Australian Government
Department of Home Affairs

Submission
For decision
PDMS Ref. Number: MS23-002238
Date of Clearance: 26/03/2024

To **Minister for Immigration, Citizenship and Multicultural Affairs**

Subject **Possible consideration under subsections 46A(2), 46B(2) and 33(2)(b)(i) of the *Migration Act 1958* to regularise the immigration status for unlawful Unauthorised Maritime Arrivals (UMAs) in the community**

Timing *At your convenience.*

Recommendations

That you:

1. indicate whether you wish to intervene under subsection 46A(2) of the *Migration Act 1958* (the Act) to lift the subsection 46A(1) statutory bar for an indefinite period to allow persons listed in **Attachment A** to lodge Bridging E (subclass 050) visa (BVE) applications; — intervene/ decline to intervene

   - if you agree to exercise your power, please sign the subsection 46A(2) decision documentation at **Attachment A**; — signed / not signed

AND

2. indicate whether you wish to intervene under subsection 46B(2) of the Act to lift the subsection 46B(1) statutory bar for an indefinite period to allow persons listed in **Attachment B** to lodge BVE applications; — intervene/ decline to intervene

   - if you agree to exercise your power, please sign the subsection 46B(2) decision documentation at **Attachment B**; — signed / not signed

AND

3. indicate whether you wish to exercise your power under subparagraph 33(2)(b)(i) of the Act to grant the UMAs listed at **Attachment C** a special purpose visa (SPV), valid until midnight the following day, to become eligible non-citizens under section 72 of the Act enabling them to make BVE applications; and — intervene/ decline to intervene

   - if you agree to exercise your power, please sign the *Special Purpose Visa Declaration* at **Attachment C**. — signed / not signed

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date...28/7.../2024

Minister's Comments

Key Issues

1. On 28 September 2023, you signed *MS23-001109 - Regularising immigration status for unlawful Unauthorised Maritime Arrivals (UMAs) in the community*, agreeing to the Department of Home Affairs (the Department) referring unlawful UMAs in the community who are unable to regularise their immigration status other than through Ministerial Intervention for your consideration (**Attachment D** refers). This accords with the overarching principle that all UMAs in the community should be able to regularise their immigration status by making an application for BVEs directly with the Department rather than requesting Ministerial Intervention.

2. This submission is being referred to you under the authority given in MS23-001109. The UMAs being referred to you in this submission require your consideration under sections 46A, 46B and/or 33 of the Act to enable them to apply for a BVE to regularise their immigration status while in the community. This includes UMAs who require your consideration to:

   - exercise your power under subsection 46A(2) of the Act to lift the section 46A(1) statutory bar for s. 47F(1) individuals listed at **Attachment A**;
   - exercise your power under subsection 46B(2) of the Act to lift the section 46B(1) statutory bar for s. 47F(1) individuals listed at **Attachment B**; and
   - make a declaration under subparagraph 33(2)(b)(i) of the Act to grant an SPV ceasing at midnight on the following day to enable the s. 47F(1) individuals listed at **Attachment C** to become an eligible non-citizen under section 72 of the Act.

3. The Department will also be applying your directive outlined in MS23-001109 that condition 8207 (no study) should not be imposed on BVEs granted to UMAs who arrived in Australia prior to 19 July 2013.

4. In MS23-001109, the Department indicated it expects to refer further Ministerial Intervention submissions seeking consideration to regularise the immigration status of UMAs in the community to you. These submissions are expected to include children born to UMAs in Australia, as the Department is made aware of them.

Background

5. For further background refer to *MS23-001109 - Regularising immigration status for unlawful Unauthorised Maritime Arrivals (UMAs) in the community* at **Attachment D**.

Option for future management

Ministerial Intervention under subsections 46A(2) and 46B(2) of the Act

6. Subsections 46A(2) and 46B(2) of the Act provide you with the power to lift the subsections 46A(1) and 46B(1) statutory bars which ordinarily operate to prevent a UMA and a transitory person (respectively) who is in Australia from making a valid visa application.

7. You may intervene under subsections 46A(2) and 46B(2) of the Act, to lift the subsections 46A(1) and 46B(1) bars if you think it is in the public interest to do so, to allow the making of a valid visa application of a class specified in your determination.

8. Should you lift the subsections 46A(1) and 46B(1) statutory bars indefinitely for the individuals listed in **Attachment A** and **Attachment B**, these individuals will be able to make BVE applications as required into the future.

9. While residing in the community as a BVE holder, they would be required to abide by conditions, including those broadly covering reporting and behaviour (noting a 'no study' condition would only be applied to valid BVE applications made by UMAs who arrived in Australia on or after 19 July 2013 in accordance with your instruction).

10. Conditions imposed on the individuals' BVE (such as departure related conditions) would be consistent with the purpose and duration of the visa grant and dependent on the individual's circumstances. Should an individual breach any visa conditions, their visa would be liable for consideration of cancellation under section 116 of the Act.

Grant of a special purpose visa (SPV) under section 33 of the Act

11. SPVs are a class of temporary visas prescribed in the Act. They are designed to provide lawful status to non-citizens who need to travel to, enter and remain in Australia. SPVs are granted by operation of law to non-citizens who have a prescribed status or who are declared by the Minister to hold SPVs. Paragraph 33(2)(b) of the Act provides you with the power to declare that a non-citizen is taken to have been granted an SPV and to specify the period for which such a visa grant is valid.

s. 47C(1)

13. An SPV is the only visa type which can be granted to UMAs and transitory persons living in the community who are prevented from lodging a valid visa application without needing to resort to administratively detaining the individual in order to enliven the section 195A Ministerial Intervention power. The grant of an SPV to these individuals will result in them being eligible non-citizens in accordance with section 72 of the Act, and consequently can be granted a BVE.

14. As outlined in the *Special* Purpose *Visa Declaration* and *Statement to Parliament* at **Attachment C**, should you decide to make a declaration to grant an SPV, it will cease to be in effect at midnight on the day after the day you sign that authority. This will then make the specified UMA or transitory person an eligible non-citizen per section 72 of the Act, for the purpose of applying for a BVE if the relevant statutory bars have also been lifted.

Consultation – internal/external

s. 47C(1)

Consultation – Secretary / Associate Secretary / ABF Commissioner

16. The Secretary, Associate Secretary and ABF Commissioner were not consulted on this submission.

Client service implications

17. There are negligible client service implications.

Risks and Sensitivities

18. In respect of the risk that individuals disengage with Status Resolution in the future, the Department will propose reporting conditions and relevant departure-related conditions be imposed for those granted a BVE. This will include ensuring individuals understand that non-compliance with visa conditions can impact their eligibility for a visa in future, through to their visa being cancelled and therefore being liable to detention under section 189 of the Act.

19. UMAs who are granted an SPV and if required, also have the statutory bar lifted under subsections 46A(1) and/or 46B(1) of the Act will be notified that they are now able to lodge a valid BVE application using the Department's online ImmiAccount system.

20. The information contained in this submission is classified and should not be publicly released without the authority of the Department. 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

21. There are no financial implications. All effort associated with the management of this cohort will be progressed within existing departmental resources.

Attachments

Attachment A Subsection 46A(2) decision documentation

Attachment B Subsection 46B(2) decision documentation

Attachment C Special Purpose Visa Declaration

Attachment D Minister signed - MS23-001109

Authorising Officer
Cleared by: David Arnold Assistant Secretary Status Resolution Branch **Date:** 26/03/2024 Ph: s. 22(1)(a)(ii)

Contact Officer David Arnold, Assistant Secretary, Status Resolution Branch, Ph: s. 22(1)(a)(ii) / Mob: s. 22(1)(a)(ii)

CC
Minister for Home Affairs, Minister for Cyber Security
Associate Secretary
Group Manager Immigration Policy
Commander, National Immigration Detention
Senior Director, Status Resolution Network
Director, Status Resolution VIC, NSW and QLD
Superintendent, Detention Health
Director, Status Resolution Support Programs Section
Status Resolution Officers

Attachment A

EXERCISE OF MINISTERIAL DISCRETION

NOTICE OF A DECISION UNDER SUBSECTION 46A(2) OF THE *MIGRATION ACT 1958* TO PERMIT THE MAKING OF VALID VISA APPLICATIONS

Pursuant to subsection 46A(2) of the *Migration Act 1958* (the Act) and after deciding it is in the public interest to do so, I hereby determine that subsection 46A(1) of the Act does not apply to an application made by the person named below for a Bridging E (Class WE) (subclass 050) visa.

