

HIGH COURT OF AUSTRALIA

GORDON J

PLAINTIFF M7/2021

PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS

DEFENDANT

Plaintiff M7/2021 v Minister for Home Affairs

[2021] HCA 14

Date of Hearing: 30 March 2021

Date of Judgment: 15 April 2021

M7/2021

ORDER

- 1. Pursuant to s 486A(2) of the Migration Act 1958 (Cth), the period within which an application may be made for a remedy to be granted in relation to a decision made by a delegate of the defendant on 12 June 2020 is extended to 29 January 2021.*
- 2. Pursuant to r 4.02 of the High Court Rules 2004 (Cth), the time fixed by rr 25.02.1 and 25.02.2(b) be enlarged in respect of this application.*
- 3. A writ of certiorari issue to quash the decision made by a delegate of the defendant on 12 June 2020 to refuse to grant the plaintiff a protection visa.*
- 4. A writ of mandamus issue directed to the defendant requiring the defendant to determine the plaintiff's application for a protection visa according to law.*
- 5. The defendant pay the plaintiff's costs of and incidental to the application.*

Representation

N P Karapanagiotidis for the plaintiff (instructed by Asylum Seeker Resource Centre)

C L Symons for the defendant (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Plaintiff M7/2021 v Minister for Home Affairs

Immigration – Refugees – Application for protection visa – Where plaintiff claimed protection on basis of feared persecution in Pakistan on account of homosexuality – Where delegate of defendant refused protection visa – Where delegate found evidence, including "open source social media", did not support view plaintiff was known homosexual in Pakistan – Where open source social media was "relevant information" within meaning of s 57(1) of *Migration Act 1958* (Cth) – Where s 57(2) required defendant to give particulars of "relevant information" to plaintiff to ensure, as far as reasonably practicable, plaintiff understood why it was relevant, and invite plaintiff to comment – Whether defendant failed to comply with s 57(2) by failing to disclose open source social media or provide particulars to enable plaintiff to understand why information was relevant to protection visa application.

Words and phrases – "active group of friends and family", "depends on the facts and circumstances of the case", "disclosure of the substance of the relevant information", "fabricated his claim to be a homosexual", "give particulars", "homosexuality", "open source social media", "opportunity to meaningfully respond", "relevant information", "sexual identity", "sufficient clarity or specificity".

Migration Act 1958 (Cth), s 57.

1 GORDON J. The plaintiff seeks constitutional writs, a writ of certiorari and other relief in respect of a decision made by a delegate of the defendant, the Minister for Home Affairs ("the delegate"), on 12 June 2020 to refuse to grant the plaintiff a protection visa ("the impugned decision"). The plaintiff claimed protection on the basis that he feared persecution in Pakistan on account of his homosexuality. The plaintiff claimed, among other things, that he left Pakistan because he faced torture and violence from his family as a result of his homosexuality; that he had been beaten publicly by his father in Pakistan and that his father has threatened to kill him if he returns; and that he cannot relocate to another area of Pakistan because there is no safe area for members of the LGBT community, who can be whipped or stoned to death under Islamic law in Pakistan.

2 In the impugned decision, the delegate made a finding, among others, that the evidence, including "open source social media", did not support the view that the plaintiff was a known homosexual in Pakistan. The plaintiff's principal complaint is that the delegate failed to comply with s 57 of the *Migration Act 1958* (Cth) because the delegate failed to disclose the open source social media or provide particulars of that information to the plaintiff to enable him to understand why that information was relevant to consideration of his application for a protection visa. The plaintiff submitted that the delegate's failure to comply with s 57 of the *Migration Act* thereby denied him the opportunity to ascertain the relevant issues and denied him the opportunity to meaningfully respond to that information.

3 The plaintiff's application in the original jurisdiction of this Court was filed outside of the period of 35 days fixed by s 486A(1) of the *Migration Act*, as well as the periods of 35 days (to file an application for a writ of certiorari) and two months (to file an application for a writ of mandamus) fixed by r 25.02.2(b) and r 25.02.1 of the *High Court Rules 2004* (Cth). The plaintiff applied for an extension of time to prosecute his application for the relief sought. That application, as well as the substantive relief, was opposed by the Minister.

4 As these reasons will explain, in relation to the open source social media information, the delegate did fail to comply with s 57 of the *Migration Act*. The plaintiff should be granted the extension of time he seeks to prosecute his application for relief in this Court and, consistent with that application, a writ of certiorari should issue to quash the impugned decision and a writ of mandamus should issue to compel the Minister to consider and determine the application according to law.

Facts and background

5 The facts are not in dispute. The plaintiff is a citizen of Pakistan. On 22 November 2015, the plaintiff travelled to Australia by plane as the holder of a subclass 573 Student Higher Education visa. On 21 February 2017, that visa was cancelled.

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6 On 23 March 2018, the plaintiff applied for a protection visa, claiming he left Pakistan because, among other things, he faced torture and violence from his family as a result of his homosexuality.

7 Some two years later, on 25 February 2020, the plaintiff was interviewed by a delegate of the Minister. An unofficial transcript of that interview was in evidence. Both parties relied on the transcript. In order to address the plaintiff's review grounds, it is necessary to set out particular aspects of that interview concerning what might be described as "open source social media".

