HIGH COURT OF AUSTRALIA

GORDON J

PLAINTIFF M19A/2024 & ORS PLAINTIFFS

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS DEFENDANT

[2024] HCASJ 39
Dates of Hearing: 26 July & 28 August 2024
Date of Judgment: 18 October 2024
M19 of 2024

ORDERS

1. *The plaintiffs' amended application filed on 31 July 2024 for a constitutional or other writ is dismissed.*

2. *The first and second plaintiffs pay the defendant's costs.*

Representation

G A Costello KC with S M C Finegan for the plaintiffs (instructed by Asylum Seeker Resource Centre)

G A Hill SC with N D J Swan for the defendant (instructed by Australian Government Solicitor)

1 GORDON J. The five plaintiffs, who are members of the same family unit, seek a declaration that a decision made on 19 December 2019 by a delegate of the defendant ("the Delegate") to cancel the plaintiffs' Protection visa (Class XA) (subclass 866) ("the Cancellation Decision") was made beyond power and that a writ of certiorari should issue to quash the decision. The reference to the plaintiffs' Protection visa is in fact a reference to the visa held by the First Plaintiff or the visas held by the First, Second and Third Plaintiffs.[1] The First Plaintiff and Second Plaintiff are husband and wife respectively. The Third, Fourth and Fifth Plaintiffs are their children. The Fourth and Fifth Plaintiffs were born in Australia and, being family members of the First to Third Plaintiffs, are also affected by the Cancellation Decision.

2 For the reasons that follow, each plaintiff's application must be dismissed.

Preliminary issues

3 It is common ground that neither the Federal Circuit and Family Court of Australia (Division 2), nor the Federal Court of Australia, has jurisdiction to hear the First, Second and Third Plaintiffs' challenge to the Cancellation Decision. Although the Federal Circuit and Family Court of Australia does have jurisdiction to hear the Fourth and Fifth Plaintiffs' challenge to the Cancellation Decision, there was no dispute that this Court should proceed to determine all the plaintiffs' applications to avoid parallel proceedings in another Court.

4 Consistent with the plaintiffs' submissions, the applications were determined by a single judge without oral evidence or cross-examination of the deponents who filed affidavits. Affidavits directed to the plaintiffs' substantive challenges to the Cancellation Decision were filed by the Second Plaintiff, her solicitor, and by Ms Stone, an Australian Government Solicitor lawyer.

Facts

5 The facts were largely not in dispute.

6 The First, Second and Third Plaintiffs arrived in Australia by boat at Christmas Island on 13 May 2010 and were granted permanent Protection visas on 27 September 2011 ("the Visas"). The defendant ("the Minister") accepts the First, Second and Third Plaintiffs contend they are stateless Faili Kurds but does not accept that as fact.

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1 See [20]-[32] below.

7 On 1 May 2018, the then Department of Home Affairs ("the Department")[2] internally referred the First Plaintiff's visa for consideration for cancellation under s 116(1AA) of the *Migration Act 1958* (Cth).

8 In May 2019, the First, Second, Third and Fourth Plaintiffs moved from South Australia to Victoria. The family notified Centrelink, Medicare and VicRoads, but not the Department, of their new address. There was no information before this Court which indicated that the First, Second and Third Plaintiffs were subject to a visa condition to notify the Department of any changes in their address.[3]

9 On 30 October 2019, a Notice of Intention to Consider Cancellation under s 116 of the *Migration Act* ("the NOICC") was sent by the Department, by registered post, to the First Plaintiff at his previous address in South Australia ("the SA address"). The First Plaintiff did not receive the NOICC.

10 The envelope containing the NOICC sent to the First Plaintiff at the SA address was in evidence. The First Plaintiff's name, SA address and the statement "Sent via registered mail" is visible through the window in the envelope. A "RETURN TO SENDER" sticker is on the envelope with a handwritten date of 5 November 2019. Four options were provided by the return to sender sticker: Insufficient Address; Left Address/Unknown; Refused and Unclaimed. The word "Refused" is circled.

11 On 19 December 2019, without having received a response to the NOICC, the Delegate cancelled the First Plaintiff's Protection visa under s 116(1AA) of the *Migration Act*, because the Delegate was not satisfied of the First Plaintiff's identity. The notification of the Cancellation Decision was again sent by registered post to the SA address. That envelope was also in evidence. The envelope has a "RETURN TO SENDER" sticker with a handwritten date of 3 January 2020 with the option "Unknown" circled. The Department received the returned letter on 9 January 2020.

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2 In these reasons, a reference to "the Department" is a reference to: (i) from 28 January 2010 to 17 September 2013, the Department of Immigration and Citizenship; (ii) from 18 September 2013 to 19 December 2017, the Department of Immigration and Border Protection; and (iii) from 20 December 2017 to the present, the Department of Home Affairs. See, eg, *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 293 [14] fn 19.

3 See, eg, *Migration Regulations*, Sch 8, condition 8550.

12 It is common ground that any application for merits review of the Cancellation Decision was required to be filed in the Administrative Appeals Tribunal ("the Tribunal") on or before 15 January 2020.

13 In June 2021, the First and Second Plaintiffs discovered that the Visas had been cancelled. Although they did not hold Protection visas, the Fourth and Fifth Plaintiffs are nonetheless affected by the Cancellation Decision. The Fourth Plaintiff was born in Australia in December 2014 while her parents, the First and Second Plaintiffs, were permanent residents. The Fourth Plaintiff is an Australian citizen. The Fourth Plaintiff's capacity to reside in Australia or outside immigration detention in Australia, given her age, is jeopardised by the Cancellation Decision. The Fifth Plaintiff was born in Australia in October 2022 after the Visas were cancelled and is not an Australian citizen. The Fifth Plaintiff has no visa to live in Australia and is at risk of immigration detention and removal from Australia.

Cancellation Decision

14 The Cancellation Decision was made on 19 December 2019. After setting out the "Personal and Visa Details" of the First Plaintiff (Pt A), the Delegate's "Consideration of Visa Cancellation" (Pt B) identified the particulars of the ground for cancellation and then summarised the evidence under six headings – Place of birth; Documentation; Residential history; Education and Employment; Health care and the birth of the [First Plaintiff's] son; and Claimed Travel to Australia. Under the final heading in Pt B, "Consideration of Evidence", the Delegate concluded there was a ground under s 116(1AA) of the *Migration Act* to consider cancelling the First Plaintiff's visa because they were not satisfied as to his identity.

15 In Pt C, headed "Grounds for Cancellation", after stating they were satisfied there were grounds for cancelling the First Plaintiff's visa, the Delegate set out their reasons for not being satisfied as to the First Plaintiff's identity:

> "To date, the [First Plaintiff] has not provided reliable documentary evidence to support his claimed identity and has provided no identity documents that predate his arrival to Australia in 2010.
>
> While the [First Plaintiff] has not provided a response to the [NOICC], I have considered his failure to provide sufficient identity documentation in conjunction with the inconsistent information he has provided to the Department throughout his various interactions.
>
> I consider that the information the [First Plaintiff] has provided in relation to his place of birth, residential history, education, employment, travel to Australia and other facets of his life in Iran to raise credibility concerns on account of significant inconsistencies, and consider that this information was provided to gain an immigration advantage.