S. 47F(1)

S. 47F(1)

S. 47F(1)

S. 47F(1)

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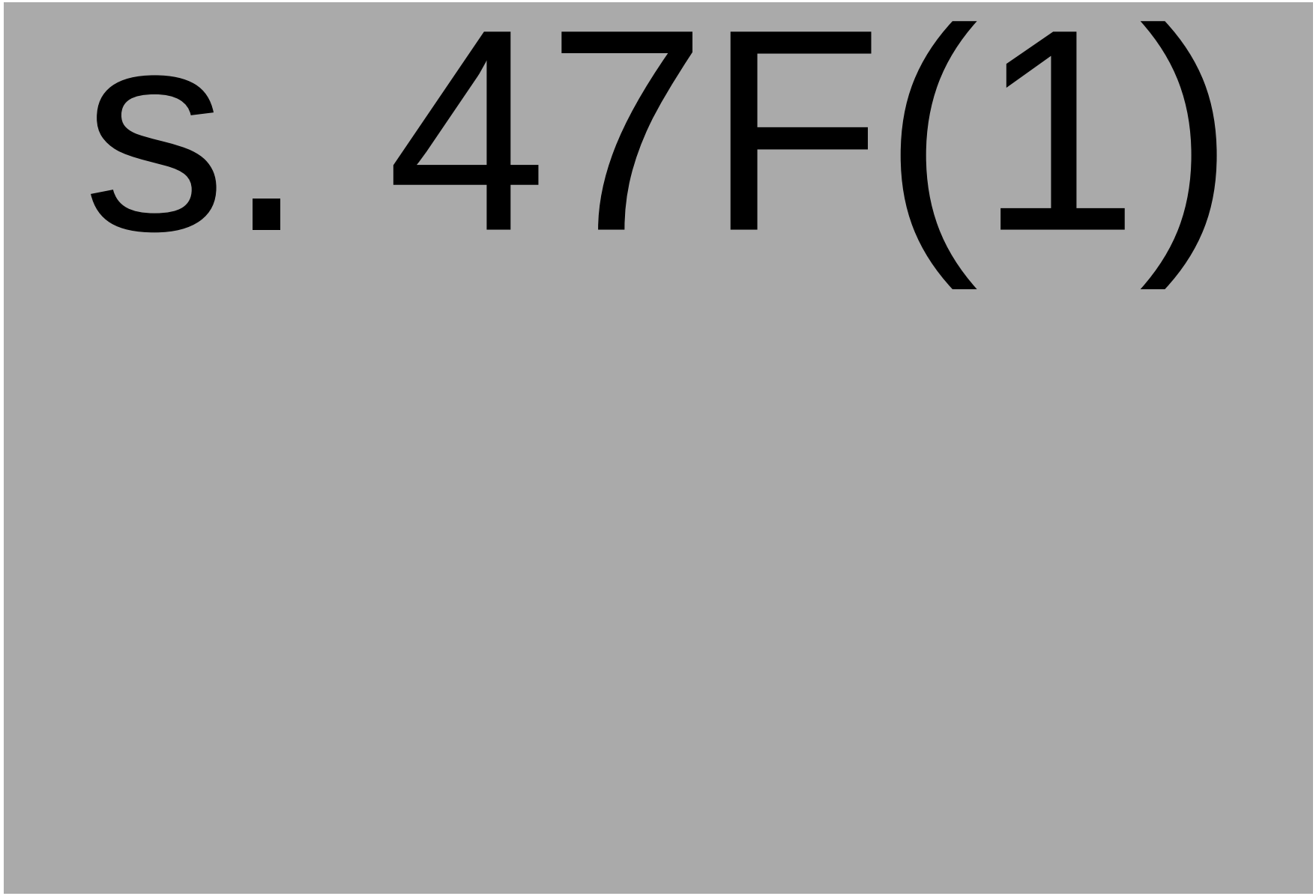
S. 47F(1)



S. 47F(1)

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S. 47F(1)

S. 47F(1)

THE HON ANDREW GILES MP
Minister for Immigration, Citizenship and Multicultural Affairs

____/____/ 2024

EXERCISE OF MINISTERIAL DISCRETION
UNDER SUBSECTION 46A(2) OF THE *MIGRATION ACT 1958*

- STATEMENT TO PARLIAMENT -

1. Exercising my power under subsection 46A(2) of the *Migration Act 1958* (the Act), I have determined that subsection 46A(1) of the Act does not apply to applications made by these persons for a Bridging E (Class WE) (subclass 050) visa.

2. Having regard to all their circumstances and personal characteristics, I considered that it was in the public interest to exercise my power under subsection 46A(2) of the Act to enable these persons to lodge a valid Bridging E (Class WE) (subclass 050) visa application in Australia.

3. In the circumstances, I have decided that as a discretionary and humanitarian act, it is in the interests of Australia as a humane and generous society to allow these persons to lodge a Bridging E (Class WE) (subclass 050) visa application in Australia.

THE HON ANDREW GILES MP
Minister for Immigration, Citizenship and Multicultural Affairs

____/____/ 2024

Attachment B

EXERCISE OF MINISTERIAL DISCRETION

NOTICE OF A DECISION UNDER SUBSECTION 46B(2) OF THE *MIGRATION ACT 1958* TO PERMIT THE MAKING OF VALID VISA APPLICATIONS

Pursuant to subsection 46B(2) of the *Migration Act 1958* (the Act) and after deciding it is in the public interest to do so, I hereby determine that subsection 46B(1) of the Act does not apply to an application made by the person named below for a Bridging E (Class WE) (subclass 050) visa.

S. 47F(1)

S. 47F(1)

S. 47F(1)

Attachment B

S. 47F(1)

S. 47F(1)

S. 47F(1)

S. 47F(1)

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S. 47F(1)

S. 47F(1)

Signature over page

Attachment B

THE HON ANDREW GILES MP
Minister for Immigration, Citizenship and Multicultural Affairs

____/____/ 2024

EXERCISE OF MINISTERIAL DISCRETION
UNDER SUBSECTION 46B(2) OF THE *MIGRATION ACT 1958*

- STATEMENT TO PARLIAMENT -

1. Exercising my power under subsection 46B(2) of the *Migration Act 1958* (the Act), I have determined that subsection 46B(1) of the Act does not apply to applications made by these persons for a Bridging E (Class WE) (subclass 050) visa.

2. Having regard to all their circumstances and personal characteristics, I considered that it was in the public interest to exercise my power under subsection 46B(2) of the Act to enable these persons to lodge a valid Bridging E (Class WE) (subclass 050) visa application in Australia.

3. In the circumstances, I have decided that as a discretionary and humanitarian act, it is in the interests of Australia as a humane and generous society to allow these persons to lodge a Bridging E (Class WE) (subclass 050) visa application in Australia.

THE HON ANDREW GILES MP
Minister for Immigration, Citizenship and Multicultural Affairs

____/____/ 2024

ADMIN 23/169

Migration (Special Purpose Visa) Declaration (ADMIN 23/169) 2023

I, Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs, under subparagraph 33(2)(b)(i) of the *Migration Act 1958* (the Act):

(a) declare that a non-citizen mentioned in the table in Schedule 1 is taken to have been granted a special purpose visa on the day this declaration is made; and

(b) specify the day after the day on which this declaration is made as the day a special purpose visa mentioned in paragraph (a) ceases to be in effect.

