

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

PLAINTIFF M1/2021

PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS

DEFENDANT

Plaintiff M1/2021 v Minister for Home Affairs
[2022] HCA 17

Date of Hearing: 30 November 2021

Date of Judgment: 11 May 2022

M1/2021

ORDER

The questions of law stated for the opinion of the Full Court in the Special Case filed on 28 April 2021 be answered as follows:

- 1. In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the Migration Act 1958 (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the Migration Act, which raised a potential breach of Australia's international non-refoulement obligations, where the plaintiff remained free to apply for a protection visa under the Migration Act?*

Answer:

In deciding whether there was "another reason" to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the Migration Act 1958 (Cth), where the plaintiff remained free to apply for a protection visa under the Migration Act:

2.

- (1) *the Delegate was required to read, identify, understand and evaluate the plaintiff's representations made in response to the invitation issued to him under s 501CA(3)(b) that raised a potential breach of Australia's international non-refoulement obligations;*
- (2) *Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration; and*
- (3) *to the extent Australia's international non-refoulement obligations are given effect in the Migration Act, one available outcome for the Delegate was to defer assessment of whether the plaintiff was owed those non-refoulement obligations on the basis that it was open to the plaintiff to apply for a protection visa under the Migration Act.*

2. *In making the Non-Revocation Decision:*

- (a) *did the Delegate fail to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act?*
- (b) *did the Delegate deny the plaintiff procedural fairness?*
- (c) *did the Delegate misunderstand the Migration Act and its operation?*

Answer:

- (a) *No.*
- (b) *No.*
- (c) *No.*

3. *Is the Non-Revocation Decision affected by jurisdictional error?*

Answer:

Does not arise.

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4. *Should the period of time fixed by s 486A(1) of the Migration Act and rr 25.02.1 and 25.02.2 of the High Court Rules 2004 (Cth) within which to make the Application be extended to 5 January 2021?*

Answer:

No.

5. *What, if any relief, should be granted?*

Answer:

None.

6. *Who should pay the costs of, and incidental to, the Special Case?*

Answer:

The plaintiff.

Representation

R C Knowles QC and C Mintz for the plaintiff (instructed by Corrs Chambers Westgarth)

C L Lenehan SC with B D Kaplan 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 M1/2021 v Minister for Home Affairs

Immigration – Visas – Cancellation of visa – Revocation of cancellation – Where plaintiff's visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where plaintiff made representations seeking revocation of cancellation decision under s 501CA(4) – Where representations raised potential breach of Australia's international non-refoulement obligations – Where delegate of Minister decided there was not "another reason" to revoke cancellation decision under s 501CA(4)(b)(ii) – Where delegate considered it unnecessary to determine whether non-refoulement obligations owed because plaintiff could make valid application for protection visa – Where delegate considered existence or otherwise of non-refoulement obligations would be fully assessed in course of processing protection visa application – Whether, in deciding whether there was "another reason" to revoke cancellation decision, delegate required to consider plaintiff's representations raising potential breach of Australia's non-refoulement obligations – Whether delegate failed to exercise jurisdiction conferred by s 501CA(4) – Whether delegate denied plaintiff procedural fairness – Whether delegate misunderstood *Migration Act* and its operation.

Words and phrases – "another reason", "domestic law", "due process", "international non-refoulement obligations", "mandatory relevant consideration", "procedural fairness", "protection visa", "read, identify, understand and evaluate", "reasonable consideration", "representations concerning non-refoulement", "requisite level of engagement".

Migration Act 1958 (Cth), ss 36, 501, 501CA, 501E.

1 KIEFEL CJ, KEANE, GORDON AND STEWARD JJ. The plaintiff was born in the Republic of the Sudan and is a citizen of the Republic of South Sudan. On 3 June 2006, the plaintiff entered Australia as the holder of a Refugee and Humanitarian (Class XB) Subclass 202 (Global Special Humanitarian) visa, which is not a protection visa¹.

2 On 19 September 2017, the plaintiff was convicted of two counts of unlawful assault and was sentenced to an aggregate term of 12 months' imprisonment. On 27 October 2017, the plaintiff's visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth) because a delegate of the then Minister for Immigration and Border Protection² ("the Minister") was satisfied that the plaintiff had been sentenced to a term of imprisonment of 12 months or more and therefore had a substantial criminal record³, and that he was serving a full-time custodial sentence ("the Cancellation Decision"). On that same day, 27 October 2017, an officer of the Department of Immigration and Border Protection notified the plaintiff of the Cancellation Decision and, under s 501CA(3)(b) of the *Migration Act*, invited him to make representations to the Minister about revocation of the Cancellation Decision.

3 The plaintiff sought revocation of the Cancellation Decision. His representations to the Minister stated, among other things, that if he were returned to South Sudan he would face persecution, torture and death. Further, in a subsequent letter, the plaintiff relevantly stated:

"[D]ue to 'non-refoulment obligations', I didn't think it was possible to force me back to South Sudan, even if I wasn't making the effort I've been making to better myself. I spoke to my mother last night, and she tells me that the situation in regards to my tribe ... remains fundamentally unchanged to the killing since we fled there just over 20 years ago ... I'm outright scared about the prospect of being forced back to South Sudan. I had to leave there, along with the rest of my family, because our lives were in danger, and I don't understand why you would want to send me to my death?"

4 On 9 August 2018, a delegate of the Minister ("the Delegate") made a decision, pursuant to s 501CA(4) of the *Migration Act*, not to revoke the

1 *Migration Act 1958* (Cth), s 35A.

2 Now the Minister for Home Affairs and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

3 *Migration Act*, s 501(6)(a) and (7)(c).

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Cancellation Decision because they were not satisfied that the plaintiff passed the character test or that there was "another reason" why the Cancellation Decision should be revoked ("the Non-Revocation Decision"). The Delegate stated that they had considered the plaintiff's representations and documents submitted in support of his representations and, relevantly, that included representations that he would "be captured, tortured and killed" if returned to South Sudan because of his ethnicity.

5 Under the heading "International non-refoulement obligations", the Delegate stated that they considered it was unnecessary to determine whether non-refoulement obligations were owed in respect of the plaintiff because the plaintiff could make a valid application for a protection visa and the existence or otherwise of non-refoulement obligations would be fully assessed in the course of processing such an application.

6 In September 2018, the plaintiff completed his custodial sentence and he has been detained in immigration detention since then. Also in September 2018, the plaintiff applied for a protection visa. Two years later, in September 2020, a delegate of the Minister refused that application.

7 After obtaining legal advice in late 2020, the plaintiff filed out of time an application for a constitutional or other writ in this Court seeking, among other things, a writ of certiorari to quash the Non-Revocation Decision and a writ of mandamus, or an injunction, to compel the Minister to exercise the power under s 501CA(4) of the *Migration Act* according to law ("the Application").

8 The plaintiff and the Minister agreed to state questions of law for the opinion of the Full Court. The primary question presented by the Special Case is whether, in deciding whether there was "another reason" to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act*, the Delegate was required to consider the plaintiff's representations which raised a potential breach of Australia's international non-refoulement obligations where the plaintiff was able to make a valid application for a protection visa. Ultimately, what divided the parties was not *if* those representations should have been considered by the Delegate, but *how*.

9 For the reasons that follow, in deciding whether there was "another reason" to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act*, where the plaintiff remained free to apply for a protection visa under the *Migration Act*:

- (1) the Delegate was required to read, identify, understand and evaluate the plaintiff's representations made in response to the invitation issued to him

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under s 501CA(3)(b) that raised a potential breach of Australia's international non-refoulement obligations;

- (2) Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration; and
- (3) to the extent Australia's international non-refoulement obligations are given effect in the *Migration Act*, one available outcome for the Delegate was to defer assessment of whether the plaintiff was owed those non-refoulement obligations on the basis that it was open to the plaintiff to apply for a protection visa under the *Migration Act*.

Statutory scheme

10 Section 501(3A) of the *Migration Act*⁴ relevantly provides that the Minister *must* cancel a visa that has been granted to a person if they are satisfied that the person has been sentenced to a term of imprisonment of 12 months or more and therefore has a substantial criminal record⁵, and that the person is serving a sentence of imprisonment on a full-time basis in a custodial institution ("the original decision"). The rules of natural justice do not apply to a decision made under s 501(3A)⁶. That is, the person's visa is cancelled without the person being given procedural fairness⁷.

11 Several consequences flow from the cancellation of a visa under s 501(3A). First, unless the cancellation decision is set aside or revoked, the former visa holder cannot apply for another visa except a protection visa or a visa specified in the *Migration Regulations 1994* (Cth)⁸. In other words, it remains open to a person

4 As it stood at the relevant time.

5 *Migration Act*, s 501(6)(a) and (7)(c).

6 *Migration Act*, s 501(5).

7 See *Minister for Immigration and Border Protection v EFX17* (2021) 95 ALJR 342 at 349 [30]; 388 ALR 351 at 359; *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 141 at [56].

8 *Migration Act*, s 501E(1) and (2). At the relevant time, the only visa specified in the *Migration Regulations* was a Bridging R (Class WR) visa: *Migration Regulations*, reg 2.12AA.

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whose visa has been cancelled under s 501(3A) (which is not a protection visa) to apply for a protection visa⁹. If, however, the visa cancelled under s 501(3A) was a protection visa, s 48A relevantly provides that the former visa holder "may not make a further application for a protection visa while in the migration zone"¹⁰. The Minister does, however, retain a personal power to determine that s 48A does not apply to a non-citizen¹¹.

12 Second, the status of the former visa holder is changed from that of lawful non-citizen to that of unlawful non-citizen¹². The former visa holder must be taken into immigration detention under s 189 of the *Migration Act* and must be removed from Australia as soon as reasonably practicable under s 198¹³.

13 Third, and relatedly, s 197C provides that, for the purposes of removal under s 198, "it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen"¹⁴ and "[a]n officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises

9 *Migration Act*, s 501E(2). Section 35A provides for classes of visa that are protection visas. If a valid application for a protection visa is made, the decision-maker must determine whether or not they are satisfied that the relevant criteria have been met: see ss 36 and 65.

10 *Migration Act*, s 48A(1B); see also s 48A(1C)(a) and (d). Paragraph 14.1(6) of *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 65") relevantly provided that if a person seeking revocation of a cancellation decision under s 501CA(4) had a protection visa cancelled and they were unable to apply for a subsequent protection visa, then "decision-makers should seek an assessment of Australia's international treaty obligations" and "[a]ny non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated".

11 *Migration Act*, s 48B. See also *Direction 65*, para 14.1(5).

12 *Migration Act*, s 15; see also ss 13 and 14. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 356 [84], 360 [96].

13 See *Migration Act*, ss 198(2A)(b), 198(2A)(c)(ii), 198(2B)(b), 198(2B)(c)(ii).

14 *Migration Act*, s 197C(1) (as it stood at the relevant time).

