IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A33 of 2016

BETWEEN:

PLAINTIFF A33/2016
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

PLAINTIFF'S SUBMISSIONS

Part I: Publication of submissions

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The application raises three issues:

   2.1 Whether the provisions of Subdivision AB, Division 3, Part 2 of the *Migration Act 1958 (Cth)* ("**the Act**") exclude the requirement of the natural justice hearing rule that an applicant who has been given an interview and has been told that the interviewer shall be the person making the relevant decision be notified of any change in that procedure?

   2.2 Whether, in contravention of ss 54 and 55 of the Act, the delegate of the defendant ("**the Minister**") failed "*to have regard to*" the fact that the plaintiff's father had been killed by the Taliban and the corroborating evidence of that fact?

   2.3 Whether the delegate misconstrued or misapplied the criterion for a protection visa prescribed in s 36(2)(aa) of the Act by requiring that a real risk of significant harm within the meaning of that provision only arose where the applicant has "*a profile*" that would cause him or her to be "*personally targeted*"?

Filed on behalf of the Plaintiff:

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Part III: Section 78B Notices

3. The plaintiff certifies that he has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

Part IV: Citations

4. This application for an order to show cause is brought in the original jurisdiction. On 26 October 2016, Nettle J ordered that the application be referred for further hearing by a Full Court.

Part V: Relevant facts

5. The plaintiff, a national of Pakistan, arrived in Australia by boat in July 2012.[1]

10 6. On 3 December 2012,[2] the plaintiff lodged with the Minister's department an application for a Protection (Class XA) visa.[3] In support of his application, he made a statutory declaration declaring that he was a Shia Muslim, and a tomato and dairy cattle farmer who lived in the area of Parachinar, Kurram Agency, Pakistan.[4] The plaintiff declared that he often travelled between Parachinar and Peshawar in order to sell his tomatoes in the markets at Peshawar.[5] He declared that, after a conflict in 2007, the Taliban were bombing and attacking Shia Muslims in Parachinar.[6]

7. The plaintiff also described an incident in 2008 when the minibus that he was travelling upon was attacked by the Taliban.[7] He left Pakistan in April 2012. He

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1 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, Decision Record, page 2.

2 The date is stated in the letter dated 14 June 2013: Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM2.

3 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1.

4 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, paras. [1]-[4], [18].

5 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, para. [5].

6 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, para. [6].

7 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, paras. [8]-[10].

declared that, subsequent to his arrival in Australia, the Taliban had killed his father in a bomb blast on 10 September 2012.[8]

8. The plaintiff declared that he feared returning to Pakistan because he feared that he would be killed by the Taliban and other anti-Shia paramilitary groups. He claimed that this amounted to persecution by these groups by reason of his religion or his membership of a particular social group, failed asylum seekers.[9] He also claimed that he would face "significant harm" by reason that the activities of the Taliban were restricting his ability to be a farmer.[10]

9. By letter dated 14 June 2013, an officer of the Minister's department
10 acknowledged that the plaintiff's application was valid and provided some general information concerning the progress of the assessment of his application.[11] The letter relevantly stated:

> *An interview with a DIAC officer is normally part of the protection visa decision making process. Your IAAAS provider will tell you when an interview is to occur. ...*

10. By letter dated 26 August 2013, an officer of the department (identified only as "Shangale 60023211") invited the plaintiff to an interview to be held on 10 September 2013.[12] Enclosed with the letter was a document described as "Important info about your PV interview".

20 11. On 10 September 2013, an officer of the Minister's department (identified as Robyn Powell) ("**Powell**") interviewed the plaintiff.[13] During the course of the interview, Powell twice stated words to the effect that she was the person who would be making the decision in relation to the plaintiff's application:

> *OK.* [name of plaintiff] */ I will be assessing whether you are a person in respect of whom Australia has protection obligations. I will be making this assessment under Australia's Migration Act and the Migration Regulations*

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8 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, paras. [14]-[15].

9 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, para. [19].

10 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM1, Statutory Declaration, para. [20].

11 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM2.

12 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM3.

13 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM4.

