HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

Mounib Ismail
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

DEFENDANT'S SUBMISSIONS

Part I: Certification

1. These written submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The plaintiff claims that a decision made by the defendant's delegate to refuse to grant the plaintiff a visa under s 501(1) of the *Migration Act 1958* (Cth) is affected by jurisdictional error. In respect of that claim, the following issues arise:

   a. whether the defendant's delegate failed to comply with paragraph 8.3(1) of *Direction 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*;

   b. whether, for the purposes of applying paragraph 8.3(1) of the Direction, the delegate was obliged to make inquiries of the plaintiff and failed to do so;

c. whether, for each of the considerations in paragraphs 8.1, 8.2 and 8.4 of the Direction, the Direction permitted the delegate to take into account, and give weight to, family violence committed by the plaintiff and, if so, whether the Direction is invalid in that regard;

d. whether the delegate took into account family violence committed by the plaintiff for a punitive or other irrelevant purpose and, if so, whether the Direction impermissibly required the delegate to do so;

e. whether the delegate was obliged to weigh the plaintiff's personal circumstances in taking into account the consideration in paragraph 8.4 of the Direction and, if so, whether the delegate failed to do so.

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

3. The defendant considers that no notice is required to be given in accordance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The plaintiff was born in Lebanon on 15 January 1989.[1]

5. The plaintiff first arrived in Australia on 3 May 2010 as the holder of a student visa.[2] He remained in Australia between that time and 13 April 2023, save for some short periods of time spent overseas.[3]

6. In the period from 8 December 2010 to 26 March 2021, the plaintiff was convicted of numerous offences.[4] The plaintiff has not disputed that, for the purposes of s 501 of

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1 Parties' statement of agreed facts dated 28 June 2023, [1]. See also AB 28 [3] and 63.
2 Statement of agreed facts, [2]. See also AB 300-301.
3 Statement of agreed facts, [2]. See also AB 300-301.
4 Statement of agreed facts, [2]. See also AB 63-68.

the *Migration Act 1958* (Cth), he does not (and did not at all relevant times) pass the character test.[5]

7. On 13 April 2022, the plaintiff departed Australia and travelled to Lebanon.[6] At that time, he held a partner visa, which had been granted on 17 August 2015.[7] The effect of s 82(6) of the Migration Act was that, upon departing Australia, that visa ceased to be in effect.[8] The plaintiff therefore had no visa permitting him to return to and enter Australia.

8. On 15 April 2022, the plaintiff applied for a Return (Resident) (Class BB) (Subclass 155) visa.[9] The plaintiff subsequently lodged various documents in support of the visa application.[10]

9. On 30 August 2022, an officer of the Department of Home Affairs sent to the plaintiff a "Notice of intention to consider refusal of your visa application under s 501(1) of the [Act]".[11] The plaintiff, by his legal representative, submitted documents in response.[12]

10. On 28 September 2022, a delegate of the defendant decided to refuse to grant the visa to the plaintiff, pursuant to s 501(1) of the Migration Act.[13] The plaintiff was notified of the delegate's decision by letter dated 29 September 2022.[14] A written statement of reasons for the decision (**D**) was also provided.[15]

11. The delegate was not satisfied that the plaintiff passed the character test (AB 34, D [9]). The delegate therefore considered whether to exercise the discretion to refuse to grant

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5 See, for example, AB 43 [5]-[9].
6 Statement of agreed facts, [5]. See also AB 28 [4] and 300-301.
7 Statement of agreed facts, [4]. See also AB 300-301.
8 Statement of agreed facts, [5].
9 Statement of agreed facts, [6]. See also AB 294-299. At the time of making the visa application, the plaintiff did not declare his past convictions. See also AB 123-125.
10 See generally AB 106-278.
11 Statement of agreed facts, [7]. See also AB 98-105.
12 Statement of agreed facts, [8]-[10].
13 Statement of agreed facts, [11].
14 Statement of agreed facts, [11]. See also AB 35-38.
15 Statement of agreed facts, [11]. See also AB 40-62. On 30 September 2022, the plaintiff's partner applied to the Administrative Appeals Tribunal for merits review of the delegate's decision. On 26 October 2022, that application was withdrawn. On 31 October 2022, the plaintiff applied to the Tribunal for review of the delegate's decision. On 23 December 2022, the Tribunal found that it did not have jurisdiction to consider the plaintiff's application. See statement of agreed facts, [12]-[13]. See also AB 334-344.

the plaintiff the visa (AB 44, D [10]ff). In doing so, the delegate had regard to *Direction 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*. Direction 90 is a direction given by the Minister under s 499 of the Migration Act.

