IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S10 of 2011

BETWEEN: **PLAINTIFF S10/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S43 of 2011

BETWEEN: **JASVIR KAUR**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S49 of 2011

BETWEEN: **PLAINTIFF S49/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S51 of 2011

BETWEEN: **PLAINTIFF S51/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

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PLAINTIFFS' SUBMISSIONS IN REPLY

Decision to consider exercise of power in certain cases

Consequences flowing from Minister's concession

1. The defendants accept that it is open to the court to infer from the guidelines that the Minister has determined, in advance, the circumstances in which he or she wishes to be put in a position to consider exercising power.[1]

2. If that inference is drawn, it must follow that:

   a) in every case in which a request is properly assessed as giving rise to those circumstances, the guidelines require that the request be forwarded to the Minister; and

   b) the processes for which the guidelines provide are to be applied to *all* non-citizens who make a request to the Minister.

3. Those conclusions must follow because that is the only way in which effect can be given to the Minister's determination that he be put in a position to consider exercising power.

4. Once it is accepted that the Minister has decided that every request must be assessed against the guidelines and, if the request falls within the guidelines it must be forwarded to the Minister, it must also be accepted that the Minister has decided to begin the process of considering those requests under ss 351 and 417.

5. In that regard, it should be recalled that this court has unanimously held that "the power to decide to *consider* the exercise of power" is itself conditioned on the observance of the principles of natural justice.[2]

6. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of the exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers.[3]

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1 Defendants' outline of submissions at [22].
2 M61 at [78].
3 M61 at [78].

7. The foundation for the inference which gives rise to the above conclusions is to be found in the guidelines themselves. The following sections reply to the defendants' submission that the guidelines are not indicative of a decision to consider the exercise of power.

Section 351/417 guidelines

8. The substance of the Minister's guidelines is set out under the bold and highlighted heading "CASES WHICH ARE TO BE BROUGHT TO MY ATTENTION".[4]

9. Immediately beneath that heading, in section 9, the Minister confirms that he "will generally... consider the exercise of [his] public interest powers in cases... which exhibit one or more unique or exceptional circumstances".[5]

10. The instructions provided by the Minister to officers are in mandatory terms and, as to whether those instructions reveal a decision by the Minister to consider the exercise of power in particular cases, the instructions speak for themselves:

> *The procedures set out below are to be followed...* [6]
>
> *If a request for me to exercise my public interest powers in respect of a person is received [and it is an initial request], an officer is to assess that person's circumstances against these guidelines and...*[7]
>
> *... for cases which fall within the ambit of... these guidelines, bring the case to my attention in a submission so that I may consider exercising my power or...* [8]
>
> *... for cases falling outside the ambit of... these guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power.*[9]

11. It is not possible to construe these words other than as a decision by the Minister that every request must be assessed against the guidelines and he will consider exercising power in respect of every initial request which falls within the ambit of the guidelines.

12. Similar but more limited statements appear with respect to repeat requests.[10]

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4 S51 at 720.

5 S51 at 720. The words "I will generally only consider the exercise of power in these cases" means "I will generally consider the exercise of power in these cases and I will generally not consider the exercise of power in other cases".

6 S51 at 724 [13].

7 S51 at 725 [16].

8 S51 at 725 [16].

9 S51 at 725 [16].

10 S51 at 725-726 [17].

Section 48B guidelines

13. The terms of the s 48B guidelines also provide a strong basis for concluding that the process of consideration has begun:

> *These Guidelines are to be used in considering every purported further PV application and/or request for ministerial intervention under s48B.*[11]

14. Where a person has had an application for a protection visa refused, "any further application is subject to s 48A and must be assessed against these guidelines".[12]

15. Further, under sections 173.4, 174.2, 174.3, 175.1 and 175.2 of the s 48B guidelines, if a request meets the criteria set out in those sections, the request must be provided to the Minister "for consideration".[13]

16. There are still other cases in respect of which "the Minister has asked that these cases be assessed under the ministerial intervention powers" and, if such a case meets the specified criteria, "the case should be referred to the Minister for the Minister to consider exercising ministerial discretion under s 48B".[14]

17. Finally, where any request "appears to come within these Guidelines", "the decision maker should refer the case to the Minister's office... for consideration under s 48B".[15]

Section 195A guidelines

18. Similar support for a decision on the part of the Minister to consider exercising power in particular cases is found in the s 195A guidelines.

