



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-001295

Date of Clearance: 27/08/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Possible Ministerial Intervention under sections 195A and 197AB of the *Migration Act 1958* in relation to s. 47F(1))

Timing The Department seeks a decision no later than 30 September 2023. s. 47F(1) is in held detention and has an ongoing High Court matter that may be listed for a final hearing in November 2023. s. 42(1)

Should the Minister wish to intervene, please arrange a suitable time with the Department for the signing to take place, **at the latest before 2pm on a week day**, so that s. 47F(1) can be released on the same day the decision is made to avoid a circumstance of inappropriate detention.

Recommendations

That you:

- note the case summary at s. 47F(1)
- s. 42(1), s. 47F(1)
s. 42(1)
- indicate whether you wish to intervene under section 195A of the *Migration Act 1958* (the Act) to grant s. 47F(1) a Humanitarian Stay (Temporary) (subclass 449) visa (HSTV) valid for seven days and a Bridging E (subclass 050) visa (BVE);
 - if you wish to grant a BVE, please indicate the time period applicable for the grant;
 - if you agree to exercise your power, please sign the section 195A documentation at s. 22(1)(a)(ii)

AND

- indicate whether you wish to exercise your power under subsection 46A(2) of the Act to lift the subsection 46A(1) bar for an indefinite period to allow s. 47F(1) to lodge BVE applications;
 - if you agree to exercise your power, please sign the section 195A documentation at s. 22(1)(a)(ii)

OR

noted/ please discuss

noted/ please discuss

intervene /
decline to intervene

six months / 12 months /

other

(please specify)

signed / not signed

intervene /
decline to intervene

signed / not signed

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5. indicate whether you wish to intervene under section 195A of the Act to grant s. 47F(1) a Bridging (Removal Pending) (subclass 070) visa (BVR);

intervene /
decline to intervene

- if you agree to exercise your power, please sign the section 195A decision documentation at s. 22(1)(a)(ii)

signed / not signed

- if you agree to grant a BVR, please specify a timeframe for reviewing s. 47F(1) case;

one year / two years /

other

(please specify)

- if you agree to grant a BVR, please specify the discretionary conditions to be imposed, by circling the relevant conditions in s. 22(1)(a)(ii)

specified / not specified

AND

6. indicate whether you wish to have s. 47F(1) referred to you for consideration to lift the sections 46A and 48B statutory bars to allow a further protection visa application;

refer / not refer

OR

7. indicate whether you wish to consider intervening under section 197AB of the Act to make a residence determination to allow s. 47F(1) to reside in the community at a specified address;

consider / not consider

- if agreed to consider intervening under section 197AB of the Act, the Department of Home Affairs (the Department) will refer a submission for your final decision;

8. should you decide to grant s. 47F(1) a visa or make a residence determination, indicate whether you wish for the Department to inform s. 47F(1) of your expectation that he should make every effort to engage in rehabilitation, including attending his sex offender's rehabilitation program;

yes / no

9. s. 42(1), s. 47F(1)

noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 139 / / 2023

Minister's Comments

Key Issues

1. On 14 November 2022, you signed MS22-002407 – *Detention Status Resolution Review*, agreeing to the Department of Home Affairs (the Department) referring detainees in identified cohorts for your consideration under sections 195A or 197AB of the Act.
2. On 7 February 2023, you declined to consider intervening under sections 195A and 197AB of the Act with respect to s. 47F(1) (MS22-002200 refers).
3. The purpose of this submission is to present you with new information regarding this case, which is detailed below. This submission also attaches expert opinions regarding s. 47F(1) risk to others (community protection risk) - s. 47F(1) s. 47F(1)
4. Since your decision of 7 February 2023, the Detention Health Services provider, International Health and Medical Services (IHMS), has arranged s. 47F(1) participation in sex offender rehabilitation treatment. s. 47C(1), s. 47F(1) s. 47C(1), s. 47F(1)
- 5.

Litigation

6. s. 47F(1) has commenced a proceeding in the original jurisdiction of the High Court seeking his release from immigration detention. He also seeks a declaration from the Court to the effect that the provisions of the Act do not authorise the lawful detention of a person in circumstances where the person:
 - (a) at present, cannot be removed from Australia; and
 - (b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
7. In addition to the declaration related to the lawfulness of his detention, s. 47F(1) seeks a declaration that, where the factual circumstances at paragraph 6 exist, the provisions of the Act which require and authorise his detention are invalid.

8. The matter is to be set down for hearing at a time *not before* the November 2023 High Court sittings. To grant these orders, s. 47F(1) will ask the High Court to overrule its past decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*). By a 4:3 majority, the High Court in *Al-Kateb* held that detention of an individual under the Act remains lawful, even where their removal from Australia is not reasonably practicable at the present time, and there is no real likelihood or prospect of removal in the reasonably foreseeable future. In addition, at the level of constitutional validity, the majority held that the detention of an unlawful non-citizen for the purpose of removal remained consistent with Australia's system of government, even if that purpose of removal was not, and not likely to become, reasonably practicable in the foreseeable future.

9. s. 42(1), s. 47F(1)

10.

11. s. 42(1), s. 47F(1)

Ongoing detention and removal prospects

12. s. 47F(1) was convicted of one child sex offence and served three years and four months full-time custodial imprisonment (from a total five years sentence). s. 47C(1), s. 47F(1)

s. 47C(1), s. 47F(1)

13. s. 47C(1), s. 47F(1)

s. 42(1), s. 47F(1)



Background

28. s. 47F(1) is a stateless person who arrived as a UMA and was detained under subsection 189(3) of the Act. He was released from held immigration detention on 6 July 2013 following a residence determination made under section 197AB of the Act by the then Minister. On 18 September 2014, s. 47F(1) was granted a BVE and released from immigration detention.
29. On 9 January 2015, s. 47F(1) was arrested and charged with one count of *sexual intercourse with a person aged between 10 and 14 years*, contrary to subsection 66C(1) of the *Crimes Act 1900* (NSW). One week later, s. 47F(1) BVE was cancelled pursuant to subsection 116(1)(g) of the Act and regulation 2.43(1)(p)(ii) of the *Migration Regulations 1994*. Upon his release from criminal custody on 8 May 2018, s. 47F(1) was detained under subsection 189(1) of the Act and has remained in held immigration detention since.
30. The Department has summarised aspects of opinions given by clinical and forensic psychologists, which address s. 47F(1) prospects of rehabilitation and recidivism at s. 47F(1)
31. Further, details regarding s. 47F(1) including immigration history, character, incidents in detention, health, identity, security, family/community links and removal availability is provided in the case summary at s. 47F(1)

Options for future management

s. 47C(1), s. 47F(1)



60. s. 42(1), s. 47F(1)



61. s. 42(1), s. 47F(1)



Consultation – internal/external

62. Status Resolution Network, Detention Operations, National Removals, Humanitarian Program Operations, Migration and Citizenship Litigation, Migration and Citizenship Law and Compliance and Community Protection Policy.

