

HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN AND JAGOT JJ

PLAINTIFF S22/2025

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

DEFENDANT

Plaintiff S22/2025 v Minister for Immigration and Multicultural Affairs
[2025] HCA 36
Date of Hearing: 16 June 2025
Date of Judgment: 3 September 2025
S22/2025

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 21 May 2025 be answered as follows:

Question (1): Should an extension of time be granted under s 486A of the Migration Act 1958 (Cth) for the filing of the application for a constitutional or other writ?

Answer: Yes.

Question (2): Is the non-revocation decision affected by jurisdictional error on the basis that the delegate, in addressing the legal consequences of the decision:

- a. misapprehended or failed to consider the legal consequences of the decision; and/or*
- b. reasoned in a way that was legally unreasonable?*

Answer: No.

Question (3): Is the non-revocation decision affected by jurisdictional error on the basis that the delegate failed to comply with Ministerial Direction 110, and so failed to comply with s 499(2A) of the Migration Act 1958 (Cth), in the consideration of the expectations of the community?

Answer: No.

Question (4): Is the non-revocation decision affected by jurisdictional error on the basis that the delegate:

- a. denied the plaintiff procedural fairness; and/or*
- b. proceeded in a legally unreasonable manner,*
by taking into account legal advice given to the plaintiff,
without notice to the plaintiff?

Answer: No.

Question (5): What relief, if any, should be granted to the plaintiff?

Answer: None.

Question (6): Who should pay the costs of the proceeding?

Answer: The plaintiff.

Representation

C L Lenehan SC with T M Wood and K E W Bones for the plaintiff
(instructed by Human Rights Law Centre)

P M Knowles SC and B D Kaplan with M P A Maynard for the defendant
(instructed by Australian Government Solicitor)

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

CATCHWORDS

Plaintiff S22/2025 v Minister for Immigration and Multicultural Affairs

Immigration – Visas – Cancellation of visa – Where plaintiff held Temporary Protection (Class XD) (subclass 785) visa ("TPV") – Where plaintiff's TPV mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ("Act") following conviction and imprisonment for offence – Where plaintiff made representations about reasons why mandatory cancellation of TPV should be revoked under s 501CA(4) of Act but Minister's delegate decided not to revoke cancellation – Where plaintiff released from immigration detention – Where plaintiff incorrectly believed cancellation of TPV revoked when plaintiff released under Bridging R (Class WR) (subclass 070) (Bridging (Removal Pending)) visa ("BVR") – Where BVR ceased pursuant to s 76AAA of Act when Republic of Nauru granted plaintiff permission to enter and remain – Where documents plaintiff gave Department of Home Affairs in support of representations included legal advice subject to legal professional privilege – Where delegate read and quoted from legal advice in delegate's reasons – Whether necessary in interests of administration of justice to grant extension of time under s 486A(2) of Act – Whether non-revocation decision void for jurisdictional error – Whether delegate did not properly confront legal consequences of non-revocation decision as required by Ministerial Direction 110 – Whether delegate misapplied para 8.5 of Ministerial Direction 110 – Whether use of legal advice by delegate without notice to plaintiff denied plaintiff procedural fairness or legally unreasonable.

Words and phrases – "certiorari", "constitutional writs", "expectations of the Australian community", "extension of time", "immigration detention", "irrational or unreasonable", "jurisdictional error", "legal advice", "legal consequences of decision", "legal professional privilege", "mandamus", "mandatory cancellation", "necessary in the interests of the administration of justice", "no real prospect of removal", "non-refoulement", "non-revocation", "practical injustice", "procedural fairness", "protection finding", "protection visa", "refugee", "relevant adverse material".

Judiciary Act 1903 (Cth), s 44.

Migration Act 1958 (Cth), ss 36(2)(a), 76AAA, 189, 195A, 197C(5)(a), 476(2), 476A, 486A, 499(2A), 501(3A), 501CA(4).

Migration Regulations 1994 (Cth), regs 2.08F, 2.20(18), 2.25AA(2), 2.25AB, Sch 2, cl 070.612(1), 070.612A(1).