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irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen"¹⁵. "[N]on-refoulement obligations" is defined in the *Migration Act* to include such obligations as may arise because Australia is party to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and obligations accorded by customary international law that are of a similar nature¹⁶. In those circumstances, the Minister retains the personal non-delegable power to grant a visa to a person who is in detention under s 189 if they think it is in the public interest to do so¹⁷.

14 Where a person's visa has been cancelled under s 501(3A), s 501CA provides a procedure for possible revocation of the original decision. The procedure relevantly has two aspects¹⁸ – as soon as practicable after making the original decision, the Minister must: give the person a written notice that sets out the original decision¹⁹; and "*invite the person to make representations to the Minister ... about revocation of the original decision*"²⁰ (emphasis added).

15 Section 501CA(4) then provides that the Minister *may* revoke the original decision if the person makes representations in accordance with the invitation issued under s 501CA(3)(b)²¹ and the Minister is satisfied that the person passes

15 *Migration Act*, s 197C(2) (as it stood at the relevant time).

16 *Migration Act*, s 5(1) definition of "non-refoulement obligations" read with definitions of "Refugees Convention", "Covenant" and "Convention Against Torture".

17 See *Migration Act*, s 195A.

18 See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13 at 17-18 [13]; 395 ALR 403 at 407.

19 *Migration Act*, s 501CA(3)(a)(i).

20 *Migration Act*, s 501CA(3)(b).

21 *Migration Act*, s 501CA(4)(a).

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the character test (as defined in s 501)²² or "that there is another reason why the original decision should be revoked"²³. This case is concerned with the latter.

16 At the relevant time, *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 65")²⁴, given by the Minister under s 499 of the *Migration Act*²⁵, relevantly provided that, in exercising the discretion to revoke a mandatory visa cancellation under s 501CA, delegates had to take into account what were described as "primary"²⁶ and "other"²⁷ considerations. The considerations listed in Direction 65 were non-exhaustive. "International non-refoulement obligations"²⁸ was listed as the first of the "other considerations". In relation to "International non-refoulement obligations", para 14.1 of Direction 65 relevantly provided:

"(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a

22 *Migration Act*, s 501CA(4)(b)(i).

23 *Migration Act*, s 501CA(4)(b)(ii).

24 On 28 February 2019, Direction 65 was revoked and replaced by *Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*.

25 The Minister has power to "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": s 499(1). The person or body must comply with the direction: s 499(2A). The Minister is not empowered to give directions that would be inconsistent with the *Migration Act* or the *Migration Regulations*: s 499(2).

26 Direction 65, paras 7(1)(b) and 13. The "primary considerations" were "Protection of the Australian community" (para 13.1); "Best interests of minor children in Australia affected by the decision" (para 13.2); and "Expectations of the Australian community" (para 13.3).

27 Direction 65, paras 7(1)(b) and 14. The "other considerations" included "Strength, nature and duration of ties" (para 14.2); "Impact on Australian business interests" (para 14.3); "Impact on victims" (para 14.4); and "Extent of impediments if removed" (para 14.5).

28 Direction 65, para 14.1.

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specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). *The [Migration Act] reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the [Migration Act].*

...

- (4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, *it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.*" (emphasis added)

Non-refoulement

17 As has been identified, the *Migration Act* expressly recognises and draws a distinction between Australia's non-refoulement obligations under international law and the extent to which those non-refoulement obligations have been implemented in Australian domestic law²⁹ by express provisions in the *Migration Act*.

18 Australia's non-refoulement obligations, to the extent enacted as domestic law, are addressed in the *Migration Act* in provisions concerning the grant of protection visas, being a class of visa created specifically to allow decision-makers

29 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at 902 [34]-[35]; 383 ALR 194 at 200-201, citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [101] and *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 627 [385], 650-651 [490]-[491]. See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 366 [4]-[5]; *DQU16 v Minister for Home Affairs* (2021) 95 ALJR 352 at 357 [12]; 388 ALR 363 at 368.

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to grant visas to persons who cannot be removed from Australia consistently, but not co-extensively, with Australia's non-refoulement obligations under international law³⁰. There are relevantly two criteria for the grant of a protection visa: "that the applicant is a non-citizen in Australia 'in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee' under s 36(2)(a); and, if the applicant does not satisfy that criterion, that the applicant meets the complementary protection criterion under s 36(2)(aa), which gives effect to some of Australia's non-refoulement obligations under international instruments"³¹. But the applicant must also satisfy "ineligibility criteria"³², including that "the applicant is not a person whom the Minister considers, on reasonable grounds ... having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community"³³.

19 *Direction No 75 – Refusal of protection visas relying on section 36(1C) and section 36(2C)(b)* ("Direction 75"), given under s 499 of the *Migration Act*, requires delegates to have regard to the refugee and complementary protection criteria before considering the ineligibility criteria³⁴. Whether it would have been unreasonable or irrational for a decision-maker (such as the Minister) who was not bound by Direction 75 to consider ineligibility criteria without first considering claims to protection is not raised by the questions of law in this case.

30 *Applicant S270* (2020) 94 ALJR 897 at 902 [34]; 383 ALR 194 at 200-201; *Migration Act*, ss 5H, 5J, 35A, 36, 37A, 91A-91X.

31 *DQU16* (2021) 95 ALJR 352 at 354 [1]; 388 ALR 363 at 364.

32 *Migration Act*, ss 36(1C) and 36(2C)(b). See *Direction No 75 – Refusal of protection visas relying on section 36(1C) and section 36(2C)(b)*. cf *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [127]-[138].

33 *Migration Act*, s 36(1C)(b).

34 As of 25 May 2021, it is a requirement of the *Migration Act* that, relevantly, in considering an application by a non-citizen for a protection visa, the Minister must consider whether they are satisfied that the non-citizen satisfies the criteria in s 36(2)(a) and (aa) before considering whether the non-citizen satisfies any other criteria for the grant of the visa: s 36A, inserted by *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), s 3 read with Sch 1, item 1.

20 Australia's international non-refoulement obligations, as distinct from the criteria for the grant of a protection visa, are addressed separately and later in the scheme of the *Migration Act* in the context of removal³⁵. That distinction is important. In point of constitutional principle, an international treaty (or customary international law obligations of a similar nature) can operate as a source of rights and obligations under domestic law only if, and to the extent that, it has been enacted by Parliament. It is only Parliament that may make and alter the domestic law³⁶. The distinction also has significant consequences for discretionary decision-making under powers, such as s 501CA, conferred by statute and without specification of unenacted international obligations: such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error³⁷.

Section 501CA(4)

21 It is in that context that the specific issue in this case is to be addressed – whether a decision-maker considering revocation under s 501CA(4) is required to determine whether non-refoulement obligations are owed to the former visa holder where the person makes representations which raise a potential breach of those obligations but the person remains free to apply for a protection visa. As has been stated, the dispute between the parties was not if, but how, such representations should be considered by the decision-maker.

Decision-makers' approach to representations

22 Section 501CA(4) of the *Migration Act* confers a wide discretionary power³⁸ on a decision-maker to revoke a decision to cancel a visa held by a non-citizen if satisfied that there is "another reason" why that decision should be revoked. The statutory scheme for determining whether the decision-maker is satisfied that there is "another reason" for revoking a cancellation decision

35 See [13] above. See also *Applicant S270* (2020) 94 ALJR 897 at 902 [34]; 383 ALR 194 at 200; *Migration Act*, s 197C.

36 *CPCF* (2015) 255 CLR 514 at 650-651 [490]; see also 627 [385].

37 *Lam* (2003) 214 CLR 1 at 33 [101]; *CPCF* (2015) 255 CLR 514 at 650-651 [490]-[491].

38 *Applicant S270* (2020) 94 ALJR 897 at 902 [36]; 383 ALR 194 at 201; *Viane* (2021) 96 ALJR 13 at 17 [12]; 395 ALR 403 at 406.

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commences with a former visa holder making representations. In determining whether they are satisfied that there is "another reason" for revoking a cancellation decision, the decision-maker undertakes the assessment by reference to the case made by the former visa holder by their representations³⁹.

23 It is, however, improbable that Parliament intended for that broad discretionary power to be restricted or confined by requiring the decision-maker to treat every statement within representations made by a former visa holder as a mandatory relevant consideration⁴⁰. But the decision-maker cannot ignore the representations. The question remains how the representations are to be considered.

24 Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations⁴¹. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman*⁴², the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to

39 *Applicant S270* (2020) 94 ALJR 897 at 902 [36]; 383 ALR 194 at 201; *Viane* (2021) 96 ALJR 13 at 17 [13]; 395 ALR 403 at 407. See also Australia, House of Representatives, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Explanatory Memorandum at 16 [92].

40 See *Viane* (2021) 96 ALJR 13 at 17-18 [13]; 395 ALR 403 at 407. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 331-332 [41].

41 *Applicant S270* (2020) 94 ALJR 897 at 902 [36]; 383 ALR 194 at 201; *Viane* (2021) 96 ALJR 13 at 17 [13]; 395 ALR 403 at 407. See also *Tickner v Chapman* (1995) 57 FCR 451 at 462, 476, 495; *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Miah* (2001) 206 CLR 57 at 81-82 [81]-[82]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24], 1101 [88], 1102 [95]; 197 ALR 389 at 394, 407, 408; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 435-436 [13], 463 [105]; *DVO16 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375 at 380 [12]; 388 ALR 389 at 393.

42 (1995) 57 FCR 451 at 495.

the representations is a matter for the decision-maker⁴³. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder⁴⁴.

25 It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness⁴⁵. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations⁴⁶. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations⁴⁷.

43 See *Peko-Wallsend* (1986) 162 CLR 24 at 41; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 580 [197]; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 176 [33].

44 *Viane* (2021) 96 ALJR 13 at 18 [14]; 395 ALR 403 at 407.

45 *Viane* (2021) 96 ALJR 13 at 18 [13]; 395 ALR 403 at 407. See also *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [38]; 207 ALR 12 at 20; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 370-371 [90]-[92]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33].

46 *Peko-Wallsend* (1986) 162 CLR 24 at 40; *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 544-545 [66]; 355 ALR 216 at 234; *SZMTA* (2019) 264 CLR 421 at 435-436 [13], 463 [105]; *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 at [56]; *Viane* (2021) 96 ALJR 13 at 18 [15]; 395 ALR 403 at 407.

47 *Dranichnikov* (2003) 77 ALJR 1088 at 1092 [24], 1102 [95]; 197 ALR 389 at 394, 408; *CRI026* (2018) 92 ALJR 529 at 544-545 [66]; 355 ALR 216 at 234. See also *Tickner* (1995) 57 FCR 451 at 462-463; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at 164-165 [59].

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The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them⁴⁸.

26 Labels like "active intellectual process"⁴⁹ and "proper, genuine and realistic consideration"⁵⁰ must be understood in their proper context. These formulas have the danger of creating "a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised"⁵¹. That is not the correct approach.