Consultation – Secretary/Associate Secretary/ABF Commissioner

63. The Secretary was not consulted on this submission.

64. The Associate Secretary was not consulted on this submission.

65. The ABF Commissioner was not consulted on this submission.

Client service implications

66. There are no client service implications.

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~~Legal Privilege~~

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Sensitivities

67. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legislation/deregulation/media implications

68. The Department is unable to provide specific details regarding the financial implications of managing an individual, either in the community or in detention. The Department notes that the costs will be highly dependent on the individual circumstances, including the level of support required. However, in the 2021-22 financial year, the average cost of managing a person:
- in held detention was \$421,674
 - in Residence Determination was \$59,565
 - on a Bridging E visa in the community was \$2,585.

Attachments

s. 47F(1)

s. 22(1)(a)(ii)

s. 47F(1)

Authorising Officer

Cleared by:

Shawn Selles
A/g Assistant Secretary
Status Resolution Branch

Date: 27/08/2023

Ph: s. 22(1)(a)(ii)

Contact Officer Shawn Selles, A/g Assistant Secretary, Status Resolution Branch, Ph: s. 22(1)(a)(ii)

CC Minister for Home Affairs, Minister for Cyber Security
Secretary
Associate Secretary
Assistant Commissioner, Detention and National Removals
First Assistant Secretary, Immigration Policy
First Assistant Secretary, Status Resolution and Visa Cancellation
Commander, National Immigration Detention
Assistant Secretary, Humanitarian Program Operations Branch
Assistant Secretary, Migration and Citizenship Litigation Branch
Assistant Secretary, Detention Policy
Senior Director, Status Resolution Network
Director, Status Resolution NSW
Superintendent, Detention Health
Director, Detention Litigation Section
Director, Status Resolution Support Programs Section
Status Resolution Officers in NSW

From: [David GAVIN](#)
To: s. 47F(1); s. 47F(1)
Cc: s. 47F(1); s. 47F(1); s. 47F(1); s. 47F(1); s. 47F(1); Stephanie FOSTER; Michael OUTRAM; Clare SHARP; Marian AGBINYA; Jim FITZGERALD; Sandra JEFFERY; Chad HODGENS; Justine JONES; Tara CAVANAGH; Mary BALZARY; Niall KERB; Steve WEBBER; Shawn SELLES; s. 22(1)(a)(ii); s. 22(1)(a)(ii); Anton BOCKWINKEL; s. 22(1)(a)(ii); s. 22(1)(a)(ii); s. 22(1)(a)(ii); Diana WILK; s. 22(1)(a)(ii); MO Registration; DLO.Giles; DLO.O'Neil; Media Operations; General Counsel Executive Support
Subject: NZYQ v Minister - S28/2023 - s. 47F(1) - indefinite detention/ Al Kateb challenge - 7/8 November hearing date [SEC=PROTECTED, ACCESS=Legal-Privilege]
Date: Tuesday, 3 October 2023 6:14:28 PM
Attachments: s. 42(1)
[Lines of Effort Plan- Al-Kateb NZYQ challenge - 3 October 2023 weekly update.DOCX](#)
[20231003 Submissions of the Defendants \(Sealed\).pdf](#)

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Dear s. 47F(1)

Please find below an update on work underway in response to the NZYQ challenge, and latest developments.

Lines of effort

- The Department has convened a whole of portfolio working group to anticipate and address issues possibly arising from the challenge
- The Lines of Effort document ([attached](#)) describes the streams of work underway. Immigration Policy Division is coordinating this planning activity which will be updated weekly and shared with your offices.
- Data and caseload analysis of potentially NZYQ affected cohorts is expected in the coming week. These data products will be shared with your offices for feedback and further development.

s. 33(a)(iii), s. 47F(1)

s. 42(1)

s. 42(1)

s. 42(1)

Commonwealth submission to the High Court

The Commonwealth's submission in relation to the High Court proceedings were filed on 3 October 2023. Please see [attached](#) for your visibility.

s. 42(1)

BACKGROUND

s. 47F(1)

I hope this is of assistance

Kind Regards

David

David Gavin
Acting General Manager
Immigration Policy
Immigration Group

Department of Home Affairs

P: s. 22(1)(a)(ii) M: s. 22(1)(a)(ii)

E: s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)

Lines of Effort Plan – AI -Kateb Challenge – Weekly SES Coordination Meeting – NZYQ vs Minister –S28/2023 – Weekly update 3 October 2023

Matter Update

- **Hearing Date:** Matter Listed to be heard in the High Court on 7 to 8 November 2023.
- **Third party interveners:** On 15 September 2023, the Australian Human Rights Commission, the Human Rights Law Centre and Kaldor Law Centre (jointly) filed Amicus submissions to the High Court (seeking to be heard as friends of the court *amicus curiae*) in support of NZYQ.
- **Ministerial Intervention:** On 18 September 2023, MICMA declined to intervene in NZYQ's case under s195A and 197AB of the Migration Act.
- **The Commonwealth's submission to proceedings, drafted by the Solicitor-General, due today 3 October 2023.**

Activity	Discussion	Next Steps/ Delivery Timeframes (indicative)	Lead
Develop reform options in light of implications to the Detention Framework	s. 47C(1) : s. 42(1) s. 47C(1) – s. 42(1) – s. 47C(1) – –	Workshop placeholder sent out for 11 October 2023	Detention Policy Branch Home Affairs – Chad Hodgins
Data Management	• Profiling the detention cohort for persons likely to be effected by a judgement outcome: for example: ○ s501 Character history ○ third country removals' case list (noting the manual effort required to update and maintain). ▪ persons in detention who are confirmed stateless ▪ persons subject to section 197C(3) - 'protection finding' ○ cases where voluntary removal cannot be effected (not owed protection) but cannot be returned (i.e. due to conflict in country) ○ involuntary removals – won't cooperate ○ average duration in detention of cohorts (available in recent Senate Estimates Briefings). • Profiling of other long term detainees. • Minister's Office requested advice on detainees with criminal histories who have parole conditions in place if released into the community (potentially a manual data extraction focussing on Tier 1 High Risk criminal cohort).	Develop a Dashboard prototype for collaboration on required data sets and design with stakeholders. First draft to be circulated to stakeholders and MOs week of 3 October 2023.	Status Resolution s. 22(1)(a)(ii) s. 22(1)(a)(ii)
Community placement of affected detention cohorts	s. 33(a)(i) • s. 33(a)(i) • •	Timeframes to be confirmed	s. 47E(d)
	Operations Plan (OPLAN) - outlining steps to be taken should the plaintiff need to be released from detention at the end of the hearing on the 7th or 8th of November 2023. • s. 47E(d) • s. 47C(1), s. 42(1) • s. 47C(1), s. 47E(d)	Provide draft OPLAN, by 6 October 2023 (Detention Operations) Drafting Ministerial Intervention Sub(s) for consultation. Timeframes to be confirmed	ABF National Detention & Removals – Sandra Jeffry Status Resolution Branch in consultation with Legal Division
	Engage with law enforcement counterparts to manage risks to the community and any conditions of release required to be imposed on certain detainees.	To be confirmed	Status Resolution Network
	• s. 47C(1) • • •	Timeframes to be confirmed	Status Resolution and Visa Cancellation Division – Justine Jones

