IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No M64 of 2015**

BETWEEN:

PLAINTIFF M64/2015

Plaintiff

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

DEFENDANT'S SUBMISSIONS

Filed on behalf of the Defendant by:

Australian Government Solicitor
200 Queen Street
Melbourne VIC 3000
DX50 Melbourne

Date of this document: 16 October 2015
Contact: Maria Ngo

File ref: 1700121
Telephone: 02 9242 1315
Facsimile: 02 9242 1333
E-mail: maria.ngo@ags.gov.au

I. PUBLISHABLE ON THE INTERNET

1. The Defendant (the **Minister**) certifies that this submission is in a form suitable for publication on the Internet.

II. STATEMENT OF THE ISSUES

2. The issues that arise for determination in this matter are identified in the questions reserved by Nettle J on 28 August 2015 for the consideration of a Full Court.[1]

3. The central issue is whether the legislative framework that governs Australia's offshore humanitarian program, which makes the grant of global special humanitarian visas dependent on the Minister being "satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa", permits the Minister to promulgate policies for the purposes of guiding individual delegates as to the Minister's intentions concerning the overall size of the humanitarian program, and priorities within it. The Minister submits that there is nothing unlawful about the Minister making, and delegates giving effect to, policies of that kind. Such policies are necessary in order to produce consistency in the implementation of the broadly expressed statutory criteria.

III. SECTION 78B NOTICES

4. The Minister has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notices need be given.

IV. MATERIAL FACTS

5. The facts by reference to which the questions reserved are to be answered are set out in the special case agreed by the parties under rule 27.08 of the *High Court Rules 2004* (Cth) and filed on 28 August 2015 (the **Special Case**).[2]

V. APPLICABLE LEGISLATION AND CHRONOLOGY

6. The Minister accepts the accuracy of the Plaintiff's statement of applicable legislation. The Minister does not seek to add to the Plaintiff's chronology (while noting that some entries refer to claims made by the Plaintiff which are neither relevant nor agreed facts).

VI. ARGUMENT

(A) INTRODUCTION

7. This matter concerns the validity of a decision by a delegate (the **Delegate**) of the Minister to refuse to grant the visa applicants Refugee and Humanitarian (Class XB) Subclass 202 (Global Special Humanitarian) visas. The Delegate was not satisfied that there were "compelling reasons for giving special consideration" to granting the visa applicants

---

1 Special Case Book (**SCB**) 19.
2 SCB 10-19.

permanent visas. Accordingly, the Delegate was not satisfied that the visa applicants satisfied the criterion prescribed in subclause 202.222(2) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**), and refused to grant the visas to the visa applicants under section 65 of the *Migration Act 1958* (Cth) (the **Act**).

8. Before turning to consider the specific questions arising in this matter as to the validity of the Delegate's decision, it is convenient to outline the broader context in which these questions arise, to identify some features of the relevant visa criterion, and to comment on the extent of the evidence as to the Delegate's reasoning.

Australia's response to the humanitarian needs of the global population

9. Since World War II, the Australian Government has sought to respond to the humanitarian needs of the global population through the part of Australia's Immigration Programme known as the "Humanitarian Programme".[3] The Regulations identify different categories of visa with different criteria to give effect to different components of the Humanitarian Programme.[4]

10. Under each component of the Humanitarian Programme (including the Special Humanitarian Programme, which is the component in issue in this proceeding), decisions are made as to how, and to what extent, Australia will respond to the humanitarian needs of the global population as they exist from time to time by selecting from the pool of people with humanitarian needs those who will be invited to resettle in Australia. Those decisions involve the making of evaluative, and essentially political, judgments on behalf of the Australian community. Those judgments necessarily involve balancing numerous competing factors, including the demands of different sections of the Australian community, Australia's role and relationships within the international community, the existence of any particularly pressing humanitarian needs as a result of war or natural disaster, and the financial and other burdens to the Australia community of resettling and integrating the beneficiaries of the programme.

11. To inform the making of these political judgments, each year the Australian Government engages in a comprehensive consultation process with the Australian public, State and Territory Governments, peak refugee and humanitarian bodies, and the UNHCR before deciding the size and composition of the Humanitarian Programme.[5] Following that consultation process, the Minister announces the size of the program and resettlement priorities for the following year as part of the annual budget process.[6]

---

3 SCB 87.
4 SCB 11-12 [6], [8].
5 SCB 14 [12], 87, 148 [5.2].
6 SCB 148 [5.2].

12. In global terms, Australia resettles a comparatively large number of people under its Humanitarian Programme each year.[7] Nevertheless, the huge size of the global population seeking resettlement for humanitarian reasons means that many more applications are received each year than there are places that are available in the Humanitarian Programme.[8]

13. The Subclass 202 visa category gives effect to Australia's "Special Humanitarian Programme", which is directed to applicants who apply offshore,[9] and who are subject to substantial discrimination amounting to gross violation of their human rights. According to the United Nations High Commissioner for Refugees (**UNHCR**), at the end of 2014, there was a global population of approximately 14.4 million refugees and "people in refugee-like situations", and an additional global population of approximately 32.3 million "internally displaced persons" protected or assisted by the UNHCR.[10] It follows that the number of persons who could potentially apply for a Subclass 202 visa far exceeds the number of persons who can realistically be resettled in Australia.

14. In order to address that disparity, the Regulations specify broad and flexible criteria that allow for the making of evaluative judgments by the Minister in implementing the Humanitarian Programme. In particular, subclause 202.222(2) of Schedule 2 makes it a criterion for the grant of a Subclass 202 visa that the Minister is satisfied that there are "compelling reasons for giving special consideration to granting the applicant a permanent visa".

15. That criterion is framed so as to allow for choices to be made between the many people with deserving claims who wish to resettle in Australia. "The number of available places in the Special Humanitarian Programme affects how compelling a case is considered to be".[11] If such choices could not be made, all people who met more objective criteria could claim a "right" to be granted a visa by reason of s 65 of the Act.[12] That would deprive the Government of the ability to mould the size and composition of its humanitarian contribution in accordance with the wishes of the Australian community from time to time.