8 After the plaintiff was asked during his interview, "[a]re you on Facebook?", and the plaintiff said "[y]es", the transcript then records the following exchange:

"DO: Did you get married in April 2015?

A: Sorry?

DO: Did you get married in April 2015?

A: No I never got married.

DO: So what's this occasion, can you see that? *[Delegate shows [the plaintiff] something]*

A: Yeah, yeah it's a function called Mehndi – so it was my friend's brother's Mehndi.

DO: What is celebrated? What is Mehndi? What are you celebrating there? Why are people congratulating you?

A: It's the night, it's the night before marriage, one night before marriage night. So it was my, my friend's brother's Mehndi function.

DO: Yeah and so what was the friend's brother's name?

A: It's uh ... my friend's name is [E].

DO: Who was the person getting married?

A: No it's not the person getting married, the person who was getting married, the person who was getting married – his nickname was [B] but I remember his, his full name um ... is [A], [A], the person who was getting married."

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9 The delegate later asked the plaintiff whether he was in contact with a previous partner on social media – "on Facebook or Insta or anything like that? Snapchat?" The plaintiff responded "[n]o".

10 In relation to his family, the following exchange between the plaintiff and the delegate took place:

"DO: Alright so who knows that you're gay in your family?

A: My whole family.

DO: Everyone?

A: Yeah.

DO: So father, mother?

A: Yeah and my siblings.

DO: Your mother never knew before? When did she first know then, when you were 17?

A: Yes.

DO: But you're still friends with them on Facebook.

A: Yes.

DO: So why is that? You're friends with them. You say that you don't talk to any of your family, but that's not true. You do talk to them on Facebook.

A: I talk to, I talk to my siblings and my mother, because they never, they never beated me.

DO: So they've got no problem with you, have they?

A: They don't have like, they don't, they don't want me to, because of, because of my father, they don't tell my father that we are, that we are talking to him.

DO: So you're saying that your family are supportive, besides your father. That your mother is, and your brothers – I think you've got 2 brothers haven't you – and a sister, they all support you.

A: They don't support me in a way like that 'we want you in our family back'. They don't, they don't support me in a way like that. They only,

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they only talk to me because I, like, I'm their blood relation, that's why they only talk to me.

DO: Well they're not obliged to talk to you on Facebook and to like pictures you've put there and to make little comments saying, you know 'Ma'shallah Bro' and all this sort of thing. They're not obliged to do that, no one is.

A: Yeah I know but I never replied to their comments and stuff like that."

The plaintiff also volunteered that he remained in occasional contact with a former partner via Facebook and referred to a dating application he had used called "Whisper".

11 On 7 May 2020, the delegate sent the plaintiff a letter that contained an invitation to comment on unfavourable information that the delegate considered would be the reason, or part of the reason, for refusing to grant a protection visa in purported compliance with s 57 of the *Migration Act*. The letter referred to "[o]pen source social media information" and "social media information" and stated that:

"Information you provided as part of your Protection visa application and at your Protection visa interview on 25 February 2020 indicated your homosexuality was known and frowned upon by your family and local community in Pakistan. For example, Information you provided as part of your Protection visa application indicates you had been beaten in public on numerous occasions by your father and his associates because of your homosexuality. Information you provided as part of your Protection visa application indicates you incurred death threats from your work colleagues in Pakistan as a result of your homosexuality. *Open source social media information before the Department [of Home Affairs ('the Department')]; however, may indicate you led a normal life in Pakistan with an active group of friends and family.* Given the known social taboo to homosexuality in Pakistan which forms part of your Protection visa application; *social media information before the Department may suggest you were not persecuted and ostracized as a result of your sexuality in Pakistan as you claim.*" (emphasis added)

The plaintiff was not provided with a copy of the "[o]pen source social media information" or the "social media information" that was "before the Department".

12 The 7 May letter also put other information to the plaintiff for comment, including information before the Department which indicated that the plaintiff's father had "recently sent money to [the plaintiff] on several occasions" and that the plaintiff had made "numerous financial transactions" to his father in Pakistan since arriving in Australia.

13 On 4 June 2020, the plaintiff provided a written response to the 7 May letter which included the following direct response to the delegate's observation that "[o]pen source social media information before the Department ... may indicate that [the plaintiff] led a normal life in Pakistan":

"In multicultural and well developed countries like Australia, social media is a very moderate way to express your feelings and your way of life. And it also can be used to seek help and support. But in a third world country like Pakistan, socio [sic] media platform cannot be utilise for homosexuality because most of the population is of medieval mindset and specifically when it comes to homosexuality the people and even the law and enforcement agencies feel proud to give harm to homosexuals as a part of their Islamic faith and by the Sharia law of the Pakistan.

That is why in Pakistan I have never used social media as a platform to seek help and justice or to express my homosexual activities. I was humiliated and beaten at work places and then received death threats from my work colleagues in Pakistan after revealing my homosexuality at my work place, my work colleagues then gave numerous applications to the police stations around the city about my homosexual activities. As a consequence of those applications the officers from law and enforcement agencies physically abused and tortured me several times. I then decided not to express my homosexuality at any other work place in Pakistan. Even since my teenage in Pakistan I was really sensitive and cautious about my relationships in school and college because of the medieval values of society. I had such a small group of friends in Pakistan. But it was extremely hard for me to live rest of my life like this.

If I had ever posted anything at social media about my homosexuality or about the torture I was facing by my family, law and enforcement agencies and then by work colleagues, then I could be stoned to death by the public of Pakistan because if I am posting anything about my homosexuality at social media, it is like I am tempting the law and enforcement agencies and rest of the society to kill me and make example of me."

14 In the same letter, the plaintiff also referred to two further matters which are relevant to the issues he has raised in this Court. The first matter concerned a claim that the plaintiff had been disinherited by his father, which was explained as follows:

"Subsequently in year 2017 I came to knew [sic] that my father has disinherited me in the presence of magistrate, from all of his properties and I am no longer any part of his family and he has made that public on local newspaper that my son is disobeying and degrading the Sharia Law and Islamic values because of his homosexual activities and he shall face a death penalty upon his return in Pakistan. As a result of legal formalities of

disinheritance in Pakistan I have only received one financial transaction from my father as part of magistrate orders from Pakistan."

15 The second matter concerned money transfers to and from Pakistan, which the plaintiff explained in these terms:

"I have made numerous transactions to the ID of my father in Pakistan since my arrival in Australia, As I have stated at my interview on 25 February 2020 that my father is a well known person in a society because of his affiliation with the Islamic extremist group called Jammāt-e-Islami, that is why small money exchange franchises owners like Xpress Money or Western Union never bothered in terms of allowing financial transactions to any of his family member using my father's ID.

I was making those transactions to my younger brother as a part of his extra expenses and only the ID of my father was being used to receive that payment.

But when my younger brother came to knew [sic] about my homosexuality from my father, he then apprised me that I am a disgrace to a family and he does not want my assistance anymore."

16 On 11 June 2020, the plaintiff provided the delegate with "additional documentation as part of [his] protection visa application" which included what was described as an untranslated "[d]ocument related to disinheritance". The plaintiff told the delegate that he would be able to provide an official certified translation of the disinheritance document immediately after he received his next fortnightly salary on 15 June 2020.

17 The next day, 12 June 2020, and without waiting for a translation of the disinheritance document, the delegate made the impugned decision. The delegate found the plaintiff was not a person in respect of whom Australia has protection obligations as outlined in s 36(2)(a) or s 36(2)(aa) of the *Migration Act*. The delegate concluded that, in light of the factual findings made, he was not satisfied that the plaintiff met the definition of "refugee" in s 5H of the *Migration Act* or that there was a real risk that the plaintiff would suffer significant harm upon his return to Pakistan.

18 Under the heading "Findings of fact", where the sole sub-heading was "Fear of persecution in Pakistan as a homosexual", the delegate made a number of findings adverse to the plaintiff. Those findings included that:

- (1) the plaintiff's father had transferred him money on one occasion in March 2017 and that the plaintiff had "made numerous financial transactions to his father in Pakistan up to May 2019". The delegate attached "significant weight" to the plaintiff's financial transaction history and found it was inconsistent with his claim to fear persecution from his father in Pakistan;

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- (2) it was "implausible that the [plaintiff's] younger brother would be able to collect money in Pakistan [sent to him by the plaintiff] using his father's identity documents as the [plaintiff] claimed in his submission dated 4 June 2020";
- (3) it was "implausible that the [plaintiff] would inform his father in Pakistan of his intention to marry his partner in Australia had he been repeatedly tortured by his father in Pakistan as a result of his homosexuality" and that, had the plaintiff's father made a public death threat against the plaintiff in a local Pakistani newspaper because of his homosexuality as he claimed in his submission dated 4 June 2020, it would be "reasonable to assume that important information would have formed part of his original Protection visa claims and the fact that it does not casts doubt on his overall credibility". The delegate noted that the plaintiff provided no documentary evidence to support this claim; and
- (4) "the [d]isinheritance document provided by the [plaintiff] is written in Urdu and is not supported by an official National Accreditation Authority for Translators and Interpreters ... English translation". The delegate "place[d] no weight on this document as evidence of the [plaintiff's] problems with his father in Pakistan" (footnote omitted). The delegate also attached no weight to the documentary evidence provided by the plaintiff as part of his submission dated 11 June 2020 as the delegate was aware, from relevant country information, that such documents are easily obtained in Pakistan.

19 The impugned decision recorded that at the plaintiff's protection visa interview it was put to him that "open source social media indicated he frequently communicated with his family members in Pakistan", and that he had admitted "he was in contact with his family members in Pakistan via social media" and that "his siblings were aware of his homosexuality in Pakistan", but that he claimed his family members only spoke to him because he was a "blood relative" and they never accepted his homosexuality. The delegate referred to the plaintiff's claim that he stopped sending money from Australia to his younger brother after his younger brother discovered he was homosexual and decided to end all communication with the plaintiff, and then made a finding that "the [plaintiff's] younger brother as a close family member would have been fully aware of the [plaintiff's] sexuality prior to his departure from Pakistan had the [plaintiff] been persecuted by his father as he claimed".