> To date, the [First Plaintiff] has failed to provide reliable evidence to support his claimed identity and status as a stateless Faili Kurd. Therefore, the inconsistent and contradictory information he has provided the Department over his various interactions, as well as the lack of identity documentation pre-dating his arrival to Australia casts doubts towards claims regarding his identity."

16 Part D of the Decision then states that in making the assessment of whether to cancel the visa, the Delegate took into account the *Migration Act* and the Procedural Instruction "*General visa cancellation powers (s 109, s 116, s 128, s 134B and s 140)*" (the "PAM3: General cancellation powers"). The balance of Pt D considers (1) the purpose of the First Plaintiff's travel to and stay in Australia; (2) the extent of his compliance with visa conditions; (3) the degree of hardship that may be caused to him and any family members; (4) the circumstances in which the ground for cancellation arose; (5) the First Plaintiff's past and present behaviour towards the Department; (6) any consequential cancellations that may result; (7) the legal consequences of a decision to cancel the visa; and (8) Australia's international obligations.

17 In Pt E, under the heading "Decision", the Delegate concluded that "[b]ased on the above, I consider the [First Plaintiff] has provided inconsistent and contradictory information regarding his identity throughout his dealings with the Department"; that the First Plaintiff "has been unable to provide reliable identity documentation to support his claimed identity"; and that the Delegate was "not satisfied of the [First Plaintiff's] identity" and therefore decided to cancel the First Plaintiff's visa.

Summary of grounds and order of resolution

18 The plaintiffs' amended application for a constitutional or other writ ("the Amended Application") challenged the Cancellation Decision on five grounds, which, after argument, may be summarised as follows:

(1) *Ground 1: Failure to consider mandatory legal consequences of the Cancellation Decision*. The Delegate did not consider that the Second and Third Plaintiffs would be subject to ss 46A, 189 and 198 of the *Migration Act*, as holders of the cancelled Protection visa and/or upon automatic cancellation of their visas under s 140 of the *Migration Act*.

(2) *Ground 2: Breach of s 120 of the Migration Act*. The Delegate breached s 120 of the *Migration Act* by not giving the First, Second and Third Plaintiffs particulars of specified information that would be the reason or a part of the reason for the Cancellation Decision.

(3) *Ground 3: The Cancellation Decision is manifestly unreasonable*.

(4) *Ground 4: The Cancellation Decision is affected by an unreasonable failure to make inquiries* as to the First Plaintiff's address or his non-response to the NOICC.

(5) *Ground 5*: *The Cancellation Decision is affected by jurisdictional error* because it was made without the NOICC under s 119 of the *Migration Act* being notified in the way the Minister considered was appropriate; and without the NOICC under s 119 being notified to the Second or Third Plaintiffs at all.

19 It is necessary to address the bases on which the Second and Third Plaintiffs held their Protection visas before turning to consider Ground 5 (service of the NOICC), Grounds 4 and 2 (directed to the conduct in providing the NOICC and conduct prior to the Cancellation Decision) and then Grounds 1 and 3 (directed to the Cancellation Decision).

The Visas held by the First, Second and Third Plaintiffs

20 The number of, and bases on which, the Visas were held by each of the First, Second and Third Plaintiffs informs and, in some cases, resolves a number of the plaintiffs' grounds.

21 The plaintiffs initially pleaded that the First Plaintiff was the primary visa holder and his wife, the Second Plaintiff, and his son, the Third Plaintiff, held visas dependent on the First Plaintiff's visa. In their Amended Application, the plaintiffs alleged that the First Plaintiff was the primary visa holder and that the Protection visa granted to the First Plaintiff "included the Second and Third Plaintiff as holders of the Protection Visa", such that all three persons jointly held the same visa.

22 During the course of argument, and contrary to their written submissions, the plaintiffs submitted that whilst they accepted that a separate visa was granted to each of the First, Second and Third Plaintiffs, nevertheless the Second and Third Plaintiffs were each a "holder" of the Protection visa granted to the First Plaintiff. The plaintiffs submitted there was a single grant of the First Plaintiff's Protection visa in which the Second and Third Plaintiffs were jointly identified so that they were "included" in the grant, in the sense contemplated by s 5 of the *Migration Act*, which provides that "holder" of a visa means "the person to whom it was granted or a person included in it".

23 Those contentions cannot be accepted.

24 First, the plaintiffs correctly accepted each of the First, Second and Third Plaintiffs was granted and held a separate visa. Extracts of the Department's internal records for each of the First, Second and Third Plaintiffs were in evidence and record under the headings "Visa Details", "Grant Details" and "Evidence Details", a unique grant number, a unique evidence number and, in each case, state

the visa relates to "No of Persons: 1". Put another way, the internal records do not list multiple holders of the First Plaintiff's visa. Each of the First, Second and Third Plaintiffs was granted and held a separate visa.

25 Second, at the time of the grant of the Visas, the criteria for their grant were in s 36(2) of the *Migration Act*:

> "A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa."

26 The grant of a protection visa under s 36(2)(b) must involve the grant of a separate visa, as s 36(2)(b)(ii) requires that the person in the family unit who meets the criterion in s 36(2)(a) already "holds a protection visa". Put in different terms, there can be, and sometimes is, a grant of a protection visa to an applicant under s 36(2)(a) but a refusal to grant a visa to another person because that second person does not meet the separate criterion for a protection visa in s 36(2)(b)(i) (being a member of the same family unit as a person to whom Australia has protection obligations).

27 As the Minister submitted, in this case, the Independent Reviewer (whose recommendation was accepted) found that the First Plaintiff was a person owed protection obligations in s 36(2)(a) of the *Migration Act* and that the Second and Third Plaintiffs met the separate criterion for a protection visa in s 36(2)(b)(i) (as members of the same family unit as the First Plaintiff, a person to whom Australia had protection obligations). The Second and Third Plaintiffs' visas were thus granted on different statutory criteria to the First Plaintiff. Although the Second and Third Plaintiffs' visas were dependent on the primary visa holder – the First Plaintiff – continuing to hold his visa,[4] the Second and Third Plaintiffs were not *holders* of the primary visa. And the fact that they were each a member of the same family as the primary visa holder did not mean that there was a "single grant" of a visa or that they were "included" in the grant of the Protection visa to the First Plaintiff. They were not.

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4 *Migration Act*, s 36(2)(b).

28 Third, the definition of "holder" in the *Migration Act* is long standing and must be read in the context of the Act as a whole.[5] The *Migration Act* contains provisions which provide, for example, that certain persons "shall be taken to be included in any visa granted to the spouse or de facto partner"[6]. The statutory scheme for the grant of protection visas is different. It does not state that any person who is granted a protection visa by reason of meeting the criteria in s 36(2)(b) is taken to be included in the visa granted to a person who satisfies the criteria in s 36(2)(a).