1 GAGELER CJ, EDELMAN AND JAGOT JJ. By an amended application filed on 28 May 2025 the plaintiff seeks a writ of certiorari quashing a decision of a delegate of the Minister for Immigration and Multicultural Affairs not to revoke the mandatory cancellation of the plaintiff's Temporary Protection (Class XD) (subclass 785) visa ("TPV") under s 501CA(4) of the *Migration Act 1958* (Cth) and a writ of mandamus requiring the Minister to make a decision under s 501CA(4) whether to revoke the cancellation of the plaintiff's TPV according to law.¹ The plaintiff and the Minister filed a special case in which they agreed the relevant facts and questions for the opinion of the Full Court.

2 As will be explained, as we are satisfied "it is necessary in the interests of the administration of justice" to make such an order as provided for in s 486A(2) of the *Migration Act*, the plaintiff should be granted an extension of time for the filing of the application for the constitutional writs. The plaintiff's contentions that the delegate's decision not to revoke the cancellation of the plaintiff's TPV is void for jurisdictional error, however, are not established.

The basic facts

3 The plaintiff is a 65-year-old citizen of Iraq who arrived in Australia in 2012. He cannot read, write or carry on a conversation in English. He was diagnosed as suffering from post-traumatic stress disorder in or around 2013. He made a valid application for a protection visa in December 2012, which was converted into an application for a Temporary Protection (Class XD) (subclass 785) visa by operation of reg 2.08F of the *Migration Regulations 1994* (Cth). The Refugee Review Tribunal determined that the plaintiff was a non-citizen in Australia in respect of whom Australia has protection obligations because he was a refugee in accordance with s 36(2)(a) of the *Migration Act* in 2015. On remittal from the Refugee Review Tribunal a protection finding was made for the plaintiff in respect of Iraq for the purposes of s 197C(5)(a) of the *Migration Act* and the TPV was granted to the plaintiff.

4 In June 2022 the plaintiff was convicted of the offence of specially aggravated detaining of a person for advantage and was sentenced to imprisonment for five years and nine months, with a non-parole period of three years and six months. On 21 March 2023, the plaintiff's TPV was mandatorily cancelled under s 501(3A) of the *Migration Act*. The plaintiff made representations to the Minister as to why the mandatory cancellation of his TPV should be revoked in response to

1 The matter cannot be remitted to the Federal Circuit and Family Court of Australia (Division 2) or the Federal Court of Australia as they do not have jurisdiction in respect of the matter: *Migration Act 1958* (Cth), ss 476(2) and 476A; *Judiciary Act 1903* (Cth), s 44.

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the Minister's invitation to do so, but the Minister's delegate decided not to revoke the cancellation on 24 October 2024.

The extension of time

5 The plaintiff was in immigration detention when the delegate's decision not to revoke the cancellation of his TPV was notified to him on 24 October 2024. The notification occurred by an officer of the immigration detention centre handing to the plaintiff the notification together with a 335-page "notification package". The plaintiff was then informed he was being released from immigration detention. The plaintiff incorrectly believed that the cancellation of his TPV had been revoked when, in fact, he had been released from immigration detention under a Bridging R (Class WR) (subclass 070) (Bridging (Removal Pending)) visa ("BVR") granted on 24 October 2024, being a type of visa which the Minister may grant to an eligible non-citizen in accordance with reg 2.25AB(1) of the *Migration Regulations* (the plaintiff being a non-citizen who, as provided for in reg 2.20(18), "there is no real prospect of the removal of ... from Australia becoming practicable in the reasonably foreseeable future").

