IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M79 of 2012

BETWEEN

M79 / 2012

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

10 **PLAINTIFF'S SUBMISSIONS**

(ANNOTATED)

Part I: Internet publication

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

Part II: Issues

2. The issues are as follows:

   (a) Whether the Defendant (**the Minister**) had power to grant to the Plaintiff a temporary safe haven visa under s 195A(2) of the *Migration Act 1958* (Cth) (**the Act**).

   (b) Whether the decision of the Minister under s 195A(2) of the Act to grant the temporary safe haven visa was made for an improper purpose.

20 (c) A subsidiary question is whether the Minister, on 12 April 2012, made a single decision to grant the Plaintiff two visas simultaneously, or whether he made two separate decisions, by each decision (or purported decision) granting a single visa.

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Filed on behalf of: The Plaintiff

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Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

3. The Plaintiff considers that notice pursuant to section 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

4. There are no decisions below. The matter is in the original jurisdiction of this Court.

Part V: Facts

5. Relevant facts are contained in the Amended Special Case. The Plaintiff also relies on the documents constituting attachments to the Special Case, in particular the affidavit affirmed by the Minister on 29 October 2012.[1]

10 6. Briefly, the facts are as follows:

(a) The Plaintiff is a citizen of Sri Lanka who arrived in Australia on or about 7 February 2010 without a valid visa. He entered Australia at Christmas Island, an "excised offshore place" as that expression is defined in s 5(1) of the Act.[2]

(b) The Plaintiff has been in Australia since first arriving.

(c) By reason of entering Australia at an excised offshore place without a valid visa, the Plaintiff was an "offshore entry person", as that expression is defined in s 5(1) of the Act. Section 46A(1) of the Act applied to him, preventing him from making a valid application under the Act for a visa, including a protection visa, unless the Minister exercised his power under s 46A(2).[3]

20 (d) The Minister never exercised his power under s 46A(2) of the Act.

(e) The Plaintiff was able to, and did, access the processes known (until recently) as "Refugee Status Assessment" (**RSA**) and "Independent Merits Review" (**IMR**). He first requested that these processes be applied to him on 19 April 2010. These processes were completed on 17 May 2011 with a recommendation by a reviewer appointed by the Minister that the Plaintiff not be recognised as a person to whom Australia has protection obligations.[4]

(f) On 5 July 2011, the Plaintiff commenced proceedings for judicial review in the Federal Magistrates Court. A hearing was held on 13 April and 10 July 2012. The decision remains reserved.[5]

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1 **SCB 088-090.**
2 **SCB [1]-[2].**
3 **SCB [3]-[4].**
4 **SCB [4]-[7].**
5 **SCB [8].**

(g) Between about 7 February 2010 and 12 April 2012, the Plaintiff was held in immigration detention.[6]

(h) On 25 November 2011 the Minister issued a press release announcing that a group of "irregular maritime arrivals" would be released from immigration detention and placed in the community on bridging visas.[7]

(i) On 5 April 2012 the Minister signed a ministerial submission headed "Ministerial Intervention (MI) under section 195A of the *Migration Act 1958* – Irregular Maritime Arrivals (IMA) – proposed grant date is 12 April 2012."[8] Paragraph 9 of the submission says:

> "As you have agreed, the department proposed to grant both a Temporary Safe Haven (subclass UJ-449) Visa (TSHV) and a Bridging (subclass WE-050) visa (BE) to IMA persons. The grant of a TSHV to these IMA persons will bar them from lodging further onshore visa applications."

(j) The Plaintiff's release from immigration detention on 12 April 2012 occurred because he was granted on that day by the Minister, purportedly by the exercise of his power under s 195A of the Act:[9]

i) a Temporary Safe Haven (Class UJ subclass 449) visa, permitting a stay of 7 days (**the TSH Visa**); and

ii) a Bridging E (Class WE subclass 050) visa, permitting a stay of six months (**the First Bridging Visa**).

(k) The letter dated 12 April 2012 from the Department of Immigration and Citizenship (**the Department**) to the Plaintiff notifying him of the grant of the visas stated: [10]

> "Your Temporary Safe Haven (subclass 449) visa has been granted for administrative reasons and will keep the processing of your protection claims."

(l) On 19 April 2012, the TSH Visa (if valid) expired.

(m) On 18 September 2012, the Plaintiff lodged with the Department an application under the Act for a protection visa.[11]

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6 **SCB [13].**
7 **SCB 018-020.**
8 **SCB 022-027.**
9 **SCB [11].**
10 **SCB 040-047.**
11 **SCB [15].**

(n) On 8 October 2012, an officer of the Department advised the Plaintiff that his application for a protection visa was not a valid application.[12]

(o) On 12 October 2012, the First Bridging Visa expired, whereupon he again became an unlawful non-citizen.[13]

(p) On 15 October 2012, an officer of the Department detained the Plaintiff pursuant to s 189 of the Act.[14]

(q) On the same day, the Minister exercised his power under s 195A of the Act to grant to the Plaintiff a Bridging E (Class WE subclass 050) visa, permitting a stay of six months (**the Second Bridging Visa**).[15] Upon the grant to him of the Second Bridging Visa, the Plaintiff again became a lawful non-citizen and was released from immigration detention.[16]

(r) On 29 October 2012, the Minister affirmed an affidavit in this proceeding.[17] In paragraph 6 the Minister deposed:

> "I decided to consider the simultaneous grant of a Temporary Safe Haven visa and a Bridging E visa because this would allow offshore entry persons to be released from detention while at the same time avoiding the consequence that they would then be able to apply for protection visas in circumstances where their protection claims had already been, or were already being, assessed through an existing process."

In paragraph 9 the Minister deposed:

> "If I had not been able to grant a Temporary Safe Haven visa to the Plaintiff simultaneously with the grant of a Bridging E visa, I would not have exercised my power under s 195A of the Act to grant to the Plaintiff a Bridging E visa. This is because the grant of a Bridging E visa on its own would have enabled the Plaintiff to lodge a valid application for a protection visa without the restriction in s 46A of the *Migration Act 1958* ..."

Part VI: Argument

(a) *Overview*

7. On 12 April 2012, the Minister made a decision to grant the First Bridging Visa and a decision to grant the TSH Visa. The precise order in which the two decisions were

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12 **SCB [17].**
13 **SCB [18].**
14 **SCB [19].**
15 **SCB [20].** The parties have separately agreed that the Second Bridging Visa was granted to the Plaintiff pursuant to a valid exercise by the Minister of the power in s 195A of the Act.
16 **SCB [21].**
17 **SCB 088-090.**

made is not important because, whatever the order, the exercise of the power under s 195A(2) to grant the First Bridging Visa was the only occasion when the power was validly exercised.

8. The Minister made two decisions because the Act does not allow for the simultaneous grant, by the one exercise of power, of two visas. Section 195A, like ss 65, 73 and 159 (the only provisions giving a power to the Minister to grant a visa)[18] provides for the grant of one visa by the one exercise of power.

9. The decision to grant the First Bridging Visa was valid.

10. The decision to grant the TSH Visa was invalid, for two reasons:

10 (a) lack of power to grant that type of visa; and

(b) if there was power, it was exercised for an improper purpose.

11. The questions of power and purpose turn primarily on the construction of ss 195A(2) and 37A(1) and Subdivision AJ of Div 3 of Part 2. That task begins and ends with a consideration of the text, informed by its context, including its legislative history and any relevant extrinsic materials.[19]

12. First, however, the question whether there was a single decision to grant two visas simultaneously or there were two decisions to grant the two visas will be addressed.

