 91F(2) and (6).

70 Section 91J(2) provides that Subdivision AJ of Division 3 of Part 2 of the Act does not apply to an unauthorised maritime arrival or a transitory person. Section 91J(2) was inserted by item 13 of sch 3 to the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015) with effect from 18 April 2015. An unauthorised maritime arrival or transitory person is subject to the exclusory provisions in ss 46A and 46B.

71 Sections 91J(1), 91K. The Temporary Safe Haven (Class UJ) visa is provided for by reg 2.07AC of the Regulations, and item 1223B of sch 1 and pt 449 of sch 2 to the Regulations. Class UJ previously also included Subclass 448 but this was repealed by the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) from 22 March 2014. In addition, certain persons who have been offered, but not granted, a temporary stay in Australia for the purpose of an application for a Temporary Safe Haven (Class UJ) visa cannot be granted a protection visa: cl 866.227.

72 Section 91L. In *Plaintiff M79/2012 v MIAC* (2013) 252 CLR 336 the High Court confirmed that a person who has been validly granted a Temporary Safe Haven visa is barred by s 91K from making an application for a protection visa: at [42], [107]. The Court was considering the validity of the exercise of the Minister's discretionary power in s 195A(2) of the Act (to grant certain detainees a visa of a particular class if he or she thinks it is in the public interest to do so) to grant the plaintiff a Temporary Safe Haven visa for 7 days and a bridging visa for 6 months. This had the effect of engaging the bar in s 91K to prevent the plaintiff from applying for a protection visa, which the grant of the bridging visa would otherwise have enabled him to do. See also *Plaintiff S4/2014 v MIBP* (2014) 253 CLR 219, where the High Court held that s 195A did not permit the Minister to grant a Temporary Safe Haven visa to an unauthorised maritime arrival who was detained for the purposes of the Minister's consideration of the exercise of power under s 46A(2) to permit him to make a valid application for a protection visa. See also *MICMSMA v CBW20* (2021) 285 FCR 667, where the Full Federal Court upheld the Tribunal's finding that the grant of a Temporary Safe Haven visa to an applicant who had entered Australia by boat at the Territory of Ashmore and Cartier Islands was invalid, and therefore that the s 91K bar did not apply to him and his application for a Safe Haven Enterprise visa was valid. The Court held that the Minister's view that it was in the public interest to grant the Temporary Safe Haven visa proceeded on the assumption that the respondent was an unauthorised maritime arrival, which was an incorrect understanding of the law as a result of the judgment in *DBB16 v MIBP* (2018) 260 FCR 447 (see above n 41): at [57]–[61]; application for special leave to appeal dismissed: *MICMSMA v CBW20* [2021] HCATrans 217.

73 Sections 91L(2), 91L(6).

Application form and other Schedule 1 requirements

A visa application must be in the approved form, which must be completed in accordance with any directions on it.[74] Completion of an application in the approved form is an essential precondition to the exercise of the power to consider, and to grant or refuse, a visa.[75]

The approved form for a permanent Protections visa, Temporary Protection visa and Safe Haven Enterprise visa is specified in a legislative instrument.[76] Instructions in the forms vary for applicants making their own claims for protection and those who are simply claiming to be members of the same family unit as those who do. Substantial compliance with the form will suffice.[77] However, an application that does not answer the critical questions as to why the applicant claims protection does not substantially comply with the requirements and therefore is not a valid application and cannot be considered.[78]

In addition to the use of the correct form, Schedule 1 to the Regulations prescribes other matters for a valid protection visa application. These have been amended over time for the different classes and subclasses of protection visa, and relate to matters such as the applicable visa application charge, the location of the applicant and the location for making the visa application.

Limitations on who may make a valid application for the visa

Although in certain cases the same application form can be used to apply for either a permanent Protection visa, a Temporary Protection visa or a Safe Haven Enterprise visa, an application can only be valid for one of the three classes of visa.

Protection (Class XA)

A valid application for a Protection (Class XA) visa can only be made by a person who: held a visa and was immigration cleared on their last entry into Australia; is not an unauthorised maritime arrival; and does not and has never held certain kinds of visas (Temporary Protection, Safe Haven Enterprise, Temporary Safe Haven, Temporary (Humanitarian Concern)).[79] While a person who does not meet one of those requirements cannot validly apply for a permanent Protection visa, they may make a valid application for a Temporary Protection or Safe Haven Enterprise visa.

Temporary Protection (Class XD)

Following amendments to the Temporary Protection visa regime in February 2023, an application for a Temporary Protection (Class XD) visa can only be made by a person who first entered Australia on or after 14 February 2023, or as at that date had not made a valid application for a Temporary Protection visa or a Safe Haven Enterprise visa, or had made an application that had

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74 Section 46(1)(b), and regs 2.07(1)(a) and (3) of the Regulations.
75 See *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486 at [59].
76 Items 1401(1), 1403(1) and 1404(1) of sch 1 to the Regulations; Migration (Arrangements for Protection, Refugee and Humanitarian Visas) Instrument (LIN 20/169) 2020 (Cth) (compilation no. 3) (F2023C00259).
77 *Acts Interpretation Act 1901* (Cth) (Interpretation Act) s 25C. For discussion of s 25C in the context of Form 866 see *SZGME v MIAC* (2008) 168 FCR 487 at [75]–[94].
78 See for example *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486; *Yilmaz v MIMA* (2000) 100 FCR 495. An invalid, or 'inchoate' application may be cured, or completed, by providing the relevant information to the Department: see *Li and Kundu*, and *Yilmaz*. Furthermore, the information might be supplied to the Tribunal and the Department after the delegate's decision is made and during the review process: *SZGME v MIAC* (2008) 168 FCR 487 at [32], referring to *Yilmaz*; compare *Li and Kundu* at [82].
79 Item 1401(3)(d) of sch 1 to the Regulations.

been finally determined and was not subject to any ongoing judicial review proceedings.[80] The person must also be unable to make a valid application for a Protection (Class XA) visa and: holds or has held certain kinds of visas (Temporary Protection, Safe Haven Enterprise, Temporary Safe Haven, Temporary (Humanitarian Concern)), did not hold a visa on their last entry into Australia, is an unauthorised maritime arrival, or was not immigration cleared on last entry into Australia.[81]

A further requirement for making a visa application is that the applicant does not have an application for a Safe Haven Enterprise visa pending before the Department at the time of making the Temporary Protection visa application (although the applicant may have been refused or granted such a visa, or withdrawn an application).[82] In addition, the application cannot be validly made at the same time as an application for a Safe Haven Enterprise visa.[83] If an applicant purports to apply for both visas at the same time, the application for the Temporary Protection visa will be deemed invalid, whereas the application for the Safe Haven Enterprise visa will remain on foot.[84]

Safe Haven Enterprise (Class XE)

Together with the amendments to the Temporary Protection visa regime referred to above, the Safe Haven Enterprise visa was also amended in February 2023. Following these amendments, a valid visa application can only be made by, a person who first entered Australia on or after 14 February 2023, or as at that date had not made a valid application for a Temporary Protection visa or a Safe Haven Enterprise visa, or had made an application that had been finally determined and was not subject to any ongoing judicial review proceedings.[85] The person must also be unable to make a valid application for a Protection (Class XA) visa and: holds or has held certain kinds of visas (Temporary Protection, Safe Haven Enterprise, Temporary Safe Haven, Temporary (Humanitarian Concern)), did not hold a visa on their last entry into Australia, is an unauthorised maritime arrival, or was not immigration cleared on last entry into Australia.[86]

Further, an applicant who has an application for a Temporary Protection visa pending before the Department cannot validly apply for a Safe Haven Enterprise visa. The applicant may, however, apply for a Safe Haven Enterprise visa at the same time as making an application for a Temporary Protection visa, although in such a case the application for the Temporary Protection visa will be invalid.[87] A further distinguishing requirement for the Safe Haven Enterprise visa is that the applicant must include in the application an indication in writing that they, or a member of the same

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80 Item 1403(3)(ba) of sch 1 to the Regulations. As per reg 1.03, the 'TPV/SHEV transition day' is 14 February 2023, being the day sch 1 to the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (F2023L00099) commenced: see item 2(1).

81 Item 1403(3)(d) of sch 1 to the Regulations, as amended by *Migration Legislation Amendment (2017 Measures No 1) Regulations 2017* (F2017L00437).

82 Item 1403(3)(e) of sch 1 to the Regulations. Note that any further visa application remains subject to the s 48A bar on making a further application for a protection visa.

83 Item 1403(3)(f) of sch 1 to the Regulations.

84 Items 1403(3)(f) and 1404(4)(f) of sch 1 to the Regulations.

85 Item 1404(3)(ba) of sch 1 to the Regulations. As per reg 1.03, the 'TPV/SHEV transition day' is 14 February 2023, being the day sch 1 to the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (F2023L00099) commenced: see item 2(1).

86 Item 1404(3)(d) of sch 1 to the Regulations, as amended by *Migration Legislation Amendment (2017 Measures No 1) Regulations 2017* (F2017L00437).