Dated 2024

The Hon. Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

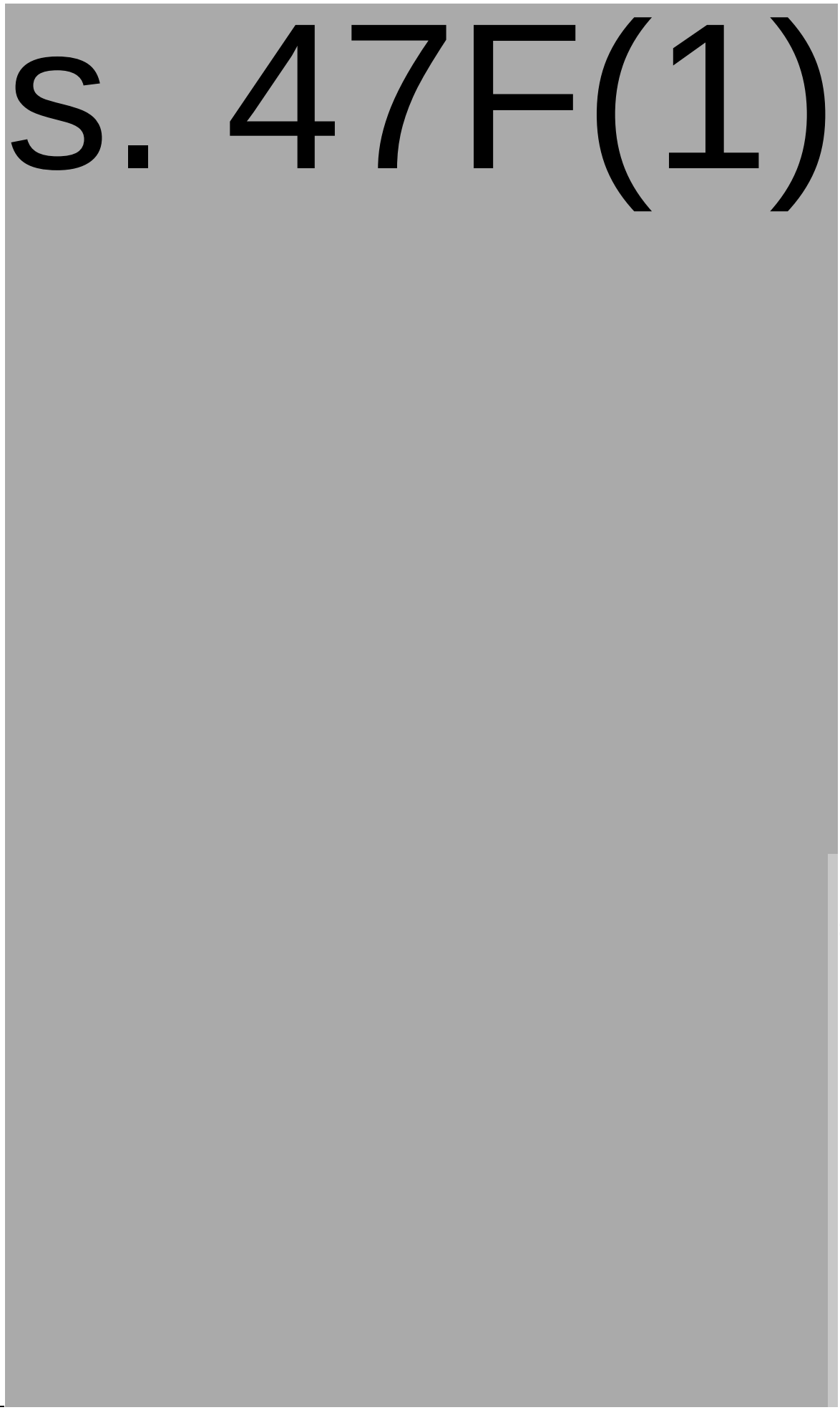
Schedule 1 Non-citizen

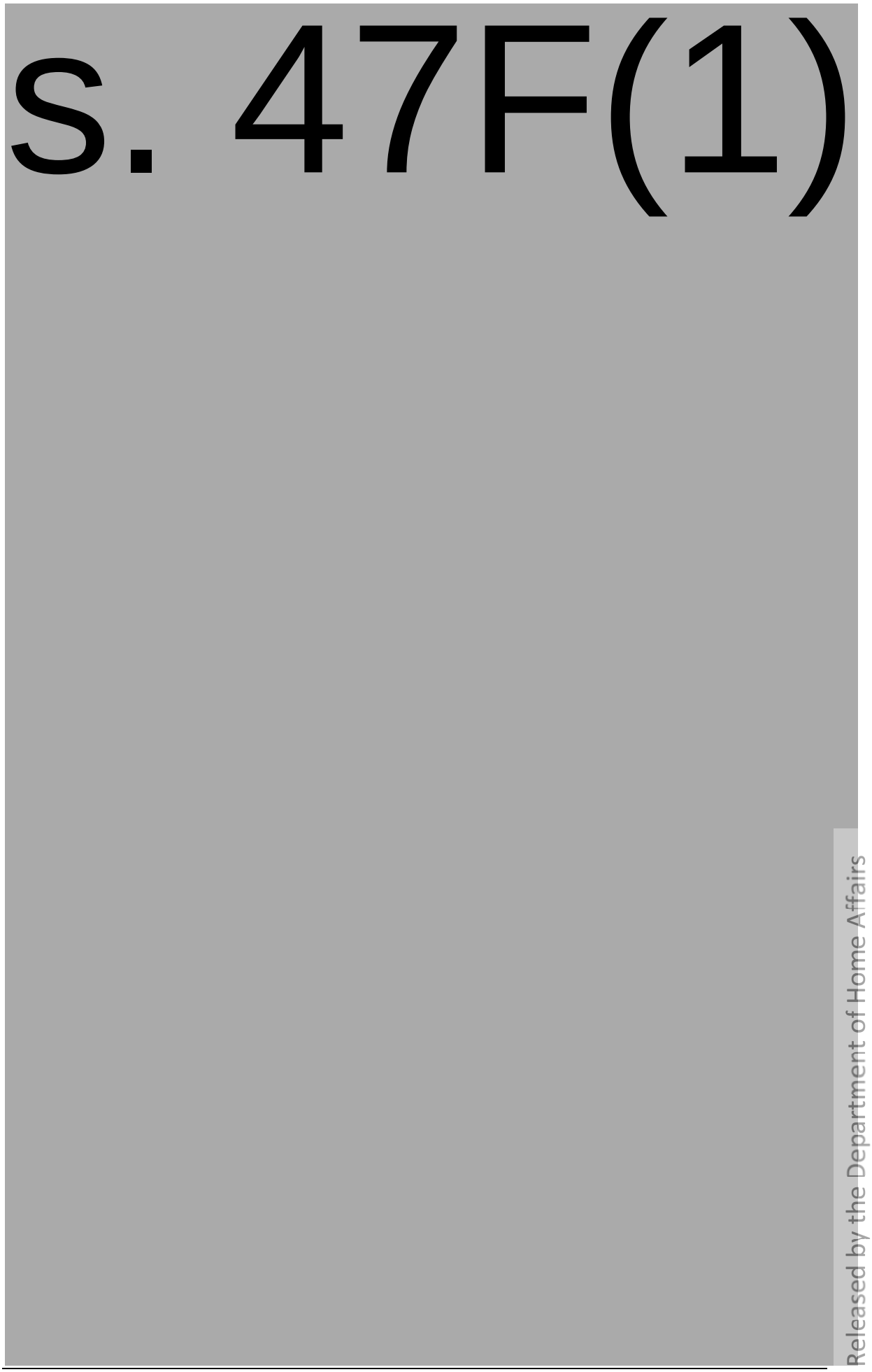
1 Non-citizen granted special purpose visa

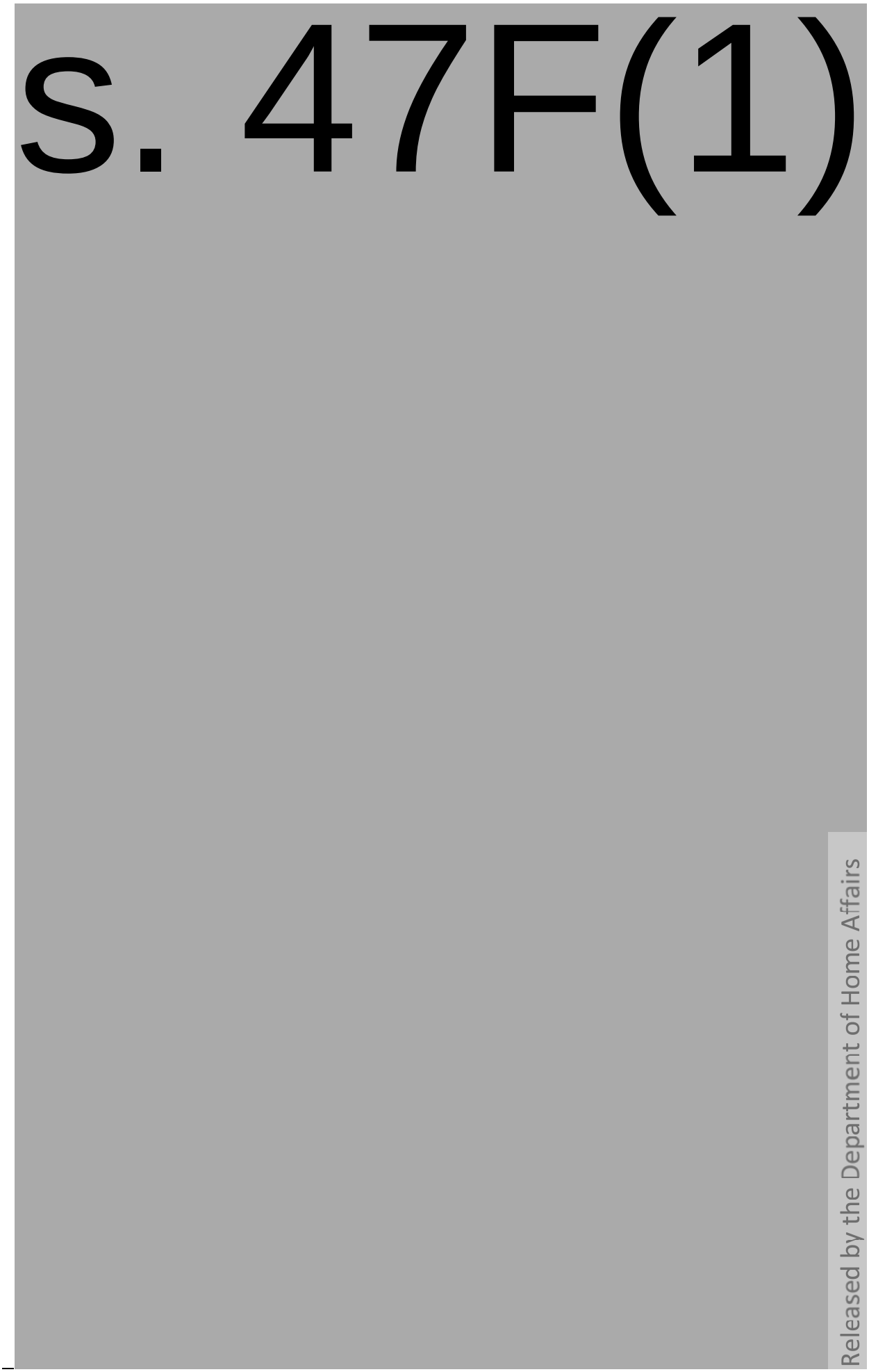
Item	Surname	Given Name/s	Client ID	Citizenship	State