Removal and Third Country Resettlement	s. 42(1)		
	The approach to the Bangladeshi High Commission in Canberra on 26 September 2023, confirmed that there were no prospects for any resettlement of this nature. A Third Person Note was sent the Saudi Embassy on 27 September 2023, s. 33(a)(iii).	Approaches to Embassies made	International Division-supported by Legal guidance
	s. 33(a)(iii)		
Communications and Media Management	In readiness for possible media coverage surrounding the listed hearing, prepare a communications plan and Talking Points. ABF to reach out to Media Branch on potential media points surrounding the potential release of NZYQ from detention.	Timeframes to be confirmed	Media in consultation with Legal Division and ABF

s22(1)(a)(ii)

From: David GAVIN
Sent: Tuesday, 31 October 2023 1:52 PM
To: Clare SHARP; s. 22(1)(a)(ii); Anton BOCKWINKEL; Michael THOMAS; Sandra JEFFERY; Chad HODGENS; s22(1)(a)(ii); Meredith BYRON; s. 22(1)(a)(ii); Tara CAVANAGH; s22(1)(a)(ii)
Subject: CM: 4pm 31 Oct: Policy discussion on NZYQ (Al Kateb) [SEC=PROTECTED, ACCESS=Legal-Privilege]
Attachments: Detention Framework Reform Workshop 11 Oct 2023 Summative notes_draftV6.docx; ADD2023 6290730 NZYQ Dashboard - 23 October 2023.pdf; ADD2023 6290811 NZYQ cohort criminality snapshot.DOCX; ADD2023 6290873 FACT SHEET RRAP and proposed settings - October 2023.DOCX
Follow Up Flag: Follow up
Flag Status: Completed

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Dear all

Please find below a proposed agenda and key supporting docs for the meeting at 4pm today, bringing together the offices of Minister O'Neil and Minister Giles and the department for a discussion on the NZYQ challenge.

Agenda

1. s42(1)
2. Caseload snapshot including QSA/ASA and registered offenders
3. Policy discussion – broad and narrow approaches across the immigration continuum
4. Portfolio impacts – effort and opportunities
5. Ops plan for next week
6. s42(1)
7. Next steps, Minister O'Neil deep dive

Attached to this email are documents to support office consideration and discussion, noting this would be followed by formal advice in due course.

- A summary of the policy and legal workshop held within Home Affairs in recent weeks, drawing together views from various areas of the agency including options and suggested outcomes for consideration.
- A dashboard product summarising the cohorts presently in immigration detention with protection obligations, are stateless or intractable to removal
- A criminality snapshot providing a sample of the offences committed by some the detainees in the protection finding cohort
- A fact sheet for information outlining proposed upcoming changes to the returns and reintegration packages available

We look forward to speaking with you shortly

Regards
David

David Gavin
Acting First Assistant Secretary

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Immigration Policy, Integrity and Assurance Division

Immigration Group

Department of Home Affairs

s22(1)(a)(ii)

E: s22(1)(a)(ii) [@homeaffairs.gov.au](mailto:s22(1)(a)(ii)@homeaffairs.gov.au)

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Return and Reintegration Program (RRAP)

Current RRAP settings

The Return and Reintegration Assistance Program (RRAP) commenced in 2010 and assists eligible non-citizens who wish to voluntarily depart Australia or a regional processing country for a **country of return (home or third country)**, but require assistance. RRAP supports voluntary departure for non-citizens who have exhausted all avenues to remain in Australia and mitigates flow-on risks requiring compliance action, including detention.

Assistance under the RRAP is currently divided into two service categories:

Returns Assistance	Reintegration Assistance
facilitates the departure process for eligible non-citizens. Returns Assistance includes (but is not limited to) returns counselling, the purchasing of air tickets, assistance to obtain travel documents, accommodation assistance, small cash allowances during transit and reception assistance in the country of return.	assists returnees to rebuild their lives in the return country to reduce the risk of further irregular migration. Reintegration Assistance is currently available only to Unauthorised Maritime Arrivals (UMAs) and can be taken as cash and/or as in-kind assistance.

The currently policy and legislative settings for RRAP have not changed since 2010 and does not effectively assist in resolving the current Status Resolution cohort. Only approximately 11% of the current status resolution population (covering clients in held detention, community detention or on a Bridging E Visa) are UMAs.

RRAP procurement and expanded program settings

Current contracts end on 30 June 2024 and the department is procuring new services (RFT in early 2024). To better support status resolution outcomes, the following program changes are proposed (Minister and Government approval required):

s47C

Current Reintegration Assistance (RA) (UMAs only)		
Who	Returning to	RA amount
UMAs who are 18 years or older	Afghanistan or Iraq	USD \$4,000 per person
UMAs who are 18 years or older	Any other country	USD \$3,300 per person
In-kind Assistance	All countries	Included in above amounts
Total per adult		\$3,300/\$4,000
Plus for each family member under 18 years	Any country	USD \$500 per person

Exchange rate current as at 19 October 2023; 1USD=1.58AUD

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NZYQ Caseload snapshot

As at 18 October 2023

The Status Resolution Network have reviewed those cases in immigration detention (including those in residence determination). The following is a snapshot of some detainees in the cohort who have a 197C protection finding, or are stateless or have unresolved identity issues and have no ongoing immigration matters and their removal is not reasonable foreseeable.

Note: this is not a complete list of all of the more serious offenders, nor does it list all of the offences each person has been charged with. This is intended to be a high level summary to demonstrate some of the characteristics of the cohort.

Below is a summary of some of those with more serious offences and their length of time in immigration detention.

S. 47F(1)

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S. 47F(1)

Longest persons in immigration detention

S. 47F(1)

Examples of cases who have been in immigration detention for longer than their criminal convictions

S. 47F(1)

Summary of Ministerial Intervention

The Department has been progressing a number of these cases and others in the detention population (including others who may sit outside this cohort but are long term detained) to the Minister for Immigration, Citizenship and Multicultural Affairs for consideration for ministerial intervention under the *Detention Status Resolution Review* MS22-002407. The Minister has agreed for the Department to refer the following cohorts for consideration:

- Detainees assessed as low risk of harm to the community.