The applicable visa criterion

16. The form of subclause 202.222(2) that was applicable to the present visa application relevantly provided as follows:[13]

---

7 SCB 13 [11(b)].
8 SCB 138 [71.2].
9 Regulations, Schedule 1, Part 4, item 1402(3)(b).
10 SCB 13 [11].
11 SCB 128.
12 See, e.g., *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at 479-480 [27]-[28] (McHugh J).
13 That reflects the form of the subclause as set out in the *Migration Amendment Regulation 2012 (No 5)* (Cth), as amended by the *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth). The Plaintiff makes repeated

... the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country;

(b) the extent of the applicant's connection with Australia;

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

(emphasis added)

17. There are three related features of the above criterion that are of particular significance in answering the questions reserved in this matter.

18. ***First***, in order for a visa applicant to satisfy the criterion the Minister must form a particular state of mind. The requisite state of mind is a state of satisfaction that "there are compelling reasons for giving special consideration to granting the applicant a permanent visa".[14] The existence of that state of mind is a jurisdictional fact that must exist in order to enliven the Minister's power under section 65 to grant the applicant a Subclass 202 visa.[15]

19. ***Secondly***, having regard to the ordinary meaning of the word "compelling" in its context, the "reasons" must be ones which are apt to "force or drive the decision-maker",[16] or to "urge" the decision-maker "irresistibly",[17] to the conclusion that, subject to the applicant satisfying the other applicable criteria, the applicant ought to be allowed permanently to settle in Australia. To be satisfied that there are "compelling reasons" leading to that conclusion involves an evaluative judgment with an essentially "subjective" element. "[R]easons ... may appear compelling to one person and not to another."[18] The breadth and evaluative nature of the judgment required does not readily lend itself to any

---

reference to the removal of the "concession" that applied to benefit the family members of unaccompanied minors for part of the period since the visa applicants made their application for Subclass 202 visas. That "concession", which was introduced after the application was made (*Migration Amendment Regulation 2012 (No 5)*, Schedule 1, item 12), and repealed before the decision on the application (*Migration Amendment (2014 Measures No 1) Regulation 2014*, Schedule 2), is irrelevant to any issue in this proceeding, given the Plaintiff's explicit acceptance (SCB 19 [33]) that the amendment to repeal the concession was applicable to the visa application.

14 The Minister must actually and affirmatively form that state of satisfaction. See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J); *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 226 [72]-[73] (Heerey, Conti and Jacobson JJ).

15 See, e.g., *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*Malaysia Declaration Case*) at 179 [57] (French CJ).

16 See *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 285 at 289 [21] (Tamberlin, Conti and Jacobson JJ); *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1645 at [17] (Moore J) (upheld on appeal), where his Honour stated that in relation to a power in the Regulations to waive a requirement for sponsorship of a visa if satisfied that there are "compelling circumstances" affecting the sponsor, "the Tribunal must consider whether the circumstances are ... such that they evoke interest or attention in a powerfully irresistible way. It is a way that must be irresistible to the Tribunal ... [P]lainly what the regulation had in mind was that the material reveal circumstances such that the Tribunal would feel overwhelming inclined to exercise the discretion in favour of the applicant ...'.

17 *Paduano v Minister for Immigration* (2005) 143 FCR 204 at 211 [32], 213 [37] (Crennan J).

18 *McNamara v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1096 at [10] (Whitlam J). Cf. *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2008) 166 FCR 428 (Gyles, Stone and Buchanan JJ).

confinement of the matters that may bear on that judgment.[19] Of course, the "Court is not entitled to substitute its views for the Minister's" in relation to this judgment."[20] The Minister has the responsibility, including the political responsibility, for making that judgment.

20. ***Thirdly***, paragraphs (a) to (d) of subclause 202.222(2) describe considerations or factors to which the Minister must have regard in making the overall evaluative judgment required. But those paragraphs are not themselves criteria for a visa. Further, each of those paragraphs require the decision-maker to make further evaluative judgments. For those reasons, it is inapt to speak of a visa applicant "satisfying" paragraphs (a) through (d). The matters in paragraphs (a) to (d) must be considered and, having been considered, there are degrees to which they may influence whether the Minister is satisfied that there are compelling reasons for giving special consideration to granting a permanent visa. The Minister may, for example, find that an applicant who has a close family member in Australia is subject to substantial discrimination in their home country, and yet nevertheless not be satisfied that there are "compelling reasons" for giving special consideration to granting that particular applicant a permanent visa.[21]

The Delegate's decision

21. The Delegate was not satisfied that there were "compelling reason for giving special consideration to granting the applicant a permanent visa".[22] In coming to that conclusion, it is clear that the Delegate considered each of the four specified matters in subclause 202.222(2)(a) to (d). That is apparent from both the terms of the "case notes" produced by the Delegate,[23] as well as the Delegate's letter to the primary visa applicant notifying her of the Decision.[24] Those documents provide a basis to infer that the Delegate accepted that the applicants were "subject to substantial discrimination", that they had a "strong connection to Australia given there is an immediate family member who is willing to support their potential settlement in Australia", and that there was "no other suitable country available for resettlement".[25]

22. The Delegate also acknowledged that the proposer indicated that short-term accommodation, airfares and settlement services would be provided for the applicants.[26] Importantly, however, the Delegate was aware that the Australian Government had "allocated" only 5,000 "places" in the Special Humanitarian Programme for 2014-2015.[27] The Delegate was also aware that, as at 1 July 2014, there were over 45,000 applicants

---

19 Cf. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 502 [330]-[331] (Kirby J).
20 Cf. *Maurangi v Bowen* (2012) 200 FCR 191 at 203 [70] (Lander J).
21 See SCB 129.1.
22 SCB 18 [30].
23 SCB 18 [31], 252.
24 SCB 18 [32], 259.
25 SCB 256, 261.
26 SCB 256.
27 SCB 14 [14], 256, 257, 261.

for Subclass 202 visas awaiting a decision.[28] And the Delegate found that "[m]ost applicants have close family in Australia and have suffered some form of discrimination or persecution" (emphasis added).[29]

23. The Delegate observed as follows in his notification letter to the primary applicant:[30]

> As we can only accept a small number of applicants, the government has set priorities within the Special Humanitarian Program. Only the highest priority applications will be successful because there are not enough visas available. Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time.

24. The "priorities" referred to above, it may be inferred, were the "priorities" as promulgated by the Department of Immigration and Border Protection (the **Department**), which are set out in paragraph 18 of the Special Case. Those "priorities" reflect policies promulgated in the Department's *Procedures Advice Manual 3* (**PAM 3**) and in a "frequently asked questions" document (the **FAQ**).[31] In addition, on 12 December 2013 the Department had made a submission to the Minister in which it recorded its understanding of the Minister's intended priorities.[32] That submission substantially reflected the "policies" as ultimately promulgated. However, there is no evidence that that submission was before the Delegate, or that it had ever been seen by the Delegate, or that it had any bearing on the Delegate's decision.

25. The "priorities" promulgated by the Department indicated that applications proposed by a holder of a Protection (Class XA) Subclass 866 visa (a **protection visa**), or by a person who arrived in Australia as an "irregular maritime arrival" (**IMA**) prior to 13 August 2012, would receive the lowest "priority".[33]

26. The Department's policy guidelines in PAM 3 also relevantly stated:

    26.1. In general, "all applications must be assessed individually".[34]

    26.2. "It is a reality of the global situation that every year many more persons apply for a Class XB visa than Australia has the capacity to accept. From a pool of many applicants, officers must ensure that the limited resettlement places available each year are offered to those applicants for whom there are compelling reasons for resettlement. This is, by necessity, a subjective process".[35]

    26.3. "When assessing the 'compelling reasons' criterion, officers should be aware of the following background: [(a)] the Government's current priorities for resettlement of

---

28 SCB 256, 257, 261.
29 SCB 261. See also SCB 257.
30 SCB 262.
31 Attachments F (SCB 130), G (SCB 135) and H (SCB 147).
32 SCB 15 [18].
33 SCB 15 [18], 150.
34 SCB 151.
35 SCB 138.

persons under the humanitarian program, as announced each year, including the number of visa places available under the refugee and special humanitarian program categories; and [(b)] the current and predicted application rates for persons in the relevant categories. Officers should have regard to this background in determining whether an applicant should be give 'special consideration' for grant of a visa".[36]

26.4. In relation to the fourth specified mandatory consideration – the "capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia" – "The Australian community does not have the capacity to offer resettlement to all persons who seek entry to Australia under the humanitarian program. Officers should consider the stated Government priorities and the size of the program when assessing this factor."[37] "If the applicant has a proposer, officers must consider the level of support available to the applicant from the proposer or other friends, relatives or organisations in Australia in assessing the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant."[38]

27. In this case, the Delegate assessed that he was not satisfied that there were "compelling reasons for giving special consideration to granting the [primary] applicant a permanent visa". It may be inferred that an aspect of the Delegate's reasoning was that the visa application was one that the Minister had indicated ought to receive the lowest "priority". It had that priority because the proposer, being the Plaintiff in this proceeding, was both the holder of a protection visa, and a person who arrived in Australia as an IMA[39] prior to 13 August 2012.[40]

28. However, the Delegate was not required to – and did not – give a statement of his reasons in relation to his decision: see sections 66(2)(c) and (3) of the Act.[41] Thus, while the Delegate's case notes and the notification letter allow inferences to be drawn as to aspects of his reasoning,[42] there is no basis for the Court to infer that those documents comprehensively or precisely set out every aspect of the Delegate's consideration of the

---

36 SCB 138 - 139.
37 SCB 139.
38 SCB 140.
39 At the time of the proposer's entry to Australia, he was designated by the Act as an "offshore entry person": see SCB 10. Following amendments made to the Act by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, and at the time of the Delegate's decision, he was instead designated as an "unauthorised maritime arrival". The expression "irregular maritime arrival" can be taken to have the same meaning.
40 SCB 10-11 [2]-[3]. The material before the Delegate sufficiently evidenced that fact: see SCB 180, 203, 219.
41 See, more generally, *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, recently cited with approval in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 497 [41] (French CJ, Crennan, Bell, Gageler and Keane JJ).
42 See, e.g., *Vishnumolakala v Minister for Immigration and Multicultural Affairs (No 2)* [2007] FCA 594 at [2]-[3] (Finn J). Cf. *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [16]-[17] (Heerey, Stone and Edmonds JJ).

visa applications. In the absence of any duty to provide reasons (including reasons setting out all material findings of fact), it is not an inference "lightly to be drawn" that the Delegate did not consider something simply because that consideration is not recorded in the case notes or notification letter.[43]

(B) QUESTIONS 1 AND 2 – INDIVIDUAL CIRCUMSTANCES OF THE VISA APPLICANTS

29. It is plain that the Delegate considered the capacity of the Australian community to provide for the permanent settlement of all persons who seek to satisfy the criteria for a Subclass 202 visa.

30. The Delegate concluded that the Australian community had the capacity to provide for the permanent settlement of 5,000 Subclass 202 visa holders in the 2014/15 financial year. It was open to the Delegate to make that finding.

30.1. Self-evidently, the capacity of the Australian community to provide for the permanent settlement of Subclass 202 visa holders may depend on matters broader than the provision of accommodation. Inevitably, the acceptance of Subclass 202 visa holders into the Australian community entails the provision of a wide range of public resources and services (language, medical, social security etc.), regardless of whether accommodation for those visa holders might be privately funded or provided.

30.2. Furthermore, the question of the capacity of the Australian community to provide for the permanent settlement of Subclass 202 visa holders also calls for an evaluative judgment: it is not a question that yields an objective answer. In making that judgment, it was open to the Delegate to have regard to and rely on evidence that the Australian Government had decided to "allocate" 5,000 "places" in the Special Humanitarian Programme following a comprehensive consultation process. The Australian Government's decision in this regard did not involve the exercise of any discrete statutory power under the Act, but nor did it need to.[44] Rather, the decision should be understood as representing a judgment on behalf of the Australian community, made following a comprehensive consultation process, as to the capacity of the community to provide for the permanent settlement of a class of persons. It is the best, if not only, evidence relevant to this issue.[45]

---

[43] See, e.g., *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 617 [70] (Gummow J, with whom Heydon and Crennan JJ agreed).

[44] Cf. Plaintiff's submissions at [30]-[31].

[45] A submission from the Department to the Minister in relation to the SHP correctly observed as follows: "[W]e could instruct decision-makers that the primary indicator of the capacity of the Australian community is the Government's annual decision on the size and composition of the Humanitarian Programme. This has been used in decisions made since July 2011. This factor can be considered in relation to the global refugee situation, the limited number of places available under the SHP and the constraints on the Government budget. Decision makers assess whether individual claims against the other factors, combined with the limited capacity of the Australian community, indicate there are 'compelling reasons for giving special consideration to the grant of a visa'.": SCB 129.

31. It was open to the Delegate to consider this issue (i.e., the capacity of the Australian community to provide for the permanent settlement of all persons who apply for Subclass 202 visas) in deciding whether he was satisfied that there were "compelling reasons to give special consideration" to the grant of permanent visas to the visa applicants.

31.1. Paragraph (d) of subclause 202.222(2) requires the Minister to have regard to the capacity of the Australian community to provide for the permanent settlement of "persons such as the applicant". A relevant class of persons of which a visa applicant is a member is, plainly, the class of persons who have applied for the same visa. Paragraph (d) expressly requires the Minister to have regard to the outer limit of the capacity of the Australian community to provide for a class of persons, whereas paragraphs (a) to (c) require the Minister to have regard to certain circumstances of the particular visa applicant.

31.2. Undoubtedly, the Minister may also have regard to the capacity of the proposer or other private individuals or organisations to provide services (such as accommodation) for the particular visa applicant. That is why the "Refugee and special humanitarian proposal" form expressly seeks such information from the proposer.[46] Evidence that a particular visa applicant will receive some support from private individuals or organisations might, depending on the Minister's weighting of other relevant considerations, form part of the basis upon which the Minister could be satisfied that there are "compelling reasons for giving special consideration" to granting that particular applicant a permanent visa.

31.3. But that fact does not deny the ability of the Minister to consider the capacity of the Australian community to provide for the permanent settlement of the wider class of persons who seek Subclass 202 visas. Indeed, it is this intersection between the outer limits of the capacity of the Australian community to provide for a class of persons, and the particular circumstances of an individual applicant within that class, that is the crux of the ultimate question for the Minister in any given case. The question posed is this: having regard to the (limited) capacity of the Australian community to provide for a class of persons including the applicant (being Subclass 202 visa applicants), are there "compelling reasons for giving special consideration" to granting this particular applicant a permanent visa?

32. While the Delegate did consider the capacity of the Australian community to provide for the permanent settlement of all persons who seek to satisfy the criteria for a Subclass 202 visa, it is tolerably clear that he also considered evidence provided in support of the visa application that suggested that the applicants would receive some private support,

---

[46] SCB 182.

including in the form of accommodation. In the notification letter, the Delegate twice recorded that he had engaged in a "careful consideration of all the information you have provided",[47] and added "I assure you that I considered all the information included in your application".[48] Further, in the case notes, the Delegate recorded that the "proposer has provided letters of support",[49] and that "the proposer has indicated they are prepared to provide short-term accommodation, airfares and settlement services for the applicant".[50]

33. The Plaintiff has the legal onus of establishing his assertion that the Delegate did not consider all the evidence that was provided in support of the visa application. "There [is] certainly no burden upon the Minister to demonstrate the positive proposition that the [Delegate] had indeed considered [that evidence]."[51] To discharge that onus, the Plaintiff must prove that it is more probable than not that the Delegate did not consider this evidence. That requires him to demonstrate that the Delegate's repeated statements that he did so were false.[52]

34. The Plaintiff has identified no basis upon which it would be open to the Court to make such a finding. The Court will not "lightly infer" that the Delegate failed to consider the evidence.[53] And there is no basis to draw an adverse inference from the Delegate's case notes or notification letter, which do not purport to represent a comprehensive or precise statement of the Delegate's reasons for his decision, nor a comprehensive or precise description of the process of consideration that led to that decision.[54] The Plaintiff's repeated mischaracterisation of the Delegate's case notes or notification letter as "the Delegate's reasons" must be rejected, at least insofar as that characterisation implies that those documents purported to comprehensively or precisely describe the Delegate's process of consideration.[55] That mischaracterisation infects much of the Plaintiff's argument in relation to this part of the case.[56]

---

47 SCB 260 and 261.
48 SCB 262.
49 SCB 254.
50 SCB 256. Insofar as the Plaintiff takes issue with the use of the adjective "short-term" to qualify the "accommodation" that he had indicated he would be able to provide for the visa applicants (see Plaintiff's submissions at [25]), and even assuming favourably to the applicant that the case notes can be treated as "reasons" (which is denied), that complaint is of a kind deprecated by the Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272: 'The reasons for the decision under review are not to be construed finely with an eye attuned to the perception of error.' ... [T]he reasons of an administrative decision-maker are meant to inform and are not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed." In any case, even if an error was made, it could be at most a factual error of a kind that cannot ground judicial review.
51 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67] (Gummow J, with whom Heydon and Crennan JJ agreed).
52 See, e.g., *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 at [25] (Heerey, Branson and Emmett JJ); *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at 273 [71] (Stone, Foster and Nicholas JJ); *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 448 [53] (Kenny, Griffiths and Mortimer JJ).
53 *Minister for Immigration and Citizenship v MZYZA* [2013] FCA 572 at [30] (Tracey J); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 617 [70] (Gummow J, with whom Heydon and Crennan JJ agreed).
54 Cf. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.
55 Plaintiff's submissions at [28], [32], [43].
56 See Plaintiff's submissions at [24], [26], [28].

