IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

B E T W E E N:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS

Dated: 28 October 2014

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I. CERTIFICATION

1. The plaintiff certifies that these submissions are suitable for publication on the internet.

II. ISSUES PRESENTED

2. The plaintiff is a national of Pakistan and a Hazara adherent to Shia Islam who in May 2013 was found to face a real chance of being seriously harmed or killed by extremist groups should he be returned to Pakistan. He is an unauthorised maritime arrival.

3. On 4 July 2014, pursuant to the decision of this Court in *Plaintiff S297 v Minister for Immigration and Border Protection* (2014) 309 ALR 209, a writ of mandamus issued out of this Court to the first defendant (**Minister**) commanding that he consider and determine the plaintiff's application for a Protection (Class XA) visa according to law or state why it had not been done.

4. The issues raised by the special case include whether the national interest criterion prescribed by clause 866.226 of Schedule 2 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**) is invalid for repugnancy to the *Migration Act 1958* (Cth) (**Migration Act**), and if so, whether a peremptory writ of mandamus should issue to the Minister commanding him to grant a permanent protection visa to the plaintiff, or whether different relief should be granted.

5. The special case states four questions for the opinion of the Full Court, which should be answered as follows:

   a. Is clause 866.226 of Sch 2 to the Migration Regulations invalid? *Yes.*

   b. Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the plaintiff made according to law? *No.*

   c. What, if any, relief should be granted to the plaintiff? *A declaration that cl 866.226 of Sch 2 to the Migration Regulations is invalid. A peremptory writ of mandamus commanding the Minister to determine the plaintiff's application for a protection visa by granting a Protection (Class XA) (Subclass 866) visa to the plaintiff forthwith. Alternatively, a peremptory writ of mandamus commanding the Minister to determine the plaintiff's application for a protection visa according to law.*

   d. Who should pay the costs of this special case? *The defendants. Alternatively, there should be no order as to costs.*

III. SECTION 78B NOTICES

6. The plaintiff has determined that there is no need for notices to be given under s 78B of the *Judiciary Act 1903* (Cth).

IV. MATERIAL FACTS

7. The plaintiff is a national of Pakistan who arrived in Australia on 19 May 2012 as an unauthorised maritime arrival (**SC** [4], [6]). The plaintiff was detained upon his arrival for the purpose of the Minister considering whether to exercise power under s 46A of the Migration Act to allow the plaintiff to make a valid application for a protection visa.

8. On 23 September 2012, thinking it in the public interest to do so, the Minister exercised power under s 46A of the Migration Act to permit the plaintiff to make a valid application for a protection visa, and the plaintiff made a valid application for a protection visa on the same day. (**SC** [9])

9. On 17 May 2013, the Refugee Review Tribunal (**Tribunal**) found that the plaintiff was a refugee, facing as he did a real chance of being seriously harmed or killed by extremist groups for reasons of his Hazara ethnicity and Shia faith. (**SC** [12])

10. On 20 June 2014, the Full Court delivered judgment on the questions referred to it by way of the special case dated 22 April 2014: *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209. (**SC** [16])

11. On 1 July 2014, French CJ ordered, by consent, that a writ of mandamus issue directing the Minister to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law. (**SC** [17]) The writ issued on 4 July 2014. (**SC** [19])

12. On 17 July 2014, having invited the plaintiff to provide comments in respect of possible adverse decisions, the Minister decided to refuse to grant a protection visa to the plaintiff and to issue a conclusive certificate in respect of that decision. (**SC** [24])

13. It is agreed that the Minister refused to grant a protection visa to the plaintiff only because the Minister was not satisfied that the criterion prescribed by clause 866.226 of Sch 2 to the Migration Regulations was satisfied. (**SC** [25])

14. On 21 July 2014, the Minister filed a return to the writ of mandamus. (**SC** [30])

15. The plaintiff challenges the validity of cl 866.226, and the sufficiency of the return made by the Minister. On the facts and inferences available from the special case,[1] on 17 July 2014 the Minister was satisfied that:

    a. the plaintiff satisfied all other criteria for the grant of a protection visa;

    b. the plaintiff passed the character test;

    c. the plaintiff was not assessed to be a risk to security;

    d. the plaintiff was not a person to whom article 1F applies; and

    e. the plaintiff was not disentitled to protection by reason of articles 32 or 33(2).

16. The plaintiff also seeks mandamus commanding the Minister to grant a protection visa.

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[1] SC [25]-[26] read with ss 36 and 501 and the other criteria prescribed for the grant of protection visa.

V. ARGUMENT

A THE NATIONAL INTEREST CRITERION IS INVALID

17. For three reasons, clause 866.226 of Sch 2 to the Migration Regulations is invalid. First, the clause is inconsistent with ss 501(3) and 501C, which give the Minister a discretionary power to refuse to grant a protection visa in the national interest only when certain other criteria are satisfied. Secondly, the clause departs from the scheme for protection visas provided for by ss 36(2), 501 and other provisions of the Act. Thirdly, section 46A abstracts power from ss 504 and 31(3) such that the concept of the "national interest" in clause 866.226 cannot validly extend to the statutorily-recognised characteristics of unauthorised maritime arrivals.

18. The starting point for all three arguments is the power given by the Migration Act to make regulations prescribing visa criteria. Section 504(1) provides that the Governor-General may make regulations "not inconsistent with this Act"[2] prescribing all matters "required or permitted to be prescribed" or "necessary or convenient to be prescribed" for carrying out or giving effect to the Act. Section 31(3) provides that the regulations "may prescribe criteria for a visa or visas of a specified class", including the class provided for by section 36, but such criteria must not be inconsistent with the Act.

19. If the power given by s 504(1) and 31(3) to prescribe visa criteria cannot be exercised to prescribe a criterion that is inconsistent with or repugnant to the Act, the plaintiff's challenge to the validity of clause 866.226 cannot be met by assertions that the regulation-making power is largely unbounded and the clause is authorised by it. The critical question is whether clause 866.226 is inconsistent with or repugnant to any other provision of the Act, or the scheme of the Act as a whole, including ss 501(3) and 501C.

20. For completeness, it may be noted that a national interest criterion has not been prescribed for any other class of visas.