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- Detainees who engage Australia's protection obligations (but who have had their visa refused or cancelled on, for example on character grounds), have no ongoing immigration matters, and where it is not currently reasonably practicable to effect involuntary removal or identify third removal country options.
- Detainees who are confirmed to be stateless and have no identified right to reside in another country.
- Detainees who are in 4 health related specialised held detention placements and/or with complex care needs.
- Detainees who have been in held immigration detention for five years or more (where not already included in any of the above cohorts).
- Detainees who are subject to a residence determination (for more than 6 months).

Table 1: Submissions and decisions under the authority of MS22-002407 – Detention Status Resolution review (as at 30 September 2023)

Processing stage	Number of persons
Cases remaining in pipeline	186
Cases referred	154
Minister decisions	108
Section 195A intervention (grant BVE)	39
Section 197AB intervention (place in residence determination)	33
Declined to intervene	36

Cleared by: s. 22(1)(a)(ii) A/g Assistant Secretary, Status Resolution Branch 19/10/2023
Trim Reference: ADD2023/6074877

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From: [David GAVIN](#)
To: s. 47F(1)
 s. 47F(1)
Cc: [Stephanie FOSTER](#); [DLO.O"Neil](#); [DLO.Giles](#); [MO Registration](#); [Budhy TANDDO](#); s. 22(1)(a)(ii)
 s. 22(1)(a)(ii); s. 22(1)(a)(ii); s. 22(1)(a)(ii); s. 22(1)(a)(ii); s. 22(1)(a)(ii); [Marian](#)
[AGBINYA](#); s. 22(1)(a)(ii); s. 22(1)(a); [Chad HODGENS](#); s. 22(1)(a)(ii); [Stephanie KOLOBARIC](#); [Michael](#)
[WILLARD](#); [Lara CAVANAGH](#); [Michael THOMAS](#); [Sandra JEFFERY](#); [Media Operations](#); [Michael BURKE](#)
Subject: NZYQ vs MICMA - Action Plan for potential release [SEC=OFFICIAL:Sensitive, ACCESS=Personal-Privacy]
Date: Friday, 3 November 2023 2:51:26 PM
Attachments: [Action plan - NZYQ - 3.11.23 1153AM.DOCX](#)
 s. 47F(1) [plan on a page - updated 02NOV23.pdf](#)

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Dear s. 47F(1)

For your visibility, please find **attached** an operations Action Plan and A3 Placemat developed ahead of the NZYQ High Court hearings on Tuesday 7 and Wednesday 8 November, next week. Thank you to the ABF for drafting and coordinating these products.

s. 47C(1)

s. 47C(1)

Media Talking Points are being finalised ahead of Monday, and these will be circulated to your media advisers through the Department's media operations section, shortly.

Key Contacts with the department are listed within the plan for each line of effort.

I trust this information is of assistance and please let us know if anything further is required.

Regards

David

David Gavin
 Acting First Assistant Secretary
 Immigration Policy, Integrity and Assurance Division
 Immigration Group
 Department of Home Affairs
 P s. 22(1)(a)(ii) | M: s. 22(1)(a)(ii)
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NZYQ – Action Plan for potential release

Below are the steps, which are required pre, during and post hearing should the court order a release of Mr s. 47F(1) during the hearing of *NZYQ v Minister* - S28/2023, scheduled to be held 7-8 November 2023.

Pre Hearing

Legal

- Migration and Citizenship Litigation are managing this matter. The Legal team are s. 22(1)(a)(ii) s. 22(1)(a)(ii) and Marian Agbinya.
- As at 31 October, no request has been made for s. 47F(1) to attend court in person, and he is expected to be in immigration detention during the hearing (to be held 7/8 November).
NOTE: Should a request be made, action plan will need to be updated.
- s. 47E(d)
- s. 42(1), s. 41(1)

Status Resolution

Ministerial Intervention

- Ministerial Intervention (MI) team are preparing a submission (MS23-002266) for the Minister to consider granting s. 47F(1) a BVR under regulation 2.25AA of the Regulations to regularise his status in the community, should the High Court order s. 47F(1) be released from detention as an unlawful non-citizen.
- The power under Regulation 2.25AA allows the Minister to grant a BVR to an eligible non-citizen who is an unlawful non-citizen where the Minister is satisfied removal of the individual is not reasonably practicable and that the individual will abide by all mandatory conditions imposed on the BVR.
- The submission is expected to be with the Minister's office on 3 November 2023 (pending Legal review and clearance) and will be discussed with the office on 6 November 2023 (by AS Status Resolution Branch).
- The Minister's office indicated on 9 October 2023 the preference would be for the Minister to consider the case on same day as the judgment being handed down and have advised the Minister can be available on this date. This will be raised with the office on 6 November 2023 (to confirm preferences and availability).
- A BVR allows a person access to social services including Medicare, and Special Benefit. Special benefit is available if the BVR holder is ineligible for any other income support payment and in financial hardship for reasons beyond their control, persons must also meet income and assets tests set by Services Australia.

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SRSS Support

- In line with current policy for long-term detainees being released on Bridging Visas, the client is eligible for Status Resolution Support Services (SRSS); for an initial 12 weeks, and potentially extension for a further 12 weeks.
- SRSS Program Section will immediately notify the SRSS provider of the HCA outcome
- SRSS provider, s. 47F(1) has been briefed about potential service delivery requirements if client released including:
 - s. 47F(1)
 -
 -
 -
- including income support (Centrelink) and health including Medicare if eligible
- s. 47F(1)
- s. 47F(1) will work with the client if released to identify additional welfare needs and provide support in accordance with contractual requirements
- The SRSS provider will not connect the client with any rehabilitation services in the community unless they are court mandated and/or in place; provider can assist client upon release to meet law enforcement reporting requirements.

Additionally, to support release and SRSS processes, the s. 47F(1) Status Resolution Officer will undertake the following actions:

- Request ImmiCard (Pre HC outcome).
 - Card ordered but if not received in time for release, an ImmiCard report will be provided to assist with essential registrations in the community.
- Notify client and local stakeholders (ABF, Serco, IHMS) as per local processes
 - Seek consent to disclose relevant information to SRSS provider.
 - Complete SRSS associated forms (1448 & 1450) along with 929 (change of contact details/address).
- Email referral to SRSS Operations (national office) to facilitate SRSS service provider support
 - Contact s. 47F(1) to coordinate transport needs. (Refer to community support)
- Request IHMS Health Discharge Summary and provide to client upon release
- s. 47F(1)
- s. 47F(1)

Detention Operations

- s. 47E(d), s. 47F(1)
- s. 47E(d)

Communications

- **Outstanding action:** Media Talking Points (TPs) to be developed – Media to lead s. 22(1)(a)(ii) and s. 22(1)(a)(ii). Business areas to provide points to media for inclusion – Legal will lead on the court hearing, legal issues and potential release wording. Date for completion: TPs to be completed by 3 November.
- **Outstanding action:** Talking points are also required for staff in Status Resolution and Detention Operations – aim should be to support the officers who release s. 47F(1) (should that transpire), but who also manage the remaining detainees who may hear of his release and have questions

about their own case. Staff TPs will be prepared based on the Media TP document.
Date for completion: week commencing 6 November.