20 The concluding paragraphs of the impugned decision in respect of his claim to fear persecution in Pakistan as a homosexual were in these terms:

"Having carefully considered the evidence before me, I do not accept the [plaintiff] genuinely fears persecution from his father, extremists or the Pakistani authorities because of his homosexuality. I do not accept the

[plaintiff] was beaten by his father or his father's associates because of his homosexuality. I do not accept his father has threatened to kill him should he return to Pakistan because of his homosexual activities in Australia. *The evidence before me, including open source social media* [footnote omitted], *does not support the view that the [plaintiff] was a known homosexual in Pakistan who was shunned by his family and local community.* I find the [plaintiff] has provided inconsistent and conflicting evidence to the Department regarding his experiences as a homosexual in Pakistan. I do not accept the significant inconsistencies and discrepancies in the [plaintiff's] various accounts to the Department can be satisfactorily explained by memory loss, stress, fear or anxiety he incurred following his arrival in Australia.

I find the [plaintiff] has lodged a Protection visa application to prevent his removal from Australia following the cancellation of his Student visa on 21 February 2017. I find the [plaintiff] has fabricated his claim to be a homosexual and concocted an elaborate story regarding his previous experiences in Pakistan in an attempt to materially enhance his Protection visa application.

Consequently, I will not discuss this claim any further as part of this Protection visa assessment." (emphasis added)

21 On the face of the delegate's reasons, the ultimate finding that the plaintiff "fabricated his claim to be a homosexual" followed from (and depended upon) his earlier finding, that the evidence before the delegate, "including open source social media, [did] not support the view that the [plaintiff] was a known homosexual in Pakistan who was shunned by his family and local community". That finding was an evident link in the delegate's chain of reasoning which culminated in the rejection of the factual basis for the plaintiff's claim that he feared persecution in Pakistan as a homosexual – namely, that he is a homosexual. That ultimately meant that the delegate considered it unnecessary to consider that claim any further.

22 Two matters should be noted regarding the delegate's finding that "[t]he evidence before [him], including open source social media, [did] not support the view that the [plaintiff] was a known homosexual in Pakistan who was shunned by his family and local community".

23 The first is that the specific open source social media information was identified in a footnote in the impugned decision. That open source social media information, which was before the delegate and which the delegate not only referred to but relied on, was in evidence before the Court. It comprised seven screenshots of entries on Facebook in 2012, 2014 and 2015 (before the plaintiff left Pakistan) and a screenshot of an entry on Facebook in June 2016 and another one in January 2017. The screenshots were accompanied by what the plaintiff

described as "commentary" on the screenshots which was attributed to an officer within the Department.

24 The screenshots are mostly photographs of the plaintiff, including photographs posted in 2012 and 2014 of the plaintiff with groups of males in various social contexts; a photograph posted in 2015 of the plaintiff with two men at what appears to be a celebration; and a photograph posted in 2016 of the plaintiff and another male at a gym. The "commentary" accompanying the photographs includes observations such as: "social media indicates [the plaintiff] has a decent relationship with his siblings", noting that "[t]hey frequently comment and 'like' each other's images/posts"; "[g]iven homosexuality is not accepted in Pakistan it's interesting [the plaintiff] has such a large group of understanding male friends"; "[i]t seems unlikely that a known homosexual's involvement in a wedding would be accepted by the grooms [sic] family"; and "[the plaintiff] seems to be acquainted with [an identified individual] well enough for a photo opportunity. I'm curious if his homosexuality was widely known in the community."

25 The second matter is that the other "evidence" before the delegate on which that particular finding was based was not expressly identified by the delegate, but it seems likely that the delegate was referring to the evidence about the plaintiff's financial transactions to and from his father, his delay in lodging his protection visa application and, perhaps, the delegate's finding that it was implausible that the plaintiff would inform his father of his intention to marry his partner in Australia.

Grounds of review

26 The plaintiff's application for constitutional writs, a writ of certiorari and other relief identified six grounds of review. During the course of argument, the grounds were refined and may be summarised as follows¹:

- (1) Ground 1: The delegate denied the plaintiff procedural fairness by failing to disclose to the plaintiff the open source social media so that he could meaningfully comment on it as required under s 57 of the *Migration Act*; and then concluding that the open source social media did not support the view that the plaintiff was a known homosexual in Pakistan, thereby denying the plaintiff the opportunity to ascertain the relevant issues and respond to adverse information that was credible, relevant and significant to the decision to be made.
- (2) Grounds 2 and 5: The impugned decision was legally unreasonable because there was no basis for the findings made by the delegate that:

1 Ground 3 was not pursued by the plaintiff in argument.

- (i) the plaintiff had provided "'inconsistent and conflicting evidence' to the Department regarding his experiences as a homosexual in Pakistan"; and
 - (ii) it was "'implausible' that the plaintiff's younger brother would be able to collect money in Pakistan using his father's identity documents".
- (3) Grounds 4 and 6: The delegate failed to assess an integer of the plaintiff's claims, namely that his father had disinherited him in the presence of a magistrate and that "as a result of legal formalities of disinheritance in Pakistan [the plaintiff had] only received one financial transaction from [his] father as part of magistrate orders from Pakistan". The delegate attributed no weight to the disinheritance document the plaintiff submitted, did not refer to the plaintiff's request for further time to provide a translation of the disinheritance document and did not consider the claim.

Cannot be remitted

27 The plaintiff's application for review of the impugned decision in the Administrative Appeals Tribunal ("the Tribunal") was lodged out of time by one day. This was due to an error made by the plaintiff's legal advisers, acting on a pro bono basis, in calculating the time within which an application was required to be lodged. Notwithstanding recognition that the delay of one day was not the fault of the plaintiff, the Tribunal considered it had no discretion to extend the time for lodging an application for review, and accordingly found it did not have jurisdiction in the matter. It is common ground that the matter cannot be remitted in circumstances where the impugned decision is the "primary decision"², in respect of which the Federal Circuit Court of Australia and Federal Court of Australia have no jurisdiction.

