



Queensland Public Interest Law Clearing House Inc

Assessment Manual:

**APPLICATIONS FOR ASSISTANCE
IN REFUGEE AND MIGRATION APPEALS**

June 2005

Acknowledgements

Prepared by Nitra Kidson, Coordinator, Refugee and Immigration Legal Support Project.

This manual expands upon project work carried out by students from **Griffith University** participating in the Griffith University "Public Interest Lawyering" course in 2003. The work of Alana Ebert, Nikola Errington and Kate McArthur is acknowledged and appreciated.

Permission has kindly been granted by the Victorian Bar Legal Assistance Scheme and Melbourne barristers John Gibson, Daniel Star and Richard Niall to reproduce in full their paper *Analysing Refugee Review Tribunal Decisions* (Appendix A).

We gratefully acknowledge the support of the **Jupiters Casino Community Benefit Fund** in the editing and publication of this document.

Disclaimer

This document provides general information only. While every effort is made to ensure accuracy and to keep it current, agency details, law and procedure outlined herein can change constantly. No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person or organisation acting or relying on this information or anything omitted from it.



CONTENTS

1	NATURE OF ASSISTANCE SOUGHT.....	1
1.1	Types of matters	1
1.2	Stage of decision-making.....	1
1.3	QPILCH policy on migration referrals	3
2	MATERIAL NEEDED TO MAKE AN ASSESSMENT	4
2.1	Criteria to be met.....	4
2.2	Application form and supporting documents.....	4
2.3	Freedom of Information requests.....	5
3	APPLICABLE LAW.....	5
3.1	Legislation	5
3.2	Structure of the legislation.....	6
4	FRAMEWORK FOR JUDICIAL REVIEW OF MIGRATION DECISIONS	7
4.1	The nature of migration litigation.....	7
4.2	The privative clause in s.474.....	7
4.3	Judicial review prior to October 2001.....	7
4.4	Which court?	8
5	TIME LIMITS	9
5.1	When time starts to run	9
5.2	Time limits for commencing proceedings.....	9
5.3	Time limits for lodging appeals	10
5.4	Migration Litigation Reform Bill 2005	10
6	 GROUNDS OF REVIEW	11
6.1	Breach of the rules of natural justice.....	11
6.2	Non-compliance with procedures required to be observed under the Act.....	12
6.3	Taking irrelevant considerations into account.....	13
6.4	Failing to take into account relevant considerations	13
6.5	Acting in bad faith.....	13
6.6	Acting at the behest of another	13
6.7	Inflexible application of a rule or policy	13
6.8	Unreasonable exercise of power	13
6.9	No evidence	13
6.10	Absence of power to make the decision	13
6.11	Actual failure to exercise jurisdiction.....	14
6.12	Constructive failure to exercise jurisdiction.....	14
6.13	Failure to make a decision	15
7	ASSESSMENT OF MERIT IN REFUGEE MATTERS.....	15
7.1	Overview	15
7.2	The Refugee Convention	15
7.3	The decision making process.....	16
7.4	Exclusions from protection.....	17
8	ASSESSMENT OF MERIT IN GENERAL MIGRATION MATTERS ..	17
8.1	Overview	17
8.2	Definitional terms	18
8.3	The decision-making process	19

9	ASSESSMENT OF MERIT IN CHARACTER MATTERS.....	21
9.1	Overview	21
9.2	The “character test”	22
9.3	Possible challenges to character decisions	23
9.4	Character matters involving Protection visas.....	25
10	MAKE YOUR ASSESSMENT	26
	APPENDIX A: <i>Analysing Refugee Review Tribunal Decisions, JA Gibson, D Star and R Niall</i>	27
	APPENDIX B: Ministerial Direction No. 21 pursuant to s.499	42

1 NATURE OF ASSISTANCE SOUGHT

1.1 Types of matters

QPILCH receives many applications for assistance in refugee and migration matters. The stage at which assistance is sought, and the type of assistance needed, varies greatly. In general, assistance is sought in relation to:

- Applications for visas; and
- Cancellation of visas.

Where the visa applied for is a “Protection Visa”, the case is referred to as a *refugee matter*.

Where the visa applied for is of any other type (such as student, business, or family relationship), the case is referred to as a *general migration matter*.

Where a visa is about to be cancelled or refused on the basis that the applicant or visa holder has a criminal history, the case is referred to as a *character matter*.

1.2 Stage of decision-making

Migration decision-making is a multi-stage process involving primary decision-making, merits review, judicial review, and discretionary Ministerial intervention. QPILCH’s response to applications differs depending on what stage of the process an application has reached. Accordingly, it is critical to have some understanding of where each stage fits within the process.

- **Primary stage – Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)**

All applications for visas (refugee and general migration) are initially lodged with DIMIA offices in Australia or overseas, depending on the applicant’s whereabouts at time of lodgement. DIMIA officers make decisions on applications as delegates of the Minister.

With character matters, DIMIA must follow a process of notifying the person concerned of its intention to cancel a visa, or refuse to grant a visa, and allowing that person the opportunity to show cause why the visa should not be cancelled or refused.

In all cases (except refugee matters processed overseas), if DIMIA decides to refuse the grant of a visa, or to cancel a visa, the person affected has access to merits review.

- **Merits Review Stage – Review Tribunals**

Independent Federal administrative tribunals provide full merits review of refugee, general migration and character decisions. These are complete

hearings de novo – fresh evidence can be led, a new hearing is convened, and the tribunal is empowered to make what it considers to be the preferable and correct decision on the merits of the case.

The appropriate tribunal for each type of decision is as follows:

Refugee matters	Refugee Review Tribunal (RRT)
General migration matters	Migration Review Tribunal (MRT)
Character matters	Administrative Appeals Tribunal (AAT)

Strict time limits apply for lodging review applications in the RRT and MRT, and neither Tribunal has discretion to extend time for lodgement. Time limits also apply to the AAT, although the AAT has discretion to extend time in appropriate cases.

In refugee and general migration matters, and in character matters involving the refusal to grant a visa, unsuccessful applicants have two possible further options - Ministerial intervention and/or judicial review.

Unsuccessful applicants in character matters involving cancellation of a visa only have the option of judicial review.

- **Ministerial stage – humanitarian intervention**

The Minister for Immigration and Multicultural and Indigenous Affairs (“the Minister”) has an unfettered, non-compellable power to substitute a decision of a merits review tribunal with a decision more favourable to the applicant, if the Minister considers it is in the public interest to do so. These are commonly referred to as the Minister’s powers of humanitarian intervention, and are found in the *Migration Act 1958 (Cth)* as follows:

Tribunal decision	Ministerial power
Decision of MRT to affirm the refusal of a general migration visa	s.351
Decision of RRT to affirm the refusal of a Protection Visa	s.417
Decision of AAT to affirm the refusal of a general migration visa on the basis that an applicant did not meet character criteria	s.391
Decision of AAT to affirm the refusal of a Protection visa on the basis that an applicant did not meet character criteria	s.454

Applications for Ministerial intervention are made by letter to the Minister. There are no time limits for the making of such applications, although applicants need to ensure they retain permission to remain in Australia whilst the Minister considers the application. The Minister has publicly available guidelines which set out the matters to be taken into consideration when deciding whether to exercise the discretionary power.

There is no appeal from a Ministerial refusal.

- **Judicial Review**

Applicants who have unsuccessfully pursued merits review have one final option – judicial review in the Federal courts.

Judicial review of migration decisions is governed by Part 8 of the *Migration Act*. It is a complex legal avenue, and the Act contains many restrictions. These are examined in more detail further below.

A successful judicial review application will usually result in the decision of the review tribunal being set aside, combined with an order remitting the matter back to the relevant tribunal to be reconsidered according to law.

1.3 QPILCH policy on migration referrals

Referring refugee and migration matters to the private profession for pro bono assistance is difficult for a few reasons:

- (a) As all primary stage applicants have access to merits review (which is a complete hearing de novo), practitioners are generally unwilling to undertake the time consuming work involved at primary stage on a pro bono basis;
- (b) At both the Primary and Merits Review stages, applicants can only be represented by registered Migration Agents. Even practising lawyers must become registered agents to carry out this type of work;
- (c) Only a limited number of practitioners have any expertise in this area. This, combined with the registration requirements, significantly reduces the number of practitioners willing and able to consider accepting pro bono referrals;
- (d) Some pro bono assistance at the Primary and Review stages is available through community legal centres and Legal Aid Queensland.

For these reasons, QPILCH will only consider applications for assistance at the Judicial Review stage.

Applications for assistance at all other stages should be referred to the following organisations:



- For character matters at the AAT stage only:

Legal Aid Queensland
44 Herschel Street
Tel. 1300 65 11 88 (Their Ref: Robin Wilkinson)

- For all other matters:

South Brisbane Immigration and Community Legal Service
1st Floor, 170 Boundary Street
West End QLD 4101
Tel. 3846 3189

The level of assistance to be provided in any particular case is at the complete discretion of those organisations.

2 MATERIAL NEEDED TO MAKE AN ASSESSMENT

2.1 Criteria to be met

Applications for assistance in refugee, migration and character matters are required to meetQPILCH's merit and public interest criteria. The staff member or volunteer making the assessment must complete a Case Assessment form.

It is important to note that at time of writing, the *Migration Litigation Reform Bill 2005* had been tabled in Parliament and will inevitably proceed. The bill provides for a scheme of personal liability for legal costs against persons who encourage the initiation or continuation of unmeritorious migration litigation (see proposed s.486E). Subsection (2) then prescribes that migration litigation need not be "hopeless" or "bound to fail" for it to have no reasonable prospects of success.

The wording of the section is ambiguous and potentially broad. Given the serious effects of a personal order for costs against practitioners, it is critical that assessment of merit in migration appeals be undertaken rigorously and thoroughly.

2.2 Application form and supporting documents

Applicants seeking assistance from QPILCH must complete and sign a QPILCH application form. Since QPILCH will only consider assistance at the judicial review stage, the application must be accompanied by:

- A complete copy of the relevant MRT, RRT or AAT decision (and reasons for decision) of which review is sought;
- Details of the actual manner and date of notification to the applicant of the tribunal decision; and



- Copies of any documents which were before the tribunal in the process of making its decision.

Ideally, applicants would provide a complete transcript of the tribunal hearing, but this is rarely available at this point in the process.

2.3 Freedom of Information requests

When the decision to be reviewed has been made by the MRT or RRT, applicants should be encouraged to apply for a complete copy of their DIMIA file and separate tribunal file under the *Freedom of Information Act (Cth)*(FOI). This will not normally be necessary in AAT cases, as the AAT procedure ensures that applicants receive a complete copy of all material placed before it.

FOI applications in these types of matters can take months to process. Although this means the files will not usually be available for the purposes of QPILCH's assessment process, they will most certainly be required by any practitioner who agrees to accept referral of the matter. Accordingly, it is critical that the FOI process is commenced early to ensure the documents become available as quickly as possible.

FOI requests must be made in the prescribed forms, and separate requests lodged with DIMIA and the tribunal. There are no fees payable for an individual to access a copy of their personal file.