35. Furthermore, and in any event, the Plaintiff's assertion that the Delegate made a jurisdictional error because "'capacity' was regarded as the overriding consideration, given that all of the other factors set out in clause 202.222(2) weighed in favour of the visa applicants", is fundamentally misconceived.[57] The Regulations do not specify the weight that is to be accorded to any of the specified considerations by the Minister in forming an assessment of whether he or she feels "compelled" to the relevant conclusion. It is trite to observe that the weight to be accorded to relevant considerations is a matter for the administrative decision-maker.[58] The complaint that the Delegate treated one of the factors as outweighing all the others is a complaint without legal significance. Any suggestion that the Delegate was obliged to engage in some sort of arithmetic "weighing" process by counting the factors in relation to which a "positive finding" had been made must be dismissed. So, too, must any suggestion that the Delegate was obliged to give greater weight to one or more specified considerations over others – i.e., that some of the specified considerations "should have been the focus of the assessment".[59] That is no more than a submission about the merits.

36. Question 1 should be answered as follows:

    (a) No, although the Delegate did construe clause 202.222(2)(d) as permitting him to consider the capacity of Australia to resettle all applicants who applied for subclass 202 visas;

    (b) No; and

    (c) No.

37. Question 2 should be answered "Does not arise". Alternatively, the answer is "No".

(C) QUESTIONS 3 AND 4 – IRRELEVANT CONSIDERATIONS

The number of "places" available in the Special Humanitarian Programme

38. The plaintiff's argument in relation to question 3(a) rests on his characterisation of the Australian Government's decision to "allocate" 5,000 "places" in the Special Humanitarian Programme for 2014-2015 as involving (or being treated by the Delegate as involving) "an informal cap or quota" (emphasis added).[60] The Plaintiff observes, uncontroversially,[61] that the Minister has not exercised the "formal mechanism" under clause 202.226 of Schedule 2 to the Regulations (read with section 39 of the Act) and section 85 of the Act to determine

---

57 Plaintiff's submissions at [28].
58 See, e.g., *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 (Mason J).
59 Plaintiff's submissions at [28].
60 Plaintiff's submissions at [30].
61 SCB 14 [15]-[16].

the maximum number of Subclass 202 visas that may be granted in a specified year.[62] On these premises, the Plaintiff submits that the Australian Government's decision "does not have any direct operation on the visa criteria" for a Subclass 202 visa, and that for the Delegate to "determine 'capacity' by reference to an administratively determined cap or quota was to take into account a consideration that was irrelevant to the application of clauses 202.222(2)(d)".[63]

39. In responding to the Plaintiff's argument, it is appropriate to commence the analysis by observing that the specified consideration in paragraph 202.222(d), as correctly construed by the Delegate, does not produce an effect that is equivalent to the effect that would be produced by the fixing of a "cap" or "quota" under section 85 of the Act.[64]

39.1. If the Minister were to make an instrument under section 85 of the Act to fix the number of Subclass 202 visas that can be granted in a financial year, then the Act (section 39(2)) would operate to produce a single "stark" effect: once the maximum number of visas specified in the instrument had been reached, outstanding applications for Subclass 202 would be taken not to have been made.[65] The criterion in clause 202.226 would never "operate through section 65(1)". Instead, section 39(2) would "intercept" that operation once the maximum number of visas had been granted by producing the effect described above.[66] Accordingly, the single result of the Minister making an instrument under section 85 would be that, once the cap was reached in any given year, all outstanding applications would be deemed not to have been made. Affected applicants would have to commence the process of applying for a visa again (likely doing so year after year, given the disparity between the number of applications and the number of visa grants).

39.2. The effect of clause 202.222(2), including the specified consideration in paragraph (d), is quite different. That criterion only operates "through section 65(1)". Moreover, it operates "through s 65(1)" in relation to each and every application for a Subclass 202 visa that the Minister considers, and not just with respect to applications considered after the "cap" or "quota" is reached. It requires the decision-maker to have regard to the limited capacity of the Australian community (quantified as the

---

62 Plaintiff's submissions at [30].

63 Plaintiff's submissions at [31].

64 This power was examined in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 732 [56]-[57] (Crennan, Bell, Gageler and Keane JJ): "There is one power in the Act for the Minister, by legislative instrument, to fix the maximum number of visas of a class that may be granted in a financial year: the power expressly conferred by s 85 ... Section 39(1) does not confer power on the Minister to make a different legislative instrument. It confers power on the Governor-General to prescribe by regulation a criterion for visas ... which is to operate by reference to any legislative instrument made by the Minister under s 85. Subject to s 39(2), the criterion so prescribed is then one of the criteria given operative effect in the decision-making process by s 65(1)(a)(ii) and (b)."

65 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 732 [58] (Crennan, Bell, Gageler and Keane JJ).

66 Ibid.

number of "places" in the Special Humanitarian Programme) and to consider – in advance of that limit being reached – whether there are "compelling reasons for giving special consideration" to granting this particular applicant a permanent visa.

40. Accordingly, the Plaintiff's implicit suggestion that the Delegate's decision cuts across the particular legislative mechanism in section 85 of the Act cannot be sustained. The imposition by the Minister of a cap or quota pursuant to that section would have a quite different consequence to that which follows from assessing the capacity of the Australian community to provide for the resettlement of persons in part by reference to the annual decisions of the Australian Government. Not only would a cap result in a need for applicants to make repeated applications year after year, but it would prevent the Minister from deciding whether he or she is satisfied that "compelling reasons to give special consideration" exist by evaluating the applicant's individual claims against the (limited) capacity of the Australian community to provide for all Subclass 202 visa applicants. Thus, any suggestion the Delegate made a jurisdictional error because his construction of paragraph 202.222(2)(d) would produce an effect equivalent to that which would be produced by the exercise of the Minister's power under section 85 must be rejected.