1. Clause 866.226 is inconsistent with sections 501(3) and 501C

21. Sections 504 and 31(3), when construed in the context of the Migration Act as a whole, must be read as not authorising the prescription of a criterion for the grant of a visa that is inconsistent with the Act's identification of, and provision of special procedures for, a decision of the kind described in s 501(3)—namely, a decision to refuse to grant a visa because the Minister is satisfied that the refusal is in the national interest.

(a) The provisions of sections 501(3) and 501C

22. Sections 501(3) and 501C were part of a suite of provisions introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) and commenced on 1 June 1999. The purpose of the amending legislation was "to ensure that the government can effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non-citizens

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2 This reflects the position at common law: *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588 (Dixon J).

who have a criminal background or have criminal associations".[3] The essential advance made by the legislation was the introduction of the character test.

23. The purpose of ss 501(3) and 501C in particular was to give the Minister a personal power "in exceptional or emergency circumstances ... to act decisively on matters of visa refusal, cancellation and the removal of non-citizens".[4] Although the special power to cancel a visa was justified by reference to "emergency cases involving non-citizens who may be a significant threat to the community" in which the Minister acting personally "should have the power to act without notice",[5] there was no express justification for the special power to refuse a visa, or any examples given of "emergency cases" which might call for the exercise of a power to refuse to grant a visa rather than cancel a visa. But it was observed that, under the new provisions, the Minister would be "very accountable for his actions to the parliament, his colleagues and the people of Australia".[6] The Minister emphasised: "I will retain a discretion, as this bill provides. It is a discretion that ought to be in the hands of the minister."[7]

24. With that context in mind, six textual considerations deriving from the provisions of ss 501(3) and 501C should be contrasted with the effect of clause 866.226.

25. First, s 501(3) provides that the Minister *may*, in certain circumstances, refuse to grant a visa if the Minister "is satisfied that the refusal ... is in the national interest", whereas the effect of clause 866.226[8] is that the Minister *must*, in all circumstances, refuse to grant a protection visa unless the Minister "is satisfied that the grant of the visa is in the national interest". The prescription of clause 866.226 dictates an outcome not required by s 501(3).

26. Secondly, and related to the first point, the mandatory effect of clause 866.226 denies to the Minister the exercise of the personal statutory discretion reflected in s 501(3) to grant a protection visa to an applicant notwithstanding the national interest. Accordingly, the outcome of an application for a visa may differ depending on the provision relied upon.[9]

27. Thirdly, the assessment of the national interest under clause 866.226 need not be made by the Minister personally, in whom the Act reposes the power given by s 501(3) to refuse to grant a visa, but may be made by a delegate of the Minister considering whether the criteria for the visa have been met under s 65(1).

28. Fourthly, a condition for the exercise of the power given by s 501(3) is that the Minister reasonably suspects that the applicant does not pass the character test. No such condition attends the consideration or application of clause 866.226, the effect of which

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3 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1230 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

4 Ibid.

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1233 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

6 Ibid.

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1246 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

8 Read with ss 65(1)(a)(ii) and 65(1)(b) of the Migration Act.

9 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [206] (Hayne J).

is to relieve the Minister from complying with a requirement that the Parliament considered to be essential to the exercise of a power to refuse to grant a visa in the national interest. That is significant for the present matter, where the plaintiff passed the character test.

29. Fifthly, s 501C provides for special procedures to be followed where a decision refusing to grant a visa is made personally by the Minister under s 501(3). Those procedures include consideration by the Minister of whether to revoke the decision (s 501C(4)) and the accountability of the Minister to each House of the Parliament (ss 501C(8)-(9)). By contrast, a decision to refuse to grant a visa relying on cl 866.226 (whether made by a delegate or by the Minister) may be reviewed by an administrative tribunal except where, as in this case, the Minister has in the national interest decided that his decision should not be subject to that form of review.

30. The particular tribunal depends on the decision. A decision to refuse to grant a visa for non-satisfaction of cl 866.226 may be reviewed by the RRT (s 411(1)(c)) except where the Minister has in the national interest issued a conclusive certificate under s 411(3), or where the decision is one "relying on" articles 1F, 32 or 33(2) of the Convention. In the latter case, the decision is not reviewable by the RRT (s 411(1)(c)(i)), but is reviewable by the AAT (s 500(1)(c)(i)), except where the Minister has in the national interest issued a certificate under s 502(1) declaring the applicant to be an excluded person.

31. In this case, there was no express parliamentary oversight of the decision to refuse to grant a visa in the national interest, as the Minister did not and could not exercise the power that would have required the Minister to report to each House of the Parliament.

32. Sixthly, the prescription of clause 866.226 as a criterion for a visa admits of the possibility of inconsistent outcomes in the assessment of the national interest. The power given by s 501(3) may be exercised only by the Minister. Clause 866.226 falls to be considered either by the Minister or (more commonly) by the person to whom power under s 65(1) has been delegated by the Minister.

33. In assessing the national interest under clause 866.226, the delegate may be satisfied that the grant of the visa is in the national interest (and therefore that s 65(1)(a)(ii) is satisfied if all other criteria are satisfied), whereas in assessing the national interest under s 501(3), the Minister may be satisfied that refusing the visa is in the national interest, coupled with a reasonable suspicion that the applicant does not pass the character test (thereby preventing s 65(1)(a)(iii) from being satisfied). The difficulties associated with such a scenario were adverted to by Lindgren J in *SZLDG*.[10]

34. Similar considerations to the above six were seen to be significant by this Court in *M47* in relation to the validity of PIC 4002 as a criterion for the grant of a protection visa having regard to the special provisions of s 500(1)(c).

(b) The decision of this Court in *Plaintiff M47*

35. Chief Justice French held that the primary reason for the invalidity of PIC 4002 was that "the condition sufficient to support the assessment referred to in public interest criterion 4002 subsumes the disentitling national security criteria in Arts 32 and 33(2)", and "is

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10 *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at [52]-[54], [80], [90] (Lindgren J).

wider in scope than those criteria and sets no threshold level of threat necessary to enliven its application".[11] That and related considerations led his Honour to conclude that PIC 4002 "negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Arts 32 and 33(2)".[12] The same observations apply with equal force to the national interest criterion in clause 866.226.

