

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, GLEESON AND JAGOT JJ

MOUNIB ISMAIL

PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS

DEFENDANT

Ismail v Minister for Immigration, Citizenship and Multicultural Affairs
[2024] HCA 2

Date of Hearing: 6 September 2023

Date of Judgment: 7 February 2024

M20/2023

ORDER

- 1. The plaintiff be granted an extension of time until 28 March 2023 to file the application for a constitutional or other writ.*
- 2. Application dismissed.*
- 3. The plaintiff pay the defendant's costs of the application.*

Representation

D J Hooke SC with J D Donnelly and J R Murphy for the plaintiff (instructed by Zarifi Lawyers)

R C Knowles KC with N D J Swan 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

Ismail v Minister for Immigration, Citizenship and Multicultural Affairs

Immigration – Visas – Application for visa – Where delegate of Minister refused to grant visa under s 501 of *Migration Act 1958* (Cth) as plaintiff did not pass character test and considerations favouring non-refusal outweighed by considerations favouring refusal – Where delegate was required to comply with *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90") in determining whether to refuse to grant visa – Where Direction 90 required decision-maker to take into account considerations, including protection of Australian community (para 8.1), any engagement in family violence by non-citizens (para 8.2), best interests of minor children affected by decision (para 8.3), and expectations of Australian community (para 8.4) – Whether delegate failed to comply with para 8.3(1) of Direction 90 or failed to inquire about status of minor child in circumstances where it was legally unreasonable not to do so – Whether para 8.2 of Direction 90 permitted delegate to give weight to family violence considerations in circumstances where delegate had given weight to considerations under other paragraphs – Whether para 8.2 invalid – Whether delegate misapplied para 8.4 of Direction 90.

Words and phrases – "direction", "double counting", "failure to consider", "failure to inquire", "illegitimate purpose", "irrational, illogical, or legally unreasonable", "legally unreasonable", "primary consideration", "relevant considerations", "relevant, legitimate, and non-punitive", "repetitious weighing".

Migration Act 1958 (Cth), ss 499, 501, 501CA.

1 GAGELER CJ, GORDON, EDELMAN, GLEESON AND JAGOT JJ. This matter, brought in the original jurisdiction of the Court, involves the construction, validity, and operation of parts of *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90"), which is a direction made under s 499(1) of the *Migration Act 1958* (Cth) ("the Act").

2 The context in which the matter arises is confined. The plaintiff was born in Lebanon and holds a travel document for Palestinian refugees issued by the Republic of Lebanon. The plaintiff came to Australia on a Student (Higher Education Sector) (Subclass 573) visa in 2010 when he was 21 years old. He was granted a Partner (Subclass 801) visa in 2015 ("Partner visa"). Between 2010 and 2022 the plaintiff was convicted of various offences, including offences of driving while disqualified and offences of domestic violence.

3 The plaintiff returned to Lebanon in April 2022 due to the illness of a family member. On leaving Australia, his Partner visa ceased to have effect by operation of s 82 of the Act. Two days after leaving Australia, he applied for a Return (Residence) (Class BB) (Subclass 155) visa ("Return visa"). He was not granted this visa and remained in Lebanon while further information was submitted to the Department of Home Affairs ("the Department") in support of his visa application.

4 In August 2022, the Department gave the plaintiff notice that consideration was being given to the refusal of his visa application on "character grounds" under s 501(1) of the Act. The notice informed the plaintiff that it appeared that he did not pass the "character test" under s 501(6) of the Act because he had a "substantial criminal record" as defined by s 501(7) of the Act. The notice invited the plaintiff to comment on the information indicating that he may not pass the "character test" and informed him that he may want to provide reasons why his visa application should not be refused even if he did not pass the character test. The notice said that in preparing any response the plaintiff may wish to consider Direction 90.

5 The plaintiff's legal representative arranged for further information to be submitted in support of the plaintiff's visa application. In the covering email dated 1 September 2022, the plaintiff's legal representative urged the Department to make a decision urgently as the plaintiff was "stranded in Lebanon" and required further medical treatment following surgery undertaken in Australia before he travelled to Lebanon.