> *and looking at whether you have claims in relation to the Refugees Convention or for Complimentary Protection Provisions under the Migration Act.*[14]

And later:

> [name of applicant] *your agent is going to provide some clarification of your claims and some additional information to me. I want you to know that any other information about your application that I receive prior to making my decision will be taken into account.*[15]

12. These statements accorded with the pro forma speaking notes held by Powell during the interview.[16]

13. At the interview, there was discussion between Powell and the plaintiff's migration agent as to the provision of further information, being "*evidence of attacks on village and Death Certificate for* [the plaintiff's] *father*".[17]

14. On 19 September 2013, the plaintiff's migration agent sought the email address for Powell,[18] which she supplied.[19] On 23 September 2013, the migration agent sent an email to Powell that stated that he had received the death certificate of the plaintiff's father and asked whether Powell would like the agent to provide the document.[20] On the same day, Powell sent an email saying "*Yes,* [name of agent], *that would be good*".[21] The department received the document on 10 October 2013.[22]

15. There is no evidence of any further communication between Powell or any other officer of the Minister's department and the plaintiff from that date until 30 September 2014.

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14 Affidavit of Kim Michelle Gough affirmed 4 October 2016, Exhibit KMG1, page 2 of 19.
15 Affidavit of Kim Michelle Gough affirmed 4 October 2016, Exhibit KMG1, page 19 of 19.
16 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM4, page 2.
17 Affidavit of Kim Michelle Gough affirmed 4 October 2016, Exhibit KMG1, page 19 of 19.
18 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM5, page 4.
19 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM5, page 4.
20 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM5, page 3.
21 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM5, page 2.
22 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM5, page 7.

16. On 30 September 2014, a delegate of the Minister (identified only as "Mary, Position No 60023144") (**"the delegate"**) made a decision to refuse the plaintiff a visa.[23] The decision record makes it clear that this person was not Powell.[24]

17. The delegate rejected the application on grounds, inter alia, that she had formed an adverse view of the credibility of the plaintiff. The delegate's adverse view of the plaintiff's credibility arose from the fact that she considered that he had given inconsistent evidence at his initial entry interview and his subsequent interview with Powell,[25] the lack of detail in his claims concerning the attack on the bus during the interview,[26] and a contradiction in his evidence concerning the schooling of his children.[27] For these reasons, she concluded that the bus attack had not occurred. She made no findings (or reference) to the fact that the plaintiff's father had been killed.

18. The delegate did not interview the plaintiff. The Minister did not notify the plaintiff that a person other than Powell was going to make the decision.

19. On 30 June 2016, the plaintiff filed an application for an order to show cause with this Honourable Court, together with an application for an extension of time in which to do so pursuant to s 486A(2) of the Act and r 25.06.1 of the *High Court Rules 2004.*

20. On 26 October 2016, Nettle J extended the time for filing of the application for an order to show cause to 30 June 2016.

Part VI: Plaintiff's argument

Legislative context

21. Division 3 of Part 2 of the Act regulates the grant of permission - a visa - to a non-citizen to travel to, enter or remain in Australia. The Minister is required to consider a valid application for a visa under s 47 of the Act, and must continue to do so until the visa is granted or refused. Section 65(1) provides that, after

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23 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6.

24 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 4.

25 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 5.

26 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 5.

27 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 6.

considering a valid application for a visa, the Minister, if satisfied that the criteria for the visa have been satisfied, is to grant the visa and if not so satisfied, is to refuse to grant the visa.

22. Subdivision AB of Division 3 is headed "*Code of procedure for dealing fairly, efficiently and quickly with visa applications*". Relevantly, it provides that, in making a decision in respect of an application for a visa:

22.1 The Subdivision is "*taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with*" (s 51A(1)).

22.2 Until a decision is made, a visa applicant may give the Minister any "*additional relevant information*" (s 55)).

22.3 The Minister may "*get any information that he or she considers relevant*" in respect of the application (s 56(1)).

22.4 Without limiting that right or power, the Minister may invite the visa applicant to give "*additional information*" in a specified way (s 56(2)).

22.5 The specified ways include an invitation that the additional information be given "*at an interview between the applicant and an officer*" (s 58(1)(d)).

22.6 The place and time of such an interview are to be specified in the invitation at either a prescribed place and within a prescribed time, or in the absence of such prescription, at a reasonable time and period (ss 58(2), (3)).

22.7 The visa applicant must make every reasonable effort to be available and attend (s 59).

22.8 In making the decision, the Minister must have "*have regard to all of the information*" in the application for a visa or subsequently supplied in respect of that application, including the information obtained in any interview (ss 54, 55 and 56).