36. Justice Hayne observed, amongst other things, that an assessment made for the purposes of PIC 4002 "may rely upon matters that are irrelevant to those that would be relevant if the decision-maker refused to grant a protection visa by applying s 501 and relying on either or both of Arts 32 and 33(2)".[13] The same can be said of an assessment of the national interest for the purposes of clause 866.226. Further, if the prescription of clause 866.226 is valid, the Act can be administered in a way that gives s 501(3) no work to do. Adopting the words of Hayne J in *M47*, such a construction of the Act should not be adopted "if by any other construction [all of the elements of s 501(3)] may ... be made useful and pertinent".[14]

37. Justice Crennan began by stating that the power in s 31(3), which is expressed generally, is a power to prescribe criteria which are not inconsistent with the Migration Act.[15] Her Honour then observed that a decision relying on PIC 4002 effectively reposed the power of determining the application for a protection visa in the hands of an ASIO officer, and gave rise to substantially different avenues for merits review, with the result that the criterion departed from and undermined the scheme of the Act.[16]

38. Justice Kiefel similarly saw significance in the different persons in whom control of the outcome of the decision-making process was reposed and held that PIC 4002 "impermissibly cuts across the process intended by the Migration Act".[17]

(c) The proposition underlying the *Anthony Hordern* principle

39. This Court has held that the proposition underlying the principle in *Anthony Hordern*[18] and later cases is "that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course".[19] The six textual matters recorded above lead to the conclusion that s 501(3) (which s 65(1)(a)(iii) of the Act calls a "special power to refuse"), and the provisions of s 501C (which apply to that

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11 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [71] (French CJ).

12 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [71] (French CJ).

13 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [204] (Hayne J).

14 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [206] (Hayne J), citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71].

15 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [382] (Crennan J).

16 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [396]-[399] (Crennan J).

17 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [457]-[459] (Kiefel J).

18 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J).

19 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 312 ALR 537 at [43] (French CJ, Hayne, Crennan, Kiefel and Keane JJ), citing *R v Wallis* (1949) 78 CLR 529 at 550 (Dixon J) and *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Harrington v Lowe* (1996) 190 CLR 311 at 324-325.

special power), appoint a course to be followed in refusing to grant a visa in the national interest and require that the same not be done by any other course.

40. Justice Hayne held in *M47* that "the grammatical meaning of s 31(3) is not its legal meaning".[20] Clause 866.226 creates a hurdle that circumvents the special provisions made by the Act for refusing the grant of a visa in the national interest.

41. By reason of the foregoing submissions, clause 866.226 is invalid.

2. Clause 866.226 departs from the scheme for protection visas provided for by sections 36, 501 and other provisions of the Act

42. Sections 504 and 31(3), when construed in the context of the Migration Act as a whole, must be read as not authorising the prescription of criteria for the grant of a protection visa (other than "health criteria") that depart from the scheme for protection visas provided for by ss 36(2) and qualified by ss 36(1B), 36(3), 500(1)(c) and 501 and like provisions of the Act.

(a) The purpose of responding to international obligations

43. Notwithstanding certain legislative amendments since the *Offshore Processing Case*, the Migration Act remains an elaborated and interconnected set of statutory provisions directed to "the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol",[21] and those international agreements inform the construction of the provisions of the Migration Act and the Migration Regulations which respond to the international obligations that Australia has undertaken pursuant to them.[22]

44. The class of protection visas established by s 36 was intended by the Parliament to be, and has acted as, "the mechanism by which Australia offers protection to persons who fall under [the Convention]"[23] and other international agreements. That mechanism is a reflection of "the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia's compliance with the obligations undertaken in the Refugees Convention and the Refugees Protocol".[24] The result is that "the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case".[25]

45. A related purpose of the statutory scheme created by the Migration Act is "to provide for cases in which those obligations are limited or qualified".[26] The circumstances in

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20 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [173] (Hayne J).

21 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27].

22 *Acts Interpretation Act 1901* (Cth) ss 15AB(1) and (2)(d), referred to in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

23 *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [40] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

24 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [98] (Gummow, Hayne, Crennan and Bell JJ), [212] (Kiefel J).

25 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27].

26 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [65] (French CJ).

which protection visas may be refused or cancelled are expressly addressed by the Migration Act. Focussing on the former, a protection visa may (and must) be refused in the following circumstances:

a. non-satisfaction of "health criteria" (s 65(1)(a)(i));

b. non-satisfaction of "other criteria" prescribed by the Act (s 65(1)(a)(ii));

c. non-satisfaction of "other criteria" prescribed by the regulations (s 65(1)(a)(ii));

d. where the grant of the visa is prevented by a provision of the Act such as s 501 or by another law of the Commonwealth (s 65(1)(a)(iii)); or

e. where visa application charge is payable and has not been paid (s 65(1)(a)(iv)).

10 46. As Hayne J observed in *M47*, the above requirements "*cannot* be contradictory or otherwise inconsistent", and "criteria prescribed by the regulations cannot be inconsistent with the operation of the special powers to refuse a visa that are given by s 501".[27] For the same reason, criteria prescribed by the regulations cannot be inconsistent with the criteria prescribed by the Act, including s 36(2), or with the scheme for protection visas of which ss 36(2), 65(1) and 501 form part.

(b) The statutory scheme for protection visas

47. The text and structure of the Act point to an expansive and enduring content for the class of protection visas created by s 36.

48. First, as has been mentioned, the central criterion in s 36(2) expressly refers to persons
20 "in respect of whom the Minister is satisfied Australia has protection obligations" (whether under the Refugees Convention or other international agreements). That beneficial provision must be construed in a manner that gives proper effect to its evident purpose.

49. Secondly, the class of protection visas provided for by s 36 stands apart from other classes of visa created by the Act or prescribed by the regulations. For example, s 39(1) expressly provides that a criterion limiting the number of visas to be granted in a particular financial year cannot be prescribed for protection visas, and no maximum number of protection visas can be determined by the Minister under s 85.[28]

50. The power given by s 41(1) to make regulations providing that visas of a specified class
30 are subject to specified conditions cannot be used to impose a condition that the holder of the visa will not be entitled to be granted a protection visa (s 41(2)(a)). Decisions under ss 501, 501A or 501B to refuse to grant a visa or to cancel a visa, although automatically refusing or cancelling other applications made and visas held by the person (s 501F) and barring the person from making new applications (s 501E(1)), do not affect a protection visa held by the person (s 501F(2)-(3)) and do not prevent the person from making an application for a protection visa (s 501E(2)).