6 On 15 February 2025 the plaintiff's BVR as then in force² ceased pursuant to s 76AAA of the *Migration Act* when the Republic of Nauru granted the plaintiff permission to enter and remain in Nauru. The next day, 16 February 2025, the plaintiff was taken into immigration detention. On that day the plaintiff, who had been placed into contact with a lawyer, realised for the first time that the cancellation of his TPV had not been revoked and that the period of 35 days to apply to this Court for review of the non-revocation decision as provided for in s 486A(1) of the *Migration Act* had expired. Section 486A(2) permits this Court to grant an extension of time as it considers appropriate if: (a) an application for that order has been made in writing to the Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and (b) the Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

7 Although the Minister submitted that the grant of an extension of time should depend on the plaintiff's grounds for review being accepted, the interests of the administration of justice dictate that an extension of time should be granted irrespective of the outcome of the plaintiff's challenge to the validity of the decision. It was not reasonable to expect that the plaintiff, who read and spoke almost no English, would understand that he was being released from immigration detention not because the mandatory cancellation of his TPV had been revoked,

2 On 6 November 2024 the Minister granted to the plaintiff another Bridging R (Class WR) (subclass 070) (Bridging (Removal Pending)) visa.

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but because the mandatory cancellation of his TPV had not been revoked and, until Nauru gave him permission to enter and remain in Nauru, he could not be lawfully detained in immigration detention as there was no real prospect of removal of him from Australia becoming practicable in the reasonably foreseeable future.³ It follows that there is a reasonable explanation for the delay of the filing of the plaintiff's application for the constitutional writs. The delay is also not excessively long, the originating application having been filed on 21 February 2025, about four months after the non-revocation decision. The Minister also points to no prejudice resulting from the delay. In light of the combined strength of these matters, and an assessment of the merits of the proposed grounds of review as a whole at a "reasonably impressionistic level",⁴ we are satisfied that it is necessary in the interests of the administration of justice to make the order for an extension of time.

8 The statutory conditions in s 486A(2) are satisfied. The extension of time is therefore granted.

Legal consequences of decision

Plaintiff's challenge

9 The plaintiff's challenge, although put in three different ways, emanates from one aspect of the delegate's reasoning. In applying Ministerial Direction 110⁵ as required by s 499(2A) of the *Migration Act*, para 9.1(1) (legal consequences of decision under s 501 or s 501CA), the delegate's reasons include the following:

"117. I am aware that even if a non-revocation decision is made under s 501CA(4), [the plaintiff] will not remain indefinitely in detention. He will be released from immigration detention. The Minister will separately consider the type of visa on which he should reside and conditions to be imposed on that visa, following further advice from the Department."

10 This statement reflected the delegate's express understanding that, as the plaintiff was the subject of a protection finding in respect of his country of citizenship, Iraq, and there was no real prospect of his removal to a third country

3 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 162 [55] .

4 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 276 CLR 579 at 591 [17], 605 [54].

5 *Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (Cth).

at that time, the plaintiff "would not be subject to indefinite detention pending his removal and would instead be released from detention".

- 11 The plaintiff contended that the statement at para 117 of the delegate's reasoning exposes jurisdictional error by reason of the delegate not confronting the legal consequences of the decision not to revoke the cancellation of the TPV in that: (1) based on his dealings within the Department of Home Affairs, the delegate in fact knew that the Minister would not consider the "type of visa on which" the plaintiff should reside in Australia and the conditions of that visa and that the plaintiff would be granted the BVR on the conditions that were mandatory to be imposed on the BVR, so that the reasoning process, being contrary to the known facts, was legally irrational and unreasonable; (2) the delegate failed to understand that the only visa the plaintiff could be granted in accordance with the statutory scheme was the BVR; and (3) the delegate failed to consider the consequences of the application of that statutory scheme to the plaintiff. The plaintiff further asserted that the "human implications" of the monitoring conditions, the breach of which carried the consequence of imprisonment, reinforced the asserted requirement for consideration of the statutory consequences of the grant of a BVR.

Discussion

- 12 By s 499(2A) of the *Migration Act* the delegate, in performing the delegate's functions and exercising the delegate's powers, was required to comply with Ministerial Direction 110. Paragraph 9(1) of Ministerial Direction 110 provided that, in making a decision under, amongst other provisions, s 501CA(4), certain considerations must be taken into account, where relevant, including "in accordance with the following provisions ... a) legal consequences of the decision". The "following provisions" stated, amongst other things: that "[d]ecision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section" (para 9.1(1)); that "[w]here a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that *non-refoulement* obligations are engaged in relation to the non-citizen" (para 9.1.1(1)); and the potential inability of the non-citizen to apply for another visa except a Bridging R (Class WR) visa (para 9.1.1(3)).