19. Where cases meet the specified criteria, the Minister has directed that those cases "are to be referred to me for consideration of my detention intervention power".[16]

20. The Minister has again instructed officers, in mandatory terms, about the circumstances in which he will consider exercising power under s 195A:

> *[6.1.1] The procedures set out below are to be followed...*
>
> *[6.2.1] A person's circumstances are to be assessed on an ongoing basis in accordance with case management principles and review practices adopted by the Department. If it is determined ... that the case falls within the ambit of these Guidelines, the case must be brought to my*

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11 S51 at 620 [173.1].
12 S51 at 620 [173.3].
13 S51 at 620-623.
14 S51 at 623 [176].
15 S51 at 624 [178.3].
16 S51 at 748 [4.1.1].

attention in a submission so that I may consider exercising my detention intervention power.[17]

21. A decision to consider the exercise of power may readily be inferred from the above.

Status of the guidelines

22. Requests made to the Minister, and the guidelines against which requests are assessed by officers of the Minister, are and always have been statutory processes.

23. It is convenient to note at this point that, although as the defendants have observed "the cessation of any [bridging visa] granted is not linked as a matter of law to the determination of th[e] request",[18] that was not always the case. Even under the current arrangements, eligibility for a bridging visa is not independent of whether a request for ministerial intervention has been finalised.

24. In the *Migration Regulations 1994* (Cth) as originally made, eligibility for a bridging visa under subclause 050.212(6) was conditioned on whether the request had been "decided":

> *An applicant meets the requirements of this subclause if he or she is the subject of a request to the Minister under section 345, 351, 391, 417 or 454 of the Act (which deal with the Minister's power to substitute a more favourable decision for the decision of a review authority) that has not been decided.*

25. That subclause was amended on 27 October 1998 to include, amongst other things, requirements that the applicant:

> *... is being assessed by an officer against the Minister's guidelines for the identification of decisions in relation to which the Minister may think that it is in the public interest to substitute more favourable decisions; and*
>
> *... has not previously sought, or been the subject of a request by another person for, the exercise of the Minister's power under that section to substitute a more favourable decision for the decision;*

26. The explanatory statement to this amending instrument confirmed that "[e]ligibility under subclause 050.212(6) will no longer be based solely upon a person seeking exercise of the Minister's non-compellable power... and that request being undecided" (No 9 of 1998, F1998B00322).

27. Subclause 050.212(6) was again amended in certain respects on 1 March 2003 (No 10 of 2002, F2002B00355). The explanatory statement provided:

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17 S51 at 750.

18 Defendants' outline of submissions at [31].

The amendments made by this item strengthen the general policy intention that a Subclass 050 bridging visa should be available for grant where the applicant is being assessed by an officer against the Minister's intervention guidelines or where the Minister is personally considering whether to intervene, only in respect of a substantive visa application onshore.

28. The express reference to "the Minister's guidelines" in the text of subclause 050.212(6) persisted until 30 June 2009. It should be noted that both the initial and repeat requests made by Plaintiff S49 were made before this date.[19]

29. Finally, on 1 July 2009, subclause 050.212(6) was amended to its present form to make provision for requests under s 48B of the Act (No 6 of 2009, F2009L02518). The explanatory statement provided:

The effect of the amendment is to allow persons seeking a ministerial determination under section 48B of the Act to be eligible for a Subclass 050 Bridging E (Class WE) visa where the applicant has not previously sought or been the subject of a request by another person for a determination under section 48B or the exercise of the Minister's power under section 345, 351, 391, 417 or 454 of the Act. Applicants who do not fall within this criteria because they have previously sought or been the subject of a determination under section 48B or the exercise of the Minister's powers above must meet the criteria in subclause 050.212(2) that provides the Minister is satisfied the applicant is making, or is the subject of, acceptable arrangements to depart Australia to be eligible for a Subclass 050 Bridging E (Class WE) visa.

30. What the history of these amendments reveals is that, like the requests made to the Minister,[20] the guidelines against which those requests are assessed by officers of the Minister are and always have been statutory processes.

The plaintiffs' interests

31. For three reasons, the assertion that the plaintiffs do not have a sufficient legal right or interest cannot be maintained.