(b) ***Single decision or two decisions***

13. The Act provides for visas permitting non-citizens to travel to, enter or remain in
20 Australia. The Act is intended to be the sole source of the right of non-citizens to enter or remain in Australia.[20]

14. A visa is a permission granted by the Minister to a non-citizen to do either or both of the following two things: (a) travel to and enter Australia; (b) remain in Australia.[21] The Act distinguishes between permanent visas and temporary visas.[22] The Act also distinguishes between substantive visas and three other kinds of visas: bridging visas criminal justices visas and enforcement visas.[23] There are both prescribed classes of visas, and classes of visas provided under the Act.[24]

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18 Other provisions in the Act give to the Minister an "indirect" power to grant a visa, by substitution of a more favourable decision: see ss 351, 391, 417, 454 and 501J.

19 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39].

20 Section 4(2).

21 Section 29(1).

22 Section 30.

23 Section 5(1), definition of "*substantive visa*".

24 Section 31.

15. Bridging visas and temporary safe haven visas are classes of temporary visas under the Act. A temporary safe haven visa is a substantive visa, whilst a bridging visa is not.

16. Subject to the Act and the Regulations, a non-citizen who wants a visa must apply for a visa of a particular class.[25]

17. Various provisions in the Act, e.g. ss 34, 35 and 78, provide for a visa to be deemed to have been granted. In respect of enforcement visas, ss 164B and 164BA provide for the grant of the visa by operation of those sections. The Minister is also able to grant a visa, under ss 351, 391, 417, 454 and 501J, when he substitutes a more favourable decision for a decision made by a tribunal. There are, however, limited powers under the Act by which the Minister may directly grant a visa to a non-citizen. The relevant provisions are ss 65, 73, 159 and 195A.

18. Section 65(1) of the Act provides that, after considering a valid application for a visa, the Minister must grant "*the visa*" if satisfied that all the prerequisites for the grant of the visa are satisfied, and must refuse to grant the visa if not so satisfied.

19. Under s 73, the Minister has a discretion to grant "*a bridging visa*" if the Minister is satisfied that the "eligible non-citizen"[26] satisfies the criteria for a bridging visa as prescribed under s 31(3). Unlike the case of s 65(1), there is no requirement that a non-citizen makes an application for a bridging visa before the power in s 73 is enlivened.

20. Under s 159, the Minister, after considering the possible grant "*of a criminal justice visa*" has the discretionary power to grant "*it*" if the Minister is satisfied that the criteria for it have been met. Like s 73, there is no requirement under s 159 that a non-citizen makes an application for a criminal justice visa before the discretion is enlivened.

21. Section 195A of the Act grants to the Minister a personal, non-compellable power to grant to a person who is in detention under s 189 of the Act "*a visa*" of a particular class, whether or not the person has applied for "*the visa*". The exercise of this power results in the release of the visa holder from immigration detention. Once the person has a visa, he/she becomes a lawful non-citizen.

22. The emphasised words show that each of ss 65(1), 73, 159 and 195A(2) is a power to grant one visa, and one visa only.[27]

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25 Section 45(1).

26 The expression is defined in s 72(1) of the Act.

27 The same can be said about the Minister's "more favourable decision" powers in ss 351, 391, 417, 454 and 501J.

23. Save for exceptional cases[28] the Act intends that a person will hold only one substantive visa at any one time.[29] The grant of a non-substantive enforcement visa means that any temporary visa ceases to have effect.[30] The grant of any visa (other than a special purpose visa or a maritime crew visa) means that a bridging visa that is at that time held by the person ceases to have effect.[31] However, a bridging visa may be reactivated if the visa whose grant caused the deactivation of the bridging visa ceases to be in effect.[32]

24. Neither the TSH Visa nor the First Bridging Visa specified that it would come into effect on a date after the date of the grant. Therefore each visa granted to the Plaintiff on 12 April 2012 (if validly granted) came into effect on the date of the grant.[33]

25. Thus, if the TSH Visa was granted first in time (assuming it was validly granted):

    (a) both visas would have had initial concurrent operation, because s 82(3) would not have operated upon the First Bridging Visa to deactivate it as it would not be, at that time, a visa that the Plaintiff held; and

    (b) the First Bridging Visa would continue in operation after TSH Visa expired.

26. If the First Bridging Visa was granted first in time, it would have ceased to have effect upon the grant of the TSH Visa but it would have been reactivated when the TSH Visa expired.

27. In either event, the First Bridging Visa was in effect from 20 April 2012, and was in effect when the Plaintiff applied for a protection visa on 19 September 2012.[34] The critical question is therefore whether the TSH Visa was validly granted. If so, s 91K prevented the Plaintiff from applying for a protection visa and his application was invalid. If the TSH Visa was not validly granted, the application for the protection visa was valid, the Department should not have rejected it[35] and the Minister can now be compelled to consider it.[36]

(c) ***Power***

(i) *The text*

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28 E.g. *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*(2006) 228 CLR 566.
29 Section 82(2) and (2AA).
30 Section 82(2A).
31 Section 82(3).
32 Section 68(4).
33 Section 68(1) and (2).
34 **SCB 049-074.**
35 **SCB 076-078.**
36 Even if the Minister were correct that the First Bridging Visa is also invalid if the TSH Visa is invalid, there is no argument about the validity of the Second Bridging Visa. The Plaintiff can now make a further application for a protection visa, which the Minister has separately conceded would be valid if the grant of the TSH Visa were invalid and the Plaintiff made the further application whilst he held the Second Bridging Visa.

28. Section 195A confers a personal, non-compellable power on the Minister which permits the grant of a visa to a person who is in detention under s 189. A person in detention under s 189 is someone who is reasonably suspected of being an unlawful non-citizen. Upon the grant of a visa pursuant to s 195A, the person becomes a lawful non-citizen and entitled to release from detention.

29. Section 195A(2) empowers the Minister to grant "a visa of a particular class" and s 195A(3) provides that the Minister, in exercising the power to grant a visa under subs (2), is not bound by the *Migration Regulations 1994 (***the Regulations***)* or by a number of subdivisions of Div 3 of Part 2 of the Act. However, the Minister is bound by s 37A (which creates the class of temporary visas known as temporary safe haven visas) and by subdivision AJ (providing for the statutory bar by reason of grant of a temporary safe haven visa, and for its possible lifting).

30. The power under s 195A(2) to grant a visa must therefore be exercised conformably with s 37A, in particular subsection (1). The critical aspects of the text of s 37A(1) are that: (i) it creates a class of temporary visas; (ii) they are known as temporary safe haven visas; and (iii) they permit the holder "to travel to, enter and remain in Australia." A note under subsection (1) says that a temporary safe haven visa "is granted to give the person temporary safe haven in Australia." Thus the designation of the visa is more than just a label, but describes the purpose for which such visas are to be granted.

31. The remaining subsections of s 37A confer power on the Minister to extend and to shorten the period of a temporary safe haven visa.

32. Subdivision AJ, comprising ss 91N-91L, prevents a holder of a temporary safe haven visa, and a person who held such a visa that has expired, from applying for a visa of any other kind unless the Minister exercises a power to lift the statutory bar. The bar is imposed by s 91K and is similar in effect to s 46A(1). The power to lift the bar is conferred by s 91L and is similar in terms and effect to s 46A(2)-(7).