87 Items 1403(3)(f) and 1403(4)(f) of sch 1 to the Regulations.

family unit as the applicant who is also an applicant for a Safe Haven Enterprise visa, intends to work or study while accessing minimum social security benefits in a specified regional area.[88]

Conversion of permanent to Temporary Protection visa applications

Regulation 2.08F of the Regulations operates to convert undetermined Class XA permanent Protection visa applications made before 16 December 2014 (pre-conversion applications) by prescribed applicants into applications for Class XD Temporary Protection visas.[89] The prescribed applicants are those who hold or have ever held certain kinds of visas (Temporary Protection, Temporary Safe Haven, Temporary (Humanitarian Concern)), did not hold a visa on last entry into Australia, are unauthorised maritime arrivals, or were not immigration cleared on last entry into Australia.[90]

Pre-conversion applications were converted on 16 December 2014 if the Minister had not made a decision on the application under s 65 of the Act before that day.[91] Where a decision was made before that date, the occurrence of any of the following events on or after 16 December 2014 will trigger conversion: the matter is remitted to the Minister by the Tribunal, a court orders the Minister to reconsider the application, a court declares or concludes that a decision of the Minister in relation to the pre-conversion application is invalid, void or of no effect, or a court quashes a decision of the Minister.[92]

Conversion of certain Temporary Protection and Safe Haven Enterprise visa applications to Resolution of Status visa applications

Regulation 2.08G of the Regulations operates to convert certain applications for Temporary Protection and Safe Haven Enterprise visas made before 14 February 2023[93] into an application for a Resolution of Status visa. According to the Explanatory Statement to the amending regulations that introduced reg 2.08G, the Resolution of Status visa is a vehicle for transitioning people who hold Temporary Protection or Safe Haven Enterprise visas, and their family members,

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88 Item 1404(3)(e). In accordance with item 1404(4), regional areas are currently specified by the Minister in IMMI 18/081 (F2018L01668).

89 Regulation 2.08F is made under s 45AA of the Act, which permits the making of 'conversion regulations' which deem an application for one type of visa to be an application for a different type of visa in certain circumstances. Regulation 2.08F and s 45AA were inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014). These changes were introduced to manage asylum seekers who have arrived in Australia illegally and ensure that those who are found to engage Australia's protection obligations are not granted permanent Protection visas: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) at 7.

90 Regulation 2.08F(2).

91 The Minister is also taken not to have made a decision in relation to a pre-conversion application in certain circumstances: reg 2.08F(4), inserted by *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015* (Cth) (SLI 2015, No 164).

92 Regulation 2.08F, inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014) and amended by *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015* (Cth) (SLI 2015, No 164). The amendment appears to overcome the effect of the High Court decision in *Plaintiff S297/2013 v MIBP* (2015) 255 CLR 231. In that judgment the Court held that reg 2.08F(3)(a) (which converts an application upon which the Minister had not made a decision as at 16 December 2014) did not apply where a decision was in fact made by 16 December 2014, regardless of whether it was infected by jurisdictional error. Furthermore, as the applicant had sought the writ of mandamus rather than certiorari, the delegate's decision was not quashed and the conversion regulation in reg 2.08F(3)(b)(iii), as it then was, which dealt expressly with the quashing of a legally infirm decision, was not triggered. Therefore, the application was not converted into one for a Temporary Protection visa.

93 As per reg 1.03, the 'TPV/SHEV transition day' is 14 February 2023, being the day sch 1 to the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (F2023L00099) commenced: see item 2(1).

to permanent residence if they satisfy health, national security and character criteria.[94] Following the passage of these amending regulations, certain groups of people who were intended to be able to have an existing application converted were inadvertently excluded from the operation of the relevant provisions, and further amending regulations were passed to rectify these issues.[95]

For applicants who held a Temporary Protection or Safe Haven Enterprise visa on or before 14 February 2023, their further application for either of these visas automatically converted to an application for a Resolution of Status visa on 14 February 2023 if the delegate had not made a decision in relation to the application before that date.[96] If the delegate had refused the visa before 14 February 2023, the application converts immediately after a 'review/court event occurs' on or after 14 February 2023.[97] A 'review/court event occurs' if: the matter is remitted to the Minister by the Tribunal or the Immigration Assessment Authority; a court orders the Minister to reconsider the application, declares or concludes that a decision of the Minister in relation to the pre-conversion application is invalid, void or of no effect, or quashes a decision of the Minister in relation to the pre-conversion application.[98]

For applicants who have not previously held a Temporary Protection or Safe Haven Enterprise visa, where the Minister had not made a decision on the application before 14 February 2023, the application converts when the Minister makes a record on or after that date that the applicant satisfies the criteria for the grant of a Temporary Protection or Safe Haven Enterprise visa.[99] Alternatively, where the Minister had made a decision to refuse the visa before 14 February 2023, and on or after that date a review/court event occurs, the application is converted when the Minister makes a record that the applicant satisfies the criteria for the grant of the Temporary Protection or Safe Haven Enterprise visa.[100]

Applicants claiming to be a member of the same family unit as another person who is owed protection obligations are also covered by the conversion regulations. For applicants who have not previously held a Temporary Protection or Safe Haven Enterprise visa, where the Minister had not made a decision on the application before 14 February 2023, the application converts when the Minister makes a record on or after that date the Minister is satisfied that: the applicant is a member of the same family unit of another person who satisfies s 36(2)(a) or (aa); and the applicant would satisfy the criteria for the grant of a Temporary Protection or Safe Haven Enterprise visa if it was assumed that the other person held a visa of that kind.[101] Alternatively, where the Minister had made a decision to refuse the visa before 14 February 2023, and on or after that date a review/court event occurs, the application converts when the Minister makes a record after the review/court event occurs that the Minister is satisfied that: the applicant is a member of the same family unit of another person who satisfies s 36(2)(a) or (aa); and the

94 As per the Explanatory Statement to F203L00099, p 11.
95 *Migration Amendment (Resolution of Status Visas) Regulations 2023* (F2023L01393). See Explanatory Statement, p 6.
96 Regulation 2.08G(1), table item 1.
97 Regulation 2.08G(1), table item 2.
98 Regulation 2.08G(1A).
99 Regulation 2.08G(1), table item 3.
100 Regulation 2.08G(1), table item 4.
101 Regulation 2.08G(1), table item 3A.

applicant would satisfy the criteria for the grant of a Temporary Protection or Safe Haven Enterprise visa if it was assumed that the other person held a visa of that kind.[102]

Criteria for grant of a protection visa

The criteria for the grant of a protection visa are set out in s 36 of the Act and Schedule 2 to the Regulations.[103] The s 36 criteria apply to the grant of all kinds of protection visas, while criteria for each subclass, including common criteria relating to health, public interest and national interest, and other criteria specific to each subclass, are prescribed in the Regulations.

Section 36 criteria

The core criteria for a protection visa are found in ss 36(1B), 36(1C) and 36(2) of the Act.[104] Section 36(2) provides that the decision maker must be satisfied that the applicant is a non-citizen in Australia and is:

- a person in respect of whom Australia has protection obligations as a refugee (s 36(2)(a), the 'refugee criterion');[105] or
- if not a person who meets the refugee criterion, a person in respect of whom Australia has protection obligations on complementary protection grounds (s 36(2)(aa), the 'complementary protection criterion');[106] or

a member of the same family unit as a person in respect of whom Australia has protection obligations and who holds a protection visa (ss 36(2)(b)[107] and (c)[108]).

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[102] Regulation 2.08G(1), table item 5.

[103] Note that where visa criteria are amended, the law that is applicable to any particular application will depend upon the terms of the amending legislation. Usually, but not always, the applicable criteria for the grant of a protection visa are those in force when the visa application was made.

[104] s 36(1B) was inserted by the *Migration Amendment Act 2014* (Cth) (No 30 of 2014) and s 36(1C) was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014).

[105] For applications made prior to 16 December 2014, the criterion refers to a person 'in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. Following amendments made by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014) applying to visa applications made on or after 16 December 2014, the criterion refers to a person 'in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee'.

[106] Introduced by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011). This alternative criterion applies to all protection visa applications made on or after 24 March 2012, as well as those made prior to, but not finally determined at that date: *Migration Amendment (Complementary Protection) Act 2012* (Cth), s 35. Note however that amendments introducing this criterion do not appear to apply to visa applications lodged prior to 1 October 2001, as the amendments are not referable to the form of s 36 at that time. The criterion was also introduced into pt 866 of the Regulations and is applicable to all visa applications made on or after 24 March 2012 as well as those made prior to, but not finally determined as at that date: reg 4: *Migration Legislation Amendment Regulations 2012* (Cth) (No 1) (SLI 2012, No 35).

[107] Section 36(2)(b) introduced on 1 October 2001 by the *Migration Legislation Amendment Act (No 6) 2001* (Cth) (No 131 of 2001) and applicable to visa applications made on or after that date (no transitional arrangements). Amended by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008* (Cth). The amendments to s 36(2)(b) apply to all applications for visas made on or after the commencement of the Part on 1 July 2009 and all applications made before that date but not decided before that date. Section 36(2)(b) is in similar terms to cl 866.221(3)(b) of sch 2 to the Regulations. Both s 36(2)(b)(ii) and cl 866.221(3)(b) require that the visa must already be held by the relevant refugee member of the family at the time the Minister or delegate makes their decision in respect of the family member: *MZXPK v MIAC* [2008] FMCA 1273 at [39].

[108] Section 36(2)(c) was introduced by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011) and applies to all protection visa applications made on or after 24 March 2012, as well as those made prior to, but not finally determined at that date: *Migration Amendment (Complementary Protection) Act 2011* (Cth), s 35. As with s 36(2)(aa), its operation appears limited to visa applications made on or after 1 October 2001 (see above).