Extension of time

28 The impugned decision was made on 12 June 2020 and the plaintiff's application in this Court was filed on 29 January 2021. As explained, the plaintiff requires an extension of time pursuant to s 486A of the *Migration Act*. The delay is not substantial, and not so significant that exceptional circumstances would need to be present to justify granting the extension³. The fact that the Tribunal did not have jurisdiction to hear the plaintiff's review application was not the fault of the plaintiff but the result of an error on the part of his pro bono legal advisers.

2 *Migration Act*, ss 476(2)(a), 476(4), 476A(1).

3 cf *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 473-474 [13], 474 [16]; 177 ALR 491 at 495-496.

This supports the grant of the extension of time sought. There was a further period of delay between the Tribunal making its decision on 22 September 2020 and the plaintiff filing his application in this Court on 29 January 2021, during which time the plaintiff's pro bono legal advisers assisted the plaintiff to request ministerial intervention under s 417 of the *Migration Act*. Nonetheless, for the reasons that follow, it is "necessary in the interests of the administration of justice" to grant the extension⁴. The plaintiff also should be granted an extension of time under the *High Court Rules* to prosecute his application for the relief sought.

Ground 1 – Open source social media

29 The principal question for this Court is whether the delegate complied with s 57(2) of the *Migration Act*. As explained, the plaintiff's submission was that the delegate's failure to disclose to the plaintiff the open source social media information amounted to a failure to comply with s 57(2). The plaintiff submitted that the delegate failed to put this information – being information which the delegate relied on in support of the conclusion that the plaintiff was not a known homosexual in Pakistan and had "fabricated his claim to be a homosexual" – to the plaintiff in the manner required for the delegate to discharge his obligation under s 57(2). The consequence, according to the plaintiff, was that he was denied the opportunity to ascertain the relevant issues and respond to adverse information that was credible, relevant and significant to the decision to be made.

30 The Minister, however, submitted that the delegate had complied with s 57(2) because the plaintiff was twice asked about open source social media in his interview with the delegate on 25 February 2020 and because it was referred to in the letter of 7 May 2020.

31 It is necessary to state what it is that s 57 of the *Migration Act* requires: namely, that (1) where information is before the Minister that would be the reason, or part of the reason, for refusing to grant a visa and the information is specifically about the applicant or another person and was not provided by the applicant ("relevant information")⁵, (2) the Minister must "give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances"⁶, "ensure, as far as is reasonably practicable, that the applicant

4 *Migration Act*, s 486A(2).

5 *Migration Act*, s 57(1).

6 *Migration Act*, s 57(2)(a).

understands why it is relevant to consideration of the application"⁷, and "invite the applicant to comment on it"⁸.

32 Section 57 was considered by this Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*⁹. As the plurality explained, s 57 deals with "relevant information" and "[s] 57(1) defines that term, subject to an immaterial exclusion, to mean information that the Minister considers meets three conditions"¹⁰:

"The first condition is relevantly that the information 'would be the reason, or part of the reason ... for refusing to grant a visa'. Whether or not that condition is met, it has been held in this Court in respect of a materially identical provision, 'is to be determined in advance – and independently – of the [Minister's] particular reasoning on the facts of the case'. For the condition to be met, it has again been held in this Court in respect of a *materially identical provision*, the information in question 'should in its terms contain a "rejection, denial or undermining" of the review applicant's claim'. That is to say, the information must in its terms be of such significance as to lead the Minister to consider in advance of reasoning on the facts of the case that the information of itself 'would', as distinct from 'might', be the reason or part of the reason for refusing to grant the visa. ...

The second condition that must be met for information to be relevant information as defined by s 57(1) is that the information 'is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member'. The third condition is that the information 'was not given by the applicant for the purpose of the application'." (emphasis added)

There was no dispute in this matter that the open source social media information comprising the nine screenshots of entries on Facebook met the three conditions and was "relevant information".

7 *Migration Act*, s 57(2)(b).

8 *Migration Act*, s 57(2)(c).

9 (2018) 264 CLR 217.

10 *Plaintiff M174* (2018) 264 CLR 217 at 223-224 [9]-[10] (footnotes omitted).

33 The question then is the nature and extent of the obligations imposed on the Minister by s 57(2) and the consequences for non-compliance with s 57(2). Those issues were also addressed in *Plaintiff M174*, in these terms¹¹:

"Section 57(2) imposes obligations on the Minister to give to the applicant particulars of relevant information, to ensure as far as is reasonably practicable that the applicant understands why the relevant information is relevant to consideration of the application, and to invite the applicant to comment on it. Compliance with s 57(2) is a condition of the valid performance of the duties of the Minister to consider a valid application and, if not satisfied that the criteria prescribed for the visa have been met, to refuse to grant the visa, with the consequence that non-compliance renders a decision to refuse to grant a visa invalid in the sense that the decision is ineffective in law to achieve that result. Non-compliance with s 57(2) can therefore result in the Minister being restrained by a constitutional writ of prohibition from taking further statutory action on the basis that the decision to refuse to grant the visa is valid and can also mean that the duties of the Minister to consider and determine the application remain unfulfilled so that their performance is able to be compelled by a constitutional writ of mandamus."