(ii) Context: other provisions of the Act and the Regulations

33. The expression from s 37A(1) "to travel to, enter and remain in Australia" receives some exposition in ss 29 and 81. By s 29(2) and (3) a visa to travel to, enter and remain in Australia may specify a period in which the holder may travel to and enter Australia, in which case the holder may only remain in Australia if he or she travelled to and entered Australia within that period. Section 81 provides that a visa to travel to, enter or remain in Australia during or within a period is not permission to do those respective things outside that period.

34. The Act provides that certain other types of visa are visas "to travel to, enter and remain in Australia": s 33(1), special purpose visas; s 38A, enforcement visas; s 38B, maritime crew visas, though limited to entry by sea.

35. Expressions similar to, but different from, "travel to, enter and remain in Australia" are found in numerous other provisions of the Act.

36. Sub-sections (1) and (2) of s 30 refer to "a visa to remain in Australia (whether or not also a visa to travel to and enter Australia)". Section 31(1) provides that there are to be prescribed classes of visas and s 31(4) provides that the regulations may prescribe whether visas of a class "are visas to travel to and enter Australia, or to remain in Australia, or both".

37. Section 33(2)(a) provides that non-citizens having a prescribed status are taken to have been granted a special purpose visa. Regulation 2.40 of the Regulations sets out those categories or descriptions of persons. They comprise predominantly persons likely to visit Australia in some official capacity. Section 33(9) empowers the Minister to declare in writing for the purposes of the section that it is undesirable that a person or class of persons "travel to and enter Australia or remain in Australia".

38. Section 34 creates absorbed person visas which are permanent visas "to remain in, but not re-enter, Australia". Section 35(1) creates a similar type of visa for ex-citizens.

39. Section 38B(3) empowers the Minister to declare in writing for the purpose of the section that it is undesirable that a person or class of persons "travel to and enter Australia, or remain in Australia".

40. Section 155 creates criminal justice visas, which may be either a criminal justice entry visa under sub-section (1) "permitting a non-citizen to travel to and enter, and remain temporarily in, Australia" or a criminal justice stay visa under sub-section (2) "permitting a non-citizen to remain temporarily in Australia". Section 161(1) further provides that a criminal justice entry visa is permission for the non-citizen "to travel to and enter and remain in Australia while it is in effect". Section 161(2) provides that a criminal justice stay visa is permission for the non-citizen to remain in Australia while it is in effect, and permits release from immigration detention.

41. Section 43(1) stipulates that a visa "to travel to and enter Australia" is permission to enter Australia at a port or on a pre-cleared flight.

42. Section 73 concerns bridging visas. It defines a bridging visa as a visa permitting a non-citizen "to remain in, or to travel to, enter and remain in Australia".

43. Section 82 makes provision for when visas cease to be in effect. Subsections (5) and (7) refer to a visa "to travel to and enter Australia (whether also a visa to remain in

Australia)". Subsection (7A) deals specifically with bridging visas and refers to a "bridging visa permitting the holder to remain in, or to travel to, enter and remain in, Australia". Subsection (8) makes specific provision for a "visa to remain in, but not re-enter, Australia".

44. Section 133(2) provides that if the cancellation of a visa is revoked the Minister may vary the period in which, or the date until which, the visa permits its holder "to travel to, enter and remain in Australia, or to remain in Australia".

45. Division 4A of Part 2 concerns enforcement visas and s 164B concerns non-citizens on foreign boats outside the migration zone who are suspected of fisheries offences. Sub-section (7) gives the Minister power to declare in writing for the purposes of s 164B that it is undesirable that a person, or class of persons, "travel to and enter Australia or remain in Australia". Section 164BA(7) contains a like power in respect of environment offences.

46. Section 500A empowers the Minister to refuse to grant a temporary safe haven visa to a person or to cancel a temporary safe haven visa granted to a person in certain situations, including, in s 500A(1)(c), if in the Minister's opinion there is a significant risk the person would do certain things "in the event the person were allowed to enter or to remain in Australia".

47. Item 1223B of Schedule 1 of the Regulations designates temporary safe haven visas as Class UJ visas and creates two subclasses: 448 (Kosovar Safe Haven (Temporary)) and 449 (Humanitarian Stay (Temporary)).

48. Clause 448.221(2) of Schedule 2 to the Regulations restricts the visas to persons resident in Kosovo on 25 March 1999 who were displaced from there since that date. Clause 448.225 requires an applicant for a Class UJ (448) visa who is outside Australia to undergo a medical examination. Clause 448.511, headed "When visa is in effect", provides:

> "Temporary visa permitting the holder to travel to, enter and remain in Australia."

Clause 448.6 provides that different conditions apply depending on whether the applicant is outside Australia or in Australia.

49. Subclass 449 of Schedule 2 deals with Class UJ (449) visas, the type of visa purportedly granted to the Plaintiff on 12 April 2012. Clause 449.221(2) provides as follows:

> "(2) The applicant meets the requirements of this subclause if:

(a) the applicant has been displaced from his or her place of residence, and:

(i) cannot reasonably return to that place of residence; and

(ii) is in grave fear of his or her personal safety because of the circumstances in which, or reasons why, he or she was displaced from that place of residence; or

(b) the applicant has not been displaced from his or her place of residence; but:

(i) there is a strong likelihood that the applicant will be displaced from that place of residence; and

(ii) the applicant is in grave fear of his or her personal safety because of the circumstances in which, or reasons why, the applicant may be displaced from that place of residence."

50. Clause 449.4 envisages that an applicant for a subclass 449 visa may either be outside or in Australia at the time of the application. Item 449.511, headed "When visa in effect", provides:

"Temporary visa permitting the holder to travel to, enter and remain in Australia."

51. Regulation 2.04 concerns circumstances that may be prescribed under s 40 of the Act as necessary for the grant of a visa. Section 40 makes provision for the requirement of personal identifiers by applicants for visas. In that context, reg 2.04(2)(b) expressly envisages that an applicant for a temporary safe haven visa may be in Australia at the time of the application for the visa.

52. The Regulations prescribe classes of visas, in some places distinguishing between the situation where the applicant is outside Australia – and the visa is to travel to, enter and remain in Australia – and where the applicant is in Australia – and the visa is merely to remain in Australia. See Schedule 2, subclasses 488, 512, 513, 676, 675, 685. However, the terminology is not uniform: cf subclasses 417, 457. Some visas are also expressed by the regulations to be visas "to travel to and enter Australia" and say nothing about remaining in Australia: see, e.g., subclass 858 (distinguishing talent visa) clause 858.511; subclass 859 (designated parent visa) clause 859.511; subclass 864 (contributory aged parent visa) clause 864.511; subclass 866 (protection visas) clause 866.511.

(iii) Context: legislative history and other extrinsic materials

53. Section 37A, subdivision AJ and s 500A were inserted into the Act by the *Migration Legislative Amendment (Temporary Safe Haven Visas) Act 1999*, which was assented to on 20 May 1999. The amendment was to give effect to a commitment of the

Australian Government to provide temporary safe haven to Kosovars who had been displaced in the Balkan conflict of the late 1990s.[37]

54. The Minister in his second reading speech[38] described the Kosovars as "in dire need of protection", said the Australian Government had responded to "a global appeal by the United Nations High Commissioner for Refugees for countries beyond the immediate region to make an exception and provide emergency shelter to Kosovars forcibly displaced from Kosovo." He said further:[39]

> "This short-term humanitarian measure will assist in alleviating the massive suffering and human tragedy that has developed in Kosovo. ...
>
> "Temporary safe haven is not to be used as a means of obtaining permanent residence in Australia. ...
>
> "As temporary safe haven is to be provided to persons at short notice and in situations where extensive character checking is not possible, it is necessary to have effective powers to withdraw temporary safe haven ...
>
> "The arrangements that have been made to date demonstrate Australia's commitment to join with members of the international community to assist in this humanitarian crisis by providing emergency temporary relief."

