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 M20 of 2023

BETWEEN: **Mounib Ismail**
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

PLAINTIFF'S REPLY

PART I: CERTIFICATION

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

PART II: ARGUMENT

Ground 1: Failure to make obvious inquiry

2. The Defendant is wrong to suggest that the Plaintiff's failure to make Mariam's best interests a positive part of his case provides a complete answer to ground 1. The context of the erroneous decision is an inquisitorial process rather than an adversarial contest.

3. The obligation to consider the best interests of a minor child, whether under an applicable ministerial direction or as a relevant consideration, is not premised on the person affected by an administrative decision advancing the child's best interests as a positive part of their case. This Court has held expressly to the contrary.[1]

4. It would be different if the Plaintiff were asserting jurisdictional error by reason of a failure to engage with his representations, in which case much would turn on the way he had put his case before the decision-maker (cf Defendant's Submissions, **DS**, [34]). The obligation on which the Plaintiff hinges ground 1 is the implied obligation of reasonableness in the performance of the statutory power in s 501(1).[2] Further, without carrying out the task of considering that child's interests in the Plaintiff's presence in Australia, the decision maker failed to exercise the power according to the requirement in the direction.

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[1] *Uelese v Minister for Immigration* (2015) 256 CLR 203, [63] (French CJ, Kiefel, Bell and Keane JJ).
[2] See, by analogy, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [100] (Gageler J).

5. In assessing the reasonableness of a failure to inquire courts have found it helpful to consider whether the inquiry: was obvious; related to a critical fact; and was easily or readily made.[3] Despite these considerations traditionally informing the analysis, the Defendant has not engaged with them in written submissions (cf Plaintiff's Submissions, **PS**, [34]). Each such consideration supports the conclusion that the Delegate's failure to inquire in this case took the decision beyond jurisdiction (see further PS [34]).
   a. As to *obviousness*, the Defendant presumably accepts that the inquiry was obvious given the Delegate themselves adverted to this lacuna in the information before them (AB 56 [75]).
   b. Nor can it be doubted that Mariam's age was a *critical fact* in circumstances where it had the potential to engage a primary consideration under Direction 90, which primary consideration is included in the direction to give effect to Australia's international obligations.[4]
   c. Mariam's age was 'information that was apparently *readily available*'.[5] The Delegate could either have inquired by email of the Plaintiff's representative (given their previous email communication: AB 104–8) or inquired directly of Mariam's mother (who had provided her email address and telephone number: AB 160). This was a case in which the decision-maker had open to them 'the simple expedient' of an inquiry.[6]
   d. Finally, that the inquiry *could have yielded a useful result* is confirmed by the affidavit of Halima Chakik (Mariam's mother) filed by the Plaintiff in this Court, in which she deposes to Mariam having a good relationship with the Plaintiff, enjoying his company, asking when he will return, and continuing to maintain phone contact with him while he remains stranded in Lebanon.[7]
6. The above analysis cannot be avoided by the Defendant's assertion that 'the plaintiff chose not to provide any information in support of that proposition to the delegate' (DS

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[3] See the references to 'criticality', 'relative ease' and 'obviousness' in *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [51] (Nettle J).
[4] See Article 3(1) of the *United Nations Convention on the Rights of the Child* (adopted 20 November 1989 by General Assembly resolution 44/25) referred to in *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187, [108] (Derrington J).
[5] *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151, [79] (Kenny J, emphasis added).
[6] *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, [29] (Ryan and Finkelstein JJ).
[7] Affidavit of Halima Chakik, affirmed and filed 28 June 2023, [9]–[10]. As to the admissibility of the affidavit see: *Rahman v Minister for Immigration and Multicultural Affairs* [2000] FCA 1277, [30] (French J).

[36]). The nature of an asserted obligation to inquire is that it will always arise where there is an *absence* of information in what *has* been provided by a party. It is this absence that – when sufficiently important – will trigger the obligation to inquire as to 'some obvious omission or obscurity that needs to be resolved before a decision is made'.[8]

7. Finally, as to materiality, the Defendant is wrong to frame the materiality analysis as asking whether the decision would have been different if the Delegate merely knew Mariam's age and nothing else (DS [40] see also DS footnote 32). The counterfactual analysis must encompass *all* of the various possible courses that the Delegate might have taken after learning of Mariam's age, which include the possibility that:
   a. The Delegate might have chosen not to inquire any further after learning of Mariam's age. In that case, the fact of Mariam being a child with whom the Plaintiff had daily contact (AB 114) combined with the Plaintiff's positive influence on other children to whom he was close (AB 151 [15], 153 [22], 157, 158 [8]), could have led the Delegate to find that it was in Mariam's best interests to grant the Plaintiff the visa.
   b. Alternatively, on having made the initial inquiry and learned that Mariam was a child, the Delegate might have felt compelled to inquire further so as to be more fully apprised of the Plaintiff's relationship with Mariam. Had the Delegate done so, the Delegate would have learned of the close and positive relationship to which Mariam's mother has deposed in this Court (see above at [5.d]).
8. In either case, the making of the initial inquiry into Mariam's age would have resulted in this primary consideration weighing even further in the Plaintiff's favour. In what was a 'finely balanced' discretionary exercise, further weight in the Plaintiff's favour might realistically have changed the outcome.[9]

