HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M20/2023
File Title:	Ismail v. Minister for Immigration, Citizenship and Multicultu
Registry:	Melbourne
Document filed:	Form 27A - Plaintiff's submissions
Filing party:	Plaintiff
Date filed:	28 Jun 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY M20 of 2023

BETWEEN: **Mounib Ismail**
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues in this application are:
   a. Did the Defendant's delegate (**Delegate**) err jurisdictionally by failing to make an obvious inquiry, and/or failing to comply with a direction (**Direction 90**) issued under s 499(1) of the *Migration Act 1958* (Cth) (**Act**), by failing to inquire as to whether or not a person listed as a child on the Plaintiff's 'Personal Circumstances Form' was in fact a child and, if so, whether her best interests would be affected by the decision to refuse to grant the Plaintiff's visa.
   b. Did the Delegate's misconception of the task as being to make a primary decision that the Administrative Appeals Tribunal could review on the merits when in fact the decision was not merits reviewable lead the Delegate into the error of failing to inquire about the child on the assumption the merit of the case could be checked on review?
   c. In the balancing exercise involved in a decision under s 501(1) of the Act, did the Delegate repetitiously weigh family violence and, if so:
      i. did Direction 90 permit such repetitious weighing;
      ii. and, if so, is Direction 90 invalid to that extent?
   d. Did the Delegate weigh family violence in a punitive or irrelevant way and, if so:
      i. did Direction 90 permit family violence to be weighed in that punitive or irrelevant way?
      ii. and, if so, is Direction 90 is invalid to that extent?

e. Did the Delegate err by weighing the expectations of the community as a significant factor in favour of refusal, without considering what weight to give that factor in light of the applicant's circumstances?[1]

PART III: NOTICE

3. The Plaintiff considers that no notice is necessary under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: REPORTS OF THE JUDGMENTS BELOW

4. There are no judgments below, this being a matter in this Court's original jurisdiction seeking relief in respect of a decision (**Decision**) of a delegate of the Defendant.

PART V: FACTS

5. The Plaintiff understands the following facts – drawn from the Application Book (**AB**) – to be uncontroversial, given they are agreed[2] or expressly not disputed in the Defendant's response.[3]

Plaintiff's life in Australia and offending

6. The Plaintiff was born in Lebanon to parents who were Palestinian refugees (AB 33). He came to Australia in 2010, when he was 21 (AB 128 [5], 301, 394 [3]). The Delegate accepted that since his arrival in Australia the Plaintiff had spent over a decade contributing to the community by his work on commercial and residential building projects, as well as volunteering (AB 61 [107]).

7. In late 2015, the Plaintiff commenced a romantic relationship with Heba Chakik (AB 130 [12]).

8. In mid-2020, the relationship deteriorated and on 25 July 2020, the Plaintiff committed the offences of common assault and contravened a prohibition/restriction by, in essence, arguing over text messages and grabbing Heba Chakik's arm (AB 81–3). Further, on 23 November 2020, the Plaintiff committed the offence of contravene a prohibition/restriction and stalk/intimidate by, in essence, yelling and screaming profanities at Heba Chakik (AB 88–90).

9. The Plaintiff and Heba Chakik had reconciled by the time of the Decision, and the Delegate considered her support to be a 'positive factor in regards to the likelihood of

[1] The Plaintiff seeks leave to add this argument to be heard and determined by the Court although it was not the subject of the original application to the High Court.
[2] See the agreed facts document filed by the parties.
[3] See Response to application for a constitutional or other writ, 26 April 2023, [3] (AB 349).

[the Plaintiff] reoffending' (AB 51 [45]). The Delegate also accepted that the Plaintiff had himself 'acknowledged the seriousness of his offending' (AB 54 [63]).

Plaintiff's departure from Australia and Delegate's refusal of return visa

10. On 13 April 2022, the Plaintiff travelled to Lebanon because his uncle was suffering from brain cancer. His uncle died within a few days of the Plaintiff's arrival in Lebanon: AB 134 [32]. Prior to his departure for Lebanon, the Plaintiff held a Partner (Subclass 801) visa. That visa ceased on the day of his departure by reason of s 82 of the Act.

11. On 15 April 2022, from Lebanon, the Plaintiff applied for a Return (Residence) (Class BB) (Subclass 155) visa (AB 294–9).

12. On 28 September 2022, purportedly pursuant to s 501(1) of the Act, the Delegate made the Decision to refuse to grant the Plaintiff the visa (AB 40).

13. The Plaintiff has since been stranded in Lebanon. The letter notifying the Plaintiff of the Decision incorrectly stated that his de facto partner (Heba Chakik) could apply to the Administrative Appeals Tribunal (**Tribunal**) for review of the Decision (AB 36).

Tribunal proceedings (see AB 325–44)

14. On 30 September 2022, Heba Chakik applied to the Tribunal for review of the Decision. On 26 October 2022, she withdrew the review application and, on 31 October 2022, the Plaintiff applied to the Tribunal for review of the Decision.

15. On 15 November 2022, the Tribunal held an interlocutory hearing on the question of whether it had jurisdiction and, on 23 December 2022, held that it did not.

PART VI: ARGUMENT

Extension of time

16. The Plaintiff applies pursuant to s 486A(2) for an order extending the time within which to apply for a remedy in this Court's original jurisdiction. He did not apply within 35 days of the written notice of the Decision.[4] It is necessary in the interests of the administration of justice to make an order extending time.