Day of Hearing

Legal

- s. 47E(d) Legal will notify stakeholders, particularly Ministerial Intervention (Status Resolution Branch), Detention Operations and Media as soon as possible, should the Court order s. 47F(1) be released from immigration detention.

The following actions may occur concurrently, and are not presented in strict order:

Status Resolution

- s. 47C(1)
- Status Resolution Support Programs Section and s. 47F(1) Status Resolution Officer to enact post release support plan as agreed with SRSS service provider s. 47F(1)

Detention Operations

- Status Resolution make the necessary arrangements s. 47E(d) See above under SRSS Support.
- s. 47E(d)

Post hearing

Status Resolution

- If the High Court makes orders requiring s. 47F(1) to be released from detention, he will be released as an unlawful non-citizen.
- Refer to *Ministerial Intervention* section for post hearing planning arrangements with regard to potential visa grant consideration by the Minister (this section will be updated accordingly following engagement with the Minister's office on 6 November 2023).
- Continuation of SRSS program support will be based on client needs. Noting client is eligible for an initial 12 weeks support, which can be extended by another 12 weeks.

Legal

- Review judgement and determine next steps, in consultation with key stakeholders.

Clearance:

Sandra Jeffrey, A/g Deputy Commissioner, National Operations, Australian Border Force – 3/11/2023

Michael Thomas, First Assistant Secretary, Status Resolution and Visa Cancellation Division – 2/11/2023

David Gavin, A/g First Assistant Secretary, Immigration Policy Division – 3/11/2023

Key Contacts

Branch	Position	Name	Email	Phone
Detention Operations	Commander Detention Operations	Budhy Tanddo	s. 22(1)(a)(ii) @abf.gov.au	s. 22(1)(a)(ii)
Detention Operations	Superintendent VIDC	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @abf.gov.au	s. 22(1)(a)(ii)
Detention Operations	Inspector VIDC	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @abf.gov.au	s. 22(1)(a)(ii)
National Removals	Chief Superintendent National Removals	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Status Resolution (MI)	A/g Assistant Secretary	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Status Resolution (MI)	Director, Ministerial Intervention	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Status Resolution (SRSS)	Senior Director	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Status Resolution (SRSS)	Director, Status Resolution Support Programs	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Legal	Assistant Secretary	Marian Agbinya	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Legal	Principal Legal Officer	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)
Media	Senior Public Affairs Officer	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 22(1)(a)(ii)



NO request has been made for s. 47F(1) to attend court

Contacts

Legal

AS Marian Agbinya (*Migration & Citizenship Litigation*)

s. 22(1)(a)(ii) (*Litigation D*)

s. 22(1)(a)(ii) (*Litigation D*)

s. 22(1)(a)(ii) (*Litigation D*)

Detention Operations

CMDR Budhy Tanddo (*Detention Operations*)

s. 22(1)(a)(ii) (*Detention Management and Planning*)

s. 22(1)(a)(ii) (*Detention Health Operations*)

Detention Security (*Detention Management and Planning*)

Status Resolution Support Service (SRSS)

s. 22(1)(a)(ii) (*Resettlement and Support*)

s. 22(1)(a)(ii) (*Status Resolution Support Programs*)

s. 22(1)(a)(ii) (*Status Resolution Support Contracts*)

Ministerial Intervention

A/g AS s. 22(1)(a)(ii) (*Status Resolution*)

s. 22(1)(a)(ii) (*Ministerial Intervention ACT*)

Media

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 47F(1)

s. 22(1)(a)(ii) (*Detention Operations* s. 47F(1))

s. 22(1)(a)(ii) (*Detention Operations* s. 47F(1))

s. 22(1)(a)(ii) (*Status Resolution* s. 47F(1))

National Removals

C/SUPT s. 22(1)(a)(ii) (*National Removals*)

s. 47C(1)

Pre-Hearing

s. 47F(1)

Pre-Hearing Notification

Check with relevant stakeholders and law enforcement if there are any special conditions needed in the community or upon release.

s. 47E(d)

s. 47E(d)

SRSS Support Procedures

s. 47F(1) SRSS service provider s. 47F(1) briefed about potential service delivery requirements. s. 47F(1) SRO initiates on the day.

Accommodation s. 47F(1)

Transport provided s. 47F(1)

SRSS require advice from Detention Health, Detention Operations or Legal if there are legal constraints due to:

- character/behavioural
- parole conditions and reporting requirements

in order to source a suitable community placement/property.

Financial assistance (Centrelink)

Ongoing case worker (Welfare)

Health support (Medicare)

12 weeks support MIN

24 weeks support MAX

Logistics Setup

s. 47E(d)

C/SUPT
Stubbs

Talking Points (TPs) for Stat Res and Det Ops staff to be provided to Media by 20OCT2023.

Stat Res &
Det Ops

Media Talking Points (TPs) to be completed by w/c 30OCT2023

HA Media

Trial Day

s. 47C(1)

s. 47C(1)

Some steps may occur concurrently upon notification

Court orders release

Legal to notify Department and ABF of court decision s. 47E(d)

Ministerial Intervention to engage with Minister's Office on submission

s. 47E(d)

SRSS to begin release processes

MI notify Legal, Detention Operations Media on Minister decision

s. 22(1)(a)(ii)

From: David GAVIN s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>

Sent: Wednesday, 8 November 2023 6:55 PM

To: s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@HOMEAFFAIRS.GOV.AU](mailto:s.22(1)(a)(ii)@HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@HOMEAFFAIRS.GOV.AU](mailto:s.22(1)(a)(ii)@HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>; s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@HOMEAFFAIRS.GOV.AU](mailto:s.22(1)(a)(ii)@HOMEAFFAIRS.GOV.AU)>;

s. 22(1)(a)(ii) s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@HOMEAFFAIRS.GOV.AU](mailto:s.22(1)(a)(ii)@HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@HOMEAFFAIRS.GOV.AU](mailto:s.22(1)(a)(ii)@HOMEAFFAIRS.GOV.AU)>

Cc: Stephanie FOSTER s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>; DLO.O'Neil

s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>; DLO.Giles s. 22(1)(a)(ii) [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)>; MO Registration