6 On 28 September 2022, a delegate of the Minister administering the Act decided to refuse to grant the plaintiff a Return visa. The delegate concluded that the plaintiff did not pass the "character test" and that the "considerations favouring

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non-refusal [of the visa application] are outweighed by the considerations favouring refusal". The plaintiff contends that in making this decision the delegate erred in law on several grounds, each relating to Direction 90. As explained below, none of the grounds is established.

The Act and Direction 90

7 Section 501(1) of the Act provides that "[t]he Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". "A decision under s 501(1) involves two steps, being a consideration of whether the person has satisfied the decision-maker that the person passes the character test, *and if not*, the exercise of the discretion whether to exercise the power to refuse the visa."¹ The plaintiff does not dispute that he does not pass the "character test" as, in accordance with s 501(6)(a), he has "a substantial criminal record" as defined in s 501(7) of the Act.

8 Direction 90 is a direction given by the Minister under s 499(1) of the Act. Section 499(1) provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or the exercise of those powers. Section 499(2) provides that the Minister is not empowered to give directions that would be inconsistent with the Act or the regulations. Section 499(2A) provides that a delegate of the Minister must comply with a direction (such as Direction 90) in deciding, relevantly, whether to refuse to grant a visa under s 501(1) of the Act.

9 Paragraph 5 in Pt 1 ("*Preliminary*") of Direction 90 is a Preamble. In para 5.1 ("*Objectives*"), sub-para (2) specifies that "[w]here the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider the specific circumstances of the case in deciding whether to exercise that discretion". Sub-paragraph (4) of para 5.1 says that "[t]he purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 ... of the Act". Paragraph 5.2 ("*Principles*") says that "[t]he principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501" and that "[t]he factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 ... of the Act are identified in Part 2". Sub-paragraphs (2), (3) and (5) of para 5.2 include:

1 *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 at 524 [68]; 410 ALR 1 at 19 (emphasis in original).

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- "(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
- (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns ...
- ...
- (5) Decision-makers must take into account the primary and other considerations relevant to the individual case ..."

10 Part 2 ("*Exercising the discretion*") of Direction 90 includes these provisions:

"6. Exercising discretion

Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

7. Taking the relevant considerations into account

- (1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.
- (2) Primary considerations should generally be given greater weight than the other considerations.
- (3) One or more primary considerations may outweigh other primary considerations.

8. Primary considerations

In making a decision under section 501(1), 501(2) or 501CA(4), the following are primary considerations:

- (1) protection of the Australian community from criminal or other serious conduct;

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- (2) whether the conduct engaged in constituted family violence;
- (3) the best interests of minor children in Australia;
- (4) expectations of the Australian community."

11 The balance of Pt 2 of Direction 90 includes provisions relating to each matter in para 8(1)-(4). Accordingly, para 8.1 (*"Protection of the Australian community"*) provides in sub-para (1) that "decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community". Sub-paragraph (2) provides that decision-makers should also give consideration to: (a) "the nature and seriousness of the non-citizen's conduct to date"; and (b) "the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct".

12 Paragraph 8.1.1 provides further matters to which decision-makers must have regard in considering the nature and seriousness of the non-citizen's conduct. These matters include that certain crimes or conduct, including acts of family violence, "are viewed very seriously by the Australian Government and the Australian community" (para 8.1.1(1)(a)(iii)). "Family violence" is defined in para 4(1) as "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family ... or causes the family member to be fearful".

13 Paragraph 8.2 (*"Family violence committed by the non-citizen"*) provides:

- "(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).
- (2) This consideration is relevant in circumstances where:
 - a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

...

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- (3) In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:

..."

14 Paragraph 8.3 ("*Best interests of minor children in Australia affected by the decision*") provides that:

- "(1) Decision-makers must make a determination about whether cancellation or refusal under section 501 ... is, or is not, in the best interests of a child affected by the decision.
- (2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse or cancel the visa, or to not revoke the mandatory cancellation of the visa, is expected to be made.
- (3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.
- (4) In considering the best interests of the child, the following factors must be considered where relevant:

..."