23. In addition, the Minister may delegate his or her powers under the Act to a person (s 496). A delegation of the power under s 65 does not require "*the delegate personally to perform any task in connection with the grant or refusal* [of a visa],

except the taking of a decision in each case whether or not a visa should be granted" (s 497(1)). Both of these provisions lie outside Subdivision AB.

Ground 1

24. The power to grant or to refuse to grant a visa under s. 65 of the Act is conditioned upon observance of the requirements of natural justice.[28] These requirements are to be construed in the context of "*the particular statutory framework in which the proceedings take place*",[29] being in this case the provisions of Division 3 generally and Subdivision AB particularly.

25. Ordinarily, the natural justice hearing rule does not require a decision-maker to conduct an oral hearing or interview with an applicant. The circumstances of a particular case may dictate that, as a matter of fairness, an interview or hearing is necessary and required. [30] "*The greater the content the more likely it will be that an oral hearing is required*".[31]

26. Where fairness does require a hearing or interview to be held, the opportunity provided by that hearing or interview must be a reasonable one.[32] To this extent, the timing and place of the interview must also be reasonable in the context of the decision to be made.

27. Even where an interview is required, the hearing rule does not necessarily require that it be conducted by the decision-maker.[33] Most (although not all) of, the information obtained from an interview may be provided to a decision-maker, either directly by way of transcript or recording, or summary thereof.

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28 *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 258-259 [11]-[13].

29 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504, cited in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 at [26].

30 *Minister for Immigration & Citizenship v WZARH* (2015) 256 CLR 326 at 336 [33], 343 [63], citing *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12-13 [34], 14 [38], 34-35 [105]-[106], 36 [113]-[114], 38-39 [122], 45 [140]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-162 [26]-[29].

31 Aronson and Groves, *Judicial Review of Administrative Action* (5th ed., 2013), p. 565.

32 *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 611 [40].

33 *Minister for Immigration & Citizenship v WZARH* (2015) 256 CLR 326 at 343 [63], citing *South Australia v O'Shea* (1987) 163 CLR 378 at 409.

28. To the extent that information by way of an assessment of demeanour or general credibility may also be derived from the interview, such information is ordinarily not able to be summarised or transmitted by an interviewer to a decision-maker. The limits on audio and video recordings in this respect have also been noted.[34] Yet even here, the hearing rule does not dictate that an interview where demeanour and credibility assessments are to be made must be conducted by the decision-maker.

29. In the present case, the plaintiff was given the opportunity of an oral interview. The powers in ss 56 and 58 were used to facilitate this. In the course of that hearing, he was advised that the interviewer was going to be the person who made his decision.

30. Being given that opportunity, and being told that it would proceed in a certain manner, fairness then required that he be notified of any change in that opportunity and given a further opportunity to be heard about that change.[35]

31. Without notice to him, the opportunity was changed and the delegate who did make the decision made adverse credibility findings against him, particularly in relation to responses he made at the interview. A practical unfairness ensued. In the circumstances, and subject to the provisions of Subdivision AB, the hearing rule required that he be notified of the change in procedure and be given an opportunity to be heard in relation to it.

32. Subdivision AB does not address the particular matter of the conduct of the interview or the nature of the opportunity given. Section 51A excludes the operation of the hearing rule aspect of the requirements of natural justice but only insofar as and to the extent that there are provisions contained in Subdivision AB that contain procedural requirements "*which go some way towards satisfying the fundamental requirements of the natural justice hearing rule*".[36] These are the "*matters*" in relation to which the Subdivison "*deals with*" for the purposes of s

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34 See for example *Australian Securities and Investment Commission v Rich* (2004) 49 ACSR 578 at 583-587 [20]-[39] (Austin J); *Kirby v Centro Properties Ltd* (2012) 288 ALR 601 at 604-605 [10] (Gordon J).

35 *Minister for Immigration & Citizenship v WZARH* (2015) 256 CLR 326 at 337-339 [37]-[44], 342-344 [60]-[64].

36 *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 267 [40].

51A. The existence of such a provision excludes the cognate requirement of the hearing rule.