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s. 22(1)(a)(ii) @homeaffairs.gov.au>; Budhy TANDDO s. 22(1)(a)(ii) @abf.gov.au>;
s. 22(1)(a)(ii) abf.gov.au>; s. 22(1)(a)(ii) <s. 22(1)(a)(ii) @abf.gov.au>; **s. 22(1)(a)(ii)** @abf.gov.au>; **s. 22(1)(a)(ii)** @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; Marian AGBINYA
 s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) <s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; Chad HODGENS
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s. 22(1)(a)(ii) @homeaffairs.gov.au>; Michael WILLARD
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 <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Michael THOMAS
 s. 22(1)(a)(ii) @homeaffairs.gov.au>; Sandra JEFFERY <s. 22(1)(a)(ii) @abf.gov.au>; Media Operations <media@homeaffairs.gov.au>; Michael BURKE
 <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Clare SHARP <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Anton BOCKWINKEL s. 22(1)(a)(ii) @homeaffairs.gov.au>; Budhy TANDDO
 s. 22(1)(a)(ii) @abf.gov.au>

Subject: RE: NZYQ vs MICMA - Action Plan for potential release [SEC=PROTECTED, ACCESS=Personal-Privacy, ACCESS=Legal-Privilege]

Importance: High

~~**PROTECTED**~~
~~**Personal Privacy, Legal Privilege**~~

Dear s. 22(1)(a)(ii)

As requested by the Ministers this evening, please find attached the following documents:

- Action plan and plan on a page (operationalised this afternoon with s. 47F(1) released from detention at 16:48 today)
- NZYQ Dashboard – 23 October
- NZYQ Criminality ‘Snapshot’
- **s. 33(a)(i)**
- Ministerial Intervention submission currently with the office of Minister Giles for Mr s. 47F(1) – this submission contain case background requested by Minister O’Neil
- The dynamic ‘Master List’ spreadsheet for people potentially affected by the NZYQ case

The document in yellow is a summary requested by s. 22(1)(a)(ii) pertaining to individuals with **s. 33(a)(i)** and I note this advice is subject to ongoing refinement and liaison with s. 33(a)

Of the cases in these lists, I note there are several ‘registerable persons’ including one individual s. 47F(1) **s. 47F(1)**, and who is subject to a new s. 33(a)(i) which is ongoing and he requires a s. 33(a)(i) for all visa applications including temporary visas. The department will closely consider this individual’s health and referral needs prior to release.

****We note that as per standard practice, any disclose of information should be cleared with the Department, and privacy considerations considered****

Key contact details for Departmental staff involved in these plans are contained in the Action plan.

Please don't hesitate to let us know if you would like further information.

Regards
David

David Gavin
Assistant Secretary
Compliance and Community Protection Policy Branch
Immigration Policy Division, Immigration Group
Department of Home Affairs
P s. 22(1)(a)(ii) s. 22(1)(a)(ii)
E s. 22(1)(a) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)

s. 22(1)(a)(ii)

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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-002266

Date of Clearance: 06/11/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Regulation 2.25AA visa grant consideration for s. 47F(1) (s. 47F(1)) - Bridging (Removal Pending) (subclass 070) visa – Upcoming High Court hearing 7-8 November 2023

Timing *This submission has been prepared in the event of a loss in the High Court requiring s. 47F(1) to be released from immigration detention. s. 47F(1) is in held detention and has an ongoing High Court matter that is listed for a final hearing on 7-8 November 2023. If the High Court finds in favour of s. 47F(1), it may make orders that he be released immediately from immigration detention as an unlawful non-citizen. Legal risks for the Commonwealth are addressed in this submission and in an email to both Portfolio Ministers' Offices (dated 22 August 2023). Should the Minister wish to consider exercising his powers under regulation 2.25AA of the Migration Regulations 1994, a decision is requested **after** any judgment of the High Court that s. 47F(1) is required to be released from immigration detention.*

Recommendations

That you:

1. note the contents of this brief; and
2. agree that should the High Court order s. 47F(1) release from immigration detention, that you agree to grant Mr s. 47F(1) a Bridging R (Class WR) (Removal Pending) (subclass 070) visa (BVR) under regulation 2.25AA of the *Migration Regulations 1994* (the Regulations);
 - if you agree to grant a BVR, please specify a timeframe for reviewing s. 47F(1) case;
3. note if you decide not to grant a BVR to s. 47F(1) under regulation 2.25AA, he will remain in the community as an unlawful non-citizen and unless his circumstances change will not be liable for any further period of detention under section 189 of the *Migration Act 1958* (the Act) noting the High Court's judgment.

noted / please discuss

agreed / not agreed

one year / two years

other

(please specify)

noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature

Date: 9/11/2023

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Minister's Comments

Key Issues

1. The purpose of this submission is to update you on the status of the High Court proceeding concerning s. 47F(1) (pseudonym 'NZYQ' (case summary at **Attachment A**)), and, in the event the High Court orders his release from immigration detention, to enable you to grant s. 47F(1) a visa after his release from detention so as to regularise his immigration status.
2. On 7 February and 18 September 2023, you declined to consider intervening under sections 195A and 197AB of the Act with respect to s. 47F(1) (MS22-002200 and MS23-001295 refer).
3. Since your decision of 18 September 2023, s. 47F(1) proceedings in the High Court have been set down for hearing on 7-8 November 2023.
4. s. 47F(1) is seeking release from immigration detention. He also seeks a declaration from the Court to the effect that the provisions of the Act do not authorise the lawful detention of a person in circumstances where the person:
 - (a) at present, cannot be removed from Australia; and
 - (b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
5. In addition to the declaration related to the lawfulness of his detention, s. 47F(1) seeks a declaration that, where the factual circumstances at paragraph 4 exist, the provisions of the Act which require and authorise his detention are invalid.
6. To grant these orders, s. 47F(1) will ask the High Court to overrule its past decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*). By a 4:3 majority, the High Court in *Al-Kateb* held that detention of an individual under the Act remains lawful, even where their removal from Australia is not reasonably practicable at the present time, and there is no real likelihood or prospect of removal in the reasonably foreseeable future. In addition, at the level of constitutional validity, the majority held that the detention of an unlawful non-citizen for the purpose of removal remained consistent with Australia's system of government, even if that purpose of removal was not, and not likely to become, reasonably practicable in the foreseeable future.

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7. As previously outlined, the High Court decision in *Al-Kateb* is significant. s. 42(1)

8. s. 42(1)

Ongoing detention and removal prospects

9. s. 47F(1) immigration detention under section 189 of the Act is based on his status as an unlawful non-citizen and for the purpose of his removal from Australia. There is no power under the Act to detain s. 47F(1) based on his criminal history, or for the purpose of treating criminal risk or protecting the Australian community.
10. As a person with respect to whom a protection finding within the meaning of section 197C of the Act has been made in the course of considering a protection visa application, there is no power to involuntarily remove s. 47F(1) to the country in respect to which the protection finding has been made (Myanmar) and it is currently not reasonably practicable to effect his removal to a third country. The Australian Border Force (ABF) and the Department of Home Affairs (the Department) made enquiries with the Bangladesh High Commission and the Royal Embassy of Saudi Arabia as potential removal options based on information s. 47F(1) provided the Department about s. 47F(1) s. 47F(1) advised that that s. 47F(1) s. 47F(1) s. 47F(1).