17. *First*, the delay is not particularly long, it being recalled that the ordinary period allowed to a person to apply to this Court for certiorari is 6 months.[5]

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[4] *Migration Act 1958* (Cth) s 486A(3) read with s 477(3)(d).
[5] *High Court Rules 2004* (Cth) r 25.02.2(a).

18. *Second*, the delay is adequately explained in evidence filed in this Court.[6] In short, the initial delay (from September to December 2022) was the result of the Plaintiff's mistaken attempt to invoke the jurisdiction of the Tribunal, rather than a forensic decision to pursue other avenues.[7] (The Tribunal's review jurisdiction is not predicated on the validity of the decision sought to be reviewed;[8] as such, it cannot be said that the Plaintiff's attempt to invoke that jurisdiction proceeded upon his acceptance of the validity of the Delegate's decision.) The subsequent delay (from January to March 2023) was the result of difficulties in the Plaintiff securing pro bono / conditional costs legal representation remotely from Lebanon.

19. *Third*, for reasons developed below, the grounds are reasonably arguable.[9]

20. *Fourth*, the Defendant accepts that there is no 'specific prejudice'.[10]

21. *Fifth*, the application for which the Plaintiff seeks an extension of time concerns the Plaintiff's right to return to, and reside in, his country of residence. It also has implications for his 'right of community'.[11] The subject matter of the application is thus of importance, both to the Plaintiff and to the members of his family who reside here in Australia.

22. *Finally*, grounds 2 and 3 raise questions of public importance about the extent of the direction-giving power in s 499(1) of the Act. Given the potentially wide ramifications of the Plaintiff's argument, an extension is warranted.

Ground 1: Failure to make obvious inquiry

23. Ground 1 of the Plaintiff's application to this Court is:

> The Delegate erred jurisdictionally by failing to make an obvious inquiry, and/or failing to comply with paragraph 8.3 of Direction 90, by failing to inquire as to whether or not Mariam Chakik was a child and, if so, whether her best interests would be affected by the decision.

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[6] Affidavit of Ziaullah Zarifi, filed 28 March 2023, [6]–[12] (AB 29); affidavit of Mounib Ismail, filed 4 May 2023, [6]–[23] (AB 394–7); affidavit of Ziaullah Zarifi, filed 4 March 2023, [3]–[9] (AB 365–6).

[7] *Plaintiff M7/2021 v Minister for Home Affairs* (2021) 95 ALJR 404, [28] (Gordon J). Cf *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 198, [14] (Goldberg J); *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89, [16] (Gageler J); *SZUSH v Minister for Immigration and Border Protection* [2016] HCATrans 112, lines 289–94 (Nettle J).

[8] *Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 176–82 (Brennan J), affirmed on appeal *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.

[9] See and compare *Plaintiff S183/2021 v Minister for Home Affairs* (2022) 96 ALJR 464, [2], [63] (Gordon J).

[10] Response to application for a constitutional or other writ, 26 April 2023, [7] (AB 350). See, by analogy, *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545, [13] (Colvin J); *MZZJY v Minister for Immigration and Border Protection* [2014] FCA 1394, [5] (Davies J).

[11] *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 372 (Burchett and Lee JJ); *Rani v Minister for Immigration and Multicultural Affairs* (1997) 80 FCR 379, 401 (Sackville J).

Facts relevant to ground 1

24. At the request of the Department,[12] the Plaintiff provided a 'Personal Circumstances Form' to the Delegate. At page 10 of that form he relevantly identified Halima Chakik in the field for 'close family members', described her as his 'sister-in-law' and noted that she resided in Australia (AB 118). In the part of the form headed 'MINOR CHILDREN (children under 18 years of age)', the Plaintiff listed three names – Noreddine Chakik (m), Mariam Chakik (f) and Mahmoud Chakik (m) – all of whom were denoted as Australian children of Halima Chakik (AB 114). In the field asking 'How often do you have contact' the Plaintiff wrote 'Daily' for each child (AB 114).

25. While no other document before the Delegate referred to Mariam, the Delegate acknowledged the reference to her in the Personal Circumstances Form and said:

> I acknowledge that Mr ISMAIL has listed the name Mariam Chakik under minor children in the Personal Circumstances form dated 30 August 2022. Mr ISMAIL 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[.] (AB 56 [75])

26. The Delegate did not otherwise inquire or consider Mariam's age or best interests.

27. If the Delegate had so inquired, it can be inferred on the evidence before this Court that the Delegate would have discovered that Mariam (whose birth name is 'Matia') was indeed a child of Halima Chakik, born on 7 August 2008 and was 14 years' old at the time of the Decision (AB 346).

28. In proceeding in that way, the Delegate erred in either of two ways.

Failure to make an obvious inquiry

29. Where an administrative decision-maker does not 'make an obvious inquiry about a critical fact, the existence of which is easily ascertainable', 'such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction'.[13] In other words, a decision-maker may fail to perform the statutory task where it fails to inquire as to 'a specific matter [that] was raised by an applicant … [where] that matter could not be properly considered without further inquiry'.[14] The obligation to inquire has

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[12] See letter of the Department to the Plaintiff's legal representative, 30 August 2022, p 4 (AB 101).
[13] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[14] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 321 (McHugh J), see also 290 (Mason CJ and Deane J).

been sourced in the obligation of reasonableness,[15] although a failure to inquire has also been suggested to be a constructive failure to exercise jurisdiction[16] or a failure to take into account a relevant consideration.[17]

30. The content of an implied obligation to make an obvious inquiry will depend on the statutory context and the facts of the particular case, as this Court has explained of implied obligations of procedural fairness,[18] impartiality[19] and reasonableness.[20]