The requisite forms are available online as follows:

DIMIA	www.immi.gov.au
MRT	www.mrt.gov.au
RRT	www.rrt.gov.au

3 APPLICABLE LAW

3.1 Legislation

All refugee, general migration and character matters are decisions made under the *Migration Act 1958 (Cth)*("the Act") and *Migration Regulations 1994* ("the regulations")

Migration is an enormously politicised area of law, which changes rapidly and frequently. It is not unusual for new regulations to be issued every month, and for the Act itself to be amended at least once per year. Keeping up to date is a constant challenge.

The law to be applied in any migration case is the law as it stood:

- In relation to *applications for visas* – as at the date of lodgement of the primary application with DIMIA (not the date of the primary decision); and
- In relation to *cancellation of visas* – as at the date of cancellation of the visa.

It is critical, therefore, to ensure that you refer to the Act and regulations as they stood at the relevant date. In the near future, historical additions of the Act and regulations will be made freely available online through ComLaw (www.comlaw.gov.au). In the meantime, current versions of the legislation are accessed online at ScalePlus (www.scaleplus.law.gov.au).

The tribunal decision itself usually reproduces key legislative provisions as they existed at the relevant time.

3.2 Structure of the legislation

The Act, regulations, and schedules to the regulations, comprise a legislative package which completely codify the law in relation to the grant, refusal and cancellation of visas.

Generally, the structure of the package is that:

- General powers are contained in the Act;
- Core definitions and other prescribed matters are contained in the regulations;
- Criteria applicable to the grant of individual visas are contained in the schedules to the regulations (particularly Schedule 2).

The Act broad creates classes of visas, which contain individual subclasses of visa (identified by name and number, for example “subclass 100 Spouse visa”). Applicants apply for a class of visa, but must ultimately be granted a visa of one particular subclass. Section 65 of the Act obliges decision-makers to consider an applicant’s eligibility against all subclasses of visa within a class.

Schedule 1 to the regulations sets out certain criteria which must be satisfied in relation to an entire class of visa.

Schedule 2 sets out other criteria which must be satisfied for the grant of each individual subclass of visa. The visas are arranged numerically within the schedule.

The remaining schedules contain smorgasbords of other conditions which can be attached to any particular visa or visa application.

4 FRAMEWORK FOR JUDICIAL REVIEW OF MIGRATION DECISIONS

4.1 The nature of migration litigation

Migration litigation involves applications for judicial review, not appeals de novo. In order to be successful, an applicant must be able to show that the decision under review is tainted by an error of law.

If successful, the court does not substitute its own decision for that of the tribunal – it usually remits the matter back to the tribunal for reconsideration according to law. Therefore, when assessing the ultimate merit of an application for pro bono assistance, it is important to also consider whether the applicant is likely to achieve a different result if a fresh merits review hearing is ordered. If not, the application for judicial review may have technical merit but be ultimately futile, and this is a factor which practitioners will take into account when deciding whether to accept pro bono referrals.

4.2 The privative clause in s.474

Judicial review of migration decisions takes place under Part 8 of the Act. Complicating matters is the presence of a privative clause in s.474 of the Migration Act (inserted in October 2001). A privative clause is a type of exclusion clause which seeks to remove any right to appeal decisions made under the Act.

After a period of uncertainty, the High Court eventually ameliorated the effect of the privative clause in the decision of *Plaintiff S157/2002 v MIMIA* [2003] HCA 2. In that case, the court unanimously held that the clause was not able to protect decisions where the error in question was so serious that it amounted to a “jurisdictional error”. In essence, this means that the error of law resulted in the decision being so fundamentally flawed that it could not stand as a valid exercise of power.

The High Court decision overruled a much more restrictive approach which had been adopted by the Full Federal Court in *NAAV v MIMIA* (2002) 193 ALR 449. This opened the way for the lower courts to find that any error of law which they consider to be especially serious is a jurisdictional error.

For the above reasons, in migration cases an error of law is usually identified (such as “a breach of natural justice”, or “taking into account irrelevant considerations”) and then classified (judges will often speak of “errors going to jurisdiction” and “errors that are jurisdictional in nature”).

4.3 Judicial review prior to October 2001

The current Part 8 completely repealed and replaced a previous Part 8 which was fundamentally different in intent and approach. Judicial review applications must be conducted in accordance with whichever version of Part

8 was in effect on the date of lodgement of the original judicial review application.

In practise, due to the passage of time, very few (if any) applications for assistance will involve the old Part 8 regime, or even earlier manifestations of judicial review. Nevertheless, as they may arise from time to time in relation to appellate matters, or as a consequence of remittals to lower courts, it is important to be alert to the issue.

The different statutory schemes for judicial review over the years are summarised below.

TYPE OF PROCEEDING	
<i>ADJRA application</i>	This refers to an application for statutory judicial review brought under the <i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
<i>Old Migration Act Part 8 application</i>	In 1994, the government removed access to the process of statutory judicial review under the ADJR Act, and replaced it with an alternative scheme of statutory review under the <i>Migration Act</i> . This is now known as “old Part 8 review”.
<i>Common law (pre-privative clause)</i>	The old Part 8 statutory review scheme was very restrictive and often bypassed by bringing original applications for common law judicial review in the High Court. Common law applications proceed by way of prerogative writs, which do not issue unless there has been a jurisdictional error.
<i>Common law (post-privative clause and Plaintiff S157)</i>	The old Part 8 review scheme was abolished in October 2001. All judicial review now proceeds by way of common law applications for prerogative writs. The nature of prerogative writs and the presence of the privative clause mean that a serious error of law amounting to jurisdictional error needs to be established.

4.4 Which court?

At present, applications for judicial review of refugee and general migration matters can be brought in either the Federal Court or the Federal Magistrates Court. As a matter of practice, the Federal Court will often remit applications filed in its jurisdiction down to the Federal Magistracy, unless the Registrar is satisfied that the matter is sufficiently complex to be retained by the Federal Court at first instance.

Applications can also be brought in the High Court pursuant to its original jurisdiction under s.75(v) of the Constitution. Again, however, the High Court will usually remit the matter to the lower courts.

The *Migration Litigation Reform Bill 2005* will alter the jurisdiction of the courts as follows:

- Application for review of refugee and general migration matters must be brought in the Federal Magistrates Court (new s.476), although there will be discretion to refer up complex matters to the Federal Court;
- Appeals from decisions of a Federal Magistrate must be brought before a single judge of the Federal Court, although there is discretion to refer to a Full Court if considered appropriate in the particular case;
- The Federal Court can only hear first instance applications in character matters;
- The High Court can only remit refugee and general migration matters to the Federal Magistrates Court. The High Court remains the only court with jurisdiction to hear applications for judicial review of DIMIA decisions (which may be necessary where merits review rights were lost). Obviously it retains its appellate role, but Special Leave must be sought.

5 TIME LIMITS

5.1 When time starts to run

Great care must be taken when calculating time limits in migration actions to ensure that the correct starting date is used. Confusion can arise because some time limits in the Act run from the date a person is “deemed” to have been notified of a decision (irrespective of whether they actually received it). Other times commence from the date of actual receipt of the decision.

When deeming provisions are operative, reference must be made to s.494C of the Act. This section prescribes different periods for deemed notification depending upon whether the decision was delivered by hand, post or facsimile.

5.2 Time limits for commencing proceedings

The Act prescribes strict time limits for the commencement of judicial review proceedings, and the courts are not given any discretion to extend time. They are:

Court commenced in	Time limit	Section
Federal Magistrates Court	28 days from deemed notification of the decision under review	477(1A)
Federal Court	28 days from deemed notification of the decision under review	477(1)
High Court	35 days from actual notification of the decision under review	486A

Under current law, however, the above time limits have been effectively neutered by the High Court decision in *Plaintiff S157*. In that case, the court held that the time limits under s.486A only apply to a “privative clause decision” as defined in s.474. Since the High Court also held that a decision infected by jurisdictional error is void *ab initio*, and therefore not a “decision” of any sort, the time limits are inoperative against any decisions where jurisdictional error is found.

Furthermore, since the court cannot determine until the final hearing whether there has been jurisdictional error, objections to competency based on time limits similarly cannot be determined until that point in time. If jurisdictional error is established, the appeal is successful and time limits are ineffective. If no jurisdictional error is established, the appeal fails by virtue of the privative clause, irrespective of whether it was brought outside of time.

5.3 Time limits for lodging appeals

Appeal to	Time limit	Section
Full Court of the Federal Court (or single judge if appeal is from a decision of the Federal Magistrates Court)	21 days after judgement	Federal Court Rules O.52, rule 15
High Court (Special leave)	28 days after judgement	High Court Rules O.69A, rule 3

The rules of court provide for extensions of those time limits in appropriate cases. These time limits will continue to apply after enactment of the Migration Litigation Reform Bill 2005.

5.4 Migration Litigation Reform Bill 2005

The Bill seeks to impose uniform time limits on applications for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and

the High Court. These are found in the proposed new sections 477, 477A and 486A of the Act respectively.

The time limits will be 28 days from actual (as opposed to deemed) notification of a decision. The courts will have a discretion to extend this time limit by 56 days to a maximum of 84 days *provided* the application is made within the 84 days and the court is satisfied that it is in the interests of the administration of justice to extend the 28 day period.

The new provisions attempt to overcome the decision in *Plaintiff S157* as they are stated to also apply to “purported decisions” (new s.5E). “Purported decisions” are decisions which would be valid had they not been infected by jurisdictional error.

There are serious concerns that these provisions of the Bill may be unconstitutional as they will effectively restrict access to the High Court’s jurisdiction in section 75(v) of the Constitution.

6 GROUNDS OF REVIEW

It is not possible in this manual to exhaustively outline the different permutations of fact and law which can make a migration decision susceptible to judicial review. What we can do is highlight several ways of approaching a decision to look for errors, and flag the types of issues which can arise. There is no substitute for the detailed and thorough reading of relevant cases.

In this section, we briefly set out the different ways in which traditional administrative law grounds have been articulated and formulated in migration cases generally. We then give separate and more detailed treatment to the specific issues arising in refugee, general migration and character matters.

Grounds of review which may be available notwithstanding the privative clause are as follows:

6.1 Breach of the rules of natural justice

This is a broad ground of review and can encompass the following:

Whether the rules are limited by statute	Where an issue arises as to whether the statute in question places limits or restrictions on the operation of the rules of natural justice. For example, there are sections of the Act which specifically seek to limit the content of the rules of natural justice.
--	--

Inadequate notice prior to decision/hearing	This will rarely arise since the Act spells out various time periods for seeking comments and putting in further information. Nevertheless, it can be used where a decision-maker has not allowed adequate time to respond to adverse information or allegations.
Failure to disclose country information	This is the most commonly invoked ground of review in refugee cases, and refers to a decision maker relying upon “country information” which is not disclosed (or not sufficiently disclosed) to the applicant. “Country information” is information pertaining to the political and human rights situation in an applicant’s country of origin. The leading High Court case on this issue is <i>Muin v MIMIA</i> [2002] HCA 30.
Failure to disclose material <i>other than</i> country information	Arises when the error of law alleged is that material <i>other than</i> country information was relied upon by the decision maker, without disclosing (or sufficiently disclosing) that material to the applicant. For example, a decision maker may have received a “dob in” from a third party.
Any other denial of opportunity to present case/address the issues	This includes any other complaints that the applicant was not able to properly put forward their case, and respond to the case against them. For example, complaints about the appropriateness of the interpreters used; whether the decision maker misled the applicant about what issues they needed to address, and so on.
Denial of legal representation	Self-explanatory.
Gross departure from the rules of evidence	Decision-makers in migration cases are not bound by the rules of evidence at any level (except in the courts). However, the leading case of <i>Pochi</i> established that evidence still needs to be logically probative.
Denial of request to call witnesses	Self-explanatory
The rule against bias	The rule against bias requires a decision-maker to bring a fair and impartial mind to the proceedings, to not prejudge issues, and to not have any conflict of interest with the applicant.