29 The plaintiffs submitted that the Court must consider s 139 of the *Migration Act*. Section 139 of the *Migration Act* provides that if a visa is held by two or more non-citizens, Subdiv H (being general provisions on cancellation) applies *as if* each of them were the holder of the visa and, to avoid doubt, if the visa held by two or more non-citizens is cancelled because of one non-citizen being its holder, the jointly held visa is cancelled so that all those non-citizens cease to hold the visa. The fact that s 139 contemplates that visas may be jointly held does not assist to identify, in the first place, whether a particular visa is jointly held. In this case, no visa was jointly held. Each of the First, Second and Third Plaintiffs was a visa holder of one visa – the visa that was granted to each of them and only them. Section 139 may be put to one side.

30 Fourth, the notification of the grant of a Protection visa sent by letter addressed to the First Plaintiff dated 17 September 2011 does not assist the plaintiffs. The letter relevantly stated:

> "**Notification of grant of Protection (Class XA) Subclass 866 visa**
>
> This letter refers to your application for a Protection visa (Class XA) Subclass 866 (PV) visa.
>
> I am pleased to advise that a decision has been made to grant you a Subclass 866 (Protection) visa and this decision comes into effect on 27th September 2011.
>
> **This grant of your Protection (Class XA) Subclass 866 visa includes the following members of your family** [the Second and Third Plaintiffs]" (emphasis in original)

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5 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 634 [71]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 348 [184].

6 See, eg, *Migration Act*, ss 29(4) and 83.

The plaintiffs emphasised that the letter included the statement that the "grant of your [Protection Visa] *includes* the following members of your family" and then identifies the Second and Third Plaintiffs. This was to be read with the definition of the word "holder" in s 5 of the *Migration Act*, which provides that "holder" in relation to a visa, means "the person to whom it was granted *or a person included in it*" (emphasis added).

31 It may be accepted that the use of the word "included" in the letter was unfortunate, but the letter does not establish that the Second or the Third Plaintiff was a "holder" of the First Plaintiff's Protection visa. That conclusion is reinforced by the fact that the letter expressly provided it was "not legal evidence of your visa". And the fact that the grant of the Visas was notified in a single document – the letter – is not a record of, and does not evidence that, the First Plaintiff's visa was jointly held.[7] The letter does not and cannot replace the statutory criteria.

32 For these reasons, the Second and Third Plaintiffs were not "included" in the Protection visa granted to the First Plaintiff and they were not a "holder" of the First Plaintiff's Protection visa.

Ground 5 – Alleged failure to provide the NOICC in the way the Minister considered appropriate, to the First Plaintiff, and failure to notify Second and Third Plaintiffs of proposed cancellation

33 The plaintiffs contend the Cancellation Decision was affected by jurisdictional error because it was made without the NOICC under s 119 of the *Migration Act* being notified in the way the Minister considered appropriate. The plaintiffs' contention had two limbs: (a) Regulation 2.55 of the *Migration Regulations 1994* (Cth) was not a prescribed method for the giving of a NOICC under s 119(2) of the *Migration Act*, and therefore the Delegate had to consider the appropriate way to give the NOICC; and (b) the Delegate should have considered whether there was another appropriate method of delivery under s 494A. The plaintiffs also contend the Cancellation Decision was invalid because the NOICC was not notified to the Second or Third Plaintiffs. That is, the NOICC was not notified to all "holders" of the visa.

34 Those contentions are rejected. The Minister's submission that reg 2.55 supplied the prescribed way of giving a NOICC, which the Delegate used, should be accepted. Further, there was no obligation to give the NOICC to the Second and Third Plaintiffs.

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7 See, eg, *BKJ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCAFC 171 at [53]-[57].

35 Section 119(1) of the *Migration Act* relevantly provides that if the Minister is considering cancelling a visa under s 116, whether its holder is in or outside Australia, the Minister must notify the holder that there appear to be reasonable grounds for cancelling it, give particulars of those grounds and of the information because of which the grounds appear to exist, and invite the holder to show within a specified time that those grounds do not exist or there is a reason why the visa should not be cancelled.[8] Section 119(2) then provides that "[t]he holder [of the visa] is to be notified in the prescribed way or, if there is no prescribed way, a way that the Minister considers to be appropriate". "[P]rescribed" means "prescribed by the regulations".[9]

36 At the time of the giving of the NOICC, reg 2.55 of the *Migration Regulations*, headed "Giving of documents relating to proposed cancellation, cancellation or revocation of cancellation", specified that it relevantly applied to "the giving of a document to a holder ... of a visa relating to the proposed cancellation ... of a visa under the Act".[10] A "document" included a "notice" or "invitation" if it was in writing.[11]

37 Taking it in steps, if the Minister is considering cancelling a visa under s 116 of the *Migration Act*, the Minister must notify the "holder" of that visa of the proposed cancellation and other specified matters. The "holder" of the visa is to be notified of the proposed cancellation of the visa in the "prescribed way" *or* if there is no prescribed way, in a way that the Minister considers to be appropriate".[12] "[P]rescribed" means "prescribed by the regulations"[13] and, here, reg 2.55 in terms prescribed a way for the giving of the notice of the "proposed cancellation". Reg 2.55 applied to the giving of a written document relating to the proposed cancellation of visa. Here, that was the NOICC, a written document dealing with only one issue – the proposed cancellation of the First Plaintiff's visa. At the time of the service of the NOICC in issue here, reg 2.55 was the prescribed method for the purposes of s 119(2) of the *Migration Act*.

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8 See *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 30-31 [14].

9 *Migration Act*, s 5 definition of "prescribed".

10 *Migration Regulations*, reg 2.55(1)(a).

11 *Migration Regulations*, reg 2.54.

12 *Migration Act*, s 119(2).

13 *Migration Act*, s 5 definition of "prescribed".

38 The *Migration Regulations* were amended in 2023 to itemise the specific provisions to which reg 2.55 applies,[14] including to expressly refer to s 119(2) of the *Migration Act*.[15] Also in 2023, the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) amended s 119 of the *Migration Act* to provide that notifications must be in writing, and by repealing s 119(2) and (3) and substituting: "[t]he notification under subsection (1) must be given in the prescribed way". The plaintiffs sought to rely on these 2023 amendments to support their contention that there was no "prescribed method" for notification of potential cancellation under s 116 of the *Migration Act* when the NOICC was issued in this matter. Putting aside the extent to which the terms of an amending enactment can throw light on the intention of an earlier enactment,[16] the 2023 amendments do not support the plaintiffs' contention that at the time of the service of the NOICC in this matter reg 2.55 did not apply, or that there was no prescribed method for issuing the NOICC.