The concept of 'protection obligations' in both ss 36(2)(a) and (aa) is qualified by subsections (3)–(6) which set out circumstances in which Australia is taken not to have protection obligations. These provisions call for consideration of whether an applicant has access to protection in any country apart from Australia.[109]

The complementary protection criterion in s 36(2)(aa) is further qualified by s 36(2C) which prevents a person satisfying the complementary protection criterion if there are serious reasons for considering that the person has committed certain serious crimes.

The applicant must also satisfy the additional criterion in s 36(1B) which requires 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 s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).[110] A further criterion in s 36(1C), applying only to applications made on or after 16 December 2014, requires that the applicant is not a person who the Minister considers, on reasonable grounds, to be a danger to Australia's security or to have been convicted of a particularly serious crime and be a danger to the community.[111]

Schedule 2 criteria

Parts 785, 790 and 866 of Schedule 2 to the Regulations set out the prescribed criteria for the Subclass 785 (Temporary Protection), Subclass 790 (Safe Haven Enterprise) and Subclass 866 (Protection) visas. These Parts also set out the circumstances applicable to the grant (including that the applicant must be in Australia at the time of visa grant),[112] details as to when the visas are in effect,[113] and visa conditions.[114]

Parts 785, 790 and 866 refer to primary criteria and secondary criteria, however, there are no secondary criteria: all applicants must satisfy the primary criteria.[115] These are divided into criteria to be satisfied at time of application[116] and those to be satisfied at time of decision.[117]

Criteria to be satisfied at time of application

The criteria to be satisfied at the time of application generally reflect the requirements in s 36(2). Specifically, they require that the applicant either:

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109 These provisions are discussed in Chapter 9 – Third country protection.
110 Sections 36(1A) and (1B) as amended by the *Migration Amendment Act 2014* (Cth) (No 30 of 2014), applying to visa applications made on or after 28 May 2014, or made before, but not finally determined as at that date.
111 Section 36(1C) was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014). This requirement is discussed further in Chapter 7 – Exclusion and cessation of this Guide.
112 Section 40 of the Act and reg 2.04 deal with the circumstances applicable to the grant of a visa. The visa applicant must be in Australia: cls 785.411, 790.411, 866.411.
113 Subclass 866 is a permanent visa (as defined in s 30(1) of the Act) permitting the visa holder to remain indefinitely in Australia, and to travel to and enter Australia for a period of 5 years from date of grant (cl 866.511). Subclasses 785 and 790 are temporary visas permitting the holder to remain in Australia for a period of 3 and 5 years respectively (or longer pending the outcome of a further application): cls 785.511, 790.511.
114 Section 41 of the Act and reg 2.05 of the Regulations deal with visa conditions.
115 Note to divs 785.2, 785.3, 790.2, 790.3, 866.2 and 866.3.
116 Subdivisions 785.21, 790.21 and 866.21. The 'time of application' criteria in sch 2 to the Regulations are to be distinguished from the requirements of a valid application as set out in sch 1. If a visa application is not valid, it cannot be considered: s 47(3) of the Act; if the 'time of application' criteria are not satisfied, the visa must be refused: s 65(1)(b) of the Act.
117 Subdivisions 785.22, 790.22 and 866.22.

- claims that a criterion mentioned in ss 36(2)(a) or (aa) of the Act is satisfied in relation to the applicant and makes specific claims as to why that criterion is satisfied; or
- claims to be a member of the same family unit as a person:
  - to whom the above applies; and
  - who is an applicant for the same subclass of protection visa.[118]

Criteria to be satisfied at time of decision

In addition to protection criteria, there are a number of other requirements that must be met at the time of decision, including health, public interest and national interest criteria.[119]

Protection criteria

The principal 'time of decision' criteria are that the Minister is satisfied that:

- a criterion mentioned in ss 36(2)(a) or (aa) of the Act is satisfied in relation to the applicant;[120] or
- the applicant is a 'member of the same family unit' as an applicant mentioned above (in subclause (2)) and that applicant has been granted a protection visa of the same class.[121]

An applicant who is found not to meet one of the alternative criteria must be assessed against the others. In considering these criteria, the decision maker is not limited to considering the basis on which the claims were made in the protection visa application. Thus, a person originally claiming the visa on the basis of family membership may nevertheless, in light of subsequent claims and evidence, meet the alternative criterion at time of decision – that they are a person to whom Australia has protection obligations.

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[118] Clauses 785.211, 790.211 and 866.211. Clause 866.211 was amended from 16 December 2014 to remove references to the Convention and replace these with references to the criteria in s 36: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014).

[119] An additional criterion was previously in force that had the effect of preventing persons who entered Australia without a valid visa from being granted a permanent Protection visa. Clause 866.222, inserted by the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (SLI 2013, No 280), required that a Subclass 866 visa applicant held a visa that was in effect on their last entry into Australia, was not an unauthorised maritime arrival, and was immigration cleared on their last entry into Australia. It was disallowed by the Senate at 12.01 pm on 27 March 2014, with the effect that this criterion was repealed from that time: Commonwealth of Australia, *Parliamentary Debates*, Senate, 27 March 2014, p. 28, on motion by Senator Hanson-Young (see also ss 42(1) and 45(1) of the *Legislation Act 2003* (Cth)). A similar criterion was inserted by the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (Cth) (SLI 2013, No 234), but this was also repealed on disallowance of that regulation on 2 December 2013.

[120] Clauses 785.221(2), 790.221(2) and 866.221(2). Clause 866.211 was amended from 16 December 2014 to remove references to the Convention and replace these with references to the criteria in s 36: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014). The previous complementary protection criterion in cl 866.221(4) was first inserted by *Migration Legislation Amendment Regulations 2012* (No 1) (Cth) (SLI 2012, No 35), for all visa applications made on or after 24 March 2012 as well as those made prior to, but not finally determined as at that date. Unlike s 36(2)(aa) (see discussion at fn 106 above), the operation of cl 866.221(4) (or cl 866.211(2) from 16 December 2014) does not appear limited to visa applications made on or after 1 October 2001.

[121] Clauses 785.221(3), 790.221(3) and 866.221(3).

Health

The applicant must have undergone a medical examination[122] and, with exceptions, a chest x-ray examination.[123] If a Commonwealth Medical Officer considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements must have been made to place the applicant under the professional supervision of a health authority to undergo necessary treatment.[124]

Public interest

The applicant must satisfy public interest criteria 4001[125] and 4003A which is set out in Part 1 of Schedule 4 to the Regulations,[126] and applicants who were over the age of 18 at the time of application must satisfy public interest criterion 4019.[127]

Criterion 4001 is satisfied if the applicant satisfies the Minister that he or she passes the character test;[128] or the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate the applicant would fail to satisfy the Minister that he or she would pass the character test; or the Minister has decided not to refuse to grant a visa to the applicant despite reasonably suspecting that the applicant does not pass the character test; or the Minister has decided not to refuse to grant a visa to the applicant despite not being satisfied that the applicant passes the character test.[129]

Criterion 4003A[130] requires that the applicant not be determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.

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[122] Clauses 785.222, 790.222 and 866.223. The medical examination must be carried out by a 'relevant medical practitioner', i.e. a Medical Officer of the Commonwealth or an approved medical practitioner, or a medical practitioner employed by an approved organisation.

[123] Clauses 785.223, 790.223 and 866.224. The x-ray examination must be conducted by a medical practitioner who is qualified as a radiologist in Australia.

[124] Clauses 785.225, 790.225 and 866.224B. If a relevant medical officer who is not a Medical Officer of the Commonwealth considers that the applicant has such a disease or condition, he or she must refer any relevant test results and reports to a Medical Officer of the Commonwealth: cls 785.224, 790.224 and 866.224A.

[125] In *BAL19 v MHA* [2019] FCA 2189, the Court made *obiter* comments that cl 785.226(a) is invalid in respect of its prescription of 4001 as a criterion for a protection visa as it is broader than, and therefore inconsistent with, s 36(1C): at [86]. However, this position appears to be doubtful following the judgment of the Full Federal Court in *MICMSMA v BFW20; BGS20 v MICMSMA* (2020) 279 FCR 475, which held that on the (related) issue of whether the power in s 501(1) to refuse to grant a visa can apply to an application for a protection visa, *BAL19* was wrongly decided: at [8].

[126] Clauses 785.226(a), 790.226(a) and 866.225(a). See the definition of 'public interest criterion' in reg 1.03 of the Regulations. Clause 866.225 previously referred to criterion 4002, which required that the applicant was not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security, within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth). However, the High Court held that for the purpose of cl 866.225, criterion 4002 was *ultra vires* and was therefore invalid: *Plaintiff M47-2012 v Director General of Security* (2012) 251 CLR 1. A criterion along similar lines as criterion 4002, s 36(1B), was subsequently inserted into the Act by the *Migration Amendment Act 2014* (Cth) (No 30 of 2014), and criterion 4002 in cl 866.225 was repealed with effect from 16 December 2014.

[127] Clauses 785.226(b), 790.226(b) and 866.225(b). Clause 866.225(b) was introduced by *Migration Amendment Regulations 2007* (No 12) (Cth) (SLI 2007, No 314) sch 1, item [290]. The provisions apply to visa applications made on or after 15 October 2007, and certain applications deemed to be made after that date: reg 4.

[128] As defined in s 501(6).

