

HIGH COURT OF AUSTRALIA

GAGELER CJ,
JAGOT AND BEECH-JONES JJ

PLAINTIFF M98/2025

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP

DEFENDANT

Plaintiff M98/2025 v Minister for Immigration and Citizenship
[2026] HCA 26

Date of Judgment: 5 August 2026
M98/2025

ORDER

- 1. The application pursuant to s 486A(2) of the Migration Act 1958 (Cth) be refused.*
- 2. The application pursuant to r 4.02 of the High Court Rules 2004 (Cth) be refused.*
- 3. The application for a constitutional or other writ be dismissed.*
- 4. The plaintiff pay the defendant's costs of the proceedings.*

Representation

The plaintiff is represented by Asylum Seeker Resource Centre

The defendant is represented 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 M98/2025 v Minister for Immigration and Citizenship

Administrative law – Judicial review – Visas – Where plaintiff applied for protection (subclass 866) visa – Where evidence plaintiff assigned female gender at birth but identifies as male – Where plaintiff wished to undergo gender-affirming surgery – Where delegate erroneously construed plaintiff's answers in interviews as stating he no longer wished to undertake gender-affirming surgery – Where plaintiff did not assert he feared harm by reason of transgender status – Whether delegate committed jurisdictional error – Whether inability to access gender-affirming surgery in country of origin of itself capable of amounting to "serious harm" or "significant harm" – Whether failure to consider report by Department of Foreign Affairs and Trade – Whether delegate's obligation extends to addressing a claim not identified.

Words and phrases – "claims for protection", "complementary protection", "constitutional or other writ", "country information", "cruel or inhuman treatment or punishment", "degrading treatment or punishment", "denial of access to basic services", "failure to consider", "gender-affirming surgery", "gender identity", "illogical, irrational or unreasonable", "materiality", "protection obligations", "protection visa", "real risk", "serious harm", "significant harm", "standards of civil societies", "transgender status", "well-founded fear of persecution".

High Court Rules 2004 (Cth), rr 4.02, 25.09.3.

Migration Act 1958 (Cth), ss 5, 5H, 5J, 5LA, 36, 411, 412, 474, 476, 476A, 476B, 486A, 499.

1 GAGELER CJ, JAGOT AND BEECH-JONES JJ. On or about 26 November 2025 the plaintiff filed an application for a constitutional or other writ, invoking the original jurisdiction of this Court conferred by s 75(v) of the *Constitution*. The principal relief sought is the issue of writs of certiorari and mandamus directed to the Minister for Immigration and Citizenship ("the Minister"), quashing a decision of a delegate of the Minister made on 14 May 2020 to refuse the plaintiff's application for the grant of a permanent protection visa ("the protection visa application"), and requiring that application to be determined according to law. The plaintiff also seeks orders pursuant to s 486A(2) of the *Migration Act 1958* (Cth) ("the Act") and r 4.02 of the *High Court Rules 2004* (Cth) extending the period in which to file the application.

2 The decision of the delegate was a "Part 7-reviewable decision" within the meaning of former s 411(1)(c) of the Act¹ and therefore was capable of being the subject of an application for merits review by the former Administrative Appeals Tribunal, although no such application was filed within the time period allowed.² Accordingly, the delegate's decision was a "primary decision" within the meaning of s 476(4) of the Act.³ It follows that the Federal Circuit and Family Court of Australia (Division 2) does not have jurisdiction in relation to the decision⁴ and nor does the Federal Court of Australia.⁵ It further follows that these proceedings cannot be remitted to either court.⁶

3 On 14 May 2026, Beech-Jones J referred this application for hearing by a Full Court.⁷ The parties consented to the application being determined on the papers. These reasons explain our conclusion that the application must be dismissed.

1 Namely, the decision was a decision to refuse to grant a protection visa, other than a decision relying on *Migration Act 1958* (Cth), s 5H(2), 36(1B)-(1C) or 36(2C)(a)-(b).

2 *Migration Act 1958* (Cth), s 412(1).

