



Australian Government  
Department of Home Affairs

Submission

For decision  
PDMS Ref. Number: MS23-001390  
Date of Clearance: 13/07/2023

To Minister for Immigration, Citizenship and Multicultural Affairs  
Subject To allow an additional person affected by the Love/Thoms High Court case to be granted a special purpose visa

Timing For consideration by 31 July 2023 in order to grant a special purpose visa to provide essential life services to the affected individual.

Recommendations

That you:

- 1. agree to make a declaration under paragraph 33(2)(b)(i) of the *Migration Act 1958* that one unlawful non-citizen who cannot be detained as a result of the High Court's decision in *Love* is taken to have been granted a special purpose visa;
- 2. sign and date the Migration (Special Purpose Visa) Declaration (ADMIN 23/128) 2023 at **Attachment A**; and
- 3. approve, sign and date the statement at **Attachment B** setting out the content of the declaration and your reasons for making the declaration to be tabled in both Houses of Parliament.

agreed / not agreed

signed / not signed

signed / not signed

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date 28.7./2023

Minister's Comments

Key Issues

1. The Department of Home Affairs (the Department) recommends that you agree to the grant of a special purpose visa (SPV) to s. 47F(1) who cannot be detained.
  - a. In *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (*Love/Thoms*), the High Court held that Aboriginal and Torres Strait Islander peoples who meet the tripartite test as set out by Brennan J in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, are not 'aliens' for the purpose of the naturalisation and aliens power in paragraph 51(xix) of the Constitution.
  - b. *Love/Thoms* recognised a legal category of persons who do not hold Australian citizenship, but fall largely outside the scope of the constitutional power in relation to 'aliens', which underpins significant parts of Australia's migration legislation. A person to whom the aliens power cannot apply cannot be detained or removed from Australia under the *Migration Act 1958* (the Migration Act).
2. On 8 June 2023, the Australian Government Solicitor provided advice that s. 47F(1) cannot be detained because of *Love/Thoms*. The Department has advised s. 47F(1) of this outcome.
3. s. 34(3)
4. On 22 December 2022 (MS22-003193 refers), you agreed to grant an SPV to 13 individuals who could not be detained because of *Love/Thoms*, and on 19 April 2023 (MS23-000602 refers), you agreed to grant an SPV to a further two individuals, s. 47F(1) who could not be detained because of *Love/Thoms*.

Background

5. On 17 January 2023, s. 47F(1) contacted the Department, claiming that his biological brother, s. 47F(1), had recently arrived in Australia across the Torres Strait and "was in the same situation".

a. s. 47F(1)

6. Through liaison with the Torres Strait District Office of the Australian Border Force (ABF), ABF officers travelled to Darnley/Erub Island to conduct an interview with **s. 47F(1)** and document his claims to be affected by the *Love/Thoms* High Court decision.

Grant of SPV

7. Under paragraph 33(2)(b) of the Migration Act, you can make a declaration in writing that a non-citizen, or a class of non-citizens, is taken to have been granted an SPV.
8. If you sign the instrument - *Migration (Special Purpose Visa) Declaration (ADMIN 23/128) 2023* at **Attachment A**, the individual mentioned in the instrument will be taken to have been granted an SPV by operation of law. The instrument is not a legislative instrument and will not be registered on the Federal Register of Legislation; however, you will need to lay a statement before both Houses of Parliament that sets out the content of the declaration and your reasons for making the declaration (see subsection 33(6) of the Migration Act). This statement must not include the name of the person who is the subject of the declaration (see subsection 33(7) of the Migration Act). A copy of this statement is at **Attachment B**.
9. This instrument once signed will result in the grant of an SPV to the person named in it the day after you sign it. The Department will notify the individual in writing of the visa grant.
10. We note that you will be able to revoke the SPV declaration, if necessary, which will have the effect of ceasing the SPV.
11. Following the signing of the instrument, your Office may wish to inform the Office of the Minister for Indigenous Australians.

Client background of **s. 47F(1)**

12.

**S. 47F(1)**

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16.