31. In this case, the content of the obligation of reasonableness and the obligation to inquire was informed by the following matters of statutory and factual context:

    a. the decision was able to be made, and was made, by a delegate (rather than personally by the Minister, who can be expected to have more demands on their time);

    b. the decision was not the subject of any statutory time limit;[21]

    c. the Delegate in fact had shown a willingness to take some time in making the decision,[22] and while the Plaintiff pressed for a prompt decision that quite obviously did not preclude the Delegate taking further time to consider important matters;

    d. the Delegate had the power to request further information;[23]

    e. the Decision was preceded by a timely and responsive exchange of communications between the Department and the Plaintiff (through his legal representative), and thus the Delegate could have expected promptness and diligence in response to any further inquiries;[24]

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[15] *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169–70 (Wilcox J); *Luu v Renevier* (1989) 91 ALR 39, 49–50 (the Court); *Tickner v Bropho* (1993) 40 FCR 183, 197–9 (Black CJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [100] (Gageler J); *McAtamney v Superannuation Complaints Tribunal* [2016] FCA 1062, [174]–[178] (North J).

[16] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [189] (Gummow and Hayne JJ).

[17] *Visa International Service Association & Anor v Reserve Bank of Australia* (2003) 131 FCR 300, [625] (Tamberlin J).

[18] *Kioa v West* (1985) 159 CLR 550, 585 (Mason J); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [26] (the Court).

[19] *Isbester v Knox City Council* (2015) 255 CLR 135, [23] (Kiefel CJ, Bell, Keane and Nettle JJ).

[20] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [59] (Gageler J), [135] (Edelman J); *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, [80] (Gordon J).

[21] Contrast *Migration Act 1958* (Cth) s 500(6L).

[22] See *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393, [87] (Mortimer J).

[23] Contrast *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177, [21] (Kiefel CJ, Gageler, Gordon and Steward JJ), [68] (Edelman J) regarding the Immigration Assessment Authority's power.

[24] *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393, [88] (Mortimer J).

f. the Decision, if made adversely, could be expected to have significant consequences for the Plaintiff and also for third parties such as the Plaintiff's Australian family and of course, the child herself; and

g. the decision was not amenable to merits review (AB 334–44).

32. In that factual and statutory context, it was a jurisdictional shortcoming for the Delegate in this case to 'fail[] to make even the most cursory inquiry'[25] of the Plaintiff (through his legal representative) as to Mariam's age and/or best interests.

33. It may be that the Delegate's misconception that merits review was available led to the failure to make any inquiry at all about what was a primary consideration for the Decision on the wrong assumption the merits of the case would be reconsidered by the Tribunal.

34. Here, specific criteria[26] were left unapplied:

a. Assessed against the evidence before the Delegate,[27] Mariam's age was centrally relevant to the decision and was a critical fact. Especially is that so in light of paragraph 8.3 of Direction 90, which gives effect to Australia's obligations under international law.[28]

b. The inquiry was obvious (indeed, the Delegate themself noted the lacuna in information: AB 56 [75]).

c. The information or fact was easily or readily ascertainable, in the sense that all the Delegate had to do was 'pick[] up the phone'[29] or send an email to the Plaintiff's legal representative, who was obviously in communication with Mariam's mother Halima Chakik (she having provided two documents to the Delegate, a letter and a statement).

d. The inquiry 'could have yielded a useful result',[30] in the sense of revealing the information above at [27].

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[25] *Uelese v Minister for Immigration* (2015) 256 CLR 203, [66] (French CJ, Kiefel, Bell and Keane JJ).
[26] See, eg, *Visa International Service Association & Anor v Reserve Bank of Australia* (2003) 131 FCR 300, [627] (Tamberlin J); *Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272, [110] (Greenwood J, Weinberg J agreeing).
[27] *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90, [50] (Wheelahan J).
[28] *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187, [178] (O'Bryan J, Katzmann J agreeing) and authorities discussed therein.
[29] *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [51] (Nettle J).
[30] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *MZZGB v Minister for Immigration and Border Protection* [2014] FCA 1052, [62] (White J). Cf *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90, [50] (Wheelahan J).

35. In anticipation of the Minister's reliance on the fact that Mariam was not advanced as a central part of the Plaintiff's submissions before the Delegate, it should be recalled that while '[t]he function of … the delegate, is to respond to the case that the applicant advances … this does not mean that the application is to be treated as an exercise in 19th century pleading'.[31] As the plurality explained in *Uelese v Minister for Immigration and Border Protection*, 'it would be to give undue weight to conceptions drawn from adversarial litigation to accept that the Tribunal was not required to take into account the interests of the appellant's two youngest children because he had not sought to advance their interests as a positive part of his case'.[32]

36. For the above reasons, the jurisdictional error alleged by ground 1 is made out.

Failure to comply with Direction 90

37. Further or in the alternative, the Delegate failed to comply with paragraph 8.3 of Direction 90. By reason of s 499(2A) of the Act, the Delegate was under a 'statutory duty'[33] to comply with that paragraph. That paragraph required that the Delegate not just 'have regard'[34] to the best interests of minor children, but 'make a determination'[35] as to those interests (except in those rare cases where no determination could be made because of insuperable deficiencies in the information known, or knowable, to the decision-maker[36]).