39 The explanatory memorandum to the *Migration Amendment (Giving Documents and Other Measures) Bill 2023* (Cth), and the explanatory statement to the amending regulations provided that the intention of the amendments was to "clarify" or "confirm" the circumstances in which reg 2.55 applies to the giving of a document, not change the position.[17] This is also evident from the fact that the 2023 amendments deal with a wider range of circumstances than just the giving of a NOICC, and were intended to clarify the position where there were a number of different provisions with slightly different requirements for serving notices. Where prior to the 2023 amendments there was no ambiguity that reg 2.55 prescribed a way for the giving of a NOICC under s 119 of the *Migration Act*, there is no reason to doubt that this was the relevant purpose. Nothing useful can be drawn from the 2023 amendments.

40 It is then necessary to turn to s 494A in Div 2 ("Other") of Pt 9 ("Miscellaneous") of the *Migration Act*. Section 494A relevantly provided that if a provision of the *Migration Act* or the *Migration Regulations* "requires or permits the Minister to give a document to a person" and "the provision does *not* state that the document must be given" by one of the methods in s 494B, the Minister may

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14 *Migration Amendment (Giving Documents) Regulations 2023* (Cth), reg 2.53A.

15 *Migration Amendment (Giving Documents) Regulations 2023* (Cth), reg 2.53A(c).

16 See, eg, *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539; Herzfeld and Prince, *Interpretation*, 3rd ed (2024) at 204 [8.340].

17 See the Explanatory Statement to the *Migration Amendment (Giving Documents) Regulations 2023*. See also Australia, House of Representatives, *Migration Amendment (Giving Documents and Other Measures) Bill 2023*, Explanatory Memorandum.

give the document to the person by any method that he or she considers appropriate.[18] Section 494B applies where the provisions of the *Migration Act* or the *Migration Regulations* require or permit the Minister to give a document to a person and state that the Minister must do so by one of the methods specified in s 494B. The methods include: handing the document to the recipient;[19] handing the document to another person who is at the last residential or business address provided to the Minister by the recipient for the purposes of receiving documents;[20] and dating the document and then dispatching it by prepaid post or other prepaid means to the last address for service, or the last residential or business address, provided to the Minister by the recipient for the purposes of receiving documents.[21]

41 The plaintiffs submitted that s 494A applied, or was capable of application, to the service of the NOICC. The submission was that it granted the Minister a discretion to give the document to a person by any method which he or she considers appropriate, which included an obligation to be satisfied that the chosen method is appropriate. The plaintiffs' contention was because the Delegate "rigidly" applied reg 2.55 and failed to recognise the discretionary power available under s 494A, the Cancellation Decision was affected by jurisdictional error. Put in different terms, the plaintiffs submitted that the Minister had impermissibly "elevated" reg 2.55 over s 494A because the Minister failed to recognise that under s 494A, where the *Migration Act* or *Migration Regulations* relevantly "require or permit" the Minister to give a document to a person, the power in s 494A(1) arises. The Minister submitted that, where a provision refers to giving notice "in the prescribed way", such as in s 119(2), this excludes the operation of s 494A. The Minister's submissions should be accepted.

42 As the Minister submits, where a provision like s 119(2) refers to the giving of notice "in the prescribed way", that "excludes" the operation of s 494A.[22] That is consistent with, and reflects the rejection by Mortimer J (as her Honour then was) of the converse position that the Minister put in *Butt v Minister for Immigration and Border Protection*.[23] In that case, Mortimer J accepted the appellant's submissions that the provision in issue in that case (s 127 of the *Migration Act*) was in mandatory terms and imposed a duty, whereas ss 494A to 494C were

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18 *Migration Act*, s 494A(1) (emphasis added).

19 *Migration Act*, s 494B(2).

20 *Migration Act*, s 494B(3).

21 *Migration Act*, s 494B(4).

22 See, eg, *Minister for Immigration, Citizenship and Multicultural Affairs v EVE21* (2023) 298 FCR 57 at 72 [62].

23 (2013) 227 FCR 359 at 373-375 [47]-[52].

general provisions and that, applying the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[24], the prescriptive terms of s 127 read with reg 2.55, applied and operated to exclude ss 494A to 494C. This was not the first time this issue had arisen. In *Singh v Minister for Immigration and Citizenship*,[25] the Full Court of the Federal Court stated that s 494B and reg 2.55 should not be read as "supplementing each other".

43 In *Butt*, Mortimer J answered the question of the relationship between ss 494A to 494C of the *Migration Act* and s 127 read with reg 2.55, in these terms. First, her Honour addressed the nature and effect of the cancellation provisions:[26]

> "Under the scheme created by the *Migration Act*, cancellation of a visa transforms the immigration status of an individual from a lawful to an unlawful non-citizen: see ss 13 and 14 of the *Migration Act*. That transformation in turn exposes the individual to loss of liberty through mandatory detention (see s 189) and removal (see s 198). Cancellation also restricts the ability of an individual to apply 'onshore' for further visas, by reason of the operation of s 48 of the *Migration Act*, read with reg 2.12 of the Regulations ... In summary, the effects of cancellation of a visa on an individual are significant. The scheme of the *Migration Act* then creates a tightly regulated merits review regime, access to which is dependent on the operation of non-extendable time limits, ... Reinforcing the tightness of the merits review scheme are the deeming provisions in both s 494C and reg 2.55, creating the situation that a person's review rights do not depend on actual notification."

44 In rejecting the Minister's contention in that case that ss 494A to 494C of the *Migration Act* and reg 2.55 could "somehow operate side by side", her Honour stated that "[i]n a scheme as detailed and comprehensive as the *Migration Act*, and in relation to an issue as critical as notification of cancellation of a visa, the scheme should be construed in a way which promotes certainty in the operation and application of its provisions. The link made by the scheme between notification and an applicant's review rights, together with the effect of the deeming provisions, means the scheme should be given an operation that is as specific and clear as possible."[27]

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24 (1932) 47 CLR 1.

25 (2011) 190 FCR 552 at 567 [55].

26 *Butt* (2014) 227 FCR 360 at 373-374 [47].

27 *Butt* (2014) 227 FCR 360 at 374 [48].

45 Her Honour concluded[28] by stating that "[a]n approach which allows, on an apparently ad hoc basis, either of ss 494A to 494C [or] s 127 read with reg 2.55 to apply creates uncertainty, and lack of clarity". Her Honour accepted the submissions made on behalf of the appellant that the principles in *Anthony Hordern* applied to the resolution of the operation of ss 494A to 494C and s 127, read with reg 2.55.