**s. 47F(1)**

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Darnley/Erub Island

19. The Torres Strait consists of over 200 islands and these are grouped into five distinct clusters: Inner islands (Thursday, Horn, Prince of Wales and Hammond islands); Outer islands consisting of the Eastern cluster (Murray, Darnley and Stephen islands); Central cluster (Yorke, Yam, Sue and Coconut islands); Top Western cluster (Saibai, Boigu and Dauan islands); and Bottom Western cluster (Moa, Badu and Mabuiag islands). Darnley/Erub Island is situated in the eastern section of the Torres Strait and has a population of approximately 400 people.
20. The Torres Strait is a unique and complex operating environment. Traveller movements from PNG to Australia are governed by Australian legislation in line with the Treaty between Australia and PNG in relation to the Torres Strait. Treaty-related movements to Australia are made by PNG citizens without the need for a passport or a visa, subject to certain conditions. The ABF maintains a network of locally employed Border Monitoring Officers who play a critical role in managing traveller movements in the Torres Strait.

21.

**s. 47E(d)**

**Consultation – internal/external**

22. Internal: Legal Group.

23. External: Nil.

**Consultation – Secretary / Associate Secretary**

24. The Secretary was not consulted on the approach in the submission.

25. The Associate Secretary was not consulted on the approach in the submission.

**Client service implications**

- 26. Arrangements have been made to record the grant of the SPV in departmental systems, through the use of a registration travel authority.
- 27. Information regarding travel, work and Medicare will be included in the letter notifying the individual of the SPV grant.
- 28. A further detailed client history can be provided to your office upon request.

**Risks and Sensitivities**

- 29. Nil.

**Financial/systems/legal/deregulation/media implications**

- 30. **s. 47C(1)**

**Attachments**

**Attachment A** Migration (Special Purpose Visa) Declaration (ADMIN 23/128) 2023

**Attachment B** Statement to both Houses of Parliament

<b>Authorising Officer</b> Cleared by:  David Gavin A/g First Assistant Secretary Immigration Policy, Integrity and Assurance Division  Date: 13/07/2023 Phone: s. 22(1)(a)(ii)
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**Contact Officer:** s. 22(1)(a)(ii) A/g Assistant Secretary, Compliance and Community Protection Policy Branch,  
**Ph:** s. 22(1)(a)(ii)

- CC Minister for Home Affairs, Minister for Cyber Security
- Secretary
- Associate Secretary Immigration
- ABF Commissioner
- Group Manager Immigration Policy
- Group Manager Executive and International
- Group Manager Legal
- First Assistant Secretary Immigration Programs Division
- First Assistant Secretary Citizenship and Multicultural Affairs Division
- First Assistant Secretary Status Resolution and Visa Cancellation Division
- Assistant Secretary Temporary Visas Branch
- Assistant Secretary Migration and Citizenship Law Branch
- Assistant Secretary Legislation Branch
- Assistant Secretary Citizenship Policy Branch



ADMIN 23/128

**Migration (Special Purpose Visa) Declaration (ADMIN 23/128) 2023 (No. 2)**

I, Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs, under subparagraph 33(2)(b)(i) of the *Migration Act 1958 (the Act)*, declare that a non-citizen mentioned in the table in Schedule 1 is taken to have been granted a special purpose visa.

This instrument commences the day after signature.

Dated 28 July 2023

A handwritten signature in blue ink that reads 'A Giles'.

The Hon. Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

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## Schedule 1      Non-citizen

### 1      Non-citizen granted special purpose visa

Item	Surname	Given Name	Date of Birth	Client ID
1	s. 47F(1)			

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**DRAFT ONLY**

## SECTION 33 OF THE MIGRATIONACT 1958

## - STATEMENT TO PARLIAMENT -

Exercising my power under subparagraph 33 (2)(b)(i) of the *Migration Act 1958 (the Act)*, I declared on the date below that the non-citizen named in the schedule to the declaration is taken to have been granted a Special Purpose visa (SPV).

The purpose for granting an SPV is to allow the specified non-citizen to travel to, enter and remain in Australia lawfully.

The power under subparagraph 33(2)(b)(i) of the Act is intended to be used in unusual circumstances or unanticipated situations. I considered that, due to the special circumstances of this case, the exercise of this power is warranted in this instance.

This SPV came into effect on the day after I signed the declaration, and will cease to be in effect at the end of the day I revoke the SPV by a declaration under subparagraph 9 of section 33 of the *Migration Act 1958 (the Act)*, or at such other time as I specify in the revoking declaration. Should this individual be granted Australian citizenship, this SPV will also cease on commencement of that citizenship.

Dated: 28 July



The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs