IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S65 of 2014

BETWEEN:

MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP
Applicant

and

SZRNY
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The appeal raises the issue of when, in accordance with s 5(9)(a) of the *Migration Act 1958* (Cth) (**Act**), a decision to refuse a visa application is no longer "subject to any form of review" by the Refugee Review Tribunal (**Tribunal**) under Part 7 of the Act, and the visa application is thus "finally determined" within the meaning of s 5(9) of the Act.

3. The first respondent (**Respondent**) contends that a decision is no longer subject to "any form of review under Part …7" only when the review of that decision under that Part has been completed, something which does not occur until the Tribunal notifies the applicant and the Secretary of the Tribunal's decision on the review in accordance with s 430A(1) and (2). The decision of Griffiths and Mortimer JJ (**Majority**) in the court below was to this effect.

4. The appellant (**Minister**) contends that the court below erred, and that a decision is no longer subject to any form of review under Part 7 of the Act once it is "no longer susceptible of being altered" by the Tribunal. The Minister contends that this occurs when the written statement for the decision (**s 430 statement**) has been prepared in accordance with s 430(1) of the Act, or at least when that statement has been communicated outside the Tribunal to the applicant or the Secretary. He accepts that the review under Part 7 may continue after this point: Minister's submissions (**MS**), para 62.

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

5. The Respondent has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Facts

6. The Respondent says that the Minister's narrative of facts is inaccurate or incomplete in the following respects:

a. at MS, para 15, the Minister states that the Majority held that "the 'review' ... did not require the performance of every obligation or function in every provision in Part 7". This is inaccurate insofar as it suggests that these additional obligations and functions are ones that form part of "the 'review'" (i.e., any particular review). It is more accurate to say that the Majority held that some functions and obligations imposed by Part 7 are not elements of the content and scope of a review under that Part, but rather part of the overall "executive or administrative functions" of the Tribunal. They include obligations and functions relating to online publication of reasons and periodic reporting to the Minister, and do not need to be performed before a Part 7 review is complete because they do not form part of "the review": *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104; (2013) 214 FCR 374 (**Full Court Decision**) at 393 [97]; and

b. at MS, para 19, the Minister addresses the Majority's consideration of the administrative consequences of its construction of s 5(9)(a). This paragraph is inaccurate for two reasons:

i. there is no substance to the distinction drawn by the Minister between, on the one hand, "unacceptable uncertainty and inconvenience for the bureaucracy in the administration of the scheme" (which is a submission the Minister says he did not make to the court below) and, on the other hand, the proposition that "the legislative scheme would not operate efficiently, or at all" (which the Minister says he did). The operation of a legislative scheme involves its administration by the bureaucracy; there is no meaningful difference between the inefficient "operation" of a legislative scheme and the inefficient "administration" of that scheme;

ii. the Majority's primary reason for giving no weight to this argument was because they found that it was "not substantiated". The relevant provisions "operate rationally" on the Majority's construction (Full Court Decision at 364 [103]). Thus, the legislative scheme was still able to operate efficiently on the Majority's construction and the Minister's primary contention about its inefficient operation was not made out; and

c. at MS, para 20, the Minister describes the Tribunal as having "sent its decision... to the respondent, albeit to the wrong address". It should be noted that there is no dispute that, while the decision was sent, it was never received. The error on the part of the Tribunal was one of both form and substance; there is no suggestion that the Respondent received actual notice of the decision on his application for review prior to 28 May 2012.

7. The Respondent accepts the Minister's chronology.

Part V: Authorities

8. The Respondent relies on the authorities set out in the List of Authorities filed with these submissions in accordance with Practice Direction No 1 of 2013.

9. The Respondent accepts the accuracy of the Minister's statement of the applicable statutes. Additional provisions of the *Migration Act 1958* (Cth) (as at 12 March 2012) on which the Respondent relies are attached to these submissions. In addition, the Respondent also relies on the Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 1998 at [115].

Part VI: Argument

10. This case involves the statutory construction of s 5(9) of the Act, and arises in the context of a legislative choice to apply the benefits of the new complementary protection regime only to those visa applications which had not, at the relevant commencement date, been "finally determined" within the meaning of s 5(9) of the Act (s 35 of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (**CP Act**)).

11. The contentions of the parties set out at paras 3-4 above give rise to the following questions:

    a. first, whether a primary decision is no longer subject to any form of review under Part 7 when (as the Respondent contends) the review of the decision under that Part has been completed, or when (as the Minister submits) the decision is no longer susceptible of being altered by the Tribunal on the review;

    b. secondly, if the Respondent's contention on the first question is preferred, whether notifying the applicant and the Secretary of the Tribunal's decision in accordance with s 430A(1) and (2) of the Act is an element of a review under Part 7, so that the review has not been completed until notification has occurred. The Minister does not appear to dispute that this is the case: see MS, para 62; and

    c. thirdly, if the Minister's submission on the first question is accepted, when a decision is no longer susceptible of being altered by the Tribunal. The Minister posits two alternatives: one, when the Tribunal has "recorded" its decision on the review by having prepared its s 430 statement or, two, when that statement has been communicated outside the Tribunal to either the applicant or the Secretary. The Respondent says that a decision is susceptible of being altered by the Tribunal until the applicant and the Secretary have been given notice of it in accordance with the Act.

12. As will be apparent from the above, while the Respondent submits that his position on the first and second questions is clearly correct, even if the Minister's position on the first question were preferred, the appeal would fail if the Respondent were correct on the third.

13. These questions are addressed sequentially below.

First question: whether a primary decision is no longer subject to any form of review under Part 7 when the review of the decision has concluded, or when the decision is no longer susceptible of being altered on the review

Introduction

14. In overview, the Respondent contends as follows. Where a valid application for review of a primary decision has been made under s 412 of the Act, s 414(1) obliges the Tribunal to review that decision in accordance with the relevant provisions of Part 7. Until that review has been completed, the primary decision remains "subject to review" under Part 7 within the meaning of s 5(9)(a) of the Act. Determining when a primary decision is no longer "subject to review" in that sense requires an identification of the elements of the content and scope of such a review. A primary decision remains subject to a Part 7 review commenced in relation to it until each of those elements has been completed.