55. The Class UJ (448) visa category was created by regulation in April 1999.[40] The Class UJ (449) visa category was created in June that year.[41] There was speculation that the latter class was created in anticipation of a humanitarian crisis in East Timor.[42] When that crisis eventuated in August and September 1999 the Australian Government granted class UJ (449) visas to about 1,800 East Timorese at the request of the United Nations High Commissioner for Refugees.[43] In 2000, a small number of Christians who had fled sectarian violence in Ambon, Indonesia, and arrived in Australia were granted Class UJ (449) visas.[44]

56. It is not clear whether, until April this year, any further temporary safe haven visas have been granted. The Department's Annual Report for 2008-2009[45] said that five people who had been living in International Organization for Migration facilities in Indonesia for five years or more were granted subclass 449 visas and then

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37 Explanatory Memorandum, Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999 (Cth) [1]; Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1999, 4128 (Philip Ruddock).

38 Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1999, 4128 (Philip Ruddock)..

39 Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1999, 4129 (Philip Ruddock).

40 *Migration Amendment Regulations (No 2) 1999 (Cth).*

41 *Migration Amendment Regulations (No 7) 1999 (Cth).*

42 S Taylor, "Protection or prevention? A close look at the Temporary Safe Haven Visa Class" (2000) 22 *UNSWLJ* 75, p 85

43 *Ibid*; Department of Immigration and Multicultural Affairs "Fact Sheet 62" available at: http://web.archive.org/web/200012040502/http:/www.immi.gov.au/facts/62haven.htm.

44 Taylor, above n 44, p 89.

45 Available online at : http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-2-1.htm

subsequently granted three year Temporary (Humanitarian Concern) (subclass 786) visas once they arrived in Australia. However, the Department's 2010 publication "Populations flows: immigration aspects 2008-2009" omits this.[46]

57. The 2008-2009 Annual Report said this under the heading "Safe Haven visas":

> "The department provides temporary Safe Haven in Australia for people who have been displaced by upheaval in their country and for whom the Australian Government considers this to be the most appropriate assistance."

(iv) The text: conclusions

58. Returning to the text of s 37A(1), informed by the context recited above, the following conclusions on its construction are put forward.

59. The expression "temporary safe haven" denotes a need for protection of some kind in response to a humanitarian emergency. The legislative history confirms this. Clause 449.221(2), pursuant to which the Plaintiff's TSH Visa was purportedly granted, spells out the kind of emergency, involving either an actual or likely displacement of the visa holder from his or her place of residence and a grave fear for the holder's personal safety because of the circumstances of the displacement.

60. Since the Minister, in exercising his power to grant a visa under s 195A(2) is not bound by the Regulations, in considering whether a temporary safe haven visa was validly granted under that section, it is no objection that the criteria in clause 449.221(2) are not satisfied. Nevertheless, it must still be a visa to give temporary safe haven in response to a humanitarian emergency.

61. These criteria also suggest that an applicant for an initial temporary safe haven visa will be outside Australia. A person within Australia does not need safe haven. The expression "to travel to, enter and remain in Australia" also supports this construction. Though the forgoing survey of the Act and the Regulations showed that the expression has no fixed meaning where used in the Act and the Regulations, nevertheless its use in relation to temporary safe haven visas in s 37A(1) suggests that such visas are confined initially to persons outside Australia. The Regulations which expressly envisage that applicants for such visas may be within Australia should be confined to applicants for second or subsequent temporary safe haven visas, as contemplated by s 91K of the Act.

62. Since the Plaintiff was in Australia at the time of the purported grant to him of the TSH Visa and since he did not at that time (and has not at any time since) needed safe

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[46] Available online at: http://www.immi.gov.au/media/publications/statistics/popflows2008-09/pop-flows-chapter4.pdf.

haven in response to a humanitarian emergency, the Minister had no power under s 195A, conformably with s 37A(1), to grant him a temporary safe haven visa.

(d) ***Improper purpose***

63. The evidence concerning the purpose for which the Minister exercised the power to grant the TSH Visa may be summarised as follows:

(a) The Ministerial Submission dated 5 April 2012, signed by the Minister, recorded at paragraph 9 that the Minister had agreed to grant both a temporary safe haven visa and a bridging visa to certain persons in detention. It then noted specifically that the grant of the temporary safe haven visas would bar the holders from lodging further onshore visa applications.[47]

(b) The letter from the Department notifying the Plaintiff of the grant of both the TSH Visa and the First Bridging Visa said the former had been granted "for administrative reasons and will keep the processing of your protection claims."[48]

(c) The Minister deposed at paragraphs 6 and 9 of his affidavit, that the TSH Visa was granted to the Plaintiff to avoid the consequence that the Plaintiff, upon release from detention, would be able to apply for a protection visa, and, further, that he would not have granted the First Bridging Visa to release the Plaintiff from detention if he had not also been able to grant the TSH Visa.[49]

64. There is nothing in the evidence that could support a finding that the power in s 195A was exercised for any purpose connected with temporary safe haven.

65. On the contrary, the evidence establishes that the sole purpose of granting to the Plaintiff the TSH Visa was to impose the statutory bar in s 91K in substitution of the one under s 46A(1) that was being lifted as a result of the grant of the First Bridging Visa.[50] This purpose further explains why the TSH Visa was only of seven days duration.

66. The purpose of granting the TSH Visa was to impose the statutory bar in s 91K is an improper purpose,[51] for two reasons.

67. First, the Act does not confer a power on the Minister to grant a visa other than for the purpose of permitting a non-citizen to be a lawful non-citizen when in the migration

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47 **SCB 023.**

48 **SCB 040.**

49 **SCB 089.**

50 **SCB 018-019, 022-027, 040, [6]-[7] and [9] 089-090.**

51 *Thompson v Randwick Municipal Corporation* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467 at 469; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Gibbs CJ at 186-7; per Aickin J at 233.

zone (including in circumstances where he/she intends to travel to and enter Australia and, thereby, come to be in the migration zone). So much is clear from s 4(1) and (2), ss 13 and 14 and, indeed, the whole structure of the Act.

68. The TSH Visa was not granted to the Plaintiff for the purpose of making him a lawful non-citizen (thereby leading to his release from detention). The evidence establishes that was not the purpose. This is confirmed by the fact that the purpose of making the Plaintiff a lawful non-citizen had been achieved by the grant of the First Bridging Visa.

69. Secondly, the power in s 195A of the Act is not exercisable in respect of persons already in Australia and who do not need safe haven. Whatever may be said of the conditions of immigration detention, the Minister cannot be heard to say that a detainee needs temporary safe haven, though, as the note to s 37A(1) makes clear, a visa under that section can only be granted for that purpose.

Part VII: Legislation

70. Relevant sections of the Act are as follows:

- s 4;
- s 5 – "*bridging visa*", "*criminal justice visa*", "*detain*", "*detainee*", "*enforcement visa*", "*excised offshore place*", "*immigration detention*", "*offshore entry person*", "*permanent visa*", "*substantive visa*", "*temporary visa*" and "*visa*";
- ss 13 and 14;
- ss 29, 30, 31, 37, 37A, 38 and 38A;
- ss 44, 45, 46 and 46A;
- ss 65(1) and 68;
- ss 72-76;
- ss 77, 81 and 82;
- ss 91H-91L;
- s 159;
- s 189(1) and (3); and
- s 195A.

