HIGH COURT OF AUSTRALIA

GORDON J

PLAINTIFF S183/2021 PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS DEFENDANT

Plaintiff S183/2021 v Minister for Home Affairs
[2022] HCA 15
Date of Hearing: 3 March 2022
Date of Judgment: 21 April 2022
S183/2021

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 the decision made by a delegate of the defendant on 17 March 2020, notified to the plaintiff on 18 March 2020, is extended to 8 November 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 17 March 2020, notified to the plaintiff on 18 March 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 application otherwise be dismissed.*

6. *The defendant pay the plaintiff's costs of and incidental to the application.*

Representation

A M Hochroth for the plaintiff (instructed by Legal Aid NSW)

D A Hughes for the defendant (instructed by Clayton Utz)

CATCHWORDS

Plaintiff S183/2021 v Minister for Home Affairs

Immigration – Refugees – Application for protection visa – Where plaintiff invited to attend protection visa interview in Melbourne – Where delegate of Minister sent plaintiff letters under ss 56 and 57 of *Migration Act 1958* (Cth) requesting further information and inviting plaintiff to comment on information – Where plaintiff lived in Sydney, suffered from mental health issues, was experiencing homelessness and was not fluent in English – Where plaintiff failed to attend interview and failed to respond substantively to letters – Where delegate offered to reschedule interview in Sydney – Where plaintiff did not understand interview offered in Sydney and did not attend – Where delegate exercised discretion under s 62 of *Migration Act* to refuse to grant visa without taking further action to obtain additional information from plaintiff – Where delegate found plaintiff's claims not credible for reasons including plaintiff's failure to attend interview and respond to letters – Whether delegate acted unreasonably in exercising discretion under s 62 – Whether delegate reasoned illogically, irrationally or unreasonably in rejecting plaintiff's claims – Whether delegate failed to comply with requirements of s 57 to give particulars of relevant information to plaintiff and to ensure as far as reasonably practicable that plaintiff understood why information was relevant – Whether delegate failed to comply with s 499(2A) of *Migration Act* by failing to take into account relevant country information as required by direction given under s 499(1).

Words and phrases – "adverse credibility findings", "country information", "credibility", "further information", "interview", "outcome and process", "relevant information", "s 56 letter", "s 57 letter", "unreasonableness".

Migration Act 1958 (Cth), ss 56, 57, 62, 65, 499.

1 GORDON J. The plaintiff seeks writs of certiorari and mandamus in relation to a decision of a delegate ("the delegate") of the defendant ("the Minister") to refuse to grant her a protection visa under the *Migration Act 1958* (Cth), based on adverse credibility findings relying in part on her failure to provide further information supporting her claims. The plaintiff's application should be upheld on the ground that the delegate unreasonably exercised the discretion under s 62 of the *Migration Act* to refuse to grant her a visa without taking any further action to obtain additional information.

2 The plaintiff requires an extension of time, which should be granted. The merits of the application support the grant of the extension sought, the plaintiff has provided a satisfactory explanation for the delay and there is no prejudice to the Minister.

Facts

3 The plaintiff, a citizen of Turkey, entered Australia on a Student (Subclass 572) visa on 8 January 2015. On 24 March 2016, she lodged an application for a Protection (Subclass 866) visa. On 14 July 2016, she was notified that her application was invalid because she had failed to provide personal identifiers as required by s 46(2A) of the *Migration Act*. She had been asked to attend the Department of Immigration and Border Protection[1] ("the Department") to provide fingerprints, but she had misunderstood the request and had gone to a police station instead.

4 On 3 August 2016, the plaintiff made a valid application for a Protection (Subclass 866) visa, which was in substantially the same form as the invalid application. The application was prepared with the assistance of a translator, and the plaintiff indicated that she would need a translator if called to attend an interview.

5 In her protection visa application, the plaintiff claimed to be a lesbian and claimed that if she was returned to Turkey she would be killed or forced to marry a man, which she said would be worse than death. She described, among other incidents, being detained by police and tortured, attacked by a group of men and forced to leave her employment after being seen holding hands with and kissing a woman. She said that she was raped after being released by the police. She claimed that her family had pressured her to get married and her mother's cousin had threatened to kill her.

6 Between August 2016 and April 2017, the plaintiff engaged in sporadic correspondence in broken but intelligible English with the Department about her application. The plaintiff did not hear anything about her application between

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1 Now the Department of Home Affairs.