12. In relation to the primary considerations in the Direction, the delegate's findings were, in summary, as follows.

13. Protection of the Australian community. The delegate found that the plaintiff's offending conduct was "very serious" in nature (AB 48, D [33]). The delegate referred to the frequency of the plaintiff's offending and its cumulative impact, and found that it displayed a disregard for Australian laws (AB 48, D [32]). The delegate considered that any future offending by the plaintiff of a similar nature would have the potential to cause "physical and/or psychological harm to members of the Australian community" (AB 49, D [35]). The delegate was satisfied that, on balance, there remained a likelihood that the plaintiff would reoffend (AB 52, D [49], [51]). The delegate found that the need to protect the Australian community from criminal or other serious conduct weighed significantly in favour of visa refusal (AB 52, D [52]).

14. Family violence. The delegate found that the plaintiff had engaged in conduct constituting family violence (AB 53, D [58]) and that that family violence should be regarded as serious (AB 55, D [67]). The delegate found that this consideration weighed significantly in favour of refusing to grant the visa (AB 55, D [67]).

15. Best interests of minor children. The delegate referred to four minor children mentioned in materials submitted by the plaintiff with the Department (AB 55, D [69]-[73]) The delegate accepted that those children might be disappointed by a decision to refuse to grant the plaintiff a visa, but found that the extent to which their best interests would be affected by such a decision was limited (AB 56, D [74]). The delegate nonetheless treated the matter as a primary consideration and attributed it some weight in favour of a decision not to refuse to grant the plaintiff a visa (AB 55-56, D [69], [74]). The delegate also noted that the plaintiff had listed the name "Mariam Chakik" as another minor child in a personal circumstances form lodged with the Department, but had provided no further information about that person, including their age. The

delegate was "unable to determine if there would be any effects [of visa refusal] on Mariam Chakik, if indeed she is a minor child" (AB 56, D [75]).

16. Expectations of the Australian community. The delegate observed that the Australian community, as a norm, expects the Australian government not to allow non-citizens who have engaged in serious conduct, or where there is an unacceptable risk that they may do so, to enter or remain in Australia (AB 56, D [76]). The delegate found that the plaintiff's past conduct raised serious character concerns, and the Australian community's general expectations applied (AB 56, D [77]). The delegate attributed significant weight to this consideration in favour of visa refusal (AB 56, D [79]).

17. In relation to the other considerations identified in the Direction, the delegate's findings were, in summary, as follows.

18. Extent of impediments in Lebanon. The delegate took into account the plaintiff's statements about impediments he was facing in Lebanon (AB 57-58, D [83]-[89]), including in relation to: health problems and emotional, financial and practical hardship (AB 57-58, D [85]-[88]); the uncertain security situation in Lebanon (AB 58, D [89]); and discriminatory treatment of Palestinian refugees (AB 58, D [89]). The delegate accepted that the plaintiff was likely to face practical, financial and emotional hardship in Lebanon (AB 59, D [90]). The delegate found that, with his parents and two siblings residing there, that hardship would be somewhat reduced (AB 59, D [91]). The delegate also observed that the plaintiff had chosen to depart Australia voluntarily and without a valid visa to return, and the risks of doing so would have been conceivable to him at that time (AB 59, D [91]). The delegate attributed some weight to this consideration in favour of not refusing to grant the visa (AB 59, D [92]).

19. Links to the Australian community. The delegate accepted that visa refusal would cause emotional hardship to members of the plaintiff's immediate family (AB 59-60, D [95]-[97]) and recognised that visa refusal would also have a negative effect on other family members and friends in Australia (AB 60-61, D [98]-[104]). The delegate took into account that the plaintiff had developed strong ties to the Australian community and had, at times, contributed positively to it (AB 61-62, D [107]-[108]). The delegate attributed some weight to this consideration in favour of not refusing to grant the visa (AB 62, D [109]).

20. Overall, the delegate concluded that the plaintiff represented a risk of harm to the Australian community that was unacceptable (AB 62, D [111]). The delegate gave significant weight to the repetitive and serious nature of the plaintiff's offending, and considered that non-citizens who had engaged in acts of family violence raised serious character concerns, such that the Australian community would expect that they should not continue to hold a visa (AB 62, D [114]). The delegate found that those matters outweighed the other matters favouring a decision not to refuse to grant the plaintiff a visa (AB 62, D [112]-[115]). The delegate therefore exercised the discretion in s 501(1) of the Migration Act to refuse to grant the visa to the plaintiff (AB 62, D [116]).