71. Relevant parts of the Regulations are as follows:

- reg 2.07AC;
- item 1223B of Schedule 1;
- subclasses 448 and 449 in Schedule 2.

72. As in force at all relevant times, the above provisions and regulations are reproduced in the Annexure to these submissions. As of the date of these submissions, there has been no change to them.

Part VIII: Orders sought

73. The questions stated for the opinion of the Full Court should be answered as follows:

Q 1: Was the Plaintiff validly granted the TSH Visa?
A 1: No.

Q 2: Is the Plaintiff's application for a protection visa a valid application?
A 2: Yes.

10 **Q 3**: Who should pay the costs of this special case?
A 3: The Minister.

Part IX: Estimate of time

74. The Plaintiff estimates that the time for presentation of oral argument (including reply) will be 1 ½ hours.

Dated: 11 December 2012

M.R. Pearce

L.G. De Ferrari

20 **Counsel for the Plaintiff**

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M79 of 2012

BETWEEN

M79 / 2012

Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

10 **PLAINTIFF'S ANNEXURE**

Migration Act 1958* (Cth) *[Version in force at 12 April 2012]

Part 1—Preliminary

4 Object of Act

(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

20 (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

(4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

Date of document: 11 December 2012
Filed on behalf of: The Plaintiff

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5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

bridging visa has the meaning given by section 37.

...

criminal justice visa has the meaning given by section 38.

...

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

detainee means a person detained.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

...

enforcement visa has the meaning given by section 38A.

...

excised offshore place means any of the following:

(a) the Territory of Christmas Island;

...

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

...

immigration detention means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

...

Note 1: See also section 198A, which provides that being dealt with under that section does not amount to ***immigration detention***.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

...

offshore entry person means a person who:

(a) entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

...

permanent visa has the meaning given by subsection 30(1).

...

substantive visa means a visa other than:

(a) a bridging visa; or

(b) a criminal justice visa; or

(c) an enforcement visa.

...

temporary visa has the meaning given by subsection 30(2).

...

visa has the meaning given by section 29 and includes an ***old visa***.

Part 2—Control of arrival and presence of non-citizens

Division 1—Immigration status

13 Lawful non-citizens

(1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

(2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

14 Unlawful non-citizens

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

(2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

Division 3—Visas for non-citizens

Subdivision A—General provisions about visas

29 Visas

(1) Subject to this Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:

(a) travel to and enter Australia;

(b) remain in Australia.

Note: A maritime crew visa is generally permission to travel to and enter Australia only by sea (as well as being permission to remain in Australia) (see section 38B).

(2) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:

(a) travel to and enter Australia during a prescribed or specified period; and

(b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely.

(3) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:

(a) travel to and enter Australia during a prescribed or specified period; and

(b) if, and only if, the holder travels to and enters during that period:

(i) remain in it during a prescribed or specified period or indefinitely; and

(ii) if the holder leaves Australia during a prescribed or specified period, travel to and re-enter it during a prescribed or specified period.

(4) Without limiting section 83 (person taken to be included in visa), the regulations may provide for a visa being held by 2 or more persons.

30 Kinds of visas

(1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.

(2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
(a) during a specified period; or
(b) until a specified event happens; or
(c) while the holder has a specified status.

31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

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.

(3) The Minister may, by notice in the *Gazette*, shorten 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 if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned.

(4) If a notice under subsection (3) is published in the *Gazette*, the Minister must cause a

copy of the notice to be laid before each House of the Parliament within 3 sitting days of that House after the publication of the notice, together with a statement that sets out the reasons for the notice, referring in particular to the Minister's reasons for thinking that changes of a fundamental, durable and stable nature have occurred in the country concerned.

(5) If a notice under subsection (2) or (3) is published in the *Gazette* and has not been revoked, then the visa ceases to be in effect on the day specified in the notice, despite any other provision of this Act.

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

(7) In this section:

country concerned means the country or countries in which the circumstances exist that give rise to the grant of temporary safe haven visas.

38 Criminal justice visas

There is a class of temporary visas, to be known as criminal justice visas, to be granted under Subdivision D of Division 4.

38A Enforcement visas

There is a class of temporary visas to travel to, enter and remain in Australia, to be known as enforcement visas.

Note: Division 4A deals with these visas.

Subdivision AA—Applications for visas

44 Extent of following Subdivisions

(1) This Subdivision and the later Subdivisions of this Division, other than this section, Subdivision AG and subsection 138(1), do not apply to criminal justice visas.

(2) This Subdivision and the later Subdivisions of this Division, other than this section and Subdivision AG, do not apply to enforcement visas.

45 Application for visa

(1) Subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.

46 Valid visa application

(1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:

(a) it is for a visa of a class specified in the application; and

(b) it satisfies the criteria and requirements prescribed under this section; and

...

(d) it is not prevented by section 48 (visa refused or cancelled earlier), 48A (protection visa), 91E (CPA and safe third countries), 91K (temporary safe haven visa), 91P (non-citizens with access to protection from third countries), 161 (criminal justice), 164D (enforcement visa), 195 (detainees) or 501E (visa refused or cancelled on character grounds).

...

(2) Subject to subsection (2A), an application for a visa is valid if:

(a) it is an application for a visa of a class prescribed for the purposes of this subsection; and

(b) under the regulations, the application is taken to have been validly made.

...

46A Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

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

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

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the offshore entry person; or

(b) any information that may identify the offshore entry person; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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

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.

68 When visa is in effect

(1) Subject to subsection (2), a visa has effect as soon as it is granted.

(2) A visa may provide that it comes into effect at the beginning of a day, being a day after its grant:

(a) specified in the visa; or

(b) when an event, specified in the visa, happens.

(3) A visa can only be in effect during the visa period for the visa.

(4) A bridging visa (the ***reactivated bridging visa***), held by a non-citizen, that has ceased to be in effect under subsection 82(3), will come into effect again during the visa period for the visa if:

(a) the non-citizen does not hold a substantive visa that is in effect; and

(b) either:

(i) the non-citizen does not hold any other bridging visa; or

(ii) the reactivated bridging visa is determined, in accordance with the regulations, to be the most beneficial of the bridging visas held by the applicant.

Subdivision AF—Bridging visas

72 Interpretation

(1) In this Subdivision:

eligible non-citizen means a non-citizen who:

(a) has been immigration cleared; or

(b) is in a prescribed class of persons; or

(c) the Minister has determined to be an eligible non-citizen.

(2) The Minister may make a determination under paragraph (1)(c) that a non-citizen is an eligible non-citizen if:

(a) the non-citizen was an unlawful non-citizen when he or she entered the migration zone; and

(b) the non-citizen made a valid application for a protection visa after he or she arrived in Australia; and

(c) the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made; and

(d) the Minister has not made a primary decision in relation to the application for a protection visa; and

(e) the Minister thinks that the determination would be in the public interest.

(3) The power to make a determination under paragraph (1)(c) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under paragraph (1)(c), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:

(a) the name of any non-citizen who is the subject of the determination; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person, or any information that may identify the person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to make a determination under paragraph (1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.

73 Bridging visas

If the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa permitting the non-citizen to remain in, or to travel to, enter and remain in Australia:

(a) during a specified period; or

(b) until a specified event happens.

74 Further applications for bridging visa

(1) Subject to subsection (2), if:
(a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa; and
(b) the Minister refuses to grant the visa;
the eligible non-citizen may make a further application for a bridging visa.