33. There are no such relevant provisions to the question of being heard as to the conduct of the interview. Section 56 itself does not impose any procedural requirements on the Minister in considering a visa application. It therefore does not exclude any aspect of the hearing rule.[37]

34. Similarly, s 58 does not impose any procedural requirement to hold an interview, or any prescription conditioning that such an interview may only occur in certain circumstances.[38] It does two things. First, it regulates the timing, place and potential adjournment of such an interview. It therefore excludes any requirements of the hearing rule that may arise in relation to the timing, place and potential adjournment as described in paragraph 26 above, in that they are a "matter" or "matters" dealt with by the provision.

35. Secondly, s 58 also codifies the existing aspect of the hearing rule described in paragraph 27 above - that the interview need not be conducted by the decision-maker. However, the fact that the section permits an interview to be conducted by an officer does not mean that the requirement to notify of any change in procedure is excluded. The section, in this sense, may be used to "*further procedural fairness*"[39] but does not regulate its content. It does not exclude the requirement described in paragraph 29 above.

36. For these reasons, the requirement that the plaintiff be notified of any change in the procedure was not excluded by operation of s. 51A. The decision has been made in breach of the rules of natural justice.

Ground 2

37. The claim that the plaintiff's father had been killed in a bomb blast by the Taliban, and the death certificate provided after the interview, were information within the meaning of ss. 54 and 55. In the interview, the death of the plaintiff's father was

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37 *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 267 [40].

38 See, by way of comparison, s 473DC of the Act when read with s 473DA of the Act relating to the Immigration Assessment Authority.

39 *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 267 [40].

regarded as relevantly demonstrating circumstances of risk similar to that of the plaintiff.[40] The certificate corroborated the fact of the death.

38. The issue constituted "information" both in the sense of being a claim or allegation that went to support the satisfaction of the relevant criteria and corroborative evidence of that claim.[41] At common law,

39. Pursuant to ss. 54 and 55, the Minister must "*have regard to all of the information*" in the application for a visa or subsequently supplied in respect of that application. The provision requires that the decision-maker to undertake a realistic or genuine intellectual process of consideration of the material, the extent of which depends on the nature and the relevance of the information.[42] A failure to do so constitutes jurisdictional error.[43] In determining whether there has been such a failure, the evidence as a whole must be considered.[44]

40. The decision record sets out the information considered. Relevantly, there is no reference to either the fact of the plaintiff's father's death, or the provision of the certificate, in the delegate's decision record.[45] To the contrary, the delegate's decision appears to be founded upon there only ever being "one occasion" when the plaintiff had been "involved in an attack by the Taliban".[46]

41. The decision-record, when combined with the circumstances in which the certificate was notified as being sent to Powell and the apparent change in decision-maker from Powell to the delegate, support the inference that the material was not considered as part of a realistic or genuine intellectual process. Even if it could be said that the delegate had apparently read the transcript of the interview (and was therefore aware of the claim of the death), the failure to refer to the certificate in any way undermines any suggestion that the information was given realistic or genuine consideration.

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40 Affidavit of Kim Michelle Gough affirmed 4 October 2016, Exhibit KMG1, page 18 of 19.

41 See the discussion in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 CLR 99.

42 *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [57]-[59].

43 *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [53].

44 *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [61].

45 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6. Cf *Acts Interpretation Act 1901* (Cth), s. 25D.

46 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 9.

Ground 3

42. At the relevant time, an applicant for a protection visa was required to satisfy at least one of the criteria in s 36(2) of the Act (s 36(1A)). These were the criteria arising under the Refugees Convention as amended by the Refugees Protocol (s 36(2)(a)) and the so-called "Complementary Protection" criterion (s 36(2)(aa)).

43. The delegate first considered the criterion in s 36(2)(a). In the course of that determination, it was found that the plaintiff "*is an ordinary Shia Muslim with no political or personal profile that distinguishes him from other Turi Shias*".[47] The delegate concluded that she was not satisfied that the plaintiff had a real chance of being persecuted for a Refugees Convention reason, and determined that the plaintiff's fear was not therefore well-founded.[48] However, the delegate does not explain whether that finding is based on the fact that the relevant degree of risk to all Shia Muslims has dropped to no longer be "real chance", or whether the applicant's own history is such as that he is not at risk of persecution.

44. The delegate then separately considered whether the plaintiff met the criteria for a protection visa pursuant to s 36(2)(aa), namely that there were "*substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm*".