Part V: Argument

Introduction

21. Without making any concession about the adequacy of the plaintiff's explanation for the delay in commencing this proceeding or the merit or public importance of matters advanced by the plaintiff, the defendant neither opposes nor consents to the grant of an extension of time.[16]

22. For the following reasons, the plaintiff's grounds in support of the application are not made out.

No erroneous consideration of best interests of minor children

23. In support of ground 1, the plaintiff argues that:

    a. the delegate was obliged under paragraph 8.3(1) of the Direction, but failed, to make a determination about the best interests of Mariam Chakik (plaintiff's submissions (**PS**) [37]); and

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16 Cf AB 349-350 [4]-[7].

b. the delegate was obliged, but failed, to make inquiries about Mariam's Chakik's age and whether her best interests would be affected by a visa refusal decision (PS [23]).

24. Neither of those arguments is made out, so as to establish jurisdictional error affecting the delegate's decision, in the circumstances of this case. Those circumstances were relevantly as follows.

25. The plaintiff was represented by a legal practitioner in his dealings with the delegate. His arguments in this Court ignore the way in which he and his legal representative put materials before the delegate in support of his visa application.

26. In those materials, there was only a single passing reference to Mariam Chakik. At page 6 of a personal circumstances form, under the heading "Minor children", the plaintiff referred to Mariam, stated that she was Halima Chakik's daughter and of Australian nationality, and claimed to have daily contact with her.[17] No further details about Mariam were included in the form.

27. On the following page of the form, under the heading "Describe your relationship with each child/ren above, including the role you play in his/her life" (original emphasis), the plaintiff stated "[p]lease see attached documents regarding my guardianship to children and impacts of my absence".[18] In that regard, the plaintiff and his representative provided the delegate with a number of supporting documents and statements. None of those documents made any reference to anyone called Mariam.[19]

28. In his own written statement dated 21 July 2022,[20] the plaintiff set out a list of people with whom he had ties in Australia.[21] Mariam was not named or referred to in that list. Nor was she named or referred to, in any way, in the plaintiff's statement more generally. On the other hand, the plaintiff *did* refer expressly to Halima and the two other children mentioned in the personal circumstances form. The plaintiff explained in some detail his relationship with Halima and those two children, Noreddine and

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17 AB 114.
18 AB 115.
19 The plaintiff concedes as much in this Court (see PS [25]).
20 AB 128-139.
21 AB 130 [10].

Mahmoud, and why they would be affected by any refusal to grant him a visa.[22] No reference was made by the plaintiff to anyone called Mariam, let alone any claimed relationship with her or any claimed effect upon her of a refusal to grant the plaintiff a visa.

29. Halima Chakik, who was described in the personal circumstances form as Mariam's mother, provided a written statement dated 20 July 2022.[23] In her statement, Halima referred to her children, Noreddine and Mahmoud, and explained the plaintiff's relationship with them, and how they would be affected by any refusal to grant a visa to him.[24] Her statement made no reference to anyone called Mariam, let alone claimed that Mariam was her daughter or that Mariam would be affected by a visa refusal decision.

30. Heba Chakik, the plaintiff's partner, provided a written statement dated 20 July 2022.[25] She referred in her statement to the plaintiff's relationship with Halima and her children, Noreddine and Mahmoud, and the effect of a visa refusal on them.[26] Again, no reference was made to anyone called Mariam. Finally, letters provided by Heba Chakik's sisters, Nadima Chakik and Marwah Boukanj, also did not refer to Mariam.[27]

31. In the circumstances, the plaintiff and his legal representative did not suggest to the delegate that Mariam's interests would be affected, one way or the other, by any refusal to grant a visa.

32. The plaintiff now seeks to rely on a solitary reference to Mariam, entirely divorced from the overall context in which it appeared, and entirely divorced from the detailed statements provided by the plaintiff and his close family members.

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22 AB 131-132 [15]-[20].
23 AB 158-160.
24 AB 158-159 [5]-[13].
25 AB 150-154.
26 AB 151-154 [12]-[29].
27 AB 161-163.