S. 47F(1)

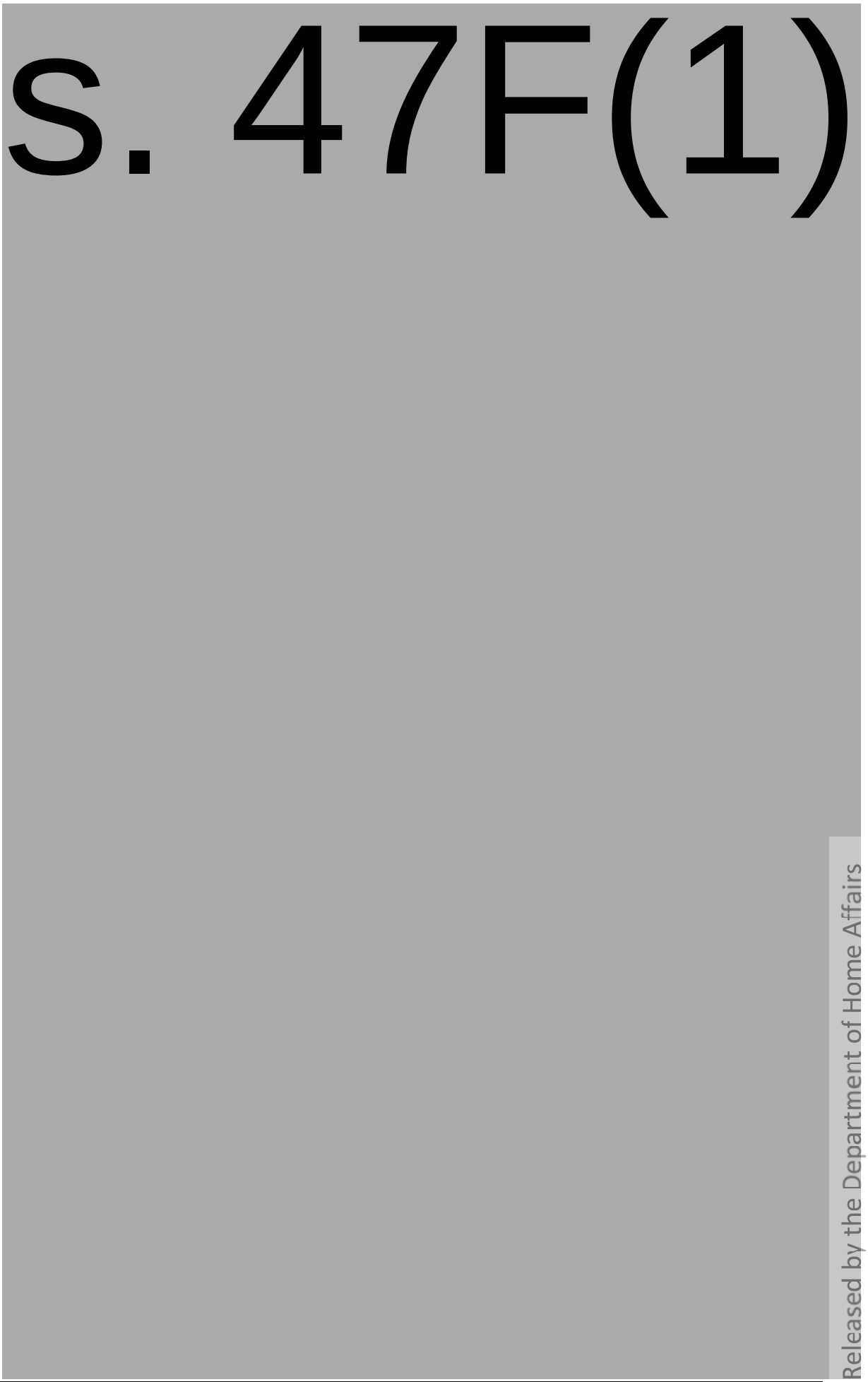
S. 47F(1)