38. Like other obligations to consider particular matters in the s 501 context, there was no single way that the Delegate could have discharged that obligation.[37] One 'fact finding path' was for the Delegate to inquire of the Plaintiff as to, at least, Mariam's age; another was for the Delegate to simply assume[38] or accept, in the Plaintiff's favour, that Mariam was in fact a child whose best interests would be adversely affected by

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[31] *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364, [17] (Selway J, quotation marks removed). See also *Uelese v Minister for Immigration* (2015) 256 CLR 203, [62] (French CJ, Kiefel, Bell and Keane JJ).

[32] *Uelese v Minister for Immigration* (2015) 256 CLR 203, [63] (French CJ, Kiefel, Bell and Keane JJ).

[33] *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187, [118] (Derrington J), [179] (O'Bryan J, Katzmann J agreeing). See also *Uelese v Minister for Immigration* (2015) 256 CLR 203, [68] (French CJ, Kiefel, Bell and Keane JJ).

[34] *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187, [179] (O'Bryan J, Katzmann J agreeing).

[35] *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187, [180] (O'Bryan J, Katzmann J agreeing) citing *Spruill v Minister for Immigration and Citizenship* (2012) 135 ALD 45, [18]–[19] (Robertson J).

[36] *Savaiinaea v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 56, [74]–[75] (the Court).

[37] See and compare *Nguyen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 985, [54]–[55] (Mortimer J).

[38] For another context in which a decision-maker may legitimately 'assume [a particular matter] in a non-citizen's favour … and make a decision on that basis' see Direction 90 [9.1(6)].

the Plaintiff's exclusion from Australia (albeit a delegate taking this path might moderate the weight to be given to this consideration on account of the relative paucity of information about it[39]). The latter course was open given the evidence of the Plaintiff's daily contact with Mariam (AB 114) and his otherwise positive influence on the children of Halima Chakik (AB 157, 158–9 [6]–[13]).

39. However, the Delegate 'chose no fact finding path at all'.[40] That was a failure to comply with paragraph 8.3 of Direction 90. The Delegate's jurisdiction was left unexercised in an important respect.

Materiality

40. If the error is framed as a failure to make an obvious inquiry, the materiality requirement is subsumed in the principle that such an error will only be jurisdictional if the inquiry could realistically have yielded a useful result. If the error is framed as a failure to comply with Direction 90, the error was jurisdictional[41] because had the Delegate considered Mariam's best interests consistently with Direction 90, this primary consideration could have weighed more powerfully in the Plaintiff's favour and that, in turn, could realistically have tipped the balance against refusal of the visa. There was another child whose interests were not considered at all. There is a realistic possibility that if the Delegate had asked about Mariam and received information about her interests, the Decision may have gone the other way and the visa application may have been granted rather than refused.

Ground 2: Repetitious weighing of family violence

41. Ground 2 of the Plaintiff's application to this Court is:

> The Delegate interpreted and/or applied paragraph 8.2 of Direction 90 as if it permitted weight to be given to family violence committed by the Plaintiff where weight was also given to this consideration in an identical way under paragraph 8.1 and/or 8.4 of Direction 90. In so doing, the Delegate erred jurisdictionally because:
>
> a. para 8.2 of Direction 90 does not permit that process of repetitious weighing; or
>
> b. insofar as para 8.2 does purportedly permit that process of repetitious weighing – it is invalid.

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[39] Compare the approach taken by a Tribunal which had 'scant information' about another consideration under a ministerial direction *Vural v Minister for Home Affairs* [2020] FCA 667, [39] (Anderson J).
[40] *Nguyen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 985, [56] (Mortimer J).
[41] *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [39] (Mortimer J).

42. It is necessary first to say something about the nature of the power in s 501(1) (and its interrelation with the power in s 499(1)) before explaining why the Delegate's exercise of that power in this case involved 'repetitious weighing'. Then, it can be explained why the Delegate's repetitious weighing in this case rendered the decision ultra vires.

The nature of the power in s 501(1), and two limits on the power in s 499(1)

43. The starting point, or 'condition precedent',[42] for the exercise of the power in s 501(1) is that the person the subject to the exercise of power has failed to satisfy the Minister that they pass the character test. There is then enlivened a discretionary power on the part of the Minister as to whether to refuse to grant the person a visa. The Act does not expressly provide for considerations or criteria in the exercise of that discretion. The 'unfettered nature of the discretion'[43] is intentional, the purpose being 'to leave [the Minister] free to consider the unique circumstances of each case'.[44] The process of considering those circumstances, and ultimately whether or not to exercise the power, has been said to entail a 'balancing exercise'[45] or a 'weighing exercise'.[46] The language of *weighing* has been used by this Court as far back as 1995,[47] and the weighing or balancing process entailed in s 501(1) and (2) is acknowledged in paragraph 7 of Direction 90.

44. Two things follow from the just-described nature of the power in s 501(1) and its interaction with the direction-giving power in s 499(1) – noting that a direction given under that provision cannot be inconsistent with the Act (s 499(2)).