[129] Protection visas are rarely refused under s 65(1)(b) of the Act for failure to satisfy this criterion. Decisions to refuse a visa for failure to pass the character test are usually made under s 501 'Refusal or cancellation of visa on character grounds'. Such decisions are reviewable by the General Division of the Administrative Appeals Tribunal: s 500.

[130] Item 4003A was introduced by *Migration Amendment Regulations 2006* (No 1) (Cth) (SLI 2006, No 10). As a criterion for protection visas it applies to visa applications made on or after 1 March 2006 and applications made, but not finally determined, before that date. Prior to 1 March 2006, the relevant criterion was item 4003 which referred to 'a person whose presence in Australia is, or would be,

Criterion 4019 requires that the applicant has signed what is known as a values statement.[131] However, if compelling circumstances exist, the Minister may decide that the applicant is not required to satisfy this provision.[132] Importantly for protection visa applicants, the relevant Explanatory Statement gives an example of a compelling circumstance as where Australia's international obligations are engaged.[133]

National interest

The criteria also require that the Minister is satisfied that the grant of the visa is in the national interest.[134]

Other criteria

There are additional criteria that relate to children born to non-citizen visa applicants after the visa application is made.[135] For permanent Protection visas, there are further criteria concerning offers of temporary or permanent stay and Resolution of Status (Class CD) visas.[136]

Visa conditions

A Subclass 785 visa holder will not be entitled to be granted a substantive visa, other than a protection visa, while he or she remains in Australia.[137] Holders of Subclass 785 and 790 visas must not enter a country by reference to which they were found to be a person to whom Australia

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prejudicial to relations between Australia and a foreign country'. Item 4003 was amended to refer to '…contrary to Australia's foreign policy interests' and at the same time removed as a criterion for a protection visa. The effect of substituting item 4003A for protection visa subclasses was to exclude refusal on grounds relating to Australia's foreign policy interests as this could adversely affect Australia's international legal obligations to persons to whom Australia may have protection or humanitarian obligations under international law.

131 Item 4019(1). Part 3 to sch 4 contains further provisions relating to values statements and the requirements for this criterion. It provides that the Minister must approve, in an instrument in writing, one or more values statements for the visa subclasses specified in the instrument, and sets out matters required to be included in such a statement.

132 Item 4019(2).

133 Explanatory Statement to SLI 2007, No 314, item [315]. Other examples mentioned are where an applicant is mentally or physically incapacitated.

134 Clauses 785.227, 790.227 and 866.226. This criterion does not permit the Minister to refuse the grant of a Protection (Class XA) visa solely on the ground that the application was made by an 'unauthorised maritime arrival' (where such a person has been allowed to apply for the visa), as the consequences that follow from this status are exhaustively prescribed by s 46A of the Act and cl 866.226 should not be construed as permitting additional consequences: *Plaintiff S297/2013 v MIBP* (2015) 255 CLR 231. In *ENT19 v MHA* (2021) 289 FCR 100 the Full Court considered a protection visa refused on the basis of the national interest criterion (in cl 790.277) for reasons related to the appellant's conviction for people smuggling. Relying on judicial authorities in the s 501 context, the Full Federal Court held that the legal and practical consequences of the decision, including any breach of Australia's international treaty obligations, must be taken into account in evaluating whether the grant of the visa is in the national interest. The Court found that in the particular circumstances of this case, the Minister erred as no reasonable decision-maker could lawfully assess whether it was in the national interest to grant the appellant a visa without considering the potential breach of Australia's non-refoulement obligations or the prospect of indefinite detention, which could put Australia in breach of its obligations under the ICCPR: at [1], [107]–[108], [138]. The Court also confirmed the difference between the broader concept of 'the national interest' and the assessment of whether the appellant is a danger to Australia's security under s 36(1C)(a): at [1], [123], [139]. Application for special leave to appeal dismissed: *MHA v ENT19* [2022] HCASL 94. Following the Full Federal Court's judgment, the Minister made a decision to refuse to grant ENT19 a visa personally on the basis that he did not satisfy cl 790.227. The applicant sought judicial review of the Minister's personal decision in the High Court's original jurisdiction, and, in *ENT19 v MHA* [2023] HCA 18, a majority of the Court quashed the Minister's decision. The majority held that the question of national interest cannot be determined solely on the basis of circumstances that fall within the discretionary 'character test' provisions in s 501, where the Minister has already decided not to exercise those discretionary powers, such that all other criteria for the protection visa are met. It found that it was inconsistent for the Minister to be satisfied PIC 4001 was met and to disavow reliance on s 501, but then conclude that the visa should be refused under s 65 because it was not in the national interest to grant the visa as the applicant had been convicted of people smuggling: at [100]–[106].

135 Clauses 785.228, 790.228, 866.230.

136 Clauses 866.227, 866.231, 866.232.

137 Clause 785.611 and condition 8503.

has protection obligations or were found to be a member of the family unit of such a visa holder unless approved by the Minister.[138] Such visa holders are also required to advise the Department within 14 days of changing their residential address.[139]

Subclass 866 is subject only to condition 8559, which imposes a restriction on the visa holder's return to the country by reference to which they were found to be owed protection obligations.[140]

Circumstances in which protection visa must be refused

Even if an applicant satisfies the substantive criteria for the grant of a protection visa, s 65 requires the Minister to refuse the visa if its grant is prevented by certain provisions in the Act.[141] Of these, three apply specifically to protection visas:

- s 91W – relating to requests for identity documents;
- s 91WA – relating to the provision of bogus identity documents or destruction of certain identity documents; and
- s 91WB – concerning applications for protection visas by members of the same family unit.

These provisions, discussed in further detail below, were introduced with effect from 18 April 2015.[142]

Identity, nationality or citizenship documentation

In certain circumstances, the Minister must refuse to grant a protection visa if an applicant does not provide evidence of their identity, nationality or citizenship, or provides bogus documents in this regard. There are two circumstances to which this applies. The first, covered by s 91W, relates to circumstances where an applicant has been expressly requested to provide such documentation, while the second, s 91WA, has a broader application.

A 'bogus document', relevant to both ss 91W and 91WA, is defined in s 5(1) of the Act as a document the Minister reasonably suspects is a document that:

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138 Clauses 785.611, 790.611 and condition 8570.

139 Clauses 785.611, 790.611 and condition 8565. Additional conditions apply for holders of Subclass 785 and 790 visas applied for and granted between 18 November 2017 and 17:56 on 5 December 2017. These require visa holders to: use the same name to identify themselves in all official Australian identity documents (condition 8304); not become involved in activities that endanger or threaten any individual, or activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community (condition 8303); and not engage in criminal conduct (condition 8564). These conditions were inserted by the *Migration Legislation Amendment (2017 Measures No 4) Regulations 2017* (Cth) (F2017L01425), which was disallowed by the Senate at 17:56 on 5 December 2017: Commonwealth of Australia, *Parliamentary Debates*, Senate, 5 December 2017, 87–89 and 92–97 on motion by Senator McKim.

140 Clause 866.611 of sch 2 and Condition 8559 of sch 8 to the *Migration Regulations 1994*. This condition applies only to protection visas granted on or after 3 June 2013: *Migration Amendment (Permanent Protection Visas) Regulation 2013* (Cth) (SLI 2013, No 234).

141 Sections 65(1)(a)(iii), (1)(b). It appears open for the Tribunal to consider the disqualifying provisions outlined below without first considering whether an applicant satisfies s 36(2)(a) or (aa): see *FRS17 v MIBP* [2022] FedCFamC2G 808 and *FRR17 v MIBP* [2022] FedCFamC2G 809: at [15]–[18]. Although these judgments considered the obligation for the Immigration Assessment Authority to conduct a review, the reasoning would also appear applicable to the ART. However, claims that an applicant faces a risk of harm may nonetheless be relevant to the reasonableness of an explanation given and, in those circumstances, would need to be considered – see discussion below. For further information about the Immigration Assessment Authority, see Chapter 12 – Merits review of protection related decisions of this Guide.

142 *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015), items 8–12 of sch 1 and (Migration Amendment (Protection and Other Measures) Commencement Proclamation 2015 dated 16 April 2015 (F2015L00541)).

- purports to have been, but was not, issued in respect of the person; or
- is counterfeit[143] 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.[144]

Non-compliance with a request to provide identity documents – s 91W

Section 91W(1) of the Act gives the Minister or an officer the power to request a protection visa applicant to produce documentary evidence of the applicant's identity, nationality or citizenship. If an applicant who has been given such a request refuses, fails to comply, or produces a bogus document in response, and does not have a reasonable explanation for doing so, then the Minister (or review body) must refuse to grant the visa.[145] However, this will apply only if the applicant was warned of that consequence at the time the request was made.[146]

There is an exception to the application of s 91W. The Minister will not be required to refuse the visa if satisfied, firstly, that the applicant has a reasonable explanation for refusing or failing to comply with the request or for producing a bogus document in response and, secondly, that the applicant has either produced the relevant evidence, or taken reasonable steps to do so.[147] A reasonable explanation for the provision of a bogus document connotes an explanation that is not fanciful, that is believable in the circumstances, which has sufficient rational connection to how and why the bogus document was provided, and which is accepted as genuine.[148]

Issues arising under s 91W need not be addressed separately and in advance of other issues relating to the substantive criteria for the visa. In fact, a decision maker may need to consider whether or not the applicant is at risk of harm if this is relevant to the reasonableness of any explanation given.[149]

Although the Tribunal on review can consider s 91W and would be bound to affirm a decision to refuse the visa if the circumstances of s 91W are made out, it does not appear that it was intended for the Tribunal itself to exercise the power to request documents.[150]

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143 In *FRS17 v MIBP* [2022] FedCFamC2G 808 and *FRR17 v MIBP* [2022] FedCFamC2G 809, the Court accepted the Minister's submission that the word 'counterfeit' should be given its ordinary meaning, which includes 'not genuine' and 'pretended' (as per the Macquarie Dictionary): at [9]–[10].