April 2017 and August 2019. She states in an affidavit filed in support of her application in this Court that during this period her father died, her mental health declined, she became homeless, and she attempted to take her own life and was hospitalised.

7 On 19 August 2019, in response to a request for a criminal history check from a Senior Status Resolution Officer ("the Status Resolution Officer") at the Department, a Senior Border Force Officer sent an email to the Department stating that there was no record of charges or convictions but there was information indicating that the plaintiff had serious mental health issues. Subsequent emails show that, around this time, the plaintiff had been admitted to hospital under the *Mental Health Act 2007* (NSW). On 20 August 2019, a hospital social worker emailed the Status Resolution Officer stating that the plaintiff had been homeless but was "ready for discharge" from hospital and was "happy to receive support from the Government to return to Turkey". The Status Resolution Officer made a referral to the International Organization for Migration ("IOM"), stating that the plaintiff was in hospital, "wishe[d] to return home asap" and was able to remain in hospital until she departed Australia. On the same day, the plaintiff was discharged because she was no longer eligible to remain in hospital under the *Mental Health Act*.

8 An email from the IOM to the Department on 23 August 2019 stated that the plaintiff had not shown up for her scheduled appointment at the hospital. An email from the Status Resolution Officer on 26 August 2019 stated that no contact details had been provided and the plaintiff's whereabouts were unknown.

9 On 27 August 2019, the plaintiff was contacted by email by the Status Resolution Officer, who asked the plaintiff to update her address details. The plaintiff's response, sent on the same day, was:

> "I was working on my passport, it is done just need to go and take, anytime I am ready for new appointment goi back turkey".

10 The Status Resolution Officer responded on the same day providing the contact details of an IOM employee. Two days later, on 29 August 2019, the Status Resolution Officer wrote to the plaintiff again stating that she had been advised that the plaintiff had not yet attended the IOM and asking the plaintiff to confirm her intentions and provide contact details.

11 On 17 September 2019, in response to a further email from the Status Resolution Officer sent that day asking whether the plaintiff still wished to depart Australia, the plaintiff wrote an email saying:

> "yes i am willing to go back turkey, i dont have adress at the moment and dont have phone.. i am living outside anywhere safe.. please give me som time appointment for talk face to face..".

The plaintiff states in her affidavit that she was hearing voices telling her to go to Turkey at this time.

12 The plaintiff did not attend an appointment and did not respond to a follow-up email sent by the Status Resolution Officer on 21 October 2019. She states in her affidavit that, around this time, she continued to suffer from poor mental health, did not have a telephone and had only limited access to email, mainly at the State Library of New South Wales.

13 On 22 October 2019, the Status Resolution Officer received an internal email stating that it was "fine to disengage [case management] service", which appears to be a reference to a departmental service provided to visa applicants who need support. The email stated that the Department and the IOM had "been [un]able to contact the [plaintiff] to ascertain her intention to depart Australia". An earlier internal email sent by the Status Resolution Officer indicated that the plaintiff's mobile phone had incoming call restrictions.

14 On 6 January 2020, an officer of the Department sent a letter to the plaintiff inviting her to attend an interview *in Melbourne* on 31 January 2020. Departmental emails from August 2019 show that the plaintiff was in New South Wales (in addition to being homeless and having no money). The plaintiff states in her affidavit that she does not recall receiving or reading the letter at the time.

15 On 14 February 2020, the plaintiff received two further letters by email from the delegate requesting further information. The first letter requested further information from the plaintiff pursuant to s 56 of the *Migration Act* ("the s 56 letter"). It stated that:

(1) the plaintiff's failure to attend the 31 January 2020 interview and her delay in lodging her application for a protection visa were relevant to an assessment of whether her claims for protection were genuine;

(2) the plaintiff's claims lacked "substantiating details such as dates and locations" and the delegate needed further information to be satisfied that her claims were genuine; and

(3) information indicating that the plaintiff had obtained a new Turkish passport and intended to return to Turkey "directly contradict[ed]" the plaintiff's claims that she could not return to Turkey because she feared she would lose her life.

The letter asked whether the plaintiff had any comments or further information to provide in relation to those matters. The inclusion of the third point in the letter is not insignificant. It means that the delegate must have reviewed the file and read the relevant correspondence and must therefore have been aware that the plaintiff was living in New South Wales, was homeless and had recently been admitted to hospital under the *Mental Health Act*.