No failure to comply with paragraph 8.3(1) of the Direction

33. The delegate did not fail to comply with paragraph 8.3(1) of the Direction.[28] That required the delegate to make a determination "about" whether visa refusal is, or is not, in the best interests of "a child affected by the decision". There may be cases where the evidence is such that the only determination capable of being made is that visa refusal is neutral so far as the best interests of a particular child are concerned.[29] It may be that visa refusal is neither "in the best interests" of a child nor "not in the best interests" of that child. Where there is a paucity of information before a decision-maker, it is open to that decision-maker to find that no determination can be made as to where the best interests lie.[30]

34. Further, as was said in *Plaintiff M1/2021 v Minister for Home Affairs*, "[t]he requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance" of what is put before the decision-maker.[31] Here, there was only a single passing reference to Mariam in the materials before the delegate, compared with the detailed information provided about the other listed children (one of whom was more than 18 years old, in any event).

35. The delegate nonetheless stated (at AB 56, D [75]) that:

> I acknowledge that [the plaintiff] has listed the name Mariam Chakik under minor children in the Personal Circumstances form dated 30 August 2022. However, [the plaintiff] has provided no further information regarding this person including their age. Therefore I am unable to determine if there would be any effects on Mariam Chakik, if she is indeed a minor child.

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28 See AB 309.

29 *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [67] (French CJ, Kiefel, Bell and Keane JJ).

30 See, by way of example, *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 504 at [27] (Buchanan J), [117]-[119] (Perry J); *Nigam v Minister for Immigration and Border Protection* (2017) 254 FCR 295 at [40]-[43] (Siopis, Griffiths and Charlesworth JJ); *Savaiinaea v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 56 at [74]-[75] (Collier, Perry and Anastassiou JJ).

31 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [25] (Kiefel CJ, Keane, Gordon and Steward JJ).

36. That is, insofar as the best interests of Mariam Chakik were concerned (even assuming she was a child), visa refusal was treated as neutral because nothing was known about her, including the effects of any such decision upon her. There is no error in the delegate's approach. The plaintiff criticises that approach, yet himself acknowledges that there will be cases in which no determination can be made on account of a paucity of information available to the decision-maker (PS [37]). There is no principled basis for the plaintiff's assertion (at PS [38]) that the delegate could or should have simply "assumed" or "accepted" that Mariam was a child whose interests would be adversely affected by any refusal to grant a visa – especially given the plaintiff chose not to provide any information in support of that proposition to the delegate.[32]

No duty or obligation to inquire

37. The delegate did not make any inquiries of the plaintiff about Mariam. However, there was no duty or obligation on the delegate to do so. It was for the plaintiff to put forward the matters he wished the delegate to consider, along with materials in support of those matters.[33] That was especially so where the plaintiff was legally represented. The delegate was entitled to make a decision on the basis of what had been put forward by the plaintiff, including the very limited information about Mariam.

38. The plaintiff's reliance (at PS [35]) on *Uelese v Minister for Immigration and Border Protection* does not alter that analysis. In that case, French CJ, Kiefel, Bell and Keane JJ held that, regardless of whether or not the appellant had sought to make the interests of certain children "a positive aspect of his case", the Administrative Appeals Tribunal was obliged by a predecessor of the Direction (and s 499 of the Migration Act) to take into account the interests of any minor child affected by the decision.[34] The Tribunal had declined to make any assessment of the interests of two children,

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32 Given the dearth of information provided by the plaintiff, it is also not apparent how any error by the delegate would be material, in the sense of there being a "realistic possibility" that a different decision could have been made. See *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [37]-[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

33 See, for example, *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187 at [181], [190] (O'Bryan J, Katzmann J agreeing); *Sami v Minister for Immigration and Citizenship* (2013) 139 ALD 1 at [30] (Jagot, Barker and Perry JJ); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Jokic* [2020] FCA 1434 at [6]-[14] (Jagot J). See also, more generally, *Abebe v Commonwealth* (1999) 197 CLR 510 at [187] (Gummow and Hayne JJ).

34 *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [64] (French CJ, Kiefel, Bell and Keane JJ).

due to its erroneous understanding of the operation of s 500(6H) of the Migration Act.[35] The paucity of material before the Tribunal arose on account of that misunderstanding. No such error is apparent here. What was said in *Uelese* does not deny that the delegate was required to make a determination "about" the interests of children based on the evidence and submissions advanced.[36] However, the delegate in this case did (as required) do that, including in respect of Mariam.