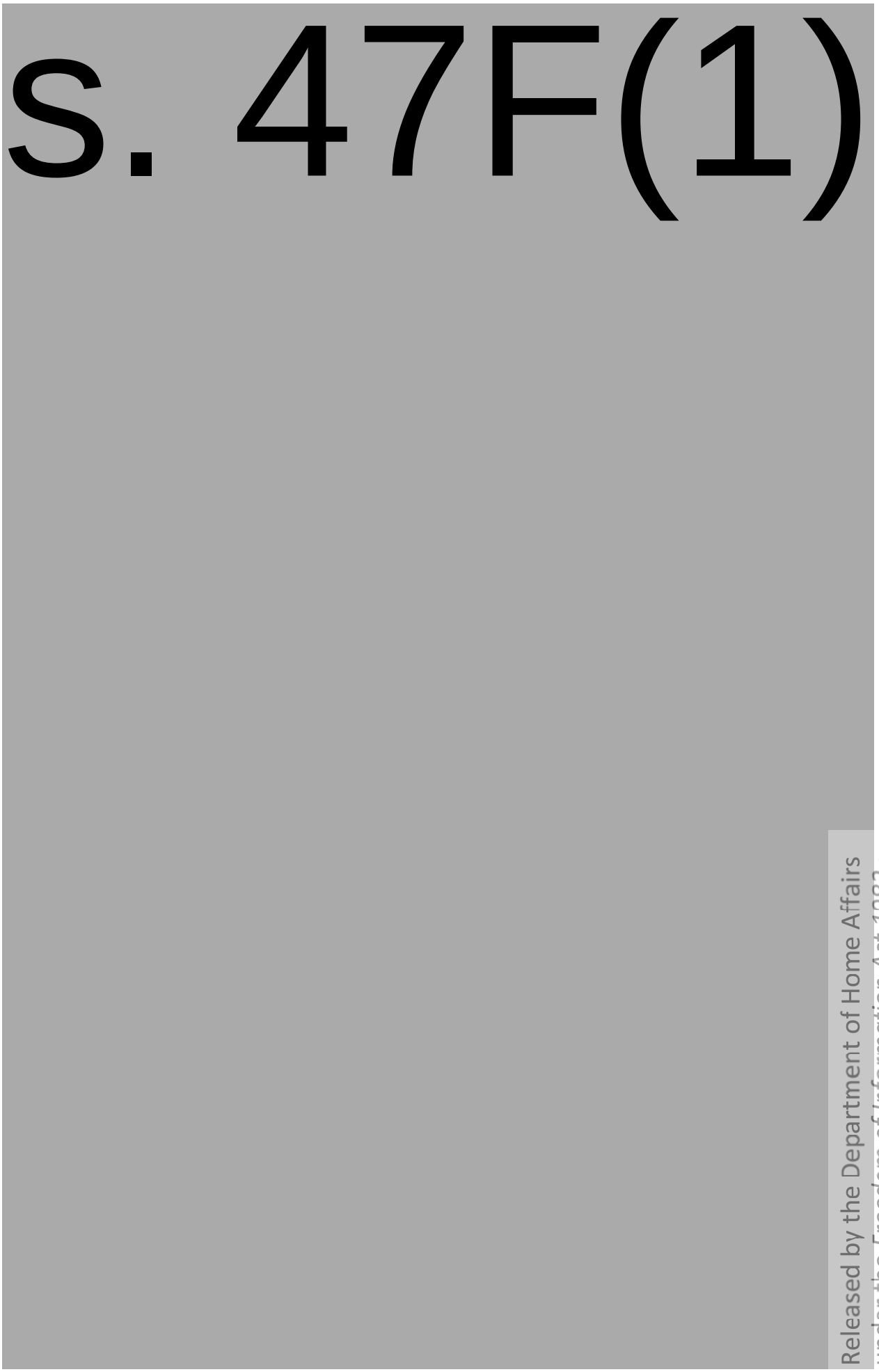


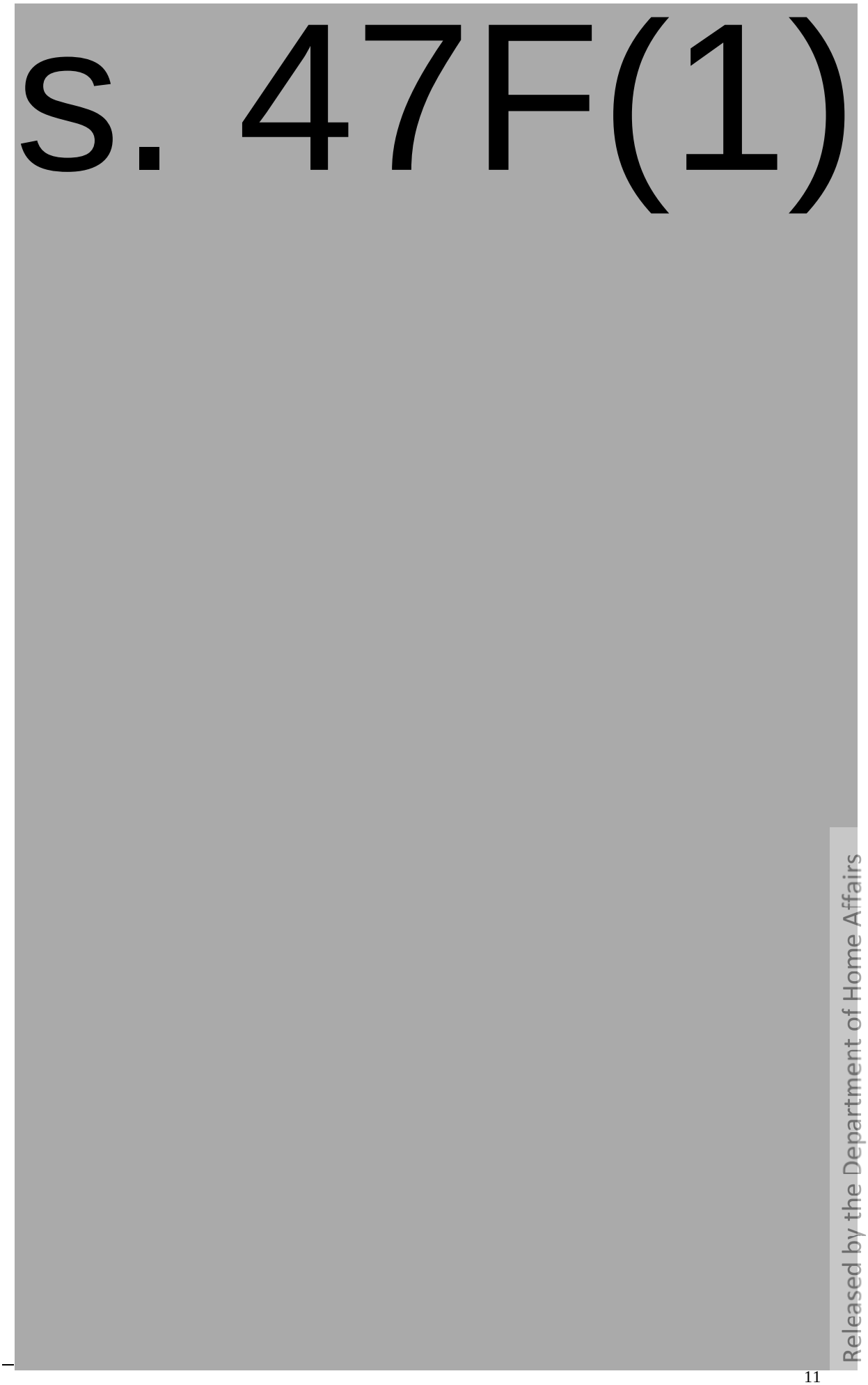


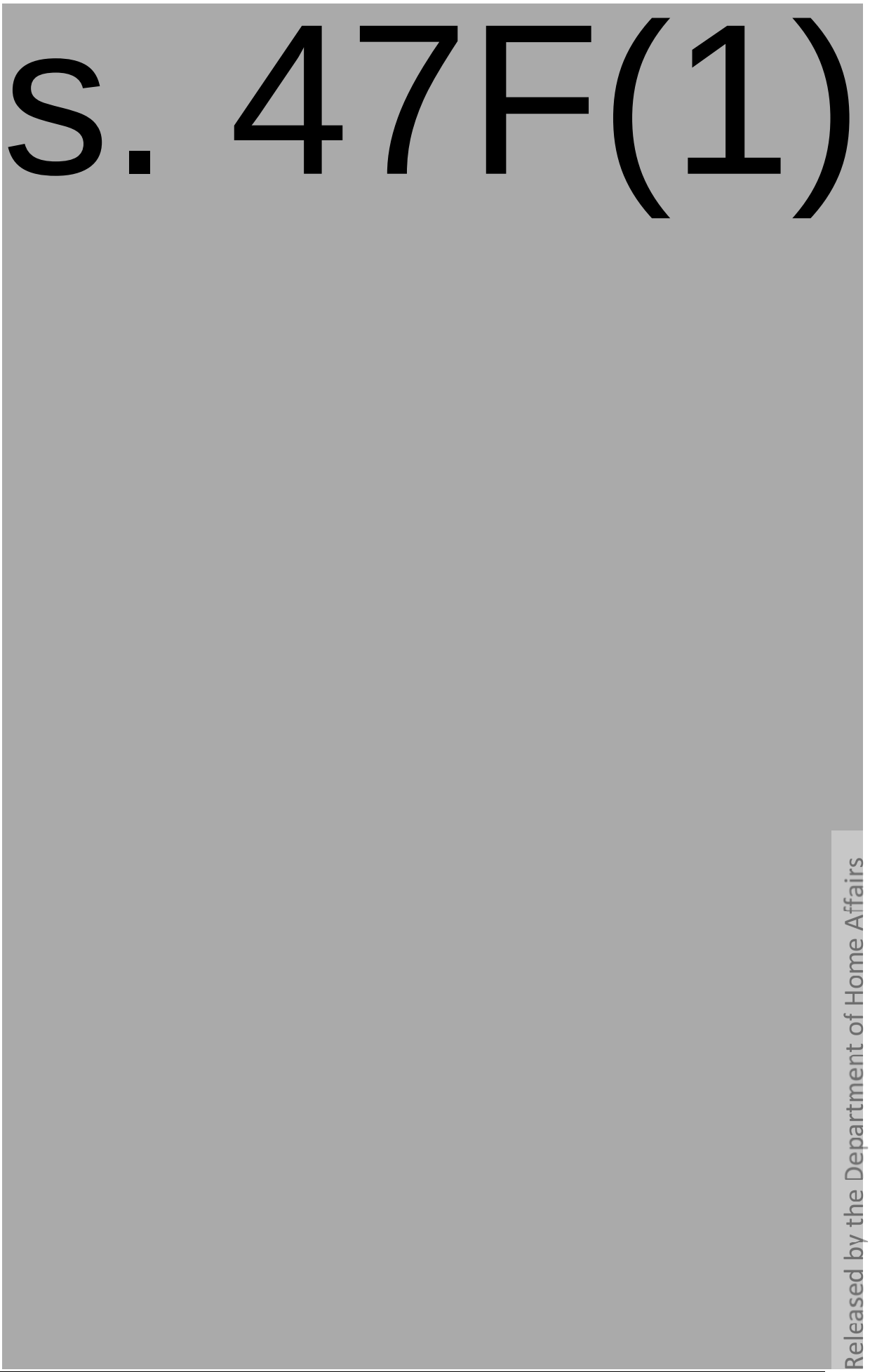


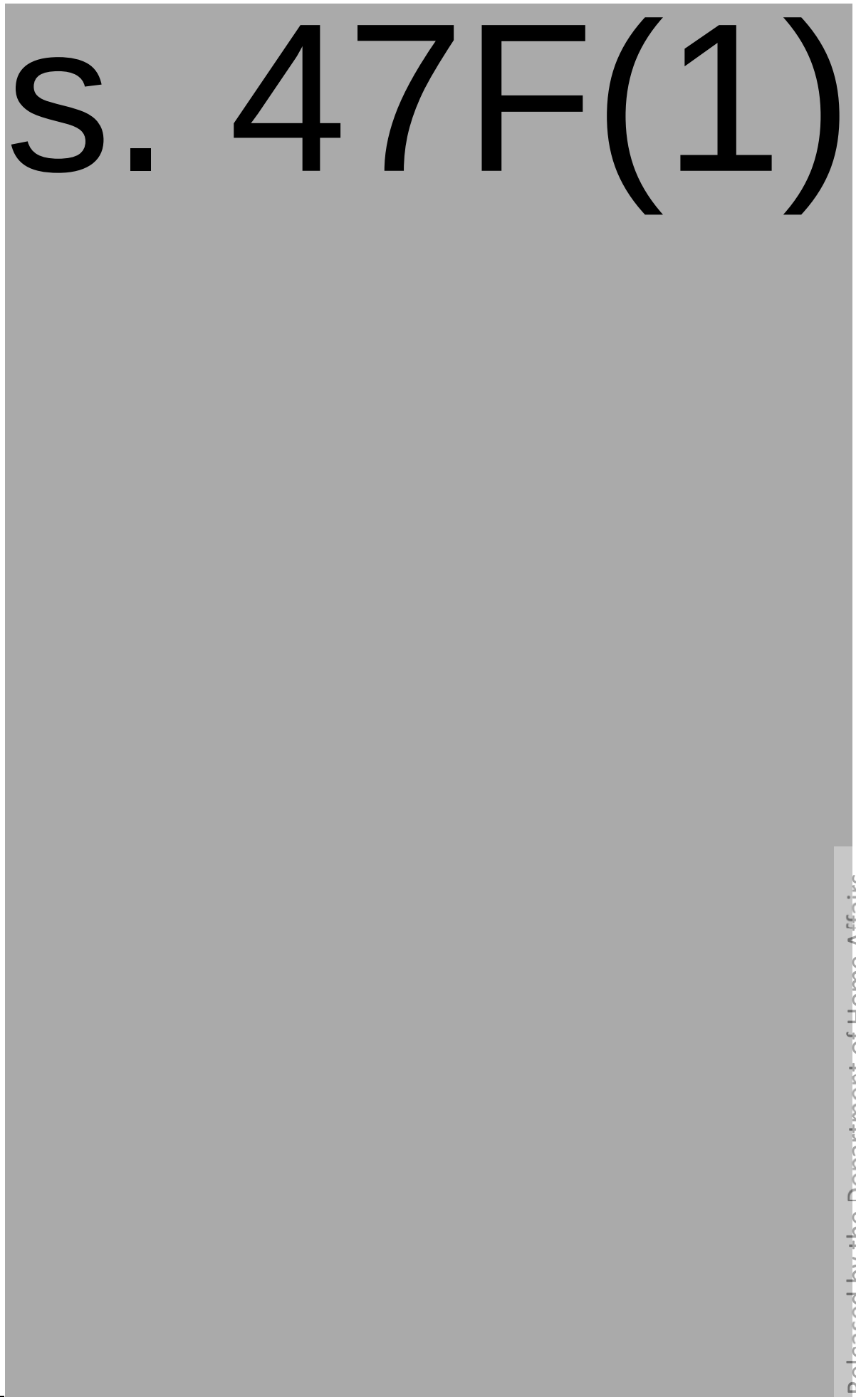
S. 47F(1)