32. *First*, on any view of the 'threshold test', the approach taken must be a broad one,[21] and it has been held on high authority that a person who seeks the discretionary conferral of a right has a sufficient interest to attract an obligation to afford procedural fairness.

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19 Plaintiffs' outline of submissions at [12].
20 Plaintiffs' outline of submissions at [23]-[26], [50](b).
21 M61 at [75].

33. Justices of this court have previously referred to "the almost infinite variety of interests" protected by the principles of natural justice.[22] A sufficient interest has expressly been held to include "reputation" and "status" as well as "social interests".[23]

34. The decision in *Kioa v West* concerned a ministerial decision for the deportation of a person who was a prohibited immigrant. Like the present plaintiffs, the applicant in that case had no substantive right to remain in Australia, or any relevant interest other than in a particular exercise of ministerial discretion.

35. The position with respect to interests in the exercise of ministerial discretion was best described by Brennan J:

> *It is hardly to be thought that a modern legislature, when it creates regimes for the regulation of social interests — licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials — intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy, should be accorded less protection than legal rights.*[24]

36. This court has now confirmed that the test is not limited to "rights in the strict sense" and that a contrast sought to be drawn between prejudice of a right, on the one hand, and a discretionary power to confer a right, on the other, "proceeds from too narrow a conception of the circumstances in which an obligation to afford procedural fairness might arise".[25]

37. This is consistent with the longstanding and widespread body of case law in which a discretionary power to confer a right has been held to attract an obligation to afford procedural fairness.[26] In these cases, it is sufficient that the plaintiffs' interests would have been affected had the power been exercised. Any complaint about whether procedural fairness is owed in those circumstances is properly directed to the content of the obligation to afford procedural fairness rather than its existence.

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22 *Kioa v West* (1985) 159 CLR 550 at 617 (Brennan J).

23 *Kioa v West* (1985) 159 CLR 550 at 582 (Mason J), 616-19 (Brennan J), 632 (Deane J).

24 *Kioa v West* (1985) 159 CLR 550 at 616-617 (Brennan J).

25 M61 at [75].

26 See, for example, *Perron v Central Land Council* (1985) 6 FCR 226; *Peninsula Anglican Boy's School v Ryan* (1985) 7 FCR 415; *Century Metals and Mining NL v Yeomans* (1989) 17 ALD 644 at 648 (French J), *Courtney v Peters* (1990) 27 FCR 404; *El-Sayed v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 22 ALD 767 at 770 (Davies J); *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 588 (Northrop, Miles and French JJ) (considered without criticism in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)); *Herscu v Queensland Corrective Services Commission* [1995] 2 Qd R 481 at 486 (Williams J).

38. It may also be noted for completeness that the publication of guidelines for the assessment of requests for ministerial intervention was capable of giving rise to a legitimate expectation that any requests made would be assessed in accordance with those guidelines (in the sense that the expectation was one which would have been entertained by a reasonable person in all the circumstances).[27] That expectation was also sufficient to attract an obligation to afford procedural fairness, which would be denied if the officer departed from the guidelines without notice.

39. *Secondly*, the modern view is that "[i]t is not the kind of individual interest but the manner in which it is apt to be affected that is important in determining whether the presumption is attracted".[28] On this approach, it is sufficient that "the repository is bound, or is entitled to have regard, to the interests of an individual",[29] and a fortiori when the repository in fact has regard to those interests. That is so with respect to the present cases.

40. *Thirdly*, the only material distinction between the powers relevant to these cases and the powers considered in cases where a discretionary conferral of a right was sought ('application cases') is that the powers in the present cases are non-compellable.

41. In essence, in order to exclude the presumption of procedural fairness, the defendants rely on the presence in ss 48B, 195A, 351 and 417 of words which render consideration of the power non-compellable. Those words are, however, not "plain words of necessary intendment"[30] excluding the obligation and those words do not meet the standard set by this court in other cases.[31] The observance of fair procedures in administrative decision-making should now be treated as one of the "basic rights of the individual" which is not to be taken away by statute in the absence of express language or necessary implication.[32] There is nothing in the extrinsic material pertaining to the making consideration of these powers non-compellable that reveals that it was intended to remove an obligation to accord procedural fairness (not that it would have been sufficient if this intention had been disclosed).