45. *First*, a direction given under s 499(1) cannot require a decision-maker to engage in an illogical, irrational or otherwise unreasonable reasoning process in the exercise of the s 501(1) power. That proposition derives from the ordinary implication of reasonableness grafted onto both the direction-giving power in s 499(1)[48] and the

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[42] *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667, [24] (Dowsett J).
[43] *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667, [24], [28] (Dowsett J).
[44] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 641 (Brennan J).
[45] *Awa v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 189 ALR 328, [37] (the Court). See also *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268, [29] (Madgwick J).
[46] *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, [57] (Dowsett J, Kenny and Mortimer JJ agreeing). Note – this decision concerned the cancellation power in s 501(2), rather than (1). See also *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268, [21] (Madgwick J).
[47] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 321 (McHugh J): 'The *Migration Act* entrusts the weighing of such considerations to administrative officials.'
[48] Other direction-giving powers in the Act have been held to be subject to the constraints of reasonableness. See, eg, s 473FB considered in *DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551, [79]–[103] (the Court).

power in s 501(1) itself. In this respect, the power in s 499(1) can be analogised[49] with regulation-making powers, which have been held – on the ground of 'unreasonableness' – not to empower regulations that would lead to 'manifest arbitrariness, injustice or partiality'.[50]

46. *Second*, a direction given under s 499(1) cannot alter the essential nature of the power in s 501(1) as one entailing a discretionary weighing or balancing exercise. It cannot extend to the giving of directions 'which abrogate, modify or qualify the scope of the power'.[51] Put in emphatic terms:

> [Section 501(1)] gives the Minister a discretion to require, in effect, the banishment from Australia of an individual. Section 499(1) does not empower the giving of directions that would turn a discretion, touching 'human fate' … into no discretion at all. It follows that there must be a genuine weighing of factors tending to opposite conclusions and no artificial limitation of such factors.[52]

47. As a result, a direction 'narrowing the discretion',[53] or which 'fetters the discretion',[54] or which 'truncates' or 'limits the range of discretion conferred',[55] may be invalid.

48. Against those general propositions of law about the nature of the powers in s 501(1) and s 499(1), it is convenient to turn now to the facts of this case and Direction 90.

Delegate weighed family violence repetitiously

49. Weighing a matter 'repetitiously'[56] involves giving a matter independent weight at multiple points in a weighing or balancing process albeit on the basis of the same

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[49] It is an analogy only because there is some uncertainty in the authorities as to whether directions given under s 499(1) can be legislative instruments: *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [54] (Robertson J); *DNN17 v Minister for Immigration and Border Protection (No 2)* [2019] FCA, [59] (Allsop CJ). Cf *Milne v Minister for Immigration and Citizenship* (2011) 120 ALD 405, [54] (the Court), special leave refused: *Milne v Minister for Immigration and Citizenship and Anor* [2011] HCASL 165.

[50] *Minister for Primary Industries and Energy v Austral Fisheries Pty* Ltd (1993) 40 FCR 381, 384 (Lockhart J), see also the descriptors 'capricious or irrational' at 399, 401 (Beaumont and Hill JJ).

[51] *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, [56] (French CJ).

[52] *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268, [20] (Madgwick J, emphasis added) quoting *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 407 (Toohey J).

[53] *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [46] (Robertson J).

[54] *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667, [10] (Dowsett J). See also *Ruhl v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 401, [37] (Cooper J); *Javillonar v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 311, [41] (Stone J); *Jahnke v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 268, [17]–[19] (Drummond J); *Andary v Minister for Immigration and Multicultural Affairs* [2001] FCA 1544, [27] (Dowsett J); *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580, [125]–[128] (the Court); *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 402, [87] (Ryan and Tamberlin JJ). Cf *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822, [29] (Whitlam J); *Martinez v Minister for Immigration & Citizenship & Anor* (2009) 177 FCR 337, [70]–[71] (Rares J).

[55] See and compare *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640–1 (Brennan J).

[56] *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646, [26] (Perram J) quoted with approval in *XXBN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 74, [53] (the Court).

relevance or purpose. In other words, where a matter such as family violence committed by a non-citizen is identified as being relevant for two purposes – *protection* and *expectations* of the Australian community – it would be repetitious to give that matter weight at a third point in the reasoning without identifying some further independent relevance. What is referred to here as 'repetitious weighing' is occasionally described, more loosely, as 'double counting', 'double weighting' or 'double dipping'.[57]

50. Repetitious weighing of a matter is not the same as considering the same matter through different lenses, or frames, or for different (permitted) purposes: 'to take account of a matter "repetitiously" is a fundamentally different proposition to … a matter being taken into account for two or more mandatory considerations'.[58] The former is impermissible (for reasons explained below), whereas the latter is permissible.

51. Here, the Delegate engaged in repetitious weighing by giving weight to family violence committed by him under paragraph 8.2 of Direction 90 where weight was also given to this consideration in an identical way and for an identical reason under paragraph 8.1 and/or 8.4. That process of repetitious weighing is revealed by examining the way the Delegate considered and applied each of paragraphs 8.1, 8.2 and 8.4 of Direction 90.

52. Paragraph 8.1 of Direction 90 concerns the 'Protection of the Australian community'. In assessing this consideration, the Delegate commenced their assessment of the '[n]ature and seriousness' of the Plaintiff's conduct by noting that 'acts of family violence … are viewed very seriously by the Australian Government and the Australian community' (AB 44 [15]). The Delegate then started their survey of the Plaintiff's offending with his family violence (referred to above at [8]), despite this not being his first offending chronologically and this not being the offending that resulted

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[57] *BYMD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 3476, [155] (Member Bellamy); *Pourabbas Aghbolagh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 4269, [59] (Senior Member Tavoularis); *Amos and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 4774, [33] (Senior Member Tavoularis); *RTTW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 4813, [47] (Senior Member Tavoularis); *Dunasemant and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 1967, [251] (Member East); *NRWQ and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2022] AATA 2879, [78] (Deputy President Britten-Jones); *JHZB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2023] AATA 1266, [166] (Senior Member Cameron).