(2) Unless the further application for a bridging visa is made in prescribed circumstances, the further application may be made not earlier than 30 days after:
(a) if the eligible non-citizen did not make an application for review of the decision to refuse to grant the visa—the refusal; or
(b) if the eligible non-citizen made an application for such review—the application is finally determined.

75 When eligible non-citizen in immigration detention granted visa

(1) If:
(a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa of a prescribed class; and
(b) the Minister does not make a decision, within the prescribed period, to grant or refuse to grant the bridging visa;
the non-citizen is taken to have been granted a bridging visa of the prescribed class on prescribed conditions (if any) at the end of that period.

(2) The period in subsection (1) may be extended in relation to a particular application by agreement between the applicant and the Minister.

76 Bridging visa not affect visa applications

(1) The fact that a non-citizen holds a bridging visa does not prevent or affect:
(a) an application by the non-citizen for a visa of another class; or
(b) the grant of such a visa.

(2) To avoid doubt, the holding by a non-citizen of a bridging visa is not to be taken to be, for the purposes of an application for a visa of another class, the holding of a visa.

Subdivision AG—Other provisions about visas

77 Visas held during visa period

To avoid doubt, for the purposes of this Act, a non-citizen holds a visa at all times during the visa period for the visa.

81 Extent of visa authority

(1) A visa to travel to Australia during a period is not permission to travel to it outside that period.

(2) A visa to enter Australia within a period is not permission to so enter outside that period.

(3) A visa to remain in Australia during a period is not permission to so remain outside that

period.

82 When visas cease to be in effect

(1) A visa that is cancelled ceases to be in effect on cancellation.

(2) A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.

(2AA) Despite subsection (2):

(a) a maritime crew visa held by a non-citizen does not cease to be in effect if a substantive visa for the non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection comes into effect; and

(b) a substantive visa held by a non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection does not cease to be in effect if a maritime crew visa for the non-citizen comes into effect.

(2A) A temporary visa held by a non-citizen ceases to be in effect if an enforcement visa for the non-citizen comes into effect.

(3) A bridging visa held by a non-citizen ceases to be in effect if another visa (other than a special purpose visa or a maritime crew visa) for the non-citizen comes into effect.

(4) A visa ceases to be in effect when the holder leaves Australia because of a deportation order made under section 200.

(5) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date unless the holder of the visa:

(a) has entered Australia in that period or on or before that date; and

(b) is in Australia at the end of that period or on that date.

(6) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect if the holder leaves Australia after that period or date.

(7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.

(7A) A bridging visa permitting the holder to remain in, or to travel to, enter and remain in, Australia until a specified event happens, ceases to be in effect the moment the event happens.

(8) A visa to remain in, but not re-enter, Australia that is granted to a non-citizen in Australia ceases to be in effect if the holder leaves Australia.

(9) This section does not affect the operation of other provisions of this Act under which a visa ceases to be in effect (such as sections 173 and 174).

(10) For the purposes of subsections (5), (6) and (7), ***particular date*** includes:

(a) the date an event, specified in the visa, happens; or

(b) the date the holder ceases to have a status specified in the visa or the regulations.

Subdivision AJ—Temporary safe haven visas

91H Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

Note: For temporary safe haven visas, see section 37A.

91J Non-citizens to whom this Subdivision applies

This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:

(a) holds a temporary safe haven visa; or

(b) has not left Australia since ceasing to hold a temporary safe haven visa.

91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

91L Minister may determine that section 91K does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a

year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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

Division 4—Criminal justice visitors

159 Procedure for obtaining criminal justice visa

(1) If a criminal justice certificate, or a criminal justice stay warrant, in relation to a non-citizen is in force, the Minister may consider the grant of a criminal justice visa for the non-citizen.

(2) If the Minister, after considering the grant of a criminal justice visa for a non-citizen, is satisfied that the criteria for it have been met, the Minister may, in his or her absolute discretion:

(a) grant it by causing a record of it to be made; and

(b) give such evidence of it as the Minister considers appropriate.

Division 7—Detention of unlawful non-citizens
Subdivision A—General provisions

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

...

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under

subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

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

Tabling of information relating to the granting of visas

(6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

(a) states that the Minister has granted a visa under this section; and

(b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

(7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

(a) the name of the person to whom the visa is granted; or

(b) any information that may identify the person to whom the visa is granted; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.

(8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

Part 1—Preliminary

4 Object of Act

(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

(3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

(4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

(5) To advance its object, this Act provides for the taking of offshore entry persons from Australia to a regional processing country.

5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

bridging visa has the meaning given by section 37.

...

criminal justice visa has the meaning given by section 38.

...

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

detainee means a person detained.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

...

enforcement visa has the meaning given by section 38A.

...

excised offshore place means any of the following:

(a) the Territory of Christmas Island;

...

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

...

immigration detention means:

(a) being in the company of, and restrained by:
(i) an officer; or
(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or
(b) being held by, or on behalf of, an officer:
(i) in a detention centre established under this Act; or

...

Note 1: Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to ***immigration detention***.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

...

offshore entry person means a person who:

(a) entered Australia at an excised offshore place after the excision time for that offshore place; and
(b) became an unlawful non-citizen because of that entry.

...

permanent visa has the meaning given by subsection 30(1).

...

substantive visa means a visa other than:

(a) a bridging visa; or
(b) a criminal justice visa; or
(c) an enforcement visa.

...

temporary visa has the meaning given by subsection 30(2).

...

visa has the meaning given by section 29 and includes an ***old visa***.

Part 2—Control of arrival and presence of non-citizens

Division 1—Immigration status

13 Lawful non-citizens

(1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

(2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

14 Unlawful non-citizens

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

(2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

Division 3—Visas for non-citizens

Subdivision A—General provisions about visas

29 Visas

(1) Subject to this Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:
- (a) travel to and enter Australia;
- (b) remain in Australia.

Note: A maritime crew visa is generally permission to travel to and enter Australia only by sea (as well as being permission to remain in Australia) (see section 38B).

(2) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:
- (a) travel to and enter Australia during a prescribed or specified period; and
- (b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely.

(3) Without limiting subsection (1), a visa to travel to, enter and remain in Australia may be one to:
- (a) travel to and enter Australia during a prescribed or specified period; and
- (b) if, and only if, the holder travels to and enters during that period:
  - (i) remain in it during a prescribed or specified period or indefinitely; and
  - (ii) if the holder leaves Australia during a prescribed or specified period, travel to and re-enter it during a prescribed or specified period.

(4) Without limiting section 83 (person taken to be included in visa), the regulations may provide for a visa being held by 2 or more persons.

30 Kinds of visas

(1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.

(2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
- (a) during a specified period; or
- (b) until a specified event happens; or
- (c) while the holder has a specified status.

31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

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.

(3) The Minister may, by notice in the *Gazette*, shorten 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 if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned.

(4) If a notice under subsection (3) is published in the *Gazette*, the Minister must cause a copy of the notice to be laid before each House of the Parliament within 3 sitting days of that House after the publication of the notice, together with a statement that sets out the reasons for the notice, referring in particular to the Minister's reasons for thinking that changes of a fundamental, durable and stable nature have occurred in the country concerned.

(5) If a notice under subsection (2) or (3) is published in the *Gazette* and has not been revoked, then the visa ceases to be in effect on the day specified in the notice, despite any other provision of this Act.

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

(7) In this section:

country concerned means the country or countries in which the circumstances exist that give rise to the grant of temporary safe haven visas.

38 Criminal justice visas

There is a class of temporary visas, to be known as criminal justice visas, to be granted under Subdivision D of Division 4.