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27 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [32], [35] (Gleeson CJ), [61] (McHugh and Gummow JJ).

28 *Kioa v West* (1985) 159 CLR 550 at 619 (Brennan J).

29 *Kioa v West* (1985) 159 CLR 550 at 619 (Brennan J).

30 *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).

31 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 85 [95] (Gaudron J), 94 [128] (McHugh J), 113 [181] (Kirby J).

32 Stephen Gageler SC, *Impact of migration law on the development of Australian administrative law* (2010) 17 Australian Journal of Administrative Law 92, 103.

42. Contrary to the submission of the defendants,[33] the interests of detainees may also be directly affected. The s 195A guidelines contemplate that immigration detention may be prolonged by the process of seeking ministerial intervention.

43. Paragraph 9.1.4 provides that where "a departmental assessment indicates that a submission with a substantive visa option be prepared, the case should be presented to [the Minister] prior to removal of the person".[34]

44. As was explained in *M61*, the statutory obligation to remove as soon as reasonably practicable, imposed by s 198(2)(c), accommodates the consideration of whether to exercise the power given by s 195A.[35] It must be regarded as accommodating the referral of a case to the Minister in accordance with paragraph 9.1.4 of the guidelines.

45. There being no principled basis for holding that the assessment process under the s 195A guidelines is statutory where a substantive visa outcome is recommended but non-statutory where a substantive visa outcome is not recommended, the latter should be held to be a statutory process as well.

Statutory executive power

46. The defendants submit that the actions of departmental officers in administering guidelines cannot be characterised as actions under and for the purposes of the Act.

47. There is, of course, another Act under and for the purposes of which the officers may be regarded as having administered the guidelines.

48. As the defendants acknowledge,[36] the departmental officers are employees of the Executive Government under the *Public Service Act 1999* (Cth), to whom duties have been assigned by the Secretary pursuant to s 25 of that Act. Insofar as those employees exercise "the executive power of the Commonwealth", as submitted by the defendants,[37] they must be exercising statutory executive power pursuant to an implied authority to do so granted by the *Public Service Act*.

49. There are no words of "plain or necessary intendment" such as to exclude an obligation to afford procedural fairness in the exercise of that power. It follows that public servants, in the course of carrying out duties and functions assigned to them under the *Public Service Act,* are required to afford procedural fairness to individuals whose rights or interests might be affected by the carrying out of those duties.

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33 Defendants' outline of submissions at [30].
34 S51 at 752.
35 M61 at [71].
36 Defendants' outline of submissions at [24].
37 Defendants' outline of submissions at [24].

Nature and scope of executive power

50. There is a further reason why the assessments carried out by departmental officers must be regarded as occurring under and for the purposes of an Act. The defendants' submissions concerning executive power proceed upon an incorrect assumption.

51. Despite the longstanding view of Alfred Deakin to the effect that the executive power of the Commonwealth extends to every matter to which its legislative power extends,[38] the better view is that the Commonwealth executive power is more closely circumscribed and does not extend to those matters unless they are the subject of valid legislation.[39]

10 52. It follows that the executive power does not necessarily extend to all of the capacities of a natural person. There are, for example, several common law capacities of a natural person that the Commonwealth does not possess and cannot possess. It does not possess a right to life or liberty. It has no legally recognised reputation and cannot be defamed. It cannot bind itself by unilateral deed (in the domestic sphere).

53. In those circumstances, there is no reason to suppose *a priori* that the Commonwealth possesses *any* of the capacities of a natural person.[40] No artificial legal entity has those capacities in the absence of an express or implied grant.

54. When regard is had to ss 61, 64 and 67 of the Constitution, and to the evident purpose of Ch II of the Constitution, it emerges that there are only three matters with respect to
20 which the executive power of the Commonwealth may be exercised:

a) the execution and maintenance of the Constitution;

b) the execution and maintenance of a law of the Commonwealth; or

c) a matter with respect to which, by reason of necessary constitutional implication, the Executive Government of the Commonwealth must be able to exercise power.

55. There being no constitutional provisions or implications relevant to the four cases before the court, it follows that, to involve an exercise of executive power, such

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38 *Vondel* opinion of 12 November 1902: "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, vol 1: 1900-1914* (1981) 129-135.

39 *Ruddock v Vadarlis* [2001] FCA 1329 at [191]-[192] (French J).