51. Thirdly, and related to the first two points, Parliament's decision to entrench the class of protection visas in the Act alongside the criterion in s 36(2) and with concomitant

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27 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [180] (Hayne J).

28 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209 at [65] (Crennan, Bell, Gageler and Keane JJ).

beneficial exemptions from other provisions of the Act, rather than leave that class and its criteria to be prescribed by regulations,[29] is significant. It reveals that the legislature intended the class of protection visas to endure: in particular, to endure a change of government.[30] What was to endure was the statutory offer of protection to the class of persons "in respect of whom the Minister is satisfied Australia has protection obligations", subject only to the qualifications expressly approved by Parliament in the Act or prescribed consistently with that regime. If at least that much did not endure, there would have been no point in enacting the criterion in s 36(2). Coupled with the absence of any executive power to limit or cap the grant of protection visas, it reveals that the protection to be afforded to members of that class is not to be cut down or diminished other than by Parliament or consistently with the legislative scheme.

52. The effect of clause 866.226 is that satisfaction of all other criteria for a protection visa, including being a person in respect of whom Australia has protection obligations and who satisfies the security criterion (s 36(1B)) and the character test (s 501(6)), is not sufficient to be granted a protection visa. The refugee must prove to the Minister's satisfaction that the national interest favours the grant of a protection visa to the refugee. That consequence runs counter to the whole purpose of s 36(2) which, properly understood, reflects a legislative judgment to the contrary.

(c) The criterion prescribed by clause 866.226

53. There are clear examples of the statutory scheme denying the making of regulations that otherwise appear to be expressly authorised by the Act. For example, although ss 40(1) and (2)(a) state that the regulations may provide that visas of a specified class may only be granted in specified circumstances, including the circumstance that the applicant "is outside Australia", no such provision could validly be made for protection visas because of the criterion in s 36(2) that the applicant be "in Australia". The balance of s 36(2) and its inclusion of those in respect of whom the Minister is satisfied Australia has protection obligations is of no less content. A criterion that the applicant is not a person who fears persecution by reason of his or her membership of a particular social group could not be sustained, nor could the exclusion of specified social groups, specified home countries, or a class of persons who arrived on or after a particular date.

54. Clause 866.226 and similar criteria that impair rather than facilitate the response to Australia's protection obligations sanctioned by Parliament provide examples of regulations which "vary or depart from" the positive provisions of the Act:

> *Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself.*[31]

55. There is no difficulty with the prescription of "health criteria" for protection visas (s 65(1)(a)(i)), or "other criteria" prescribed by the regulations (s 65(1)(a)(ii)) that are not inconsistent with the statutory scheme for protection visas, such as a requirement to provide personal identifiers to an officer (ss 40(3)-(3A)), or a criterion that the person

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29 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 298 ALR 1 at [72] (Hayne J).

30 It should be recalled that the *Migration Reform Act 1992* (Cth) was passed with bipartisan support. Section 26B was the predecessor to s 36 of the present Act.

31 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

claims to be a person in respect of whom Australia owes protection obligations (clause 866.211), or a criterion that the person cannot be granted another class of protection visa such as a temporary protection visa.

56. But the wide terms of clause 866.226 permit the Minister to exclude from the grant of a protection visa any person who the Minister thinks it is in the national interest to exclude, irrespective of whether power to refuse the visa is available under s 501 and notwithstanding the absence of any general ministerial power in the Act to dispense with the legislated response to Australia's protection obligations. The clause cannot be reconciled with the statutory scheme for protection visas and is invalid.

3. Clause 866.226 does not extend to the circumstances in section 5AA

57. The Migration Act regulates the circumstances in which a person is disentitled to a protection visa because the person is an unauthorised maritime arrival. Sections 504 and 31(3), when construed in the context of the Migration Act as a whole, must be read as not authorising the prescription of a criterion for the grant of a protection visa that the applicant does not have some or all of the statutory characteristics of an unauthorised maritime arrival. Clause 866.226 is invalid to the extent that it permits a protection visa to be refused to an applicant because the applicant has those characteristics.

(a) Unauthorised maritime arrivals

58. Section 5AA provides that, subject to certain exclusions not presently material, a person is an "unauthorised maritime arrival" if the person entered Australia by sea at certain places and at certain times and "became an unlawful non-citizen because of that entry". An entrant becomes an unlawful non-citizen because of that entry where the entrant does not hold a visa that is in effect at the time of that entry (ss 13-14). It follows that an unauthorised maritime arrival is a person who has travelled to and entered Australia without a visa that is in effect in contravention of s 42(1). Subject to the exclusions in s 5AA(3), once a person answers the description of an unauthorised maritime arrival, there are no circumstances in which the person ceases to answer it.

59. Section 46A(1) provides that a visa application is not a valid application if it is made by an unauthorised maritime arrival who is in Australia without a visa that is in effect, and subsection (2) provides that the Minister may, thinking it in the public interest to do so, permit such a person to make a valid application for a specified class of visas. One of the conditions for the exercise of the power given by s 46A(2) is that the person is an unauthorised maritime arrival who is subject to the bar imposed by s 46A(1).

60. Other provisions of the Act regulate unauthorised maritime arrivals. Sections 198AA to 198AJ provide that an unauthorised maritime arrival who arrives in Australia on or after 13 August 2012[32] and who is detained under s 189 must be taken to a regional processing country that has been designated under s 198AB(1) unless the Minister exercises the power given by s 198AE(1).