16 The second letter invited the plaintiff under s 57 of the *Migration Act* to comment on the information indicating that she had obtained a new Turkish passport and intended to return to Turkey ("the s 57 letter"). The letter stated that the plaintiff's apparent willingness to return to Turkey could suggest that she did not genuinely fear that she would lose her life upon return.

17 On 17 February 2020, the plaintiff responded by email as follows:

> "i am [name redacted] is waiting for my case, i havent go back turkey with getting passport, i am in sydeny without money and home, i have been reaaly bad situation to come back melbourne for case, no body listen to me even government, call me bla bla or whatever or ye ye ye, i am really suffering mentally and phscichly, i dont even have phone or money, i will have court in sydey for steal chochlate cause suffering financily, dowling court.. if i go back mine where am i now? people call me this and that... please help me"

18 In response, on the same day, the plaintiff received an email from the delegate stating that the Department was "prepared to re-schedule [the 31 January 2020] interview to be held in Sydney in the week commencing 9 March 2020". The plaintiff was "encourage[d] ... to contact [her] previous case manager in Status Resolution should [she] require assistance". The Status Resolution Officer sent the plaintiff a separate email on 17 February 2020 stating that the plaintiff's application was continuing and the Department needed to interview her for the application to progress.

19 On 20 February 2020, the plaintiff responded to the delegate's email, stating:

> "to protection visa assessment
>
> i am on the street without money how can i make it to come *melbourne*, i really in bad situation, i came here for good life live my identity but here what i am living is like iam relegionous person from turkey, my life is worse then being death.." (emphasis added)

20 On 3 March 2020, the Status Resolution Officer wrote to the plaintiff stating:

> "If you are continuing to experience difficulty, we may be able to provide some support for you.
>
> Please contact me by email or phone so that we can discuss your current situation."

There was no response to this email.

21 Two weeks later, on 17 March 2020, the delegate refused to grant the plaintiff a protection visa. The plaintiff was notified of that decision by letter dated 18 March 2020.

Delegate's reasons

22 After summarising the plaintiff's claims for protection, the delegate referred to the plaintiff's failure to attend her protection visa interview in Melbourne on 31 January 2020 and her failure to contact the Department to provide reasons explaining why she did not attend the interview or to request that the interview be rescheduled. The delegate then set out the contents of the letters sent on 14 February 2020 under ss 56 and 57 of the *Migration Act* respectively, as well as the plaintiff's emailed response to the s 57 letter of 17 February 2020. The delegate recorded that, in response to the plaintiff's 17 February 2020 email, she had advised the plaintiff that the Department was prepared to reschedule the interview in Sydney and the plaintiff "did not respond to this email". That was wrong. The delegate referred to the plaintiff's response on 20 February 2020 two paragraphs later. The contents of that email are important and are set out at [19] above.

23 The delegate then stated that, on 3 March 2020, the Status Resolution Officer had emailed the plaintiff saying that if the plaintiff was continuing to experience difficulties, the Department may be able to provide some support to her and asking the plaintiff to contact the Status Resolution Officer by email or phone to discuss her situation. In relation to that offer, the delegate stated:

> "The Department has received no further contact from the [plaintiff] and the 28 day periods for the [plaintiff] to respond to the section 56 and 57 requests respectively, have now passed. I note that the [plaintiff] has not provided substantive responses to my requests for further information or the concern that was raised about her obtaining a new Turkish passport relatively recently, despite being given multiple opportunities to do so and invitations to contact her most recent Status Resolution Officer for support. Accordingly, I am proceeding to make a decision on the information already before the Department."

24 Under the heading "Findings of Fact", the delegate set out her reasons for finding that the plaintiff's claims were not credible. The delegate said that she had raised concerns about the plaintiff's failure to attend her scheduled interview in Melbourne and the plaintiff "did not engage with" the offer to schedule another interview in Sydney. The delegate said that she was not satisfied that the plaintiff's response to her concern about the plaintiff's failure to attend her scheduled interview in Melbourne constituted "a reasonable explanation for her failure to attend". The delegate said that the plaintiff's failure to "engage" with the offer to reschedule the interview was a "further reason for concern about the credibility of [the plaintiff's] protection visa claims".