40 The view of Griffith CJ in *Clough v Leahy* has been disapproved by members of this court: *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 88-89 (Mason J), 155-156 (Brennan J).

inquiries as were made by departmental officers could only have been made in the execution of laws of the Commonwealth, being ss 48B, 195A, 351 and 417 of the Act.

56. Alternatively, even if the orthodox view is adopted, the officers involved in these cases were not, in any event, exercising a mere capacity or power of inquiry. The power of inquiry, in the sense used by the defendants, is the capacity of a natural person to ask questions. The officers responsible for assessing requests against ministerial guidelines played a far greater role in the decision-making process of the Minister than would have been the case had they merely asked questions.

57. Each officer was required independently to exercise his or her own discretion, to weigh conflicting evidence and to draw his or her own inferences. They were also required to consider questions of law, such as the application of relevant treaties. It was the departmental officers who, in the first instance, were responsible for deciding whether a particular request came within the guidelines. Far from involving a mere capacity to inquire, those tasks are the hallmark of administrative decision-making.

58. For these reasons, the inquiries are properly to be regarded as having been carried out under and for the purposes of the Act.

Denials of procedural fairness

59. It is convenient to make some general observations in reply at the outset.

60. First, at no point in the defendants' submissions do they grapple with the simple point that in none of these cases did the Minister consider himself bound by the rules of procedural fairness. In Plaintiff S10 and Kaur there was also no consultation process between the department and the plaintiff prior to the department finalising its assessment of the plaintiff's circumstances against the guidelines.

61. Secondly, the relevant inquiry under the intervention powers is very broad. This is the first occasion on which Australia's international obligations (including non-refoulement obligations) under the CAT,[41] the ICCPR[42] and the CROC[43] are able to be considered.

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41 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85; 1989 ATS 21 (entered into force 26 June 1987).

42 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171; 1980 ATS 23 (entered into force 23 March 1976).

43 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3; 1991 ATS 4 (entered into force 2 September 1990).

62. Both the s 351/417 guidelines[44] and the s 48B guidelines[45] require those international obligations to be considered.

Plaintiff S10 – s 48B initial request – RRT's findings and error of law

63. The defendants submit that there is nothing to suggest that the officer relied on the RRT's findings about state protection, or a particular understanding of those findings, in assessing Plaintiff S10's request.[46]

64. However, it is for the defendants to show cause why the relief sought should not be granted, and in the absence of any evidence to the contrary, the appearance of those findings in the only record produced by the officer is itself sufficient to sustain a conclusion that the officer had regard to those findings in assessing the request.

65. The defendants submit that the RRT's central finding was that Plaintiff S10 was not credible and that "while it stood" questions of state protection did not arise.[47]

66. If that was the approach taken by the officer, the officer misconceived the nature of the inquiry required to be undertaken. As previously explained, the inquiry under s 48B (public interest) is different to and broader than the inquiry undertaken by the RRT (protection obligations under the Refugee Convention). The s 48B guidelines expressly required the officer to consider Australia's non-refoulement obligations under the CAT and the ICCPR, being obligations which were not able to be considered by the RRT.[48]

67. Plaintiff S10's claims (which expressly referred to the probability of torture and execution) enlivened those obligations.[49] The officer failed to consider them.

Plaintiff S10 – s 48B initial request – letter from Nazim Union Council

68. The defendants submit that the conclusion reached by the officer (that there was no new evidence) was obviously open on the known material.[50]

69. It is hardly a fine distinction based on language to omit reference to a claim by the Nazim Union Council that the Taliban were continuing to actively look for the

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44 S51 at 721-722.
45 S51 at 623-624 [177.1]. Decision-makers "should ... ensure that their consideration is consistent with Australia's international obligations to prevent refoulement".
46 Defendants' outline of submissions at [43].
47 Defendants' outline of submissions at [44].
48 S51 at 623-624 [177.1].
49 S10 at 365-366.
50 Defendants' outline of submissions at [45].

Plaintiff in circumstances where his whole case turned on new material demonstrating that he had a well-founded fear of being persecuted if he was returned to Pakistan.

70. It was a serious omission in the summary of the Nazim Union Council letter (which was not put in its original terms to the Minister) to omit those words. The omissions of those words simply changed the meaning of the letter. The letter then became a mere notation to the effect that because three family members had died, the plaintiff was in fear of returning to Afghanistan. That is a very different proposition to what the letter really contained which was three relatives had died and the Taliban were actively looking for the plaintiff and therefore he feared for his life on his return.