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32 See item 36 of Sch 1 to the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

(b) Clause 866.226 is repugnant to section 46A

61. There is an obvious incongruity between s 46A and clause 866.226. The Minister permitted the plaintiff to apply for a protection visa, thinking it in the "public interest" to do so,[33] but then refused to grant a protection visa to the plaintiff, not being satisfied that the grant of a protection visa would be in the "national interest".[34] The plaintiff's status as an unauthorised maritime arrival is said to have empowered the Minister to permit the plaintiff to apply for a protection visa while at the same time forbidding its grant. The plaintiff's detention during that period apparently served little purpose.[35]

62. That tension between s 46A and clause 866.226 is to be resolved in the following way.

63. Section 46A may be understood as abstracting from the regulation-making power under ss 504(1) and 31(3) any power to prescribe a criterion for a visa that requires the grant of the visa to be refused because the applicant is an unauthorised maritime arrival or has some of the statutory characteristics of an unauthorised maritime arrival. Where power may be exercised under s 46A(2) to permit a person to make a valid application for a visa, ss 504(1) and 31(3) do not authorise the prescription of a criterion that forbids the grant of that visa merely because the person has the very same characteristics that empowered the Minister to permit the person to apply for that visa in the first place, and any pre-existing criterion to like effect is necessarily repugnant to s 46A.

64. Those characteristics include that the person is an unauthorised maritime arrival and a person who travelled to Australia without a visa that is in effect in contravention of s 42(1). They are conditions for the exercise of power under s 46A(2). In this case, each of the bullet point reasons given by the Minister for refusing to grant a protection visa to the plaintiff was founded on those characteristics, namely, that the plaintiff is an "unauthorised maritime arrival" or a person who had arrived "illegally" in the sense that the plaintiff had travelled to Australia without a visa that is in effect.[36] The concept of the "national interest" in cl 866.226 cannot validly extend to those matters consistently with s 46A.

B THE MINISTER'S DECISION WAS NOT MADE ACCORDING TO LAW

65. By reason of the invalidity of cl 866.226 in whole or in part, the Minister's decision on 17 July 2014 to refuse to grant a visa to the plaintiff based upon that criterion was not a decision made "according to law" as required by the writ of mandamus. It follows that the return made by the Minister to the writ was insufficient in law.

66. Notwithstanding that legal deficiency, the Minister was satisfied on that date that the requirements of s 65(1) and all other criteria for a protection visa had been met.[37]

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33 SC at 7.

34 SC at 145.

35 SC at [8].

36 SC at 150.

37 SC [25]-[26].

C THE APPROPRIATE RELIEF

67. The plaintiff claims a peremptory writ of mandamus commanding the Minister to determine the plaintiff's application for a protection visa by granting a Protection (Class XA) (Subclass 866) visa to the plaintiff forthwith; declaratory relief; and costs.

68. Alternatively, if the plaintiff succeeds only on his third argument for the invalidity of clause 866.226, the plaintiff claims a peremptory writ of mandamus commanding the Minister to determine the plaintiff's application for a protection visa according to law.

1. The Minister has a duty to grant a protection visa to the plaintiff

69. The special case records that on 17 July 2014 the Minister was satisfied that all of the requirements of s 65(1)(a) were satisfied in respect of the plaintiff's application for a protection visa. (**SC** [25]) It follows from the terms of s 65(1)(a) that the Minister "is to grant the visa". The expression "the visa" refers to the visa considered by the Minister under s 47(1), being the visa for which a valid application was made under s 46, in this case, a Protection (Class XA) (Subclass 866) visa.

70. It is settled that "s 65(1) imposes an obligation to grant a visa, as distinct from conferring a power involving the exercise of a discretion".[38] Mandamus will issue where the decision-maker "is required by the statute to act in a particular way and in particular circumstances".[39] Under s 65(1)(a), "the granting of a visa is mandatory",[40] and mandamus requiring the Minister to grant a visa may issue where it is established that either the Minister or a section 65 delegate became satisfied that all of the criteria for the grant of the visa referred to in s 65(1)(a) were satisfied.[41]

71. In other words, on 17 July 2014, "the applicant had a right to be granted a visa if the minister was satisfied of all of the s 65(1) factors".[42] The Minister was so satisfied on that date, and the right accrued to the plaintiff on that date. It is appropriate that those circumstances be recognised by the relief that is granted. In *Chen Shi Hai*, French J remitted a matter to the Tribunal "to be dealt with on the basis that the applicant is entitled to refugee status",[43] recognising that no other lawful course was open to the Tribunal, which this Court held was "correct".[44] Here, there is similarly only one lawful course open to the Minister in this case.

72. By reason of the operation of s 65A(1), the Minister should have granted a protection visa to the plaintiff within 90 days of 17 May 2013, being the date on which the RRT

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38 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

39 *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 81 (Mason CJ), citing *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188 (Kitto J), 203, 206 (Windeyer J); *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536-539 (Sheppard J with whom Beaumont and Burchett JJ agreed).

40 *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at [41] (Lindgren J).

41 *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at [41], [111] (Lindgren J).

42 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at [28] (McHugh J).

43 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [1998] FCA 622 at 14 (French J).

44 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

remitted the application to the Minister. (SC [12]) That more than one year has passed without the Minister performing the duties imposed by ss 65(1)(a) and 65A(1) calls for the issue of a peremptory writ of mandamus commanding a visa be granted forthwith.

73. It is not sufficient to describe the visa to be granted as a Protection (Class XA) visa. Class XA has included different subclasses of protection visas at different times. For example, for the duration of the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth), Class XA was amended to include Subclass 785 (Temporary Protection) in addition to Subclass 866 (Protection), the latter being the only permanent visa. On 17 July 2014, only one protection visa was recognised by law, being the Protection (Class XA) (Subclass 866) visa.

74. The tenor of the writ should be to command that the duty imposed by s 65(1)(a) be performed, and should not be qualified by the words "or show cause why it has not been done". The plaintiff has established a right to a Protection (Class XA) (Subclass 866) visa. There is no longer any lawful basis upon which the Minister can refuse to perform, or delay the performance of, the duty imposed by s 65(1)(a). A failure to comply with a peremptory writ involves contempt. The writ should command the Minister to determine the plaintiff's application for a protection visa by granting a Protection (Class XA) (Subclass 866) visa to the plaintiff forthwith.

75. Should the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) be passed by Parliament and commence prior to the hearing or determination of the special case, the plaintiff may seek leave to make further submissions in relation to any purported operation of that law.

2. Alternatively, the Minister has a duty to consider and determine the plaintiff's application for a protection visa according to law

76. In the alternative, the plaintiff should have a peremptory writ of mandamus commanding the Minister to determine the plaintiff's application for a protection visa according to law. The Minister remains under the same statutory duty as was held by the Full Court to justify the issue of the initial writ.