38A Enforcement visas

There is a class of temporary visas to travel to, enter and remain in Australia, to be known as enforcement visas.

Note: Division 4A deals with these visas.

Subdivision AA—Applications for visas

44 Extent of following Subdivisions

(1) This Subdivision and the later Subdivisions of this Division, other than this section, Subdivision AG and subsection 138(1), do not apply to criminal justice visas.

(2) This Subdivision and the later Subdivisions of this Division, other than this section and Subdivision AG, do not apply to enforcement visas.

45 Application for visa

(1) Subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.

46 Valid visa application

(1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:

(a) it is for a visa of a class specified in the application; and

(b) it satisfies the criteria and requirements prescribed under this section; and

...

(d) it is not prevented by section 48 (visa refused or cancelled earlier), 48A (protection visa), 91E (CPA and safe third countries), 91K (temporary safe haven visa), 91P (non-citizens with access to protection from third countries), 161 (criminal justice), 164D (enforcement visa), 195 (detainees) or 501E (visa refused or cancelled on character grounds).

...

(2) Subject to subsection (2A), an application for a visa is valid if:

(a) it is an application for a visa of a class prescribed for the purposes of this subsection; and

(b) under the regulations, the application is taken to have been validly made.

...

46A Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

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

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

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's

reasons for thinking that the Minister's actions are in the public interest.

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

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

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

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.

68 When visa is in effect

(1) Subject to subsection (2), a visa has effect as soon as it is granted.

(2) A visa may provide that it comes into effect at the beginning of a day, being a day after its grant:
(a) specified in the visa; or
(b) when an event, specified in the visa, happens.

(3) A visa can only be in effect during the visa period for the visa.

(4) A bridging visa (the ***reactivated bridging visa***), held by a non-citizen, that has ceased to be in effect under subsection 82(3), will come into effect again during the visa period for the visa if:

(a) the non-citizen does not hold a substantive visa that is in effect; and

(b) either:

(i) the non-citizen does not hold any other bridging visa; or

(ii) the reactivated bridging visa is determined, in accordance with the regulations, to be the most beneficial of the bridging visas held by the applicant.

Subdivision AF—Bridging visas

72 Interpretation

(1) In this Subdivision:

eligible non-citizen means a non-citizen who:

(a) has been immigration cleared; or

(b) is in a prescribed class of persons; or

(c) the Minister has determined to be an eligible non-citizen.

(2) The Minister may make a determination under paragraph (1)(c) that a non-citizen is an eligible non-citizen if:

(a) the non-citizen was an unlawful non-citizen when he or she entered the migration zone; and

(b) the non-citizen made a valid application for a protection visa after he or she arrived in Australia; and

(c) the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made; and

(d) the Minister has not made a primary decision in relation to the application for a protection visa; and

(e) the Minister thinks that the determination would be in the public interest.

(3) The power to make a determination under paragraph (1)(c) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under paragraph (1)(c), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:

(a) the name of any non-citizen who is the subject of the determination; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person, or any information that may identify the person.

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

(7) The Minister does not have a duty to consider whether to make a determination under paragraph (1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.

73 Bridging visas

If the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa permitting the non-citizen to remain in, or to travel to, enter and remain in Australia:
(a) during a specified period; or
(b) until a specified event happens.

74 Further applications for bridging visa

(1) Subject to subsection (2), if:
(a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa; and
(b) the Minister refuses to grant the visa;
the eligible non-citizen may make a further application for a bridging visa.

(2) Unless the further application for a bridging visa is made in prescribed circumstances, the further application may be made not earlier than 30 days after:
(a) if the eligible non-citizen did not make an application for review of the decision to refuse to grant the visa—the refusal; or
(b) if the eligible non-citizen made an application for such review—the application is finally determined.

75 When eligible non-citizen in immigration detention granted visa

(1) If:
(a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa of a prescribed class; and
(b) the Minister does not make a decision, within the prescribed period, to grant or refuse to grant the bridging visa;
the non-citizen is taken to have been granted a bridging visa of the prescribed class on prescribed conditions (if any) at the end of that period.

(2) The period in subsection (1) may be extended in relation to a particular application by agreement between the applicant and the Minister.

76 Bridging visa not affect visa applications

(1) The fact that a non-citizen holds a bridging visa does not prevent or affect:

(a) an application by the non-citizen for a visa of another class; or
(b) the grant of such a visa.

(2) To avoid doubt, the holding by a non-citizen of a bridging visa is not to be taken to be, for the purposes of an application for a visa of another class, the holding of a visa.

Subdivision AG—Other provisions about visas

77 Visas held during visa period

To avoid doubt, for the purposes of this Act, a non-citizen holds a visa at all times during the visa period for the visa.

81 Extent of visa authority

(1) A visa to travel to Australia during a period is not permission to travel to it outside that period.

(2) A visa to enter Australia within a period is not permission to so enter outside that period.

(3) A visa to remain in Australia during a period is not permission to so remain outside that period.

82 When visas cease to be in effect

(1) A visa that is cancelled ceases to be in effect on cancellation.

(2) A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.

(2AA) Despite subsection (2):
(a) a maritime crew visa held by a non-citizen does not cease to be in effect if a substantive visa for the non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection comes into effect; and
(b) a substantive visa held by a non-citizen that is of a class specified by the Minister, by legislative instrument, for the purposes of this subsection does not cease to be in effect if a maritime crew visa for the non-citizen comes into effect.

(2A) A temporary visa held by a non-citizen ceases to be in effect if an enforcement visa for the non-citizen comes into effect.

(3) A bridging visa held by a non-citizen ceases to be in effect if another visa (other than a special purpose visa or a maritime crew visa) for the non-citizen comes into effect.

(4) A visa ceases to be in effect when the holder leaves Australia because of a deportation order made under section 200.

(5) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date unless the holder of the visa:
(a) has entered Australia in that period or on or before that date; and

(b) is in Australia at the end of that period or on that date.

(6) A visa to travel to and enter Australia (whether also a visa to remain in Australia) during a particular period or until a particular date ceases to be in effect if the holder leaves Australia after that period or date.

(7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.

(7A) A bridging visa permitting the holder to remain in, or to travel to, enter and remain in, Australia until a specified event happens, ceases to be in effect the moment the event happens.

(8) A visa to remain in, but not re-enter, Australia that is granted to a non-citizen in Australia ceases to be in effect if the holder leaves Australia.

(9) This section does not affect the operation of other provisions of this Act under which a visa ceases to be in effect (such as sections 173 and 174).

(10) For the purposes of subsections (5), (6) and (7), ***particular date*** includes:
(a) the date an event, specified in the visa, happens; or
(b) the date the holder ceases to have a status specified in the visa or the regulations.

Subdivision AJ—Temporary safe haven visas

91H Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

Note: For temporary safe haven visas, see section 37A.

91J Non-citizens to whom this Subdivision applies

This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:
(a) holds a temporary safe haven visa; or
(b) has not left Australia since ceasing to hold a temporary safe haven visa.

91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

91L Minister may determine that section 91K does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
(a) sets out the determination; and
(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:
(a) the name of the non-citizen; or
(b) any information that may identify the non-citizen; or
(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:
(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

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

Division 4—Criminal justice visitors

159 Procedure for obtaining criminal justice visa

(1) If a criminal justice certificate, or a criminal justice stay warrant, in relation to a non-citizen is in force, the Minister may consider the grant of a criminal justice visa for the non-citizen.