3 *Migration Act 1958* (Cth), s 476(4)(b); see also *Migration Act 1958* (Cth), s 474(2).

4 *Migration Act 1958* (Cth), s 476(2)(a).

5 *Migration Act 1958* (Cth), s 476A(1).

6 *Migration Act 1958* (Cth), s 476B.

7 Pursuant to *High Court Rules 2004* (Cth), r 25.09.3(d).

Background

4 The plaintiff is a national of Malaysia who arrived in Australia in May 2017. On or around 3 August 2017 the plaintiff applied for a Class XA – Protection visa (subclass 866) ("the protection visa").

5 As part of the plaintiff's application to this Court, the plaintiff filed an affidavit in which the plaintiff states that he was assigned a female gender at birth but identifies as male and uses he/him pronouns.

6 In respect of the delay between the delegate's refusal of the protection visa application in May 2020 and the filing of the application for a constitutional or other writ in November 2025, the plaintiff states in his affidavit that in May 2020 he was living in a house with others in Adelaide and received an email notifying him of the refusal of the protection visa application but that he could not read the email because he has difficulties reading English. A housemate read the email and advised him of the refusal. The plaintiff's housemates and their friend then offered to assist him in seeking review of the delegate's decision but asked for \$10,000, which the plaintiff could not afford. After further futile attempts to seek assistance from others, the plaintiff moved to Cairns in late 2020.

7 While the plaintiff was living in Cairns a person applied for and obtained a Bridging E (class WE) (General) (subclass 050) visa on the plaintiff's behalf. The visa was only valid from 19 to 27 May 2021. The person who had provided the assistance did not respond to any request from the plaintiff for further assistance. In October 2022 the plaintiff moved to Melbourne. The plaintiff said that he paid "about \$500-\$600" for a friend to provide him with assistance but the friend only made an (invalid) application for a protection visa on his behalf.

8 Eventually, in December 2022, the plaintiff approached the Asylum Seeker Resource Centre for assistance.

9 An affidavit affirmed by the plaintiff's solicitor recounts the steps taken from that point until the filing of the application in this Court in November 2025, including conducting interviews with the plaintiff through an interpreter, seeking counsel's advice, and obtaining material pursuant to freedom of information requests made to the Queensland police.

10 The affidavits do not satisfactorily explain several periods of delay. Given our conclusion that the plaintiff has not established that the delegate's decision refusing the grant of a protection visa to the plaintiff is affected by jurisdictional error, it is unnecessary to determine whether the lengthy and in part unexplained delays in the filing of this application justify refusal of the application on a discretionary basis.

3.

The plaintiff's claims

11 The protection visa application is not in evidence. However, the delegate's decision recounts the plaintiff's claims in the protection visa application as including that, if he returned to Malaysia, the plaintiff would face familial and societal ostracism on account of his transgender status. The decision records the plaintiff as stating that Malaysia has rules which do not permit a "person [to] have a transgender operation" but that he "will soon have an operation in Australia and become a perfect man" and that after the operation the plaintiff believed that the Malaysian "authorities will accept and protect" him.

12 The plaintiff attended an interview with the delegate on 15 January 2020. The transcript of the plaintiff's interview with the delegate records the plaintiff stating that he came to Australia to "change my life as [a] male", that the protection visa application was completed by a friend, and that "I don't know what's in it".

13 After seeking details concerning the friend who completed the form, the delegate asked the plaintiff open-ended questions as to what harm the plaintiff feared if he returned to Malaysia. The plaintiff stated that he feared retribution from a "loan shark" from whom he borrowed money and was also concerned about the consequences of having applied for a protection visa in Australia and being unable to renew his passport at the Malaysian consulate. At one point the plaintiff stated that he wanted to undergo "a sex change, to change to become a man ... but ... there are too many procedures". When asked if he feared that he would be hurt if he returned to Malaysia, the plaintiff replied, "no harm, I won't be hurt".

14 The following exchange then occurred:

"Q62 Do you fear harm from anybody in Malaysia?

A I'm only – I'm only scared of the loan shark, that's all.