15. The Minister disputes this, submitting that the language of s 5(9)(a) "does not 'invite attention to the question whether the notification of the Tribunal's decision to the review applicant is an element of the scope and content of a Part 7 review'" (MS, para 27), and that that language "does not require the court to determine whether notification of a decision by the Tribunal is a 'critical elemen[t] in a review under Part 7": MS, para 28. The Minister describes taking such matters into account as "the central error in the approach of the court below": MS, para 27. The Minister says that, instead, s 5(9)(a) directs attention to when the primary decision ceases "to be subject to being altered in a review under Part 7": MS, para 27. The Minister accepts that, on this construction, a decision may no longer be "subject to review" within the meaning of s 5(9)(a), even though the "Part 7 review" in relation to it is continuing: MS, para 62.

16. It should be noted at the outset that the Minister's submissions involve a false distinction between, on the one hand, a review of a primary decision under Part 7 and, on the other, a "Part 7 review". So, for example, in para 62 of his submissions, the Minister concedes that in this case "a 'Part 7 review' … may, in some senses, have continued after 12 March 2012" (i.e., the date of the Tribunal's s 430 statement), while in para 33 of his submissions he asserts that "the review of the delegate's decision has been completed upon the recording of the Tribunal's decision". Those statements are irreconcilable, unless one distinguishes between a review under Part 7 of the Act, and the review of a primary decision under that Part. However, any such distinction is, with respect, nonsensical because the only type of review for which Part 7 provides is a review of a primary decision.

17. No member of the court below adopted the construction of s 5(9)(a) for which the Minister now contends. That construction was not accepted by Buchanan J (who was in the minority as to the result). This is apparent from his Honour's rejection of the relevance of determining when the Tribunal became *functus officio*; that is, the point at which the delegate's decision was no longer subject to being altered by the

Tribunal: Full Court Decision at 381 [34]-[38].[1] And the construction was obviously not accepted by the Majority, who identified the relevant question as being "whether the notification of the Tribunal's decision to the review applicant is an element of the content and scope of a Part 7 review": Full Court Decision at 390 [85].

18. In addition, contrary to para 42 of the Minister's submissions, no authority supports the contention that, once the Tribunal has made a valid decision to affirm a primary decision, that primary decision will no longer be subject to a form of review under Part 7. The Minister refers, in footnote 43, to the first instance decisions of Emmett J in *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 at [12] and of Mansfield J in *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1571; (2004) 140 FCR 137 at 141 [13]. However, those decisions, which were also cited below, do not support his contention because in neither one did any issue arise as to whether a review under Part 7 continued past the point at which the Tribunal had made its decision on the review.

19. For the reasons set out below, the text of s 5(9) and considerations of context and purpose demonstrate that the construction propounded by the Respondent, and accepted by the Majority, is correct.

The text of s 5(9)

20. Section 5(9) of the Act is in the following terms:

> "For the purposes of this Act, an application under this Act is finally determined when either:
>
> (a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or
>
> (b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed."

21. The text of s 5(9) of the Act supports the construction adopted by the Majority, not that for which the Minister contends.

22. *First*, the Minister's distinction between the conclusion of a review under Part 7 of the Act and the point at which a primary decision is no longer "subject to review" under that Part is inconsistent with the essential character of a Part 7 review. As noted at para 16 above, a review under Part 7 is a review of a primary decision in respect of which a valid application for review has been made: s 414(1), Act. It follows from this that there cannot be a review under Part 7 without there being a decision which is the subject of that review. Each element of a review under Part 7 is necessarily an element of the review of that particular decision. Accordingly, until

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[1] It seems, from the distinction Buchanan J drew (at 381 [35]) between the Tribunal becoming *functus officio* and "the finalisation of other essential functions before a review is regarded as complete", that his Honour did not regard notifying both the applicant and the Secretary of the Tribunal's decision on the review as part of those "essential functions".

each element of a review has been completed, the relevant decision remains, as a matter of ordinary English, "subject to" it.

23. *Secondly*, the Minister's dictionary definition of "subject to" as meaning "liable to, open to, or exposed to" supports this: MS, para 22(b). Given that a review under Part 7 is a review *of a decision*, it does not strain the terms of the definition to hold that a decision remains "subject to" review until all of the elements in the review of it under the Part have been completed. That is so, even if the Tribunal's decision on the review can be said to have been made prior to one or more of those elements being completed.

10 24. *Thirdly*, in any event, the Minister's focus on the meaning of "subject to" is misplaced. The critical words in s 5(9) are "any form of review under Part ... 7" because they are the words which identify what the relevant decision is "subject to". It is only by examining what a review under Part 7 comprises that one can determine the point at which a decision ceases to be "subject to" such review. Paragraph 22(d) of the Minister's submissions equates a decision being "subject to review" with a decision being liable to or open to (i.e., "subject to") being "*altered in* the review" (emphasis added). The idea of a decision being "altered" is not conveyed by the use of the words "subject to". A decision can be "subject to review" (or any number of other things, e.g., "subject to examination") without being at risk of alteration, it
20 depends entirely on what the review entails. It follows that if (as seems common ground: MS, para 62) a review of a decision under Part 7 involves not only the making of a decision on the review, but also notifying the applicant and the Secretary of that decision in accordance with the Act, then the decision under review must remain "subject to" review until that notice has been given.

