Administrative Review Tribunal

A Guide to Refugee Law in Australia

Chapter 12 – Merits review of protection related decisions

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Chapter 12 – Merits review of protection related decisions[1]

Introduction

In most cases where an application for a protection visa is refused or a protection visa is cancelled by a delegate of the Minister for Home Affairs, the applicant is entitled to a merits review of that decision. Depending on the basis of the decision, merits review of protection visa decisions by the Administrative Review Tribunal (the Tribunal) is generally available under s 348 or s 500 of the *Migration Act 1958*. Different application requirements and procedures apply, depending upon whether the review is under s 348 or s 500. A decision made under s 501CA(4) not to revoke a visa cancellation, and decisions under s 197D(2) of the *Migration Act 1958* (Cth) (the Act) that a 'protection finding' would no longer be made in relation to certain unlawful non-citizens[2] are also reviewable under s 500 and s 348 respectively.

The *Administrative Review Tribunal Act 2024* (Cth) (the 'ART Act') has established eight jurisdictional areas, including a Protection jurisdictional area and a Migration jurisdictional area. It provides that the President may establish one or more lists as subareas within a jurisdictional area.[3]

This Chapter sets out the jurisdiction of the Tribunal to review decisions about protection visas, in terms of whether decisions are of a kind that are reviewable. It also sets out the Tribunal's jurisdiction to review a decision made under s 197D(2) in relation to protection findings. It briefly discusses whether a person has standing to apply for review, but does not deal with other requirements for establishing jurisdiction, such as matters relating to forms, fees and time limits to apply to the Tribunal for review. It also outlines some provisions governing reviews under s 348, but it is otherwise beyond the scope of this Guide to discuss merits review procedure in the Tribunal.

The Tribunal's jurisdiction

Which decisions can be reviewed?

The Act gives the Tribunal the power to review a range of decisions about protection visas, including a decision to refuse to grant, a decision to cancel, or a decision not to revoke a decision to cancel, a protection visa.[4] It provides for different application and procedural requirements

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and Migration Regulations 1994 (Cth) (the Regulations) currently in force.

[2] An 'unlawful non-citizen' is a person who is not an Australian citizen, who is in the migration zone and who does not hold a visa that is in effect: ss 13, 14 of the Act.

[3] ART Act, s 196.

[4] See generally ss 338A, 348 and 500(1)(b)–(c), subject to the more specific restrictions described below.

depending on whether the decision is a 'reviewable protection decision' (under Part 5 of the Migration Act), or a decision reviewable under s 500.[5]

Reviewable protection decisions (Part 5, s 338A)

Broadly, speaking, a 'reviewable protection decision' is defined to include the following types of decision:[6]

- certain decisions made before 1 September that a person is not a refugee;[7]
- a decision to refuse a protection visa, other than a decision that was made because of s 5H(2), 36(1B) or (1C), or s 36(2C)(a) or (b)[8];
- a decision to cancel a protection visa, other than a decision that was made because of s 5H(2), 36(1B) or (1C), or s 36(2C)(a) or (b), or an Australian Security Intelligence Organisation security assessment[9];
- a decision under s 197D(2) that a person is no longer a person who is owed protection obligations.[10]

The following types of decisions, however, are expressly excluded from the definition of 'reviewable protection decision':

- decisions in relation to which the Minister has issued a certificate preventing review.[11]
- decisions to cancel a visa made by the Minister personally ;[12]
- decisions made in relation to a person who was not in Australia's migration zone at the time of the decision;[13]

The Tribunal can also review a decision made under s 197D(2) of the Act that a 'protection finding' would no longer be made in relation to certain unlawful non-citizens.[14]

Decisions reviewable under s 500 ('character decisions')

The following decisions to refuse, cancel, or not to revoke the cancellation of a visa are generally reviewable under s 500:

- decisions of a delegate under section 501 to refuse or cancel a visa on character grounds[15]

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5 See s 347(4) – (7), and the more limited carve-outs in s 500(1A), (6CA), (6D), (6FB), (6G)(d), (6L)(c), and (6M).