45. Unlike the criterion arising under the Refugees Convention, there is no requirement under s. 36(2)(aa) that the harm be directed towards an applicant for a particular reason. The fact of the real risk of the harm is sufficient.

46. The delegate that she was not satisfied that the plaintiff had a real risk of harm of being subject to significant harm should he return to Pakistan. She stated:

> *Based on all of the evidence in Part A and Part B of this record, I am not satisfied the applicant has a profile which would see him personally targeted or killed upon return to Pakistan. In the present case I am not satisfied the applicant has a real risk of being subject to significant harm should he return to Pakistan.*[49]

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47 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 8.

48 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 9.

49 Affidavit of Jonathan Craig McKay affirmed 28 June 2016, Exhibit JCM6, page 12.

47. There was no separate consideration of whether there was a real risk of harm arising from whether the plaintiff would be killed by the bombings committed by the Taliban, irrespective of whether he had such a profile or not. This lack of consideration is emphasised by the failure to refer to the death of the plaintiff's father or the certificate. This failure to consider the issue constituted jurisdictional error in that it amounted to a misconstruction of the relevant question posed by s. 36(2)(aa).[50]

Part VII: Legislative provisions

48. See attached.

Part VIII: Orders sought

49. The orders sought are:

49.1 A writ of certiorari issue quashing the decision made by the delegate of the defendant on 30 September 2014 to refuse to grant the plaintiff a Protection (Class XA) visa.

49.2 A writ of mandamus directing the defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law.

49.3 The defendant pay the plaintiff's costs of the application, including the costs of the application for an extension of time.

Part IX: Time estimate

50. It is estimated that the plaintiff will require 1.5 hours for the presentation of oral argument.

Dated: 16 December 2016

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[50] *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [61]-[63].

Annexure

Migration Act 1958 (Cth), as in force at 30 September 2014

1. Section 36

2. Subdivision AB, Division 3, Part 2 (ss 51A to 64)

3. Section 496

4. Section 497

(2) A person who:

(a) before 1 September 1994, ceased to be an Australian citizen while in the migration zone; and

(b) did not leave Australia after ceasing to be a citizen and before that date;

is taken to have been granted an ex-citizen visa on that date.

(3) A person who, on or after 1 September 1994, ceases to be an Australian citizen while in the migration zone is taken to have been granted an ex-citizen visa when that citizenship ceases.

(4) Subdivisions AA, AB, AC (other than section 68), AE and AH do not apply in relation to ex-citizen visas.

36 Protection visas

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

Note: See also Subdivision AL.

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

(a) the criterion in subsection (1B); and

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

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

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

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

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

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  (i) is mentioned in paragraph (a); and
  (ii) holds a protection visa; or
(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  (i) is mentioned in paragraph (aa); and
  (ii) holds a protection visa.

(2A) A non-citizen will suffer ***significant harm*** if:
(a) the non-citizen will be arbitrarily deprived of his or her life; or
(b) the death penalty will be carried out on the non-citizen; or
(c) the non-citizen will be subjected to torture; or
(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
(e) the non-citizen will be subjected to degrading treatment or punishment.

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

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:
(a) the Minister has serious reasons for considering that:
  (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by

international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

Protection obligations

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

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

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

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

(a) the country will return the non-citizen to another country; and

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

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

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

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

Determining nationality

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

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

37 Bridging visas

There are classes of temporary visas, to be known as bridging visas, to be granted under Subdivision AF.

37A Temporary safe haven visas

(1) There is a class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas.

Note: A temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia.

(2) The Minister may, by notice in the *Gazette*, extend the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice.

(a) an application for a protection visa, where the grant of the visa has been refused and the application has been finally determined; or

(b) applications for protection visas, where the grants of the visas have been refused and the applications have been finally determined;

makes a further application for a protection visa, the Minister, in considering the further application:

(c) is not required to reconsider any information considered in the earlier application or an earlier application; and

(d) may have regard to, and take to be correct, any decision that the Minister made about or because of that information.

Note: Section 48A prevents repeat applications for protection visas in most circumstances where the applicant is in the migration zone.

51 Order of consideration

(1) The Minister may consider and dispose of applications for visas in such order as he or she considers appropriate.

(2) The fact that an application has not yet been considered or disposed of although an application that was made later has been considered or disposed of does not mean that the consideration or disposal of the earlier application is unreasonably delayed.