25. *Fourthly*, in this regard, the use of the words "any form of review under Part ... 7" is significant. As the Majority below observed (at 390 [85]), that language is "broadly expressed" and is apt to refer to all of the elements comprising a review under Part 7, not any one element in a review. If the Minister's meaning had been intended, it could have been conveyed, simply and clearly, by using as the relevant reference
30 point in s 5(9)(a) of the Act the date of the s 430 statement on a Part 7 review: see, in this respect, the Full Court Decision at 394 [104] per the Majority.

26. *Fifthly*, it is relevant to note that s 5(9) defines when an application under the Act is "finally determined". Such an application will inevitably be one by an applicant to the Minister or a departmental officer. It would be odd if such an application could be "finally determined" without the applicant and the Minister or relevant officer knowing of it. On the Respondent's construction of s 5(9)(a), it could not.[2] On the Minister's construction, however, it could.[3] On that construction, where a review under Part 7 of a decision in respect of an application has been commenced, the application will be "finally determined" when the Tribunal makes its decision on the
40 review, before the applicant (who made the application) and the Minister or relevant departmental officer (to whom it was made) know of it.

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[2] That is, assuming (as submitted at paras 42-57 below) the Respondent is correct as to the second question.
[3] That is, assuming (contrary to the submissions at paras 58-77 below) the Minister is correct as to the third question.

Considerations of context and purpose

27. The Minister relies on various considerations of context and purpose which are said to support his construction of s 5(9)(a). For the reasons which follow, the considerations relied upon do not provide that support, and a number of other considerations of similar kind in fact demonstrate the correctness of the construction adopted by the Majority below.

28. ***Provisions of Part 7.*** At paras 33-39 of his submissions, the Minister points to a number of sections of Part 7 which, he asserts, support his construction of s 5(9)(a) as being directed to when a primary decision under review is no longer susceptible of being altered by the Tribunal (as opposed to when a Part 7 review has been completed). However, the sections identified do not provide support for that construction at all.

29. *First*, paras 35-37 of the Minister's submissions, which refer to ss 430 and 430A of the Act, seek to establish that making a decision on a review and notifying the applicant and the Secretary of it are distinct elements of a Part 7 review.

30. That distinction was recognised by the Majority below (at 387 [72]), and is not in dispute. In fact, Part 7 of the Act distinguishes between the making of a decision, the preparation of a s 430 statement, and notifying the applicant and the Secretary of the Tribunal's decision. In the case of oral decisions, for example, s 430D provides that: the decision is made when it is given orally; the applicant is taken to have been notified of the decision on the day on which it was made; and the Tribunal must give the applicant and the Secretary the s 430 statement within 14 days of the decision being made. In the case of non-oral decisions, ss 430(2) and 430A provide that: the decision is taken to have been made on the date of the s 430 statement (s 430(2)); and the Tribunal must notify the applicant and the Secretary of the decision within 14 days of that date (s 430A). The deeming character of s 430(2) also reflects a distinction between the making of the decision and the preparation of the s 430 statement.

31. But these matters provide no support for the Minister's construction of s 5(9)(a). On the contrary, the fact that the distinct elements of a Part 7 review referred to in the preceding paragraph are all provided for in the same handful of sections in one Division (Division 5) of Part 7 suggests that a primary decision does not cease to be "subject to review" until each element has been completed.

32. That is illustrated by s 430D of the Act, which is concerned with oral decisions of the Tribunal. It provides as follows:

> "If the Tribunal gives an oral decision on an application for review, the Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection 430(1) within 14 days after the decision concerned is made. The applicant is taken to be notified of the decision on the day on which the decision is made."

In the case of an oral decision under this section, the Minister's construction would have it that the relevant primary decision was no longer "subject to review" within the meaning of s 5(9)(a) once the Tribunal had given its decision as provided for in

the first part of s 430D, even though the balance of the section had yet to be satisfied. Nothing in the text or context of s 5(9) or Part 7 provides support for such a strained construction. A more natural reading of the relevant provisions is that a primary decision in respect of which the Tribunal made an oral decision remains "subject to review" until there has been compliance with the whole of s 430D. The same applies in relation to ss 430 and 430A of the Act regarding non-oral decisions of the Tribunal.

33. *Secondly*, paras 36 and 38 of the Minister's submissions are directed to establishing that "statutory significance" attaches to the preparation of a s 430 statement. The different parts of these paragraphs are addressed in turn below:

a. in para 36, it is pointed out that, in the case of non-oral decisions, the time for the Tribunal to notify the applicant and the Secretary of its decision runs from the date of the s 430 statement. That is true, although under s 430D, in the case of oral decisions, time for the Tribunal to give its s 430 statement runs from the date on which the Tribunal gives its decision. In any event, neither provision provides support for the Minister's construction of s 5(9)(a) (i.e., that a primary decision is no longer "subject to review" when it ceases to be susceptible of change by the Tribunal, rather than when the relevant Part 7 review has been completed);

b. in para 38(a), reference is made to s 414A(1) as providing a time period within which the Tribunal must review a primary decision under s 414 and prepare its s 430 statement. That is consistent with the preparation of a s 430 statement being an element of a Part 7 review. However, it does not indicate that a primary decision ceases to be "subject to review" within the meaning of s 5(9)(a) once that element of the review has been completed, if other elements (such as giving notice of the Tribunal's decision) have not been;

c. paras 38(b) and 38(c) refer to ss 440A(5)(b) and 440A(6)(b), which form part of the Principal Member's reporting obligations to the Minister. Those provisions concern reporting in relation to applications for review for which the Tribunal has reviewed the decision under s 414 and prepared its 430 statement, but not within the period specified in s 414A(1). Again, this is consistent with the preparation of a s 430 being an element of a Part 7 review, but that is all. Contrary to para 38(c), the provisions do not indicate that the Tribunal completes a review once it has prepared its s 430 statement.[4] As the Majority observed, these provisions relate to executive or administrative functions to be carried out by the Principal Member (rather than being part of the content and scope of a review under Part 7), and "are not of any particular assistance in construing s 5(9)(a)": Full Court Decision at 393 [97];

d. in para 38(d), the Minister refers to s 422A and notes that s 422A(2)(a) precludes the Principal Member from directing that the Tribunal be reconstituted in the interests of achieving the efficient conduct of a particular review if the Tribunal's decision on the review has been recorded in writing or