6 Following the repeal of Part 7AA in the Act by the *Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Act 2024* (Cth), a person who was, immediately before 14 October, a fast track applicant within the meaning of repealed Part 7AA, and on 14 October the Minister had not made a decision on their application, a decision made by the Minister on or after 14 October to refuse to grant them a protection visa, the Minister must refer the decision to the Tribunal. Once referred, the application is taken to be an application for review of a reviewable protection decision. See the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*, Schd 16, Item 35.

7 s 338A((1)(a) and (b)

8 s 338A(1)(c)

9 s 338A (1)(d)

10 s 338A (1)(e)

11 s 338A (2)(a).

12 s 338A(2)(b).

13 s 338A(2)(c).

14 s 338A(1)(e).

15 s 500(1)(b)

- decisions of a delegate under subsection 501CA(4) not to revoke a decision to cancel a visa[16]
- decisions to refuse to grant a protection visa, relying on s 5H(2) or 36(1C); or s 36(2C)(a) or (b) of the Migration Act.[17]

Who can apply for review?

For a reviewable protection decision or a decision to refuse or cancel, or not to revoke the cancellation of, a visa relying on s 5H(2), 36(1C) or 36(2C)(a) or (b) , only the non-citizen who is the subject of the primary decision can apply for review, and they must be physically present in Australia's migration zone when they apply.[18]

For a decision not to revoke the mandatory cancellation of a protection visa, an application for review may be made by a person whose interests are affected by the decision.[19]

Limitations on powers in Part 5 reviews

Part 5 and s 500 review powers are exercised under different provisions, and different jurisdiction and procedural requirements apply.

In reviewing a decision to refuse or to cancel a protection visa that did not rely on ss 5H(2), 36(1C) or 36(2C) for the refusal or cancellation, the Tribunal exercising its powers under s 348 cannot make any determination on those provisions. The Tribunal's power to remit the visa application to the primary decision-maker for reconsideration is limited by the directions permitted by the *Migration Regulations 1994* (Cth) (the Regulations), and those regulations effectively prevent the Tribunal exercising its powers under s 348 from making directions in relation to the kinds of matters described in ss 5H(2), 36(2C) or 36(1C).[20] While this limits only the Tribunal's powers to make directions, the reasoning of the Full Federal Court in *Daher v MIEA* suggests that the Tribunal cannot adjudicate upon those provisions exercising its powers under s 348.[21] Therefore, if an applicant otherwise meets the refugee definition or complementary protection criteria, but the material before the Tribunal raises an issue going to ss 5H(2), 36(1C) or 36(2C), the determination of those issues falls outside the scope of Part 5 Review.

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[16] s 500(1)(ba)
[17] s 500(1)(c)
[18] s 347A(4) and (5) for reviewable protection decisions. These limitations also apply to visa refusal and cancellation decisions referred to in ss 500(1)(b) and (c) (which would otherwise be governed by the standing provisions in s 17 of theART Act, see s 501(3) of the Act
[19] Section 17 ART Act.
[20] Section 349(2)(b) and regs 4.33(3)(b), (4)(b) and (4)(c) of the Regulations. The longer descriptions in reg 4.33(4), which concern permissible directions relating to the complementary protection criterion in s 36(2)(aa), appear directed to the provisions in s 36(2C) that prevent an applicant from meeting s 36(2)(aa).
[21] *Daher v MIEA* (1997) 77 FCR 107; regs 4.33(3)(b), 4.33(4)(b)–(c). Although the Court in *Daher* was considering only art 1F, the Federal Court has since effectively confirmed that the principles from *Daher* continued to operate in respect of the legislative provisions which provided a bifurcated review structure within the AAT prior to its abolition: *Hamidy v MIBP* [2019] FCA 221 at [31]–[33], [52]–[53]; *GWRV v MICMSMA* [2022] FCA 602 at [20]–[24], upheld on appeal in *GWRV v MICMA* [2023] FCAFC 39 at [47] (application for special leave to appeal dismissed: *GWRV v MICMA* [2023] HCASL 117); and *SLGS v MICMSMA* [2022] FCA 1055 at [81]–[83] (undisturbed on appeal in *SLGS v MICMSMA* [2023] FCAFC 104). The retention of remittal powers in reg 4.33 preventing remittal on the basis that a person satisfies matters specified in art 1F, s 5H(2), or s 36(1C), the continued jurisdiction for review of matters relevant to s 5H(2) under s 500, and their exclusion from Part 5 reviewable decisions, suggests the reasoning still applies under the amended Migration Act and the ART Act.