34 Earlier, in *Saeed v Minister for Immigration and Citizenship*¹², French CJ, Gummow, Hayne, Crennan and Kiefel JJ considered the nature and extent of the operation of s 57(2). After referring to Mason J's observation in *Kioa v West*¹³ that the common law natural justice hearing rule requires a decision-maker to bring the critical issue or factor on which a decision is likely to turn to the attention of the person affected, their Honours went on to observe¹⁴:

"The requirement in s 57(2)(b), that the Minister *ensure*, as far as reasonably practicable, that the visa applicant understands why certain information is relevant, *may go further. It would require that the importance of the information and its potential impact upon the applicant's case for a visa be identified and the information be communicated in a way which promotes that understanding as far as is possible. It would also require that consideration be given to the means by which particulars of the*

11 (2018) 264 CLR 217 at 224 [11] (footnote omitted).

12 (2010) 241 CLR 252.

13 (1985) 159 CLR 550 at 587.

14 *Saeed* (2010) 241 CLR 252 at 261 [20]; see also 261 [19].

information should be provided, as most suitable to that purpose."
(first emphasis in original, second emphasis added)

35 What is required in order for a decision-maker to give particulars of relevant information in a way that ensures, as far as reasonably practicable, that a visa applicant understands why the information is relevant has been considered in a number of cases¹⁵, including in the context of s 424A of the *Migration Act*, which this Court described in *Plaintiff M174*¹⁶ as a "materially identical provision".

36 What is required for the Minister to discharge his or her obligations under s 57(2) depends on the facts and circumstances of the case¹⁷. The "relevant information" cannot be divorced from the context in which it appears¹⁸. The required degree of disclosure about that surrounding context will depend upon the individual case¹⁹. In some cases, disclosure of the substance of the relevant information may be sufficient, whereas in other cases, it may be necessary for an entire document – the "source" of the relevant information – to be provided to an

15 See, eg, *SXRB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 14 at [9]; *SZNGO v Minister for Immigration and Citizenship* (2010) 184 FCR 505 at 512 [23]; *MZYFH v Minister for Immigration and Citizenship* (2010) 188 FCR 151 at 159-160 [30]-[34]; *SZOCE v Minister for Immigration and Citizenship* [2011] FCA 133 at [21]; *SZTGV v Minister for Immigration and Border Protection* (2015) 229 FCR 90 at 102 [27]-[28]; *Ibrahim v Minister for Immigration and Border Protection* [2018] FCA 2087 at [68]-[75]; *Hasnat v Minister for Immigration and Border Protection* [2020] FCA 784 at [80]-[81]; *DCP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 290 at [46]-[49].

16 (2018) 264 CLR 217 at 223 [9], referring to *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; 235 ALR 609.

17 *SZMTJ v Minister for Immigration and Citizenship [No 2]* (2009) 232 FCR 282 at 296 [52]; *SZNGO* (2010) 184 FCR 505 at 512 [23]; *MZYFH* (2010) 188 FCR 151 at 160 [38]; *Saeed* (2010) 241 CLR 252 at 261 [20]; *SZTGV* (2015) 229 FCR 90 at 102 [27]; *DLF16 v Minister for Immigration and Border Protection* [2017] FCA 1072 at [82]; *Ibrahim* [2018] FCA 2087 at [74]-[75]; *Hasnat* [2020] FCA 784 at [81]; *DCP17* [2021] FCA 290 at [42].

18 *SZMTJ* (2009) 232 FCR 282 at 296 [52]; *SZNGO* (2010) 184 FCR 505 at 512 [23]; *MZYFH* (2010) 188 FCR 151 at 160 [38]; *SZTGV* (2015) 229 FCR 90 at 102 [27]; *DLF16* [2017] FCA 1072 at [82]; *DCP17* [2021] FCA 290 at [42].

19 See fn 17 above.

applicant²⁰. This reflects that, in each case, compliance with s 57 will only be achieved if what has been provided is sufficient to ensure the applicant understands why the information is relevant to consideration of the application and can meaningfully respond²¹. Moreover, as Murphy J explained in *DLF16 v Minister for Immigration and Border Protection*²²:

"The greater the clarity of the information provided, the less that may be required of the Minister in exposing relevance. Conversely, the more the uncertainty in the information provided the greater may be the need to explain relevance".

37 In the present case, neither the interview between the delegate and the plaintiff, nor the letter to the plaintiff dated 7 May 2020, provided particulars of the relevant information – the open source social media information – sufficient to enable the plaintiff to understand why the information was relevant so he could meaningfully respond. It is appropriate to address the interview and then the letter.

38 Taken at their highest, the questions asked by the delegate at the interview on 25 February 2020 indicated that the delegate, and the Department, were aware of, and had accessed, information about and photographs of the plaintiff that were publicly available on social media²³. At no time was it stated with sufficient clarity or specificity to the plaintiff during his interview with the delegate that publicly available information on his Facebook page was seen to indicate or support a finding that his claims as to his sexual identity, and associated persecution in Pakistan, may have been fabricated. The delegate's questions about a photograph of what the delegate referred to as a "marri[age]" were directed at ascertaining the nature of the plaintiff's participation in the event depicted²⁴; the delegate did not expressly state, or even allude to, any adverse inferences that might be drawn from

20 *SZINKO* (2010) 184 FCR 505 at 512 [23]; *SZOCE* [2011] FCA 133 at [21], [27]; *SZTGV* (2015) 229 FCR 90 at 102 [27], 103 [32]; *Hasnat* [2020] FCA 784 at [81]; *DCP17* [2021] FCA 290 at [42]-[44], [49]-[50], [59], [79].