25 The delegate recorded that:

(1) the plaintiff's failure to respond to the delegate's concerns about the plaintiff's delay in applying for a protection visa "raise[d] further concerns that the [plaintiff's] claims [might] not be credible";

(2) "[t]he [plaintiff's] failure to respond to [the delegate's] concerns regarding the lack of detail in her protection claims ... suggest[ed] that the [plaintiff's] situation [was] not as described in her protection visa application";

(3) "[a]s flagged with the [plaintiff] ..., the [plaintiff's] statement of claims lack[ed] substantiating details", "no further details or supporting documents were provided" and "[t]his raise[d] concerns that her claims [were] not credible"; and

(4) the plaintiff "did not respond to [the delegate's] concern ... about the fact that [the plaintiff] had obtained a new Turkish passport" and "[t]his raise[d] concerns that the [plaintiff's] claims for protection [might] not be genuine".

26 The delegate said that because she had "not been able to interview" the plaintiff and having considered the information before her (including the plaintiff's limited responses to her requests for further information), she could not be satisfied that the plaintiff's claims were credible and she rejected them "in their entirety". The delegate concluded that she did not accept as credible the plaintiff's "claims that she is a lesbian" and did not accept the plaintiff's "claim that she was subjected to past harm in Lebanon [sic] by the authorities or her family members because she is a lesbian". The reference to Lebanon was obviously an error.

Application

27 As has been stated, the plaintiff applies for writs of certiorari and mandamus. The grounds of the application are that the delegate's decision was affected by jurisdictional error in that:

> "(a) **Ground 1**: in rejecting the plaintiff's claims to be a lesbian and to have suffered past harm in Turkey, the delegate reasoned illogically, irrationally or unreasonably.
>
> (b) **Ground 2**: the delegate acted unreasonably in exercising their discretion under s 62 of the [*Migration Act*] to refuse to grant the visa without taking any further action to obtain additional information from the [plaintiff] which had been sought under s 56 of the [*Migration Act*], and/or the [plaintiff's] views on information which had been sought under s 57 of the [*Migration Act*].

(c) **Ground 3**: the delegate failed to comply with s 57 of the [*Migration Act*] in that:

(1) the delegate failed to give particulars of relevant information to the plaintiff, namely the plaintiff's failure to respond to an invitation under s 56 of the [*Migration Act*]; and/or

(2) in respect of particulars of relevant information which were given to the plaintiff, the delegate failed to ensure, as far as was reasonably practicable, that the plaintiff understood why the information was relevant to consideration of her application.

(d) **Ground 4**: the delegate failed to comply with s 499(2A) of the [*Migration Act*] in failing to take into account a relevant country information assessment prepared by the Department of Foreign Affairs and Trade (**DFAT**), as required by *Direction No 84 – Consideration of Protection Visa Applications* (**Direction 84**) made under s 499."

Ground 2 – unreasonable exercise of s 62 discretion

28 The logical starting point is ground 2, which concerns the delegate's decision to exercise the discretion under s 62 of the *Migration Act* to refuse to grant the plaintiff a protection visa without taking any further action to obtain additional information from the plaintiff.

29 Section 62 of the *Migration Act*, headed "Failure to receive information does not require action", provides:

"(1) If an applicant for a visa:

(a) is invited to give additional information; and

(b) does not give the information before the time for giving it has passed;

the Minister *may* make a decision to grant or refuse to grant the visa without taking any action to obtain the additional information.

(2) If an applicant for a visa:

(a) is invited to comment on information; and

(b) does not give the comments before the time for giving them has passed;

> the Minister *may* make a decision to grant or refuse to grant the visa without taking any further action to obtain the applicant's views on the information." (emphasis added)

30 It may be accepted that the *Migration Act* does not impose an obligation on a decision-maker to give reasons for exercising the discretion conferred by s 62[2]. Nonetheless, it was common ground that the power must be exercised reasonably[3].

31 The principles are well established and may be stated shortly. "Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker. The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker"[4] (emphasis in original). That conclusion will be open where a decision is "so unreasonable that no reasonable person could have arrived at it", although it is by no means limited to such a case[5]. It is concerned with both outcome and process[6].

32 In the present case, the critical point is that it was apparent on the face of the email sent by the plaintiff on 20 February 2020 that she did not realise that the Department was offering her an interview *in Sydney*. Her response to the email offering to reschedule the interview in Sydney was: "i am on the street without money how can i make it to come *melbourne*, i really in bad situation" (emphasis added).