[4] Moreover, the submission that they do is inconsistent with the Minister's position that s 5(9)(a) is concerned with when a primary decision is no longer susceptible of alteration by the Tribunal, rather than with when the Tribunal completes a Part 7 review.

given orally. However, that is contrary to the Minister's construction of s 5(9)(a); if a primary decision were no longer "subject to review" once the Tribunal's decision on the review had been recorded in writing, then s 422A(2)(a) would be otiose. The Minister's submission also ignores s 422 of the Act. These provisions were considered carefully by the Majority (at 304 [102]), and are addressed further at paras 47-52 below.

34. ***Asserted adverse consequences of the Majority's construction.*** The Minister also seeks to impugn the Majority's construction of s 5(9)(a) on the basis that it would have adverse consequences for the finality of the Tribunal's decisions, even outside the unusual circumstances of this case: MS, paras 30-32. Those submissions, too, should not be accepted.[5]

35. *First*, the hypothetical, adverse consequences raised by the Minister proceed from a mischaracterisation of the Majority's decision. It is true that, as submitted in the second last sentence of para 30 of the Minister's submissions, the Majority "declined to consider whether the Tribunal's power to review was spent" in the sense that they did not construe the words "no longer subject to ... review" in s 5(9)(a) as referring to the point in time at which the Tribunal becomes *functus officio*. As noted at para 17 above, Buchanan J did not construe s 5(9)(a) in that way either. However, it is not the case, as the Minister submits in the same sentence of para 30, that the Majority "impliedly accepted that the Tribunal was bound to reconsider its decision when the visa criteria subsequently changed". The Majority did not need to address that issue because (as he did at first instance) the Minister conceded it. That is, the Minister accepted that, whatever construction of s 5(9)(a) was adopted, if the Respondent's visa application had not been "finally determined" before 24 March 2012, then the Tribunal was bound to reconsider its decision. The Majority noted, with respect correctly, that this concession "was properly made": Full Court Decision at 395 [106]. But the issue was not one their Honours had to decide.

36. *Secondly*, even leaving the preceding point to one side, the decision below does not go to the question of whether, ordinarily, the Tribunal may "be bound to consider any new claims or fresh evidence advanced on behalf of a review applicant before the application is 'finally determined'": MS, para 30 (last sentence). That is because, in this case, the legislature chose to make the new criteria introduced by the CP Act applicable to all protection visa applications which had not been "finally determined" before 24 March 2012. This obliged the Tribunal to consider the new criteria on a review of a primary decision in respect of such an application.[6] No doubt that is the reason the Minister made the concession referred to above. It is certainly the basis on which the Majority understood the concession to have been properly made: Full Court Decision at 395 [106]. It does not follow that, in cases where no such

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[5] For completeness, it should be noted that, unless the Minister were correct on the third question (as to when the Tribunal's powers are "spent"), acceptance of his answer to the first question would not overcome the adverse consequences to which he refers (even if, contrary to paras 35-39 below, his submissions were otherwise correct).

[6] In this sense, the present case is starkly different from *Minister for Immigration and Multicultural Affairs v Thiyagarajah* [2000] HCA 9; (2000) 199 CLR 343 (***Thiyagarah***), quoted at para 43 of the Minister's submissions. As the portion quoted by the Minister states, in that case "the Act did not confer upon the Tribunal any authority subsequently to reconsider the decision of the delegate by reason of later changed circumstances". In this case, the CP Act required the Tribunal to reconsider the delegate's decision by reference to the new criteria.

obligation was imposed, the Tribunal would be bound to consider new claims or fresh evidence after it had prepared its s 430 statement or sent it outside the Tribunal, but before it had concluded the review by notifying the applicant and the Secretary of its decision in accordance with s 430A(1) and (2). The present case does not raise that issue.

37. *Thirdly*, the adverse consequences about which the Minister speculates could only arise in the event of non-compliance with the Act by the Tribunal. That is because those consequences depend on the Tribunal failing to notify an applicant of its decision on a review as the Act requires: MS, para 30. Accordingly, consideration of these consequences does not provide a sound guide to the construction of s 5(9)(a). The Act should be construed on the general assumption of compliance by the Tribunal with its terms: *SZGME v Minister for Immigration and Citizenship* (2008) [2008] FCAFC 91; 168 FCR 487 at 492 [13] per Black CJ and Allsop J. To the extent that the Act contemplates the Tribunal's non-compliance with those terms, the consequences of this are expressly addressed in s 430A(3). As the Majority held (at 393 [100]), that provision does not address the question of when a review under Part 7 is or is not completed.[7]

38. *Fourthly*, the possible need (if any) to verify the Tribunal's compliance with its notice obligations does not mean that the legislative scheme would not operate efficiently or at all with the Majority's construction. As the Majority held (at 394 [103]), the Minister has not substantiated claims of this kind. Further, as their Honours also held (at 394 [103]) any administrative inefficiency which might be said to result could not detract from a construction of s 5(9) based on its text, context and purpose. And, as the Majority observed (at 394 [104] - 395 [105]), "any practical problems for the bureaucracy ... are the product of a deliberate choice by the Parliament" both as to the reference point by which s 5(9)(a) operates and as to the use of s 5(9) as the reference point for the application of the new visa criterion introduced by the CP Act. The different reference points used in Part 7 of the Act and referred to by the Majority (at 394 [104]) illustrate this.