46 As is apparent, the tables are turned. In this case, it is the Minister seeking to apply her Honour's reasoning to the relationship between s 119 of the *Migration Act*, read with reg 2.55, and ss 494A-C. Here, as in *Butt*, the Parliament has in s 119 specifically contemplated a prescribed notification process. Section 119 of the *Migration Act*, like s 127 (in issue in *Butt*), appears in Subdiv E entitled "Procedure for cancelling visas under Subdivision D in or outside Australia". That subdivision "sets out the procedure for notice of intention to cancel, the content of such notices, opportunities to respond and notification of a decision".[29] Section 119 provides for the manner in which notification of a proposed decision to cancel is to be given and, like s 127, is expressed in mandatory terms. Section 119 does not refer to s 494B or state that the document must be given by one of the methods referred to in s 494B.[30]

47 Adopting and adapting the language of Mortimer J in *Butt*, "[g]iven the nature of the cancellation power, and the context and purpose of these provisions, it is clear the legislature intends there to be compliance with the procedure set out in the subdivision", being s 119 read with reg 2.55.[31]

48 The decision of the Federal Court in *Minister for Immigration, Citizenship and Multicultural Affairs v EVE21* does not alter the construction that has been adopted. In that case, the Court held that reg 2.55(3) (concerning pre-paid post) did not prevent the Minister from exercising the power in s 494A(1).[32] But that statement was made in relation to powers where the *Migration Act* did not prescribe the method of notification.[33]

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28 *Butt* (2014) 227 FCR 360 at 374 [49].

29 *Butt* (2014) 227 FCR 360 at 374 [50].

30 See also *Migration Act*, s 494C.

31 See *Butt* (2014) 227 FCR 360 at 374 [50].

32 (2023) 298 FCR 57 at 69 [48].

33 See *EVE21* (2023) 298 FCR 57 at 60 [3], 61 [4]-[6].

49 In addressing Ground 4, it will be necessary to consider the plaintiffs' further arguments about the alleged failure of the Department to make further inquiries about the First Plaintiff's address.

Notice to Second and Third Plaintiffs not required

50 The plaintiffs' further argument was that a NOICC had to be notified to the Second and Third Plaintiffs. That contention is rejected.

51 The obligation under s 119 of the *Migration Act* is to notify the "holder" of the visa which the Minister is considering cancelling that there appear to be grounds for cancelling the visa. Whilst the Delegate considered the cancellation of the First Plaintiff's visa, as explained above, neither the Second nor Third Plaintiff were a "holder" of that visa.

52 The Delegate was also not "considering cancelling" the visas of the Second and Third Plaintiffs and, given the statutory scheme, would not do so. Section 140(1) of the *Migration Act* relevantly provided that if a person's visa was cancelled under s 116 of the *Migration Act*, as was the case here, *"a visa held by another person because of being a member of the family unit of the person is also cancelled*."[34] That is, the Second and Third Plaintiffs' visas were cancelled by the operation of the law. There was no separate decision-making process.[35] No NOICC was required. The law operated according to its terms. The obligation to provide the NOICC did not extend to the Second and Third Plaintiffs.

53 Ground 5 is rejected.

Ground 4 – Unreasonable failure to make inquiries

54 The plaintiffs then allege that the Cancellation Decision was legally unreasonable because the Delegate failed to inquire as to the First Plaintiff's address or his failure to respond to the NOICC. That contention relies on four pleaded particulars: first, the Delegate erred in giving weight to the fact that the First Plaintiff "failed to respond to the [NOICC] or engage in the cancellation process" and "refused to sign for the article"; second, the Delegate did not make a reasonable effort to obtain a response from the First Plaintiff to the NOICC where the visa being considered for cancelling was a protection visa so the wrongful cancellation may lead to a serious risk of harm and refoulement; third, there was readily available evidence from Centrelink and Medicare as to the First Plaintiff's address; and fourth, the Department's Procedural Instruction "PAM3: Act – Code of procedure – Notification requirements" called for further inquiries to be made.

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34 Emphasis added.

35 cf *Kioa v West* (1985) 159 CLR 550 at 588, 634.

The plaintiffs also rely on the fact that the Delegate did not call the number provided by the First Plaintiff to the Tribunal in the application for review of the refusal of his citizenship application in 2019 and the likelihood that the plaintiffs would have moved since their visas were granted in 2011. Those contentions are also rejected.

55 First, as to the First Plaintiff's "refusal" to sign for the NOICC, the Cancellation Decision recorded:

> "The [First Plaintiff] has failed to respond to the [NOICC] or engage in the cancellation process. The [NOICC] was sent to the [First Plaintiff's] last known address according to departmental records. However, information provided by Australia Post indicates that while delivery was attempted to this address, the recipient refused to sign for the [NOICC].
>
> I give this consideration some weight in favour of cancelling the visa."

56 The plaintiffs submit that there was no evidence the First Plaintiff refused to sign for the NOICC. This meant there was an unreasonable failure by the Delegate to inquire as to the First Plaintiffs' address or failure to respond to the NOICC.

57 The plaintiffs' complaint should be rejected. The plaintiffs did not dispute that a "no evidence" ground is not available where there is more than a "skerrick of evidence".[36] That threshold is met here, including because the return to sender sticker for the NOICC had the word "Refused" circled rather than "Left Address/Unknown" or "Unclaimed".[37]

58 As the Minister submitted, on the material before the Delegate, a logical and rational decision-maker could have come to the same conclusion. A decision is not illogical or irrational "if there is room for a logical or rational person to reach the same decision on the material before the decision maker".[38] The fact that another decision-maker might have come to a different conclusion does not establish illogicality or irrationality sufficient to vitiate the Cancellation

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36 See, eg, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 408 [17].

37 See [10] above.

38 See, eg, *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 649 [135].

Decision.[39] The plaintiffs' complaint that these findings were unreasonable, irrational or "not open" should be rejected.

59 Second, whilst the plaintiffs are correct to say that the consequences of the cancellation of a protection visa are grave (and the Minister does not submit to the contrary), the reasonableness of the preliminary procedural steps taken must be assessed in the particular statutory context of the decision. Here, Pt 2 in Div 3 of Subdiv E of the *Migration Act* (which contained ss 119 and 120) is taken to be an exhaustive statement of the requirements of natural justice in relation to the matters it deals with.[40] If the Minister provides the NOICC in the prescribed way, and the visa holder does not respond to the invitation within the specified time, the Minister is permitted to make the decision about cancellation without taking any further action about the information.[41] That scheme applies to the cancellation of protection visas. And, as has been explained in relation to Ground 5, the First Plaintiff was given the NOICC in the prescribed way.

60 Moreover, this is not a case where the Delegate took no further steps. The uncontradicted evidence before this Court is that on the day the NOICC was sent to the First Plaintiff (30 October 2019), a call was attempted to the First Plaintiff's mobile to confirm the "LKA" (or the last known address) but the First Plaintiff's number was disconnected. Ten minutes later on the same day, a call was made to the Second Plaintiff's mobile but the call went to voicemail. Twenty minutes later, after checking that there was no known email address for the First Plaintiff to confirm the last known address, the NOICC was sent to the SA address, being the last known address notified to the Minister.

61 The uncontradicted evidence also records that the NOICC was returned to the Delegate on 15 November 2019 and that, on that date and again five days later, on 20 November 2019, a call was placed to the Second Plaintiff's mobile and a message was left asking them to phone the Department. Neither the First nor the Second Plaintiff returned the calls. The plaintiffs accept that the number used for the Second Plaintiff was the correct number.