33 This also has to be seen in the context of other information on the plaintiff's file which was in evidence before this Court, including the plaintiff's email sent

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2 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 497-498 [43].

3 cf *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 549 [4], 575 [89]. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29], 362 [63], 363 [65], 370-371 [88]-[92].

4 *SZVFW* (2018) 264 CLR 541 at 572 [80]. See also *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 481 [98].

5 *SZVFW* (2018) 264 CLR 541 at 573 [82]. See also *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 648 [130]; *Li* (2013) 249 CLR 332 at 364 [68].

6 *SZVFW* (2018) 264 CLR 541 at 573 [81]-[82], quoting *Li* (2013) 249 CLR 332 at 375 [105]. See also *SZMDS* (2010) 240 CLR 611 at 620-621 [23]-[24], 638 [102], 648 [132], 649-650 [135].

three days earlier, in which she said, among other things: "i am in sydeny without money and home, i have been reaaly bad situation to come back melbourne for case, no body listen to me even government, call me bla bla or whatever or ye ye ye, i am really suffering mentally and phscichly". The Minister submitted that this was "a rational response written in English". That submission cannot be accepted. The information before the delegate indicated that the plaintiff was homeless, had no money, struggled to communicate in English and had been experiencing serious mental health issues requiring hospitalisation[7].

34 No one from the Department attempted to correct the plaintiff's misunderstanding as to the location of the interview she was being offered. It is not necessary to decide whether, given the plaintiff's circumstances, someone should have attempted to correct the plaintiff's misunderstanding *in Turkish* because no attempt was made *in English*. The email sent on 3 March 2020 stating that the Department might be able to provide support if the plaintiff "continued to experience difficulty" and inviting the plaintiff to contact the Status Resolution Officer did not ameliorate the situation. The plaintiff obviously *was* experiencing difficulty, and the offer of support did not attempt to inform the plaintiff that she had misunderstood that she was being offered an interview in Sydney. That was the critical issue that needed to be addressed.

35 The Minister submits that it was not unreasonable for the delegate to exercise the discretion conferred by s 62 because "the plaintiff [was] given multiple opportunities to respond to the delegate's request for information and [did] not respond[] *substantively*" (emphasis added). The Minister also drew attention to the difficulty the Department had experienced in contacting the plaintiff in the seven months or so leading up to the delegate's decision.

36 To say that the plaintiff did not respond *substantively* is to ignore what the plaintiff did communicate, namely, that she was in desperate circumstances and could not go to Melbourne. No reasonable decision-maker could have ignored the plaintiff's misunderstanding, particularly having regard to her circumstances, and proceeded to refuse to grant a visa for reasons that depended on the plaintiff's failure to provide further information and to attend an interview.

37 It must be accepted that, if a visa applicant is unresponsive, there may come a point in time where it is reasonable for a decision-maker to exercise the discretion under s 62 of the *Migration Act* and make a decision to refuse to grant a visa. But no reasonable decision-maker could have decided that that point had been reached when the plaintiff had obviously misunderstood what was being offered to her and no one attempted to correct her misunderstanding.

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7 cf *TTY167 v Republic of Nauru* (2018) 93 ALJR 111 at 116 [28]-[29]; 362 ALR 246 at 251.

38 The Minister's reliance on s 51A of the *Migration Act*, which provides that Subdiv AB of Div 3 of Pt 2 (which contains s 58, among other provisions) is taken to be "an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with", is misplaced. The complaint which has been upheld is of unreasonableness, not denial of natural justice.

39 Given that the plaintiff's application must be upheld on the basis of ground 2, it is strictly unnecessary to consider the remaining grounds. It is appropriate, however, to say something about each ground.

Ground 1 – unreasonable finding that claims for protection were not credible

40 By ground 1, the plaintiff contends that in rejecting her claims to be a lesbian and to have suffered past harm in Turkey, the delegate reasoned illogically, irrationally or unreasonably. The parties' submissions on this ground raise three issues. First, can the formation of a state of satisfaction be impugned on the basis that the process of reasoning engaged in was unreasonable? Second, did the delegate in fact rely entirely, or substantially, on the plaintiff's failure to provide substantive responses and to attend an interview in reaching her credibility findings? Third, assuming the answer to the first two questions is "yes", was it unreasonable for the delegate to rely on the plaintiff's failure to provide substantive responses and to attend an interview?