15 Paragraph 8.4 ("*Expectations of the Australian community*") includes these provisions:

- "(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.
- (2) ... In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:
- (a) acts of family violence; or

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- (3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.
- (4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case."

16 Paragraph 9 ("*Other considerations*") provides that in making a decision under, relevantly, s 501(1) of the Act, a decision-maker must also take into account (where relevant) "impact on victims" and "links to the Australian community", the latter including "strength, nature and duration of ties to Australia". Paragraph 9.3 ("*Impact on victims*") requires the decision-maker to consider the impact of the decision on "members of the Australian community, including victims of the non-citizen's criminal behaviour", and on members of the victim's family. Paragraph 9.4 ("*Links to the Australian community*") includes provisions identifying matters relevant to the consideration of the strength, nature, and duration of a person's ties to Australia.

Best interests of a minor child (ground 1)

17 The plaintiff contends that the delegate failed to comply with para 8.3(1) of Direction 90 or failed to inquire about the status of a minor child (referred to as "MC") in circumstances where it was legally unreasonable not to make that inquiry before deciding to refuse the plaintiff's application for a visa.

The information available to the delegate

18 In the information initially submitted in support of the plaintiff's visa application, there is no mention of MC. In contrast, there is reasonably detailed information about two children who are brothers of MC, one also being a minor child (under 18 years of age) and the other not being a minor child (as he was 22 years old at the time). The information initially submitted comprised statements in support, including one from the plaintiff, one from the plaintiff's partner (who provided information about her sister's two sons – the brothers of MC – and the three children of another sister, but did not mention MC), and one from the sister of the plaintiff's partner and the mother of the brothers of MC (who provided information about the plaintiff's relationship with her two sons but did not mention

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MC). For example, the plaintiff's statement said the plaintiff had a "very strong bonded family-like relationship" with his partner's sister, who was a single mother to a 7-year-old and a 22-year-old, identified as the two sons of his partner's sister. The statement said the plaintiff had built a "very strong connection and relationship" with his partner's sister, "supporting her with the management and upbringing of her children and assuming responsibility over her children". MC is not mentioned in this statement.

19 The plaintiff subsequently submitted a "Personal Circumstances" form. That form had a section saying, "**List below all your minor children ... Provide evidence to support your claims including birth certificates, if available.**"² The plaintiff's response in this part of the form identified the two sons of the sister of the plaintiff's partner (as noted, only one of whom is a minor child under 18 years of age). It also identified, for the first (and only) time, MC as a child of his partner's sister, with whom the plaintiff stated he had "daily" contact. In response to another question asking for a description of the plaintiff's relationship with "each child/ren above, including the role you play in his/her life",³ the plaintiff referred to attached documents "regarding my guardianship to children and impacts of my absence". None of the documents referred to MC. Another section of the form, asking the plaintiff to list all other minor children in his life in Australia, was left blank.

Delegate's reasons

20 The delegate noted that the plaintiff and others had identified his relationships with four minor children. The delegate said that the best interests of these children were a primary consideration. The delegate found that the extent to which these children's best interests would be affected by the decision was "limited" and said that this consideration was attributed "some weight" in favour of a decision not to refuse the visa application. The delegate then said:

"I acknowledge that [the plaintiff] has listed the name [MC] under minor children in the Personal Circumstances form dated 30 August 2022. However, [the plaintiff] has provided no further information regarding this person including their age. Therefore I am unable to determine if there would be any effects on [MC], if she is indeed a minor child".

2 Emphasis in original.

3 Emphasis in original.

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Failure to comply with para 8.3(1)?

21 The first contention for the plaintiff is that the delegate failed to comply with para 8.3(1) of Direction 90.

22 The contention is unsustainable. Paragraph 8.3(1) provides that a decision-maker must make a determination about whether, relevantly, refusal of the visa application under s 501 of the Act is or is not in the best interests of a child affected by the decision. This provision, as with all provisions in Direction 90, is to be read in the context of the Direction as a whole. The general requirements in para 5.1(2) and (4) make plain that the decision-maker must consider the specific circumstances of each case and that the purpose of Direction 90 is to guide decision-makers in performing their functions under, relevantly, s 501 of the Act. Paragraphs 5.2 and 6 of Direction 90 reiterate that the matters to be taken into consideration are those "relevant in the particular case" and "relevant to the decision".