48 See *Applicant S270* (2020) 94 ALJR 897 at 902 [33]; 383 ALR 194 at 200; *Viane* (2021) 96 ALJR 13 at 18 [15]; 395 ALR 403 at 407. cf *Dranichnikov* (2003) 77 ALJR 1088 at 1100 [78]; 197 ALR 389 at 405.

49 See, eg, *Tickner* (1995) 57 FCR 451 at 462; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 363-364 [45]-[46]; *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41 at 51-52 [53]; *Singh v Minister for Home Affairs* (2019) 267 FCR 200 at 208 [30]; *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at 638 [38]; *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at 607 [37]; *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at 643 [45]; *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 285 at 291-292 [20], quoting *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [16]-[20]; *DVO16* (2021) 95 ALJR 375 at 380 [12]; 388 ALR 389 at 393.

50 See, eg, *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 11 December 1987) at 11; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 482 [37], 526 [171]; *SZJSS* (2010) 243 CLR 164 at 175-176 [29]-[30]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 at 675 [43]. See also *Swift v SAS Trustee Corporation* (2010) 6 ASTLR 339 at 351-352 [45]-[47].

51 *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at 520 [24], quoting *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 442 [65]. See also *SZJSS* (2010) 243 CLR 164 at 175-177 [29]-[34]; *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 448 [54]; *Carrascalao* (2017) 252 FCR 352 at 360-361 [32]-[34]; *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 at 654 [42]; *CXS18 v Minister for Home Affairs* [2020] FCAFC 18 at [35]; *AXT19* [2020] FCAFC 32 at [56]; *XFCS v Minister for Home Affairs* [2020] FCAFC 140 at [22].

As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*⁵², "[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind". The court does not substitute its decision for that of an administrative decision-maker.

27 None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials⁵³ or a substantial and clearly articulated argument⁵⁴; misunderstood the applicable law⁵⁵; or misunderstood the case being made by the former visa holder⁵⁶, that may give rise to jurisdictional error.

Decision-makers' approach to non-refoulement

28 Where the representations do *not* include, or the circumstances do *not* suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa⁵⁷.

52 (1986) 162 CLR 24 at 40; see also 30, 71.

53 *Craig v South Australia* (1995) 184 CLR 163 at 179; *SZJSS* (2010) 243 CLR 164 at 175 [27], citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351-352 [82]-[84]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [25]; *SZMTA* (2019) 264 CLR 421 at 436 [13]; *Viane* (2021) 96 ALJR 13 at 19 [22]; 395 ALR 403 at 409. See also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 271-274 [4.770].

54 See *SZMTA* (2019) 264 CLR 421 at 436 [13], 463 [105]. See also *Dranichnikov* (2003) 77 ALJR 1088 at 1092 [24]-[25], 1102 [95]; 197 ALR 389 at 394, 408.

55 *Hetton Bellbird Collieries* (1944) 69 CLR 407 at 430; *Miah* (2001) 206 CLR 57 at 81-82 [81]-[82]; *Wei* (2015) 257 CLR 22 at 35 [33].

56 *Dranichnikov* (2003) 77 ALJR 1088 at 1101 [88]; 197 ALR 389 at 407.

57 *Applicant S270* (2020) 94 ALJR 897 at 902 [33], 902-903 [36]; 383 ALR 194 at 200, 201; *Viane* (2021) 96 ALJR 13 at 18 [13]; 395 ALR 403 at 407.

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29 Where the representations *do* include, or the circumstances *do* suggest, a non-refoulement claim by reference to *unenacted international non-refoulement obligations*, that claim may be considered by the decision-maker under s 501CA(4)⁵⁸. But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error⁵⁹ – they are not part of Australia's domestic law.

30 Where the representations *do* include, or the circumstances *do* suggest, a claim of non-refoulement *under domestic law*, again the claim may be considered by the decision-maker under s 501CA(4)⁶⁰, but one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.

Prior decisions

31 After the hearing, the Minister provided a list of decisions of the Federal Court of Australia identifying specific paragraphs in each decision which the Minister submitted are inconsistent with the analysis set out above. Although each case was fact specific and the approach adopted and the ultimate result depended on the decision-maker's reasoning in the particular case, it is necessary to address what might be seen as five related paths of reasoning arising from the decisions.

32 Where, in prior decisions, error was found on the basis that the decision-maker conflated the concept of Australia's non-refoulement obligations under international law with protection obligations under the *Migration Act*⁶¹

58 See Direction 65, para 14.1.

59 *Lam* (2003) 214 CLR 1 at 33 [101]; *CPCF* (2015) 255 CLR 514 at 650-651 [490]-[491].

60 Direction 65, para 14.1.

61 *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 at 36-37 [106]-[117]; *FQM18 v Minister for Home Affairs* [2019] FCA 1263 at [10]-[15]; *Kio v Minister for Home Affairs [No 2]* [2019] FCA 1293 at [30]-[31]; *EKC19 v Minister for Home Affairs* [2019] FCA 1823 at [28]; *DGI19 v Minister for Home Affairs* [2019] FCA 1867 at [78]-[79]; *DGP20 v Minister for Home Affairs* [2020] FCA 1055 at [37]; *PKZM v Minister for Immigration, Citizenship, Migrant Services and Multicultural*

(the first path), failed to appreciate the qualitative differences in the manner in which Australia's non-refoulement obligations may be considered for the purposes of s 501CA(4) and the protection visa process⁶² (the second path), or misunderstood that the protection visa process does not call for full exploration of whether Australia is in breach of non-refoulement obligations *under international law*⁶³ (the third path), the decisions overlook that Parliament made a choice about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the *Migration Act*. As Direction 65 states, "[t]he [*Migration Act*] reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the [*Migration Act*]"⁶⁴. To the extent that these paths of reasoning were relied on in previous authorities to conclude that it was not open to a decision-maker to defer consideration of non-refoulement obligations, they should not be adopted.

33 The fourth path of reasoning was that error could be found on the basis that a decision-maker failed adequately to consider representations about non-refoulement obligations (or non-refoulement claims squarely arising from the materials) by deferring assessment of whether a former visa holder was owed non-refoulement obligations to a potential protection visa application⁶⁵. This path

Affairs [2021] FCA 845 at [96]-[111]; *FAK19* [2021] FCAFC 153 at [110]-[111], [117]-[124]; cf [148].

62 *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at 467-468 [48]-[49]; *Omar v Minister for Home Affairs* [2019] FCA 279 at [43]-[46]; see also [73]; *DGI19* [2019] FCA 1867 at [66]; *Hernandez* [2020] FCA 415 at [61]-[64]; *Ali* (2020) 278 FCR 627 at 663-665 [107]-[112]; *FAK19* [2021] FCAFC 153 at [114], [139]-[142]; *AFD21 v Minister for Home Affairs* (2021) 393 ALR 398 at 411 [49], 415 [59]. See also *LGLH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1529 at [120]-[125].

63 *Ibrahim* (2019) 270 FCR 12 at 32-37 [87]-[112]; *DGI19* [2019] FCA 1867 at [84]; *Hernandez* [2020] FCA 415 at [58]-[59]; *Ali* (2020) 278 FCR 627 at 665-666 [113]-[118].

64 Direction 65, para 14.1(1).

65 *Omar* [2019] FCA 279 at [66]-[67], [77]-[78], [82]; *Hernandez* [2020] FCA 415 at [56], [61]-[64], [68]; *Ahmed v Minister for Immigration, Citizenship and Multicultural Affairs* [2020] FCA 557 at [142]-[149]; *Ali* (2020) 278 FCR 627 at 643-648 [45]-[49], 662-663 [101]-[103]; *Minister for Immigration, Citizenship,*

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of reasoning is inconsistent with the statutory scheme set out above and, to the extent of unenacted international non-refoulement obligations, contrary to constitutional principle.

34 To the extent that those paths of reasoning focused on decision-makers failing to properly consider *the consequences*, both to a former visa holder and to Australia (for example, the impact on Australia's reputation and standing in the global community), which would flow from removing a former visa holder *contrary to* non-refoulement obligations under international law⁶⁶, they ignored the choice Parliament made about the extent to, and manner in, which Australia's international non-refoulement obligations are incorporated into the *Migration Act*. At least in some cases where a non-refoulement claim was raised expressly or by necessary implication, the reasoning required a decision-maker to address a number of questions: whether Australia owed the person non-refoulement obligations; whether returning the person would breach those non-refoulement obligations; the consequences of such a breach for the person; and the consequences for Australia for breaching its non-refoulement obligations⁶⁷. Where a decision-maker defers assessment of a person's claim to non-refoulement, none of those questions are required to be asked or answered⁶⁸.

35 The fifth path of reasoning was that error could be found on the basis that a decision-maker misunderstood the likely course of decision-making under the *Migration Act* because the decision-maker erroneously assumed that non-refoulement obligations would *necessarily* be considered in the protection

Migrant Services and Multicultural Affairs v CTB19 (2020) 280 FCR 178 at 190-192 [29]-[39]; *LGLH* [2021] FCA 1529 at [112]-[117].

66 See, eg, *Hernandez* [2020] FCA 415 at [63]; *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420 at 463 [224]; *Ali* (2020) 278 FCR 627 at 660 [91], 662 [99], [101], 663 [103], 665-666 [115], [117]; *FAK19* [2021] FCAFC 153 at [124], [156]-[159]; *LGLH* [2021] FCA 1529 at [112]. See also *Hands* (2018) 267 FCR 628 at 630 [3]; *Omar* [2019] FCA 279 at [58], [66].

67 See *LGLH* [2021] FCA 1529 at [112]; see also [113]-[116]. See also *Ali* (2020) 278 FCR 627 at 662 [99], 663 [103], 665-666 [115], [117]; *FAK19* [2021] FCAFC 153 at [156]-[159].

68 cf *PKZM* [2021] FCA 845 at [72]-[80]; see also [81], [86], [88].

visa process⁶⁹. Incrementally, that path of reasoning has been addressed by Direction 75 from 6 September 2017⁷⁰ and, from 25 May 2021, by s 36A of the *Migration Act*⁷¹. In considering a valid application for a protection visa, decision-makers must assess whether the refugee and complementary protection criteria are met before considering any other criteria⁷².

Plaintiff M1/2021

36 The Delegate was required to read, identify, understand and evaluate the plaintiff's representations. The Delegate's reasons record that they did so. The Delegate accurately identified that the plaintiff's representations raised a potential breach of Australia's non-refoulement obligations but said that it was unnecessary to determine whether non-refoulement obligations were owed in respect of him because he was able to make an application for a protection visa, "in which case the existence or otherwise of non-refoulement obligations would be fully considered in the course of processing that application". The Delegate decided not to bring the plaintiff's representations in relation to non-refoulement to account (in the sense of giving weight to them and balancing them against other factors) in making the Non-Revocation Decision, reasoning that a protection visa application was "the key mechanism provided for by the [*Migration Act*]

69 *BCR16* (2017) 248 FCR 456 at 470 [62], 471-472 [66]-[68]; see also 467-469 [42]-[52]; *ALN17 v Minister for Immigration and Border Protection* [2017] FCA 726 at [14]-[27]; *Steyn v Minister for Immigration and Border Protection* [2017] FCA 1131 at [11]-[16], [19]-[20]; *Ibrahim v Minister for Immigration and Border Protection [No 2]* (2017) 256 FCR 50 at 60-61 [41]-[47]; *Minister for Immigration and Border Protection v BHA17* (2018) 260 FCR 523 at 549-550 [84]-[91]; *DDN17 v Minister for Immigration and Border Protection* [2018] FCA 1126 at [16]-[40]; *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 at [25]-[36]; *Hamidy v Minister for Immigration and Border Protection* (2019) 164 ALD 149 at 154 [25]; *FAK19* [2021] FCAFC 153 at [129]-[138].