39. Nothing said by this Court in *Minister for Immigration and Citizenship v SZIAI* establishes the existence of a duty or obligation on the delegate to make inquiries in the circumstances of this case.[37] None of the matters identified by the plaintiff (at PS [31]-[33]) demonstrates that the delegate was legally *obliged* to make inquiries. Even if the delegate could have made a particular inquiry, or if it might now be said to have been desirable for the delegate to make such an inquiry, it does not follow that the lack of such an inquiry is legally unreasonable or otherwise gives rise to jurisdictional error.[38]

40. The plaintiff claims that the making of an inquiry by the delegate "could have yielded a useful result", namely Mariam's age, and that her age was a "critical fact" (PS [27], [34]). That is not so. As the delegate observed, there was "no further information" provided about Mariam. Merely knowing Mariam's age would have revealed nothing about the nature of the plaintiff's relationship (if any) with her and how, if at all, she might have been said to be affected by any visa refusal. The difficulty identified by the delegate would remain. Even if the delegate had discovered Mariam's age, there would be no obligation on the delegate to "assume" or "accept", as the plaintiff suggests (at PS [38]), that her interests would have been affected by refusal to grant the visa.[39]

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35 *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [66]-[68] (French CJ, Kiefel, Bell and Keane JJ).

36 See *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187 at [181] (O'Bryan J, Katzmann J agreeing); *Savaiinaea v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 56 at [66] (Collier, Perry and Anastassiou JJ).

37 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25]-[26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). It is otherwise noted, that, in *Uelese*, the boundaries of any duty to inquire were expressly not considered. See *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [67] (French CJ, Kiefel, Bell and Keane JJ).

38 *Kaur v Minister for Immigration and Border Protection* (2017) 256 FCR 235 at [33] (Dowsett, Pagone and Burley JJ).

39 It is also not apparent why the delegate would reason in that fashion, given the plaintiff *did* provide detailed information about the effect of visa refusal on two other children, Norredine and Mahmoud. If anything, the failure to give such information in relation to Mariam might have suggested that the plaintiff was *not* saying that there would be an adverse effect on Mariam.

Whether that was so, and the extent of any impact on Mariam's interests, would depend on the nature of the plaintiff's relationship with her.

41. In reality, the plaintiff's argument must be that the delegate should have conducted a general inquiry into the nature and circumstances of the plaintiff's relationship with Mariam and the potential effect of visa refusal on her – even though the legally-represented plaintiff chose not to advance information on those matters. There was no such obligation on the delegate in this case.

No "repetitive" weighing of family violence "in an identical way"

42. In ground 2, the plaintiff argues that, in applying paragraph 8.2 of the Direction, the delegate impermissibly gave weight to family violence committed by the plaintiff, where, it is said, weight had already been given to that matter "in an identical way" under one or both of paragraphs 8.1 and 8.4 of the Direction. This argument proceeds on a misapprehension as to the proper construction of the Direction and its application in this case.

43. The Direction identifies considerations that must be taken into account by the decision-maker, to the extent relevant in each case. In doing so, the Direction provides guidance on, and a framework for, the exercise of the discretionary power in s 501(1) of the Migration Act.[40] That guidance does not compel the decision-maker to reach a particular decision. The Direction makes clear that, in exercising the discretion whether to refuse to grant a visa, the decision-maker must have regard to the "specific circumstances of the case".[41] The Direction does not stipulate specific weight to be given to a particular consideration in the individual circumstances of a certain case. In each case, there remains an overall weighing and balancing process to be undertaken, and that process is left to the individual decision-maker alone.[42] The Direction does

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40 See paragraphs 5.1(4) and 5.2 of the Direction.

41 Paragraph 5.1(2) of the Direction.

42 *Singh v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 46 at [23] (Mortimer J); *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296 at [54] (Robertson J); *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461 at [57], [61], [78] (Kenny and Mortimer JJ; Dowsett J agreeing); *Minister for Immgration and Border Protection v Lesianawai* (2014) 227 FCR 562 at [80, [83], [100] (Perry J) (and see also at [12]-[14] per Buchanan J).

not, and does not purport to, fetter the exercise of power conferred by s 501(1) of the Act.[43]

44. The matters to be taken into account in respect of the primary and other considerations identified in the Direction can and do overlap. In this regard, there can be overlap between paragraph 8.1 (protection of the Australian community), paragraph 8.4 (expectations of the Australian community) and paragraph 8.2 (family violence committed by the non-citizen). That is unsurprising – one consideration may have an impact on others.[44] The potential overlap between paragraphs 8.1, 8.2 and 8.4 is recognised by the terms of the Direction itself: see paragraphs 8.1.1(1)(a)(iii), 8.2(1), 8.4(2)(a). Each of those paragraphs in the Direction refers to the relevance of family violence in different ways. The mere fact of potential overlap between these considerations does not mean that a decision-maker will repetitiously give weight to family violence in an "identical way", for an "identical reason" (cf PS [49]-[51]).