3. Declaratory relief

77. It is also appropriate for this Court to declare that clause 866.226 of Schedule 2 to the Migration Regulations is invalid. In his reasons for decision, the Minister stated: "In my view, I must treat that criterion as valid unless a court declares otherwise".[45] For the avoidance of doubt, that declaration should be made.

4. Costs

78. If the plaintiff is entitled to relief, the defendants should pay the costs of the special case. Otherwise, the character of the special case being of "very general importance",[46] there should be no order as to costs.

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45 SC at 149.5.

46 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [77].

VI. LEGISLATION

79. The applicable statutory provisions and regulations as they existed at the relevant time are set out verbatim in the annexure and remain in force.

VII. ORDERS SOUGHT

80. The questions on the special case should be answered as stated in paragraph 5 above.

VIII. ESTIMATE OF ORAL ARGUMENT

81. The plaintiff estimates that about one to two hours will be required for oral argument.

Dated: 28 October 2014

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S297/2013

BETWEEN:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

Dated: 28 October 2014

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ANNEXURE TO PLAINTIFF'S SUBMISSIONS

CONTENTS

MIGRATION ACT 1958 **(CTH)**

Section 5AA - Meaning of unauthorised maritime arrival

(1) For the purposes of this Act, a person is an unauthorised maritime arrival if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person entered Australia by sea if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the Maritime Powers Act 2013) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or

(ba) the person entered the migration zone as a result of being on a vessel detained under section 69 of the Maritime Powers Act 2013 and being dealt with under paragraph 72(4)(a) of that Act; or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an excluded maritime arrival if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

ship has the meaning given by section 245A (as in force before the commencement of section 69 of the Maritime Powers Act 2013).

vessel has the same meaning as in the Maritime Powers Act 2013.

Section 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.

Section 36 - Protection visas

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

Note: See also Subdivision AL.

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

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

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

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

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

(ii) holds a protection visa; or

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

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

(ii) holds a protection visa.

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

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

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

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

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

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

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

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

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

Protection obligations

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

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

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

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

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

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

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

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

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

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

Determining nationality

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

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

Section 40 - Circumstances for granting visas

(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

(2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:

(a) is outside Australia; or

(b) is in immigration clearance; or

(c) has been refused immigration clearance and has not subsequently been immigration cleared; or

(d) is in the migration zone and, on last entering Australia:

(i) was immigration cleared; or

(ii) bypassed immigration clearance and had not subsequently been immigration cleared.

(3) Without limiting subsection (1), if:

(a) prescribed circumstances exist; and

(b) the Minister has not waived the operation of this subsection in relation to granting the visa to the person;

the circumstances under subsection (1) may be, or may include, that the person has complied with any requirement of an officer to provide one or more personal identifiers in relation to the application for the visa.

(3A) An officer must not require, for the purposes of subsection (3), a person to provide a personal identifier other than:

(a) if the person is an applicant for a protection visa—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an audio or a video recording of the person;

(iv) an iris scan;

(v) the person's signature;

(vi) any other personal identifier contained in the person's passport or other travel document;

(vii) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(b) if the person is an applicant for a temporary safe haven visa within the meaning of section 37A, or any other visa of a class that the regulations designate as a class of humanitarian visas—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an iris scan;

(iv) the person's signature;

(v) any other personal identifier contained in the person's passport or other travel document;

(vi) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(c) if paragraphs (a) and (b) do not apply—any of the following (including any of the following in digital form):

(i) a photograph or other image of the person's face and shoulders;

(ii) the person's signature;

(iii) any other personal identifier contained in the person's passport or other travel document;

(iv) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a).

Note: Division 13AB sets out further restrictions on the personal identifiers that minors and incapable persons can be required to provide.

(3B) In requiring, for the purposes of subsection (3), a person to provide a personal identifier, an officer must not contravene regulations made for the purposes of paragraph (3C)(b).

(3C) The regulations:

(a) may prescribe other types of personal identifiers; and

(b) may provide that a particular personal identifier referred to in subsection (3A), or a particular combination of such personal identifiers, must not be required except in the circumstances prescribed for the purposes of this paragraph.

(4) A person is taken not to have complied with a requirement referred to in subsection (3) unless the one or more personal identifiers are provided to an authorised officer by way of one or more identification tests carried out by an authorised officer.

Note: If the types of identification tests that the authorised officer may carry out are specified under section 5D, then each identification test must be of a type so specified.

(5) However, subsection (4) does not apply, in circumstances prescribed for the purposes of this subsection, if the personal identifier is of a prescribed type and the person:

(a) provides a personal identifier otherwise than by way of an identification test carried out by an authorised officer; and

(b) complies with any further requirements that are prescribed relating to the provision of the personal identifier.

Section 42 - Visa essential for travel

(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

Note: A maritime crew visa is generally permission to travel to Australia only by sea (see section 38B).

(2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.

(2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

(a) if the travel is by a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) if the travel is by a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) if:

(i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or 72(4) of the Maritime Powers Act 2013; and

(ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(ca) the non-citizen is brought to Australia under section 198B; or

(d) if:

(i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and

(ii) the non-citizen travels to Australia as a direct result of that refusal; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(e) if:

(i) the non-citizen has been removed under section 198; and

(ii) before the removal the High Court, the Federal Court or the Federal Circuit Court had made an order in relation to the non-citizen, or the Minister had given an undertaking to the High Court, the Federal Court or the Federal Circuit Court in relation to the non-citizen; and

(iii) the non-citizen's travel to Australia is required in order to give effect to the order or undertaking; and

(iv) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(v) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(f) if:

(i) the travel is from Norfolk Island to Australia; and

(ii) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen.

(3) The regulations may permit a specified non-citizen or a non-citizen in a specified class to travel to Australia without a visa that is in effect.

(4) Nothing in subsection (2A) or (3) is to be taken to affect the non-citizen's status in the migration zone as an unlawful non-citizen.

Note: Section 189 provides that an unlawful non-citizen in the migration zone must be detained.

Section 46A - Visa applications by unauthorised maritime arrivals

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

(a) is in Australia; and

(b) 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 unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

(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 unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; or

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

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

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

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

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

Section 65 - Decision to grant or refuse to grant a visa

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

(a) if satisfied that:

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

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

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

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

is to grant the visa; or

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

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

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

Section 65A - Period within which Minister must make decision on protection visas

(1) If an application for a protection visa:

(a) was validly made under section 46; or

(b) was remitted by any court or tribunal to the Minister for reconsideration;

then the Minister must make a decision under section 65 within 90 days starting on:

(c) the day on which the application for the protection visa was made or remitted; or

(d) in the circumstances prescribed by the regulations—the day prescribed by the regulations.