62 The plaintiffs submit that no reasons have been given for why before the NOICC was sent, and again before the Cancellation Decision was made, the Delegate did not use the phone number the First Plaintiff had given to the Tribunal in December 2016 when the First Plaintiff sought review in the Tribunal of the Department's decision to refuse him citizenship. The First Plaintiff's handwritten

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39 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [75].

40 *Migration Act*, s 118A.

41 *Wei* (2015) 257 CLR 22 at 30-31 [14].

review application lodged with the Tribunal does list a different telephone number. The oddity of the Delegate not using that number is reinforced by the fact the Delegate obtained the mobile number for the Second Plaintiff from their application to the Department for citizenship.

63 The Minister properly accepted that the documents before the Tribunal were in the "corpus" of material available to the Department and that the person who sent the NOICC as well as the Delegate must have been aware of the Tribunal proceedings because both the NOICC and the Cancellation Decision referred to those proceedings. In particular, the Delegate noted the Tribunal's statement that in "assessing the [First Plaintiff's] citizenship refusal", his claims lacked credibility.

64 However, legal unreasonableness is assessed at the time of the performance of the duty.[42] Multiple, direct attempts were made to contact the First Plaintiff prior to the exercise of the power to issue the NOICC and to contact the Second Plaintiff both prior to the exercise of the power to issue the NOICC and after the First Plaintiff's failure to respond to the NOICC. The fact that further steps could have been taken (including searching documents filed in the Tribunal, or extending time for the First Plaintiff to respond to the NOICC) does not mean that it was unreasonable *not* to take those steps.[43] The plaintiffs correctly noted that no reasons were given for why the Delegate did not use the number the First Plaintiff had given to the Tribunal. But that is not the question. This is not merits review.

65 Moreover, any assessment must reflect the applicable statutory context.[44] Under Subdiv E, once the NOICC was served in accordance with the prescribed method, the Delegate was not obliged to take *any* further steps to bring the NOICC to the attention of the First Plaintiff and, indeed, it was not necessary that the First Plaintiff in fact receive the NOICC.[45] In that context, it cannot be said that no reasonable decision maker could have decided to issue the NOICC or Cancellation Decision without further attempts to contact the First Plaintiff.[46]

66 Finally, the plaintiffs refer to the following extract of the "PAM3: Act – Code of procedure – Notification requirements" and, in particular, the statement

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42 *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563 [26].

43 See *Li* (2013) 249 CLR 332 at 363 [66].

44 See [36]-[37], [59] above.

45 *Wei* (2015) 257 CLR 22 at 30-31 [14].

46 cf *Li* (2013) 249 CLR 332 at 350-351 [28].

that in relation to "Identifying the last address known to the Minister (reg. 2.55)" that:[47]

> "Officers must take all available steps to determine the last address 'known to the Minister', including searching ICSE/IRIS, TRIM files (for files in Australia), the passenger card database and the Settlement Database. Officers should take care with addresses recorded in the Settlement Database, as the Settlement Database does not distinguish between residential and business addresses. *If appropriate, officers may need to liaise with other government departments or other persons (for example, an education provider or employer) who may have an address…*
>
> Under policy, enquiries to find the client should be conducted if:
>
> - the address was not provided to the department recently (whether an address is 'recent' will depend on the circumstances, including the visa period) or
>
> - the notification is returned undelivered to the department.
>
> *Officers should contact the following third parties, if appropriate,* and when doing so must bear in mind privacy issues:
>
> - Medicare
>
> - Centrelink
>
> - state/territory police and/or correction facilities
>
> - *private sources, such as family members or utility companies*." (emphasis added)

67 It may be accepted that, given that there was a passage of some eight years[48] between the Protection visa being granted (2011) and the Cancellation Decision (2019), the last known address had not been provided to the Department recently,

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47 The Minister does not suggest that this "policy" did not apply.

48 The plaintiffs' applications are determined on this basis. However, the documentary evidence records that the period may have been shorter. In 2015, the First Plaintiff provided the SA address to the Department in his citizenship application. In 2016, the First Plaintiff sent a form to the Department that indicted his family had bought the house at the SA address. The First and Second Plaintiffs also used the SA address in applications filed in the Tribunal in December 2016, and in correspondence to the Tribunal in 2017.

and the NOICC was returned, further enquiries to seek to locate the First Plaintiff were appropriate.

68 The difficulty for the plaintiffs is that the Delegate did make inquiries of such a third party, a "private source" identified in PAM3: Act – Code of procedure – Notification requirements, namely the Second Plaintiff, who was the wife of the First Plaintiff, and the person who would most likely know where the First Plaintiff might be located. The plaintiffs' complaint is that the Delegate should have tried harder "to track down" the First Plaintiff for a response to the NOICC by contacting one or more of Centrelink or Medicare. In the circumstances, it was not legally unreasonable for the Delegate not to contact one or more of Centrelink or Medicare.[49]

69 Ground 4 must be dismissed.

Ground 2 – Breach of s 120 of the Migration Act

70 The plaintiffs allege that the Delegate breached s 120 of the *Migration Act* by failing to give the First, Second and Third Plaintiffs particulars directed to the fact that other decision-makers had reached adverse conclusions about the First Plaintiff and that the information would be used by the Delegate as a reason or part of the reasons for the Cancellation Decision. The particulars the plaintiffs contend should have been put to the First, Second and Third Plaintiffs pursuant to s 120 ("the Particulars") were:

(a) the Tribunal assessing the First Plaintiff's Protection visa application did not accept the First Plaintiff's explanation that his family secured his premises in Iran and connected the utilities;[50]

(b) the Tribunal assessing the First Plaintiff's citizenship refusal found his claims as to how funds were raised lacked credibility;[51] and

(c) the Tribunal assessing the First Plaintiff's citizenship refusal found his evidence unconvincing and inadequate.[52]

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49 The Minister accepted contacting these agencies was an avenue available to the Delegate, notwithstanding restrictions on the transfer of information such as *Social Security (Administration) Act 1999* (Cth), s 204; *Health Insurance Act 1973* (Cth), s 130; *National Health Act 1953* (Cth), s 135A.

50 Cancellation Decision at [38].

51 Cancellation Decision at [49].

52 Cancellation Decision at [69].

71 This ground also fails. Section 120(2)(a) of the *Migration Act* provided, at the time of the NOICC and the Cancellation Decision, that the Minister must "give particulars of the relevant information to the [visa] holder". "Relevant information" was defined in s 120(1). One necessary criterion was that the information "was not disclosed to the [visa] holder in the notification under section 119".[53] That is, if the information was disclosed in a NOICC under s 119, then it was *not* "relevant information" for the purposes of s 120 and there was no obligation under s 120(2) to give further particulars of it to the visa holder.