21 See *SZINKO* (2010) 184 FCR 505 at 512 [23], 513 [27]; *MZYFH* (2010) 188 FCR 151 at 159 [33]; *ATP15 v Minister for Immigration and Border Protection* (2016) 241 FCR 92 at 104 [39]; *Ibrahim* [2018] FCA 2087 at [87]; *DCP17* [2021] FCA 290 at [42]-[43], [51], [55]-[56], [59]. See also *Saeed* (2010) 241 CLR 252 at 261 [20].

22 [2017] FCA 1072 at [82], citing *SZMTJ* (2009) 232 FCR 282 at 296 [52].

23 See [8]-[10] above.

24 See [8] above.

the photograph. The delegate's question about whether the plaintiff was in contact with a previous partner on social media was open-ended²⁵; the delegate did not suggest the Department had identified social media information exposing that there had been contact between the plaintiff and a previous partner. At one point in the interview, the plaintiff accepted that he was friends with his family members on Facebook and said that his siblings and mother talked to him on Facebook because he is "their blood relation", not because they support him²⁶. The delegate also put to the plaintiff that his family are "not obliged to" talk to him on Facebook, or to "like" or comment on his pictures²⁷. However, the delegate did not, for example, identify specific examples of communication or photographs that might be relied on to support a conclusion that the plaintiff's family were "supportive" of the plaintiff. Nor did the delegate identify why the plaintiff's engagement with his family as depicted in the open source social media information before the Department might suggest that the plaintiff was not a known homosexual in Pakistan and that he had fabricated his claim to be a homosexual.

39 Thus, the delegate did not, in the interview, identify the open source social media information (other than possibly the photograph of the "marri[age]") which the Department had collated, what that information disclosed or its relevance to the plaintiff's application. The interview was insufficient to discharge the obligation imposed by s 57(2).

40 And that position was not remedied by the letter of 7 May 2020. As outlined above, the letter relevantly stated that open source social media information before the Department "may indicate" that the plaintiff "led a normal life in Pakistan with an active group of friends and family", which "may suggest" the plaintiff "[was] not persecuted and ostracized as a result of [his] sexuality in Pakistan". The letter did not comply with s 57(2). Compliance with s 57(2) required the open source social media information before the Department, which was "the reason, or part of the reason" for refusing to grant the visa, to be provided to the plaintiff in order to equip him to *meaningfully* respond.

41 The screenshots, and the commentary attached to each screenshot, were expressly identified in the impugned decision as the open source social media upon which the delegate relied in making the impugned decision. The commentary attached to each screenshot is, as the Minister submitted, not relevant information within the meaning of s 57(1), because it is commentary.

25 See [9] above.

26 See [10] above.

27 See [10] above.

42 But the commentary, and the contents of that commentary, reinforce the conclusion that for the delegate to comply with s 57(2) it was necessary for the delegate to provide the open source social media information to the plaintiff *and* explain why or how it was said that the screenshots undermined his claim for a protection visa (as the commentary did) and to seek the plaintiff's response to those matters. That is because one could not expect the plaintiff to have been able to ascertain, simply by looking at the screenshots without any further explanation as to their relevance, the basis on which they might be relied upon as adverse to his claims. Absent such explanation, it could hardly be said to be self-evident why or how the screenshots undermined the plaintiff's claims²⁸.

43 The adverse conclusions in the impugned decision, drawn from the open source social media information, necessarily depended on assumptions or speculative inferences drawn from the *identity of* and *relationship between* persons in photographs, as well as the *context* in which certain photographs were taken or posts made. Although the screenshots and the commentary were identified in the impugned decision, it is not clear whether the commentary reflects the inferences drawn from the photographs by the delegate. Nonetheless, four aspects of the commentary are illustrative of the speculative nature of the adverse conclusions that might have been drawn from the open source social media information:

- (1) the commentary on one screenshot was that "[the plaintiff] appears to have a close group of male friends ... Given homosexuality is not accepted in Pakistan it's interesting he has such a large group of understanding male friends";
- (2) other commentary accompanying the screenshots recorded that, "[a]ccording to [Facebook] comments, this is [a] retired Major" and "social media indicates [the plaintiff] has a decent relationship with his siblings. They frequently comment and 'like' each other's images/posts. Example below of sister ... and brother ... interacting with [the plaintiff]";
- (3) commentary on one screenshot stated "[y]ou'll note the green/grey t-shirt in the images above is worn by [the plaintiff] and another male. I haven't listened to the interview but I'm curious if this is the claimed homosexual partner"; and
- (4) the commentary recorded that a photograph in one of the screenshots "appears to be in a restaurant" and that "[the plaintiff] seems to be acquainted with [an identified individual] well enough for a photo opportunity".

28 *DLF16* [2017] FCA 1072 at [82], citing *Wang v Minister for Immigration and Citizenship* [2007] FCA 488 at [29].