However, the Tribunal could still affirm the decision on the basis that the applicant does not satisfy one of the other criteria for the visa, or remit the application with a direction that the applicant satisfies other aspects of the refugee or complementary protection criteria apart from that issue.[22] If the visa is later refused again at the primary level on the basis of that issue, the applicant may be able to have that later decision reviewed under s 500.[23]

These same limitations do not apply to the review of a decision made under s 197D(2), however, and consideration of a 'protection finding' in s 197C may require consideration of ss 5H(2), 36(1C) and/or 36(2C).

Special provisions for reviewable protection decisions

There are some special statutory provisions governing the conduct of part 5 reviews which concern an applicant's obligations to make their case, and dealing with new claims and evidence. The Tribunal is also required to comply with certain directions made by the Minister. These requirements are discussed below.

Obligations on an applicant in making their case

The Migration Act places certain obligations on protection visa applicants in presenting their case. Section 5AAA clarifies that it is the responsibility of an applicant to specify all particulars of his or her claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Minister (or the Tribunal on review) does not have any responsibility or obligation to specify or assist in specifying any particulars of the claim, or to establish or assist in establishing the claim.[24] This is consistent with the well-settled proposition that it is for the applicant to make his or her own case.[25]

Dealing with new claims and evidence

Section 367A, which applies to all reviewable protection decisions, requires the Tribunal to draw an unfavourable inference as to the credibility of an applicant's claim or evidence where an applicant raises a claim or presents evidence that was not put forward before the primary decision was made, if the Tribunal is satisfied that the applicant does not have a reasonable explanation as to why the claim was not raised or evidence presented before the primary decision. This effectively

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22 See the directions available under regs 4.33(3)(a), (3)(aa), (4)(a) and (5).

23 See *GWRV v MICMSMA* [2022] FCA 602. The Court's view at [23]–[26] was that where any part of the primary decision to refuse the visa relied on there being serious reasons for considering that the applicant had committed a serious non-political crime before entering Australia (which is an exclusion found in ss 5H(2)(b) and 36(2C)(a)(ii)), the applicant must seek review in the General Division (of the AAT as it was then), even if the refusal decision also relied on findings that the applicant did not meet the refugee or complementary protection criteria. The General Division's jurisdiction would be confined to reviewing the refusal decision to the extent that reliance was placed on the serious crime finding. In dismissing an appeal, the Full Federal Court endorsed the primary judge's findings on these points: *GWRV v MICMA* [2023] FCAFC 39 at [48], [55]–[57] (application for special leave to appeal dismissed: *GWRV v MICMA* [2023] HCASL 117). Although these judgments refer to the General Division of the previous AAT, the review path was under s 500 of the Migration Act, and the findings in relation to which powers the Tribunal may exercise under the Migration Act would still apply.

24 Section 5AAA of the Act, inserted by item 1 of sch 1 to the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) with effect from 14 April 2015.

25 *Prasad v MIEA* (1985) 6 FCR 155 at 169–70; *SZBEL v MIMIA* (2006) 228 CLR 152; at [40]; *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60 at [57] and [1]; *WAKK v MIMIA* [2005] FCAFC 225 at [73]; *MIMA v Lay Lat* (2006) 151 FCR 214 at [76]; and *Abebe v Commonwealth* (1999) 197 CLR 510 at [187].

requires applicants to present all claims and evidence to the primary decision-maker unless they have a reasonable explanation for not doing so.

Section 367A does not impose on the Tribunal a method by which it is to obtain an applicant's explanation for a claim or evidence that falls within the scope of the provision, nor does it prescribe any preconditions to its operation.[26] The Federal Court has also commented in *obiter* that repealed s 423A (which was replaced by s 367A in the Act as amended) has a 'limited compass', and that it does not limit or circumscribe credibility findings which may be made more generally about an applicant's claim.[27] Nonetheless, in order to reach the requisite level of satisfaction required by s 367A, the Tribunal must follow an active intellectual process when considering an applicant's new claim (or evidence) and the explanation provided as to the delay.[28] Further, the Tribunal should take care to ensure that it does not use s 367A to draw adverse inferences against the credibility of other claims or evidence that do not fall within the scope of the provision.[29]