- 13 It can be inferred that the delegate knew that, as a consequence of the delegate's decision not to revoke the cancellation of the plaintiff's TPV, the plaintiff would be considered for and would most likely be the subject of a grant of the BVR including the mandatory conditions to which such visas are subject. This does not mean, however, that the statement in para 117 of the delegate's reasons exposes a failure to confront the legal consequences of the delegate's decision in any of the ways proposed on behalf of the plaintiff. To the contrary, in

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circumstances where the plaintiff is correct that the delegate knew that the grant of a BVR to the plaintiff was being considered and was very likely to be granted on the same day as the delegate's decision refusing to revoke the cancellation of the plaintiff's TPV, it is impossible to infer that the delegate misunderstood the statutory scheme or failed to consider its application to the plaintiff.

14 Although the delegate made no specific reference to the consequences of the grant of a BVR, including the imposition of mandatory monitoring conditions, there was no obligation upon the delegate to make express reference to those consequences (however probable) of a discretionary exercise of executive power while the plaintiff was being detained or after release.⁶ The plaintiff is then left with the first way in which he alleges that the decision is void on this ground, being legal irrationality or unreasonableness based on what should be characterised as nothing more than, at worst, mere infelicitous drafting of reasons.

15 To explain further, the statement that the Minister "will separately consider the type of visa on which [the plaintiff] should reside" is incorrect in that it is common ground that the only "type" of visa that could be granted to the plaintiff after the delegate decided not to revoke the cancellation of the plaintiff's TPV was the BVR. The plaintiff submitted that the statement in para 117 exposed that, contrary to the true position, the delegate wrongly believed that the Minister could grant a visa other than a BVR to the plaintiff under s 195A(2) of the *Migration Act*. Section 195A(2) provides that if "the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom [s 195A] applies a visa of a particular class (whether or not the person has applied for the visa)", but by s 195A(1) the section only applies to a "person who is in detention" under s 189 and the delegate clearly understood that the plaintiff would be granted another visa because he could not be kept in immigration detention.

16 The plaintiff accepted, in oral argument, that no mistake could be inferred to have been made by the delegate if the words "the type" of did not appear in para 117 of the delegate's reasons. It is settled, however, that reasons for decision of an administrative decision-maker "are not to be construed minutely and finely with an eye keenly attuned to the perception of error".⁷ It is not to be assumed that the delegate understood the power in s 195A(2) to be available when s 195A(1) expressly confines that power to a person in detention under s 189 of the *Migration Act* and the very purpose of the delegate in giving the relevant part of

6 *Migration Regulations 1994* (Cth), regs 2.25AA(2) and 2.25AB(2).

7 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

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the delegate's reasons in which para 117 appears was to explain why the plaintiff could not be held in immigration detention given this Court's reasoning in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.⁸

17 Further, although the words "the type of" are inapt in their application to the visa the plaintiff could be granted, they are apt for the conditions to be imposed on any such BVR as only certain conditions are mandatory⁹ whereas other conditions are discretionary. In addition, apart from the words "the type of" in para 117, there is no suggestion in the delegate's reasons that the delegate wrongly believed that some type of visa, other than the BVR, would be available to the plaintiff.

18 Finally, in circumstances where it must be inferred from the internal departmental communications that the delegate knew the grant of the BVR to the plaintiff was being considered and was very likely to be granted on the same day as the delegate's decision refusing to revoke the cancellation of the plaintiff's TPV, the real import of para 117 is reasonably clear. The real import is twofold. First, that as a result of this Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,¹⁰ the plaintiff could not be held in immigration detention for so long as there was no real prospect of removal of him from Australia becoming practicable in the reasonably foreseeable future and therefore would reside in the Australian community. Second, that the process by which it would be decided if the plaintiff would be granted a visa regulating his residing in the community and, if so, the conditions to be imposed on that visa would be the subject of separate consideration (and, by implication, a separate decision) from the decision the delegate was making not to revoke the cancellation of the plaintiff's TPV. It must be inferred that the unstated alternative if the plaintiff was not granted the BVR, that he would reside in the community without a visa as an unlawful non-citizen, was not mentioned by the delegate because he knew that the grant of the BVR was the overwhelming likelihood. Nothing in this reasoning involves a failure to consider the legal consequences of the delegate's decision.