[58] *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138, [123] (Halley J).

in him failing the character test. After then devoting six paragraphs to considering the two incidents of family violence (AB 44–5 [16]–[21]), the Delegate concluded 'having considered the circumstances of the above offending, I find these offences to be acts of family violence and therefore viewed as very serious' (AB 46 [22]). After going on to consider the Plaintiff's other offending, the Delegate concluded: 'I find Mr ISMAIL's conduct to be very serious in nature. I have attributed this consideration *significant weight* for refusal of Mr ISMAIL's visa application' (AB 48–9 [33] emphasis added). In the Delegate's assessment of the risk to the Australian community of the Plaintiff repeating his conduct, the Delegate noted the harms to the victim and the community associated with family violence (AB 49 [35]) and referred to matters relevant to the risk of the Plaintiff again engaging in family violence against Heba Chakik (see especially AB 50 [40]–[43]).

53. Paragraph 8.2 of Direction 90 concerns 'Family violence committed by the non-citizen'. In assessing this consideration, the Delegate found 'that Mr ISMAIL has engaged in conduct constituting family violence' (AB 53 [58]). The Delegate then assessed the seriousness of the conduct very similarly to its earlier assessment (compare AB 51 [45] and AB 64 [62]). The Delegate concluded that 'the family violence in this case should be regarded as serious' and stated 'I have attributed this consideration *significant weight* in refusing Mr ISMAIL's visa application' (AB 55 [67] emphasis added).

54. Paragraph 8.4 of Direction 90 concerns the 'Expectations of the Australian community'. In assessing this consideration, the Delegate noted (consistently with Direction 90) that 'the Australian community expects that the Australian Government can and should refuse a visa if the applicant raises serious character concerns through certain kinds of conduct.' (AB 56 [77]) The Delegate did not refer to any of the Plaintiff's other offending (i.e. non-family violence offending). The Delegate concluded: 'I have attributed this consideration *significant weight* in favour of refusal of Mr ISMAIL's visa application.' The Delegate returned to this matter at the conclusion of the reasons (AB 62 [114]).

55. From the above, it is clear the Delegate weighed family violence under three of the primary considerations that the Delegate said they took into account (AB 44 [11]). However there were only two identified reasons to give family violence weight (protection and expectations of the Australian community), and thus the attribution of

weight to this matter under paragraph 8.2 must have been repetitious of the weight given under paragraphs 8.1 and/or 8.4.

56. The conclusion that the Delegate repetitiously weighed family violence against the Plaintiff leads, in turn, to the conclusion that the Decision is ultra vires, either because it was not made in compliance with Direction 90 (because repetitious weighing is not permitted by Direction 90) or because, insofar as repetitious weighing *was* permitted by Direction 90, the direction was invalid and thus purported compliance with it took the Delegate outside of jurisdiction. Those contentions are developed below.

Repetitious weighing not permitted by Direction 90

57. Direction 90 should not be read to permit repetitious weighing for two reasons.

58. *First*, the power to give directions under s 499(1) – like other powers to make policies to guide decision-makers[59] – was designed to 'improve' decision making,[60] and to 'lead to greater certainty for applicants'.[61] Repetitious weighing is not conducive to improved administrative decision-making, nor to certainty; in fact, it defies common sense, and will necessarily be unpredictable, insofar as it involves the artificial attribution of weight to a particular factor at multiple points in a decision-making process without any further or independent identification of the relevance of that factor. Rather than read Direction 90 as permitting such reasoning, the better reading of the direction is that it requires family violence to be considered through different frames (relevantly for present purposes: paragraphs 8.1, 8.2 and 8.4) but (implicitly) requires the Tribunal to avoid repetitious weighing by moderating the weight to be given to family violence under the various considerations or giving it neutral weight under paragraph 8.2. That is how discerning Tribunals have read it.[62] But that is not how the Delegate approached the exercise here.

59. *Second*, for reasons that are developed below, the process of repetitious weighing is inconsistent with the discretionary balancing or weighing power in s 501(1), and thus repetitious weighing could not be validly authorised by a direction under s 499(1).

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[59] See, generally, *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639–40 (Brennan J). See also *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, [137] (Kirby J).
[60] Commonwealth House of Representatives, *Parliamentary Debates*, 2 December 1998, p 1229, 1230 (Ruddock).
[61] Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997* (1998) [3.5].
[62] See the Tribunal decisions cited in footnote 56.

Thus, in order to preserve the validity of Direction 90,[63] it ought be read not to permit repetitious weighing.

Direction 90 invalid insofar as it permits repetitious weighing

60. In the alternative, if Direction 90 must be read to permit repetitious weighing, it was beyond the power in s 499(1) to that extent because it infringed either or both of the two limitations identified above at [45]–[47].

61. *First*, Direction 90 is beyond power insofar as it permits repetitious weighing because that is a an illogical, irrational or otherwise unreasonable reasoning process,[64] and the power in s 499(1) does not empower directions that require decision-makers to engage in such reasoning. Similar repetitious reasoning is forbidden in another acutely discretionary exercise – criminal sentencing – where a decision-maker errs if they 'doubly punish' an offender by weighing a single consideration against them at multiple points in the reasoning,[65] of if they engage in 'double counting' of a matter that has already been factored into the decision.[66]

62. *Second*, Direction 90 is beyond power insofar as it permits repetitious weighing because repetitious weighing has the effect of 'narrowing the discretion'[67] or distorting a fundamental aspect of the power in s 501(1), namely, its character as a discretionary balancing process involving the 'genuine weighing of factors'[68] for and against visa refusal (see above at [43]). That repetitious weighing has that distorting effect has been recognised in a number of Tribunal decisions,[69] where it has been said that to give family violence weight under both the first and second primary considerations would 'distort the balancing exercise the Tribunal is required by the Direction to undertake'.[70]