23 The decision of this Court in *Uelese v Minister for Immigration and Border Protection*⁴ does not undermine the validity of the proposition that it is generally for the person making the application to identify the personal facts and circumstances relevant to the decision.⁵ In *Uelese*, the decision-maker disabled itself from considering the best interests of two minor children because it wrongly construed a provision of the Act as preventing it from undertaking such a consideration. The observation in *Uelese* that "the best interests of an applicant's minor children in Australia are 'relevant' if such children exist and that fact is known to the [decision-maker]"⁶ is conditioned on the decision-maker in fact knowing of the existence of a minor child who might be affected by the decision. In the present case, however, the delegate did not know from any information submitted in support of the visa application that MC was in fact a "minor child" (that is, a person under the age of 18 years). The Personal Circumstances form identified three "minor children" as "your" (that is, the plaintiff's) minor children. It was apparent from other information before the delegate that this was incorrect. The plaintiff had no children of his own in Australia. The children listed on the

4 (2015) 256 CLR 203.

5 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at 508-509 [25]; 400 ALR 417 at 425-426.

6 *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 221 [61].

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Personal Circumstances form were children of his partner's sister. As noted, one of those children was also not a "minor child" (that is, a person under the age of 18 years). The information provided otherwise did not identify MC as a minor child or any relationship between the plaintiff and MC.

24 This context explains both the comment in the delegate's reasons "if [MC] is indeed a minor child" and why, in this case, it cannot be said that the delegate in fact knew that MC was a minor child, let alone that MC was a minor child who might be affected by the decision. *Plaintiff M1/2021 v Minister for Home Affairs* makes the point that "[w]hat 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 representations".⁷ In circumstances where there was but one reference to MC as a "minor child" in a context purportedly identifying two other minor children (when, in fact, one was not a minor child) and no reference elsewhere to MC as a minor child with whom the plaintiff had a relationship (including by the plaintiff or MC's mother), the delegate did not fail to comply with para 8.3(1) of Direction 90 by concluding that the delegate was "unable to determine if there would be any effects on [MC], if [MC] is indeed a minor child". Under para 8.3(1) a "child affected by the decision" is one whom the decision-maker in fact knows to exist as a minor child who might be affected by the decision. In the circumstances, MC was not such a minor child.

Failure to inquire?

25 The making of a decision, the decision-maker having failed to inquire about a relevant fact or matter, may involve jurisdictional error capable of characterisation as either a constructive failure to exercise jurisdiction⁸ or a legally unreasonable exercise of a particular duty or power.⁹ While decisions have expressed the criteria for an error of this kind as including that the potential fact

7 (2022) 96 ALJR 497 at 509 [25]; 400 ALR 417 at 425-426.

8 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1129 [25]; 259 ALR 429 at 436.

9 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290, 321; *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563-564 [26]-[27].

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was readily ascertainable and was critical or central to the decision,¹⁰ these criteria merely reflect the usually high threshold for a conclusion that a power has been unreasonably exercised as a matter of law.¹¹

26 It was submitted for the plaintiff that seven circumstances supported the conclusion that the exercise of the power to refuse the grant of the visa, without the delegate making an inquiry as to MC's existence and status as a minor child, was legally unreasonable. Those circumstances were: (1) the decision would have significant consequences for the plaintiff and third parties in Australia; (2) the decision was made by a delegate, who could not be expected to be subject to the same demands of time as the Minister personally; (3) the delegate had taken some time to make the decision; (4) the Department and the plaintiff's legal representative had been in communication and, on that basis, the delegate could have expected a prompt and diligent response to any inquiries; (5) the delegate had power to request further information; (6) the delegate did not have to make a decision within any particular time period (albeit that the plaintiff's legal representative had requested an urgent decision); and (7) the decision was not subject to review on the merits.