39. *Fifthly*, the assertions in paras 30 and 31 of the Minister's submissions that, on 12 March 2012, the Tribunal made a "*valid* decision" in relation to the Respondent's application for review are not to the point. The issue is not whether the Tribunal's decision was "valid" at that time. The issue is whether, before 24 March 2012, the Respondent's visa application had been "finally determined" within the meaning of s 5(9), which depends on whether the delegate's decision in respect of that application was "no longer subject to any form of review under Part ... 7" before that date. If not, then it was common ground that the CP Act required the Tribunal to consider the new visa criteria in reviewing the delegate's decision, and that its decision was affected by jurisdictional error as a result of its failure to do this. Similarly, the question of whether the Secretary or Minister was bound or entitled to act upon the Tribunal's decision prior to 24 March 2012 does not arise. There is no suggestion that either did act on the decision, and it is perilous to seek to consider such issues in the abstract.

[7] As to s 430A(3) see also paras 55-56 below.

40. ***Adverse consequences of the Minister's construction.*** Certain adverse consequences of the Minister's construction of s 5(9)(a) lend further support to that of the Majority. These relate to ss 198(2) and 198(6) of the Act. Under both provisions, an officer must remove from Australia as soon as is reasonably practicable an unlawful non-citizen who is in detention where, *inter alia*, the non-citizen has made a valid application for a substantive visa that can be granted when the applicant is in the migration zone, the grant of the visa has been refused,[8] and the application "has been finally determined": see, e.g., *Thayananthan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1054; (2003) 132 FCR 222 at 230 [22] - 231 [23] per Merkel J. If (as would be the case on the Minister's construction) a visa application could be "finally determined" without the unlawful non-citizen who made the application being notified of it, then that person might be removed from Australia without having had an opportunity to commence judicial review proceedings under Part 8 of the Act in respect of the Tribunal's decision. The fact that the Act provides for such proceedings to be brought points against a construction of s 5(9) which could have this effect, and supports the Majority's construction. Conversely, the obligation on departmental officers to remove a person under s 198 is an obligation to remove as soon as practicable after an application is finally determined. It would not make sense for this requirement to be triggered when a decision is recorded internally by the Tribunal (as it would be on the Minister's construction), as opposed to when notice of it is given in accordance with the Act (as on the Majority's construction).

41. ***Conclusion.*** For the reasons set out above, the text of s 5(9)(a) of the Act, together with contextual and purposive considerations, demonstrate the correctness of the Majority's construction. It should be held that a primary decision is no longer "subject to any form of review under Part ... 7" of the Act when the Tribunal's review of that primary decision has been completed, and not merely when the primary decision is no longer susceptible of being altered by the Tribunal.

Second question: whether notifying the applicant and the Secretary of the Tribunal's decision is part of a review under Part 7 of the Act

42. As already mentioned, the Minister appears to accept that one of the elements of a review under Part 7 of the Act is that the Tribunal notify the applicant and the Secretary of its decision on the review in accordance with s 430A(1) and (2): MS, para 62. It follows that, if (as submitted at paras 14-41 above) the Majority was correct to hold that, within the meaning of s 5(9)(a), a primary decision is no longer "subject to review" under Part 7 only when all the elements of the review have been completed, then the delegate's decision in respect of the Respondent's visa application remained "subject to review" as at 24 March 2012, when the amendments made by the CP Act relevantly commenced. That is because the Tribunal had not notified the Respondent, before that date, of its decision on his application for review in accordance with s 430A(1) (or at all).

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[8] Refusal of the grant of the visa is not an express requirement under s 198(2), but it is implicit because, had the visa been granted, the person in question would no longer be an unlawful non-citizen (see s 13(1) of the Act).

43. The Majority gave careful and, it is submitted, compelling reasons for concluding that notification of the Tribunal's decision to the applicant and the Secretary in accordance with s 430A(1) and (2) is an element of a review under Part 7 of the Act: see Full Court Decision at 390 [84] - 395 [106]. In the event that the Minister seeks to dispute the Majority's conclusion to that effect (as distinct from submitting that the Majority was wrong to construe s 5(9)(a) by reference to the elements of the content and scope of a Part 7 review), the Respondent relies on that reasoning. A number of aspects of it should be emphasised.

44. *First*, at 390 [85] of the Full Court Decision the Majority observed that:

> "As a matter of general principle, it is difficult to understand why the taking of the prescribed steps concerning notification of the decision ... are not part of the content and scope of such a review. In the ordinary course one would expect that the conduct of a review of a primary decision would not be complete until steps were taken to notify interested parties of the decision. Reviews of administrative decisions affecting people's interests are not conducted solely for internal objectives pertaining to the reviewing entity. In most two-tiered administrative decision-making processes, telling those affected by the primary decision (and in particular the person who invoked the review jurisdiction in the first place) of the outcome of the review is an important element of the process. In our view the position is no different under the Act."

45. This aspect of the Majority's reasoning is, with respect, plainly correct. The place of notification as an element of a review under Part 7 of the Act arises, not only from the language of that Part, but from the objects of the review process: namely, to provide an applicant with an opportunity for an independent determination of the merits of his or her application, and the Minister with a legally binding determination which can be acted upon appropriately. The role of the Tribunal is entirely confined to the review; its decision has no impact without being communicated to the parties (compare, for instance, a decision made by an officer of a government department, which upon internal recording may set in train processes or activities). Notification of the applicant and the Secretary is, accordingly, essential to the attainment of the objects and purposes of the review itself.

46. *Secondly*, the Majority regarded certain observations of Logan J and Barker J in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131; (2012) 206 FCR 24 (***SZQOY***), addressing when the Tribunal becomes *functus officio*, as "especially apposite" in highlighting the significance of the Tribunal's notification requirements to a Part 7 review. Those observations are quoted at 391 [89] - 392 [90] of the Majority's reasons for judgment. The Minister's submission that *SZQOY* was wrong as to when the Tribunal becomes *functus officio* is addressed at paras 58-77 below in the context of the third question, and should not be accepted. Moreover, once it is accepted that giving notice of the Tribunal's decision in accordance with the Act is an element of a review under Part 7, there is no basis for holding that partial compliance with the notification requirements (i.e., giving notice to one of the applicant or the Secretary, but not the other) is sufficient to complete a review: see Full Court Decision at 392 [92] per the Majority.