41 The first issue arises because of the terms of s 65 of the *Migration Act*, which provides that the Minister (or her delegate) is to grant a visa *if satisfied that*, relevantly, the criteria prescribed for the visa are satisfied and is to refuse to grant the visa if not so satisfied. The delegate refused to grant the plaintiff a protection visa because she was not satisfied that the plaintiff met the relevant criteria.

42 Drawing on the reasons of Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*[8], the Minister submits that the proper test for whether the formation of a state of satisfaction is unreasonable is whether the state of satisfaction reached "is one at which no rational or logical decision maker could arrive on the same evidence". In other words, the process by which the decision-maker did in fact reach their state of satisfaction is said to be less relevant. In this respect, the Minister distinguished the test for unreasonableness in respect of "an exercise of a power".

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8 (2010) 240 CLR 611 at 647-648 [130].

43 The Minister's submissions are rejected. As stated above, unreasonableness is concerned with both outcome and process[9]. Whether what is being reviewed is an exercise of a power or the formation of a state of satisfaction, a finding of unreasonableness is not limited to cases where the outcome is one which no reasonable decision-maker could have reached. As Crennan and Bell JJ relevantly said: "the correct approach is to ask whether it was open to the [decision-maker] to engage *in the process of reasoning* in which it did engage"[10] and a decision might be said to be illogical or irrational (or, it might be added, unreasonable) "if there is no logical connection between the evidence and the inferences or conclusions drawn"[11]. Leaving aside the supposed distinction between the exercise of a power and the formation of a state of satisfaction, it is not in dispute that adverse credibility findings are susceptible to jurisdictional error on the basis of unreasonableness[12].

44 The second issue raised is therefore to identify what inferences or conclusions were drawn by the delegate. That is, what is the proper construction of the delegate's reasons? The Minister submitted that the delegate did not rely solely on the plaintiff's failure to provide further information and to attend an interview; rather, the delegate relied on the underlying doubts she had about the plaintiff's claims *compounded by* the plaintiff's failure to provide further information and to attend an interview.

45 The difficulty with this argument is that even if the delegate also relied on her underlying doubts in finding that the plaintiff's claims were not credible, it is not, and could not be, suggested that the delegate did not also rely on the plaintiff's failure to provide further information and to attend an interview. And the Minister did not submit that if the delegate relied on the plaintiff's failure to provide further information and to attend an interview, and that was an error, the error was not material.

46 Whether or not the plaintiff's failure to provide further information and to attend an interview was the *only* matter relied on by the delegate, the delegate's

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9 *SZVFW* (2018) 264 CLR 541 at 573 [81]-[82], quoting *Li* (2013) 249 CLR 332 at 375 [105]. See also *Li* (2013) 249 CLR 332 at 366 [72].

10 *SZMDS* (2010) 240 CLR 611 at 648 [133].

11 *SZMDS* (2010) 240 CLR 611 at 649-650 [135]. See also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 136 [34].

12 *BFH16 v Minister for Immigration and Border Protection* (2020) 274 FCR 532 at 545 [34]. See also *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175 at 183-184 [30].

reasons make it plain that those matters were the *critical* considerations. The first paragraph of the reasons under the heading "Findings of Fact" describes the plaintiff's failure to "engage with" the delegate's offer to schedule an interview in Sydney, which was said to be "further reason for concern about the credibility of her protection visa claims"[13]. The next three paragraphs each start by identifying the plaintiff's failure to respond to a particular concern raised by the delegate and finish with the conclusion that this "raise[d] concerns" about the credibility of the plaintiff's claims. The final paragraph states that *given that* the delegate was unable to interview the plaintiff and having considered the information before her (including the plaintiff's limited responses to her requests for further information), the delegate could not be satisfied that the plaintiff's protection claims were credible and, *therefore*, the delegate rejected the plaintiff's claims "in their entirety".

47 The third issue is whether it was unreasonable for the delegate to rely on the plaintiff's failure to provide further information and to attend an interview as supporting the conclusion that her claims were not credible. The short answer is that it was unreasonable. On the face of the emails sent by the plaintiff on 17 and 20 February 2020, the plaintiff: was homeless; was not fluent in English; was suffering from mental health problems ("i am really suffering mentally"); had no phone and no money; and did not understand that the delegate was offering to reschedule the interview in Sydney.