72 The plaintiffs' complaint is that the Particulars were not given to them because the NOICC was "refused" on 5 November 2019 and returned to sender unopened and because the NOICC was served using the "prescribed method". The premise for this contention – failure to serve the NOICC in accordance with the *Migration Act* – has already been addressed and rejected.[54] That is sufficient to reject the contention. However, in any event, each Particular was set out in the NOICC (which the First Plaintiff was taken to have received within a particular time period)[55] and in identical terms in the Cancellation Decision. In the circumstances, there was no relevant information which had to be disclosed to the First Plaintiff under s 120 of the *Migration Act*.

73 Finally, the contention that s 120 of the *Migration Act* has been breached because notice of the information was not provided to the Second and Third Plaintiffs must fail. The obligation in s 119 of the *Migration Act* was only to provide the information to the "holder" of the visa which the Minister was considering whether to cancel and, as explained above, the Second and Third Plaintiffs were not holders of that visa[56] and the Minister did not consider cancelling the visas held by the Second and Third Plaintiffs.[57]

74 It is now appropriate to turn to Grounds 1 and 3 which are directed to the reasoning in the Cancellation Decision and the reasonableness of its outcome.

Ground 1 – Failure to consider consequences of Cancellation Decision

75 It is now well established that "if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood

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53 *Migration Act*, s 120(1)(d).

54 See [33]-[48] above.

55 *Migration Regulations*, reg 2.55(7).

56 See [22]-[31] above.

57 See [52] above.

the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error".[58]

76 Under this ground of their Amended Application, the plaintiffs are inconsistent. Initially, the ground as first stated in the Amended Application is limited to considerations concerning the Second and Third Plaintiffs. In the body of the Amended Application, however, the plaintiffs seek also to rely upon considerations concerning the Fourth Plaintiff. These reasons address all five legal consequences that the plaintiffs allege the Delegate failed to consider, namely: (1) the Second and Third Plaintiffs may be subject to immigration detention; (2) the Second and Third Plaintiffs may be removed under s 198 of the *Migration Act*; (3) the Second and Third Plaintiffs would be subject to a ban on applying for a further visa under s 46A; (4) the Fourth Plaintiff, an Australian child, may become an unaccompanied minor because her parents and sibling are in immigration detention under s 189 or removed under s 198; (5) the Fourth Plaintiff may be deprived of the benefits of living in Australia as an Australian citizen by virtue of having to leave Australia with them.

77 It was common ground that the identified considerations fell into two categories: mandatory consequences of the Cancellation Decision (issues (1)-(3)) and "practical" consequences of the Cancellation Decision (issues (4) and (5)). It was also common ground that failure to consider issues (4) and (5) would not, on their own, lead to invalidity.

78 The plaintiffs submitted that while the Delegate made cursory reference to "Any consequential cancellations that may result", "Legal consequences of a decision to cancel the visa" and "Rights of the Child" and "Family Unity", the content under those headings showed that significant legal consequences of the Cancellation Decision were overlooked. The plaintiffs further submitted that, because each of the legal consequences were serious, the Delegate would have said so if they had been taken into account and their consideration would have been reflected in the weight which was ascribed to each legal consequence under those headings. In support of that contention, the plaintiffs referred to the fact that "some weight" was given to the "Legal consequences of a decision to cancel the visa" in the Cancellation Decision[59] which included references to the First Plaintiff being liable to removal and immigration detention, and that he would be subject to a ban on applying for a further visa, as compared to "a little weight" against cancellation given to the section dealing with the consequential cancellations of the visas of the Second and Third Plaintiffs.

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58 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 600 [27] (footnotes omitted).

59 See [16] above.

79 The plaintiffs' contentions should not be accepted. When the reasons for decision are read fairly and not in an unduly critical manner,[60] it cannot be said that the Delegate failed to consider or overlooked the identified consequences.

First and second matters – Second and Third Plaintiffs (the First Plaintiff's wife and son) may be subject to immigration detention and removal

80 It may be accepted that the first and second matters were not directly referred to in the Cancellation Decision. However, the Delegate referred to the fact that the visas held by the Second and Third Plaintiffs were dependent on the First Plaintiff's visa and that if the First Plaintiff's visa were cancelled, the visas held by the Second and Third Plaintiffs would also be liable to be cancelled, in considering various aspects of the Cancellation Decision.

81 Under the heading "Australia's international obligations" and the sub-heading "Family Unity", the Delegate recorded that:

> "As the [First Plaintiff's] wife and son's visas will be consequentially cancelled in the event of a cancellation outcome, I consider that a visa cancellation outcome would not result in separation of the family unit, as the [First Plaintiff], his wife and son can reside offshore together to maintain the family unit. I also consider the [First Plaintiff's] daughter would have the option of departing Australia with the [First Plaintiff] to maintain their family unit."

82 Under the heading "Any consequential cancellations that may result", the Delegate stated:

> "If the [First Plaintiff's] Protection visa is cancelled, *his wife and son* would be liable for consequential cancellation under section 140 of the Migration Act. I give this consideration a little weight against cancelling the visa". (emphasis added)

That section of the Cancellation Decision is then immediately followed by a section headed "Legal consequences of a decision to cancel the visa" in which the Delegate identifies those consequences as including detention under s 189 of the *Migration Act* and subsequent removal under s 198.

83 As these passages, read fairly, reveal, the fact that the Second and Third Plaintiffs may be subject to immigration detention and removal was not overlooked by the Delegate. And it is not open to the Court to infer that, because

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60 See, eg, *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 45 [38] citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

"a little weight" was given to the consideration of consequential cancellations, these matters were not considered.

84 In this context, the plaintiffs' submissions that the Delegate did not consider the statutory consequences for the Second and Third Plaintiffs due to the Cancellation Decision affording "disproportionate weight" to the consequences for the First Plaintiff, and that the Delegate would have expressly said they considered the legal consequences for the Second and Third Plaintiffs, particularly given their seriousness, cannot be accepted.

Third matter concerning Second and Third Plaintiffs: subject to a ban on applying for a further visa under s 46A of the Migration Act

85 The Delegate expressly noted that, should the First Plaintiff's visa be cancelled, he will be subject to s 46A(1) of the *Migration Act* and "barred from making a valid application for a further visa, including bridging visas".

86 As the Minister submits, given that reference, there is no reason to think that the Delegate was unaware that s 46A of the *Migration Act* would also apply to the Second and Third Plaintiffs. And further, s 46A does not apply where a person is outside Australia and the Delegate's decision plainly contemplates the prospect of the plaintiffs departing Australia. Again, it is not open to the Court to infer that this matter was not considered because only "a little weight" was given to the consideration of consequential cancellations.

Fourth and fifth matters concerning the Fourth Plaintiff – may become an unaccompanied minor, or detained, and may be deprived of the benefits of living in Australia as an Australian citizen

87 These matters may be addressed together. It may be accepted that these matters were not directly referred to by the Delegate but, reading the Cancellation Decision fairly, neither matter was overlooked.