144 In *AIB16 v MIBP* (2017) 254 FCR 457 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].

145 Sections 91W(2)(a)–(c). In this context, 'produces a document' includes producing, giving, presenting or providing the document or causing the document to be produced, given, presented or provided: s 91W(4). While the language of s 91W does not suggest that an applicant will fail to comply with a request to produce 'documentary evidence' by producing a copy of an original document, a copy may need to be closely inspected to determine whether it is a 'bogus document'.

146 Section 91W(2)(d). Prior to amendment by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015), s 91W allowed the Minister to draw an inference unfavourable to the applicant's identity, nationality or citizenship in circumstances where the applicant failed to comply with such a request, but did not require the Minister to refuse the visa.

147 Section 91W(3).

148 *AIB16 v MIBP* (2017) 254 FCR 457 at [91]–[92]. In *FVJ18 v MHA* [2020] FCCA 2046 the Court confirmed that s 91W applies in the same way to both the provision of a bogus document and a failure to provide a document: at [55].

149 See *FVJ18 v MHA* [2020] FCCA 2046 where the Court commented that s 91W does not exist in isolation from an applicant's claims for protection, which may inform and give context to an explanation and, for that reason, decision-makers should tread carefully before exercising their powers under s 91W: at [80]. See also *AIB16 v MIBP* [2017] FCCA 231, upheld on appeal: *AIB16 v MIBP* (2017) 254 FCR 457. However, the explanation for providing a bogus document will not always be connected to the claims of persecution, such as where the applicant claims to be an innocent victim of fraud by a migration agent: *AIB16 v MIBP* (2017) 254 FCR 457 at [89]–[90].

150 Section 415(1) empowers the Tribunal to exercise the powers and discretions of the primary decision maker, but the references in s 91W to the decision maker 'granting the protection visa' (e.g. in s 91W(2)(d), which requires the applicant to be warned that the

Provision of bogus identity documents and the destruction of identity documents – s 91WA

The broader provision in s 91WA is not dependent upon a request for documentation having been made.[151] Rather, it will apply in any case where either:

- an applicant provides[152] a bogus document as evidence of their identity, nationality or citizenship; or
- the Minister is satisfied that an 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.[153]

As with s 91W, there is an exception in circumstances where the Minister (or the review body) 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 that the applicant has either provided evidence of identity, nationality or citizenship as relevant, or has taken reasonable steps to do so.[154] A reasonable explanation for the provision of a bogus document connotes an explanation that is not fanciful, that is believable in the circumstances, which has sufficient rational connection to how and why the bogus document was provided, and which has been accepted as genuine.[155]

In *BGM16 v MIBP*, the Full Federal Court held that s 91WA(1)(a) is directed to the provision of bogus documents during or in connection with an application for a protection visa.[156] In this case, the applicant's provision of a false passport upon entering Australia, and in two subsequent tourist visa applications and a student visa application did not engage the terms of s 91WA.[157] However, it is not clear from the judgment in *BGM16* whether s 91WA(1)(a) applies in the case of a bogus document provided in connection with a protection visa application made before 18 April 2015.[158]

Additionally, while s 91WA(1)(a) requires a connection to a protection visa application, it is not limited to those cases where the false information contained in the 'bogus document' is relied upon by an applicant. There is no requirement for a decision-maker to ascertain the manner in which a

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decision maker cannot grant the applicant the visa) suggest that the power to request the documents is one of the primary decision maker, as the Tribunal does not generally grant visas in any case.

151 In *BZE21 v MICMA* [2022] FedCFamC2G 723, the Court confirmed that s 91WA is not reliant upon, or referable to s 91W, and that as far as s 91WA is concerned, how the provision of documents comes about is not relevant: at [59].

152 A person provides a document if the person provides, gives or presents the document or causes it to be provided, given or presented: s 91WA(3).

153 Section 91WA(1).

154 Section 91WA(2). In considering whether an applicant has a reasonable explanation for providing a bogus document, the Tribunal is entitled to have regard to an applicant's intention, knowledge or capacity, but a 'reasonable explanation' is not limited to the innocent, unintended or accidental provision of such a document: *BES16 v MIBP* [2017] FCCA 820 at [80]–[81]; upheld on appeal in *BES16 v MIBP* [2018] FCA 78 at [53]–[55].

155 *AIB16 v MIBP* (2017) 254 FCR 457 at [91]–[92]. Although that judgment was considering s 91W, the reasoning appears to apply to the similar exception in s 91WA.

156 *BGM16 v MIBP* (2017) 252 FCR 97 at [81], [8]. The Court overturned the decision of the Federal Circuit Court in *BGM16 v MIBP* [2016] FCCA 2297, which previously held that there was no warrant for reading in a temporal limitation to s 91WA. In reaching its conclusion, the Federal Court emphasised that an individual's identity, nationality and citizenship are critical in the assessment of a protection visa application, that it would be a drastic result if s 91WA(1)(a) was construed to include the provision of a bogus document to anyone at any time, and that the use of the present tense 'provides' imposes a temporal limit: per Mortimer and Wigney JJ at [63], [70] and [81] (see similar comments by Siopis J at [4]).

157 *BGM16 v MIBP* (2017) 252 FCR 97 at [105].

158 Item 15(3) of sch 1 to the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth), stated that s 91WA applies to protection visa applications not finally determined at the time the provision commenced, but as 'provides' is expressed in the present tense and the section commenced on 18 April 2015, it is unclear whether it applies to bogus documents provided at an earlier time.

bogus document is given and relied upon, and which information in the document is false and which is accurate.[159]

Although the Court in *BGM16* was primarily addressing the construction of s 91WA(1)(a), aspects of its reasoning suggest that destruction or disposal of documents for the purposes of s 91WA(1)(b) must also have some connection to the making of a protection visa application.[160] However, the Federal Circuit Court has more recently rejected such an argument, finding that the temporal nexus between the protection visa application process and the destruction of identity documents is realistically non-existent because of the difference between s 91WA(1)(b), which is written in the past tense (i.e. 'destroyed', 'disposed' and 'caused') and s 91WA(1)(a), which is written in the present tense (i.e. 'provides'). The Court was of the view that any unfairness associated with this approach is removed, or at least ameliorated, by the provisions of s 91WA(2).[161] Nonetheless, given the Full Federal Court's observations in *BGM16* about the 'drastic result' of a broad interpretation of the scope of s 91WA(1)(b), this issue is likely to be the subject of further judicial consideration.[162]

Applications made by family members of protection visa holders

Section 91WB prevents the Minister from granting a protection visa to an applicant on the basis of the family unit criteria in ss 36(2)(b) or (c) if the applicant applies for the visa *after* their family member has already been granted a protection visa.

Persons in respect of whom Australia has protection obligations

As noted above, a protection visa may be granted on the basis that the non-citizen meets either the refugee (s 36(2)(a)) or complementary protection criteria (s 36(2)(aa)).

For the purpose of s 36(2)(a), the definition of 'refugee' that is applicable to a particular case depends upon the date of the protection visa application. For applications made prior to 16 December 2014, an applicant will meet the criterion in s 36(2)(a) 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'.

However, for applications made on or after 16 December 2014, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) amended s 36(2)(a) to refer instead to a person 'in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee'. Refugee is defined in s 5H of the Act.

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159 *BMK18 v MHA* [2019] FCA 189 at [41]–[42]; application for special leave to appeal dismissed: *BMK18 v MHA* [2019] HCASL 178.

160 In *BGM16 v MIBP* (2017) 252 FCR 97 at [70], Mortimer and Wigney JJ remarked in relation to s 91WA(1)(b) (similarly to s 91WA(1)(a)) that it would be a drastic consequence if the scope of the provision extended to the destruction or disposal of identity documents at any time, and anywhere.

161 *EDI18 v MHA* [2019] FCCA 631 at [29]–[30] and [38]–[39].

162 See also the Minister's Second Reading speech, referred to by the Court in *EDI18* (at [40]–[41]), which commented that the provision was intended to address the common practice of identity documents being destroyed or discarded by those seeking to enter Australia unlawfully or by people smugglers on their behalf: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 June 2014, 7279 (Scott Morrison, Minister for Immigration and Border Protection).

Unlike the pre-16 December 2014 criterion, which directly links the visa grant to the discharge of Australia's obligations under the Convention, the post 16 December 2014 definition of 'refugee', does not reference the Convention. However, that criterion is nonetheless intended to codify Australia's obligations under the Convention, rather than resile from them.[163] Similarly, although s 36(2)(aa) does not reference Australia's obligations under human rights instruments, it is intended to provide a mechanism to enhance the integrity of Australia's arrangements for meeting its *non-refoulement* obligations under the ICCPR, the Second Optional Protocol, the CAT, and CROC.[164]

Protection obligations as a refugee

The definitions used to determine whether Australia has protection obligations in respect of a person because they are a 'refugee', for the purpose of s 36(2)(a) of the Act, depend upon when the visa application was made.