6.2 Non-compliance with procedures required to be observed under the Act

This ground is used when the Act specifies that certain *statutory* procedures must be followed prior to making a decision, and the applicant alleges they were not. It only occasionally arises under the current judicial review regime, but was used frequently under the old Part 8 scheme.

6.3 Taking irrelevant considerations into account

This is pretty self-explanatory and covers where an applicant alleges a decision-maker had regard to irrelevant matters when making the decision.

6.4 Failing to take into account relevant considerations

The converse of above and one of the most frequently used grounds of review.

6.5 Acting in bad faith

This ground is thrown around a lot in refugee cases and has never been successful, as it requires a pretty strong finding from a court that borders on fraud.

6.6 Acting at the behest of another

This ground can also be referred to as “acting under dictation” and reflects when a decision-maker is effectively overborne by the Minister. For example, it was used successfully when Cambodian asylum seekers were rejected by DIMIA as refugees after the then Minister had publicly stated that “There is no such thing as a Cambodian refugee”. It can overlap with the rule against bias.

6.7 Inflexible application of a rule or policy

This is when a policy is used to dictate the outcome of a decision, without the merits of the case being considered.

6.8 Unreasonable exercise of power

This ground has been used a few times to attack both specific findings and the overall conduct of a case. It arises when an applicant alleges that a decision is “so unreasonable that no reasonable decision maker could have made it”. It is extremely difficult to make out.

6.9 No evidence

This covers a situation where a decision-maker cannot point to any evidence to support the findings of fact, or the decision as a whole. The ground is not made out by insufficient evidence, nor does it include arguments about the weight given to different pieces of evidence.

6.10 Absence of power to make the decision

This ground can also be described as “no jurisdiction”, “acting outside the scope of an enactment”, or making a decision “not authorised by the enactment”. It covers the situation where a decision has been made without any legislative basis, and there was, in fact, no power to make that decision.

This must be distinguished from “constructive failure to exercise jurisdiction”, which is discussed below.

It also covers situations where statutory powers only arise if certain facts are established, and the applicant alleges those facts were not present. For example, DIMIA only has power to process an application for a visa if a valid application is lodged. If an application was in fact invalid, then no power to process ever arises. This is also known as the “jurisdictional fact doctrine”.

6.11 Actual failure to exercise jurisdiction

This deals with a situation where a decision-maker had power to act and refused or failed to do so. For example, the Refugee Review Tribunal must review all valid applications for review. If the Tribunal wrongly believes that an application is invalid and therefore refuses to accept it, the Tribunal will have completely failed to exercise its jurisdiction. This is to be distinguished from a “constructive failure to exercise jurisdiction” (discussed below).

6.12 Constructive failure to exercise jurisdiction

This is really an umbrella term, covering many different situations where a decision-maker correctly embarks upon a decision-making process, but then goes off on the wrong track, or gets something so wrong that they are considered to have never really exercised the jurisdiction that was given to them. The situations can overlap considerably, and different judges often describe the same type of error in different ways.

Examples are:

Asking the wrong question	If a decision maker misunderstands the nature of the task to be performed, they can ask themselves the wrong questions in the process of performing that task.
Misconstruing the statute, or a term/provision within the statute	This ground will often arise where definitional terms are in issue, but includes any error in statutory interpretation.
Failing to consider the claim as made	This applies when a decision maker has so misunderstood an applicant’s case that they are said to have never really considered the application. It is also used when a decision maker appears to have completely ignored specific claims.

6.13 Failure to make a decision

This ground is only relevant to applications brought under the old Part 8 of the Act or the ADJR Act, and covers unreasonable delay in the making of a decision.

7 ASSESSMENT OF MERIT IN REFUGEE MATTERS

7.1 Overview

Refugee matters involve applications for Protection visas. Under the Act and regulations there are different types of Protection visas depending upon whether they are applied for in Australia or overseas. Applications received by QPILCH will nearly always involve the visas available in Australia, which are:

- Subclass 785 Temporary Protection Visa (TPV)
- Subclass 866 Protection Visa (PV)

The TPV is valid for 3 years. The PV is a permanent resident visa.

When assessing applications for assistance in refugee matters, regard must be had to the criteria relevant to all Protection Visas in Schedule 1, and the particular criteria relevant to each subclass of visa in Schedule 2.

7.2 The Refugee Convention

At their core, refugee matters involve determinations as whether an applicant meets the criteria for the grant of a protection visa prescribed by s.36(2) of the Act, which states:

A criterion for a protection visa is that the applicant for the visa is:

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

Australia owes protection obligations to persons who come within the definition of a refugee contained in Article 1A(2) of the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees* (“the Convention”), which define a refugee as being:

Any person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country.

The definition can be broken down into key elements:

- The person must be outside their country of nationality
- They must have a well-founded fear
- Of persecution
- The risk of harm must be causally linked to their race, religion, nationality, membership of a particular social group, or political opinion (these are known as “convention reasons”)
- The State must be unable or willing to protect the person from that risk of harm

Additionally, certain aspects of the refugee definition have been altered in Australian domestic law. See in particular the following sections of the Act:

- | | |
|-------|---|
| s.91R | Defines the meaning of “persecution” and prescribes the causal link between the persecution and the convention reason |
| s.91S | Prescribes certain conditions upon application of the convention reason of “membership of a particular social group” |

Judicial review of refugee matters will frequently involve the way in which the RRT has interpreted or dealt with particular elements of the refugee definition set out above. Every aspect of the refugee definition has been subjected to judicial scrutiny over the last decade. There is an abundance of case law, and sorting through it to find relevant cases is a considerable task.

While it is not possible in this manual to summarise the judicial dissection of the elements of the refugee definition, a good starting point is the *Case Law Guide* available online at www.sparelawyers.com under “Lawyers Resources”.

Note that many applicants fail before the RRT because of adverse findings in relation to their credibility. These sorts of cases are almost impossible to challenge on judicial review, unless the RRT has committed serious errors elsewhere in the decision.

7.3 The decision making process

The other way in which refugee matters are challenged in the courts involves close scrutiny of the manner in which the RRT dealt with the case. For example, did the RRT:

- Properly consider all of the evidence?
- Provide the applicant with the opportunity to comment on any adverse information or allegations? (but note s.422B)



- Address all of the claims made by the applicant?
- Make all of the factual findings it was required to make?
- Complied with any procedures prescribed by statute? (see ss. 42B-429A of the Act)

A useful paper by Melbourne barristers John Gibson, Daniel Star and Richard Niall canvasses many of these procedural attacks, and is reproduced in its entirety at Appendix A.

7.4 Exclusions from protection

The Convention provides that, in certain circumstances, persons meeting the refugee definition are nevertheless to be denied international protection. These circumstances relate to the commission of human rights violations and serious criminal offences prior to coming to Australia, and are known as “the exclusion clauses of the Convention”.

Applicants who are refused protection visas on the basis of the exclusion clauses, or who have had their protection visas cancelled due to the commission of criminal offences in Australia, are dealt with in the section on *Assessment of Merit in Character Matters*.

8 ASSESSMENT OF MERIT IN GENERAL MIGRATION MATTERS

8.1 Overview

There are many different types of visas available under the Act and regulations. They basically fall into the following streams:

Family	These visas are based upon certain familial relationships with Australian citizens or permanent residents. They include spouses and intended spouses, dependent children, some parents, and exceptional circumstances (such as orphan relative, or when an Australian family member is ill or disabled and requires a carer)
Economic	These visas enable persons to engage in economic activity in Australia, such as establishing a business, or taking up a position with an Australian employer.
Student	Student visas are granted to enable students to undertake vocational or tertiary studies in Australia.
Visitor	A wide range of visas issued for temporary stays for the purposes of tourism, or family visits

When starting any assessment of merit, it is critical to first identify which class of visa has been applied for, and which subclass of visa has been refused. You must closely scrutinise:

- The criteria contained in Schedules 1 and 2 in relation to that visa;
- Whether any of the terminology used in the Schedules is defined in the Act or (more likely) the regulations;
- Whether any other matters are prescribed by the regulations in relation to that particular class or subclass of visa.

8.2 Definitional terms

Assessing merit in general migration matters is considerably less fraught than in refugee matters. Eligibility for a particular visa usually centres on the application of one or two key definitional terms, or components of definitional terms, and assertions that the MRT has misinterpreted or misapplied those terms is the main basis for judicial challenges.

Look closely at the visa under consideration in the case for assessment and identify:

Was the visa refused because the MRT determined that the applicant, *even accepting all of their evidence*, could not satisfy a particular statutory requirement?

If so, you need to examine recent cases dealing with that particular statutory requirement. You can do this by searching High Court and Federal Court decisions available on AustLii. There are different techniques you can use to narrow your search. For example:

- If the definitional term is one unlikely to be used anywhere except in the Migration Act (such as “special need relative”, “last remaining relative”), confine your search to that phrase;
- If the term is likely to be one used in many different legislative contexts (such as “dependent child”), confine your search to the specific statutory provision (Migration Regulation 1.04)

Some examples of judicial intervention in MRT decisions for this reason are set out below:

Meaning of “last remaining relative” (Reg. 1.15)

In *MIMIA v Hidalgo* [2005] FCA 437, the Federal Court looked at the prescribed conditions for an applicant to qualify as a “last remaining relative”, one of which involved not residing in the same country as certain other relatives. At issue was the MRT’s finding that the applicant had resided in Australia for the last few years. The Minister’s argument that the construction

of the legislation did not allow Australia to be an applicant's country of residence was rejected by the court.

Meaning of "special need relative" (Reg. 1.03)

In *Biyiksiz v MIMIA* [2004] FCA 814, Gray J considered the requirement in the definition of "special need relative" that the Australian relative must not be able to obtain the care needed from hospital, community or welfare agencies in Australia. There was evidence that the mother would be unable to reside in a nursing home without serious difficulty because she was of Kurdish ethnic origins, had no English, and was illiterate.

His Honour held that the statutory provision must be construed as meaning that assistance was reasonably obtainable, not just available; that the cultural appropriateness of assistance must be taken into account when deciding whether assistance is reasonably obtainable; and that the Tribunal had failed to take into account a relevant consideration, namely that the mother wished to stay with the applicant and would not be comfortable in a nursing home.