11. s. 33(a)(iii)

Possible resettlement in the USA

12. The Department has approached authorities in the United States of America (USA) to pursue a resettlement pathway for s. 47F(1). This enquiry has been underway since 29 September 2023 and is ongoing. There is sufficient viability with this enquiry and evidence has been submitted to the High Court demonstrating potential removal prospects in respect of s. 47F(1). It will ultimately be for the High Court to determine whether this enquiry might equate to s. 47F(1) removal from Australia being 'reasonably practicable' in the foreseeable future, which is relevant to the claims he is making. It is difficult to predict when discussions with the USA may be finalised in respect of s. 47F(1) possible resettlement.

Rehabilitation

13. s. 47F(1)



Considerations for possible visa grant

14. If the High Court orders s. 47F(1) be released from immigration detention, his status would remain as an unlawful non citizen. As an unlawful non-citizen, s. 47F(1) would have no work rights and no access to social security support.

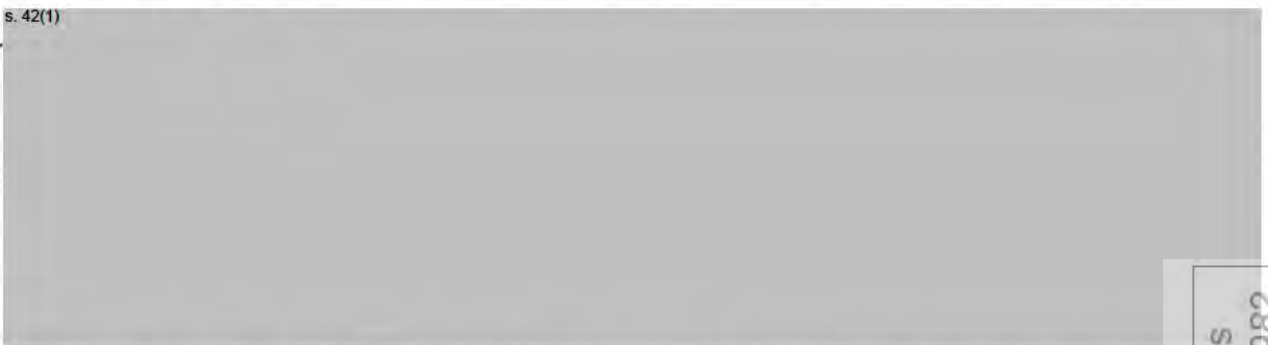
15. As an unauthorised maritime arrival (UMA), s. 47F(1) is prevented by the bar in subsection 46A(1) of the Act from making a valid visa application while he is in Australia as an unlawful non-citizen. s. 47F(1)

s. 47F(1)



s. 47F(1) however, he is still prevented by the subsection 46A(1) statutory bar from lodging a valid visa application.

16. s. 42(1)



17. However, should the High Court order s. 47F(1) release from immigration detention, s. 47F(1) is open to you to grant him a:

- Special purpose visa (SPV) under s 33 of the Act; or
- A Bridging R (Class WR) (Subclass 070 (Bridging (Removal Pending)) visa (BVR) under regulation 2.25AA of the Regulations.

18. You can grant s. 47F(1) a SPV by declaring, in writing, he is taken to have been granted a SPV. s. 47F(1) does not need to apply for a SPV and there are no specified criteria for the grant of a SPV. You could prescribe conditions which would apply to s. 47F(1) and the SPV could remain in force indefinitely, or until the end of a day on which the declaration is revoked (section 33(5)(b)(iv) of the Act). However, to grant a SPV you would need to cause to be laid before each House of Parliament a statement that sets out the declaration and reasons for making it (in accordance with section 33(6) of the Act).

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19. Alternatively, you could consider granting s. 47F(1) a BVR under regulation 2.25AA of the Regulations. Regulation 2.25AA provides:

(1) *"This regulation applies to an eligible non-citizen if:*

- a) the eligible non-citizen is an unlawful non-citizen; and*
- b) section 195A of the Act is not available to the Minister in relation to the grant of a visa to the eligible non-citizen; and*
- c) the Minister is satisfied that the eligible non-citizen's removal from Australia is not reasonably practicable at that time.*

(2) *Despite anything in Schedule 1, the Minister may grant the eligible non-citizen a Bridging R (Class WR) visa if the Minister is satisfied that, at the time of decision, the eligible non-citizen satisfies the criteria set out in clause 070.222 of Schedule 2."*

20. You can grant s. 47F(1) a BVR if satisfied he meets the criteria above. Some statements of fact are set out below to assist your consideration in this regard:

a) s. 47F(1) is an eligible non-citizen per section 72 of the Act who is also an unlawful non-citizen.

- As outlined at paragraph 15, s. 47F(1) is an 'eligible non-citizen' per section 72 of the Act as he was granted an HSTV in September 2014. He also does not hold a valid visa that is in effect and so he is therefore an unlawful non-citizen. In the event the High Court orders s. 47F(1) be released from immigration detention, he will be released as an unlawful non-citizen therefore, s. 47F(1) would meet this eligibility requirement.

b) Section 195A of the Act is not available in s. 47F(1) case as he is no longer in immigration detention.

- s. 42(1)

c) s. 47F(1) removal from Australia is not reasonably practicable at this time.

- An order from the High Court to release s. 47F(1) from immigration detention would likely be on the basis the High Court finds s. 47F(1):
 - a) at present, cannot be removed from Australia; and
 - b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
- While s. 47F(1); possible resettlement in the USA remains subject to ongoing consideration, if that issue has not been satisfactorily resolved at the time the High Court orders s. 47F(1) release from immigration detention, it is likely he would also meet this criterion. For this criterion to be satisfied, you will have to be satisfied about the reasonable practicability of his removal **at the time** you're deciding whether or not to grant s. 47F(1) a visa under reg 2.25AA.

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d) At the time of decision, s. 47F(1) satisfies the criteria set out in clause 070.222 of Schedule 2 of the Regulations, being:

- That you are satisfied that, if the BVR is granted, s. 47F(1) will abide by the conditions to which the visa is subject.
 - As outlined at **Attachment C**, Division 070.6 of Schedule 2 to the Regulations provides that, there are 18 mandatory conditions that must be imposed on a BVR granted under regulation 2.25AA. These conditions broadly cover reporting and behavioural obligations while s. 47F(1) is residing in the community. The mandatory conditions also cover a number of restrictions related to possession of weapons and **s. 33(a)(i)**, which must be imposed.