Protection obligations under the Convention (pre-16 December 2014)

If an applicant who applied for a protection visa prior to 16 December 2014 is claiming to be a refugee, the decision maker must be satisfied, pursuant to s 36(2)(a) of the Act, that the applicant is a person 'in respect of whom Australia has protection obligations' under the Convention and Protocol.

Generally speaking, Australia has protection obligations to persons who satisfy the definition of 'refugee' in art 1 of the Convention. Therefore, the criterion in s 36(2)(a) of the Act calls for consideration of that definition. However, the concept of 'protection obligations' in s 36(2)(a) is qualified by s 36(3), which provides that Australia is taken not to have protection obligations in respect of a non-citizen in certain specified circumstances, and ss 91R, 91S and 91T, which explain or qualify some aspects of the Convention definition.

The Convention – Historical background and structure

Since early in the twentieth century the international community has assumed responsibility for protecting and assisting refugees. Prior to World War II a number of international agreements were drawn up for the benefit of refugees.[165] At present the primary international instruments dealing with refugee status are the 1951 Convention and the 1967 Protocol.[166]

The Convention was drafted in the aftermath of the Second World War and originally only permitted a person to be declared a refugee as a result of events occurring before 1 January 1951, and allowed for contracting states to limit its application to events in Europe.[167] However, the

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[163] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth) at 10.

[164] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 1.

[165] For example, the Arrangements of 12 May 1926 and 30 June 1928, the Conventions of 28 October 1933 and 10 February 1938, the protocol of 14 September 1939 and the Constitution of the International Refugee Organization, all of which established the status of 'statutory refugee' for certain individuals, which status is preserved in art 1A(1) of the 1951 Convention.

[166] There are also a number of regional instruments relating to refugees, including the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. In addition, the Statute of the Office of the UNHCR gives the UNHCR authority to provide protection to refugees falling under its competence: see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (UNHCR, re-issued February 2019) at [13]–[23].

[167] arts 1A, 1B.

Protocol removed the time and geographical limits in the Convention's definition of a refugee. The Convention and Protocol thus extend to all persons who are refugees because of events occurring at any time.

Chapter 1 of the Convention comprises the General Provisions, including the definition of the term 'refugee' (art 1), general obligations on the refugee (art 2), and obligations on Contracting States (arts 3–11). The remaining chapters relate mainly to matters such as the specific rights and obligations which should be accorded to refugees by the Contracting State[168] and more general administrative matters relating to the Convention itself.[169]

It should be noted that the Act does not incorporate into municipal law the Convention in its entirety. The phrase 'in respect of whom…Australia has protection obligations under [the Convention]' in s 36(2)(a) describes no more than a person who is a refugee within the meaning of art 1.[170]

It should also be noted that the Convention does not deal with the matter of granting asylum[171] or the mechanism by which this might occur. The manner of granting asylum to refugees under the Convention is a matter for each State's municipal laws.[172]

The Convention definition of 'refugee'

The term 'refugee' is defined in art 1 of the Convention. In particular, art 1A(2) of the Convention, read with the Protocol, defines a refugee as a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Other provisions of art 1 are also relevant to an assessment of whether a non-citizen is a person to whom Australia has protection obligations under the Convention and Protocol. In particular, there are provisions which deal with circumstances in which a person may cease to be a refugee[173] or be

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168 Including Chapter II - Juridical Status; Chapter III - Gainful Employment; and Chapter IV - Welfare.

169 Including Chapter V - Administrative Measures; Chapter VI - Executory & Transitory Provisions and Chapter VII - Final Clauses which includes clauses dealing with signature, ratification and accession, territorial application, reservations and entry into force.

170 *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [42]. The High Court has elsewhere emphasised that the Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chapters II, III and IV of the Convention, but rather focuses upon the definition in art 1: see for example, *MIMA v Khawar* (2002) 210 CLR 1 at [45]. Note that a line of Australian cases decided prior to the High Court's decision in *NAGV and NAGW* considered the criterion in s 36(2) by reference to art 33, often referred to as the principal obligation under the Convention: see for example *MIMA v Thiyagarajah* (1997) 80 FCR 543, *MIMA v Al-Sallal* (1999) 94 FCR 549, *NAGV v MIMIA* (2003) 130 FCR 46. However, the High Court's decision in *NAGV and NAGW* makes it clear that the approach taken in these cases is incorrect. These cases are briefly discussed in Chapter 9 – Third country protection of this Guide.

171 The grant of 'asylum' is mentioned briefly in the Preamble but nowhere else in the Convention.

172 *Applicant A v MIEA* (1997) 190 CLR 225 at 273, *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [137]; *MIMA v Khawar* (2002) 210 CLR 1 at [44].

173 Article 1C, see Chapter 7 – Exclusion and cessation of this Guide.

excluded from the benefits of refugee status.[174] Elements of this definition have been qualified by the Act.

The statutory qualifications: sections 91R, 91S, 91T

The question whether Australia has protection obligations to a person also involves consideration of ss 91R, 91S and 91T of the Act. These sections make detailed provision with respect to matters which would otherwise fall for consideration solely by reference to the terms of the Convention.

These qualifications are contained in Subdivision AL of Part 2 Division 3 of the Act, 'Other provisions about protection visas'. Section 91R qualifies the concept of persecution in art 1A(2); s 91S limits the application of the Convention ground 'membership of a particular social group' in art 1A(2) in relation to members of a family; and s 91T qualifies the concept of 'non-political crime' in art 1F(b) of the Convention.[175]

Protection obligations as a statutory refugee (post 16 December 2014)

For protection visa applications made on or after 16 December 2014, s 36(2)(a) refers to Australia having protection obligations to a person because they are a 'refugee'. The term 'refugee' is defined in s 5H(1) of the Act as follows:

> (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.

This definition, which draws on terms used in the Convention, was intended to codify art 1A(2) as interpreted in Australian case law.[176] The term 'well-founded fear of persecution' is further defined in the Act, incorporating other concepts derived from the Convention, including the requirement that the persecution be for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Just as art 1A(2) of the Convention is qualified by art 1F, s 5H(1) is qualified by s 5H(2), which provides s 5H(1) will not apply if the Minister has serious reasons for considering that an applicant has committed certain grave crimes.[177]

The statutory qualifications: sections 5J, 5K, 5L and 5LA

The definition of 'refugee' in s 5H(1) is part of a statutory framework relating to refugees based upon the Government's interpretation of terms and concepts derived from the Convention as they

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[174] Article 1D, E and F, see Chapter 7 – Exclusion and cessation of this Guide.
[175] Section 91R is discussed in Chapter 3 – Well-founded fear, Chapter 4 – Persecution and Chapter 5 – Refugee grounds and nexus of this Guide; s 91S in Chapter 5 – Refugee grounds and nexus; and s 91T in Chapter 7 – Exclusion and cessation.
[176] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth) at 169 [1167].
[177] Article 1F and s 5H(2) are discussed in Chapter 7 – Exclusion and cessation of this Guide.

apply in Australia.[178] The concept of 'well-founded fear of persecution', which forms part of the definition of 'refugee' is further defined in s 5J of the Act, incorporating some concepts arising from art 1A(2) as interpreted by the Australian courts, while qualifying others. Further definitions relevant to 'well-founded fear of persecution' are set out in ss 5K–LA.

Protection obligations on complementary protection grounds

A person in respect of whom Australia does not have protection obligations under the refugee criterion may nevertheless be granted a protection visa, if he or she satisfies the 'complementary protection' criterion in s 36(2)(aa).[179] Unlike the pre 16 December 2014 refugee criterion in s 36(2)(a), s 36(2)(aa) does not link directly to any international instrument although, as noted above, Australia's obligations under a number of such instruments provide the context for its introduction.

Section 36(2)(aa) requires that the non-citizen be a person in respect of whom the Minister is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk he or she will suffer significant harm.[180] A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment.[181] 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in the Act.[182]

However, there will not be a real risk that the person will suffer significant harm if any one of the conditions in s 36(2B) are established, relating to internal relocation, state protection and generalised risk of harm. Furthermore, a person will be ineligible for the grant of a protection visa on complementary protection grounds if he or she has committed certain crimes, or if he or she can access protection in a third country.

Importantly, s 36 requires that the complementary protection criterion can only be considered after the non-citizen has been assessed as not meeting the refugee criterion. This ensures that the primacy of the Convention is maintained.[183]

The statutory qualifications: sections 36(2B) and 36(2C)

The complementary protection criterion is subject to the qualification contained in s 36(2B).[184] That is, there is taken not to be a real risk of significant harm if the non-citizen could reasonably relocate to an area of the country where there would not be a real risk of such harm, or that protection could

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178 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth) at 169 [1165].
179 The criterion in s 36(2)(aa) can only be met once the decision maker is satisfied that the non-citizen is not a person in respect of whom Australia has protection obligations under the Convention in accordance with s 36(2)(a): *MIAC v SZQRB* (2013) 210 FCR 505 at [71].
180 Section 36(2)(aa) as inserted by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011).
181 Sections 5(1), 36(2A).
182 Section 5(1).
183 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 11.
184 The qualifications in s 36(2B) are discussed in Chapter 10 – Complementary protection of this Guide.

be obtained from an authority of the country such that there would not be a real risk of harm, or the risk is faced by the population of the country generally, and not the non-citizen personally.