19 It also cannot be inferred, therefore, that the delegate misunderstood that the plaintiff could be granted some type of visa other than a BVR. On the same basis, it cannot be concluded that the delegate's reasoning process was legally irrational or unreasonable. The Minister, via the Minister's Department, was "separately consider[ing]" the grant of the BVR to the plaintiff. The delegate's

8 (2023) 280 CLR 137.

9 *Migration Regulations 1994* (Cth), Sch 2, cl 070.612(1) and 070.612A(1).

10 (2023) 280 CLR 137.

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point, rightly made, was that the process involving any such grant was separate from his own decision-making process. Nor, in so saying, was the delegate failing to consider the application of the statutory scheme to the plaintiff and the resulting "binary" consequences of the delegate's refusal being that, for so long as there was no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future, the plaintiff could not be detained in immigration detention and therefore would be in the Australian community either under the BVR or not. To the contrary, the delegate was correctly recognising that the statutory scheme provided for the performance of the delegate's functions and exercise of the delegate's powers under s 501CA(4) of the *Migration Act* (the power of the Minister to revoke the cancellation decision) separately from the performance of other functions and exercise of other powers of the Minister to grant the BVR in accordance with reg 2.25AB(2) of the *Migration Regulations*, subject to conditions including the mandatory conditions.

20 For these reasons, the delegate complied with the obligation imposed by para 9(1)(a) of Ministerial Direction 110 to consider the legal consequences of the delegate's decision and each of the three ways in which the plaintiff puts this ground of challenge to the validity of the delegate's decision must be rejected.

Expectations of the Australian community

Plaintiff's challenge

21 Ministerial Direction 110, para 6, provides that a decision-maker must "take into account the considerations identified in [paras] 8 and 9 [of the Direction], where relevant to the decision". Paragraph 8.5, headed "Expectations of the Australian Community", contains the following 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 addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. 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:

...

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable [sic] 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."

22 It is common ground that the plaintiff's offending did not involve conduct of the kind specified in para 8.5(2).

23 In complying with Ministerial Direction 110, the delegate said this in the delegate's reasons for decision:

"101. The Direction indicates that 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.

102. In addition, the Direction also indicates that non-revocation of the mandatory cancellation of a visa may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not continue to hold a visa. In particular, the Direction states that the Australian community expects that the Australian Government can and should cancel a visa if the visa holder raises serious character concerns through certain kinds of conduct.

103. In this regard, I have also noted the Direction states that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

104. I have proceeded on the basis that the Australian community's general expectations about non-citizens, as articulated in the Direction, apply in this case. I have attributed this consideration significant weight against revocation of the cancellation of [the plaintiff's] visa."

24 The plaintiff contended that the delegate misapplied para 8.5(2) in that, first, as none of the plaintiff's conduct was of the specified kind there was no

logical basis to apply the expectation in that provision and, second, the reasoning is internally inconsistent with the delegate's reasoning that the plaintiff would be granted another visa permitting the plaintiff to reside in the Australian community for so long as there was no real prospect of removal of him from Australia becoming practicable in the reasonably foreseeable future.

Discussion

25 Neither contention of the plaintiff withstands scrutiny. Paragraphs 101 to 103 of the delegate's reasons reflect the terms of para 8.5(1), (2) and (3) of Ministerial Direction 110. Paragraph 104 of the delegate's reasons applies para 8.5(4) of Ministerial Direction 110, which required the decision-maker to "proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case". In referring, in para 104, to the "Australian community's general expectations", it is not to be assumed or inferred that the delegate wrongly believed the plaintiff's conduct fell within the list specified in para 8.5(2) of Ministerial Direction 110, thereby triggering the application of the "particular" expectation in the second sentence of that paragraph. To the contrary, the fact that the delegate does not identify any such specific conduct of the plaintiff and instead refers at a high level of generality to para 8.5(2) as concerning "certain kinds of conduct" conveys that the delegate understood both that the plaintiff had not engaged in any kind of the specified conduct and that the plaintiff was therefore not subject to the particular expectation in the second sentence of that paragraph.