Meaning of "domestic violence" (Reg. 1.23)

In *Cakmak v MIMIA* [2003] FCAFC 257 the Full Federal Court had to consider specific provisions in the Act which enable a spouse visa to be granted notwithstanding the breakdown of the spousal relationship, if domestic violence has occurred in the relationship. The Court held:

"'Violence' is an ordinary English word. The phrase 'domestic violence' refers to the social context of its occurrence. This is reflected in the spousal and familial relationship found in the regulations. The phrase is not a term of art. It describes something: 'violence' occurring in the domestic context....However belittling, lowering self esteem, emotional violence, or psychological violence and such behaviour as surrogates or synonyms for violence is, we think, to broaden the scope of the regulations beyond their words. There must be 'violence' or the 'threat of violence' involving the application, or threat of application of force such that the alleged victim is caused to fear for, or be apprehensive about his or her well-being or personal safety....Belittlement and expressed contempt may have their place in the creation of a climate of fear. But we reject the extension of 'violence' to encompass 'emotional' and 'psychological' violence as the subject of these regulations, in the absence of the application, or threat of application, of physical force..."

8.3 The decision-making process

Just as with refugee matters, the MRT can fall into error by the way it approaches a case or conducts a hearing. Read the decision carefully and ask if the MRT:

- Properly considered all of the evidence?



- Provided the applicant with the opportunity to comment on any adverse information or allegations? (but note s.357A)
- Addressed all of the claims made by the applicant?
- Made all of the factual findings it was required to make?
- Complied with any procedures prescribed by statute? (see ss. 357A-367 of the Act)

Many cases fail before the MRT because the applicant's evidence has been rejected as untruthful or unsatisfactory. It is almost impossible to challenge such findings unless the applicant can point to a serious error of law which, had it not been made, might have persuaded the MRT to a different conclusion.

Here are some examples of the principles applied by the courts in relation to the decision-making process:

Failure to give opportunity to comment

Re MIMA; Ex parte Lam [2003] HCA 6 involved a decision by an officer of DIMIA to cancel Mr Lam's permanent resident visa on the basis that he had committed serious criminal offences. In the course of making his decision, the departmental officer had regard to a letter of support from Mr Lam's wife. The officer advised Mr Lam that he would contact Mrs Lam to discuss the letter, but did not in fact do so. In this instance, the High Court denied Mr Lam relief. It held that the officer's failure to undertake the further step he had foreshadowed did not amount to a breach of natural justice because it did not result in any loss of opportunity for Mr Lam to present his best case.

Central to the court's ruling was Mr Lam's evidence that, even if he had known that the officer was not going to contact his wife, he would not have done anything further or submitted any additional information. Everything his wife had to say in relation to his application had been said in her letter of support.

Bias/Failing to consider all of the applicant's case

In *MIMA v Asif* [2000] FCA 228, the Full Federal Court considered a decision by the MRT to reject an application for a Spouse visa, when the MRT's principal finding had been that the applicant was an untruthful witness, and therefore his evidence as to the genuineness of his marriage could not be accepted. The MRT made this finding despite having before it substantial documentary evidence consistent with a genuine relationship.

The court found the MRT's decision was affected by bias:

"[32] ...Its steadfast refusal to evaluate the probative force of any of the evidence from sources other than the respondent himself that was relevant to the issue on which it based its decision shows that once it became convinced that the respondent was a wholly untruthful witness the case was over: from that point, the respondent had to lose, irrespective of how cogent the body of evidence he produced from

others was on the issue of his attitude to his marriage and to his wife at the earlier (as well as the later) relevant date....

[34] In agreeing with the learned primary judge that the decision was affected by actual bias, we do not suggest that the Tribunal acted otherwise than in good faith: it appears to have allowed its understandable distaste for the respondent's willingness to lie to advance his claims to distract it from giving proper consideration to the whole of the case the respondent presented..."

Failing to consider relevant matters

In *Nassouh v MIMA* [2000] FCA 788, Katz J found that the MRT had erred by failing to consider all of the matters prescribed by Reg. 1.15A when determining whether or not a "genuine and continuing relationship" existed for the purposes of a spouse visa:

"[10] ..one finds nowhere in the Tribunal's statement of findings and reasons it adopting terminology from which it appears that the Tribunal was consciously reflecting the terminology used in subreg 1.15A(3) of the Regulations, nor does one find anywhere in the Tribunal's statement of findings and reasons anything else betraying a consciousness on the Tribunal's part of the applicability of subreg 1.15A(3) of the Regulations to the review before it. That subregulation, it will be recalled, was expressed in mandatory terms..."

[21] There was thus evidence before the Tribunal relating to the issues of the financial aspects of the relationship and the nature of the household, evidence which, one would think, might have tended in favour of the formation of an opinion that, as of 15 July 1997, Mr and Ms Nassouh were in a married relationship within the meaning of reg 1.15A of the Regulations. However, when the Tribunal came to set out in its statement of findings and reasons its findings on material questions of fact, it made no reference to that evidence and further made no findings of fact as to the financial aspects of the Nassouh relationship or the nature of the Nassouh household as of the date with which it was concerning itself, 15 July 1997."

9 ASSESSMENT OF MERIT IN CHARACTER MATTERS

9.1 Overview

Character matters involve cases where a person has been refused permission to remain in Australia, or has had existing permission withdrawn, because the person is considered to be of bad character (discussed below).

Character matters usually involve an exercise of power under either:

s.200 – deportation of non-citizens

s.501 – refusal or cancellation of visa on character grounds

Applicants affected by the character criteria have merits review rights in the AAT. Thus, judicial review in character matters usually involves consideration of whether the AAT has committed a serious error of law. Occasionally, if merits review rights were lost for some reason, review of the DIMIA decision is pursued.

9.2 The “character test”

A determination under the Act that a person is of bad character is an application of “the character test” contained in s.501. That section has been amended several times in recent years. Its current manifestation in s.501(6) and (7) is reproduced in full here:

- “(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
 - (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;
 - (d) 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.”

The powers under ss.200 and 501 are discretionary. There is no obligation to deport a person, or refuse or cancel their visa, even if the Minister or delegate has found that they are of bad character.

The Minister has issued directions pursuant to s.499 of the Act, setting out the various matters to be taken into account when deciding whether to refuse or cancel a visa on character grounds. Those directions change from time to time, and it is important to have regard to the directions which applied at the time the decision was made. The Minister’s current directions are reproduced in full at Appendix B.

9.3 Possible challenges to character decisions

Character matters are probably the most difficult migration decisions to challenge on judicial review. This is because the legislative provisions give the Minister a wide discretion; there are few definitional terms upon which the Minister can come “unstuck”; and character decisions turn primarily upon findings of fact, which are difficult to attack on review.

Nevertheless, examples of judicial intervention in character cases can occur. Some examples follow:

Misunderstanding the onus of proof under s.501

The Full Federal Court in *MIMIA v Godley* [2005] FCAFC 10 has recently clarified that, on its proper construction, s.501 does not place an onus on an applicant to establish that he or she passes the character test. Rather, the obligation is upon the Minister (or her delegate) to make a finding of fact that a person is not of good character. If the Minister fails to make such a positive finding, the applicant is deemed by the section to pass the test:

“[48] It is clear that a person does not pass the character test if any one or more of the conditions set out in paras (a), (b), (c) and (d) of s 501(6) are fulfilled. For example, if a person has a substantial criminal record, as defined by s 501(7), the person thereby does not pass the character test. Whether or not a person has such a substantial criminal record can only be determined by means of an objective finding by the Minister. Such a finding is therefore implicitly required....

[55] It follows, therefore, that if the Minister is unsure whether a person is or is not of good character, is unable to reach a positive decision that the person is not of good character and declines to do so, then, if that is the only matter under consideration, that person will have passed the character test.”

Failing to give an opportunity to comment on adverse information

In *Godley’s* case (above), the Full Court also held that the Minister had breached the rules of natural justice by failing to give the applicant an opportunity to rebut the Minister’s view that the applicant had previously given false information to DIMIA, in circumstances where the applicant had not been convicted of that offence:

“[76] ...the Minister concluded that the respondent was guilty of criminal conduct without ever warning the respondent that he might do so. Had the respondent been made aware that actual crimes were being alleged against him, he would have been on notice that legal questions concerning criminal liability might be involved. He might have expressly drawn attention to the fact that his account of relevant matters, not denied by other material, was inconsistent with the requirement of the existence of a ‘guilty mind’ (mens rea). It is one thing to be put on notice of allegedly misleading a government department; it is another to be accused of an outright crime which involved actual knowledge of the falsity of one’s statements.”

Whether directions under s.499 amount to a fetter on the Minister’s power

Several cases in the Federal Court examine whether the nature of particular directions under s.499 amount to an impermissible fetter on the Minister’s discretion by directing the Minister to assign greater weight to some matters over others. The success of these arguments has depended upon a careful analysis of the wording of the particular directions in question and the facts of the case. For an example of an unsuccessful attempt, and a good review of the cases, see the judgement of Kiefel J in *Shaw v MIMA* [2004] FCA 1353.

Failing to take into account a relevant consideration

In *Taurino v MIMIA* [2005] FCA 119 Wilcox J held that the Minister had not given proper consideration to one of the matters raised in the directions, namely the best interests of the applicant’s Australian children. His Honour

held that the Minister was under a positive obligation to make a finding on this issue:

“[60] ..The Issues Paper was silent about the consequences for the children of the applicant being forced to leave Australia, with the children staying in Australia with their mother. Under the heading ‘the likely effect that any separation from the non-citizen would have on the child’, the Issues Paper simply said the applicant ‘did not provide any information with which to address this point’. No mention was made of the children’s loss of the company, support and guidance of their father; still less was there any attempt to assess the significance to the children of that loss.”

Constitutional validity of the power

In *Shaw v MIMA* [2003] HCA 72, a person who had entered Australia as a young child and “British subject” in 1974, challenged the constitutional power of the Commonwealth to treat British subjects as “aliens” under Australian law. By majority, the High Court determined that the aliens power had reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949, and who were born out of Australia of parents who were not Australian citizens, and who had not been naturalised.

9.4 Character matters involving Protection visas

In addition to the general character test set out above, applicants for protection visas can encounter specific character issues because the Refugee Convention provides that, in certain circumstances, persons meeting the refugee definition are nevertheless to be denied international protection. These circumstances relate to the commission of human rights violations and serious criminal offences prior to coming to Australia, and are known as “the exclusion clauses of the Convention”. They are summarised as follows:

EXCLUSION FROM PROTECTION	
Crimes against humanity – Article 1F(a)	The Convention denies protection to persons who are themselves human rights abusers, namely persons who have committed war crimes or crimes against humanity.
Serious non-political offences – Article 1F(b)	The Convention also denies protection to persons who are considered to be such a danger or menace to society that a State is justified in expelling them, notwithstanding the fact that they have been assessed as being at risk of persecution. Since October 2001, the Act has contained a definition of “non-political crime” in s.91T.

In such cases, when considering potential grounds of review, it is important to look closely at judicial interpretations of Article 1F and ensure that the AAT's application of the law is correct. These are not easy cases.

For example, in *SRYYY v MIMIA* [2005] FCAFC 42, the applicant was a Sri Lankan national who had applied for a protection visa. The applicant had been an army officer involved in actions against Tamil rebels. In his evidence, he admitted to acts of torture against Tamil civilians, including children, during interrogations. The Full Court set aside the AAT's finding that the applicant was precluded from protection under Article 1F. The Full Court undertook a lengthy analysis of the provisions of the Rome Statute; whether the statute could be used to define "war crimes" and "crimes against humanity" when it post-dated the applicant's conduct; whether the AAT had properly applied the definitions within the Rome Statute and considered the defence of "acting under orders" set out therein.