70 Direction 75 requires that protection claims must be considered before any character or security concerns.

71 The *Migration Amendment (Clarifying International Obligations for Removal) Act*, s 3 read with Sch 1, item 1 inserted s 36A into the *Migration Act*.

72 *Migration Act*, s 36A (as currently in force).

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for considering claims by a non-citizen that they would suffer harm if returned to their home country". That approach was not inevitable, but it was not erroneous.

37 Contrary to the plaintiff's submissions, the Delegate's reasons do not reflect a misunderstanding of the operation of the *Migration Act*. For the reasons explained above, the Delegate was not required to determine whether the plaintiff was owed non-refoulement obligations (by conducting an assessment of the merits of the plaintiff's claim) in the same manner, or to the same extent, as would be called for by a direct application of the international instruments to which Australia is a party or by reference to the domestic implementation of those obligations.

38 The Court is not "astute to discern error" in the reasons of an administrative decision-maker⁷³. The Delegate's reasons convey that the Delegate had read and understood the plaintiff's claim and proceeded on the basis that non-refoulement obligations could be assessed to an extent and in a manner that they considered appropriate and sufficient to deal with the claim, namely in accordance with the specific mechanism chosen by Parliament for responding to protection claims in the form of protection visa applications. That provided a reasonable and rational justification for not giving weight to potential non-refoulement obligations as "another reason" for revoking the Cancellation Decision. Consequently, the Delegate did not fail to exercise the jurisdiction conferred by s 501CA(4) of the *Migration Act* or deny the plaintiff procedural fairness.

39 Where the cancelled visa is not a protection visa and a decision-maker defers assessment of whether non-refoulement obligations are owed to permit a former visa holder to avail themselves of the protection visa procedures provided for in the *Migration Act*, it nevertheless may be necessary for the decision-maker to take account of the alleged facts underpinning that claim where those facts are relied upon by a former visa holder in support of there being "another reason" why the Cancellation Decision should be revoked⁷⁴.

73 *Plaintiff M64* (2015) 258 CLR 173 at 185 [25], citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 278, 282.

74 See *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 at 681 [185]; *Omar* (2019) 272 FCR 589 at 607 [39]; *GBV18 v Minister for Home Affairs* (2020) 274 FCR 202 at 223 [45]; *DCC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 395 at [38], citing *Ezegbe v Minister for Immigration and Border Protection* (2019) 164 ALD 139 at 147 [36]; *AFD21* (2021) 393 ALR 398 at 413 [55].

40 Here, the reasons record the Delegate's consideration of the issues of fact presented by the plaintiff's non-refoulement claims. The Delegate stated that they had considered the plaintiff's "claims of harm upon return to [South] Sudan outside the concept of non-refoulement and the international obligations framework" and that they accepted that, "regardless of whether [the plaintiff's] claims [were] such as to engage non-refoulement obligations, [the plaintiff] would face hardship arising from tribal conflicts were he to return to [South] Sudan". The harm, which formed the basis of his non-refoulement claims, was that if he was returned to South Sudan he faced persecution, torture and death. In concluding that they were not satisfied that there was another reason to revoke the Cancellation Decision, the Delegate stated that they had "considered all relevant matters including ... an assessment of the representations received in relation to the invitation for the purposes of s 501CA(4)(a)". The Delegate concluded that the plaintiff represented an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed both the interests of his children and "other countervailing considerations", which would include the hardship identified by the Delegate.

41 Given the answers to questions 1, 2 and 3 of the questions of law stated in the Special Case, it would be futile to grant the plaintiff the extension of time he would need to bring the proceeding.

Answers

42 For those reasons, the questions of law stated in the Special Case filed on 28 April 2021 should be answered as follows:

1. In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the Migration Act, which raised a potential breach of Australia's international non-refoulement obligations, where the plaintiff remained free to apply for a protection visa under the Migration Act?

Answer: In deciding whether there was "another reason" to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), where the plaintiff remained free to apply for a protection visa under the *Migration Act*:

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- (1) the Delegate was required to read, identify, understand and evaluate the plaintiff's representations made in response to the invitation issued to him under s 501CA(3)(b) that raised a potential breach of Australia's international non-refoulement obligations;
- (2) Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration; and
- (3) to the extent Australia's international non-refoulement obligations are given effect in the *Migration Act*, one available outcome for the Delegate was to defer assessment of whether the plaintiff was owed those non-refoulement obligations on the basis that it was open to the plaintiff to apply for a protection visa under the *Migration Act*.

2. In making the Non-Revocation Decision:

- (a) did the Delegate fail to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act?
- (b) did the Delegate deny the plaintiff procedural fairness?
- (c) did the Delegate misunderstand the Migration Act and its operation?

Answer:

- (a) No.
- (b) No.
- (c) No.

3. Is the Non-Revocation Decision affected by jurisdictional error?

Answer: Does not arise.

4. Should the period of time fixed by s 486A(1) of the Migration Act and rr 25.02.1 and 25.02.2 of the *High Court Rules 2004*

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(Cth) within which to make the Application be extended to 5 January 2021?

Answer: No.

5. What, if any relief, should be granted?

Answer: None.

6. Who should pay the costs of, and incidental to, the Special Case?

Answer: The plaintiff.

43 GAGELER J. I agree with the answers proposed by Kiefel CJ, Keane, Gordon and Steward JJ to Questions (2) to (6). Without disagreeing with their reasoning in support of the answer proposed by them to Question (1), I prefer to respond: "Inappropriate to answer".

44 The question is inappropriate to answer because it is in a form inappropriate to be asked. The question is inappropriate to be asked because it is unduly abstract and because it is cast in contentious and ambiguous language. The consequence is that to answer the question requires elaboration of legal principle at a level of generality more appropriate to be included in reasons for judgment, one purpose of which is to guide legal analysis in similar cases through the outworking of the doctrine of precedent, than to be included in a judicial order, the sole purpose of which is to bind the parties in the resolution of the case at hand.

45 This Court has recently emphasised that the function performed in answering a question of law stated by parties in a special case is "not advisory but adjudicative"⁷⁵ and that performance of the function, like the performance of any adjudicative function performed in an adversarial context, "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy"⁷⁶.

46 Unlike a question of law framed by an applicant for special leave to appeal with a view to highlighting its "public importance, whether because of its general application or otherwise"⁷⁷, a question of law stated by parties who choose to agree a special case must be framed with a view to obtaining by its answer the judicial determination of a legal right or legal obligation as a step in resolving the justiciable controversy between them. The question should be directed to the specific legal right or legal obligation and should be cast in succinct, unambiguous and uncontentious language.

47 To reflect the principal ground on which the plaintiff seeks a constitutional writ of mandamus, Question (1) would be appropriately framed by asking: "Was the Delegate obliged by s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) to form an opinion on the correctness of the plaintiff's representations to the effect that his removal to South Sudan would be contrary to international non-refoulement obligations owed by Australia in respect of him?". For the reasons given by

75 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [58]; 393 ALR 551 at 566.

76 *Clubb v Edwards* (2019) 267 CLR 171 at 217 [137], quoted in *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [58]; 393 ALR 551 at 566.

77 See s 35A(a)(i) of the *Judiciary Act 1903* (Cth). See also *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218.

23.

Kiefel CJ, Keane, Gordon and Steward JJ, the answer appropriate to be given by judicial order would then be "No".

EDELMAN J.

A sentence of death

48 "Sending me back to South Sudan is sentencing me to the same fate as my
father ... I will either get killed, or persecuted then killed, or tortured then killed."

49 These representations were made by the plaintiff, and reiterated again and
again, to a delegate of the Minister for Home Affairs in seeking to have his refugee
and humanitarian visa cancellation revoked. There is no dispute about the factual
accuracy of the representations: a later delegate concluded that on return to South
Sudan, the plaintiff would face "a real risk of being extorted, kidnapped and
potentially killed".

50 The plaintiff made these representations with an understanding that "due to
'non-refoulement' obligations, [he] didn't think it was possible to force [him] back
to South Sudan". That understanding was wrong. But the plaintiff was entitled to
a reasonable consideration by the Minister of his representations as a whole. The
Minister's duty to consider the plaintiff's representations as a whole might be
described as a duty related to process rather than to outcome. But process-related
powers and duties must be exercised or performed reasonably just as
outcome-related powers and duties must be exercised or performed reasonably⁷⁸.
The failure to exercise a process-related power in a reasonable way was the gist of
the plaintiff's allegation, which was described as a denial of procedural fairness in
question 2b of the special case.

51 Whilst purporting to accept this very basic implication of fair process,
requiring performance of the Minister's duty in a reasonable manner, the Minister's
submissions on this special case paid only lip service to it. Indeed, the Minister
sought to have this Court overturn no fewer than 24 decisions of the Federal Court
of Australia or the Full Court of the Federal Court of Australia, including a decision
from which special leave to appeal was refused for reasons including the
insufficiency of the prospects of success⁷⁹. Although expressed in various ways,
many of those decisions involve little more than an application of this basic
implication, which is based in reasonable expectations of treatment with respect
for human dignity. The underlying theme of those decisions is that reasonable and
fair process matters. Sometimes, as in this case, it could be a matter of life or death.

52 The plaintiff was denied due process by the delegate, who concluded, under
s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), that there was not "another

78 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 489-491 [122]-[125].

79 *Minister for Immigration and Border Protection v BCR16* [2017] HCATrans 240.

reason" why the decision to cancel the plaintiff's visa should be revoked. The delegate refused to take into account the plaintiff's representations concerning "non-refoulement obligations" on the basis that those matters would be considered in the course of processing an application for a protection visa, which was later made and refused. In refusing to take those matters into account, the delegate ignored or brushed aside the plaintiff's many representations of persecution, torture, and death. At the very most and even then, in light of the reasons of Gleeson J, with considerable generosity, the active consideration given by the delegate to those matters of life or death was no more than a passing euphemism, five words in the middle of the delegate's decision, where the delegate said that the plaintiff would suffer "hardship arising from tribal conflicts".