41. In any event, even if the effect of paragraph 202.222(2)(d) was similar to that which would be produced by an exercise of power by the Minister under section 85 of the Act (which is denied), it is wholly unclear why that would demonstrate that the Delegate took into account an "irrelevant consideration". The Plaintiff does not appear to assert that paragraph 202.222(2)(d) would, if so construed, be invalid. Nor does he engage in any analysis of the construction of paragraph 202.222(2)(d) that gives any reason to conclude that the legislature has forbidden decision-makers from taking into account evidence as to a judgment made by the Australian Government, following a comprehensive consultation process with the Australian public and relevant representative organisations, when considering the "capacity of the Australian community" to provide permanent settlement.

42. The meaning of paragraph 202.222(2)(d) is reasonably clear. It requires decision-makers to consider the capacity of the Australian community to provide for the permanent settlement of a class of persons including, but not limited, to the visa applicant. The Plaintiff has provided no good reason to read paragraph 202.222(2)(d) as precluding the decision-maker from identifying the common element in that class as being the fact that each member of the class seeks to satisfy the criteria for a Subclass 202 visa, and then to consider the capacity of the Australian community to provide permanent settlement to all members of that class. In considering that question, a decision-maker must have regard to some evidence as to what "the capacity of the Australian community" to provide for the permanent settlement of that class of persons actually is. For the reasons outlined in paragraph 30 above, in making a finding as to that topic it is open to the decision-maker to

treat the judgment made by the Australian Government as to the appropriate size of the Special Humanitarian Programme as the best evidence of that issue.

43. Question 3(a) of the Special Case should be answered "No".

The Australian Government's "priorities" in relation to the Special Humanitarian Programme

44. The Plaintiff's argument in relation to question 3(b) substantially overlaps with his argument in relation to Questions 5 and 6.[67] That argument is addressed below.

45. For the avoidance of doubt, Question 3(b) of the Special Case should be answered "No".

46. It follows that the answer to Question 4 is "Does not arise". Alternatively, if it does arise, the answer is "No".

(D) QUESTIONS 5 AND 6 – THE "PRIORITIES"

47. As noted above, the Delegate referred in his notification letter to the "priorities" that the Australian Government has set within the Special Humanitarian Programme, and it may readily be inferred these "priorities" were the "priorities" as set out in paragraph 18 of the Special Case. The "priorities" relevantly included that applications proposed by someone who held a protection visa, or who arrived in Australia as an IMA prior to 13 August 2012, would receive the lowest "priority".[68]

48. It is tolerably clear that, in assessing whether he was satisfied that there were "compelling reasons for giving special consideration" to granting the visa applicants a permanent visa, the Delegate had regard to those "priorities". The Plaintiff does not affirmatively submit to the contrary, and his suggestion that the Delegate might have applied some "idiosyncratic notion of government 'priorities' within the Special Humanitarian Programme"[69] appears to be based principally on the Delegate's failure to refer expressly to the PAM 3 document in the case notes or the notification letter. That is a matter of no significance given that, as addressed in paragraph 34 above, these documents are not and do not purport to represent a comprehensive and precise statement of the Delegate's reasons or the process of consideration that led to his decision. In the absence of any proper factual foundation for any submission that the Delegate did not have regard to the priorities, Question 5 of the Special Case should be answered "Yes".

49. The real controversy is whether, in having regard to the "priorities" in this case, the Delegate made a jurisdictional error. In particular, the controversy is whether the Delegate erred in

---

67 Plaintiff's submissions at [32].

68 SCB 15 [18], 150.

69 Plaintiff's submissions at [32(a)]. The paraphrasing of the priorities was loose, but it cannot be inferred that a different policy was applied because, as the Plaintiff accepts in footnote 46, had the Delegate applied a policy in the terms literally stated in the notification letter, a different decision would have been made.

having regard to the priorities they were "inconsistent" with the Act and the Regulations, or because the Delegate applied the priorities "inflexibly".

Applicable principles

50. Ordinarily, an administrative decision-maker should treat like cases alike. To act otherwise is to act arbitrarily and contrary to basic notions of fairness and equality.[70] As Deane J explained in *Nevistic v Minister for Immigration and Ethnic Affairs*:[71]

> There are many reasons for the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under the law. Paramount among them is the fact that inconsistency in the treatment of those amenable to the law involves an element of injustice. Particularly where there is competition or correlativity between rights, advantages, obligations and disadvantages, equality of treatment under the law is an ingredient of modern concepts of justice and the rule of law.

51. The importance of policy guidelines in order to promote values such as consistency, rationality and executive governmental control over decision-making has long been recognised.[72] Indeed, as French and Drummond JJ indicated in *Minister for Immigration, Local Government and Ethnic Affairs v Gray*, the Act may reasonably be interpreted as contemplating that policies or guidelines will be developed by the Executive Government so as to promote consistency in the "high volume decision-making" that is required.[73]

52. The importance of the promulgation of, and adherence to, policy guidelines is particularly acute with respect to the determination of applications for Subclass 202 visas. This is an area of extremely high-volume decision-making, which necessarily requires decision-making by a large class of delegates, and where each decision involves the application of visa criteria that call for evaluative judgments that do not yield of objective answers. Indeed, the subjectivity inherent in the criterion in subclause 202.222(2), and the fact that "[r]easons ... may appear compelling to one person and not to another," underscores the importance of adherence to guidelines promulgated by the Executive Government (in this case, by the Department, with the imprimatur of the Minister).

53. Of course, mere consistency is insufficient to ensure lawful decision-making. Adherence to a policy that is incompatible with the legislative scheme may give rise to jurisdictional error. However, if a policy guideline is consistent with the legislative scheme, the delegate will not err by making an evaluative judgment that reflects a general "principle", "value" or "priority" as expressed in it.[74] On the contrary, good public administration demands that delegates

---

70 See, generally, Woolf et al, *De Smith's Judicial Review* (7th ed., 2013) at 616 [11-063] – 618 [11-066].

71 (1981) 51 FLR 325 at 334. See also *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 504 (Kirby P, Priestley and Clark JJA).