(2) If the Minister, after considering the grant of a criminal justice visa for a non-citizen, is satisfied that the criteria for it have been met, the Minister may, in his or her absolute discretion:
(a) grant it by causing a record of it to be made; and
(b) give such evidence of it as the Minister considers appropriate.

Division 7—Detention of unlawful non-citizens
Subdivision A—General provisions

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

...

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

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

Minister to exercise power personally

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

Tabling of information relating to the granting of visas

(6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

(a) states that the Minister has granted a visa under this section; and

(b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

(7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

(a) the name of the person to whom the visa is granted; or

(b) any information that may identify the person to whom the visa is granted; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.

(8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

Migration Regulations 1994 (Cth) *(in force at all relevant times)*

2.07AC Applications for Temporary Safe Haven and Temporary (Humanitarian Concern) visas

(1) For subsection 46 (2) of the Act, each of the following classes of visa is a prescribed class of visa:

(a) the Temporary Safe Haven (Class UJ) visa class;

...

(2) An application for a visa of a class mentioned in subregulation (1) is taken to have been validly made by a person (the ***interviewee***) if:

(a) the interviewee indicates to an authorised officer that he or she accepts the Australian Government's offer of a temporary stay in Australia; and

(b) the authorised officer endorses, in writing, the interviewee's acceptance of the offer.

(3) An application for a visa of a class mentioned in subregulation (1) is also taken to have been validly made by a person if an interviewee identifies the person as being a member of his or her family unit.

Schedule 1

1223B. Temporary Safe Haven (Class UJ)

(1) Form: Nil.

(2) Visa application charge: Nil.

(3) Subclasses:

448 (Kosovar Safe Haven (Temporary))

449 (Humanitarian Stay (Temporary))

Note See regulation 2.07AC for how an application for a Temporary Safe Haven (Class UJ) visa is taken to have been validly made.

Schedule 2

Subclass 448 Kosovar Safe Haven (Temporary)

448.1 Interpretation

Note No interpretation provisions specific to this Part.

448.2 Primary criteria

Note The primary criteria must be satisfied by at least 1 member of a family unit. The other members of the family unit who are applicants for a visa of this Subclass need satisfy only the secondary criteria.

448.21 [No criteria to be satisfied at time of application]

448.22 Criteria to be satisfied at time of decision

448.221(1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if the applicant:

(a) was resident in Kosovo in the Federal Republic of Yugoslavia on 25 March 1999; and

(b) has been displaced from Kosovo since 25 March 1999.

(3) The applicant meets the requirements of this subclause if the applicant:

(a) is a member of the immediate family of a holder of a Subclass 448 visa (the visa holder); and

(b) was a member of the visa holder's immediate family when the visa holder was first granted a Subclass 448 visa.

448.223 Grant of the visa would not result in either:

(a) the number of Subclass 448 visas granted in a financial year exceeding the maximum number of Subclass 448 visas, as determined by Gazette Notice, that may be granted in that financial year; or

(b) the number of visas of particular classes, including Subclass 448, granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.

448.224 The applicant satisfies public interest criteria 4002 and 4003.

448.225 If the applicant is outside Australia, the applicant has undergone a medical examination carried out by a medical practitioner approved by the Minister.

448.226 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

448.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

448.31 [No criteria to be satisfied at time of application]

448.32 Criteria to be satisfied at time of decision

448.321 The applicant:

(a) is a member of the family unit of a person who, having met the requirements of subclause 448.221 (2), is the holder of a Subclass 448 visa; or

(b) is a member of the immediate family of a person who, having met the requirements of subclause 448.221 (3), is the holder of a Subclass 448 visa.

448.322 The applicant satisfies public interest criteria 4002 and 4003.

448.323 If the applicant is outside Australia, the applicant has undergone a medical examination carried out by a medical practitioner approved by the Minister.

448.324 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

448.4 Circumstances applicable to grant

448.411 The applicant may be in, or outside, Australia at time of grant.

448.5 When visa is in effect

448.511 Temporary visa permitting the holder to travel to, enter and remain in Australia until a date specified by the Minister.

448.6 Conditions

448.611 If the applicant is outside Australia at time of grant, conditions 8104, 8506 and 8529.

448.612 If the applicant is in Australia at time of grant, conditions 8104 and 8506.

448.613 Condition 8303 may be imposed.

448.7 Way of giving evidence

448.711 No evidence need be given.

448.712 If evidence is given, to be given by a label affixed to a valid passport or valid Convention travel document.

Subclass 449 Humanitarian Stay (Temporary)

449.1 Interpretation

Note No interpretation provisions specific to this Part.

449.2 Primary criteria

Note The primary criteria must be satisfied by at least 1 member of a family unit. Other members of the family unit, or members of the immediate family of a person, who are applicants for a visa of this subclass need satisfy only the secondary criteria.

449.21 [No criteria to be satisfied at time of application]

449.22 Criteria to be satisfied at time of decision

449.221 (1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant has been displaced from his or her place of residence, and:

(i) cannot reasonably return to that place of residence; and

(ii) is in grave fear of his or her personal safety because of the circumstances in

which, or reasons why, he or she was displaced from that place of residence; or

(b) the applicant has not been displaced from his or her place of residence, but:

(i) there is a strong likelihood that the applicant will be displaced from that place of residence; and

(ii) the applicant is in grave fear of his or her personal safety because of the circumstances in which, or reasons why, the applicant may be displaced from that place of residence.

(3) The applicant meets the requirements of this subclause if the applicant:

(a) is a member of the immediate family of a holder of a Subclass 449 visa (***the visa holder***); and

(b) was a member of the visa holder's immediate family when the visa holder was first granted a Subclass 449 visa.

449.223 Grant of the visa would not result in either:

(a) the number of Subclass 449 visas granted in a financial year exceeding the maximum number of Subclass 449 visas, as determined by Gazette Notice, that may be granted in that financial year; or

(b) the number of visas of particular classes, including Subclass 449, granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.

449.224 (1) The applicant satisfies public interest criteria 4002 and 4003A.

(2) The applicant satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

449.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit, or members of the immediate family, of a person who satisfies the primary criteria.

449.31 [No criteria to be satisfied at time of application]

449.32 Criteria to be satisfied at time of decision

449.321 The applicant:

(a) is a member of the family unit of a person who, having met the requirements of subclause 449.221 (2), is the holder of a Subclass 449 visa; or

(b) is a member of the immediate family of a person who, having met the requirements of subclause 449.221 (3), is the holder of a Subclass 449 visa.

449.322 (1) The applicant satisfies public interest criteria 4002 and 4003A.

(2) The applicant satisfies public interest criterion 4007, unless the Minister is satisfied that it

would be unreasonable to require the person to undergo assessment in relation to that criterion.

449.323 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

449.4 Circumstances applicable to grant

449.411 If the application is made outside Australia, the applicant must be outside Australia at the time of grant.

449.412 If the application is made in Australia, the applicant must be in Australia at the time of grant.

449.5 When visa is in effect

449.511 Temporary visa permitting the holder to travel to, enter and remain in Australia until a date specified by the Minister.

449.6 Conditions

449.611 Condition 8506.

449.612 Condition 8101 or 8104 may be imposed.

449.612A Condition 8303 may be imposed.

449.613 If the Minister is satisfied that it would be unreasonable to require an applicant to undergo assessment in relation to criterion 4007, condition 8529.

Note See subclauses 449.224 (2) and 449.322 (2).

449.7 Way of giving evidence

449.711 No evidence need be given.

449.712 If evidence is given, to be given by a label affixed to a valid passport or valid Convention travel document.