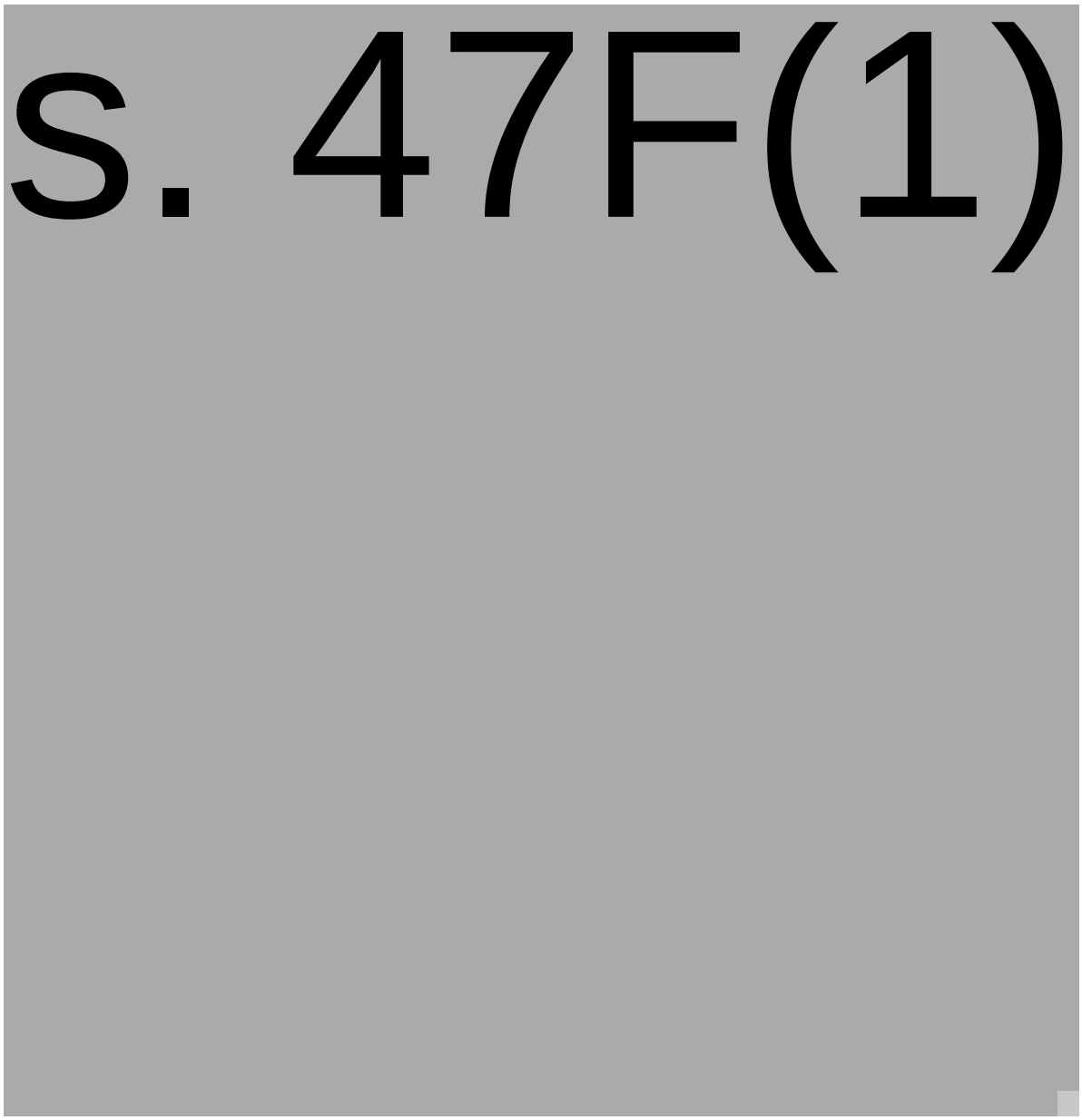












SECTION 33 OF THE *MIGRATION ACT 1958*

- 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 become an eligible non-citizen within the meaning of section 72 of the Act.

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

This SPV came into effect on the day I signed the declaration, and will cease to be in effect at midnight on the day after the day I signed the declaration.

Dated 2024

The Hon Andrew Giles MP
Minister for Immigration, Citizenship and Multicultural Affairs

Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS23-001109
Date of Clearance: 08/09/2023

To **Minister for Immigration, Citizenship and Multicultural Affairs**

Subject **Regularising immigration status for unlawful Unauthorised Maritime Arrivals (UMAs) in the community**

Timing *Not time critical.*

Recommendations

That you:

1. note that there is a cohort of unlawful UMAs in the community who are unable to regularise their immigration status other than through Ministerial Intervention; — noted / please discuss

AND

2. agree to the overarching principle that all UMAs in the community should equally be able to regularise their immigration status by making an application for a Bridging E (subclass 050) visa (BVE) directly with the Department rather than requiring ongoing Ministerial Intervention, where legislatively possible; — agreed / not agreed

AND

3. agree to the Department referring to you, in a streamlined group submission, all unlawful UMAs in the community, both now and going forward, that require a statutory bar lift under subsections 46A(2) and/or 46B(2) of *the Migration Act 1958* (the Act), to allow them to apply for further BVEs directly with the Department (should they also be an eligible non-citizen); — agreed / not agreed

AND

4. agree to the Department referring to you in streamlined group submissions, both now and going forward, all unlawful UMAs in the community that require your intervention to become eligible non-citizens under section 72 of the Act, to enable them to make valid BVE applications by either; — agreed / not agreed

a) making those referrals in the form of a submission for you to consider granting a Special Purpose Visa (SPV) under section 33 of the Act, valid until midnight the following day – (no administrative detention required); — agreed / not agreed

OR

b) making those referrals in the form of a direct second-stage section 195A submission for you to intervene to grant a Humanitarian Stay (Temporary) (subclass 449) visa (HSTV) for a period of seven days – (administrative detention required to enliven the power); — agreed / not agreed

AND

5. agree to the Department exploring longer term legislative and policy options to improve the management of UMAs in the Australian community, to be presented to you in a future submission. — agreed / not agreed

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date 28/9/2023

Minister's Comments
Condition 8207 should not be applied to the BVE of those who arrived prior to 19/7/2013. Thanks.

Key Issues

1. The purpose of this submission is to seek your agreement to a proposed streamlined administrative approach to re-regularising the immigration status of unlawful UMAs in the community who are currently unable to do so without Ministerial Intervention.

2. The options being provided to you in this submission would allow you to regularise the immigration status of these UMAs immediately. There are however legislative changes which may be possible to reduce the need for Ministerial Intervention. It will take some time to make any regulation changes and will therefore not be an option that can be given immediate effect.

3. Over the past 15 years, there has been no consistent approach to the lifting of statutory bars that affect UMAs or the granting of visas through Ministerial Intervention which would allow a person to become an eligible non-citizen in accordance with section 72 of the Act, for the purpose of making a BVE application.

4. The Department Home Affairs (the Department) is seeking your authority to refer to you unlawful UMAs that fall into different cohorts requiring your intervention under different powers within the Act.

5. Some UMAs and their children are unable to regularise their immigration status through a BVE while they await the outcome of a primary decision, merits review or judicial review in relation to their protection application, Ministerial Intervention request or while they make departure arrangements, other than through Ministerial Intervention.

6. As a result, there is a cohort of UMAs onshore who remain unlawful non-citizens (UNC) who cannot work lawfully and do not have access to Medicare pending status resolution and there is inconsistent treatment of non-citizens in the same caseload.