Conclusion to ground 2

63. Assuming Direction 90 can be saved from invalidity by reading it so as not to permit repetitious weighing, the Delegate's repetitious weighing constituted a material failure

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[63] *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268, [20] (Madgwick J); *Bustescu v Minister for Immigration and Multicultural Affairs* (1999) 30 AAR 482, [40] (Sackville J).
[64] See further Jason Donnelly, 'Double Counting Family Violence for the Same Purpose – Permissible Decision-making or Legal Unreasonableness?' (2022) 29 *Australian Journal of Administrative Law* 267, 274–9.
[65] *Wakim v The Queen* [2016] VSCA 301, [43] (the Court); *Torrefranca v The Queen* [2021] VSCA 157, [39] (the Court); *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd* [2022] FCA 665, [97] (Abraham J) quoting *Bae v The Queen* [2020] NSWCCA 35, [57] (Johnson J, Bell P and Walton J agreeing).
[66] See, eg, *Andrews v The Queen* [2006] NSWCCA 42, [18] (Grove J, Giles JA and Hoeben J agreeing).
[67] *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [46] (Robertson J).
[68] *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268, [20] (Madgwick J, emphasis added) quoting *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 407 (Toohey J).
[69] See the Tribunal decisions cited at footnote 56.
[70] *Batson and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2022] AATA 1715, [106] (Senior Member Morris).

to comply with Direction 90 as required by s 499(2A). Alternatively, insofar as paragraph 8.2 of Direction 90 purports to permit repetitious weighing, it is not a valid exercise of the power in s 499(1) of the Act and the Delegate's adherence to that paragraph resulted in jurisdictional error.[71]

Ground 3: Punitive or otherwise irrelevant treatment of family violence

64. Ground 3 of the Plaintiff's application to this Court is:

> In the alternative to ground 2, the Delegate interpreted and/or applied paragraph 8.2 of Direction 90 as if it permitted weight to be given to family violence committed by the Plaintiff unconnected to the protection and/or expectations of the Australian community, thereby giving weight to family violence in a punitive or irrelevant way. In so doing, the Delegate erred jurisdictionally because:
>
> a. paragraph 8.2 of Direction 90 does not permit weight to be given to family violence in a punitive or irrelevant way; or
>
> b. insofar as paragraph 8.2 does purportedly permit weight to be given to family violence in a punitive or irrelevant way – it is invalid.

65. If, contrary to the above, the Delegate did not engage in a process of repetitious weighing and instead gave family violence weight for reasons other than the protection and expectations of the Australian community, that would also have been beyond power for a different reason, namely, that would be to give weight to family violence in a punitive or irrelevant way that could not be permitted by a direction given under s 499(1).

What can, and cannot, be permitted by a direction under s 499(1)

66. It is uncontroversial that a direction may validly prescribe considerations such as protection of the Australian community[72] and expectations of the Australian community,[73] because to do so is 'non-punitive in nature'.[74]

67. However, a direction given under s 499(1) cannot validly:

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[71] See, by analogy, the argument summarised and conceded in *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [33], [38] (Robertson J).
[72] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [15] see also [26] (Allsop CJ).
[73] *Folau v Minister for Immigration and Border Protection* (2017) 256 FCR 455, [49] (Collier J, Murphy and Burley JJ agreeing).
[74] See *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488, [61] (the Court). See also *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, [73]–[74] (the Court).

a. 'direct[] decision-makers to take into account irrelevant considerations',[75] because the power in s 499(1) does not extend to the giving of directions that are inconsistent with the Act; or

b. require decision-makers to take into account considerations in a punitive way, because the power in s 499(1) – read in a way to preserve its validity – does not extend to the giving of directions that would infringe the separation of powers.

Delegate considered family violence in punitive or irrelevant way

68. Recalling that an assumption of this ground is that the Delegate did not give weight to family violence in a repetitious way, it is necessary to ask: how *was* family violence given weight if not in connection with protection or expectations of the Australian community?

69. The answer to that question lies in the Delegate's reasons,[76] in particular the reasons on paragraph 8.2 of Direction 90 (AB 52–5 [53]–[67]).

70. The most telling feature of the reasons is the complete failure of the Delegate to explain *why* family violence was given independent weight under paragraph 8.2. In the absence of an explanation, it is left to this Court to infer the silent purpose that the Delegate gave family violence 'significant weight' (AB 55 [67]) under paragraph 8.2 independently of giving it weight under paragraphs 8.1 and 8.4

71. A clue to the Delegate's silent purpose is the backward-looking nature of the Delegate's assessment under paragraph 8.2, in particular the use of the past tense throughout. As was explained in *NBMZ v Minister for Immigration and Border Protection*:

> If the Minister's decision was to avoid the charge that he was intent on some form of punishment (normally the preserve of the courts) then his assessment of whether the applicant should be granted a visa should also have been directed to some assessment of the consequences for the Australian community if the applicant was granted a visa. Normally, there should be an attempt to assess the likelihood of similar, or other, criminal conduct of the kind which had aroused the Minister's displeasure and provoked the censorious conclusion that the applicant had demonstrated a

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[75] *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [46] (Robertson J). Mortimer J (as her Honour then was) would go further and hold that a direction under s 499(1) cannot render mandatory that which the Act only makes a permissive consideration: *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, [142] (Mortimer J); *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112, [43] (Mortimer J).
[76] *ENT19 v Minister for Home Affairs* [2023] HCA 18, [7] (Kiefel CJ, Gageler and Jagot).