Q63 Is there any reason why you can't report that to the government, to the authorities?

A Because it is illegal.

...

Q66 And what is happening with regards to your – you said that you wanted to have a sex change operation but there's too many things involved. Are you still planning to go ahead with that or not?

A *Yes, I still would like to go ahead with it ... I went to ... a doctor, and a doctor was the one who told me about the numerous procedures*

4.

that I had to go through if I would like to do a sex change. All I can say is that this is my dream, to become a – a man. But at the moment it's impossible because of the numerous procedures." (emphasis added)

15 Later the delegate asked the plaintiff:

"Q72 Did you have difficulties with your parents and family, yes or no?

A Oh no, I have a good relationship with them. My – my parents even accepted my – my dream to become a man, and my family.

Q73 Did you ever have problems with the government or authorities in Malaysia?

A No, no, never.

...

Q84 Okay. Do you fear harm on return to Malaysia for any other reason [than concerns about loan sharks and your passport]?

A Other reasons? I just can't have a sex change. No, no other reasons.

Q85 And what is the reason you can't have a sex change [in Malaysia]?

...

A They don't do that in Malaysia."

16 The delegate's reasons record the plaintiff stating the following at the interview:

"The [plaintiff] ... stated that she came to Australia ... to have a sex change but had experienced a lot of problems and had lost a lot of money and was hurt. [The plaintiff] *also stated that she no longer wants to have a sex change as there are too many procedures.*

...

Later in the interview [the plaintiff] said the reason she did not want to return to Malaysia was because they do not conduct sex change operations there." (emphasis added)

The delegate's reasons for refusing the protection visa application

17 The delegate considered whether the plaintiff was a person in respect of whom the delegate was satisfied that Australia had protection obligations, either because he was a refugee⁸ or because the delegate had substantial grounds for believing that, as a necessary and foreseeable consequence of his removal from Australia to Malaysia, there was a real risk that he would suffer "significant harm" (ie, a complementary protection claim).⁹

18 Insofar as the plaintiff made claims in relation to his inability to receive gender-affirming surgery, the delegate stated:

"While the [plaintiff] confirmed that she is a female to male transgender and had hoped to have a sex change operation, since arriving in Australia and having spoken with a doctor here, she has decided not to proceed with gender reassignment due to the numerous procedures she must undertake.

In consideration of the [plaintiff's] statement at interview that she no longer wishes to proceed with gender reassignment, it follows that I reject the claim relating to Malaysia not offering gender reassignment surgery, as this is no longer a consideration of the [plaintiff]."

19 The delegate then addressed the balance of the plaintiff's claims of feared harm on return to Malaysia against the statutory criteria for establishing his refugee status for the purposes of the Act.¹⁰ Amongst other things, the delegate reviewed material concerning the level of state protection afforded by the Malaysian authorities against reprisals from "loan sharks", and concluded that they were satisfied that "there are effective protection measures available to the [plaintiff] in the receiving country and that the [plaintiff] does not have a well-founded fear of persecution" for this reason.¹¹

20 The delegate also did not accept that the plaintiff would suffer any detriment on return to Malaysia on account of having applied for a protection visa in Australia but accepted that the plaintiff might face a fine and be prevented from further travel for up to two years for not returning on a renewed and valid passport.

8 *Migration Act 1958* (Cth), s 36(2)(a).

9 *Migration Act 1958* (Cth), s 36(2)(aa); see also *Migration Act 1958* (Cth), s 36(2A).

10 See *Migration Act 1958* (Cth), ss 5H, 36(2)(a); see also *Migration Act 1958* (Cth), s 5J.

11 See *Migration Act 1958* (Cth), s 5J(2).

However, the delegate reasoned that a fine or travel prohibition would be the result of a law that was generally applicable to all Malaysian nationals returning to the country under such circumstances, and that the application of such a law does not amount to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹² For the same reason, the delegate concluded that the plaintiff's inability to have his passport renewed, which would prevent his travel to Singapore to obtain work, did not constitute persecution for the purposes of the Act.