Subdivision AB—Code of procedure for dealing fairly, efficiently and quickly with visa applications

51A Exhaustive statement of natural justice hearing rule

(1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

(2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

52 Communication with Minister

(1) A visa applicant or interested person must communicate with the Minister in the prescribed way.

(2) The regulations may prescribe different ways of communicating and specify the circumstances when communication is to be in a particular way. For this purpose, a ***way of communicating*** includes any associated process for authenticating identity.

(3) If the applicant or interested person purports to communicate anything to the Minister in a way that is not the prescribed way, the communication is taken not to have been received unless the Minister in fact receives it.

(3A) A visa applicant must tell the Minister the address at which the applicant intends to live while the application is being dealt with.

(3B) If the applicant proposes to change the address at which he or she intends to live for a period of 14 days or more, the applicant must tell the Minister the address and the period of proposed residence.

(3C) If, in accordance with the regulations, 2 or more non-citizens apply for visas together, notifications given to any of them about the application are taken to be given to each of them.

Note 1: If the Minister gives a person a document by a method specified in section 494B, the person is taken to have received the document at the time specified in section 494C in respect of that method.

Note 2: Section 494D deals with giving documents to a person's authorised recipient.

(4) In this section, ***interested person*** means a person who wants, or who is requested, to give information about the applicant to the Minister.

54 Minister must have regard to all information in application

(1) The Minister must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application.

(2) For the purposes of subsection (1), information is in an application if the information is:

(a) set out in the application; or

(b) in a document attached to the application when it is made; or

(c) given under section 55.

(3) Without limiting subsection (1), a decision to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions.

55 Further information may be given

(1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision.

(2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

56 Further information may be sought

(1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.

(2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

57 Certain information must be given to applicant

(1) In this section, ***relevant information*** means information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and

(c) was not given by the applicant for the purpose of the application.

(2) Subject to subsection (3), the Minister must:

(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and

(c) invite the applicant to comment on it.

(3) This section does not apply in relation to an application for a visa unless:

(a) the visa can be granted when the applicant is in the migration zone; and

(b) this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.

58 Invitation to give further information or comments

(1) If a person is:

(a) invited under section 56 to give additional information; or

(b) invited under section 57 to comment on information;

the invitation is to specify whether the additional information or the comments may be given:

(c) in writing; or

(d) at an interview between the applicant and an officer; or

(e) by telephone.

(2) Subject to subsection (4), if the invitation is to give additional information or comments otherwise than at an interview, the information or comments are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

(3) Subject to subsection (5), if the invitation is to give information or comments at an interview, the interview is to take place:

(a) at a place specified in the invitation, being a prescribed place or if no place is prescribed, a reasonable place; and

(b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, a reasonable period.

(4) If a person is to respond to an invitation within a prescribed period, that period may be extended by the Minister for a prescribed further period, and then the response is to be made in the extended period.

(5) If a person is to respond to an invitation at an interview at a time within a prescribed period, that time may be changed by the Minister to:

(a) a later time within that period; or

(b) a time within that period as extended by the Minister for a prescribed further period;

and then the response is to be made at an interview at the new time.

59 Interviews

(1) An applicant must make every reasonable effort to be available for, and attend, an interview.

(2) Section 58 and this section do not mean that the Minister cannot obtain information from an applicant by telephone or in any other way.

60 Medical examination

(1) If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.

(2) An applicant must make every reasonable effort to be available for, and attend, an examination.

61 Prescribed periods

If this Subdivision requires or allows the regulations to prescribe a period or other time limit relating to a step in considering an application for a visa, the regulations may prescribe different limits relating to that step and specify when that specified limit is to apply, which, without limiting the generality of the power, may be to:

(a) applications for a visa of a specified class; or

(b) applications in specified circumstances; or

(c) applicants in a specified class of persons; or

(d) applicants in a specified class of persons in specified circumstances.

62 Failure to receive information not require action

(1) If an applicant for a visa:

(a) is invited to give additional information; and

(b) does not give the information before the time for giving it has passed;

the Minister may make a decision to grant or refuse to grant the visa without taking any action to obtain the additional information.

(2) If an applicant for a visa:

(a) is invited to comment on information; and

(b) does not give the comments before the time for giving them has passed;

the Minister may make a decision to grant or refuse to grant the visa without taking any further action to obtain the applicant's views on the information.