45. An administrative decision-maker is not prohibited from taking into account a particular fact, issue or matter in relation to more than one relevant consideration, where the decision-maker perceives that it is relevant to each consideration. The weight to attribute to that fact, issue or matter is for the decision-maker to determine. As Halley J observed in *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:[45]

> Not being required to take into account a matter "repetitiously" is a fundamentally different proposition to prohibiting a matter being taken into account for two or more mandatory considerations. The matters to be taken into account in addressing mandatory and other considerations may well overlap, particularly in circumstances where a consideration is expressed in general

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43 *Kumar v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 94 at [42]-[43] (Logan, SC Derrington and Anderson JJ).

44 That overlap between considerations might arise has long been recognised by the Federal Court. See, for example: *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667 at [21] (Dowsett J); *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367 at [63] (Rangiah J); *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76] (Mortimer J). It is notable that the plaintiff does not suggest that any error would arise if a decision-maker placed weight on the same matter when assessing each of paragraphs 8.1 and 8.4, nor has it been held that any such overlap might lead to invalidity of the Direction or of a decision in which the Direction has been applied in that way.

45 [2021] FCA 1138 at [123]. An appeal was allowed (*XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 34), but not in respect of this issue.

terms. It is neither desirable nor, in my view, permissible not to have regard to material that is otherwise relevant to a consideration in Direction 79 on the basis that it is more directly relevant to another consideration in that direction.

46. The plaintiff refers (at PS [49]) to *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[46] and *XXBN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[47] Those decisions explain that a decision-maker is not usually *required* to take a matter into account repetitiously. It does not follow that a decision-maker is *prohibited* from doing so. Those decisions do not support the proposition that a decision-maker cannot have regard to the same fact, issue or matter as relevant to more than one mandatory consideration.

47. Nothing in the Migration Act or the Direction prohibited the delegate from giving weight to a particular fact, issue or matter in connection with multiple relevant considerations. The delegate's consideration of family violence committed by the plaintiff was in no way illogical, irrational or unreasonable.

48. The delegate was obliged to take into account the primary consideration in paragraph 8.2 of the Direction and did so.[48] As paragraph 8.2(1) of the Direction states, "[t]he Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia".[49] A delegate is entitled to take into account such concerns, views and expectations, and broader policy considerations, in exercising the power under s 501(1) of the Migration Act.[50] The Direction did not dictate how family violence committed by the plaintiff was to be weighed by the delegate in a given case. That remained for the delegate and was to be balanced against other considerations taken into account by the delegate.[51] It was open to the delegate to consider, and give weight to, family violence committed by the plaintiff, both in its own right and to the extent that it informed the considerations of the protection of the community and the expectations of the community.

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46 [2020] FCA 646.
47 [2022] FCAFC 74.
48 Direction, paragraph 7. See AB 52-55, D [53]-[67].
49 The delegate acknowledged those concerns: AB 52, 54, D [53] and [66].
50 *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [67], [71]-[72] (Tamberlin, Sackville and Stone JJ).
51 AB 62, D [111]-[114].

49. Insofar as the plaintiff refers to various decisions of "discerning Tribunals" (PS [58]), the findings and reasons set out in each of those decisions reflect no more than an individual Tribunal member's consideration of the merits of a given case. That the Tribunal has, on some occasions, declined to give weight to a particular factual matter in a particular context does not establish any general principle about the proper construction and application of paragraph 8.2 of the Direction.[52]

50. The plaintiff identifies no proper basis upon which it might be said that the Direction is invalid. The Direction does not mandate an illogical, irrational or unreasonable reasoning process. The plaintiff's reliance (at PS [61]) upon criminal sentencing does not assist. Sentencing is a fundamentally different task, involving different considerations, to decision-making under s 501 of the Migration Act. In any event, there is no suggestion in the delegate's reasons that the delegate "doubly punish[ed]" the plaintiff (or punished him at all).

51. Contrary to what is asserted at PS [62], the Direction does permit a "genuine" weighing of matters by the delegate. As already observed, while the Direction refers to certain mandatory considerations, it does not mandate how, and the extent to which, matters relevant to a consideration are ultimately to be weighed in a given case. The weight given to a particular consideration and the matters relevant to it remains for the decision-maker, within his or her own discretion. The exercise of discretion is not distorted or fettered.[53]

No "punitive" or "irrelevant" weighing of family violence

52. In ground 3, the plaintiff argues that the delegate impermissibly interpreted and applied paragraph 8.2 of the Direction in a way that is "unconnected to protection and/or expectations of the Australian community, thereby giving weight to family violence in a punitive or irrelevant way" (PS [64]). The plaintiff does not identify what that

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52 The plaintiff also ignores other decisions in which the Tribunal has taken a different approach to that identified in the cases cited by him. See, for example, *JTNW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4948 at [92]-[95] (SM Kirk).