72 See, for example, *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 201-202 (Menzies J) and 205 (Windeyer J); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 83 (Mason J) and 116 (Aickin J); *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 639-640 (Brennan J).

73 (1994) 50 FCR 189 at 206.

74 See, e.g., *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 98 (Hill J); *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 418 (Gibbs CJ), 429 (Mason and Wilson JJ).

faithfully apply such policy guidelines. That is so even if it means that certain classes of applications will generally fail.

No error in having regard to the "priorities"

Alleged "inconsistency" of the policy

54. The Plaintiff appears to identify four bases for his assertion that the "priorities" are "inconsistent" with the legislative scheme, such that the Delegate's reliance on them resulted in jurisdictional error.

55. ***First***, the Plaintiff submits that the "priorities" are "directly inconsistent" with the criterion in subclause 202.222(2) because they impose a "gloss" on the criterion.[75] The Plaintiff fixes here on certain sentences in a submission from the Department to the Minister in December 2013, where the Department expressed an "expectation" that visa applicants within "priority 5" would not "proceed to grant" unless there were "exceptionally compelling" or "extraordinarily and highly compelling reasons".[76]

56. This submission lacks merit for numerous reasons:

56.1. There is no basis to infer that the Delegate had regard to the Department's submission to the Minister. That submission preceded the Department's promulgation of the "priorities" in PAM 3 and the FAQ document, and there is no basis to conclude (and certainly not to conclude on the balance of probabilities) that it was read or considered by the Delegate in this case. Neither PAM 3 nor the FAQ document identify what the Plaintiff describes as a "different and higher test".

56.2. In any event, there is no basis in the evidence to conclude that the Delegate in this case "applied" this part of what he says (wrongly) is an element of the relevant policy. Rather, the available evidence in the case notes and the notification letter suggest that the Delegate correctly considered the standard in subclause 202.222(2) – whether there were "compelling reasons for giving special consideration" to granting the applicant a permanent visa.[77]

56.3. Furthermore, and in any event, the relevant sentences of the Department's submission to the Minister express only an "expectation" by the Department as to what the effect of the implementation of the "priorities" would be. Read fairly, they do not purport to substitute a "different and higher test" for persons with "priority 5". Rather, the sentences appear designed to acknowledge that, although it is to be expected having regard to the high volume of applications that applications within the lowest "priority" will rarely proceed to grant, certain applications within "priority 5" may

---

75 Plaintiff's submissions at [35].
76 Plaintiff's submissions at [35], referring to SCB 123.
77 SCB 254, 257, 258, 261.

nevertheless "compel" (i.e., force or drive or urge the decision-maker irresistably) the decision-maker to the conclusion that the applicant ought to be allowed to settle permanently in Australia.[78] Thus, contrary to the Plaintiff's argument, the sentences appear expressly to acknowledge that the "priorities" do not represent, and should not be applied as, an inflexible set of rules that admit of no sensitivity to the particular facts and circumstances of a given case.

57. ***Secondly***, the Plaintiff submits that "the manner in which the [priorities] are framed ... has no relevance to the capacity of the Australian community to provide for the permanent settlement of ... visa applicants".[79] In particular, the Plaintiff asserts that "[t]he policy appears to be designed to visit a punitive consequence on certain [IMAs]", and that "such an objective has nothing to do with the question of capacity for the purposes of clause 202.222(2)(d)".[80] That submission wrongly assumes that the priorities are relevant only to paragraph (d), and not to whether there are "compelling reasons for giving special consideration" to a particular applicant. Further, the assertion that the priorities are "designed" to be punitive is unsupported by evidence, and is wrong. The evident purpose of the priorities is to assist in rebalancing the Special Humanitarian Program, which had come to be dominated by the immediate families of IMAs, so as to have an "offshore SHP and refugee focus" of the kind recommended in the Report of the Expert Panel on Asylum Seekers.[81]

58. The manner in which the proposer came to Australia is capable of rationally relating to the evaluative judgment required by subclause 202.222(2), including having regard to considerations of the kind discussed in the Report of the Expert Panel.[82] Consistently with that report, the "priorities" reflect the Government's decision to refocus the Special Humanitarian Program so that more places within that program are available to the families of persons within Australia who obtained their visas from outside Australia, rather than after travelling to Australia via irregular means.[83] That is a permissible and rational approach to deciding which applicants will receive "special consideration" for permanent settlement.

59. Furthermore, as the Delegate observed in the notification letter, "[m]ost applicants have close family in Australia and have suffered some form of discrimination or persecution". The specified considerations in paragraphs (a) and (b) (read in light of the limited capacity of the Australian community to provide for the resettlement of relevant persons in Australia) will therefore frequently not provide a sufficient basis to distinguish between applicants.

---

78 For example, as the Department's submission notes, "[a]pplicants in extremely vulnerable circumstances, including where there are potentially life threatening conditions". SCB 123.
79 Plaintiff's submissions at [35].
80 Plaintiff's submissions at [36].
81 SCB 61-62.
82 SCB 55 (recommendations 11 and 12), 58-59 [3.13]-[3.16], 60 [3.71], 61-63.
83 SCB 62.

59.1. It is not to be supposed that the Regulations intended that in an area of extremely high-volume decision-making (45,000 applications as at 1 July 2014), and in considering the case of an applicant proposed by a close family member and for whom there is no suitable alternative country for resettlement, the Minister would be required to make extremely fine gradations as to the precise degree of discrimination to which one applicant is subject compared to all others.[84]

59.2. Nor is to be supposed that the Regulations intended that the Minister would be obliged to be satisfied that every one of the many thousands of applicants who are subject to a substantial degree of discrimination in their home country, who are proposed by a close family member, for whom there is no suitable alternative country for resettlement, and who would receive some support from their proposer, must be granted a permanent visa, irrespective of the total number of such applicants.