In addition, under s 36(2C) of the Act, a person is ineligible for the grant of the visa if there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime; or there are reasonable grounds for considering the non-citizen would be a danger to Australia's security, or the Australian community (having been convicted by a final judgment of a particularly serious crime). These grounds of 'ineligibility' broadly mirror: the exclusion provision in art 1F of the Convention, which effectively serves to exclude persons from the definition of refugee; and art 33(2) of the Convention, which qualifies a signatory's obligation under the Convention in respect of persons who have committed certain crimes. These qualifications to the complementary protection criterion are designed to provide the same exclusions to the complementary protection regime as applies to those making a protection visa application claiming protection as a refugee,[185] although it should be noted that art 33 (or its s 36(1C) equivalent) is not part of the consideration under s 36(2)(a) of the Act. Article 33 arises in respect of persons who have already been recognised as refugees, whereas s 36(1C) is specified as a separate criterion for a protection visa.

Common statutory qualifications: section 36(3)

Section 36(3) qualifies the concept of 'protection obligations' in s 36(2)(a) (both pre and post 16 December 2014) and s 36(2)(aa) by setting out circumstances in which Australia is taken not to have protection obligations in respect of a non-citizen.

Section 36(3) is itself qualified by subsections (4), (5) and (5A). The effect of these provisions is that Australia is to be 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 any country other than Australia (the third country) unless:

- the non-citizen has a well-founded fear of being persecuted for a Convention reason in that country (s 36(4)(a));
- the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing him or herself of that right, there would be a real risk the non-citizen would suffer significant harm in that country (s 36(4)(b));
- the non-citizen has a well-founded fear the third country would return the non-citizen to another country where he or she would be persecuted for Convention reasons (s 36(5)); or
- the non-citizen has a well-founded fear that the third country will return him or her to a country where the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person availing themselves of the right to enter and reside in the third country, there would be a real risk of suffering significant harm in the other country (s 36(5A)).[186]

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[185] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at 14. Section 36(2C), arts 1F and 33(2) are discussed in Chapter 7 – Exclusion and cessation of this Guide.

[186] Note that although, in most cases where s 36(3) does not apply to prevent an applicant meeting s 36(2)(a) because of one of the

Section 36(3) was intended to deal with circumstances of attempts to choose Australia as a preferred place of asylum over other places where the applicant would have no well-founded fear, or 'forum shopping'[187] and is usually considered in relation to 'safe third countries'.[188]

Interpretative principles

The relevant principles of interpretation relating to protection visas were explained by the High Court in *MIMIA v QAAH of 2004*.[189] As the majority explained, the relevant law is found in the Act and Regulations, which are governed by Australian principles of statutory interpretation and in particular, the *Acts Interpretation Act 1901* (Cth) (Interpretation Act).[190]

Section 15AA of the Interpretation Act requires that in the interpretation of a provision of an Act, regard must be had to the purpose or object of the Act.[191] Section 15AB permits recourse to extrinsic materials to confirm that the meaning of the provision is the ordinary meaning conveyed by the text, taking into account its context in the Act and the purpose or object underlying the Act, or to determine its meaning where the provision is ambiguous or obscure or where the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or is unreasonable.[192] The materials that may be considered for these purposes include any relevant explanatory memorandum[193] or second reading speech[194] and any treaty or other international agreement referred to in the Act.[195]

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exceptions, it will be the 'refugee' exceptions in ss 36(4)(a) and (5) which will be applicable. However, there appears to be nothing to prevent s 36(3) not applying to an applicant who meets s 36(2)(a) on the basis of ss 36(4)(b) or (5A), which refer to a real risk of significant harm. That is, an applicant who has a well-founded fear of being persecuted for a Convention reason, but who has a right to enter and reside in a third country, may not be excluded from protection if, although having no well-founded fear in that country, has a real risk of suffering significant harm there. Similarly, an applicant who has a real risk of suffering significant harm, but who has a right to enter and reside in a third country, may not be excluded from protection if, although having no real risk of significant harm in that third country, has a well-founded fear of being persecuted there (with the effect that ss 36(4) or (5) are applicable).

187 Supplementary Explanatory Memorandum, Border Protection Legislation Amendment Bill 1999 (Cth).

188 The operation of s 36(3) in this context is considered in detail in Chapter 9 – Third country protection of this Guide. The Full Federal Court has held that s 36(3), as qualified by subsections (4) and (5), is not confined to 'third countries' as it expressly encompasses the country of nationality as among those in respect of which it can apply: *NBGM v MIMIA* (2006) 150 FCR 522 at [12], [44], [210]. See also per the Court at first instance: *NBGM V MIMIA* [2004] FCA 1373 at [55]–[59]. This aspect of the Full Court's reasons was not disturbed on appeal to the High Court: *NBGM v MIMA* (2006) 231 CLR 52. Somewhat surprisingly, and notwithstanding its emphasis on the primacy of the statutory provisions, the High Court did not consider the effect of s 36(3). However, in light of the High Court's interpretation of the Convention definition, the provisions of ss 36(3)–(5) would probably operate in the same way as art 1A(2) in relation to the country of flight and therefore need not be given separate consideration in relation to that country.

189 *MIMIA v QAAH of 2004* (2006) 231 CLR 1.

190 *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [34]. The discussion of interpretive principles in Kirby J's dissenting judgment in this case, and in *NBGM v MIMIA* (2006) 231 CLR 52 at [9]–[18], is broadly consistent with the majority; however the emphasis is somewhat different in some respects. See also *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [92] where Hayne and Heydon JJ stated that 'questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes.'

191 Section 15AA of the Interpretation Act provides: 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'.

192 Section 15AB(1) of the Interpretation Act is subject to subsection (3) which provides that in determining whether consideration should be given to extrinsic material, or the weight to be given to any such material, regard must be had, among other things, to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.

193 Interpretation Act s 15AB(2)(e).

194 Interpretation Act s 15AB(2)(f).

195 Interpretation Act s 15AB(2)(d).

Further, Australian courts will favour a construction of the Act and Regulations which conforms to Australia's obligations under an international treaty, or convention.[196]

Interpreting international instruments

Where a provision of a treaty is transposed into a statute to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it does in the treaty.[197] As already mentioned, s 36(2)(a) of the Act as applicable to applications made prior to 16 December 2014 focuses upon the definition of 'refugee' in art 1 of the Convention. Thus, s 15AB(2)(d) of the Interpretation Act permits the Convention to be considered for the purposes of interpreting s 36(2)(a) as it applies to such applications.[198] In a similar manner, to the limited extent that the Act references other international instruments (for example in the definitions of some of the forms of 'significant harm' for the purposes of the complementary protection criterion) similar principles apply.[199]

For applications made on or after 16 December 2014, the interpretation of 'refugee' in s 36(2)(a) should be made by reference to the relevant definitions in the Act rather than to the Convention. However, to the extent that those definitions replicate terms from the Convention, existing Australian case law interpreting such terms will remain applicable, subject to any legislative intention to the contrary.

Treaty interpretation

It is well established that the Convention should be interpreted in accordance with the principles of international treaty interpretation as set out in the *Vienna Convention on the Law of Treaties* ('Vienna Convention').[200] The general rule of interpretation of treaty provisions appears in art 31 of the Vienna Convention, paragraph 1 of which provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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196 *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [34]; see also *MIEA v Teoh* (1995) 183 CLR 273 at 287–8. However, an international treaty that does not form part of Australia's domestic law cannot operate as a direct source of individual rights and obligations. In particular, there is no requirement on the Tribunal to consider the best interests of an applicant child, as per the *Convention on the Rights of the Child*, in determining whether or not that applicant meets either the refugee or complementary protection criteria under the Act: *AXL17 v MIBP (No 2)* [2019] FCA 778 at [51]; and *FMN17 (by his litigation guardian) v MICMA* [2018] FCCA 3499 at [20] (this point was undisturbed on appeal: *FMN17 v MICMSMA* (2020) 274 FCR 612 at [41]).

197 *Applicant A v MIEA* (1997) 190 CLR 225 at [231].

198 Section 15AB(1) of the Interpretation Act provides that in the interpretation of a provision of an Act, 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 (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by its text taking into account its context in the Act and the purpose or object underlying the Act; or (b) to determine the meaning of the provision when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or is unreasonable. Section 15AB(2)(d) provides that the material that may be considered includes any treaty or other international agreement that is referred to in the Act.

199 This would only appear to be applicable to provisions which directly reference international instruments, such as references to the 'Covenant' (ICCPR) in s 5(1) of the Act. Although the list of significant harms in s 36(2A) contains terms drawn from international instruments, it is clearly intended that these be further qualified by the definitions in s 5(1).

200 *Applicant A v MIEA* (1997) 190 CLR 225 at 239–240, 252, 277. That case concerned earlier statutory provisions which defined 'refugee' as having 'the same meaning as it has in Article 1 of [the Convention]'; however the discussion of the applicable principles of interpretation would be equally relevant to s 36(2)(a) as that provision is to be understood: see *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [37]–[42]; and *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [34], [74]. The Vienna Convention was ratified by Australia on 13 June 1974 and came into force on 27 January 1980: see *QAAH* at fn 27. On the relevance of the Vienna Convention to the interpretation of the Convention, see also *MIMA v Savvin* (2000) 98 FCR 168 at [14]–[15], [93]–[94].

The subsequent paragraphs of art 31 provide guidance on what comprises the context for the purpose of the interpretation of a treaty and other relevant matters to be taken into account.[201] Article 32 of the Vienna Convention states that where the interpretation according to art 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning.