48 Yet, the delegate found that the plaintiff's claim to be a lesbian and her claim that she was subjected to harm in Turkey on that account were not credible because the plaintiff had:

(1) failed to respond properly to the delegate's concerns raised in the letters sent on 14 February 2020;

(2) failed to attend her scheduled interview in Melbourne or provide a "reasonable explanation" for why she did not attend; and

(3) failed to "engage" with the offer to reschedule the interview in Sydney.

49 No reasonable decision-maker could have reasoned in the way that the delegate reasoned. First, it is not correct that the plaintiff "did not engage" with the offer to reschedule the interview in Sydney. She did not understand that an interview in Sydney was being offered (as was plain on the face of the emails) and, as explained above, the delegate did not attempt to correct this misunderstanding.

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13 As the Minister noted in argument, it is curious that this is referred to as a "further" reason, given that it is the first reason listed.

50 Second, it was unreasonable for the delegate to find that the plaintiff had failed to provide "a reasonable explanation for her failure to attend" her scheduled interview in Melbourne. The delegate was aware of information indicating that the plaintiff was in Sydney, struggled to communicate in English, was homeless, had no money and was suffering from serious mental health issues.

51 The delegate's conclusion that the plaintiff's failure to "engage" with the offer to reschedule the interview was a "further reason for concern about the credibility of her protection visa claims" was a combination of the first and second errors. The delegate did not refer to the plaintiff's difficulties understanding and communicating in English, her mental health issues or homelessness. Nor did the delegate acknowledge the fact that the plaintiff misunderstood that she was being offered an interview in Sydney. As explained, all of those matters were evident on the face of the plaintiff's correspondence and other emails on the plaintiff's file.

52 The delegate proceeded on the false unstated premise that the only explanation for that failure to engage was that there was some doubt about the veracity of the plaintiff's claims. The adverse credibility findings that the delegate arrived at by this flawed process of reasoning were not reasonable.

Ground 3 – s 57 of the *Migration Act*

53 By ground 3, the plaintiff submits that the Minister failed to comply with the requirements of s 57(2) of the *Migration Act*, which requires the Minister to give particulars of certain information to a visa applicant. Section 57 relevantly provides:

> "(1) In this section, ***relevant information*** means information (other than non-disclosable information) that the Minister considers:
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> (a) would be the reason, or part of the reason:
>
> (i) for refusing to grant a visa; or
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> ...
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> (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or another person is a member; and
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> (c) was not given by the applicant for the purpose of the application.
>
> ...

(2) The Minister must:

(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and

(c) invite the applicant to comment on it."

Breach of s 57 may give rise to jurisdictional error[14].

54 In her written submissions, the plaintiff relied on alleged contraventions of s 57(2)(a) and (b). The relevant information which it was said that the Minister had failed to provide particulars of was the plaintiff's failure to respond to the s 56 letter inviting her to comment on various matters sent on 14 February 2020. That argument is misconceived. A failure to respond to a letter seeking further information is not itself "relevant information"[15]. In any event, it was arguably implicit in the letter seeking the plaintiff's comments that a failure to respond would be relevant to the determination of her application.

55 At the hearing, without expressly abandoning reliance on s 57(2)(a), the plaintiff focused on s 57(2)(b). The submission was that the plaintiff appeared to misunderstand the s 57 letter – rather than responding to the suggestion that her obtaining a new passport and indicating a willingness to return to Turkey contradicted her claim to fear harm, the plaintiff responded that she had not returned to Turkey and wished to proceed with her application – and that showed that the delegate had failed to "ensure, as far as [was] reasonably practicable, that the [plaintiff] under[stood] why [the information was] relevant to consideration of [her] application". The reliance on the plaintiff's subjective understanding is also misconceived. Whether there has been compliance with s 57(2)(b) depends on an objective assessment of the relevant communication, not on the recipient's subjective understanding. The s 57 letter clearly identified the relevant information and explained why it was relevant[16] – namely, because it

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14 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 224 [11], 235 [47].

15 cf *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18]; 235 ALR 609 at 616. See also *Plaintiff M174* (2018) 264 CLR 217 at 223 [9].

16 cf *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 261 [20].