53 For the reasons below, I respectfully dissent. The approach of the delegate was not a legally reasonable consideration of the plaintiff's representations as a whole. The plaintiff was entitled to have reasonable consideration given to his representations that he would be persecuted, tortured, and killed. This entitlement follows not merely as a matter of principle, based upon considerations of dignity and humanity, but also as a matter of authority. The entitlement is consistent with a long line of authority in the Federal Court, including the Full Court of the Federal Court. The Federal Court now has vast expertise and refined knowledge in the field of migration law. In relation to issues of interpretation and application of the terms and meaning of the *Migration Act*, which for decades now has seen refinement upon refinement by both the courts and Parliament, this Court should pause for serious thought before concluding that such a large swathe of decisions of the Federal Court should be overturned.

Background

54 The plaintiff is a citizen of the Republic of South Sudan. In 2006, at the age of 19, the plaintiff, together with other members of his family, entered Australia holding a Refugee and Humanitarian (Class XB) visa, subclass 202 (Global Special Humanitarian) ("Refugee visa"). This class of visa is distinct from a protection visa⁸⁰.

55 On 19 September 2017, the plaintiff was convicted of two counts of unlawful assault and sentenced to an aggregate term of 12 months' imprisonment. The plaintiff had previously been imprisoned on several occasions with the longest term being six months' imprisonment. In September 2018, the plaintiff completed the custodial term of his sentence and was transferred to immigration detention.

56 As a consequence of the plaintiff's sentence of 12 months' imprisonment, a delegate of the Minister cancelled the plaintiff's Refugee visa, as was required by s 501(3A) of the *Migration Act*. On 27 October 2017, the Minister sent the plaintiff

80 *Migration Act 1958* (Cth), s 35A.

written notice of this decision and, pursuant to s 501CA(3)(b), invited the plaintiff to make representations to the Minister on a Revocation Request Form within 28 days about revocation of the cancellation decision, together with any additional information that the plaintiff wished to provide, including subsequently to the 28-day period, before a decision about revocation was made.

57 In a Revocation Request Form dated 3 November 2017, with the assistance of another prisoner, the plaintiff made representations to the Minister about revocation of the cancellation decision. Consistently with the Minister's invitation, the plaintiff made further representations, including a number of months later, on 10 May 2018.

58 As the delegate of the Minister explained, the plaintiff's representations could "reasonably be summarised as follows:

- He has been in Australia for 12 years.
- He has two minor children for who[m] he would like to be a role model and to bring up; he wants to make sure they don't repeat the same mistakes he has made.
- His family will be devastated if he is removed.
- He will not re-offend. He is ashamed of his mistakes and he has learn[ed] [that] alcohol is not the effective way to cope with stress. He has done courses and will adopt different strategies to cope with stress.
- He will have no direct contact with his former partner, the victim of much of his offending.
- He will be killed if he returns to South Sudan because of his ... ethnicity."

59 The last of these matters in the delegate's summary was a theme that was repeated again, again, and again in the plaintiff's representations. He wrote of "sending me to a premature death". He said that "[s]ending me back to South Sudan is sentencing me to the same fate as my father", who was killed. He said:

"I might be tortured before being killed by [another tribe] or ISIS in an attempt to extract any possibly useful information I might have. They won't know I know nothing of use to them until after they've tortured me, but I fear that ISIS might try to use my capture to pressure my family in Australia, either for money, or maybe for something much worse."

Later, in a passage substantially repeated on a further two occasions in the course of the plaintiff's representations, he added:

"We left South Sudan as refugees because ... we were being hunted by [a] much larger and more powerful ... tribe, and because my father was amongst the first of us to be killed we had no protection whatsoever.

[That other tribe], already a brutal people, are now the majority tribe in that region, and as such has political and military dominance, which makes it very dangerous to be [another] ... tribesperson in South Sudan. Despite having left South Sudan as a child, the tribe I was born into will still be the primary defining characteristic that I'd be judged by, and forcing me to return without any political or military alliances, affiliations or aspirations is exactly the same as sentencing me to death.

To further complicate the matter I understand that more recently ISIS has been active in the region, having aligned many of its local interests with the [other tribe] in its efforts to gain further support, and in doing so has decimated much of my homeland, and most of my people.

...

... I've little doubt that sending me to a premature death would leave my entire family devastated."

Still later, when reiterating the sentence of death that would be the effect of refouling him, as a member of his particular tribe, to South Sudan, the plaintiff said, "I will either get killed, or persecuted then killed, or tortured then killed". On a further occasion, when repeating, again, the "sentence of death" that he would face upon refoulement to South Sudan, the plaintiff added that "because my father was amongst the first of us to be killed we had no protection whatsoever". And, still later, he added that "I've no doubt that sending me to a premature death would no doubt leave my entire family devastated". He again later pleaded that:

"Sending me back to South Sudan is sentencing me to the same fate as my father, and no doubt my entire family would be devastated ... I will either get killed, or persecuted then killed, or tortured then killed."

60

On 10 May 2018, the plaintiff supplemented his representations with further representations in a letter which responded to a letter that he said he had received from the Australian Border Force. The plaintiff said that "due to 'non-refoulement obligations', I didn't think it was possible to force me back to South Sudan". He added:

"I spoke to my mother last night, and she tells me that the situation in regards to my tribe ... remains fundamentally unchanged to the killing since we fled there just over 20 year[s] ago ... I had to leave there, along with the rest of my family, because our lives were in danger, and I don't understand why you would want to send me to my death?"

61 On 9 August 2018, the delegate determined that the visa cancellation should not be revoked. About one month later, again with the assistance of another prisoner, the plaintiff applied for a protection visa.

62 Two years later, on 21 September 2020, the plaintiff's protection visa application was refused by a delegate of the Minister. The delegate made findings including the following: "the perpetrators specified by the applicant do commit large-scale human rights abuses, including killings and torture, against those whom they consider their tribal or political enemies"; the plaintiff would be "targeted by non-state actors because he is perceived to be wealthy and/or an outsider"; and, since the plaintiff "is identifiable as a [member of his tribe], he is unlikely to be able to access protection from [other] groups". In a finding which was repeated twice, the delegate concluded that there is a real chance that the plaintiff would be "forced into destitution, extorted, kidnapped, and possibl[y] killed".

63 Despite making the findings above about the real risk to the plaintiff of destitution, extortion, kidnapping, and possible death upon return to South Sudan, the delegate refused the plaintiff a protection visa due to ss 36(1C)(b) and 36(2C)(b)(ii) of the *Migration Act*. Those provisions qualify the availability of a protection visa on various grounds if the Minister considers, on reasonable grounds, that the applicant, having been convicted of a particularly serious crime, is a danger to the Australian community. The delegate considered that the application of either of those provisions would have been sufficient to require the refusal of a grant of a protection visa.

64 No issue was raised in this Court concerning the operation of s 36(2C)(b)(ii), which neither permits nor requires the Minister to refuse a protection visa where the plaintiff is a refugee under s 36(2)(a). Section 36(2C)(b)(ii) permits refusal only on the ground of complementary protection (s 36(2)(aa)), for essentially the same reasons concerning conviction of a particularly serious crime and being a danger to the Australian community. By contrast, s 36(1C)(b) provides that "[a] criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds ... having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community".

The reasonableness condition upon consideration of representations under s 501CA(4) of the *Migration Act*

65 Under s 501(3A) of the *Migration Act*, cancellation of a visa is mandatory if the Minister is satisfied that the person has been sentenced to a term of imprisonment of 12 months or more and therefore has a substantial criminal record, and the person is serving a sentence of imprisonment on a full-time basis

in a custodial institution⁸¹. The cancellation decision under s 501(3A) can be made by a delegate of the Minister. And the cancellation decision is not subject to rules of natural justice⁸².

66 Upon cancellation of a visa, the person's status is changed from a lawful non-citizen to an unlawful non-citizen⁸³ and, subject to circumstances which include a power to grant a "detainee visa" to the person⁸⁴, or the person (whose cancelled visa under s 501(3A) was other than a protection visa) making an application for a protection visa⁸⁵, or pending consideration of representations by the person about revocation of the cancellation decision⁸⁶, they must be detained in immigration detention and removed from Australia as soon as practicable⁸⁷.

67 Section 501CA makes provision for revocation of the original cancellation decision under s 501(3A). As soon as practicable after making the cancellation decision, the Minister must give the person a written notice setting out the cancellation decision, and must invite the person to make representations to the Minister about revocation of the decision⁸⁸.

68 Section 501CA(4) of the *Migration Act* empowers the Minister to revoke the original decision cancelling a visa. It provides:

"The Minister may revoke the original decision if:

- (a) the person makes representations in accordance with the invitation;
and
- (b) the Minister is satisfied:

81 *Migration Act*, ss 501(3A), 501(6)-501(7).

82 *Migration Act*, s 501(5).

83 *Migration Act*, ss 13-15.

84 *Migration Act*, s 195A.

85 *Migration Act*, ss 501E(1)-501E(2).

86 *Migration Act*, s 501CA(4)(a).

87 *Migration Act*, ss 189, 193(1)(a)(iv), 198(2A).

88 *Migration Act*, s 501CA(3).

- (i) that the person passes the character test (as defined by section 501); or
- (ii) that there is another reason why the original decision should be revoked."

69 Under s 501G(1)(e), the Minister is required to provide reasons for a decision not to revoke a decision to cancel a visa.

70 Section 501CA(4)(b) has two limbs, each permitting revocation of a cancellation decision. The first limb, which must be considered first, requires the satisfaction of the Minister that the person passes the character test (as defined by ss 501(6)-501(7)). The second limb arises if the person does not pass the character test. In those circumstances, the Minister must then consider whether there is "another reason" why the cancellation decision should be revoked. The reasons that can constitute "another reason" are unlimited, other than that they must be reasons other than whether the person has passed the character test. With this small exception, s 501CA(4)(b) is thus an example of a provision that does not expressly confine the matters which the decision-maker can take into account⁸⁹. The Minister was therefore correct to disclaim any submission that it was not open for the decision-maker to take into account non-refoulement considerations, such as treaty obligations, when considering the second limb of s 501CA(4)(b).

71 The effect of the conjunction "and" between ss 501CA(4)(a) and 501CA(4)(b) is that the satisfaction of the Minister must be formed by having regard to the representations made by the person. In other words, the Minister has a duty to consider the representations as a whole. But as Robertson J observed in *Goundar v Minister for Immigration and Border Protection*⁹⁰, and as has been reiterated many times since⁹¹, although the Minister's duty to consider the representations means that the representations, as a whole, are a mandatory relevant consideration, the same is not necessarily true of "any particular statement in the representations".

89 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

90 (2016) 160 ALD 123 at 133 [56].

91 *Minister for Immigration and Border Protection v BHA17* (2018) 260 FCR 523 at 562 [139]; *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at 546-547 [70]-[72]; *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 331-332 [41]; *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at 603 [34(e)].

72 Whilst it is not the case that every representation made by an applicant is a mandatory relevant consideration for the delegate who makes a decision under s 501CA(4), the delegate's duty to take into account the representations as a whole is not entirely at large. Like the exercise of a power that is not subject to an express constraint⁹², a duty cannot be performed in bad faith or outside the scope of the statutory purposes⁹³. Further, the duty to take into account the representations as a whole will not be satisfied by any erroneous, cursory, or perfunctory consideration of the representations as a whole. The conferral of this duty upon the Minister, as is common with other statutory powers and duties, carries with it the "usual implication"⁹⁴ that the power will be exercised, or the duty performed, in a reasonable manner⁹⁵.