Similarly, see the High Court decision in *MIMA v Singh* [2002] HCA 7 in relation to the meaning of "non-political crime" (although the case pre-dates s.91T)

As with refugee and general law matters, however, the AAT can fall into error in the way it conducts its proceedings.

For example, in *Applicant S214 of 2002 v MIMIA* [2004] FCAFC 66, the Full Court held that the AAT had breached the rules of natural justice by failing to provide the applicant with sufficient particulars of allegations made against him which raised the spectre of Article 1F applying, thereby denying to him the opportunity to lead evidence refuting those allegations.

10 MAKE YOUR ASSESSMENT

Now that you have considered all of the matters raised in this manual, you should be in a position to assess whether:

- The applicant meets QPILCH's public interest criteria;
- The case has sufficient merit to be considered to have reasonable prospects of success; and
- The applicant has at least some prospect of a different outcome if the matter is remitted to the relevant decision-maker for rehearing.

If the application meets these criteria, the case should be referred to the firms and barristers participating in the RAILS referral project.

If the application does not meet these criteria, the applicant should be notified immediately in writing, giving reasons for that decision.

If you are unable to reach a conclusive view, you may refer the matter out to participating barristers for an advice on prospects.

APPENDIX A:
Analysing Refugee Review Tribunal Decisions,
JA Gibson, D Star and R Niall

***Reproduced with the kind permission of the authors and
the Victorian Bar Legal Assistance Scheme***

ANALYSING REFUGEE REVIEW TRIBUNAL DECISIONS: IDENTIFYING JURISDICTIONAL ERROR

JOHN A. GIBSON –VICTORIAN BAR

(Much of the material contained in this paper first appeared in papers presented by Daniel Star and Richard Niall, Members of the Victorian Bar at earlier Vicbar training sessions. The author wishes to thank them for their willingness to allow liberal reproduction of their papers)

1. Decisions under challenge:

- usually decisions of the RRT ; a decision by a delegate that a person comes within the exclusions contained in Article 1F of the Refugees Convention is a matter reviewable only by the AAT
- occasionally may be of decisions of delegates where no review under Pt 5 or Pt 7 is available; e.g. offshore refusal of refugee or humanitarian visas .

2. Judicial Review !

- Always keep in mind that you are engaged in a process of seeking to establish grounds of judicial review not, for example, for error on an appeal de novo against a Tribunal's findings of fact. Tribunal's have a wide margin of appreciation in carrying out their fact finding functions. You will essentially be continually analysing the Tribunal's decision asking yourself whether a particular factual finding is open. To this end while striving to be creative you should keep the limits of judicial review in mind. Note the strictures in *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

“... the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (38). In the present context, any court reviewing a decision

upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court. ...”

Cf Kirby J’s comments on this “the rule of restraint” in *Re MIMIA; Ex p Applicant S20/2002* [2003] HCA 30 at [147]-[150].

3. Are you using the correct version of the *Migration Act*?

What is the date of the application to the Court?

If it is on or after 2 October 2001, then the “privative clause” regime enacted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (No 134 of 2001) applies. **Use *Migration Act 1958 Reprint 9 (April 2004)***. There will be cases where an applicant has been a member of a High Court class action begun before this date and is permitted to maintain his action or commence fresh proceedings, or has previously had a matter finally determined and wishes to commence fresh proceedings on a ground that may not have been available before under the old Part 8 grounds of review (s476). In these cases depending on the circumstances (and where appropriate the effect of Item 8 of the transitional provisions to the *Migration Legislation Amendment (Judicial Review) Act 2001* (No 134 of 2001) the case may be dealt with under the 75(v) and S39B grounds of jurisdictional error.

4. Has the RRT has complied with the provisions of the *Migration Act*?

See, generally, Part 7 of the *Migration Act*. Tick and cross what the RRT has done against important obligations imposed upon it (or facultative provisions) in the *Migration Act*.

For instance-

- Section 424(1):

“In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal **must** have regard to that information in making the decision on the review.”
- Section 424A:

“(1) Subject to subsection (3), the Tribunal **must**:

 - (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and
 - (c) invite the applicant to comment on it.
- (2) ...
- (3) This section does not apply to information:

- (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
 - (b) that the applicant gave for the purpose of the application; or
 - (c) that is non-disclosable information.”
- Section 424A:
 - “(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
 - (2) Subsection (1) does not apply if:
 - (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
 - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
 - (c) subsection 424C(1) or (2) applies to the applicant.
 - (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.”
- Section 425
 - (1)

The [Tribunal](#) must invite the applicant to appear before the [Tribunal](#) to give evidence and present arguments relating to the issues arising in relation to the decision under review.
 - (2)

Subsection (1) does not apply if:

 - (a)

the [Tribunal](#) considers that it should decide the review in the applicant's favour on the basis of the material before it; or
 - (b)

the applicant consents to the [Tribunal](#) deciding the review without the applicant appearing before it; or
 - (c)

subsection 424C(1) or (2) applies to the applicant.
 - (3)

If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the [Tribunal](#).

- It is vital to understand:
 - the claims made by the applicant including the factual matters relied on and the Convention ground;
 - the procedure adopted:
 - did the applicant give evidence or written argument as provided for in s 423;
 - what information if any was the applicant given under s 424A;
 - was there an invitation to give additional information: s 424B;
 - did the Tribunal invite the applicant to appear: s 425;
 - was there a hearing and were there witnesses;
 - do the reason reflect the claims, the evidence and did the applicant have access to the material on which the Tribunal based its decision?

5. Grounds no longer available.

- There are a plethora of earlier judgments reflecting the various legislative and juridical bases upon which judicial review has proceeded during different periods in the past. It is important to keep in mind when reading judgments delivered in 2001/2002 and earlier that they will generally concern superseded grounds of judicial review (From the purposes of substantive refugee law subject to later

jurisprudential developments and legislative amendments they are still useful) A breach of s 420 is not itself a ground of review: *MIMA v Eshetu* (1999) 197 CLR 611. A breach of *Migration Act* s 430(1) is not itself a ground of review: *MIMIA v Yusuf* (2001) 180 ALR 1. However the failure by the RRT to make a relevant finding of fact and take account of relevant considerations may support a finding of actual or constructive ‘jurisdictional error’ or error of law: *Yusuf* per Gleeson CJ at [10]; per McHugh, Gummow and Hayne JJ at [76]-[83]; and per Gaudron J at [38]-[43].

6. Grounds available

- Speaking generally it is established that an administrative tribunal (absent any statutory indication to the contrary) will commit jurisdictional error if:
 - “it falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion”(*Craig v South Australia* (1995) 184 CLR 163 at 179 see also *MIMIA v Yusuf* (2001) 206 CLR 323 at [82])
 - it breaches the rules of natural justice:
 - “The general rule in Australia is that whenever a statute confers on an administrative decision-maker the power to affect a person's rights, interests or legitimate expectations the decision-maker must accord procedural fairness to the person affected unless the statute clearly indicates that this need not be done: *Kioa v West* (1985) 159 CLR 550, 582-

586; *Annetts v McCann* (1990) 170 CLR 596, 598” per
Finkelstein J in *Saitta v Commonwealth* [2002] FCA 1105

- judicial review is not about errors of fact: there is no reviewable error simply in making a wrong finding of fact, and it is not about a review of the merits.
- grounds of jurisdictional error which you should have in mind when analysing Tribunal decisions are
 - Breach of natural justice/denial of procedural fairness ;
 - failure to deal with a claim or the case as put; i.e as to the Convention ground or as to the source of persecution or a significant aspect of the case such as an incident of past persecution (which is elevated beyond simply “a piece of evidence”
 - a misunderstanding of how a claim is put factually so that the claim is not dealt with
 - misconstruction or misunderstanding of the criteria for the grant of a protection visa i.e a misunderstanding of the Convention definition akin to an error of law The following are examples of the sort of issues that may arise:
 - i) an applicant who is forced to hide his sexuality subject to persecution
 - ii) a devotee of a religion who will avoid physical harm if she practices her faith in private

- iii) the scope of “social group”
- iv) the relationship between effective protection and the chance of harm?
- v) the standard of proof set by the Tribunal
- o a finding that is unsupported by evidence which is critical to the ultimate determination (akin to the old statutory “no evidence” ground)
- o “Wednesbury unreasonableness “
- o Material error of fact: it may be that where the decision maker so misunderstands the facts it fails to exercise its jurisdiction

7. The structure of RRT reasons?

- (a) The Decision Under Review.
- (b) The Background. *
- (c) Jurisdiction.
- (d) The Applicant’s Case. *
- (e) The Legislative Framework. *
- (f) Discussion and Findings. **
- (g) Decision.

8. The Background; The Applicant’s Case; Discussion and Findings - Has the RRT dealt with the Applicant’s claims?

Yusuf per McHugh, Gummow and Hayne JJ at [75] (Gleeson CJ agreed at [1]).

“If the Tribunal, confronted by claims of past persecution, does not make findings about those claims, the statement of its reasons and findings on material questions of fact may well reveal error. The error in such a case will most likely be either an error of law (being an erroneous understanding of what constitutes a well-founded fear of persecution) or a failure to take account of relevant considerations (whether acts of persecution have occurred in the past).”

Critically analyse the RRT's reasons against the Applicant's claims, evidence and submissions in:

- unauthorised arrivals interview;
- the application for a protection visa – see Form C;
- the decision record of the primary decision-maker (the Minister's delegate);
- the course of the RRT review, such as-
 - the application for review to the RRT;
 - submissions given to the RRT before and after a hearing;
 - the transcript of the RRT hearing.

For a successful example, see *Applicant WAEE v MIMIA* [2003] FCAFC 184. In that case French, Sackville and Hely JJ said at [46]-[47]:

“It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) [206 CLR 323](#) at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where **however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.**”

Caveats:

The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he

is **bound** to take into account in making that decision: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at 39-41. This is subject to the principle that the manner in which the case is presented may make a particular claim or issue a mandatory relevant consideration for the purposes of judicial review (*Yusuf*).

There is a distinction between relevant considerations and particular pieces of evidence: see *Li Shi Ping v MILGEA* (1994) 35 ALD 225 at 236 per Carr J (Sheppard and Gummow JJ agreed).

The RRT is not bound to refer to every item of material relied on by the Applicant: see *Re MIMIA; Ex parte Durairajasingham* (2000) 168 ALR 407 at 423 per McHugh J.

“If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.”

It is important to note from the natural justice perspective that country material may have been noted or issues may have arisen at an earlier point in the proceedings which will have put an applicant on notice regarding their relevance to the review and preclude later reliance on a ground of denial of procedural fairness.

9. Some pointers

- Are there any matters material to the applicant’s claim that are referred to or stated in the application form or accompanying material that seem to have been omitted from the statement of facts in the Tribunal decision
- Are there any such matters raised in either the interview with the delegate or at the RRT hearing similarly ignored.
- Sometimes important claims may be noted in the statement of facts but ignored completely in the Findings. If it can be argued that such a claim is not otherwise dealt with by a more general finding or there is not otherwise a dispositive finding which makes the failure to make

specific reference to the claim immaterial, then some basis to argue that the Tribunal has not really turned its mind to the issue is at least available.