Ministerial Directions

Section 499(1) of the Act allows the Minister to give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or exercise of those powers. 'Ministerial Direction No 84 – Consideration of Protection visa applications' requires 'decision makers performing functions or exercising powers under s 65, 414 or 415 of the Act when considering an application for the grant of a Protection visa and when reviewing a decision to grant a Protection visa' to take account of the Department of Home Affairs' 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' to the extent that they are relevant to the decision under consideration.[30] Although the Tribunal no longer conducts reviews under s 414 or s 415, those provisions having been repealed and replaced with s 338A and s 348 respectively by the *Administrative Review (Consequential and Transitional Provisions No 1) Act 2024 ('the C&T Act'),* Direction No 84 continues to apply to the Tribunal due to the transitional provisions in the *C&T Act* [31]

Those Guidelines contain the Department's interpretation of the Act, and set out examples of circumstances which may or may not fall within the protection visa criteria in ss 36(2)(a) and (aa).[32]

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[26] *EQU19 v MICMSMA* [2022] FedCFamC2G 609 at [100]; similar comments were made in *obiter* by the Federal Court on appeal in *EQU19 v MICMA* [2023] FCA 1182 at [51]. In this case, even though the Tribunal's statement of reasons did not expressly refer to s 423A, the Court at first instance inferred that the Tribunal considered the applicant's reason for not having earlier raised a claim regarding his political opinion, found that the explanation was not reasonable and that this undermined the credibility of the claim. The Court drew this inference as it was 'tolerably clear' from two paragraphs of the decision record that the Tribunal considered the applicant's reason for not having raised the claim prior, that an implicit finding was made that the explanation was not reasonable, and that some of the wording used by the Tribunal reflected the language of the statute: at [99]–[100]. This judgment was upheld on appeal for similar reasons in *EQU19 v MICMA* [2023] FCA 1182 at [52]–[67]. Although these judgments refer to s 423 of the Act which has been repealed, s 367A is in the same terms and so these judgments likely still provide guidance as to the application of s 367A

[27] *EQU19 v MICMA* [2023] FCA 1182 at [51].

[28] *ASJ22 v MICMA* [2023] FedCFamC2G 476 at [61]–[64]. See also *DWP17 v MIBP* [2019] FCA 160 at [20]–[22].

[29] See for example *AMM21 v MICMA (No 2)* [2022] FedCFamC2G 496 at [29]–[30].

[30] Ministerial Direction No 84 was made under s 499 on 24 June 2019 and has effect from 25 June 2019. It replaced Ministerial Direction No 56 (dated 21 June 2013) to reflect changes to the citation of guidelines, but did not make any substantive changes.

[31] *Administrative Review (Consequential and Transitional Provisions No 1) Act 2024,* Schd 16, Item [13] provides that a reference to a provision of the *Administrative Appeals Act 1975* in an instrument in force immediately before the commencement of the *Administrative Review Tribunal Act 2024* is taken to be a reference to an equivalent provision of the *Administrative Review Tribunal Act 2024.*

[32] Department of Home Affairs, 'Policy: Refugee and humanitarian – Refugee Law Guidelines', re-issued 27 November 2022, and 'Policy: Refugee and humanitarian – Complementary Protection Guidelines', re-issued 29 February 2020.

The Direction also requires decision-makers to take account of certain country information assessments prepared by the Department of Foreign Affairs and Trade, where relevant.

The Direction states that it is desirable for first instance and review decision-makers to take consistent approaches to the decision-making task where there is no rational basis for inconsistencies. It goes on to say that, accordingly, it is desirable that subject to the Migration Act and Regulations and other applicable laws, decision-makers take as a starting point a common set of guidelines and country information.