"could suggest [she did] not genuinely fear [she would] lose [her] life upon return" to Turkey and thus contradicted her claims.

Ground 4 – country information

56 By ground 4, the plaintiff contends that the delegate failed to comply with s 499(2A) of the *Migration Act* in failing to take into account certain country information. Section 499(1) of the *Migration Act* provides that "the Minister may give written directions to a person or body having functions or powers under [the *Migration Act*] if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers". Section 499(2A) provides that "[a] person or body must comply with a direction under subsection (1)".

57 *Direction No 84 – Consideration of Protection Visa Applications (Section 499)* ("Direction 84"), given under s 499 of the *Migration Act*, relevantly provides:

> "Where the Department of Foreign Affairs and Trade has prepared country information assessment expressly for protection status determination purposes, and that assessment is available to the decision maker, the decision maker must take into account that assessment where relevant, in making their decision."

58 It is not in issue that the Department of Foreign Affairs and Trade has prepared a country information report falling within Direction 84 in relation to Turkey and that the information was available to the delegate. The issues raised by this ground are, first, whether the country information report was relevant, and second, whether the delegate took it into account.

59 The Minister submits that "[i]n circumstances where the delegate disbelieved all of the plaintiff's claims, the country information had no relevance". That submission misunderstands the nature and potential relevance of country information. Such information provides *context* for the assessment of a visa applicant's claims. It does not matter that, in the present case, the delegate was not satisfied that the plaintiff's claim to be a lesbian – as distinct from her claims to have suffered harm – was credible. The inquiries are not siloed. If the plaintiff's claims to have suffered harm were (or were not) consistent with the country information, that would be relevant not only to the plaintiff's claims to have suffered harm but also to the plaintiff's claim to be a lesbian[17].

60 As for whether the delegate took the country information into account, the only reference to country information is in a list of material identified under

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17 See *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11].

the heading "Material before the decision maker" at the end of the decision record, which relevantly refers to:

> "Country information as footnoted throughout the decision record including any relevant country information assessment prepared by the Department of Foreign Affairs and Trade specifically for the purpose of assessing protection obligations."

But there is no country information footnoted in the decision record. That does not necessarily mean that it was not considered, as required by s 499(2A) and Direction 84[18], but it may be inferred that it was not considered in circumstances where, first, the delegate specifically referred to country information "as footnoted throughout the decision record", but none is footnoted, and second, the country information was broadly consistent with the plaintiff's claims, but the claims were rejected on the basis that they were not credible without referring to it.

61 It is unnecessary to consider a further issue raised by the Minister, namely, whether any error in failing to consider the country information was material.

Extension of time

62 The Minister resisted the grant of an extension of time, relying on the asserted weakness of the plaintiff's grounds, the plaintiff's failure to invoke her right of merits review and her failure to satisfactorily explain the delay.

63 An extension of time should be granted. The plaintiff's substantive application has merit. Her delay in making the application to this Court was also satisfactorily explained. When the plaintiff was able to seek merits review, she was suffering from acute mental illness and was restricted in her ability to access her email because public libraries were closed as a result of the pandemic lockdown[19]. None of those matters were challenged by the Minister. The delay is also explained in part by the difficulty of the Legal Aid Commission of New South Wales taking instructions (as a result of the plaintiff being in detention, not being fluent in English and suffering from mental health problems) and the pandemic.

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18 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69]. See also *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605-606 [31]; *ETA067 v Republic of Nauru* (2018) 92 ALJR 1003 at 1006 [13]; 360 ALR 228 at 231.

19 cf *Plaintiff S71/2014 v Minister for Immigration and Border Protection* [2015] HCATrans 039 at lines 145-153.

Finally, the Minister identifies no prejudice that would result from the grant of an extension of time.

Relief

64 A writ of certiorari should issue to quash the impugned decision. As "the duties of the Minister to consider and determine the application remain unfulfilled ... their performance is able to be compelled by a constitutional writ of mandamus"[20], and such a writ should issue.

65 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 the decision made by a delegate of the defendant on 17 March 2020, notified to the plaintiff on 18 March 2020, is extended to 8 November 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 17 March 2020, notified to the plaintiff on 18 March 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 application otherwise be dismissed.

6. The defendant pay the plaintiff's costs of and incidental to the application.

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20 *Plaintiff M174* (2018) 264 CLR 217 at 224 [11].