- Sometimes misuse of Convention language or using the wrong test may indicate the possibility of error
- It is extremely difficult to establish that selective reliance on country information is jurisdictional error. But still look at this aspect.
- An understanding of the elements of the Convention definition and the relevant jurisprudence will enable you to identify possible errors .

10. The Legislative Framework - Has the RRT got the law right?

Has the RRT misstated the law and proceeded on an erroneous view of the law?

As summarised by Gaudron and Kirby JJ in *Re MIMIA; ex p Applicants*

S134/2002 (2003) 195 ALR 1 at [76]:

“Hitherto, if a decision-maker has, in considering an application for a protection visa, failed to give effect to the Convention because, for example he or she has misunderstood the nature of persecution (*Chan v Minister for Immigration and Ethnic Affairs* (1989) [169 CLR 379](#)) or the nature of the grounds to which the Convention refers (*Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) [201 CLR 293](#)), that failure has constituted jurisdictional error entitling an applicant to relief under [s 75\(v\)](#) of the Constitution. That is because a decision-maker who has not given effect to the Convention cannot be said either to have been satisfied or not to have been satisfied that the person concerned is a person to whom Australia owes protection obligations. And his or her satisfaction or lack of satisfaction in that regard is a condition precedent to the grant or refusal of a protection visa.”

What about the use of templates in the RRT’s reasons? See *Wu Shan Liang*

(1996) 185 CLR 259 at 266 per Brennan CJ, Toohey, McHugh and Gummow JJ.

“A different delegate rejected the claims of each respondent in separate reasons for decision. Each set of reasons followed a broadly similar form. This was, at least partly, due to the practice of addressing common claims with "standard paragraphs" which had been prepared for the use of delegates. This practice was the subject of extensive argument before Wilcox J. His Honour rejected submissions that the use of such standard paragraphs indicated that the delegates "failed to give proper, genuine and realistic consideration to the merits of each application". Wilcox J's conclusion on this point was not the subject of consideration by the Full Court and the matter was not pressed in this Court. **A statement of reasons for a decision reviewable under the ADJR Act is not invalid merely because it employs a verbal formula that**

is routinely used by persons making similar decisions. If the formula is used to guide the steps in making the decision and reveals no legal error, the use of the formula will not invalidate the decision. On the other hand, if a decision-maker uses the formula to cloak the decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed by the Act, the incantation of the formula will not save the decision from invalidity. In such a case, the use of the formula may even be evidence of an actionable abuse of power by the decision-maker. As the significance of the formulae employed by the respective delegates of the Minister in making their decisions in the present cases was not canvassed before us, we say no more about it.”

11. Is there doubt expressed in the RRT’s critical findings adverse to the Applicant such that the RRT should have considered “what if it was wrong”?

See *MIMA v Rajalingam* (1999) 93 FCR 220 per Sackville J at 241 (North J agreed at 253):

“In general, however, the question of whether the RRT should have considered the possibility that its findings of fact might not have been correct is to be determined by reference to the RRT's own reasons. If a fair reading of the reasons as a whole shows that the RRT itself had "no real doubt" (to use the language in *Guo*) that claimed events had not occurred, there is no warrant for holding that it should have considered the possibility that its findings were wrong. Reasonable speculation as to whether the applicant had a well-founded fear of persecution does not require a possibility inconsistent with the RRT's own findings to be pursued. A "fair reading" of the reasons incorporates the principle that the RRT's reasons should receive a "beneficial construction" and should not be "construed minutely and finely with an eye keenly attuned to the perception of error": *Wu Shan Liang*, at 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 (FC), at 287. **Only if a fair reading of the reasons allows the conclusion that the RRT had a real doubt that its findings on material questions of fact were correct, might error be revealed by the RRT's failure to take account of the possibility that the alleged events might have occurred (or the possibility that an event said not to have occurred did not in fact occur). If the fair reading allows of such a conclusion, the failure to consider the possibilities might demonstrate that the RRT had not undertaken the required speculation about the chances of future persecution.**”

12. Closely scrutinise the Tribunal’s reasons or its decision-making process to see if there is anything which seems unfair

The possibilities are endless, especially since a breach of procedural fairness is a jurisdictional error that gives rise to relief.

- Actual bias by the RRT member?

Eg, *SBAN v MIMIA* [2002] FCA 591 per Mansfield J at [28].

“In my judgment, the Tribunal's approach discloses that it was actually biased against acceptance of the applicant's claim. **It demonstrates views which are incapable of alteration.** In reaching that conclusion, I have had regard to the very useful discussion of Lindgren J in *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* (1997 FCA 324, pp 95-99) about the meaning of "actual bias", in that case in the context of the former s 476(1)(f) of the Act. Accepting the need for great caution which should be exercised before reaching such a conclusion, I have come to that firm conclusion for the reasons given. **The Tribunal itself has indicated that its views about the applicant's claims, based upon the hypothesis of his own evidence being accurate, are incapable of alteration by the proposed additional material.** As it said, that was because it had found that any problems of the applicant are not Convention related, so "it follows from this" that the additional material, if signed so as to represent apparently cogent evidence, would not alter its conclusion. Unlike the decision of the Full Court in *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* (1997) 81 FCR 71, my conclusion is based upon what the Tribunal has said and not upon inference from the circumstances: compare per Burchett J at 126. In that case, on appeal, North J agreed with Burchett J that actual bias had been made out. Wilcox J agreed in the result, but upon different grounds.”

Overtaken on appeal in *MIMIA v SBAN* [2002] FCAFC 431 but also see *VFAB v MIMIA* [2003] FCA 872 (2003) 131 FCR 102. where Kenny J. found that the ground of apprehended or ostensible bias was made out by reason of the manner in which the Tribunal member had conducted the hearing.

- A finding that that documents that were potentially corroborative of a critical aspect of the appellant's claims were not genuine and a failure to give the appellant an opportunity to be heard on this issue was a denial of procedural fairness . (*WACO v MIMIA* [2003] FCAFC 171 (2003) 131 FCR 511 77 ALD 1
- unsupported speculation in RRT’s reasons that documentary evidence relied upon by the Applicant was produced as the result of arrangements made by the Applicant and other person in Iran that was never put to the Applicant was a breach of procedural fairness. See *WAGU v MIMIA* [2003] FCA 912 per French J.

- RRT failed to give an Applicant an opportunity to respond to adverse country information on which it intended to rely. See *WAEJ v MIMIA* [2003] FACFC 188 per Lee, Hill and Marshall JJ.
- Has there been any other type of unreasonable exclusion of relevant country information provided by the Applicant from the RRT's consideration? Eg, *Abedi v MIMA* [2001] FCA 1430 per Merkel J at [28]-[29].

“[28] The point I made in *Inderjit Singh [v Minister for Immigration and Multicultural Affairs* [2001] FCA 73] is that the RRT, as an inquisitorial body, is required to have regard to the material "before it" for the purposes of the review in the sense that it is not entitled to *exclude* that material from its consideration without having a proper basis for so doing. A proper basis may exist, for example, where the RRT is *functus officio* or where it has determined that the material is not credible or reliable or is irrelevant to the review it is conducting.

[29] In the present case the RRT did not give any reason for excluding the information contained in the Macpherson & Kelly [*ie, the previous adviser's*] submission. It was not requested to exclude that material from its consideration. It was not suggested on behalf of the Minister that the change of advisers, without more, would entitle the RRT to exclude from its consideration apparently credible and relevant material proffered by the previous adviser.”

- Any other breach of the rules of natural justice? Eg, In *Tran v MIMIA* [2003] FCA 44, Finkelstein J set aside a decision of the MRT in breach of the rules of natural justice where the MRT rejected evidence of witnesses because they were present in the hearing room without giving a warning that the witnesses should leave the room.
- An unreasonable refusal of an adjournment? Eg, In *SCAZ v MIMIA* [2002] FCA 1377, von Doussa J held that an arbitrary and capricious refusal of adjournment of the RRT's hearing deprived the Applicant of a fair hearing on the real issue **that required decision**. (However cf *NAMJ v MIMIA* [2003] FCA 983 per Branson J where the RRT satisfied all its statutory obligations and no jurisdictional error was able to be shown.)
- A breach of the common law rules of natural justice or the duty of procedural fairness is jurisdictional error for the purposes of applications to the RRT made before 4 July 2002. Depending on the true scope of s422B in seeking to exclude breaches of the common law rules of natural justice

where the review application is brought after the introduction of the Migration legislation Amendment (Procedural Fairness) Act 2002, (post July 3 2002. Applications) it is beyond doubt that a failure to comply with S424A as part of the statutory procedural code imposed on the RRT is such an error. For such applications it is arguable that a breach of s425 is a breach of a statutory natural justice hearing rule where it involves a party being misled into not giving evidence or making submissions (see *NAQF v MIMIA* [2003] FCA 781 per Lindgren J.) A failure to invite comment on an adverse conclusion not implicitly or explicitly an issue in the hearing and not therefore dealt with by s425, was a breach of procedural fairness the requirements of which were not excluded by s422B. So held French J in *WAJR v MIMIA* [2004] FCA 106 (2004) 204 ALR 624 .

13. The difficult but not impossible tasks.

- Persuading the Court that you have a case; it is always better to go with the one good point you might have than a range of points within which your one good point is lost .
- Declining to take a case because no prospects of success - and explaining why to a client in an interstate detention centre whom speaks little or no English.
- Ensuring that if you win at Court that the Applicant is put in as good a position possible for when the case is re-heard by the RRT; sometimes if error in misinterpreting the Convention .is made out the guidance provided by the judgment can be most useful on remitter (where obviously a successful outcome is the object)

JOHN A GIBSON

Chambers at Level 9/ 179 Queen Street

Melbourne

28 February 2005



APPENDIX B:
Ministerial Direction No. 21 pursuant to s.499

DIRECTION NO. 21

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Visa refusal and cancellation under section 501 of the Migration Act 1958

**DIRECTION - VISA REFUSAL AND CANCELLATION UNDER SECTION
501 - No. 21**

PREAMBLE:

This Direction provides guidance to decision-makers in making decisions to refuse or cancel a visa under section [501](#) of the *Migration Act 1958* (the Act).

The object of the Act is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. To facilitate this object the Minister has been given a discretion to refuse or cancel a visa where the visa applicant or visa holder does not pass the [Character Test](#). In exercising this power, the Minister has a responsibility to the Parliament and to the Australian community to protect the community from criminal or other reprehensible conduct and to refuse to grant visas, or cancel visas held by non-citizens whose actions are so abhorrent to the community that they should not be allowed to enter or remain within it. The powers conferred under section [499](#) enable directions to be given, in exercising discretions under section 501, for the protection of the Australian community.

Under the Character Test, visa applicants and visa holders must satisfy decision-makers that they can pass the test. When a visa applicant or visa holder does not pass the Character Test, decision-makers will decide whether to refuse the application or to cancel a visa. Exercise of this discretion will take into account a wide range of factors including the expectations of the community, the nature of crimes committed, the non-citizen's links to Australia and any relevant international law obligations.