Where relevant to the decision under consideration, the decision makers bound by the Direction must 'take account' of the Guidelines. The Full Federal Court has commented that it is highly desirable, if not essential, that a decision-maker's reasons clearly expose consideration of Ministerial directions to demonstrate that the Guidelines have been taken into account. Merely adhering to the statutory scheme does not, of itself, establish that there has been compliance with the Direction, which ensures an additional safeguard to those claiming protection.[33]

However, as the Minister cannot make a direction under s 499 that is inconsistent with the Act or the Regulations, the Direction does not require the Tribunal to take account of any aspects of the Guidelines which are inconsistent with the Act and its interpretation by the Australian courts.[34]

It is for the Tribunal to determine whether the Guidelines or country information are relevant to the decision, and if a decision does not expressly refer to the Guidelines or country information, a court might infer that the Tribunal did not consider them to be relevant.[35] However, a court won't always draw such an inference (depending for example on the manner in which the reasons are drawn, the context and whether there is material that detracts from or displaces the inference), and in some circumstances a failure to expressly engage with the Guidelines or country information may lead to error.[36] A court might also infer from language used in the decision that the Tribunal has in fact had regard to the Guidelines.[37]

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[33] *BQL15 v MIBP* [2018] FCAFC 104 at [19] (application for special leave to appeal dismissed: *BQL15 v MIBP* [2018] HCASL 363). These comments suggest a more thorough consideration is required than that suggested by the Court at first instance: *BQL15 v MIBP* [2017] FCCA 1976. In that judgment, the Court held that the Complementary Protection Guidelines contain opinions about the law relating to complementary protection, and the duty to take them into account is not a duty to treat them as a fundamental element in the making of a decision, but rather a duty for the decision-maker to acquaint himself or herself with them for the purpose of informing himself or herself of the law to apply in the context of considering complementary protection claims: at [23]–[31]. Judge Manousaridis also made *obiter* comments that jurisdictional error would rarely arise for failure to take into account the Guidelines (at [34]), however in light of the Full Federal Court's comments, this view should be treated with caution.

[34] Section 499(2); *SZTCV v MIBP* [2015] FCCA 1677 at [70] (upheld on appeal: *SZTCV v MIBP* [2015] FCA 1309) and *SZTCU v MIBP* [2014] FCCA 1600 at [40].

[35] *SZTMD v MIBP* [2015] FCA 150 at [20]. In that case, the Tribunal's reasons were silent as to its consideration of the Guidelines or country information, and the Court held it was open to infer that it did not think that information was material to its task, following *MIMA v Yusuf* (2001) 206 CLR 323 [15]–[18]. In *SZUWX v MIBP* [2015] FCCA 2151 at [22]–[23], the Court found that it was not necessarily apparent that the Tribunal erred by failing to discuss the detail of the Guidelines in circumstances where the Tribunal was clearly aware of the Guidelines, having referred to them in the introductory portion of its reasons, and it was unclear what specific guidance the Guidelines might have provided (upheld on appeal, but this aspect of the reasoning was not expressly considered: *SZUWX v MIBP* [2015] FCA 1389. In *SZTPD v MIBP* [2015] FCCA 3109 at [52], the Court found that the Tribunal was not required to have regard to particular extracts from the Guidelines because those extracts were not relevant to the claims made.

[36] *SZTMD v MIBP* [2015] FCA 150 at [19]. See *SZUQZ v MIBP* [2015] FCCA 1552 and *ARS15 v MIBP* [2015] FCCA 2135 as examples of judgments where the Tribunal has been found to have erred by failing to consider the relevance of the Guidelines. See also *DQD16 v MIBP* [2021] FCA 1586 where the Federal Court found no basis to infer that the Tribunal considered the most recent DFAT report on Nepal, and that as the content of the report had credible and significant information on many of the issues raised by the appellants relevant to s 36(4) of the Act, the Tribunal erred by failing to consider it: at [70], [73]–[78].

[37] See *SZTCU v MIBP* [2014] FCCA 1600 at [42] and *BQL15 v MIBP* [2018] FCAFC 104 at [16]–[17] (application for special leave to

appeal dismissed: *BQL15 v MIBP* [2018] HCASL 363). See also *AJW15 v MIBP* [2015] FCCA 2579 where the Court found that the Tribunal had considered the Guidelines by its reference to former Direction No 56 (now replaced by Direction No 84) and findings on matters discussed in the Guidelines: at [3]–[5]. On appeal, the Federal Court held that the Tribunal's statement that it was required to take into account the Guidelines should in itself be sufficient to conclude that the Tribunal had done so: *AJW15 v MIBP* [2016] FCA 197 at [46].