71. There was no reference in the officer's record to the fact that the Nazim Union Council letter came into existence after the RRT decision. Rather, as the defendants' submissions sought to emphasise,[51] the focus of the officer's inquiry appeared to be on the acceptance of circumstances occurring before the RRT decision.

72. Contrary to that approach, however, the guidelines required the officer to focus on new material that had not been considered by the RRT (such as the entirety of the Nazim Union Council letter) which might engage Australia's international obligations and which had not been considered during the previous review process.

73. The facts are that the decision of the RRT was made on 22 February 2008.[52] In his s 48B request, the plaintiff claimed that the situation in Pakistan had worsened since the RRT's decision.[53] The letter relied on by the plaintiff came into existence on 12 August 2009.[54] The letter was not before the RRT and it evidenced the plaintiff's claim: "the Talibans are in search of [Plaintiff S10] ... when the Talibans find [Plaintiff S10], they will kill him".[55]

74. It follows that it could not have been open to the officer to conclude that there was "no new information or evidence before the department to contradict the RRT's findings" or that there was "no information to indicate that [Plaintiff S10] will be differentially treated by the authorities in Pakistan". Those conclusions involved a denial of procedural fairness.[56]

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51 Defendants' outline of submissions at [42]-[43].
52 S10 at 167.
53 S10 at 196 U-V.
54 S10 at 237.
55 S10 at 237.
56 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 588 (Northrop, Miles and French JJ)

Plaintiff S10 – s 48B initial request – country information

75. The defendants submit that the question of state protection had been canvassed before the RRT,[57] but it must be recalled that, contrary to the officer's description of the RRT's findings, the RRT was not satisfied that Plaintiff S10 would be able to obtain effective state protection.[58] It was therefore incumbent on the officer to inform the plaintiff if country information not in his possession would be relied on to come to a different conclusion.

76. The plaintiff has never contended that the s 48B conclusions were applied in the s 417 assessment "to the exclusion of any independent consideration".[59] The plaintiff's case is that the s 48B conclusions were plainly relevant to the assessment of the plaintiff's case under s 417, were adverse to the plaintiff, were taken into account by the officer but were not exposed to the plaintiff for comment.

77. Further, the country information known to the plaintiff was not capable of supporting the adverse conclusion reached. The report relied upon by the plaintiff stated: "Police routinely engage in crime, excessive force, torture and arbitrary detention; extort money from prisoners and their families; accept bribes to file or withdraw charges; rape female detainees; and commit extrajudicial killings".[60] The adverse conclusion reached by the officer was: "Pakistan has a functioning police, security, and judicial establishments."[61]

78. Whether or not the plaintiff was entitled to the full panoply of common law natural justice, fairness required that the plaintiff be informed of the nature and content of adverse material,[62] especially where there has been a change in circumstances. A majority of this court has held that a failure to disclose the substance of adverse country information amounts to a denial of procedural fairness.[63]

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57 Defendants' outline of submissions at [48].
58 S10 at 182 C.
59 Defendants' outline of submissions at [50].
60 S10 at 260 N-O.
61 S10 at 368 L.
62 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), approving *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 588 (Northrop, Miles and French JJ).
63 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [30] (Gleeson CJ), [64] (Gaudron J), [133]-[135] (McHugh J).

Plaintiff S10 – s 417 initial request

79. For the reasons given above, the plaintiff maintains his submission that the denials of procedural fairness which tainted the s 48B decision also affected the s 417 decision.

Kaur – s 351 repeat request

80. The defendants seek to emphasise that it was open to the assessing officer to find that the plaintiff's request did not raise new substantive issues. That conclusion may have been open as a matter of law, but the officer was nevertheless required to afford the plaintiff procedural fairness in coming to that conclusion. It was not a conclusion which was "obviously" open on the known material.[64]

81. The failure of the assessing officer to refer to Justice Jacobson's finding that the letter was 'confusing' is of particular importance in circumstances where that finding was an important new development in the contest that had been occurring between the department and the plaintiff, during which the department had on two occasions failed to persuade federal judicial officers that its letter was not confusing.