The Act enables the Minister to give precise written directions on what weight is to be given to each of these factors. These directions are binding to all decision-makers, including merits review tribunals, to ensure a consistency of approach.

The Act also enables the Minister to order the deportation of non-citizens under section [200/201](#) of the Act in certain cases. The Government is currently considering recommendations of the Joint Standing Committee on Migration on criminal deportation matters. [Following that consideration, there may be a further direction in respect of the exercise of deportation powers.](#)

For the purposes of this Direction the term **decision-maker** includes both the Minister's delegates for the purposes of section 501 of the Act, and members of the Administrative Appeals Tribunal when conducting a [review of a decision made under section 501 of the Act.](#)

THEREFORE I, Philip Maxwell Ruddock, the Minister for Immigration and Multicultural Affairs, hereby give the following Direction pursuant to section [499](#) of the *Migration Act 1958* to any person or body having functions or powers under section [501](#) of the Act.

1. This Direction may be cited as "Direction - Visa Refusal and Cancellation under section 501 - No.21". This Direction revokes and replaces Direction No.17.
2. The purpose of refusing or cancelling a visa under section 501 is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the Australian community as a whole as to who should be allowed to enter or to remain in the community.

PRELIMINARY

This Direction consists of two parts. Part 1 provides directions on the application of the Character Test. Non-citizens who are being considered under section 501 must satisfy the [decision-maker](#) that they pass the Character Test. If the non-citizen does not pass the Character Test, decision-makers are to exercise the discretion to consider whether to refuse or cancel a visa, taking into account primary and other

considerations. [Part 2](#) provides directions on what these considerations are and the weight to be given to them.

PART 1 - APPLICATION OF THE [CHARACTER TEST](#)

The Minister may refuse or cancel a visa if the non-citizen does not satisfy the Character Test

1.1 Non-citizens who are being considered under section 501 must satisfy the [decision-maker](#) that they pass the Character Test. If there is reasonable suspicion that a non-citizen does not pass the Character Test, [the non-citizen must also provide evidence to satisfy the decision-maker](#) that the non-citizen passes the Character Test.

1.2 If a non-citizen is unable to satisfy the decision-maker that they pass the Character Test, subsection [501\(1\)](#) provides the authority to refuse to grant a visa and subsection [501\(2\)](#) provides the authority to cancel a visa that has already been granted.

1.3 There are four grounds against which a non-citizen may be considered to not pass the Character Test under subsection [501\(6\)](#).

[Paragraph 501\(6\)\(a\) “substantial criminal record”](#)

1.4 A non-citizen does not pass the Character Test if they have a substantial criminal record. Substantial criminal record is defined in subsection [501\(7\)](#).

[Paragraph 501\(6\)\(b\) “association” grounds](#)

1.5 The meaning of “association” for the purposes of the [Character Test](#) encompasses a very wide range of relationships including having an “alliance” or a “link” or “connection” with a person, a group or an organised body that is involved in criminal activities. “Association” does not require actual membership of a group or an organised body that is involved in criminal activities. In establishing criminal association, the [decision-maker](#) may have regard to the following:

- (a) the degree and frequency of association the non-citizen had or has with the individual, group or organisation;
- (b) the duration of the association; and
- (c) the nature of the association.

1.6 In some cases the information concerning association will be protected from disclosure by section [503A](#) of the Act. In all cases, great care should be taken not to disclose information that might put the life or safety of informants or other persons at risk.

[Paragraph 501\(6\)\(c\) – not of good character on account of past and present criminal or general conduct](#)

1.7 Under paragraph [501\(6\)\(c\)](#), decision-makers are required to make a finding that a non-citizen is “not of good character” on account of the non-citizen’s past and present, criminal or general conduct and thereby does not pass the [Character Test](#). In reaching the conclusion that a non-citizen is not of good character, decision-makers must take into account all the relevant circumstances of a particular case, including evidence of rehabilitation and recent good conduct.

• **Subparagraph 501(6)(c)(i) – past and present *criminal* conduct**

1.8 In considering whether a non-citizen is not of good character against subparagraph [501\(6\)\(c\)\(i\)](#), decision-makers should take into consideration the following:

- (a) the nature, severity and frequency of the offence/s;
- (b) how long ago the offence/s were committed;
- (c) the non-citizen’s record since the offence/s were committed, including:

- any evidence of recidivism or continuing association with criminals;
- a pattern of similar offences; and/or
- pattern of continued or blatant disregard/contempt for the law; and

(d) any mitigating circumstances such as may be evident from judges' comments, parole reports and similar documents.

- **Subparagraph 501(6)(c)(ii) – past and present *general* conduct**

1.9 In considering whether a non-citizen is not of good character against subparagraph 501(6)(c)(ii), decision-makers should consider the following matters (where they are relevant to the facts of the particular case), and where they are relevant, would, in the absence of any countervailing factors, constitute a failure to pass the [Character Test](#):

(a) whether the non-citizen has been involved in activities indicating contempt, or disregard, for the law or for human rights. This could include, but need not be limited to:

- engaging in business activities which fall short of criminal fraud requiring proof beyond reasonable doubt, but which, on a more likely than not basis, are disreputable and reflect poorly on a non-citizen's moral qualities;
- continual evasion or non-payment of debt;
- continual disregard as to payments of family maintenance;
- involvement in activities such as organised crime, terrorism, drug related activities, political extremism, extortion, "white collar" crime, fraud, breaches of immigration law; or
- involvement in war crimes or crimes against humanity.

(b) whether the non-citizen has, in connection with any application for the grant of a visa or any kind of Government benefit, provided a [bogus document](#) or made a false or misleading statement;

(c) whether the non-citizen has ever made a false or misleading declaration on an approved form, as defined in subsection [5\(1\)](#) of the Act, about the non-citizen's character or conduct or both;

(d) whether the non-citizen has been removed/deported from Australia or removed/deported from another country; or

(e) whether the non-citizen has been dishonourably discharged from the armed forces of any country or discharged prematurely as the result of disciplinary action in circumstances, or because of conduct, which would be regarded as serious in Australia.

1.10 In addition to the above matters, a non-citizen is, in the absence of any countervailing factors, not of good character under the general conduct provisions if the conduct of the non-citizen has:

(a) resulted in offences that are the subject of charges but are not resolved pending a hearing or trial. Matters to be considered when deciding the weight to be given to unresolved charges could include, (but are not limited to):

- whether there is a pattern of conduct relating to the applicant (eg similar charges in the past, other criminal behaviour); and/or
- the seriousness of the offence with which the applicant has been charged; or

(b) resulted in the non-citizen being acquitted of a criminal offence or where there has been no conviction recorded.

1.11 General conduct also includes recent good conduct. Any good acts of the non-citizen after reprehensible conduct are indications that the non-citizen's character may have reformed. Thus, both good and bad conduct must be taken into consideration in obtaining a complete picture of the non-citizen's character. However, where the [decision-maker](#) is not fully persuaded that the non-citizen has reformed, the discretion to refuse or cancel a visa is enlivened, and evidence of good acts and recent conduct becomes relevant to the exercise of the discretion (see [Part 2](#)).

[Paragraph 501\(6\)\(d\) - “significant risk” of future conduct grounds](#)

1.12 For the purposes of the [Character Test](#), it is not sufficient to find that a non-citizen has engaged in conduct specified in paragraph 501(6)(d) in the past, rather, decision-makers are required to determine whether there is a significant risk that a

non-citizen would engage in the specified conduct set out in paragraph 501(6) (d) in the future.

1.13 The “significant risk” criterion will be met if there is evidence which suggests that there is more than a minimal or trivial likelihood that a non-citizen would, if allowed to enter or to remain in Australia, engage in conduct specified in paragraph [501\(6\)\(d\)](#).

- **Subparagraph 501(6)(d)(i) - “engaging in criminal conduct in Australia”**

1.14 The reference to criminal conduct must be read as requiring there to be a significant risk of the person engaging in conduct for which a criminal conviction could be recorded. [Decision-makers](#) must make a finding that there is a significant risk that the non-citizen would engage in conduct which, if proven, would amount to a criminal offence.

- **Subparagraph 501(6)(d)(ii) - “harass, molest, intimidate, or stalk another person in Australia”**

1.15 For the purposes of section 501(6)(d)(ii), the words “harassment”, “molestation”, “intimidation” and “stalking” are to be given their ordinary meaning and should not be narrowly interpreted. However, decision-makers should note that subsection [501\(11\)](#) defines the scope of conduct amounting to harassment or molestation. A wide variety of conduct and behaviour fall under this category including, (but is not limited to) the following:

- (a) conduct that does not breach the terms of an Apprehended Violence Order, or similar order, but nevertheless could be construed as harassment or intimidation;
- (b) engaging in conduct recognised as placing children in danger, such as unwelcome and inappropriate approaches, particularly to children; or
- (c) any conduct that causes a person to be severely apprehensive, fearful, alarmed or distressed regarding the behaviour or alleged behaviour of the non-citizen, towards a person or in relation to his or her or another person’s property.

- **Subparagraph 501(6)(d)(iii) - “vilify a segment of the community”**,



- **Subparagraph 501(6)(d)(iv) - "incite discord"**

1.16 Factors that must be considered in deciding whether or not a non-citizen passes the Character Test on subparagraph 501(6)(d)(iii) "vilify a segment of the community", and (iv) "incite discord" grounds includes, (but is not limited to), evidence that the non-citizen:

- (a) holds or advocates extremist views such as a belief in the use of violence as a legitimate means of political expression;
- (b) intends to vilify a part of the community;
- (c) has a record of behaviour linked to or encouraging disregard for law and order, for example in the course of addressing public rallies;
- (d) has engaged or threatens to engage in conduct likely to be incompatible with the smooth operation of a multicultural society, for example advocating that particular ethnic groups should adopt political, social or religious values well outside those generally acceptable in Australian society, and if adopted or practised, might lead to discord within those groups or between those groups and other segments of Australian society;
- (e) participates in, or is active in promotion of politically motivated violence or criminal violence and/or being likely to propagate or encourage such action in Australia;
- (f) is likely to provoke civil unrest in Australia because of the conjunction of the non-citizen's intended activities and proposed timing of their presence in Australia with those by another person who may hold opposing views;
- (g) evidence that the presence in Australia of the non-citizen will result in there being a significant risk that Australia's foreign relations will be prejudiced; or
- (h) any other credible material which may be relevant to the exercise of the discretion under subsections 501(1) & (2) or to the determination under Public Interest Criterion 4003 of Schedule 4 of the Migration Regulations.

1.17 When considering a non-citizen against subparagraph [501\(6\)\(d\)\(iii\)](#) "vilify a segment of the community", and (iv) "incite discord", the [decision-maker](#) should bear in mind that subparagraphs 501(6)(d)(iii) and (iv) are not intended to provide a charter for denying entry or continued stay to non-citizens merely on the ground that they hold and are likely to express unpopular opinions, even if these opinions may attract strong expressions of disagreement and condemnation from some elements of the Australian community. It is therefore incumbent on the decision-maker to balance the operation of these subparagraphs against Australia's well established tradition of free expression.

[PART 2 - EXERCISING THE DISCRETION](#)

2.1 If a non-citizen does not pass the [Character Test](#), decision-makers must have regard to the following considerations when exercising the discretion to decide whether or not the non-citizen should be permitted to enter or remain in Australia.