(2) Failure to comply with this section does not affect the validity of a decision made under section 65 on an application for a protection visa.

Section 411 - Decisions reviewable by Refugee Review Tribunal

(1) Subject to subsection (2), the following decisions are RRT-reviewable decisions:

(a) a decision, made before 1 September 1994, that a non-citizen is not a refugee under the Refugees Convention as amended by the Refugees Protocol (other than such a decision made after a review by the Minister of an earlier decision that the person was not such a refugee);

(b) a decision, made before 1 September 1994, to refuse to grant, or to cancel, a visa, or entry permit (within the meaning of this Act as in force immediately before that

date), a criterion for which is that the applicant for it is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol (other than such a decision made under the Migration (Review) (1993) Regulations or under the repealed Part 2A of the Migration (Review) Regulations);

(c) a decision to refuse to grant a protection visa, other than a decision that was made relying on:

(i) one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or

(ii) subsection 36(1B); or

(iii) paragraph 36(2C)(a) or (b);

(d) a decision to cancel a protection visa, other than a decision that was made because of:

(i) one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or

(ii) an assessment by the Australian Security Intelligence Organisation that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979); or

(iii) paragraph 36(2C)(a) or (b).

(2) The following decisions are not RRT-reviewable decisions:

(a) decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made;

(b) decisions in relation to which the Minister has issued a conclusive certificate under subsection (3).

(3) The Minister may issue a conclusive certificate in relation to a decision if the Minister believes that:

(a) it would be contrary to the national interest to change the decision; or

(b) it would be contrary to the national interest for the decision to be reviewed.

Section 500 - Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or

(b) decisions of a delegate of the Minister under section 501; or

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act;

other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or

(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

(4) The following decisions are not reviewable under Part 5 or 7:

(a) a decision under section 200 because of circumstances specified in section 201;

(b) a decision under section 501;

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

(4A) The following decisions are not reviewable under this section, or under Part 5 or 7:

(a) a decision to refuse to grant a protection visa relying on subsection 36(1B);

(b) a decision to cancel a protection visa because of an assessment by the Australian Security Intelligence Organisation that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979).

(5) In giving a direction under the Administrative Appeals Tribunal Act 1975 as to the persons who are to constitute the Tribunal for the purposes of a proceeding for review of a decision referred to in subsection (1), the President must have regard to:

(a) the degree of public importance or complexity of the matters to which that proceeding relates; and

(b) the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal; and

(c) the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia; and

(d) if:

(i) the person to whom the decision relates has been convicted of, or sentenced for, an offence; and

(ii) that conviction or sentence is relevant to the matters to which that proceeding relates;

the seriousness of that offence; and

(e) if:

(i) the person to whom the decision relates has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; and

(ii) that acquittal is relevant to the matters to which that proceeding relates;

the seriousness of that offence;

and must not have regard to any other matters.

(5A) Section 23B of the Administrative Appeals Tribunal Act 1975 does not apply in relation to a proceeding for review of a decision referred to in subsection (1) of this section.

(6) Where an application has been made to the Tribunal for the review of a decision under section 200 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 253 to have ceased or to cease to be in force by reason only of any order that has been made by:

(a) the Tribunal; or

(b) a presidential member under section 41 of the Administrative Appeals Tribunal Act 1975; or

(c) the Federal Court of Australia or a Judge of that Court under section 44A of that Act; or

(d) the Federal Circuit Court of Australia or a Judge of that Court under section 44A of that Act.

(6A) If a decision under section 501 of this Act relates to a person in the migration zone, section 28 of the Administrative Appeals Tribunal Act 1975 does not apply to the decision.

(6B) If a decision under section 501 of this Act relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the Administrative Appeals Tribunal Act 1975 do not apply to the application.

(6C) If a decision under section 501 relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be accompanied by, or by a copy of:

(a) the document notifying the person of the decision in accordance with subsection 501G(1); and

(b) one of the sets of documents given to the person under subsection 501G(2) at the time of the notification of the decision.

(6D) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

section 37 of the Administrative Appeals Tribunal Act 1975 does not apply in relation to the decision.

(6E) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Registrar, a District Registrar or a Deputy Registrar of the Tribunal must notify the Minister, within the period and in the manner specified in the regulations, that the application has been made. Accordingly, subsection 29(11) of the Administrative Appeals Tribunal Act 1975 does not apply in relation to the application.

(6F) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

then:

(c) the Minister must lodge with the Tribunal, within 14 days after the day on which the Minister was notified that the application had been made, 2 copies of every document, or part of a document, that:

(i) is in the Minister's possession or under the Minister's control; and

(ii) was relevant to the making of the decision; and

(iii) contains non-disclosable information; and

(d) the Tribunal may have regard to that non-disclosable information for the purpose of reviewing the decision, but must not disclose that non-disclosable information to the person making the application.

(6G) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not:

(c) hold a hearing (other than a directions hearing); or

(d) make a decision under section 43 of the Administrative Appeals Tribunal Act 1975;

in relation to the decision under review until at least 14 days after the day on which the Minister was notified that the application had been made.

(6H) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

(6J) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or Tribunal under subsection 501G(2) or subsection (6F) of this section.

(6K) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal is of the opinion that particular documents, or documents included in a particular class of documents, may be relevant in relation to the decision under review;

then:

(d) the Tribunal may cause to be served on the Minister a notice in writing stating that the Tribunal is of that opinion and requiring the Minister to lodge with the Tribunal, within a time specified in the notice, 2 copies of each of those documents that is in the Minister's possession or under the Minister's control; and

(e) the Minister must comply with any such notice.

(6L) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal has not made a decision under section 42A, 42B, 42C or 43 of the Administrative Appeals Tribunal Act 1975 in relation to the decision under review within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1);

the Tribunal is taken, at the end of that period, to have made a decision under section 43 of the Administrative Appeals Tribunal Act 1975 to affirm the decision under review.