53 The cases referred to in PS [47] and fn 54 considered a predecessor of the Direction, which was in a materially different form to the Direction the subject of this matter. In this regard, see *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 at [70]-[75] (Rares J), explaining why Direction 21 was not invalid, because there was no distortion or fettering of the discretion, unlike in the earlier Direction 17.

"irrelevant" way is. The plaintiff also acknowledges that the argument only arises if the Court finds that the delegate "gave family violence weight for reasons other than the protection and expectations of the Australian community" (PS [65]).

53. The plaintiff's argument fails on a factual level. There is nothing in the delegate's reasons, fairly read, that suggests that the delegate approached the exercise of power in s 501(1) with a punitive purpose. Nothing stated by the delegate in respect of paragraph 8.2 of the Direction (at AB 52-55, D [53]-[67]) indicates a view that the plaintiff should be punished for having engaged in family violence. Nor can it be said that the delegate approached the consideration of paragraph 8.2 of the Direction in a manner "unconnected to the protection or expectations of the Australian community".[54] In particular, it cannot be said that, in addressing each of the mandatory relevant considerations in paragraphs 8.1, 8.2 and 8.4 of the Direction, the delegate was unaware of the potential overlap between them.[55]

54. Further, while a direction made under s 499 for the purposes of decision-making under s 501 of the Migration Act may refer to considerations such as the protection of the Australian community and the expectations of the Australian community (cf PS [66]), that does not mean that *every* consideration set out in such a direction must bear upon either or both of those considerations, or that any consideration unconnected to either of them is extraneous (in the sense of being a mandatory irrelevant consideration). There is no principled basis for such a view, and the plaintiff identifies no authority in support of it.[56] Nothing suggests that the considerations set out in the Direction are punitive or "otherwise irrelevant" to the exercise of power under s 501 of the Act.

55. The plaintiff relies (at PS [71]) on comments of Buchanan J in *NBMZ v Minister for Immigration and Border Protection*.[57] Those comments were made in a different context to that which arises here (and in any event go beyond the basis on which the

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54 For instance, at AB 52, D [53], the delegate had regard to the Australian government's stated concerns about non-citizens who engage in family violence being given the privilege of entering Australia. Similarly, at AB 54, D [66], the delegate stated that the Direction "makes it clear that the problem of family violence is regarded very seriously by the Australian Government and the community". Those reasons do not reflect a punitive purpose on the part of the delegate.

55 See, for example, AB 44, 49, 52, 54, 56, 62, D [15], [35], [53], [55], [66], [76]-[77], [114].

56 The plaintiff refers, at PS fn 74, to *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488 at [61] and *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [73]-[74]. Neither of those authorities stands for such a proposition.

57 (2014) 220 FCR 1 at [192].

plurality decided that matter). Further, Buchanan J was not denying that an assessment of whether a citizen should be allowed to enter Australia could be based on past conduct. There is no reason why a decision-maker cannot consider a non-citizen's past conduct in the exercise of the discretion in s 501(1). Indeed, s 501(6)(c) would appear to countenance such an approach. Moreover, what has occurred in the past can often bear upon an assessment of what will or might happen in the future.[58]

56. Here, the delegate legitimately considered the past conduct of the plaintiff to guide assessment of considerations such as protection of the Australia community, family violence, and expectations of the community. All of that was for the purpose of deciding whether, as a matter of discretion, the plaintiff should be granted a visa to enter Australia. It was not undertaken for any purpose of punishment for past conduct or any other "irrelevant" purpose.

No failure to consider personal circumstances

57. In a new ground 4, the plaintiff argues that the delegate impermissibly took into account the expectations of the Australian community "as a significant factor" weighing in favour of visa refusal, "without considering what weight to give that factor in light of the [plaintiff's] circumstances" (PS [74], [77]). Insofar as the plaintiff requires leave to advance this new ground, the grant of leave is not opposed. However, the plaintiff has not, by this ground, made out any jurisdictional error affecting the delegate's decision.