7. Individuals unable to regularise their status may be at increased risk of harm linked to worker exploitation, lack of access to medical care, avoiding engagement with law enforcement where they are a victim of crime due to their unlawful status due to fear of being detained/re-detained and risk to minor children in their care associated with these risks.

8. This cohort of unlawful UMAs in the community continues to grow as more UMAs have their protection visa application refusals affirmed in merits and judicial review processes. Any associated BVEs cease and due to statutory bars in place or not being an eligible non-citizen, these UMAs are unable to lodge a valid BVE application.

9. The Department is seeking your agreement to the overarching principle that all UMAs in the community should be able to regularise their immigration status by making an application for a Bridging E (subclass 050) visa (BVE) directly with the Department rather than requiring ongoing Ministerial Intervention.

Definitions

10. Under section 5AA of the Act, a person is a UMA if:

    (a) the person entered Australia by sea:

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

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

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

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

11. Section 5AA also operates so that a person who is born in the migration zone to a parent who is a UMA at the time of the person's birth will be a UMA, as long as the person is not an Australian citizen at the time of their birth.

12. UMAs are prevented from making a valid visa application in Australia by several statutory bars. The subsection 46A(1) statutory bar applies to all UMAs. The subsection 46B(1) statutory bar only applies to transitory persons. Certain UMAs are also transitory persons and as such both the subsections 46A(1) and 46B(1) statutory bars may apply at once to some non-citizens (there is a group of transitory persons onshore who arrived between 13 August 2012 and 19 July 2013 whose claims for protection were assessed and processed in Australia). Under subsections 46A(2) and 46B(2) of the Act, Home Affairs Portfolio Ministers have the ability to exercise their personal powers to lift these statutory bars to allow UMAs to lodge an application for a specified subclass of visa. It is also open to Portfolio Minister to determine that these statutory bars are lifted for a specified or indefinite timeframe.

13. Applicants for a Bridging visa, including a BVE, must be an eligible non-citizen as defined in section 72 of the Act. Under section 72 of the Act, a person is an eligible non-citizen if they are a non-citizen who has been immigration cleared or is in a prescribed class of persons or the Minister has determined them to be an eligible non-citizen. Section 172(1)(c) of the Act provides that a person who is refused immigration clearance and is subsequently granted a substantive visa is immigration cleared.

14. Between 13 August 2012 and 31 May 2013, there were several vessels containing irregular maritime arrivals who arrived directly in the Australian migration zone, in a location not declared to be an Australian port of entry. As they did not arrive at an excised offshore place, they are categorised as non-Offshore Entry Persons or Maritime Direct Entry Persons. 'Direct Entry Persons' is not a term that is defined in the Act. Unlawful Maritime Direct Entry Persons in the community are not included in this submission. Ministerial Intervention options for this cohort will be considered in a separate submission s. 22(1)(a)(ii)

15. Currently, there are approximately s. 47F(1) UMAs residing unlawfully in the community. They have all previously been detained under section 189 of the Act. Subsequently, former Portfolio Ministers have intervened in each of their cases under section 195A of the Act to grant a BVE and release them from immigration detention; however, those BVEs have now ceased. An HSTV valid for seven days was granted to only some of these UMAs, at the same time they were also granted a BVE, which made them an eligible non-citizen in accordance with section 72 of the Act. This allowed some of them to be able to make a valid application for a BVE in their own right if the subsections 46A(1) and/or 46B(1) statutory bars were also lifted in their individual cases.

16. The UMAs referenced in this submission cannot lodge valid BVE applications because they have statutory bars in place or they are not an eligible non-citizen. Without Ministerial Intervention, these individuals will remain unlawful in the community, be unable to work lawfully or access Medicare, and will continue to be liable for immigration detention.

Breakdown of groups within the cohort

17. Although the Department estimates there are over s. 47F(1) unlawful UMAs in the community, there are currently only records for s. 47F(1) UMAs residing unlawfully in the community. It is known that there are many UMAs who have given birth to children in Australia but have not notified the Department and hence there is no record of these children currently in departmental systems to be able to determine an exact number. Details of all known clients will be provided in the group submissions but there may be a need for further submissions in the future once any children who are not currently known are bought forward. A summary is at **Attachment A**. Of the s. 47F(1) known unlawful UMAs in the Australian community, this group can be broken down into the following cohorts:

Cohort 1 – UMAs who only require a bar lift under subsection 46A(2) and/or subsection 46B(2) of the Act

18. There are s. 47F(1) known UMAs in the community, who require Ministerial Intervention under subsection 46A(2) and/or 46B(2) to have these statutory bars lifted and allow them to lodge a valid BVE application for a departmental delegate to decide.

19. All UMAs in this cohort are eligible non-citizens under section 72 of the Act as they have been previously granted a HSTV. UMAs in this cohort only require a subsection 46A(2) and/or 46B(2) statutory bar lift to enable them to make a valid BVE application. Ministerial Intervention under subsections 46A(2) and/or 46B(2) does not require the non-citizen to be administratively detained at the time of intervention.

20. Should you agree to the Department referring non-citizens in this cohort to you to consider, the Department recommends that you lift the relevant statutory bars indefinitely for BVE applications only, so that the Department can continue to manage the immigration status resolution outcome for each person.

21. Should you agree to the Department referring non-citizens in this cohort for your consideration, a group submission with all persons identified in this cohort will be referred for your consideration, noting that the Department may then issue the notification of the decisions in a staged manner so as to manage the timeframe of subsequent BVE applications which may be lodged.

Cohort 2 – UMAs who only need to become eligible non-citizens under section 72 of the Act in order to regularise their immigration status

22. There are s. known UMAs in the community, who need to become eligible non-citizens under section 72 of the Act in order to be able to lodge a valid BVE application and regularise their immigration status.

23. In order for these individuals to become eligible non-citizens under section 72 of the Act, you have two options currently available:

    a. You may consider intervening under section 195A of the Act to grant a HSTV valid for seven days. From the point of the grant of the HSTV the individual would become an eligible non-citizen and be able to make a valid application for a BVE in their own right, once the HSTV expires. This is the way in which most other UMAs have become eligible non-citizens in the past. Some children born in Australia to UMA parents have also become eligible non-citizens at birth through Regulation 2.20(11A) of the *Migration Regulations 1994* (the Regulations) – that is the eligible non-citizen status was passed on from the parent to the child, rather than through a substantive visa grant or immigration clearance.

    This option requires non-citizens to be administratively detained under section 189 of the Act in order to enliven your power under section 195A of the Act. As such, there are additional administrative processes to be undertaken by both your office and the Department to arrange the logistics to administratively detain this many people. In order to undertake administrative detention for this number of people a third party location would need to be sourced as no departmental office across Australia has capacity to accommodate more than 10 individuals in a room at a time.

    ...or...

    b. You may choose to grant an SPV under section 33 of the Act for a short defined period. The use of SPVs for this purpose has not been used in the past; however, has been identified by the Department as a viable option open for you to consider using.

    The Department recommends that if you choose to grant SPVs to this cohort that the duration of the visa only be for a short period, preferably midnight the following day.

s. 47C(1)

Notification letters will advise the individuals they have become eligible non-citizens and provide information to them on how to lodge a valid BVE application in order to guide their attention to that pathway. s. 47C(1)

This option does not require the individuals to be administratively detained. As such, there are less administrative processes required by your office and the Department as there is no need to arrange the logistics which would be required if you were to choose the option to intervene under section 195A of the Act.

24. Should you choose the option for UMAs to become eligible non-citizens through the grant of an SPV, the Department would only provide you with the relevant submission to grant the SPV and not ask that you also intervene to grant a BVE. By making these UMAs eligible non-citizens, the onus will then be on them to make a valid BVE application and engage with the Department in regards to their ongoing visa process or departure arrangements.

Cohort 3 – UMAs who require both a bar lift under subsection 46A(2) and/or subsection 46B(2) of the Act AND need to become eligible non-citizens under section 72 of the Act in order to regularise their immigration status

25. There are s. 47F(1) known UMAs in the community, who require both a bar lift under subsection 46A(2) and/or subsection 46B(2) of the Act and who need to become eligible non-citizens under section 72 of the Act in order to regularise their immigration status.

26. This cohort faces a combination of the issues discussed above for the first two cohorts and the Department would refer these cases in the same manner that you so choose to manage those two cohorts.

27. If you agree to the Department referring to you all of the UMAs in *Cohort 1* referenced above, to consider lifting the statutory bars under subsections 46A(2) and/or 46B(2) of the Act, to allow them to apply for further BVEs directly with the Department, we will also include all UMAs in *Cohort 3* in that submission.

28. If you agree to the Department referring to you all of the UMAs in *Cohort 2* referenced above, to either grant an SPV, or to grant HSTVs under section 195A, to allow them to become eligible non-citizens in accordance with section 72 of the Act, we will also include all UMAs in *Cohort 3* in that submission.

Cohort 4 – UMAs who are barred from making any visa application due to the section 501E statutory bar

29. There are s. 47F(1) known UMAs in the community, who can only be managed through Ministerial Intervention under section 195A of the Act due to the section 501E statutory bar being in place, as they have previously had a visa mandatorily cancelled under section 501 of the Act.