59.3. The priorities are a mechanism by which the Minister guides his delegates as to matters that assist in deciding which of the many applicants who potentially satisfy subclause 202.222(2) should be considered the most compelling.

60. ***Thirdly***, the Plaintiff simply asserts that subclause 202.222(2) "does not permit the Minister … 'to attach an additional consequence to being an unauthorised maritime arrival beyond those fixed by the Act'".[85] That submission draws on a particular statement by the High Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2)*, taken out of context.[86] It was established by the Court in that case that the scheme of the Act, which includes a general bar in section 46A on an unauthorised maritime arrival making a valid application for a visa, evinces an intention that the regulation-making power would not authorise the prescription of a visa criterion that would entail that any application by an unauthorised maritime arrival when the bar is lifted must necessarily be refused. Section 46A "states exhaustively what visa consequences attach to being an unauthorised maritime arrival"; "[t]he affirmative statements in s 46A of those visa consequences appoint or limit an order or form of things in a way which has a negative force".[87] The criterion in subclause 202.222(2) involves no inconsistency with section 46A of the Act, because that criterion deals only with the "visa consequences" of a person who is not an unauthorised maritime arrival (for an applicant for such a visa must be offshore). There is, therefore, no reason to read down the wide regulation-making power in section 504, read with section 31.[88]

---

84 Cf. Plaintiff's submissions at [45].
85 Plaintiff's submissions at [37].
86 (2015) 89 ALJR 292 at 294 [5].
87 (2015) 89 ALJR 292 at 297 [21].
88 As the Full Court of the Federal Court observed in *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 135 at 141 [20] (Heerey, Finkelstein and Allsop JJ): "The structure of the *Migration Act* is

61. ***Fourthly***, the Plaintiff asserts that the "priorities" are "inconsistent" with the Act, because sections 39 and 85 of the Act "create specific statutory mechanisms for limiting the maximum number of visas of a particular class that may be granted in a financial year".[89] That submission must be rejected, for the reasons outlined in paragraphs 38 to 41 above. But whatever may be the position in relation to the Australian Government's decision as to the number of places in the Special Humanitarian Programme, the setting of the priorities as to the allocation of those "places" clearly does not cut across the operation of sections 39 and 85.

Alleged "inflexible" application of policy

62. The Plaintiff's alternative submission that the Delegate made a jurisdictional error by "treat[ing] the policy as a fetter on the exercise of his discretion" is misconceived.[90]

63. ***First***, the application of the visa criterion in subclause 202.222(2) does not involve the exercise of any "discretion".[91] Rather, it involves the exercise of an evaluative judgment as to whether the Minister is satisfied that there are "compelling" reasons to the conclusion that the applicant ought to be allowed to settle permanently in Australia. If that evaluative judgment is favourable, and the applicant satisfies the other criteria, then the applicant has the right to be granted a visa.

64. ***Secondly***, the "priorities" do no more than express a particular value to inform the making of that evaluative judgment. The "priorities" do not purport to express an inflexible set of "rules" to which "exceptions" might apply. Rather, the "priorities" express values the application of which is expressed to depend on the particular facts and circumstances of a given case. Further, the policy expressly acknowledges that in some cases it may be appropriate to give individual applications higher priority than the "priorities" policy would otherwise indicate.[92]

65. ***Thirdly***, the Plaintiff's complaint that "there is nothing in the Delegate's reasons for decision which reveals any consideration of whether the Government's policy as to 'priorities' within the SHP should not be applied to the particular circumstances of this case" is misconceived. It is misconceived, in part, because in the absence of any submission from the applicant or proposer to the effect that the priorities should not be applied, the Delegate was under no obligation to consider departing from the policy.[93] But further, the submission is again

---

such as to give a central role to the prescription by the Executive of criteria necessary to be satisfied for the grant of a visa. Sections 31 and 65 reflect that."

89 Plaintiff's submissions at [40].

90 Plaintiff's submissions at [41].

91 Cf. Plaintiff's submissions at [41], [42].

92 SCB 150 [7.2 (note)].

93 See, e.g., *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 645 (Brennan J); *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 207 (French and Drummond JJ); *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [33]; *R v Moore; Ex parte Australian Telephone and Phonogram Officers' Association* (1982) 148 CLR 600 at 612, citing with approval

predicated on the assumption that the notification letter can properly be treated as "the Delegate's reasons", such that in the absence from that document of any record of consideration being given to whether there were exceptional circumstances sufficient to justify the grant of the visas notwithstanding the general principles set by the Government[94] means that no consideration was given to that topic. For the reasons outlined in paragraphs 28 and 33 to 34 above, in circumstances where the Delegate was not obliged to – and did not – give a statement of reasons, there is no basis to infer that the Delegate did not do something on the basis that that particular action or thought process is not recorded (or recorded in detail) in the case notes or notification letter. Absent such an inference, the Plaintiff has failed to prove this aspect of his case.

66. Question 5 should be answered "Yes". Questions 6(a) and (b) should be answered "No".

(E) QUESTION 7 – RELIEF

67. Question 7 should be answered "None".

(F) QUESTION 8 – COSTS

68. Question 8 should be answered "The Plaintiff".

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

69. The Minister estimates that presentation of his oral argument will take 1.5 hours.

Dated: 16 October 2015

STEPHEN DONAGHUE
Owen Dixon Chambers West
T: (03) 9225 7919
F: (03) 9225 6058
stephen.donaghue@vicbar.com.au

NICK WOOD
Owen Dixon Chambers West
T: (03) 9225 6392
F: (03) 9225 8395
nick.wood@vicbar.com.au

British Oxygen Co Ltd v Board of Trade [1971] AC 610 at 625 (Lord Reid); *Harts Fidelity Pty Ltd v Deputy Commissioner of Taxation* (1999) 42 ATR 438 at [41] (Kiefel J).

94 Plaintiff's submissions at [43].