Grounds 2 and 3: Repetitious weighing of family violence, or weighing family violence for a punitive or otherwise irrelevant purpose

9. The Defendant might have responded to the Plaintiff's grounds 2 and 3 by arguing that the Delegate did not give weight to family violence independently of the protection and expectations of the Australian community. The Defendant could have attempted to argue that the Delegate's reasons under the heading 'Family violence' (AB 52–5) were in fact an elaboration of the reasons why family violence was particularly important to, and needed to be given particular weight in relation to, the protection and

[8] *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167, 178 (Toohey J).
[9] See by analogy *ZMBZ v Minister for Home Affairs* [2019] FCAFC 195, [47]–[48] (the Court).

expectations of the Australian community. In other words, the Defendant could have argued that there was no independent weight given to family violence in its own right.

10. The Defendant has not sought to advance that reading of the Delegate's reasons. Instead, the Defendant asserts that it is reasonable and consistent with Direction 90 for the Delegate to have 'give[n] weight to, family violence committed by the plaintiff, both in its own right and to the extent that it informed the considerations of protection of the community and the expectations of the community' (DS [48], emphasis added).

11. However, the Defendant has not articulated how family violence can be understood to be relevant 'in its own right'.

12. If the Defendant is correct that the Delegate gave family violence weight 'in its own right' rather than to inform the protection and expectations of the Australian community, this can only have been for a punitive or otherwise irrelevant purpose (PS [68]–[72]). Ground 3 would thus succeed.

13. If, however, the Court concludes that the Delegate only gave weight to family violence for two reasons (protection and expectations of the Australian community) then one of these reasons must have generated repetitious weight, because there are three discrete points in the reasons where the Delegate has given weight to family violence (see further PS [51]–[55]). Ground 2 would thus succeed.[10]

Ground 4: Erroneous approach to the expectations of the Australian community

14. The Minister has not addressed the two decisions of the Federal Court on which the Plaintiff relies for this ground (see PS [77]). Presumably, the Minister will submit that those decisions are distinguishable or wrong. Such a submission should be rejected.

15. In ***Kelly*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, Beach J found that the Minister erred jurisdictionally where, 'having found that "the broader Australian community's general expectations about non-citizens, as articulated in the Direction, apply in this case"' the Minister 'then and without any explanation and before anything else immediately state[d] that he "attributed this

[10] That analysis is not changed by the recent decision *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870. In that case, the Court did not accept the characterisation of the decision as entailing 'double counting' because the exercise was 'not mathematical' and rather was 'instinctive', and inferred that the decision-maker had adjusted the weight to avoid any double counting: [21]–[22], [25], [26]. In the present case, the Delegate's decision did involve a degree of mathematical logic, was not instinctive and involved no adjustment (see, especially, AB 62 [111]–[115]). In any event, it is not correct that 'instinctive' decision-making – like criminal sentencing – is immune from assertions of double counting: PS [61].

consideration significant weight against revocation"'.[11] That is exactly what the Delegate did in the present case (AB 56 [78]–[79]).

16. In ***Ali*** *v Minister for Immigration, Citizenship and Multicultural Affairs*, Bromberg J found 'that in attaching significant weight towards non-revocation to the community expectations consideration, the Minister assessed the weight to be attached to that consideration without having regard to the applicant's personal circumstances'.[12] That was held to entail jurisdictional error. While it is true that in *Ali* the applicant had made express representations concerning the expectations of the Australian community, in the present case the Plaintiff had asked the Delegate to take into account 'all' his circumstances when considering the visa application (AB 127), and had said that his formal statement was directed to 'the various considerations in Direction no. 90' (AB 139 [48]). In those circumstances, the Delegate could not perform the statutory task of weighing community expectations without taking into account the Plaintiff's circumstances.

17. *Kelly* and *Ali* stand for the proposition that, to comply with the statutory task and the direction on community expectations, a decision-maker must 'consider what weight to give to that deemed expectation in light of the evidence of the specific circumstances particular to the applicant'.[13] The Delegate failed to do that here.

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[11] *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396, [98] (Beach J, references removed).
[12] *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559, [70], [91] (Bromberg J).
[13] *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396, [108] (Beach J)