21. BVRs cease when you (or a delegate) give written notice to the visa holder that you are satisfied that the holder's removal is reasonably practicable or the visa holder has breached a visa condition. If such a notice is given, the person cannot seek merits review; however, they may seek judicial review of the decision. The visa could also be liable for cancellation grounds (including on the basis of character). It may be necessary to provide procedural fairness before cancelling the visa and/or the cancellation decision may attract merits and/or judicial review rights depending on the cancellation power used and whether the decision is made by a Minister or a delegate of the Minister.

Support services available to BVR holders

22. BVR holders have access to Medicare and Special Benefit income support payments through Services Australia, (with access to Special Benefit subject to them meeting other eligibility criteria specified by Services Australia including meeting the income and assets tests and demonstrating that they are in financial hardship for reasons beyond their control).
23. s. 47F(1) would also be eligible for transitional assistance through the Status Resolution Support Services Program (SRSS) program. This may include extended transitional support noting your decision in MS22-001485 to allow SRSS transitional support (SRSS Band 4) for up to 12 weeks with a possible extension of a further 12 weeks for long term detainees released from immigration detention. These arrangements assist individuals to transition to residing lawfully in the community by supporting them while they source their own accommodation and while they are seeking employment.

24. s. 47F(1)

Decline to grant a visa

25. Should the High Court order s. 47F(1) be released from immigration detention, and you decline to grant a visa, including a SPV, or a BVR under regulation 2.25AA of the Regulations, s. 47F(1) would be released from detention into the community as an unlawful non-citizen.

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26. If the High Court orders s. 47F(1) be released from immigration detention (and irrespective of whether you choose to grant a visa or not), he has indicated his s. 47F(1) s. 47F(1) are willing to provide accommodation and support to s. 47F(1) s. 47F(1) ss. 47F(1) s. 47F(1)
27. Should s. 47F(1) remain in the community as an unlawful non-citizen, he will be unable to seek employment and will not have access to Medicare or welfare payments through Services Australia. Australia's international obligations require that all persons in Australia have an adequate standard of living and s. 47F(1) may be eligible for SRSS support, which would be assessed on an as-needs basis.

Department's recommendation on preferred visa

28. s. 42(1) s. 42(1) The Department has explored the viability of the SPV option and considers it is not recommended in s. 47F(1) case noting there are limitations on s. 47F(1) ability to access both SRSS or Medicare and welfare payments through Services Australia as the holder of an SPV.
29. On balance, if you are inclined to grant s. 47F(1) a visa in the event the High Court orders he be released from immigration detention as an unlawful non-citizen, the Department considers it preferable to grant s. 47F(1) a BVR.

Background

30. Further, details regarding s. 47F(1) including immigration history, character, incidents in detention, health, identity, security, family/community links and removal availability is provided in the case summary at **Attachment A**.

Consultation – internal/external

31. Status Resolution Network, National Removals, International and Legal Group.

Consultation – A/g Secretary / A/g Deputy Secretary / ABF Commissioner

32. The A/g Secretary, A/g Deputy Secretary Immigration and ABF Commissioner were not consulted on this submission.

Client service implications

33. There are no client service implications.

Risks and Sensitivities

34. s. 42(1)

35. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

36. If you grant a BVR, ^{s. 47F(1)} [REDACTED] will be eligible to access Medicare and Special Benefit income support payments through Services Australia, (with access to Special Benefit subject to them meeting other eligibility criteria specified by Services Australia including meeting the income and assets tests and demonstrating that they are in financial hardship for reasons beyond their control). The Special Benefit payment is currently \$749.20 fortnightly (for a single person, over 22 years old).
37. The payments and services attached to a BVR differs to the support services programs and policy settings available to other asylum seekers and UMAs who are granted a Bridging E (subclass 050) visa (BVE) and released from immigration detention. These persons are not eligible for mainstream social services income support such as Special Benefit, and are instead eligible for income support paid by Services Australia on behalf of the Department through the SRSS program. SRSS income support is 89 per cent of the current Jobseeker/Special Benefit rate currently \$666.79 fortnightly (for a single person, over 22 years old). Additionally UMAs granted a BVE are eligible for Medicare; however, non-UMAs granted a BVE are not eligible for Medicare. Where an asylum seeker holding a BVE is not eligible for Medicare, the Department may fund general health and medical services equivalent to what an Australian citizen or permanent resident would receive under Medicare via the SRSS program.

38. ^{s. 47C(1)} [REDACTED]

Attachments

Attachment A Case summary

Attachment B MS23-001295 – Minister signed

Attachment C BVR mandatory conditions – Regulation 2.25AA

Authorising Officer

Cleared by:

s. 22(1)(a)(ii)

A/g Assistant Secretary
Status Resolution Branch

Date: 06/11/2023

Ph: s. 22(1)(a)(ii)

Contact Officer **s. 22(1)(a)(ii)** A/g Assistant Secretary, Status Resolution Branch, Ph: s. 22(1)(a)(ii)

CC Minister for Home Affairs and Minister for Cyber Security
A/g Secretary
A/g Deputy Secretary Immigration
Assistant Commissioner, Detention and National Removals
Group Manager Legal
A/g First Assistant Secretary, Immigration Policy
Commander, National Immigration Detention
Senior Director, Status Resolution Network
Chief Superintendent, National Removals
Director, Status Resolution NSW
Director, Status Resolution Support Programs Section
Superintendent, Detention Health
Status Resolution Officers NSW

Possible resettlement in the USA

The Department has approached authorities in the United States of America (USA) to pursue a resettlement pathway for s. 47F(1). This enquiry has been underway since 29 September 2023 and is ongoing. There is sufficient viability with this enquiry and evidence has been submitted to the High Court demonstrating potential removal prospects in respect of s. 47F(1). It will ultimately be for the High Court to determine whether this enquiry might equate to s. 47F(1) removal from Australia being 'reasonably practicable' in the foreseeable future, which is relevant to the claims he is making. It is difficult to predict when discussions with the USA may be finalised in respect of s. 47F(1) possible resettlement.

Litigation:

s. 47F(1) seeks to raise the correctness of the High Court's decision in *Al-Kateb v Godwin* (2004) (*Al-Kateb*) and either distinguish his case from *Al-Kateb* or have *Al-Kateb* overruled, so as to secure an order for his release from detention.

s. 47F(1) says that his detention is not authorised under the Act, or alternatively under the Constitution, in circumstances where at present he cannot be removed from Australia and there is no real likelihood or prospect of his removal in the reasonably foreseeable future. The Commonwealth is represented by the Australian Government Solicitor's Constitutional Litigation Unit, who in turn are briefing the Solicitor General and a team of senior and junior counsel ahead of the hearing.

The case is listed for hearing in the High Court on 7-8 November 2023.

Risks

s. 42(1)

Signal Message

Marian

09 November

Clare: There's going to be another joint Min briefing at 11.30. s. 42(1)
s. 42(1)

Marian: You have the invite. I'm in your office.