(7) In this section, decision has the same meaning as in the Administrative Appeals Tribunal Act 1975.

(8) In this section:

business day means a day that is not:

(a) a Saturday; or

(b) a Sunday; or

(c) a public holiday in the Australian Capital Territory; or

(d) a public holiday in the place concerned.

Section 501 - Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

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

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

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

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

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

Character test

(6) For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

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

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

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

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

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

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

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

the person is not of good character; or

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

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

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

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

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

Residential schemes or programs

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

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

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

Pardons etc.

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

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

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

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

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

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

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

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

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

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

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

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

Section 501C - Refusal or cancellation of visa—revocation of decision under subsection 501(3) or 501A (3)

(1) This section applies if the Minister makes a decision (the original decision) under subsection 501(3) or 501A(3) to:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person.

(2) For the purposes of this section, relevant information is information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

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

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10))—invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the person satisfies the Minister that the person passes the character test (as defined by section 501).

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

(6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).

(7) Any detention of the person that occurred during any part of the period:

(a) beginning when the original decision was made; and

(b) ending at the time of the revocation of the original decision;

is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.

(8) If the Minister makes a decision (the subsequent decision) to revoke, or not to revoke, the original decision, the Minister must cause notice of the making of the subsequent decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the subsequent decision was made.

(9) If the person does not make representations in accordance with the invitation, the Minister must cause notice of that fact to be laid before each House of the Parliament within 15 sitting days of that House after the last day on which the representations could have been made.

(10) The regulations may provide that, for the purposes of this section:

(a) a person; or

(b) a person included in a specified class of persons;

is not entitled to make representations about revocation of an original decision unless the person is a detainee.

(11) A decision not to exercise the power conferred by subsection (4) is not reviewable under Part 5 or 7.

Section 502 - Minister may decide in the national interest that certain persons are to be excluded persons

(1) If:

(a) the Minister, acting personally, intends to make a decision:

(i) under section 200 because of circumstances specified in section 201; or

(iii) to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);

in relation to a person; and

(b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;

the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person.

(2) A decision under subsection (1) must be taken by the Minister personally.

(3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made.

Section 504 - Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, without limiting the generality of the foregoing, may make regulations:

(a) making provision for and in relation to:

(i) the charging and recovery of fees in respect of any matter under this Act or the regulations, including the fees payable in connection with the review of decisions made under this Act or the regulations, whether or not such review is provided for by or under this Act; or

(ii) the charging and recovery of fees in respect of English language tests conducted by or on behalf of the Department;

(iii) the way, including the currency, in which fees are to be paid; or

(iv) the persons who may be paid fees on behalf of the Commonwealth;

(b) making provision for the remission, refund or waiver of fees of a kind referred to in paragraph (a) or for exempting persons from the payment of such fees;

(c) making provision for or in relation to the furnishing or obtaining of information with respect to:

(i) persons on board a vessel arriving at a port in Australia in the course of, or at the conclusion of, a voyage or flight that commenced at, or during which the vessel called at, a place outside Australia; and

(ii) persons on board a vessel leaving a port in Australia and bound for, or calling at, a place outside Australia; and

(iii) persons on board an aircraft arriving at or departing from an airport in Australia, being an aircraft operated by an international air carrier;

(d) making provision for and in relation to the use that may be made by persons or bodies other than officers of the Department of information collected pursuant to regulations made under paragraph (c);

(e) making provision for and in relation to:

(i) the giving of documents to;

(ii) the lodging of documents with; or

(iii) the service of documents on;

the Minister, the Secretary or any other person or body, for the purposes of this Act;

(f) prescribing the practice and procedure in relation to proceedings before a Commissioner or a prescribed authority under this Act, including the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, the administering of oaths or affirmations and the payment of expenses of witnesses;

(g) requiring assurances of support to be given, in such circumstances as are prescribed or as the Minister thinks fit, in relation to persons seeking to enter, or remain in, Australia and providing for the enforcement of assurances of support and the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connexion with, the persons in respect of whom the assurances of support are given;

(h) making provision for the remission, refund or waiver of charges under the *Migration (Health Services) Charge Act 1991*;

(i) enabling a person who is alleged to have contravened section 137 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding $1,000;

(j) enabling a person who is alleged to have contravened section 229 or 230 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding:

(i) in the case of a natural person—30 penalty units; and

(ii) in the case of a body corporate—100 penalty units; and

(jaa) enabling a person who is alleged to have committed an offence against subsection 245N(2) to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding 10 penalty units; and

(ja) enabling a person who is alleged to have committed an offence against subsection 280(1) to pay to the Commonwealth, as an alternative to prosecution, a penalty of 12 penalty units; and

(k) prescribing penalties not exceeding a fine of $1,000 or imprisonment for 6 months in respect of offences against the regulations; and

(l) making provision for matters that, under the *Education Services for Overseas Students Act 2000*, are required or permitted to be prescribed in regulations made under this Act.

(2) Section 14 of the *Legislative Instruments Act 2003* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the taking effect of the regulations.

(3) The regulations that may be made under paragraph (1)(e) include, but are not limited to, regulations providing that a document given to, or served on, a person in a specified way shall be taken for all purposes of this Act and the regulations to have been received by the person at a specified or ascertainable time.

(3A) The *Evidence Act 1995* does not affect the operation of regulations made for the purposes of paragraph (1)(e).

(4) Regulations in respect of a matter referred to in paragraph (1)(g) may apply in relation to maintenance guarantees given before the commencement of this Part in accordance with the regulations that were in force under any of the Acts repealed by this Act.

(5) An assurance of support given, after the commencement of this subsection, in accordance with regulations under paragraph (1)(g) continues to have effect, and may be enforced, in accordance with such regulations in spite of any change in circumstances whatsoever.

(5A) The following have effect only in relation to assurances of support that were given before 1 July 2004 and are not assurances of support in relation to which Chapter 2C of the *Social Security Act 1991* applies or applied:

(a) subsection (5) of this section;

(b) regulations made under paragraph (1)(g) (whether before, on or after the commencement of this subsection) providing for:

(i) the enforcement of assurances of support; or

(ii) the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connection with, the persons in respect of whom the assurances of support are given.

(6) In this section:

international air carrier means an air transport enterprise that operates an air service between Australia and a place outside Australia.