47. *Thirdly*, the Majority held that the conclusion that giving notice in accordance with the Act was an element of a review under Part 7 was supported by other relevant provisions of the Act: Full Court Decision at 394 [102]. In that regard, their Honours placed emphasis on ss 422 and 422A of the Act.

48. As noted at para 33(d) above, s 422A permits the Principal Member to reconstitute the Tribunal in the interests of achieving the efficient conduct of a particular review, but only if the Tribunal's decision on the review has not been recorded in writing or given orally: s 422A(2)(a). Section 422(1), on the other hand, obliges the Principal Member to reconstitute the Tribunal to finish a review in the event that the member constituting the Tribunal stops being a member or becomes unavailable. That obligation is not limited to circumstances where the member has not recorded his or her decision in writing or given it orally: c.f., s 422A(2)(a). The limitation in s 422A(2)(a), on its own, indicates that a review under Part 7 is not complete when the Tribunal's decision is recorded in writing or given orally. If it were, the limitation on the Principal Member reconstituting the Tribunal at that point would be unnecessary. In addition, the absence of a corresponding limitation on the requirement imposed by s 422(1) further supports this. It indicates that the Principal Member may be required to reconstitute the Tribunal for the purposes of a particular review, even after the Tribunal's decision has been recorded in writing or given orally. The Majority were, with respect, correct to conclude that this "strongly suggests" that the Tribunal's review function is still ongoing at that stage.

49. Notwithstanding his apparent acceptance of the Respondent's position on the second question, the Minister attacks the Majority's reliance on ss 422 and 422A of the Act: MS, paras 63-66. Those aspects of the Minister's submissions are addressed here.

50. The Minister seeks to dismiss the significance of ss 422 and 422A on the footing that the Majority's reasoning applied the *expressio unius est exclusio alterius* principle to the construction of those provisions without regard to the fact that the provisions were enacted at different times: MS, para 65. That submission is flawed for at least three reasons. One is that the Majority's reasoning was not based exclusively on the principle of *expressio unius*. As their Honour's observed (at 394 [102]), on its own the restriction in s 422A(2)(a) indicates that a review is not complete when the Tribunal's decision has been recorded in writing or given orally: see para 48 above. A further reason is that ss 422 and 422A are contiguous, deal with the same subject matter, use the same language, and are complementary. Given this, use of the *expressio unius* principle in their construction is entirely reasonable and appropriate: c.f., *Construction, Forestry, Mining and Energy Union (CFMEU) v Hadgkiss* [2007] FCA FC 197; (2007) 169 FCR 151 at 154 [12] -156 [16] per North J. Moreover, while the provisions were enacted some time apart, para 115 of the Explanatory Memorandum to the *Migration Legislation Amendment Bill (No 1) 1998*, which became Act No 118 of 1998 inserting s 422A into the Act, refers expressly to s 422 and indicates that regard was had to the latter provision in drafting the former. This makes cautions regarding the *expressio unius* principle particularly inapt in the present case.

51. The Minister also asserts that s 422(1) has been construed as applying only where a member constituting the Tribunal for the purposes of a particular review stops being a member or becomes unavailable prior to making a decision on the review: MS,

para 66. However, the authority cited for that proposition, *Abujoudeh v Minister for Immigration & Multicultural Affairs* [2001] FCA 1351; (2001) 115 FCR 179, did not consider a scenario in which it was necessary to reconstitute the Tribunal between the preparation of the s 430 statement and its notification. Further, if the member who constitutes the Tribunal for the purposes of a particular review becomes unavailable after giving an oral decision, it is clear that the Principal Member would be obliged under s 422(1) to direct another member to constitute the Tribunal at least for the purpose of preparing the s 430 statement for the decision: see para 48 above. Accordingly, it cannot be the case that s 422(1) only applies prior to the making of a decision on a review.

52. Additionally, in a further attack on the significance of ss 422 and 422A, the Minister submits that there is no reason not to construe the obligation to notify in accordance with s 430A of the Act as falling on the "Tribunal" as an entity, rather than on the member who constitutes the Tribunal for the purpose of a particular review under s 421(1): MS, para 66. Underpinning this is the idea that, if that be so, the Principal Member could not be obliged to reconstitute the Tribunal under s 422 for the purpose of giving such notice. This submission, too, should not be accepted.

53. "Tribunal" is plainly used in s 430A of the Act in the same sense as it is used in ss 430(1) and 430D; that is, as meaning the member who constitutes the Tribunal for the purpose of a particular review. Section 430D is instructive in this respect: see para 32 above. It is clear that that section, which refers to the "Tribunal" giving an oral decision, uses the term as meaning the member who constitutes the Tribunal for the purpose of a particular review. Section 430D also places the obligation to give the applicant and the Secretary a copy of the s 430 statement on the "Tribunal". This must be a use of "Tribunal" in the same sense; the term cannot have been used in two different senses in the space of two lines in the one provision. That the s 430D obligation to give the s 430 statement to the applicant and the Secretary is on the member who constitutes the Tribunal for the purpose of a particular review is a strong indication that the corresponding obligation in s 430A also rests on the member who constitutes the Tribunal. The contrasting reference to the Principal Member in s 431(1) also supports this construction.

54. One extra aspect this should also be mentioned. That is, the fact that the obligation to notify the applicant and the Secretary in accordance with s 430A rests on the member who constitutes the Tribunal for the purpose of a particular review further supports the Majority's conclusion that giving such notification is an element of a review under Part 7.