44 In circumstances where the plaintiff was not provided with the screenshots themselves or any descriptions of the screenshots and where there was no explanation as to why or how it was said that the screenshots undermined his claim for a protection visa, it cannot be said that he had sufficient particulars to enable him to *meaningfully* respond to the relevance of those images to his claimed persecution in Pakistan. He was not provided with the dates of the social media posts, identities of the persons in those posts or any context as to the information relied upon, other than that its source was information publicly available on social media. The plaintiff was not informed of which social media platform or platforms the information before the Department was collated from. Nor was he informed about whose social media profile or profiles the information was derived from (that is, whether the information was from his profile or whether it was from his family's or friends' profiles). The generality of the plaintiff's response matched the generality of the letter provided.

45 It would have been reasonably practicable for each screenshot and the delegate's concerns (whether as reflected in the commentary or held on different grounds) to have been put to the plaintiff in the interview and the plaintiff to have been asked to respond. It may even have been possible to have grouped the screenshots by year or subject-matter. But that was not done. And even describing in the letter that the screenshots "may indicate" that the plaintiff had "led a normal life in Pakistan with an active group of friends and family", which "may suggest" the plaintiff "[was] not persecuted and ostracized as a result of [his] sexuality in Pakistan", did not enable the plaintiff to meaningfully respond to the information. No context was provided – no year, no source, no description of activity. That list is not exhaustive. Indeed, the reference to social media information suggesting that the plaintiff led a "*normal life* ... with an active group of friends and family" is ambiguous. It could be taken to mean, for example, that the plaintiff did not post on social media about his sexuality or, perhaps, that the plaintiff's social media profile was not used as a platform to protest against his mistreatment on account of being a homosexual (the plaintiff's letter of 4 June 2020 suggests this may have been his understanding).

46 If, adopting the language of Murphy J²⁹, "[t]he greater the clarity of the information provided, the less that may be required of the Minister in exposing relevance" and, conversely, "the more the uncertainty in the information provided the greater may be the need to explain relevance", then in this case the delegate failed on both accounts. The delegate did not provide any clarity about what was the open source social media information and nor did he expose the relevance of it. Nonetheless, the delegate went on to conclude that the evidence before him, *including the open source social media*, "[did] not support the view that the [plaintiff] was a known homosexual in Pakistan who was shunned by his family and local community". This was a critical finding, rejecting a fundamental basis

29 DLF16 [2017] FCA 1072 at [82].

for the plaintiff's claim that he feared persecution in Pakistan on account of his homosexuality, namely, that his family and local community were aware of his homosexuality and that he had previously been subjected to torture and violence in Pakistan because of his homosexuality. On the face of the delegate's reasons, that finding is an important link in the chain of reasoning that led to the delegate's ultimate conclusion that the plaintiff had "fabricated his claim to be a homosexual and concocted an elaborate story regarding his previous experiences in Pakistan".

47 In circumstances where the open source social media information was a foundation for multiple findings by the delegate that were central to the conclusion that the plaintiff's application for a protection visa should be rejected and, as the photograph of the so-called "marri[age]" showed³⁰, where the assumptions and speculative inferences that were drawn by the delegate from that social media information may have been incorrect and capable of being rebutted by the plaintiff, not putting the open source social media information to the plaintiff *and* not explaining why or how it was said that the screenshots undermined his claim for a protection visa deprived him of a meaningful opportunity to respond – to explain what appeared in that information.

Other grounds

48 Although the conclusion reached in relation to the first ground of review is sufficient to dispose of the application, it is further to be noted that the delegate did not address or answer the plaintiff's statement in his letter of 11 June 2020 that he was able, within a few days, to provide a translation of a document that he had provided to the delegate relevant to a claim that he had been disinherited by his father and, instead, the delegate proceeded immediately to dismiss his other claims without otherwise addressing the plaintiff's claim that he had been disinherited by his father.

Relief

49 As explained by the plurality in *Plaintiff M174*³¹, the consequences of non-compliance with s 57(2) are twofold. First, as "[c]ompliance with s 57(2) is a condition of the valid performance of the duties of the Minister to consider a valid application ... non-compliance renders a decision to refuse to grant a visa invalid in the sense that the decision is ineffective in law to achieve that result". A writ of certiorari should issue to quash the impugned decision. Second, as "the duties of the Minister to consider and determine the application remain unfulfilled"

30 See [8] above.

31 (2018) 264 CLR 217 at 224 [11].

by reason of the non-compliance with s 57(2), "their performance is able to be compelled by a constitutional writ of mandamus", and such a writ should issue.

50 The orders of the Court are:

1. Pursuant to s 486A(2) of the *Migration Act 1958* (Cth), the period within which an application may be made for a remedy to be granted in relation to a decision made by a delegate of the defendant on 12 June 2020 is extended to 29 January 2021.
2. Pursuant to r 4.02 of the *High Court Rules 2004* (Cth), the time fixed by rr 25.02.1 and 25.02.2(b) be enlarged in respect of this application.
3. A writ of certiorari issue to quash the decision made by a delegate of the defendant on 12 June 2020 to refuse to grant the plaintiff a protection visa.
4. A writ of mandamus issue directed to the defendant requiring the defendant to determine the plaintiff's application for a protection visa according to law.
5. The defendant pay the plaintiff's costs of and incidental to the application.