88 The Fourth Plaintiff, an Australian child, is referred to in the Cancellation Decision under the heading "Australia's international obligations" and the sub-heading "Rights of the Child" as the First Plaintiff's five-year old daughter. The Delegate acknowledged that the Fourth Plaintiff was born in Australia, had spent all her life in Australia and was an Australian citizen. In the passage extracted addressing family unity,[61] the Delegate considered the Fourth Plaintiff, noting that she would have the option of departing Australia with the First Plaintiff to maintain the family unit. This demonstrates that the Delegate was aware that the position in

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61 See [81] above.

relation to the Fourth Plaintiff was different regarding detention or mandatory removal.

89 The Cancellation Decision records that the Delegate was aware that, as an Australian citizen, the Fourth Plaintiff would not necessarily be required to depart Australia but rather that she had the option of doing so. As the Minister submitted, the fact that the Fourth Plaintiff would not live in Australia is the necessary corollary of the Fourth Plaintiff having "the option" of departing Australia with her family. Finally, leaving the Fourth Plaintiff as an unaccompanied minor was not a realistic possibility for the Delegate to consider.

Ground 3 – Unreasonableness in the Delegate's decision

90 Ground 3 was argued on the basis that the NOICC was given to, and deemed to have been received by, the First Plaintiff (that is, on the basis that the plaintiffs' arguments with respect to Ground 5 are not accepted). Ground 3 alleges that the Cancellation Decision was manifestly unreasonable by reference to four matters:

(1) It was unreasonable and irrational to give weight to the fact that the First Plaintiff "failed to respond to the [NOICC] or engage in the cancellation process" and "the recipient refused to sign for the article", where there was no evidence that the First Plaintiff knew about the NOICC or that it was the First Plaintiff who had refused to sign for the NOICC.

(2) It was unreasonable for the Delegate not to make further inquiries about the contact details of the First and Second Plaintiffs (beyond two phone calls to the Second Plaintiff only) after the NOICC was returned to sender.

(3) In purporting to consider the degree of hardship that may be caused to the First Plaintiff and any family members, the Delegate did not consider disruption to the Second Plaintiff's employment obligations.

(4) The Delegate purported to apply the "PAM3: General cancellation powers" which stated that the best interests of the child shall be a primary consideration but did not in fact consider what was in the best interests of the Third or Fourth Plaintiffs.

Engagement with NOICC and further inquiries

91 It is convenient to address the first and second matters together.

92 The first matter, described by the plaintiffs as the "main thrust" of Ground 3 – that the First Plaintiff "refused" the NOICC and failed to engage in the

cancellation process – has been addressed in the context of Ground 4.[62] Thus, this ground is assessed on the basis that it was not unreasonable for the Delegate not to make further enquiries as to the contact details of the First Plaintiff following the NOICC being returned to sender.

93 In those circumstances, the plaintiffs' complaint that the weight given by the Delegate to these matters in the Cancellation Decision was legally unreasonable falls away because the premise for the complaints that the Delegate's findings were irrational, or "not open" have been rejected.

94 As to the second matter, the fact that the Delegate understood, reasonably, that the NOICC had been refused rather than sent to the incorrect address informs the reasonableness of the steps that might otherwise have been taken. Additionally, the circumstance that the NOICC was deemed to have been received by the First Plaintiff also informs the reasonableness of any further steps. In that context, and having regard to the attempts to contact the plaintiffs by telephone, it was not unreasonable for the Delegate to not take any further steps to contact the plaintiffs. Moreover, there was no obligation on the Delegate to give reasons as to why the NOICC was sent to the SA address.[63]

Failure to consider disruption to Second Plaintiff's employment

95 In purporting to consider the degree of hardship that may be caused to the visa holder and any family members, the plaintiffs say the Delegate considered disruption to the First Plaintiff's employment obligations but not the Second Plaintiff's employment obligations.

96 The Minister submits that, at the time of the Cancellation Decision, there was no evidence of the Second Plaintiff's employment. Nonetheless, the Delegate accepted that the visa cancellation may lead to some hardship for the First Plaintiff and his family, which would necessarily include effects on the Second Plaintiff's employment if she were employed. The Minister's submissions should be accepted.

Failure to consider best interests of Third or Fourth Plaintiffs

97 The plaintiffs contend that the Delegate purported to apply the PAM 3: *General cancellation powers* which stated that the best interests of the child shall be a primary consideration but did not in fact consider what was in the best interests of the Third Plaintiff child or the Fourth Plaintiff child. The PAM 3: *General cancellation powers* states when deciding whether to cancel a visa under

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62 See [54]-[58] above.

63 cf *Migration Act*, s 127.

s 116: "[i]f there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, delegates are obliged to treat as a primary consideration the best interests of the children". The Minister submitted that as the "policy" was "non-binding", a failure to consider it could not amount to jurisdictional error, but irrespective, the Delegate did consider the best interests of the Third and Fourth Plaintiffs.

98 Under the heading "The degree of hardship that may be caused to the visa holder and any family members", the Delegate referred to the Fourth Plaintiff as the First Plaintiff's "5-year old Australian citizen daughter". Just two paragraphs later, the Delegate noted that the First Plaintiff's son (the Third Plaintiff) is "school-aged and that a cancellation outcome may affect his education onshore, however [I] consider he could study at an institution outside of Australia if required to depart". Given the Delegate's appreciation of the age differences of the children, and reasoning directed to the Third Plaintiff's education, the Delegate must be taken to have considered the impact on the Fourth Plaintiff's education was lesser or manageable.

99 Under the heading "Rights of the Child", the Delegate stated that the Convention on the Rights of the Child (1989)[64] (the "CROC") should be considered. Immediately before that heading, the Delegate set out Art 3.1 of the CROC which provided "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". It was in that context that the Delegate then stated "[w]hile I acknowledge that Iran would be a different cultural environment to Australia, I note the relatively young age of the [Third and Fourth Plaintiffs] and therefore consider that they would be able to integrate and adjust to life outside of Australia if required to depart."

100 The plaintiffs say that merely describing the Fourth Plaintiff having the "option" (under the heading of Family Unity) of departing Australia does not involve any assessment of the best interests of the child; therefore, whilst the consideration was adverted to, the necessary evaluation was not undertaken. This impermissibly transgresses into merits review.[65] The Delegate considered matters directed to the best interests of the Third and Fourth Plaintiffs through the prism of the rights of the child and family unity just not in the specific way in which the plaintiffs would have the Delegate do so.

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64 [1991] ATS 4, 1577 UNTS 3, Art 3.

65 *Li* (2013) 249 CLR 332 at 363 [66].

Conclusion

101 Having regard to the matters complained of individually or collectively, the Cancellation Decision was not manifestly unreasonable. The requirement that the decision be one which no reasonable repository of a power could have taken is not lightly reached.[66] The courts cannot exceed their supervisory role by undertaking a review of the merits of the exercise of a discretionary power.[67]

Conclusion and Orders

102 For those reasons, the plaintiffs' Amended Application is dismissed. The First and Second Plaintiffs should pay the Minister's costs of the application.

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66 *Li* (2013) 249 CLR 332 at 375 [106].

67 *Li* (2013) 249 CLR 332 at 363 [66].