The High Court has held that art 31 calls for a holistic approach in which '[p]rimacy is to be given to the written text of the Vienna Convention but the context, object and purpose of the treaty must also be considered'.[202] This approach would be equally applicable to interpretation of other international instruments referred to in the legislation (such as the reference to ICCPR in the definitions of the various form of significant harm in s 5(1)).

Considered decisions of foreign courts, and the work of foreign jurists, can also provide guidance.[203]

Refugee law and complementary protection in other jurisdictions

Australian Courts have observed that it is desirable to strive for uniformity of interpretation of international instruments. Thus, Australian Courts would seek to adopt, if available, a construction of the Convention definition that conforms with any generally accepted construction in other countries subscribing to the Convention, subject to the terms of the Act.[204] However, the relevance of foreign authority for Australian decision makers in relation to the Convention is limited by the wealth of domestic jurisprudence on the operation of the Convention definition in the Australian context. It is also limited by the particular way the Convention is implemented in Australian legislation,[205] particularly in the case of applications to which the refugee definition in s 5H applies. Further, differing approaches among jurisdictions to the interpretation of the Convention also means that foreign case law may not always be particularly helpful within the Australian context.[206]

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[201] See paragraphs (2) and (3). Paragraph (4) states that 'a special meaning shall be given to a term if it is established that the parties so intended'.

[202] *Applicant A v MIEA* (1997) 190 CLR 225 at 254 following Judge Zekia J in *Golder v United Kingdom* (1975) 1 EHRR 524 and Murphy J in the *Commonwealth v Tasmania* (1983) 158 CLR 1 at 177; see also the discussion of the principles and the authorities at 251–6, 231, 240, 277, 292–6. In *Morrison v Peacock* (2002) 210 CLR 274, the High Court explained at [16]: 'The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However, treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation.' As to ascertaining the object and purpose of a treaty, while the text of the treaty may assist, assistance may also be obtained from extrinsic sources: *Applicant A v MIEA* (1997) 190 CLR 225 at 231.

[203] See for example *Chan v MIEA* (1989) 169 CLR 379 at 392, *Somaghi v MILGEA* (1991) 31 FCR 100 at 117, *NBGM v MIMIA* (2006) 150 FCR 522 at [158]–[160]. See also for example *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [73]–[81].

[204] See for example *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [34] and cases there cited, and *SZATV v MIAC* (2007) 233 CLR 18 at [68]–[76]. See also *Russell v Commissioner of Taxation* (2011) 190 FCR 449 at [26] to [29], cited in *BZAAH v MIAC* (2013) FCR 261 at [20].

[205] As was pointed out in *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [18], other Contracting States have adopted criteria drawn from the Convention in different ways in their migration laws. Their Honours observed that the legislative methods adopted in Australia, New Zealand, Canada, the United Kingdom and the United States all differ.

[206] For example, the reasoning of the Supreme Court of Canada in *Attorney-General (Canada) v Ward* [1993] 2 SCR 689; (1993) 103 DLR (4th) 1 appears to have been influenced by the provisions of the Charter of Rights and Freedoms; and the reasoning of the US Court of Appeals, Ninth Circuit in *Canas-Segovia v INS* 902 F 2d 717 (9th Cir 1990) was evidently influenced by particular principles of US constitutional law. See *Applicant A v MIEA* (1997) 190 CLR 225 at 245–7, 281, 296, *Ram v MIEA* (1995) 57 FCR 565 at 567, and *Mehenni v MIMA* [1999] FCA 789 at [20].

The complementary protection criterion in s 36(2)(aa) was intended to introduce greater efficiency, transparency and accountability into Australia's arrangements for adhering to its non-refoulement obligations under the ICCPR, Second Optional Protocol, CAT and CROC[207] but it does not itself represent an incorporation of those obligations.[208] As such the need to directly consider the terms of these international instruments is limited.[209] The express references to 'art 7 of the [ICCPR] and 'Articles of the [ICCPR]' in the definitions of 'torture', 'cruel and inhuman treatment and punishment' and degrading treatment or punishment' will require consideration of the meaning of these articles, which may be guided by the views expressed in the commentary of the relevant international human rights treaty bodies.[210] As the criterion in s 36(2)(aa) and related provisions do not directly mirror tests used in other jurisdictions, foreign case law may be of only limited relevance to the interpretation of that criterion.

In sum, decision makers in Australia must first and foremost be guided by the domestic legislation and the legal principles developed by the Australian courts. While foreign case law may provide assistance in matters where there is no Australian jurisprudence, care should be exercised when drawing upon it.

Use of the UNHCR Handbook and other commentaries

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (the Handbook)[211] and other commentaries on the Convention published by the UNHCR and others[212] can provide useful guidance on aspects of the Convention in the absence of binding authority,[213] and have been referred to, where relevant, in this Guide. In areas where there is little or no Australian authority these commentaries can provide useful insight.

However, it should be remembered that the Handbook and other commentaries on the Convention (and other international treaties) should not be taken to be determinative of any question of interpretation, or as a substitute for the words of the Convention properly interpreted.[214] Some of

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207 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011(Cth) at 1.

208 Although the language of s 36(2)(aa) and related provisions draws from obligations arising under these four international instruments, specific legislation would be required in order to give effect to and incorporate the obligations arising from the instruments themselves into Australian law. This is the position, for example, with respect to the ICCPR: *Dietrich v R* (1992) 177 CLR 292 at [17]; *Minogue v Williams* [2000] FCA 125 at [24]–[25].

209 In *MIAC v MZYYL* (2012) 207 FCR 211 at [20] the Court stated that it is not necessary or useful to assess how the international instruments would apply to the circumstances of a case. The Court emphasised that the complementary protection regime in the *Act* uses definitions and tests different from those referred to in the international human rights treaties and commentaries on those treaties: at [18].

210 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) at [52].

211 UNHCR, re-issued February 2019.

212 Such as James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd edition, 2014) and Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford University Press, 3rd edition, 2007).

213 See *QAAH v MIMIA* (2005) 145 FCR 363 at [46], [97]; *NBGM v MIMIA* (2006) 150 FCR 522 at [161]–[163] and [233]; and *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [79]–[81] for strong endorsement of the use of UNHCR materials by decision makers. Note, however, that the High Court majority on appeal from both those cases did not endorse that approach to interpretation of the Convention in the Australian context, or the prevailing view of UNHCR and other expert commentators on the particular provisions in question: see *MIMIA v QAAH of 2004* (2006) 231 CLR 1; and *NBGM v MIMA* (2006) 231 CLR 52.

214 *NBGM v MIMIA* (2006) 150 FCR 522 at [162]. In *Chan v MIEA* (1989) 162 CLR 379 Mason CJ commented at 392 that the Handbook should be regarded more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention. See also *Barzideh v MIEA* (1996) 69 FCR 417 at 427, *Applicant A v MIEA* (1997) 190 CLR 225 at 302, *Semunigus v MIMA* [1999] FCA 422 at [10], *Shah v MIMA* [2000] FCA 489 at [9], *MIMA v Mohammed* (2000) 98 FCR 405 at [28], *WACW v MIMIA* [2002] FCAFC 155 at [17] and *WADA v MIMA* [2002]

the views expressed in the Handbook and other commentaries have been approved by Australian courts while others have not[215] and the courts have emphasised that the Handbook is not binding.[216] Further, the refugee criterion in s 36(2)(a) (for all applications) is subject to statutory qualifications not reflected in the Handbook. For all these reasons, recourse to Australian case law and legislation will be more helpful than the Handbook.[217]

FCAFC 202 at [42]. In *MIMA v Mohammed,* French J noted that while the Handbook has been regarded in various jurisdictions as 'another important source of law', 'a valuable aid to Member States in determining refugee status' and as providing 'significant guidance', it has no binding force at international law: at [28] referring to *R v Home Secretary, Ex parte Bugdaycay* [1987] AC 514 at 524, *R v Home Secretary, Ex parte Mehari* [1994] QB 474 at 489, *INS v Cardozo-Fonseca* (1987) 480 US 421 at 438 fn 22.

215 Notably, the decision of the majority in *MIMIA v QAAH of 2004* (2006) 231 CLR 1 appears to be at odds with the opinion of most commentators, including UNHCR, as to the operation of art 1C of the Convention.

216 See for example *SZOXA v MIAC* [2011] FMCA 298 at [47] where the Court stated '[t]he Tribunal is bound to follow Australian law. If there is an absence of binding authority, it may have regard to the UNHCR Handbook, but that is not binding on the Tribunal, it is, at best, a guide only', citing *Semunigus v MIMA* [1999] FCA 422, *Shah v MIMA* [2000] FCA 489; *Eshetu v MIEA* [1997] FCA 19 and *MIMA v Mohammed* (2000) 98 FCR 405. See also *SZQAM v MIAC* [2011] FMCA 624 at [74].

217 See *SZRGE v MIAC* [2013] FMCA 18 at [55]–[60]. The Court there commented critically on the Reviewer's reliance on the UNHCR Handbook's reference to the 'benefit of the doubt' when dealing with the question of credibility, rather than looking for direction from the ample domestic Australian law available to her. His Honour noted, for example, that the Reviewer may have gained greater, and certainly more relevant and helpful, direction from what was said by the High Court in cases such as *MIEA v Guo Wei Rong* (1997) 191 CLR 559, than from the Handbook. For further discussion of the concept of the 'benefit of the doubt', please see Chapter 3 – Well-founded fear of this Guide.