27 To the extent that the submissions for the plaintiff suggested that the delegate may have wrongly believed that the decision was subject to review on the merits and that this might have dissuaded the delegate from making an obvious inquiry about MC's existence and status as a minor child, the evidence does not enable either of these inferences to be drawn. The delegate was not the person who signed the letter to the plaintiff (enclosing the decision) which contained an erroneous reference to a (non-existent) right of merits review. Nothing in the delegate's reasons suggests that the delegate believed merits review of the decision was available or, if available, was relevant to the decision.

28 In the circumstances described, it was not legally unreasonable for the delegate to decide to refuse the visa application without making an inquiry about MC. The plaintiff had multiple opportunities to provide the Department with information about all minor children who he contended would be affected by the

10 eg, *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169, cited in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289-290.

11 *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563 [26], citing *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [11], 564 [52], 575 [89], 586 [135].

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decision. None of the circumstances which were identified on the plaintiff's behalf as salient to the alleged legal unreasonableness of the delegate's decision alter the basic fact that no one suggested any possible effect of the decision on the best interests of MC.

29 The delegate was entitled to decide the visa application without making an inquiry about MC. The delegate did not have a duty, either generally or under para 8.3(1) of Direction 90, to determine if the decision would or would not be in the best interests of MC as a minor child given that the information provided by and on behalf of the plaintiff did not establish that MC was in fact a minor child whose interests might be affected in any way by the decision.

Family violence (grounds 2 and 3)

30 The plaintiff contends that: (1) para 8.2 of Direction 90 did not permit the delegate to give weight to family violence under para 8.2 in circumstances where the delegate had already given weight to the same family violence under paras 8.1 and/or 8.4 of Direction 90; (2) if Direction 90 permits this giving of "repetitious weight" to family violence, para 8.2 is invalid as its operation is irrational, illogical, and legally unreasonable, or as an illegitimate fetter on the discretion of the decision-maker which is not authorised by s 499(1) of the Act; (3) alternatively, para 8.2 of Direction 90 does not permit family violence to be given weight in the consideration of whether a visa should be granted for reasons other than the protection of the Australian community or the expectations of the Australian community, as para 8.2 would then operate for illegitimate punitive or irrelevant purposes; or (4) if para 8.2 of Direction 90 permits family violence to be given weight in the consideration of whether a visa should be granted for reasons other than the protection of the Australian community or the expectations of the Australian community, para 8.2 is invalid (by which the plaintiff meant *ultra vires*) as it purports to authorise the decision-maker to impose extra-curial punishment on an offender for their offending (which would be beyond the scope of the Act)¹² or to act on an irrelevant basis.

12 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 583 [96], [98], 595 [157]-[158], 598 [173], 601 [186], 614 [252]-[253]; 401 ALR 438 at 460, 461, 475-476, 480, 484, 501-502; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 910 [41], 912 [50], 920 [88]-[89]; *Jones v The Commonwealth* (2023) 97 ALJR 936 at 945 [36], 946 [39], 952 [75], 968 [152], 974 [188].

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Delegate's reasons

31 In the context of para 8.1(2)(a) of Direction 90, the delegate found the plaintiff's offending conduct, which included his family violence offences, to be "very serious" and said that this was given "significant weight" in the decision to refuse the plaintiff's visa application.

32 In the context of para 8.1(2)(b) of Direction 90, the delegate found that the type of conduct committed by the plaintiff had potential to cause physical and psychological harm to members of the Australian community and that, on balance, there remained a likelihood that the plaintiff would reoffend. The delegate said that the need to protect the Australian community from criminal or other serious conduct weighed significantly in favour of refusal of the plaintiff's visa application.

33 In the context of para 8.2 of Direction 90, the delegate found that the plaintiff's assault of his partner and related offences were "family violence". Bearing in mind the substance of para 8.2, the delegate said that the family violence committed by the plaintiff should be regarded as serious and the delegate had given this "significant weight" in refusing the visa application.

34 In the context of para 8.4 of Direction 90, the delegate referred to the expectations of the Australian community, including the expectation that the Australian Government can and should refuse a visa to people who had engaged in certain kinds of conduct, such as family violence. As the plaintiff had engaged in family violence, the delegate concluded that this should be given "significant weight" in favour of refusal of the plaintiff's visa application.