30. These UMAs have previously been released into the community on a BVE, due to a decision by a former Minister to intervene under section 195A of the Act. After the initial BVE granted through Ministerial Intervention ceases, these UMAs are unable to lodge a valid application for a further BVE due to the section 501E statutory bar.

31. s. 47C(1)

Cohort 5 – UMAs who are already delegate manageable

32. There are s. 47F(1) known unlawful UMAs in the community, who are able to regularise their immigration status if they engage with the Department and meet BVE eligibility criteria. They do not require any Ministerial Intervention to regularise their immigration status.

33. There is no action required by you in regards to this cohort. This cohort is raised to explain where the remaining unlawful UMAs in the community fall into and show that approximately s. 47F(1) per cent of the population of unlawful UMAs in the community are already delegate manageable; however, for various reasons they have not sought to apply for a BVE of their own accord. The Status Resolution Network is aware of this cohort and continues to encourage these UMAs to engage with the Department to regularise their immigration status.

34. s. 47C(1)

Options for management

Ministerial Intervention under subsections 46A(2) and/or 46B(2) of the Act

35. Subsections 46A(2) and 46B(2) of the Act provide you with the power to lift the subsections 46A(1) and 46B(1) statutory bars which ordinarily operate to prevent a UMA and a transitory person (respectively) who is in Australia, and is either an unlawful non-citizen (UNC) or holds a prescribed temporary visa, from making a valid visa application.

36. You may intervene under subsections 46A(2) and 46B(2) of the Act, to lift the sections 46A(1) and 46B(1) bars if you think it is in the public interest to do so for a specified visa subclass.

37. Should you lift the subsections 46A(1) and 46B(1) statutory bars, the Department will consider the grant of further BVEs on each application, provided the individual continues to meet the relevant criteria for the grant of a BVE.

38. The Department will apply the following conditions, as a minimum, to any BVE granted:
    - conditions to promote engagement – **8401** (report every fortnight) and **8506** (notify new address),
    - conduct related conditions – **8564** (must not engage in criminal behaviour) and **8566** (must abide by Code of Behaviour), and
    - study restricted unless under 18 – **8207** (no study).

Ministerial Intervention under section 195A of the Act

39. Section 195A of the Act provides you with the power to grant a visa to a person in immigration detention if you think it is in the public interest to do so. Your section 195A power is non-compellable which means you are under no obligation to exercise or to consider exercising the power.

40. To enliven your section 195A power, these individuals will need to be administratively detained under section 189 of the Act. The Department would need to refer multiple section 195A group submissions to seek your intervention in these cases. The Department would liaise closely with your office and these individuals in order to arrange a time for you to make such decisions once the individuals are administratively detained. No departmental office has a facility to accommodate a large group administrative detention and will require an external facility.

Grant of a Special Purpose Visa (SPV) under section 33 of the Act

41. SPVs are a class of substantive temporary visas prescribed in the Act. They are designed to provide lawful status to non-citizens who need to travel to, enter and remain in Australia. SPVs apply to persons with prescribed status. The categories of non-citizens to whom SPVs usually apply are quite varied and can include those who are members of the royal family, guests of government, Status of Forces Agreement forces member, foreign naval force members and airline crew members.

42. SPVs are held by operation of law to non-citizens who have a prescribed status or who are declared by the Minister to hold SPVs. Paragraph 33(2)(b) of the Act provides you with the power to declare that a non-citizen is taken to have been granted an SPV and to specify the period that such a visa is valid for. s. 47C(1) [redacted]

43. The Department has identified granting SPVs to UMAs for the purpose of making them eligible non-citizen's in accordance with section 72 of the Act, is the only visa type which can be granted without the need to first administratively detain the individuals to enliven the section 195A Ministerial Intervention power. To make the process as logistically streamlined as possible, the Department would refer all necessary UMAs in one group SPV submission, allowing the Minister to consider the grant of these visas to all necessary individuals at the one time.

44. Although the original policy intent of the SPV was not for this proposed purpose of making UMAs eligible non-citizens, a Ministerial decision to grant these visas to this cohort is legally appropriate. Similar to any Ministerial Intervention decision, a decision by a Minister to grant an SPV must be accompanied by a Statement to Parliament to make such a decision transparently known to all Parliamentarians.

Amendments to legislation

45. The Department has provided you with the options outlined at paragraph 23 in order to make these individuals eligible non-citizens, as these are the only options available under the current legislation.

46. [redacted]

47. S. 47C(1)

48. [redacted]

Consultation – internal/external

49. Status Resolution Network; Legal Group, including Special Counsel; Compliance and Community Protection Policy; Humanitarian Program Operations; People Smuggling Policy and Implementation; Temporary Visas.

Consultation – Secretary / Associate Secretary / ABF Commissioner

50. The Secretary was not consulted on this submission.

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

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

Client service implications

53. For the purpose of administrative detention under section 189 of the Act to enliven the section 195A power, no departmental office has a facility to accommodate a large group administrative detention and will require an external facility. The Department will need to hire conference rooms within the relevant regions or local council offices.

54. There may be a time limited impact on the Status Resolution Network depending on the number of BVE applications lodged should the subsections 46A(1) and 46B(2) statutory bars be lifted as outlined above. Extensive consultation has been undertaken to lessen the resourcing impact should the affected individuals lodge BVE applications within the same timeframe. The Department intends to lessen the impact of all individuals lodging BVE applications at the same time, by staggering the notification of any bar lifts.

Risks and Sensitivities

55. In respect of risk that individuals do not engage with Status Resolution, the Department will propose reporting conditions and relevant departure-related conditions be imposed for those granted a visa. Individuals who fail to comply with visa conditions may be liable for visa cancellation or may not meet the requirements for grant of a further visa. s. 47C(1) [redacted]

56. The Department will use voluntary compliance to encourage departure for those granted a BVE on departure grounds. Through engagement with Status Resolution Officers, individuals will be reminded they must make satisfactory arrangements to depart, the support available through the Returns and Reintegration Assistance Program and the consequences of failing to do so. This will include ensuring individuals understand that non-compliance with visa conditions can impact their eligibility for a visa in future, through to their visa being cancelled and therefore being liable to detention under section 189 of the Act. Immigration compliance including voluntary compliance through to enforcement activity will be critical to manage individuals toward a status resolution outcome, particularly those released from held detention who are on a removal or departure pathway.

57. s. 47C(1) [redacted]

58. UMAs who are granted an SPV will be notified that the visa was granted for the purpose of making them an eligible non-citizen. They will also be advised if they have already had the subsection 46A(1) and 46B(1) statutory bars lifted and that they are now able to lodge a valid BVE application using the Department's online ImmiAccount system.

59. s. 47C(1)

60. 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

61. There are no financial implications. All effort associated with the management of this cohort will be progressed within existing Departmental resources.

Attachments

62. Nil.

Authorising Officer
Cleared by: Shawn Selles A/g Assistant Secretary Status Resolution Branch Status Resolution and Visa Cancellation Division Date: 08/09/2023 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
Special Counsel, Legal Group
First Assistant Secretary Status Resolution and Visa Cancellation Division
First Assistant Secretary Immigration Policy
Assistant Commissioner, Detention and National Removals
Assistant Secretary, Migration and Citizenship Law
Assistant Secretary, Compliance and Community Protection Policy
Assistant Secretary, Temporary Visas
Senior Director, Status Resolution Network
Chief Superintendent, National Removals
Director, International Obligations and Complex Cases
Director, Border and Event Visas
Director, Status Resolution and Removals Policy
Director, Status Resolution Support Programs
Director, Status Resolution Operational Coordination
Director, Status Resolution Program Management and Capability
Director, Community Status Resolution Program Management
Directors, Status Resolution NSW/ACT, Vic/Tas, Qld/SA/NT and WA/CI

Attachment A - Unauthorised maritime arrivals (UMAs) unlawful in the community and not detained

Statistics as at 4 Sept 2023

Table 1: Overview (by cohort)

(persons)	
Delegate manageable	793
Need bar lift under subsection 46A(2) and/or subsection 46B(2)	764
Need to become eligible non citizens under s72 of the Act	136
Need both bar lift under subsection 46A(2) and/or subsection 46B(2) and to become eligible non citizens under s72 of the Act	320
s501E barred	s. 47F(1)
Total	

Table 2: Overview (by immigration process)

Ongoing substantive visa application	108
Ongoing section 501 revocation	s. 47F(1)
Finally determined and have ongoing judicial review[1]	428
Finally determined and have no ongoing immigration matters (excluding MI requests)	1414
Never lodged a protection visa application[2]	94
Total	s. 47F(1)

[1] Note the number of persons refused a Temporary Protection Visa or Safe Haven Enterprise Visa and are at merits review is 4,855 as at 4 September 2023, however, the majority hold an associated Bridging E Visa and are therefore lawful in the community and separate from the unlawful cohort.

[2] Note the section 46A bar was lifted in May 2017 by the then Minister to allow UMAs to lodge their first application for a TPV or SHEV, the bar lift was closed on 1 October 2017.