73 The existence and content of the implied requirement of reasonableness will depend upon the nature, terms, and context of the power or duty. The inference to be drawn as to the existence of that implication arises as a matter of ordinary language, although, unless the language reveals otherwise, the reasonable reader of legislation must take into account the expectation of basic values that underlie the common law. Some of those basic values have been expressed as individual self-realisation, good administration, electoral legitimacy, and decisional autonomy⁹⁶. The basic values inform the presuppositions of the common law and the usual implications, by implicatures conditioning the exercise of statutory

92 *Victorian Railways Commissioners v McCartney and Nicholson* (1935) 52 CLR 383 at 391; *R v Trebilco; Ex parte F S Falkiner & Sons Ltd* (1936) 56 CLR 20 at 32; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

93 *Walton v Gardiner* (1993) 177 CLR 378 at 409; *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq)* (2022) 96 ALJR 166 at 193-194 [135]-[137]; 399 ALR 1 at 35.

94 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 61 [27]; 385 ALR 212 at 220.

95 See, eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 623 [33], 625 [40]-[42]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63]; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21], 245 [86], 249 [97]; *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 490-491 [125].

96 Daly, *Understanding Administrative Law in the Common Law World* (2021) at 14.

powers and performance of statutory duties, such as conditions of reasonableness⁹⁷.

74 In relation to s 501CA(4), the implication of the usual condition of reasonableness as a requirement for the manner of performance of the Minister's duty is further reinforced by the circumstance that cancellation of the visa of a non-citizen under s 501(3A) is a matter to which, as the heading provides, "natural justice does not apply". Hence, the only opportunity provided by the *Migration Act* for a non-citizen to have representations about the cancellation of their visa considered by the Minister is under s 501CA(4). The importance of this opportunity, combined with the potentially devastating consequences of the decision, reinforces the importance of the implication of reasonableness in the manner of performance of the duty. Of course, in assessing whether consideration has been undertaken reasonably, it is necessary to have regard to the particular circumstances of every case, including the relevance, importance, and clarity of the representations made⁹⁸.

75 Ultimately, therefore, the Minister was correct to accept in oral submissions that the obligation in s 501CA(4) upon the Minister or the delegate to consider the plaintiff's representations as a whole was an obligation that was required to be performed reasonably.

76 Many of the 24 decisions of the Federal Court which the Minister sought to have this Court overturn involved little more than the application of this basic condition of reasonableness in consideration by the Minister under s 501CA(4) of a non-citizen's representations. It is unnecessary to consider all of those decisions. Unsurprisingly, the application of a condition of reasonableness will require close consideration of the facts and circumstances involved. One example suffices to illustrate the point.

77 In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*⁹⁹, one of the two appeals heard by the Full Court of the Federal Court involved the circumstance, like that in the plaintiff's case now

97 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 478-479 [166]-[169]; 390 ALR 590 at 632-633.

98 *Tickner v Chapman* (1995) 57 FCR 451 at 462-463; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at 164-165 [59]. See also *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24], 1102 [95]; 197 ALR 389 at 394, 408; *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 544-545 [66]; 355 ALR 216 at 234.

99 [2021] FCAFC 153.

before this Court, of mandatory cancellation of the visa of the appellant, FAK19, under s 501(3A). Upon review by the Administrative Appeals Tribunal, constituted by two members who disagreed, with the decision of the presiding member therefore prevailing¹⁰⁰, the Tribunal affirmed a decision not to revoke the cancellation. In the Federal Court, the primary judge, and the unanimous Full Court (Kerr and Mortimer JJ, with whom Allsop CJ agreed), held that the Tribunal had made a jurisdictional error by excluding from its consideration the effect of the cancellation of the plaintiff's visa on Australia's international non-refoulement obligations¹⁰¹. This issue had been the subject of "a lengthy discussion between the Tribunal and counsel for both FAK19 and the Minister"¹⁰². Although the nature of this jurisdictional error was characterised in various ways by Kerr and Mortimer JJ, it is relevant that their Honours endorsed a statement that there is "a statutory obligation on the Minister to engage, in an active intellectual sense with the representations"¹⁰³.

78 Many other decisions of the Federal Court have expressed the obligation on a delegate of the Minister under s 501CA(4) to consider reasonably the representations as a whole as requiring that the Minister "engage in an active intellectual process" with the applicant's significant and clearly expressed representations¹⁰⁴. The source of this description of an "intellectual process" may be the decision in 1995 in *Tickner v Chapman*¹⁰⁵, in which each of Black CJ¹⁰⁶, Burchett J¹⁰⁷, and Kiefel J¹⁰⁸ spoke of the "intellectual process" required by the

100 *Administrative Appeals Tribunal Act 1975* (Cth), s 42(2).

101 [2020] FCA 1124 at [60]; [2021] FCAFC 153 at [156]-[159].

102 [2021] FCAFC 153 at [161].

103 [2021] FCAFC 153 at [76], citing *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at 604-607 [35]-[37] and the authorities cited therein.

104 *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at 606 [36(d)]; *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 285 at 292 [20]; *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at 643 [45].

105 (1995) 57 FCR 451.

106 (1995) 57 FCR 451 at 462.

107 (1995) 57 FCR 451 at 476.

108 (1995) 57 FCR 451 at 495.

statutory requirement to "consider" in s 10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The use of expressions such as engagement in an "active intellectual process" with the applicant's significant and clearly expressed representations is simply an application of the implied requirement that the Minister's duty to consider representations be performed in a reasonable way.

79 Whether or not the approach of the presiding member of the Tribunal in *FAK19* was unreasonable involved an assessment of the nature and consequences of the approach that was taken by the presiding member. There is no occasion to revisit in this case whether that approach was unreasonable. As will be explained below, this is because the extent of any unreasonableness in *FAK19* pales almost into insignificance in comparison with the enormity of the unreasonableness of the approach taken by the delegate in this case.

The decision of this Court in Applicant S270/2019

80 The Minister submitted that the decision of this Court in *Applicant S270/2019 v Minister for Immigration and Border Protection*¹⁰⁹ precluded the possibility of any implied obligation in s 501CA(4) of the *Migration Act* having the effect of requiring the Minister or delegate to take particular representations into account. There is no such inconsistency.

81 In *Applicant S270/2019*, the issue was whether non-refoulement was required to be considered by the delegate in circumstances in which no claim for non-refoulement had been made by the applicant for revocation of a cancellation decision. This Court held that, without any such claim, non-refoulement was not a mandatory relevant consideration. The Court was not concerned with the extent of any obligation upon the delegate to consider, reasonably, representations concerning non-refoulement. The scope of reasonableness in the consideration of representations that were made is plainly a very different question from any particular obligation to consider matters that were not raised. The joint judgment of Nettle, Gordon and Edelman JJ thus said that "[i]t is unnecessary to decide, however, whether consideration of [non-refoulement] can be deferred where a non-refoulement claim is made in a revocation request"¹¹⁰.

82 A footnote to the sentence quoted above directed attention as a comparison to reasoning in *BCR16 v Minister for Immigration and Border Protection*¹¹¹. In that case, the Assistant Minister had declined to consider the representations of an

¹⁰⁹ (2020) 94 ALJR 897; 383 ALR 194.

¹¹⁰ (2020) 94 ALJR 897 at 902 [34]; 383 ALR 194 at 201.

¹¹¹ (2017) 248 FCR 456 at 470 [63].

applicant concerning international non-refoulement obligations on the basis that those representations would be considered if a protection visa application were made. In a paragraph of the reasons of Bromberg and Mortimer JJ in the majority, which was cited in *Applicant S270/2019*, their Honours said that "[t]he error could also be characterised as a failure to carry out the task required under s 501CA(4) which requires consideration of whether there is 'another reason' to revoke the visa cancellation". An application for special leave to appeal in that case was dismissed for reasons including the insufficiency of the prospects of success¹¹².

The delegate's reasons concerning the claims of persecution, torture, and death

83 Given that the plaintiff had been sentenced to 12 months' imprisonment, the delegate was not satisfied that the plaintiff passed the character test, which is the first of the two alternative limbs of s 501CA(4)(b). The delegate thus turned to whether the second limb was satisfied, in other words whether there was "another reason" to revoke the original cancellation decision.

84 Senior counsel for the plaintiff submitted that, in considering the second limb of s 501CA(4)(b), the delegate did not merely fail to consider legal questions of non-refoulement matters, but also failed to consider "the precise claims or basis upon which [the claim of non-refoulement was] put", which included the hardship or harm that was "wrapped up in" the non-refoulement claim. Those claims had been made clearly and repeatedly. They went to the heart of the plaintiff's representations and concerned matters of devastating consequence. The extent of the failure by the delegate had the effect that the delegate acted unreasonably in their consideration of the plaintiff's representations. That submission should be accepted.

85 It is necessary to set out in full the consideration by the delegate of the plaintiff's representations about his persecution, torture, and death if he were sent back to South Sudan. The consideration was contained in a section of the delegate's reasons, paras 46-50, entitled "International non-refoulement obligations". The only subsequent reference back to this discussion was towards the end of the delegate's reasons, in para 60:

"46. [The plaintiff] arrived in Australia on a Class XB Subclass 202 Global Special Humanitarian visa, and as such, his circumstances may give rise to international non-refoulement obligations and I note that he submits that he does not think it is possible that he will be sent back to South Sudan because of 'non refoulement obligations'.

112 *Minister for Immigration and Border Protection v BCR16* [2017] HCATrans 240.

47. I note that [the plaintiff] states that he might be captured, tortured and killed by [another] tribe or ISIS if he returns to South Sudan. [The plaintiff] belongs to [a] ... tribe which is hunted by [a] much larger and more powerful ... tribe in South Sudan; he states that his father was killed because of the conflict. They may use his capture to pressure his family in Australia for money or something worse. He stated that sending him back would be sending him to a premature death.
48. I consider that it is unnecessary to determine whether non-refoulement obligations are owed in respect of [the plaintiff] for the purposes of the present decision as he is able to make a valid application for a Protection visa, in which case the existence or otherwise of non-refoulement obligations would be fully considered in the course of processing that application.
49. A protection visa application is the key mechanism provided for by the Act for considering claims by a non-citizen that they would suffer harm if returned to their home country. Further, I am aware that the Department's practice in processing Protection visa applications is to consider the application of protection-specific criteria before proceeding with any consideration of other criteria, including character-related criteria. To reinforce this practice, the Minister has given a direction under s 499 of the Act (Direction 75) which, among other things, requires that decision-makers who are considering an application for a Protection visa must first assess whether the refugee and complementary protection criteria are met before considering ineligibility criteria, or referring the application for consideration under s 501 of the Act. I am therefore confident that [the plaintiff] would have the opportunity to have his protection claims fully assessed in the course of an application for a Protection visa.
50. I have also considered [the plaintiff's] claims of harm upon return to Sudan outside the concept of non-refoulement and the international obligations framework. I accept that regardless of whether [the plaintiff's] claims are such as to engage non-refoulement obligations, [the plaintiff] would face hardship arising from tribal conflicts were he to return to Sudan.
- ...
60. While I find [the plaintiff] will not suffer any substantial language or cultural barriers returning to Sudan or South Sudan, I accept that his return will cause him some hardship."