63 When decision about visa may be made

(1) Subject to sections 39 (criterion limiting number of visas), 57 (give applicant information), 84 (no further processing), 86 (effect of limit on visas) and 94 (put aside under points system) and subsections (2) and (3) of this section, the Minister may grant or refuse to grant a visa at any time after the application has been made.

(2) The Minister is not to refuse to grant a visa after inviting the applicant to give information and before whichever of the following happens first:
  (a) the information is given;
  (b) the applicant tells the Minister that the applicant does not wish to give the information or does not have it;
  (c) the time in which the information may be given ends.

(3) The Minister is not to refuse to grant a visa after inviting the applicant to comment on information and before whichever of the following happens first:
  (a) the comments are given;
  (b) the applicant tells the Minister that the applicant does not wish to comment;
  (c) the time in which the comments are to be given ends.

(4) The Minister is not to refuse to grant a visa after giving a notice under section 64 and before whichever of the following happens first:
  (a) the applicant pays the visa application charge; or
  (b) the applicant tells the Minister that the applicant does not intend to pay the visa application charge; or
  (c) the end of the period set out in the notice.

64 Notice that visa application charge is payable

(1) This section applies to a valid application for a visa if the Minister, after considering the application, has made an assessment that:
  (a) the health criteria for it (if any) have been satisfied; and
  (b) the other criteria for it, prescribed by this Act or the regulations, have been satisfied.

(2) If this section applies and an amount of visa application charge is unpaid, the Minister must give the applicant written notice stating that:
  (a) an amount of visa application charge is payable within the prescribed period; and

(b) subject to the regulations providing otherwise, a visa cannot be granted unless that amount is paid; and

(c) the Minister may refuse to grant the visa unless that amount is paid within the prescribed period.

(3) If, in accordance with the regulations, 2 or more non-citizens apply for a visa together, the Minister may give notices under this section in the same document.

Subdivision AC—Grant of visas

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

(b) any provision of this Act or of the regulations that the Minister, by legislative instrument, determines to be part of the designated migration law.

495B Minister may substitute more favourable decisions for certain computer-based decisions

(1) The Minister may substitute a decision (the ***substituted decision***) for a decision (the ***initial decision***) made by the operation of a computer program under an arrangement made under subsection 495A(1) if:

(a) a certificate under paragraph 271(1)(l) relates to the computer program and to the initial decision; and

(b) the certificate states that the computer program was not functioning correctly; and

(c) the substituted decision could have been made under the same provision of the designated migration law as the initial decision; and

(d) the substituted decision is more favourable to the applicant.

(2) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

(3) Subsection (1) has effect despite:

(a) any law of the Commonwealth; or

(b) any rule of common law;

to the contrary effect.

496 Delegation

(1) The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act.

(1A) The delegate is, in the exercise of a power delegated under subsection (1), subject to the directions of the Minister.

(2) The Secretary may, by writing signed by him or her, delegate to a person any of the Secretary's powers under this Act.

(3) If an application for a visa that has a health criterion is made, the Minister may:

(a) delegate to a person the power to consider and decide whether that criterion is satisfied; and

(b) consider and decide, or delegate to another person the power to consider and decide, all other aspects of the application.

(4) To avoid doubt, if there is a delegation described in paragraph (3)(a) in relation to an application for a visa:

(a) Subdivision AB of Division 3 of Part 2 has effect accordingly; and

(b) for the purposes of subsection 65(1), the Minister is satisfied or not satisfied that the health criterion for the visa has been satisfied if the delegate who was given that delegation is so satisfied or not so satisfied, as the case may be.

(5) Subsection (1A) does not limit subsection 499(1).

497 Delegate not required to perform certain administrative tasks

(1) If the Minister delegates the power to grant or refuse to grant visas, the delegation does not require the delegate personally to perform any task in connection with the grant or refusal, except the taking of a decision in each case whether or not a visa should be granted.

(2) If the Minister delegates the power to cancel visas, the delegation does not require the delegate personally to perform any task in connection with the cancellation, except the taking of a decision in each case whether a visa should be cancelled.

(3) Nothing in subsection (1) or (2) shall be taken to imply that:

(a) a person on whom a power is conferred by or under this or any other Act; or

(b) a delegate of such a person;

is required personally to perform all administrative and clerical tasks connected with the exercise of the power.