55. *Fifthly*, the Majority held (at 393 [99] - 394 [101]) that s 430A(3) of the Act was not inconsistent with their construction. Their Honours recognised (at 393 [99]) that that provision "could be seen as a textual indication that non-compliance with the notice requirements imposed by s 430A(1) and (2) is not intended to affect the validity of the decision to which the notification requirements attach". They continued (at 393 [100]):

> "Neither the text nor context of s 430A(3) evince any intention to immunize the decision on review in any broader sense. Nor does it speak to when a

review is or is not completed, which is the question posed by the terms of s 5(9)."

56. Those statements are clearly correct and explain why s 430A(3) is of little relevance to the present case. It is not the Respondent's contention that it was the Tribunal's failure to notify him in accordance with s 430A(1) which invalidated its decision on his application for review. The Respondent's contention is that the Tribunal's failure to notify merely had the consequence that his visa application had not been "finally determined" within the meaning of s 5(9), and thus the complementary protection regime applied to it from the relevant commencement date. As addressed at para 36 above, this case is not concerned with whether the Tribunal had power to revisit a decision of its own motion simply because the decision had not been notified in accordance with s 430A. Rather, it concerns whether, on the proper construction of s 5(9)(a), the CP Act applied the new complementary protection visa criteria to the Respondent's visa application, in circumstances where the Minister concedes that, if it did, the Tribunal's decision on the Respondent's application for review of the delegate's decision in respect of that visa application was affected by jurisdictional error.

57. *Sixthly*, the Majority correctly rejected the Minister's arguments in relation to adverse consequences and inefficiency resulting from the construction their Honours adopted. Those matters are dealt with at paras 34-39 above.

Third question: when is a primary decision no longer susceptible of being altered by the Tribunal

58. The third question only arises if the Minister's submission on the first question is accepted. That is, if it is held that a primary decision is no longer "subject to review" under Part 7 within the meaning of s 5(9)(a) when that decision is no longer susceptible of being altered by the Tribunal on the review (rather than when the Part 7 review in relation to that decision has been completed).

59. In the event that the question arises, the Minister contends that a primary decision is no longer susceptible of being altered by the Tribunal on a Part 7 review: one, when the Tribunal has "recorded" its decision on the review by having prepared its s 430 statement or, two, when that statement has been communicated outside the Tribunal to either the applicant or the Secretary.

60. On the other hand, the Respondent contends that a primary decision is susceptible of being altered by the Tribunal until the applicant and the Secretary have been given notice of it in accordance with s 430A(1) and (2).

61. For the reasons set out below, each of the Minister's contentions is unsupported either by the terms of Part 7 of the Act or by authority, and that of the Respondent should be preferred.

62. ***Minister's primary contention: when the Tribunal has prepared its s 430 statement.*** There are a number of reasons for rejecting the Minister's primary contention; namely, that a primary decision is no longer susceptible of alteration once the Tribunal has "recorded" its decision on the review by having prepared its s 430 statement.

63. *First*, the Minister's contention is contrary to a number of Federal Court decisions which have recognised that publication of the Tribunal's decision on a review (not mere recording of it) is necessary before it will be regarded as *functus officio*. The principal decisions in this line of authority are *SZQOY*, *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240; (2000) 96 FCR 533 (***Semunigus***), *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 73; (2001) 109 FCR 18 (***Singh***), and *Applicant in V346 of 2000 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1179; (2001) 111 FCR 536 (***V346***). Those decisions (other than *Semunigus*) were reviewed by the Majority below at 391 [88] - 393 [95], and the Respondent submits that their Honours' analysis of them was correct (see further at para 76 below).

64. *Secondly*, and related to the first point, the Minister's contention is in fact inconsistent with the common law understanding of a decision as something requiring not just the formation of a state of mind, but a communication of that state of mind: *Semunigus* at 536 [11]-[12] per Spender J, 542 [71] and 543 [75], [78] per Higgins J, and 547 [103] per Madgwick J. It is to be noted that, under the Act, preparing a s 430 statement does not involve or require communication to any person external to the member who constitutes the Tribunal for the particular review, not even the Registry. Even Higgins J in *Semunigus* recognized that "[t]he mere writing of reasons pursuant to an opinion the decision-maker expects to be final does not put it beyond the power of a decision-maker to change his or her mind": *Semunigus* at 543 [78].

65. *Thirdly*, the authorities referred to by the Minister in para 40 of his submissions at footnote 40 do not support his contention. Leaving to one side *Singh*, which supports the reasoning of the Majority (not the Minister), those authorities do not decide the point at which the Tribunal's decision on a review becomes final, in the sense that the Tribunal no longer has power to alter the decision. Further, the significant difference between the principal authority to which the Minister refers, *Thiyagarajah*, and this case is noted in footnote 6 above.

66. *Fourthly*, contrary to paras 46-50 of the Minister's submissions, the provisions of Part 7 do not indicate that the Tribunal becomes *functus officio* or that its decision-making power is "spent" once it has "recorded" its decision on a review by preparing its s 430 statement. To the contrary, a number of the features of Part 7 mentioned above demonstrate that this only occurs when the Tribunal has notified the applicant and the Secretary of its decision on the review in accordance with s 430A(1) and (2).

67. In particular, contrary to para 47 of the Minister's submissions, to the extent that the provisions of Part 7 attach "statutory significance" to the preparation of a s 430 statement, this is slight and offers no indication that the Tribunal loses the power to alter its decisions at that point. In this respect, see para 33 above.

68. More instructive in this respect is Division 5 of Part 7, particularly ss 430, 430A and 430D. The features of those provisions referred to at paras 28-32 above indicate that the Tribunal does not lose the power to alter a decision on review until it has completed each of the steps of making the decision, preparing a s 430 statement for it, and giving the statement to the applicant and the Secretary in accordance with the Act. Section 430D (at para 32 above) illustrates this well. There is no sound basis for

concluding that the Tribunal becomes *functus officio* part way through the performance of its obligations under that section, rather than when it has completed all of those obligations. And, if that is so in respect of oral decisions, there is no reason that it should not also be so in respect of non-oral decisions under ss 430 and 430A.