35 In their overall conclusion, the delegate said that the "considerations favouring non-refusal are outweighed by the considerations favouring refusal as outlined above".

Paragraph 8.2 invalid?

36 The contentions for the plaintiff that para 8.2 of Direction 90 is invalid depend on the proposition that family violence can be relevant only to the protection of the Australian community (under para 8.1) or to the expectations of the Australian community (under para 8.4). The underlying assumption is that family violence is a matter irrelevant in all other contexts and for all other purposes to the making of a decision to which Direction 90 applies. If that proposition and assumption are wrong, then it cannot be said that para 8.2 requires a decision-maker to give weight to the same factor in the same context and for the same purpose twice or unlawfully fetters the discretionary power in s 501. Nor, on

that basis, can it be said that para 8.2 purportedly authorises a decision-maker to refuse to grant a visa for the illegitimate purpose of further punishing an applicant for acts of family violence or for any other irrelevant purpose.

37 Contrary to the plaintiff's proposition and its converse assumption, the potential relevance of the commission of family violence is not logically or reasonably confined either to the protection of the Australian community (under para 8.1) or the expectations of the Australian community (under para 8.4). Paragraph 8.2 ("*Family violence committed by the non-citizen*") is identifying a different relevance for family violence. The different relevance is that para 8.2 identifies that the Australian Government itself has serious concerns about conferring the privilege of entering or remaining in Australia on non-citizens who engage in family violence. The Minister was entitled to identify that as a concern of the Australian Government and to direct decision-makers to consider that identified concern.

38 The relevant, legitimate, and non-punitive purpose of para 8.2 is apparent from the structure of Direction 90. Paragraph 8.1 ("*Protection of the Australian community*") involves an assessment based on consideration of an applicant's past conduct, present circumstances, and likely future conduct. While the assessment is carried out at the time of the decision, it is necessarily prospective in nature, looking forward to the position of the Australian community if, by a decision favourable to the applicant, the applicant is permitted to enter or remain in Australia. Paragraph 8.4 ("*Expectations of the Australian community*") involves an assessment in which the decision-maker is required to consider that the Australian community, as a norm, expects the Australian Government not to allow a non-citizen who has engaged in serious conduct in breach of Australian law to enter or remain in Australia. This assessment under para 8.4 thus focuses on the expectations that Direction 90 itself (by para 8.4(1)-(3), applied as required by para 8.4(4)) instructs the decision-maker that the Australian community holds about the response of the Australian Government to a non-citizen seeking to enter or remain in Australia if they have committed serious breaches of Australian law. In contrast, para 8.2 is not focused on the expectations that the Australian community holds about the response of the Australian Government to such a non-citizen. Paragraph 8.2 is focused on the views or policies of the Australian Government. Paragraph 8.2 is directing the decision-maker that the Australian Government has serious concerns about conferring on a non-citizen the privilege of entering or remaining in Australia if the non-citizen has engaged in family violence.

39 Paragraph 8.2 therefore involves a field of operation separate from paras 8.1 and 8.4. That separate field of operation requires the decision-maker to

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consider family violence, if relevant to the decision, from the perspective of the Australian Government. Paragraph 8.2 ensures the decision-maker does not have to infer or guess the views of the Australian Government about family violence. It identifies for the decision-maker that family violence is of serious concern to the Australian Government. In so doing, para 8.2 creates a different consideration from paras 8.1 and 8.4. The consideration created by para 8.2 is relevant to the decision to be made, legitimate (in the sense of rationally, logically, and reasonably related to the decision-making power to which it applies), and non-punitive. The consideration created by para 8.2 is relevant and legitimate because the decision to which Direction 90 (and in particular para 8.2) applies is a decision of the Executive arm. Relevantly, once it is enlivened, the power under s 501(1) confers a broad discretion to refuse a visa. The Minister is entitled to identify for other decision-makers authorised to exercise the Minister's power under that provision the views or policies of the Australian Government. The Minister has directed under s 499(1) that a delegate consider whether the applicant has engaged in family violence. The consideration created by para 8.2 is non-punitive because the purpose of para 8.2 is not properly characterised as one of punishment, retribution, denunciation, or deterrence.¹³ Rather, the purpose is to give effect to the Australian Government's serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia.