26 This reading of the delegate's reasons is reinforced by the fact that in para 104 the delegate refers only to the "Australian community's general expectations". Those "general" expectations are to be understood as a reference to the "norm" identified in para 8.5(1) (that "[t]he Australian community expects non-citizens to obey Australian laws while in Australia" and "[w]here a non-citizen has engaged in serious conduct in breach of this expectation ... the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia") and the statement in the first sentence of para 8.5(2) (that "non-revocation of the mandatory cancellation of a visa ... may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa"). The provision in the second sentence of para 8.5(2) beginning with the words "[i]n particular", as a matter of ordinary English text, operates separately and solely by reference to the specified conduct. Having already characterised the plaintiff's custodial sentence for his offending as reflecting the view of the sentencing court that the offending was "very serious", the delegate was entitled to give the expectations of the Australian community significant weight in deciding against the revocation of the mandatory cancellation

of the plaintiff's visa even though the plaintiff's conduct was not of the kind specified in para 8.5(2).

27 Nor is there any inconsistency between that evaluation and the delegate's recognition that the plaintiff would be in the Australian community for so long as there was no real prospect of removal of him from Australia becoming practicable in the reasonably foreseeable future. Paragraph 8.5(2), in saying that "the Australian community would expect that the person should not be granted or continue to hold a visa", must be understood in context. It is plain from the context that the "visa" being referred to in this sentence, in the case of a visa that has been subject to mandatory cancellation, is the visa that permitted the non-citizen to remain in Australia – such as, in the plaintiff's case, the TPV. The reference is not to the BVR, which includes mandatory conditions regulating the plaintiff's conduct and which ceases by operation of s 76AAA of the *Migration Act* once removal of the non-citizen from Australia is reasonably practicable because of a third country granting the non-citizen a right to enter and remain in that country.

28 For these reasons, the delegate complied with the obligation imposed by para 8.5 of Ministerial Direction 110.

Delegate's use of legal advice

Plaintiff's challenge

29 The plaintiff's challenge is based on agreed or undisputed facts that: (1) the plaintiff gave to the Department documents in support of his representations to the Minister to revoke the cancellation of his TPV; (2) those documents erroneously included a legal advice from counsel in respect of the plaintiff's prospects of appealing against his sentence; (3) the legal advice was the subject of legal professional privilege, having been provided by his then solicitor to the plaintiff under cover of a letter also provided to the Department stating that the enclosed legal advice (and related documents) were protected by legal professional privilege and the envelope in which they came was not to be opened nor the documents read or inspected by any person other than the plaintiff; (4) the plaintiff did not intend to waive that legal professional privilege when giving the legal advice to the Department; (5) the Department provided the legal advice to the delegate; and (6) the delegate read and quoted the legal advice in the delegate's reasons.

30 The delegate recorded in para 7 of the delegate's reasons that he had considered the representations made by the plaintiff and the documents provided in support and recorded in para 35, in the context of considering the nature and seriousness of the plaintiff's conduct leading to the plaintiff's conviction, that "[o]verall, [the sentencing judge] found [the plaintiff's] criminality to be of a high order **Attachment H2**". Attachment H2 is the legal advice. As noted, the legal

advice concerned the prospects of the plaintiff successfully appealing against his sentence. The legal advice stated that the sentencing judge found the plaintiff's "criminality to be one of a high order", quoting from the sentencing judge's remarks on sentence. The legal advice concluded that an appeal against the severity of the sentence was unlikely to succeed.

31 The plaintiff submitted that the delegate was on notice that the legal advice was subject to legal professional privilege and had been provided in error, the knowledge of the Department of that fact being attributable to the delegate. Further, that the legal advice contained material adverse to the plaintiff in that it supported an inference that the sentence imposed on the plaintiff was not too severe and therefore had the effect of bolstering the delegate's view as to the seriousness of the plaintiff's offending. According to the submissions, the delegate's use of the legal advice denied the plaintiff procedural fairness and was legally unreasonable in the circumstances.