69. In that regard, it should be noted, as well, that s 430A(3) does not support the Minister's primary contention as asserted in para 50 of his submissions. Section 430A(3) is addressed at paras 55-56 above. The section may indicate that, without more, mere non-compliance with the notice requirements in s 430A(1) and (2) is not intended to affect the validity of a decision of the Tribunal on a review. However, it says nothing about the point at which such a decision can no longer be altered, or when a review under Part 7 is complete.

70. Sections 422 and 422A, which are the subject of paras 47-52 above, also indicate that the Tribunal retains the power to alter its decision on a review until the applicant and the Secretary have been given notice of that decision in accordance with the Act. This follows from the fact that s 422(1) of the Act may oblige the Principal Member to reconstitute the Tribunal for the purpose of finishing a review right up until that time. If the Tribunal can be reconstituted, it must follow that it has power to alter its decision on a review (leaving aside the question of whether and in what circumstances that power should be exercised).

71. ***Minister's alternative contention: when the Tribunal's s 430 statement has been communicated to the applicant or the Secretary.*** At paras 52-60 of his submissions, the Minister contends, in the alternative, that the delegate's decision was no longer "subject to review" because the Tribunal's powers were "spent" once it sent a copy of its s 430 statement outside the Tribunal to the Secretary on 12 March 2013.

72. This is inconsistent with the Minister's primary contention, and obtains no support from the provisions the Minister relies on in support of that contention. There is no support in the Act for the Minister's alternative contention. Indeed, the contention would have the result that a primary decision would no longer be "subject to review" when the Tribunal had complied with one half of its obligations under s 430A (or part of its obligations under s 430D) of the Act, but not the balance. As the Majority held (at 392 [92]), "[t]here is nothing in the text, context or purpose" of the relevant provisions of Part 7 to suggest that this is so, and "[t]here is ... much in the context and purpose of these provisions suggesting that the prescribed steps are to be taken to inform both [the review applicant and the Secretary] of the decision before the review is completed, because each of them being told is an element of this review scheme".

73. Lacking statutory support, the Minister submits that his alternative contention is supported by authority. That submission should not be accepted for a number of reasons.

74. *First*, far from being supported by authority, as the reasoning of the Majority below (at 391 [88] - 392 [91]) shows, the contention is inconsistent with *SZQOY*. Although Barker J expressed himself in more qualified terms, all three members of the Full Court in *SZQOY* approached the matter on the basis that notification of both the review applicant and the Secretary under s 430A was a critical element in a Part 7

review: *SZQOY* at 30 [23] per Buchanan J, 32-3 [39]-[41] per Logan J, 36 [57] per Barker J. Although the Full Court did not have to go so far to decide *SZQOY*, it is plain from the parts of their reasons to which the Majority referred below, that they did so. The point at which power is spent is determined by the statute, and the scheme is inconsistent with that point occurring before the applicant has received notification of the decision.

75. *Secondly*, in *Semunigus*, Madgwick J held (at 547 [103]) that:

> "In a case of the kinds dealt with by the RRT, a decision is no decision, in my opinion, until either it has been communicated to the applicant or irrevocable steps have been taken to have that done. I speak of communication to the applicant because, before the RRT, the applicant is the only party. There is no need to regard a decision as irrevocable before it must be considered to have passed into the public domain."

Obviously, this is inconsistent with the Minister's contention that giving the s 430(1) statement to the Secretary alone was sufficient to complete the review.

76. *Thirdly*, the other authorities cited in paragraph 55 and footnote 52 of the Minister's submissions were addressed by the Majority below: Full Court Decision at 392 [93] - 393 [96]. As their Honours' reasons show, in *Singh* (at 28-9 [38]), Merkel J identified the majority view in *Semunigus* as being to the same effect as the passage from the reasons of Madgwick J quoted above and followed it. Further, in *V346* (at 567, [77]), Ryan J identified the preponderance of views in *Semunigus* and *Singh* as being "that the Tribunal is not functus officio until its decision has been handed down or given orally or notified, as contemplated by, for example, ss 430A, 430B and 430D of the Act", and held that this accorded with principle. Thus, those authorities are also inconsistent with the Minister's alternative contention.

77. In addition to this misplaced reliance on authority, the Minister submits that the Majority's reasoning leads to an absurd outcome, namely that the delegate's decision could never cease to be "subject to review" because the First Respondent could no longer be given the Tribunal's s 430(1) statement within the 14 day period prescribed by s 430A(1)(a). However, that submission is based on a mistaken reading of the Majority's reasons. The Majority should be understood as saying that giving a s 430 statement to the applicant and the Secretary by one of the methods specified in ss 441A and 441B respectively is necessary to complete a review, but that strict compliance with the time limits in s 430A is not.

Part VII: Notice of contention or cross-appeal

78. The Respondent has not filed a notice of contention or a notice of cross-appeal.

Part VIII: Oral argument

79. The Respondent estimates that he will require one-and-a-quarter hours for the presentation of his oral argument.

Dated: 14 May 2014

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FIRST RESPONDENT'S COUNSEL

Migration Act 1958

Act No. 62 of 1958 as amended

This compilation was prepared on 27 January 2012
taking into account amendments up to Act No. 135 of 2011

Volume 1 includes: Table of Contents
Sections 1–261K

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on that date is appended in the Notes section

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Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Division 8—Removal of unlawful non-citizens

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

198A Offshore entry person may be taken to a declared country

(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).

(2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:

(a) place the person on a vehicle or vessel;

(b) restrain the person on a vehicle or vessel;

(c) remove the person from a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(3) The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

(4) An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).