58. The delegate's consideration of the expectations of the Australian community was orthodox and in accordance with the Direction (see paragraph 8.4).[59] Paragraphs 8.4(1) and (4) identified the expectations of the Australian community, as a norm, where a non-citizen has engaged in serious conduct, and paragraph 8.4(2) identified that the Australian community expects that the Australian Government can and should refuse entry to persons who raise character concerns of particular kinds. The delegate correctly understood those aspects of the Direction: see AB 56, D [76]-[77]. The delegate formed the view that the plaintiff's past conduct *did* raise the sorts of character

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58 *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 at 574-575 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

59 See AB 310-311.

concerns identified in the Direction. The result was that, in the delegate's view, "the community expectation described above applies in this case" (AB 56, D [77], [79]). The delegate decided to attribute "significant weight" to these community expectations (AB 56, D [79]). That was a matter for the delegate. There is nothing erroneous about the delegate choosing to reason in that way.[60]

59. The plaintiff complains that the delegate did not consider what weight to give to the expectations of the community "in light of the plaintiff's personal circumstances" (PS [77]). However, nothing in paragraphs 8.4(1)-(4) identifies any countervailing matters that the delegate *must* mandatorily assess against the community expectations identified in the Direction.[61] Indeed, paragraph 8.4(4) states that this consideration is about the expectations of the community "as a whole" and, for the purposes of paragraph 8.4, decision-makers should proceed "without independently assessing the community's expectations in the particular case".[62] Further, and in any event, the plaintiff does not point to any submission made by him or his legal representative to the delegate that the expectations of the Australian community were to be assessed and weighed against his own personal circumstances. There was no failure to consider any clearly articulated argument in this respect.[63] Nor did the delegate misunderstand the case put forward by the plaintiff and his representative.

60. The plaintiff's argument also fails to read the delegate's reasons fairly and as a whole.[64] The delegate set out, in detail, matters raised by the plaintiff about his personal circumstances and the hardship that he was suffering, and would continue to suffer, in Lebanon (AB 57-58 D [84]-[89]).[65] The delegate acknowledged those matters and found that the plaintiff was likely to continue to face practical, financial and emotional hardship in Lebanon (AB 59, D [90]-[91]). This is not a case where the delegate

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60 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 41 (Mason J); *Minister for Immigration and Citizenship v SZSSJ* (2010) 243 CLR 164 at [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

61 *Morgan v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 392 at [38] (Hespe J).

62 In this regard, see, for example, *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68 at [35]-[48] (Moshinsky, Stewart and Jackman JJ).

63 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [27] (Kiefel CJ, Keane, Gordon and Steward JJ). See also *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76] (Mortimer J).

64 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

65 See paragraphs 18-19 above for a summary of the delegate's findings and reasons on those issues.

overlooked the plaintiff's circumstances and failed to weigh them in the course of making the decision.[66]

61. The delegate explained that a number of factors weighed in favour of not refusing the visa – including the "impediments [the plaintiff] is currently experiencing in Lebanon and the compassionate reasons he has submitted for his return to Australia" (AB 62, D [113]). However, the delegate ultimately concluded that other matters, including the expectations of the Australian community, outweighed matters such as the impediments and compassionate reason he had raised (AB 62, D [114]-[115]). That is an orthodox approach to weighing competing considerations.

62. Contrary to what is suggested by the plaintiff, there was no failure by the delegate to weigh the Australian community expectations against the plaintiff's personal circumstances. That was done, and those personal circumstances were simply outweighed. As Perram J explained in *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[67] a decision-maker is not usually *required* to take a matter into account repetitiously. There is no reason why such requirement might be said to have arisen in this case.

63. This ground also reveals a tension in the plaintiff's case as a whole. The plaintiff criticises the delegate for taking into account family violence "repetitiously" under various considerations. Yet the plaintiff seeks also to criticise the delegate for, in effect, not taking into account and weighing his personal circumstances when dealing with the expectations of the Australian community – despite those matters having plainly been taken into account, and weighed, elsewhere. That is, the plaintiff seems to assert that his "personal circumstances" must be taken into account "repetitiously" under multiple considerations, yet family violence must not.

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66 See, in particular, AB 62, D [111]-[115].

67 [2020] FCA 646 at [26]. See also paragraph 46 above.

Part VI: Estimated length of oral presentation

64. It is estimated that the defendant will require 1½ to 2 hours for the oral presentation of his argument.

Dated 26 July 2023

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The defendant is represented by the Australian Government Solicitor.

Annexure: Part VII: a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions

Constitution, Statues and Statutory Instruments	Provisions	Versions
Migration Act 1958 (Cth)	Sections 82(6); 499; 501; 501CA	Compilation number 152 (as in force 28 September 2022)