40 The relevant, legitimate, and non-punitive purpose of para 8.2 is apparent from the statement in para 8.2(1) that the concerns of the Australian Government are proportionate to the seriousness of the family violence engaged in by the non-citizen. That proportionate relationship is given substance by para 8.2(3). The subject-matter of para 8.2(3) is not punishment, retribution, denunciation, or deterrence; rather, para 8.2(3) provides factors identified as relevant to the decision-maker calibrating what weight to give to the concern of the Australian Government about family violence.

41 Paragraph 8.2 of Direction 90 does not unlawfully require a decision-maker to give weight to the same factor in the same context and for the same purpose twice or illegitimately fetter the discretionary power in s 501. Nor does it unlawfully authorise a decision-maker to refuse to grant a visa for the illegitimate purpose of further punishing an applicant for acts of family violence or by reference to any other irrelevant matter. The claimed invalidity of para 8.2 must be rejected.

13 See *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 580 [82], 587 [120], 596 [163], 614 [251]; 401 ALR 438 at 457, 466, 477, 501.

"Repetitious weighing" or "double counting"?

42 Under Direction 90, a delegate is entitled to give such weight to relevant acts of family violence as the delegate sees fit by reference to paras 8.1, 8.2 and 8.4 (as well as, for that matter, paras 5.2(2); 8.3(1), 8.3(4)(g) and (h); and 9(1)(c) and 9.3, if relevant). In so doing, the fact that the acts of family violence considered under each of the paragraphs are the same does not mean that the delegate's decision is irrational, illogical, or legally unreasonable because the delegate has engaged in "repetitious weighing" or "double counting".¹⁴ These shorthand phrases are apt to mislead. The same facts may be relevant to multiple different considerations. In the case of a matter made a mandatory consideration by a direction under s 499(1) of the Act, the matter to be considered may be described in a multiplicity of ways, such as by reference to a particular context, a particular purpose, or a particular assessment. Weighing the relevance or significance of the same facts by reference to those different considerations does not involve "repetitious weighing" or "double counting" in any illegitimate sense. It is doing no more than the direction, in terms, requires, and the direction is not inconsistent with the Act.

43 In the present case, it is apparent from the delegate's reasons that the delegate weighed the same circumstances in the different contexts and for the different purposes Direction 90 required – the protection of the Australian community (under para 8.1), the identified concern of the Australian Government of family violence (under para 8.2), and the expectations of the Australian community (under para 8.4). There was no irrational, illogical, or legally unreasonable weighing of the same factor in the same context and for the same purpose twice.

44 Although the resolution of each case in which an argument to this effect is put will depend on the terms of the applicable direction and the specific reasons of the delegate, care would also be required before an inference was drawn that a decision-maker had given weight to the same factor in the same context and for the same purpose twice under Direction 90 with the result that the decision is irrational, illogical, or legally unreasonable. Considerations which overlap (such as the consideration of the same acts of family violence in the different contexts of the protection of the Australian community, the views or policies of the Australian

14 Descriptions used in, for example, *Jama v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 148. See also *Ali v Minister for Home Affairs* [2018] FCA 1895; *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396.

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Government, and the expectations of the Australian community), by definition, are not wholly coextensive with each other. Weighing the relevance of the same acts of family violence in each different (albeit overlapping) context is not "repetitious weighing" or "double counting", and it would be wrong to conceptualise such a process of reasoning as irrational, illogical, or legally unreasonable.

45 Further, the fact that the delegate's reasons are expressed sequentially and separately in dealing with each provision of Direction 90 should not be taken to mean that the decision-maker has not engaged in an overall balancing of the weight of all considerations together. This overall weighing is apparent in the present case, where the delegate said that the "considerations favouring non-refusal are outweighed by the considerations favouring refusal as outlined above". This overall weighing itself speaks against the decision being an irrational, illogical, or legally unreasonable exercise of power by reason of giving weight twice to the same facts in the same context and for the same purpose in making the decision.