Weight of considerations

2.2 The Government is mindful of the need to balance a number of important factors in reaching a decision whether or not to refuse or cancel a visa. In making such a decision, a [decision-maker](#) should have regard to three primary considerations and a number of other considerations. The primary considerations are set out at paragraphs 2.3 - 2.16 and other considerations are set out at paragraphs [2.17 - 2.24](#). Decision-makers must have due regard to the importance placed by the Government on the three primary considerations, but should also adopt a balancing process which takes into account all relevant considerations.

PRIMARY CONSIDERATIONS

2.3 In making a decision whether to refuse or cancel a visa, there are three primary considerations:

- (a) the protection of the Australian community, and members of the community;
- (b) [the expectations of the Australian community](#); and



(c) in all cases involving a parental or other close relationship between a child or children and the person under consideration, [the best interests of the child](#) or children.

Protection of the Australian Community

2.4 The Government seeks to take reasonable steps to protect the Australian community from the actions of criminals and to take action to lessen the risk of crime and disorder within the Australian community. The Government is especially mindful to take reasonable steps to protect the safety of the more vulnerable members of the community, such as children and young people who are especially at risk. This is of particular importance when the offences in question are in relation to drugs and crimes of violence.

2.5 The factors relevant to an assessment of the level of risk to the community of the entry or continued stay of a non-citizen include:

- (a) the seriousness and nature of the conduct;
- (b) the [likelihood that the conduct may be repeated](#) (including any risk of recidivism); and
- (c) whether visa refusal or cancellation may prevent or discourage similar conduct ([general deterrence](#)).

a. The seriousness and nature of the conduct

2.6 It is the Government's view that the following are examples of offences which are considered by the Government to be very serious:

- (a) the production, importation, distribution, trafficking (including possession for this purpose), commercial dealing, or selling of illicit drugs:

- persons who embark upon drug-related crime for financial gain have shown a callous disregard for the insidious effects of illicit drugs on the health and welfare of Australia's young people;
 - the Government views non-citizens who have sought to profit from the import or supply of drugs, whether or not motivated by their own need for illicit drugs, as extremely serious offenders. It is important both as a deterrent to other criminals and to protect Australian society that it is clearly understood that crimes involving drug trafficking, which puts the lives of young Australians at risk, be viewed as completely unacceptable to the community; and
 - offences involving illicit drugs of dependency or addiction, such as heroin, are also of particular concern to the Government and the community;
- (b) organised criminal activity resulting in a conviction in Australia or elsewhere;
- (c) serious [crimes against the Migration Act 1958](#), including, but not limited to, offences attracting a sentence of imprisonment of 12 months or more for bringing non-citizens into Australia in contravention of the Act; or to harbour unlawful non-citizens; arranging a contrived marriage, de facto relationship or interdependency to obtain permanent residence; or providing certain false or misleading information about a marital, de facto or interdependency relationship, applying or nominating for permanent residence on the basis of a contrived marriage, de facto relationship or interdependency relationship; or using or possessing a visa granted to another person; or presenting false or forged documents or making a false or misleading statement in connection with entry or stay in Australia;
- (d) sexual assaults are particularly repugnant to the Australian community, especially sexual assaults involving children regardless of whether there was overt violence or the threat of violence;
- (e) armed robbery (including robbery involving the use of imitation weapons), home invasion;
- (f) murder, manslaughter, assault or any other form of violence against persons;
- (g) terrorist activity;
- (h) kidnapping;

- (i) blackmail;
- (j) extortion;
- (k) arson;
- (l) serious theft (including “white collar” crimes):
 - such crimes are of concern because of the amounts of money involved and/or the disruption caused to individuals, business and Government;
- (m) crimes against children:
 - due to their vulnerability as victims and potential victims, crimes against children take on a special significance, especially crimes involving inducing children to take illicit drugs, sexual assaults on children, child prostitution, violence to children, kidnapping and crimes taking advantage of children;
- (n) any other crimes involving violence or the threat of violence:
 - such crimes are of special concern to the welfare and safety of the Australian community; and
- (o) ancillary offences in respect to any of the above offences, including:
 - convictions for attempting to commit any of the above offences;
 - convictions for conspiracy to commit any of the above offences; and
 - convictions for being an accessory before or after the fact in any of the above offences.

2.7 It is the Government's view that the sentence imposed for a crime is an indication also of the seriousness of the offender's conduct against the community. Decision-makers should have due regard to the Government's view in this respect, including:

- (a) the extent of the person's criminal record, including the number and nature of offences, the time between offences, and the time that has elapsed since the most recent offence; and

(b) the repugnance of the crime:

- crimes involving violence or fraud against defenceless persons (such as children, the elderly, the disabled and the incapacitated) are especially repugnant to the whole community.

2.8 When exercising discretion, decision-makers must also take the following factors into account as relevant considerations:

(a) any relevant factors provided by the non-citizen as mitigating factors;

(b) the offence is not classified as an offence in Australia.

- for example, a non-citizen who has been subjected to imprisonment as a result of political, religious or ethnic persecution may fail the substantial criminal record component of the [Character Test](#). However, discretion may be exercised to grant the visa permitting the non-citizen to enter or stay;

(c) a lighter sentence would be incurred in Australia for a similar offence; or

(d) the non-citizen has been [pardoned](#):

- Note in some jurisdictions “pardons” may only have the status of spent convictions legislation in Australia.

2.9 In relation to non-citizens who do not pass the Character Test due to convictions resulting from unsoundness of mind or insanity, the degree of recovery must be taken into consideration. If the non-citizen continues to rely on medication to control their condition, the non-citizen cannot be defined as having fully recovered. Moreover, the likely consequences of a non-citizen deliberately or accidentally not taking their medication must be considered.

b. likelihood that the conduct may be repeated (including any risk of recidivism)

2.10 It is the Government's view that the person's previous general conduct and total criminal history are highly relevant to assessing the likelihood of an offence and risk of recidivism. In particular, the following factors will be relevant to the assessment:

- (a) a non-citizen commits a further offence after having been warned previously about the risk of refusal or cancellation;
- (b) a non-citizen with several previous convictions in Australia should be considered as having an increased risk of recidivism in light of that past behaviour. In cases where there is a gap or gaps between convictions, the inference may be open that the non-citizen has demonstrated that a substantial period since an earlier conviction is not a reliable indicator that future offences will not be committed; and
- (c) the extent of rehabilitation already achieved, the prospect of further rehabilitation and the positive contribution to the community the person may reasonably be expected to make.

c. general deterrence - the likelihood that visa refusal or visa cancellation would prevent (or inhibit the commission of) like offences by other persons

2.11 General deterrence aims to deter other people from committing the same or a similar offence. While not a conclusive factor in itself, general deterrence is an important factor in determining whether to refuse or cancel a visa. The general deterrence factor may be relevant in a number of ways:

- (a) the nature of the offence may be such that visa refusal or cancellation may deter others from committing similar offences; and
- (b) the visa refusal or cancellation in respect of a non-citizen who has been involved in a criminal scheme or schemes may discourage or prevent another person or persons from engaging in similar schemes.

Expectations of the Australian community

2.12 The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is a significant risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application or cancel the visa held by such a person. Visa refusal or cancellation and removal of the non-citizen may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person

would not be granted a visa or should be removed from Australia. Decision-makers should have due regard to the Government's view in this respect.

The best interests of the child

2.13 This consideration only applies if the child is or would be less than 18 years of age at the time when the decision is intended to come into effect. The best interests of any children aged 18 years or more is not a primary consideration but may be considered with other considerations under paragraph [2.17](#).

2.14 Where there are two or more relevant children, it should not be assumed that the interests of each child will coincide, and it may be that the best interests of one child may indicate the non-citizen parent should not be refused a visa or removed from Australia, but that the best interests of another child may point towards visa refusal or cancellation.

2.15 In general terms, the child's best interest will be served if the child remains with its parents. Countervailing considerations, which may point to the child's best interests being served by separation from the non-citizen, include, but are not limited to:

- (a) any evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; or
- (b) any evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

2.16 When considering the best interests of the child, decision-makers should have regard to the following:

- (a) the nature of the relationship between the child and the non-citizen;
- (b) the duration of the relationship including the number and length of any separations and reason/s for the separation; the hypothetical prospect for developing a better/stronger relationship in future (whether or not there has been significant recent contact) would normally be given relatively less weight than the proven history of the relationship based on past conduct;

- (c) the age of the child;
- (d) whether the child is an Australian citizen or [permanent resident](#);
- (e) the likely effect that any separation from the non-citizen would have on the child;
- (f) the impact of the non-citizen's prior conduct on the child;
- (g) the time (if any) that the child has spent in Australia;
- (h) the circumstances of the probable receiving country, including the educational facilities and the standard of the health support system of the country to which the child may have to go, or return to, should the non-citizen not be permitted to enter or remain in Australia;
- (i) any language barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children acquire new languages; and
- (j) any cultural barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children adapt to new circumstances.

OTHER CONSIDERATIONS

2.17 When considering the issue of visa refusal or cancellation, other matters, although not primary considerations, may be relevant. It is the Government's view that where relevant, it is appropriate that these matters be taken into account but that generally they be given less individual weight than that given to the primary considerations. These other considerations may include:

- (a) the extent of disruption to the non-citizen's family, business and other ties to the Australian community;



- "Article 23.1 of the International Covenant on Civil and Political Rights (ICCPR) provides that::

"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State."

Article 17.1 provides that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation."

(b) genuine marriage to, or de facto or interdependent relationship with, an Australian citizen, [permanent resident](#) or [eligible New Zealand citizen](#):

- in assessing the compassionate claims of the Australian partner (Australian citizen, resident or eligible New Zealand citizen), decision-makers must consider the circumstances under which the relationship was established and whether the Australian partner knew that the non-citizen was of character concern at the time of entering into or establishing the relationship;

(c) the degree of hardship which would be caused to [immediate family members](#) lawfully resident in Australia (including Australian citizens), including whether the immediate family members are able to travel overseas to visit the non-citizen, the nature of the relationship between the non-citizen and the immediate family members, whether immediate family members are in some way dependant on the non-citizen for support which cannot be provided elsewhere;

(d) family composition of the non-citizen's family, both in Australia and overseas;

(e) the likelihood of the non-citizen seeking to evade any outstanding legal matter or on-going liability;

(f) the likelihood of the non-citizen breaching any conditions attached to the outstanding legal or on-going matter, any cost or bilateral implications of such a breach (eg extradition);

- (g) the nature and seriousness of the offence(s) or alleged offence(s) (in the context of seeking to evade an outstanding legal matter);
- (h) any evidence of rehabilitation and any recent good conduct;
- (i) whether the application is for a [temporary visa](#) or [permanent visa](#);
- (j) the purpose and intended duration of the entry to or stay in Australia, including any significant compassionate circumstances; and
- (k) the fact that a non-citizen has been formally advised in the past by an officer of the Department of Immigration and Multicultural Affairs about conduct which brought him or her within the deportation provisions at section [200/201](#) of the Act or the visa refusal and cancellation provisions at section [501](#).

[OTHER INTERNATIONAL OBLIGATIONS](#)

[Go to page 2 of 2](#)