> fundamental disrespect for Australian laws, standards and authorities. That is because the discretion to be exercised under s 501 is fundamentally forward, rather than backward, looking. It concerns the future, not the past.[77]

72. Another factor supporting an inference that the Delegate's reasoning under paragraph 8.2 was animated by a punitive or otherwise irrelevant purpose is the morally repugnant nature of family violence, which makes it plausible that the Delegate was animated by an impulse to punish the Plaintiff by reaching the 'censorious conclusion' that he ought not hold a visa.[78]

73. Here, that family violence was weighed under paragraph 8.2 in a punitive or irrelevant way. That weighing resulted in a failure to comply with Direction 90 (if Direction 90 is read to be within power and thus not to permit punitive or irrelevant weighing of family violence) or purported compliance with an invalid part of Direction 90. Either way, the Delegate exceeded their jurisdiction.

Ground 4 - Erroneous approach to the expectations of the Australian community.

74. Ground 4 is that the Delegate erroneously applied the expectations of the community as a significant factor to be weighed in favour of refusal, without considering what weight to give that factor in light of the applicant's circumstances. The point is clear from paragraphs 76-79, 108 and 114 of the Delegate's reasons.

75. The Plaintiff, in an email with the subject "Unbearable situation" sent on 13 September 2022 submitted that he was emailing out of "severe desperation" and that he had been

> "waiting and stranded for over five months now, away from partner, loved ones, my family, including my non-biological disabled child of whom I am a caretaker. I am away from my self-employed company employees and projects I manage for work, away from my life and everything that really matters to me. Everything that I had build and worked hard for over the last 13 years to be imprisoned in a country that I originally escaped have no ties to, and am enduring severe and hard conditions, where the very basic needs of life don't exist. There is no electricity, very limited to no access of water, no Internet, severe political and economic crisis, huge risk of harm on myself, overwhelming fear and danger."

76. The email also said the Plaintiff was questioning his "very existence" and that he had lost vision in his left eye while waiting to return to medical care in Australia.

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[77] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [192] (Buchanan J). Allsop CJ and Katzmann J did not determine this issue: see [28], nor did Buchanan J: [195]. See also *Jagara v Minister for Immigration and Border Protection* [2018] FCA 538, [23] (Lee J); *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100, [133]–[136] (Katzmann J), although that reading of the Minister's reasons was not accepted by three members of this Court: *ENT19 v Minister for Home Affairs* [2023] HCA 18. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, [75] (Kiefel CJ, Keane and Gleeson JJ).

[78] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [192] (Buchanan J). See also *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, [144] (Mortimer J).

77. The Delegate failed to consider what weight to give the deemed adverse factor of expectations of the Australian community in light of the Plaintiff's personal circumstances. Similar reasoning was found to be erroneous very recently by Bromberg J in *Ali v Minister for Immigration, Citizenship and Multicultural Affairs*[79] and in 2022 by Beach J in *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[80] where his Honour stated:[81]

> Now of course the Minister has a broad decisional freedom as to the relative weight to be given to these different considerations. But in my view the Minister did not give active intellectual consideration to the applicant's representation about his specific circumstances in the context of the weight to be given to the community expectations.

PART VII: ORDERS SOUGHT

78. The Plaintiff seeks the following orders:
    a. The Plaintiff have leave to amend his application to add Ground 4.
    b. Certiorari to quash the decision of the delegate of the Defendant on 28 September 2022 to refuse to grant the Plaintiff a Return (Residence) (Class BB) (Subclass 155) visa.
    c. Mandamus requiring the Defendant to determine the visa application according to law.
    d. Costs.
    e. Such further or other orders the Court thinks fit.
79. If the Court upholds ground 2(b), the Plaintiff seeks:
    a. A declaration that, insofar as it purports to permit persons or bodies exercising the power under s 501(1) of the *Migration Act 1958* (Cth) to give weight to family violence committed by the non-citizen where weight is also given to this consideration in an identical way under another paragraph of 'Direction No. 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA', paragraph 8.2 of Direction 90 is not a valid exercise of the power in s 499(1) of the Act.
80. If the Court upholds ground 3(b), the Plaintiff seeks:[82]

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[79] [2023] FCA 559.
[80] [2022] FCA 396 at [100]–[101], [108], [112].
[81] *Ibid* at [112].
[82] This proposed declaration has been slightly amended from that originally sought in the Plaintiff's application by the addition of the words 'in a punitive or irrelevant way'. The amendment better aligns the declaration with the wording of ground 3(b).

a. A declaration that, insofar as it purports to permit persons or bodies exercising the power under s 501(1) of the *Migration Act 1958* (Cth) to give weight to family violence committed by the non-citizen unconnected to the protection of the Australian community and/or expectations of the Australian community in a punitive or irrelevant way, paragraph 8.2 of 'Direction No. 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' is not a valid exercise of the power in s 499(1) of the Act.

PART VIII: ESTIMATE

81. The Plaintiff estimates that he will require approximately 1.5 hours for oral argument, exclusive of any time for reply.

Dated: 28 June 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY M20 of 2023

BETWEEN: **Mounib Ismail**
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to Practice Direction No.1 of 2019, the Plaintiff sets out below a list of the constitutional provisions and statutes referred to in these submissions.

No.	Description	Version	Provisions
1	*High Court Rules 2004* (Cth)	Current	r 25.02.2(a)
2	*Migration Act* 1958 (Cth)	Current	ss 82, 477, 486A, 499, 501