82. The true position is that it was not at all obvious that the assessing officer would conclude that no "new substantive issues" were raised in circumstances where two federal judicial officers had rejected the basis upon which the department had assessed the plaintiff's initial request.

83. Those issues brought Ms Kaur's case within the s 351 guidelines, either by the public interest criteria or the criteria relating to referral by a review tribunal.

Plaintiff S49 – s 417 repeat request – nationality

84. The defendants submit that the plaintiff should have known that his identity and nationality were critical issues in the assessment of his requests.

85. So much may be accepted. But the plaintiff's claim is that the assessing officer was only satisfied that he was Indian because another officer had told her that the Indian authorities recognised him as Indian.[65] That opinion was based on the fact that the Indian authorities had previously issued the plaintiff with a travel document.[66]

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64 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [29] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), citing *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 (Northrop, Miles and French JJ).

65 S49 at 290 K-L.

66 S49 at 290 H-I, K-L.

86. There can be no real dispute that the opinion was adverse to the plaintiff's claim and constituted information sourced from a third party.

87. Had the plaintiff been informed of that adverse opinion, he could have pointed out that the previous travel document had been issued on a document that purported to be an Indian birth certificate,[67] and that the department itself had subsequently determined that the Indian birth certificate was not genuine.[68]

88. In those circumstances, the plaintiff could have made enquiries of the Indian authorities to ascertain whether they knew the birth certificate was not genuine and whether they still held the view that the plaintiff was Indian.

10 89. Having been denied that opportunity, the plaintiff was denied procedural fairness.

Plaintiff S49 – s 417 repeat request – travel document

90. The way in which the procedural fairness ground has been advanced by the plaintiff in this case is narrower than the incorrect characterisation of the issue by the defendants in paragraph 82. The plaintiff says that the particular information contained in the submission to the Minister, that he would be able to be removed to India within two weeks and easily obtain an Indian travel document, was a new piece of information which had never been put to him. He was not given an opportunity to comment on that information.

91. It is no answer to that denial of procedural fairness to say that the information
20 appeared under the heading "Removal/Departure arrangements" in the submission to the Minister. There is no way of knowing whether the Minister took that information into account in assessing whether to exercise the power to grant a visa. Indeed, it was obviously relevant to the question of whether the Minister ought to intervene in circumstances where the plaintiff was claiming that he could not return to India and therefore he needed a visa to prevent him from being in limbo.

92. It is artificial to draw a distinction between such critical information based on where it appears in the scheme of the minute which went to the Minister in relation to whether or not he would exercise his power under s 417 of the Act.

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67 *Kumar v Minister for Immigration and Citizenship* [2008] FMCA 1099 at [164] (Scarlett FM).
68 *Kumar v Minister for Immigration and Citizenship* [2008] FMCA 1099 at [62], [127] (Scarlett FM).

Plaintiff S49 – s 48B repeat request – country information

93. Paragraph 85 of the defendants' submissions seeks to exclude country information from the ambit of procedural fairness on grounds similar to those found in s 424A(3)(a) (information not specifically about the applicant).

94. There is no warrant for reading such a restriction into the requirements of procedural fairness at common law. Plainly the country information was material which was used in reaching the decision adverse to the plaintiff that he did not meet the guidelines. It was not at all clear that the department "would do its own research on the subject and come to its own view"[69] without affording the plaintiff procedural fairness.

95. The plaintiff should have been put on notice of that information and invited to respond.

Plaintiff S51 – s 195A

96. The defendants submit that access to power under s 417 removed the plaintiff's case from the ambit of the s 195A guidelines and justified non-referral of the plaintiff's case. That submission misapprehends the basis upon which the plaintiff was assessed in November 2009.

97. The record referred to[70] an assessment carried out by International Health and Medical Services (IHMS) dated 20 September 2009 and a STARTTS[71] report dated 23 November 2009. The case officer concluded:

> *[Plaintiff S51] is likely to be in an IDC for a considerable length of time with no other visa pathway available to him;*
>
> *[Plaintiff S51] has been diagnosed by STARTTS as having PTSD and if detained for an indefinite period, he is at risk of deteriorating further and developing chronic depression and a more complex form of PTSD.*[72]

98. On the correct analysis of that assessment, the criterion in the s 195A guidelines which had been assessed as being met was the first bullet point in section 4.1.1:

> *The person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.*

99. It follows that the availability of some "other intervention power" was not relevant.

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69 Defendants' outline of submissions at [85].
70 S51 at 218.
71 Service for the Treatment And Rehabilitation of Torture and Trauma Survivors.
72 S51 at 219.