86 Following the section of the delegate's reasons concerning "international non-refoulement obligations", the delegate proceeded to consider the strength, nature, and duration of the plaintiff's ties to Australia and the extent of impediments that he faced if he were to be removed to South Sudan. In relation to the latter, the delegate observed: the plaintiff had no family living in South Sudan; he would not see his children and family again; and his return would cause him "some hardship", which appears to be a reference back to the hardship from tribal conflict referred to in para 50 of the delegate's reasons. All those factors were then weighed by the delegate against the serious crimes committed by the plaintiff. The delegate concluded that "[t]he Australian community should not have to accept any risk of further harm" and decided that the cancellation decision should not be revoked.

87 Senior counsel for the plaintiff submitted that in the context of the whole of the delegate's reasons a particular meaning should be given to the delegate's remark in para 50, set out above, that consideration had been given to the plaintiff's "claims of harm upon return to Sudan outside the concept of non-refoulement and the international obligations framework". That meaning was that the plaintiff's claims of harm had been considered only to the extent that those claims of harm existed outside the concept of non-refoulement and the framework of Australia's international obligations of non-refoulement.

88 The meaning of para 50 of the delegate's reasons is, to say the least, difficult. None of the plaintiff's claims of harm were outside the concept of non-refoulement and Australia's international obligations unless the delegate is taken to be referring only to international law rather than its implementation in domestic law. But whatever was meant by the delegate in para 50, it is plain that the delegate was not considering the plaintiff's claims of persecution, torture, and death. The only possible harm alleged by the plaintiff which, as the delegate expressed it, concerned the plaintiff's generalised claim of "hardship arising from tribal conflicts" was separate from the plaintiff's claims of persecution, torture, and death. The delegate's reference to hardship appears to have been a reference to the plaintiff's more generalised representations that South Sudan is a country with "longstanding tribal feuds" and that he was a member of a tribe which "being both peaceful and a minority simply made [them] the targets of everyone else".

89 The delegate's reference in paras 50 and 60 of their reasons to "hardship arising from tribal conflicts", and "some hardship" on return, could not possibly be understood to encompass the plaintiff's repeated representations of persecution, torture, and death. Those perfunctory references to "hardship" comprised fewer words of the 69 substantive paragraphs in the delegate's reasons for decision than the delegate's discussion of how long the plaintiff had worked in Australia as a meat worker. The references to hardship responded in terms to a different representation by the plaintiff about hardship from generalised tribal conflict. The references cannot reasonably be understood to be considering the plaintiff's repeated and clearly expressed representations of persecution, torture, and death.

Whether or not it is even possible to characterise death following torture by the extraordinary euphemism of "some hardship", this is not what the delegate can reasonably be understood to have meant.

90 Since writing these reasons I have had the benefit of reading the reasons of Gleeson J. Her Honour interprets the delegate's reference to hardship arising from tribal conflicts as bearing no relation to the plaintiff's representations at all and as perhaps being little more than repetition of sentences from a template¹¹³. With respect, there is great force in that interpretation, for the reasons that her Honour gives. It is, however, unnecessary for me to reach a final view on whether my initial interpretation of the delegate's reasons was wrong because, on the interpretation of Gleeson J, the consideration by the delegate of the plaintiff's claims is even more unreasonable than it would be under the interpretation that I had initially preferred. That issue of unreasonableness is discussed immediately below.

The unreasonableness of the consideration by the delegate

91 The Minister submitted that the delegate considered the plaintiff's submissions about the persecution, torture, and death to which the plaintiff would be exposed on return to South Sudan. The Minister's argument was effectively that these representations were reasonably "considered" because they were read and understood by the delegate, who stated in their reasons that the plaintiff's representations and documents submitted in support of his representations had been "considered", even though that "consideration" involved reasoning that the representations should not be considered in any detail because they would be considered by another delegate if the plaintiff later brought a protection visa application, which was potentially doomed because of the character concerns that arose from the plaintiff's criminal record¹¹⁴. In other words, the delegate "considered" the representations by reaching a considered view not to consider them.

92 That submission should not be accepted. The implied obligation to consider the plaintiff's representations in a reasonable way should be applied as a matter of substance, not as a matter of verbal prestidigitation. As a matter of substance, the delegate declined to engage with the heart of the plaintiff's submissions and the most powerful and clearly expressed of the plaintiff's representations, matters that were almost as grave and devastating as could be imagined and which the plaintiff had repeated again and again.

113 Reasons of Gleeson J at [111], [113].

114 *Migration Act*, s 36(1C)(b).

93 The Minister relied upon cl 14.1(4) of Direction 65¹¹⁵, made pursuant to s 499 of the *Migration Act*, which provides that, where a non-citizen can make an application for another visa, "it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked". The Minister submitted that the delegate acted consistently with that direction by declining to consider whether any non-refoulement obligations were owed to the plaintiff. It is unnecessary for the purposes of this special case to consider whether, as the plaintiff submitted, cl 14.1(4) is ultra vires in so far as it purports to remove a possible consideration from the statutory reference to "another reason" in s 501CA(4)(b)(ii). This issue is unnecessary to determine because, on any view of cl 14.1(4), it does not make it unnecessary for a delegate to consider core, clearly articulated factual claims that might give rise to non-refoulement obligations. As has been explained, that is what the delegate failed to do in this case.

94 It can be accepted that *if* the plaintiff were to bring a later application for a protection visa, and *if* the plaintiff were to repeat the same claims in the same terms in that application, then those claims would be considered in that later protection visa application, even if it was ultimately doomed due to character considerations. A consideration of those claims would be required even in a doomed protection visa application due to Direction 75¹¹⁶. Direction 75 requires a delegate, in "considering elements of the Protection visa assessment for applicants who raise character or security concerns", to undertake the consideration by "first assess[ing] the applicant's refugee claims with reference to section 36(2)(a) and any complementary protection claims with reference to section 36(2)(aa) before considering any character or security concerns".

95 But the possibility that factual representations by the plaintiff might be considered in a later protection visa application made by the plaintiff did not make it reasonable for the delegate expressly to decline to consider the heart of the plaintiff's representations when considering whether the plaintiff had raised "another reason" to revoke the original decision cancelling his visa within s 501CA(4).

96 To the extent that the Minister asserted that the plaintiff had not discharged his onus of proof that the unreasonableness of the delegate was material, this

115 *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

116 *Direction No 75 – Refusal of Protection visas relying on section 36(1C) and section 36(2C)(b).*

submission cannot be maintained. It is impossible to deny the possibility that the result of the delegate's consideration might have been different if the delegate had added to their balancing of the relevant representations the plaintiff's claims of persecution, torture, and death.

Conclusion

97 At its simplest, this special case involves little more than asking whether the consideration by the delegate of the whole of the plaintiff's representations was reasonable. In *Hands v Minister for Immigration and Border Protection*¹¹⁷, Allsop CJ, speaking of s 501 of the *Migration Act*, said that, "where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people". The consequences of persecution, torture, and death are the most devastating consequences that could be encountered by a person facing removal from Australia. Even with the usual strict sense in which the standard of reasonableness is applied there is no sense in which it was reasonable for the delegate to decline to engage with the plaintiff's repeated pleas not to expose him to persecution, torture, and death.

98 A lengthy extension of time is required for this application, including an extension of 845 days under s 486A of the *Migration Act*. In the exceptional circumstances of this case, that extension is appropriate for four reasons. First, the merits of the plaintiff's case are strong and the issues are of considerable public importance. Secondly, the substance of the plaintiff's case concerns matters of the gravest import to him. Thirdly, the plaintiff has limited ability to read and write in English and relied heavily upon the assistance of another prisoner in the preparation of his application. In the course of receiving that assistance, a substantial part of the delay, including two years between the application and decision, was caused by the plaintiff applying for a protection visa, which was the course that the delegate's reasons had asserted to be the only manner in which the plaintiff's claims of non-refoulement could be considered. Fourthly, the Minister did not suggest any specific prejudice would arise from the grant of an extension of time.

Answers to the questions stated in the special case

99 Two points should be made about the manner in which the questions in the special case were expressed. First, question 1 was expressed broadly by the plaintiff, no doubt to ensure that it did not confine his submissions concerning the unreasonableness of the delegate's consideration of the plaintiff's representations. Those submissions were not limited to the delegate's failure to engage with Australia's international non-refoulement obligations but extended also to the

117 (2018) 267 FCR 628 at 630 [3].

failure to engage with the heart of the plaintiff's representations: that removal would result in his persecution, torture, and death. Secondly, as the plaintiff's submissions made clear, question 2b relied upon the concept of "procedural fairness" in a broad, perhaps loose, sense that also encompassed unreasonableness in the process of decision-making. The answer to that question reflects that extended sense in which procedural fairness was also relied upon.

100

The questions in the special case should be answered as follows:

Question 1: In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the Migration Act, which raised a potential breach of Australia's international non-*refoulement* obligations, where the plaintiff remained free to apply for a protection visa under the Migration Act?

Answer: The delegate was required to consider reasonably the plaintiff's representations as a whole.

Question 2a: In making the Non-Revocation Decision did the Delegate fail to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act?

Answer: No.

Question 2b: In making the Non-Revocation Decision did the Delegate deny the plaintiff procedural fairness?

Answer: Yes. The delegate considered the plaintiff's representations in an unreasonable manner.

Question 2c: In making the Non-Revocation Decision did the Delegate misunderstand the Migration Act and its operation?

Answer: Unnecessary to answer.

Question 3: Is the Non-Revocation Decision affected by jurisdictional error?

Answer: Yes.

Question 4: Should the period of time fixed by s 486A(1) of the Migration Act and rr 25.02.1 and 25.02.2 of the *High Court Rules 2004* (Cth) within which to make the Application be extended to 5 January 2021?

Answer: Yes.

Question 5: What, if any relief, should be granted?

Answer: The relief set out in the paragraph immediately below.

Question 6: Who should pay the costs of, and incidental to, the Special Case?

Answer: The defendant.

101

Orders should be made as follows:

1. The time for filing an application for constitutional writs be extended to 5 January 2021.
2. A writ of certiorari issue to quash the decision made on 9 August 2018 by a delegate of the defendant, purportedly pursuant to s 501CA(4) of the *Migration Act 1958* (Cth), not to revoke the decision made on 27 October 2017 to cancel the plaintiff's Refugee and Humanitarian (Class XB) visa, subclass 202 (Global Special Humanitarian).
3. A writ of mandamus issue to compel the defendant to exercise the power under s 501CA(4) of the *Migration Act* according to law.
4. The defendant pay the plaintiff's costs.