46 Otherwise, the delegate's reasons do not expose any considerations of family violence that are capable of being characterised as punitive or as otherwise irrelevant. The delegate was required to consider para 8.2 as a primary consideration in accordance with its terms. By para 7(2) this primary consideration was one that "should generally be given greater weight than the other considerations". As noted, the terms of para 8.2 involve a relevant, legitimate, and non-punitive subject-matter, being the views of the Australian Government that the privilege of entering or remaining in Australia should not be conferred on a non-citizen who has engaged in family violence. The purpose of this primary consideration is not to further punish a non-citizen who has committed family violence but to give effect to the serious concerns of the Australian Government about conferring on non-citizens who engage in family violence that privilege.

Expectations of the Australian community (ground 4)

47 The plaintiff contends that the delegate misapplied para 8.4 of Direction 90 in that, when weighing the expectations of the Australian community, the delegate was required to consider those expectations in light of the plaintiff's personal circumstances and did not do so.

Delegate's reasons

48 The delegate noted that the plaintiff had engaged in family violence which, in accordance with para 8.4(2)(a) of Direction 90, raised serious character concerns about the plaintiff. The delegate referred to the substance of para 8.4(2), which says that the Australian community expects that the Australian Government

can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns. The delegate also referred to the substance of para 8.4(3), which says that the expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. The delegate "proceeded on the basis that the Australian community's general expectations about non-citizens, as articulated in the Direction, apply in this case". The delegate gave "this consideration significant weight in favour of refusal of [the plaintiff's] visa application".

Failure to consider?

49 The argument for the plaintiff is that the part of the delegate's reasons under the heading "Expectations of the Australian community" does not refer to any aspect of the information submitted by the plaintiff and on the plaintiff's behalf about his personal circumstances. Rather, the delegate's reasons consider that information under the subsequent section of those reasons under the heading "Other considerations specified in Direction". The point the plaintiff makes is that, as the expectations of the Australian community would have been affected by knowledge of the plaintiff's personal circumstances, the delegate was required to, but did not, weigh those personal circumstances in deciding what ultimate weight to give to the expectations of the Australian community.

50 If the delegate was required to weigh the plaintiff's personal circumstances in deciding what ultimate weight to give to the expectations of the Australian community, no inference can be drawn that the delegate did not do so. A decision-maker's written reasons for a decision are often structured in sequence. The sequential structure of reasons, so that each topic is dealt with under a separate heading, is not generally a sufficient reason to infer that in dealing with one matter the decision-maker has forgotten the substance of the preceding parts of the reasons or is unaware of the substance of the subsequent parts of the reasons. Nor would it be readily inferred from mere sequential structuring and dealing with each topic under its own heading that a decision-maker had quarantined the assessment of each topic from every other topic. As previously noted, in the present case, moreover, the concluding section of the delegate's reasons discloses an overall weighing of all considerations against each other. In so doing, the delegate expressly weighed the plaintiff's personal circumstances against, amongst other things, the expectations of the Australian community.

51 Further, para 8.4 does not stipulate that, in assessing what weight is to be given to the expectations of the Australian community, the decision-maker must attribute to that hypothesised community knowledge of the personal circumstances of the applicant for the visa as known to the delegate. To the contrary, para 8.4(4)

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stipulates that the decision-maker is to proceed on the basis of the Australian Government's views as set out in para 8.4 "without independently assessing the community's expectations in the particular case".

52 Paragraph 8.4(4) is to be understood as directing the decision-maker not to attempt to infer what the expectations of the Australian community would be "in the particular case" (that is, with the knowledge of the delegate about the applicant's personal circumstances), but to proceed on the basis that the views of the Australian Government set out in para 8.4(1)-(3) are the relevant norm described as the expectations of the Australian community. That norm, as applicable by reference to the terms of para 8(1)-(3), is then to be weighed with other relevant matters as required by paras 6 and 7 of Direction 90. The delegate's reasoning accords with these requirements.

Conclusions and orders

53 The grounds of the plaintiff's application are not sustainable. The plaintiff should be granted the required extension of time to make the application for a constitutional or other writ and that application should be dismissed with costs.