100. The defendants also submit that the plaintiff had no right to be heard in relation to any part of the assessments carried out under s 195A.

101. The correct position is that the plaintiff's entitlement to be heard derived from the fact that the departmental officers were exercising a statutory or executive power conditioned on the observance of principles of natural justice. That is the premise upon which this part of the case must proceed.

102. The fact that the Minister had decided not to consider requests made directly by detainees, and had instead decided that he would consider requests initiated by the department, cannot be regarded as having so attenuated the content of the obligation to afford procedural fairness that the plaintiff was never entitled to be heard in any circumstances.

103. That decision did not reduce the extent to which the plaintiff's interests were affected by the exercise of power and, as has already been pointed out,[73] the s 195A guidelines contemplate the prolongation of detention in cases where an assessment recommends a substantive outcome.

Plaintiff S51 – s 48B initial request

104. The defendants' submissions are based upon the premise that a request under s 48B should be understood as a continuation of a procedure before the Refugee Review Tribunal. The plaintiff contends that the process is a separate process, before a separate decision-maker and relating to a separate source of power in the *Migration Act*. The process is also broader and different in relation to its criteria. The plaintiff's entitlement to an opportunity to comment upon adverse material, including the drawing of conclusions that are not obviously open, is not circumscribed by the fact that he had participated in the earlier processes.

Plaintiff S51 – s 417 initial request

105. The defendants posit a view that procedural fairness is owed only in respect of adverse material on a "critical issue". No authority for this proposition is cited. The officer relied upon material that was adverse to the applicant's claims about his health in advising the Minister that he was "fit to travel". It cannot be said that the plaintiff's (alleged) fitness to travel was not considered by the Minister in the balance of deciding whether or not to exercise the power under s 417. It is enough that the denial of procedural fairness went to an issue that formed part of the mix of factors weighed

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73 See above [21]-[45].

up by the Minister. Although not involving a credibility issue, the point made by Gleeson CJ in *Aala*,[74] is equally applicable here:

> *It cannot be concluded that the denial of that opportunity made no difference to the outcome of the proceeding. ... It is possible that, even if the prosecutor had been given an opportunity to deal with the point, the Tribunal's ultimate conclusion would have been the same. But no one can be sure of that.*

106. The plaintiff should have been given an opportunity to comment both upon the material provided by his doctor (which appears to have been mistaken) and also from country information concerning the availability of treatment in Nigeria. The court should not accept the defendants' invitation to assess how important this adverse material was in the mix of factors considered by the Minister.

107. The defendants submit that the plaintiff's submissions concerning the evidence of integration issue (see S51 submissions in chief at [53]-[56]) relies upon characterising the absence of such evidence as the principal reason for recommending that intervention was not appropriate (see defendants' submissions at [107]). While the plaintiff did characterise the issue in that way (given the terms of the officer's submission to the Minister), it is not essential to the plaintiff's argument that it be the principal reason. This seeks to further limit procedural fairness from the defendants' "critical issue" analysis now to a "principal" issue limitation. The plaintiff contends that procedural fairness is not limited to critical issues or principal reasons.

108. It is enough that the plaintiff was not given an opportunity to address what was an issue, by reason of the officer's correspondence (as noted in the plaintiff's submissions in chief).

Relief

109. In respect of mandamus, certiorari and injunctions, the plaintiffs maintain their principal submissions. It should be noted that the defendants appear to accept that, at least in the case of Plaintiff S10, certiorari may have some utility.[75]

110. The grant of declaratory relief does not require the presence of "extraordinary factors"[76] and each plaintiff has a real interest in raising the questions to which the declaration would go.[77]

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74 *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, at [4]

75 Defendants' outline of submissions at [113].

76 Defendants' outline of submissions at [114]; cf *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

77 M61 at [103].

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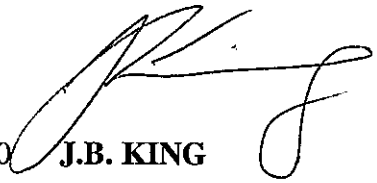

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