102 GLEESON J. The relevant facts and relevant portions of the delegate's decision
record are stated in the reasons of Kiefel CJ, Keane, Gordon and Steward JJ, and
Edelman J.

103 In his application the plaintiff identified, as the matter that the delegate
failed to consider, "that his removal to South Sudan would be contrary to
international non-refoulement obligations owed to him". In the Special Case, the
first question of law identified by the parties concerned whether the delegate was
required to consider that aspect of the plaintiff's representations made in response
to the invitation issued under s 501CA(3)(b) of the *Migration Act 1958* (Cth)
"which raised a potential breach of Australia's international non-refoulement
obligations". In general terms, an international non-refoulement obligation is an
obligation, arising under an international convention to which Australia is a party,
not to forcibly return, deport or expel a person to a place where they will be at risk
of a specific type of harm¹¹⁸.

104 It is necessary to look at the representations to see how they "raised a
potential breach". In the representations, the plaintiff claimed that he faced
persecution, torture and death, at the hands of another tribe or ISIS, if he was
returned to South Sudan by reason of membership of his tribe ("the relevant
claims"). As Edelman J illustrates, the plaintiff made his claims in stark terms that
comprised death by killing as a certainty and persecution or torture as possibilities.
Thus, the plaintiff "raised a potential breach of Australia's international non-
refoulement obligations" principally, if not solely, by claiming that he would suffer
serious and lethal harm if forcibly returned to his home country. The plaintiff asked
the delegate to confront what he claimed would be the devastating consequences
visited upon him in South Sudan if the cancellation of his visa was not revoked¹¹⁹.
Separately, the plaintiff stated that "due to 'non-refoulement' obligations, I didn't
think it was possible to force me back to South Sudan".

105 The delegate was required to consider the plaintiff's representations in order
to decide whether there was "another reason" why the decision to cancel the
plaintiff's visa should be revoked. This entailed engaging with any substantial and
clearly articulated argument contained in the plaintiff's representations that there
was "another reason" why the cancellation of the plaintiff's visa should be

118 cf Direction 65, para 14.1.

119 cf *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at
630 [3].

revoked¹²⁰. Failure to consider such an argument is at least a denial of procedural fairness and may also constitute a constructive failure to exercise jurisdiction¹²¹.

106 As Edelman J observes¹²², the reasons that can constitute "another reason" are not confined by the terms of s 501CA except that they must be reasons other than whether the person whose visa has been cancelled has passed the character test. Direction 65, followed by the delegate in accordance with s 499(2A) of the *Migration Act*, recognised that Australia's international non-refoulement obligations may be a reason why a decision to cancel a visa should be revoked¹²³. As to possible consequences for the former visa holder in the event that non-refoulement obligations are found to be owed, Direction 65 stated that Australia would not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligations exist¹²⁴. On this basis, the Direction stated, the existence of a non-refoulement obligation did not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. The Direction added that the consequence of non-revocation of a visa cancellation may be the prospect of indefinite detention "[g]iven that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations"¹²⁵.

107 The delegate did not record any finding as to the likely or possible consequences to the plaintiff of non-revocation of the visa cancellation. However, the delegate made findings about the impediments that the plaintiff would face if removed to South Sudan, concluding that "his return will cause him some hardship". The delegate did not identify any other possible consequence for the plaintiff apart from removal from Australia, consistent with s 197C of the

120 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]; 197 ALR 389 at 394; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 177 [35]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 436 [13].

121 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]-[25]; 197 ALR 389 at 394; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 435-436 [13], 442 [35]. See also *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 356 [90].

122 Reasons of Edelman J at [70].

123 Direction 65, para 14(1).

124 Direction 65, para 14.1(2).

125 Direction 65, para 14.1(6).

Migration Act, which expressly provided that non-refoulement obligations are irrelevant when considering the power to remove an unlawful non-citizen, and that the duty to remove arises irrespective of whether there has been an assessment of such obligations. These aspects of the delegate's decision indicate that the delegate approached the question of whether there was "another reason" for revoking the visa cancellation upon the basis that the plaintiff's removal to South Sudan was a likely or possible consequence of non-revocation of the visa cancellation. In that context, the relevant claims constituted a substantial and clearly articulated argument that another reason why the cancellation of the plaintiff's visa should be revoked was to avoid serious harm to the plaintiff, including torture and death, if he were returned to South Sudan.

108 Unlike Kiefel CJ, Keane, Gordon and Steward JJ (with whom Gageler J agrees), I am unable to accept that the delegate's reasons record, beyond assertion, adequate consideration of the issues of fact presented by the plaintiff's non-refoulement claims. Such consideration would be "proper, genuine and realistic" consideration¹²⁶, addressing the merits of the factual basis for the relevant claims or, in other words, an "active intellectual process"¹²⁷ of evaluating those issues of fact to the extent necessary to decide whether the plaintiff identified "another reason" why the cancellation of his visa should be revoked.

109 The relevant passage of the decision record is set out in Edelman J's reasons¹²⁸. The passage commences by acknowledging that the plaintiff's circumstances may give rise to international non-refoulement obligations and noting that the plaintiff adverted to that matter in his representations. Next, the delegate misstates the gist of the plaintiff's claims concerning the consequences if he is returned to South Sudan by recording a claim that the plaintiff "might" be captured, tortured and killed, when the plaintiff represented that death was a certainty. Next, the delegate explains why they consider it to be unnecessary to determine whether non-refoulement obligations are owed in respect of the plaintiff. The reasons include that a protection visa application is "the key mechanism provided for by the Act for considering claims by a non-citizen that they would suffer harm if returned to their home country" and that the plaintiff

126 *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 11 December 1987) at 11; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 482-483 [37]; *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [51]; *Swift v SAS Trustee Corporation* (2010) 6 ASTLR 339 at 342 [1], 351-352 [45]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 at 675 [43].

127 *DVO16 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375 at 380 [12], 393 [77]; 388 ALR 389 at 393, 411.

128 Reasons of Edelman J at [85].

would have "the opportunity to have his protection claims fully assessed in the course of an application for a Protection visa". To this point, there is no evidence in the decision record that the delegate engaged with the substance of the relevant claims, except that the delegate has misunderstood the claims by interpreting them as claims about possible rather than certain lethal harm.

110 The final relevant portion of the delegate's reasons is cryptic. It is convenient to set out the relevant sentences in full:

"I have also considered [the plaintiff's] claims of harm upon return to Sudan outside the concept of non-refoulement and the international obligations framework. I accept that regardless of whether [the plaintiff's] claims are such as to engage non-refoulement obligations, [the plaintiff] would face hardship arising from tribal conflicts were he to return to Sudan."

111 Similar language appears in many decisions concerning visa cancellations around the time of the delegate's decision¹²⁹. The mere fact that a decision maker appears to have used a template, or copied the language of another decision maker, is not necessarily indicative of a denial of procedural fairness or some other jurisdictional error¹³⁰. Template reasons may evidence a sufficient intellectual process of genuine engagement with relevant claims or issues presented by claims in the circumstances of the particular case. However, in this instance, when considered in relation to the relevant claims, the repetition of language that may have been apt as a response to different representations does not disclose an intellectual process of the kind required to decide whether the plaintiff had identified "another reason" why the cancellation of his visa should be revoked.

112 While the delegate evidently considered the plaintiff's claims of harm in some confined or constrained fashion ("outside the concept of non-refoulement

129 See, for example, *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 at 661-662 [106]; *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 at 28 [67]; *Sowa v Minister for Home Affairs* (2019) 369 ALR 389 at 393 [6]; *GBV18 v Minister for Home Affairs* [2019] FCA 1132 at [21]; *EVK18 v Minister for Home Affairs* (2020) 274 FCR 598 at 606 [22]; *DQM18 v Minister for Home Affairs* (2020) 278 FCR 529 at 540-541 [43]; *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at 631-632 [6].

130 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 266; *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at 367 [10]; *MZZZW v Minister for Immigration and Border Protection* (2015) 234 FCR 154 at 172-173 [66]; *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at 630 [3]; *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at 632 [7], 648 [51].

and the international obligations framework"), the decision record reveals nothing about the intellectual process applied by the decision maker to those claims. I do not understand the plaintiff to have made any claims to which that concept and that framework would not apply. In this regard, I respectfully disagree with Edelman J that the plaintiff made a generalised claim of hardship arising from tribal conflicts. Addressing a question about factors that may help to explain the plaintiff's offending, the plaintiff argued that he had suffered from extreme trauma during his early childhood as a result of circumstances in his home country, which included longstanding tribal feuds and persecution of his tribe. The argument was addressed to historical circumstances and not to the consequences of removal to South Sudan.

113 The factual finding that the plaintiff would face hardship arising from tribal conflicts were he to return to South Sudan bears no relation to the plaintiff's representations. The plaintiff said nothing about hardship: his claims were far more drastic. The decision record says nothing to explain what kind of hardship the delegate envisaged would be faced by the plaintiff. At most, this finding might be understood as a response to the delegate's mistaken appreciation of the plaintiff's claims, that the plaintiff "might be captured, tortured and killed", so that the relevant hardship might be living in fear of such an eventuality. Otherwise, the nature or degree of the accepted hardship can only be a matter of speculation.

114 Without more, the delegate's statements that they "considered [the plaintiff's] representations" and "considered all relevant matters including ... an assessment of the [plaintiff's] representations" do not reveal the requisite evaluation of the relevant claims.

115 The statutory task for the delegate concerned the particular visa that the plaintiff had previously held and whether there was "another reason" why the cancellation of that visa should be revoked. By failing to consider, in the sense explained above, whether the relevant claims afforded another reason why the visa cancellation should be revoked, and where a likely consequence of non-revocation was the plaintiff's removal to South Sudan, the delegate denied the plaintiff procedural fairness¹³¹. "Deferring" assessment of whether non-refoulement obligations were owed to a prospective protection visa application was no answer to the plaintiff's representations about the adverse consequences to him of non-revocation of the visa cancellation. The practical injustice suffered by the plaintiff in this case was not that he lost the opportunity of having the relevant claims considered at all. The practical injustice was that he was denied the delegate's consideration of a substantial and clearly articulated argument presented by the

131 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 502-503 [104]-[105], 526 [172]; *Swift v SAS Trustee Corporation* (2010) 6 ASTLR 339 at 352 [47].

plaintiff in support of revocation of the cancellation of his visa¹³². The loss of that opportunity could not be remedied in the course of a subsequent protection visa application, directed towards the grant of a different visa and affected by different considerations¹³³.

116 For the reasons given by Edelman J, the plaintiff should be granted an extension of time to make his application. Accordingly, I would answer the questions stated in the Special Case in the same terms as Edelman J except for Question 2b, which I would answer "Yes".

132 *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 11 December 1987); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37]-[38].

133 See particularly ss 36(1C)(b) and 36(2C)(b)(ii).