Discussion

32 The problems for the plaintiff's submissions are twofold. First, it cannot be inferred that the Department or the delegate knew that the plaintiff had provided the legal advice to the Department in support of the plaintiff's representations in error. Second, the content of the legal advice concerned only the prospects of success of the plaintiff appealing against the severity of his sentence. These problems for the plaintiff are related in their consequences for the plaintiff's arguments. The consequences are that, in circumstances where the plaintiff's own representations included that he was "very wrong to commit" the offences, took "full responsibility for [his] actions", and felt "so remorseful" about his conduct, a reasonable inference was open to the Department and the delegate that the plaintiff had provided the legal advice in support of his representations that he recognised the wrong he had done and, as he said he wished, wanted only to "rebuild [his] life as a productive and law-abiding member of society". In the face of that reasonably open inference, it would not be inferred that the Department or the delegate knew that the plaintiff had not intended to waive legal professional privilege in providing the legal advice in support of the plaintiff's representations.

33 Further, the quote from the legal advice is itself a quote from the sentencing judge's remarks on sentence of the plaintiff, which the Department had separately provided to the delegate. The delegate could take no more from the legal advice than that separately established fact and that, given the sentencing judge's assessment of the seriousness of the plaintiff's offending, the plaintiff was unlikely to have been able to successfully appeal against the severity of his sentence. There is no suggestion in the delegate's reasoning that the legal advice had any effect on the delegate's assessment of the seriousness of the plaintiff's offending. It would have been irrational for the delegate to so reason as, the sentence having been

imposed and not having been subject to appeal, the sentence was an incontestable fact, as was the sentencing judge's assessment that the offending was "of a high order". It therefore cannot be said that the legal advice could have bolstered the delegate's conclusion about the seriousness of the plaintiff's offending.

34 For these reasons, the legal advice did not constitute relevant material adverse to the interests of the plaintiff such as to attract an obligation of procedural fairness requiring disclosure to the plaintiff of his error and an opportunity for the plaintiff to claim legal professional privilege over the legal advice. Nor was any practical injustice caused to the plaintiff by not having been given that opportunity. To explain, the sentencing judge's sentencing remarks were relevant adverse material, but the plaintiff was on notice of those remarks and had the opportunity to make representations about them. Therefore, the quote from the legal advice in the delegate's reasons, being no more than a quote from the remarks of the sentencing judge, could not constitute separate relevant adverse material. The opinion in the legal advice that it was unlikely that the plaintiff could successfully appeal against the severity of his sentence is not mentioned in the delegate's reasons. No doubt, this absence reflects the irrelevance of that opinion. Given that the plaintiff had not in fact appealed against sentence, the delegate, in any event, was required to assume the sentence and the remarks on sentence of the sentencing judge to be correct.

35 For the same reasons, the plaintiff's submission that the delegate using the legal advice in the way in which the delegate did was legally unreasonable cannot be accepted. The delegate could have quoted the remarks of the sentencing judge directly; that the delegate did so indirectly by relying on the quote in the legal advice was neither unreasonable nor irrational in the circumstances of this case.

Answers to separate questions

36 The separate questions are to be answered as follows:

- 1) Should an extension of time be granted under s 486A of the [*Migration Act*] for the filing of the application for a constitutional or other writ?

Answer: yes.

- 2) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate, in addressing the legal consequences of the decision:

- a. misapprehended or failed to consider the legal consequences of the decision; and/or

13.

- b. reasoned in a way that was legally unreasonable?

Answer: no.

- 3) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate failed to comply with Ministerial Direction 110, and so failed to comply with s 499(2A) of the [*Migration Act*], in the consideration of the expectations of the community?

Answer: no.

- 4) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate:

- a. denied the plaintiff procedural fairness; and/or

- b. proceeded in a legally unreasonable manner,

by taking into account legal advice given to the plaintiff, without notice to the plaintiff?

Answer: no.

- 5) What relief, if any, should be granted to the plaintiff?

Answer: none.

- 6) Who should pay the costs of the proceeding?

Answer: the plaintiff.