21 Otherwise, the delegate was not satisfied that any inability on the part of the plaintiff to "earn a livelihood" in Malaysia would amount to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. The delegate was not satisfied that considered individually or cumulatively the plaintiff would face a real chance of persecution now or in the reasonably foreseeable future. Accordingly, the delegate concluded that the plaintiff was not a refugee for the purposes of the Act.¹³

22 In respect of the complementary protection criteria,¹⁴ the delegate noted their finding that effective protection was available in Malaysia in respect of alleged reprisals by loan sharks.¹⁵ The delegate also noted that the consequences of returning without a passport would be faced by all such persons in those circumstances, as would the difficulties in seeking employment, such that any such risk was one faced by the population of Malaysia generally and not the plaintiff personally.¹⁶ The delegate considered that those conclusions had the consequence that the complementary protection criteria were also not satisfied.¹⁷

Proposed grounds 1 and 2: gender-affirming surgery

23 Proposed ground 1 of the application for a constitutional or other writ contends that in "wrongly determining that the plaintiff no longer wished to proceed with gender-affirming surgery, the delegate reasoned illogically, irrationally, or unreasonably". Proposed ground 2 of the application contends that

12 *Migration Act 1958* (Cth), s 5J(1)(a).

13 *Migration Act 1958* (Cth), s 36(2)(a); see also *Migration Act 1958* (Cth), s 5H.

14 *Migration Act 1958* (Cth), s 36(2)(aa).

15 *Migration Act 1958* (Cth), s 36(2B)(b).

16 *Migration Act 1958* (Cth), s 36(2B)(c).

17 *Migration Act 1958* (Cth), s 36(2)(aa).

7.

the delegate committed jurisdictional error by failing to consider an "integer" of the plaintiff's claims for protection, namely that he feared harm if he returned to Malaysia because he could not receive gender-affirming surgery in that country and by not taking into account relevant country information provided by the Department of Foreign Affairs and Trade ("DFAT") to that effect.¹⁸

24 The "country information" was a detailed report concerning Malaysia prepared by DFAT, dated 13 December 2019 ("the Report"). The relevant part of the Report dealing with sexual orientation and gender identity noted that in Malaysia adult same-sex acts are illegal regardless of age and consent. The Report noted an instance in 2005 in which a transgender person was permitted to change their name, sex marker and related last digit on their identity card, but added that this practice has not been followed "and the National Registration Department does not generally allow transgender people to access such changes". The Report also noted that in 1983 a religious body banned Muslims from undergoing gender-affirming surgery. The Report noted that "[n]either [sexual reassignment surgery] nor transition therapy are available in Malaysia". The Report did not explain why they are not available. The Report also stated that transgender people in Malaysia experience instances of discrimination, violence and harassment.

25 Proposed grounds 1 and 2 are each premised on a contention that the delegate erred by wrongly concluding that the plaintiff did not wish to have gender-affirming surgery. Contrary to the delegate's reasons,¹⁹ the plaintiff told the delegate that he wanted to have gender-affirming surgery, but could not do so "at the moment" because of the numerous procedures involved.²⁰ The plaintiff's answers during the interview with the delegate are capable of being construed as him stating that, although the reason he came to Australia was to undertake such surgery and he does not wish to return to Malaysia because that surgery is not available there, the "harm" he fears on his return is reprisals from loan sharks and difficulties arising with respect to the renewal of his Malaysian passport given his making of the protection visa application. Despite this, the balance of this judgment proceeds on the assumption, favourable to the plaintiff, that he identified in his interview an inability to undergo gender-affirming surgery as a form of harm he would suffer if he returned to Malaysia.

18 As required by *Migration Act 1958* (Cth), s 499(2A) and *Direction No 84 – Consideration of Protection Visa Applications*.

19 See above at [16].

20 See above at [14].

26 The plaintiff's contention in proposed ground 1 that it was illogical, irrational or unreasonable for the delegate to misunderstand the plaintiff's desire to proceed with gender-affirming surgery is no different in substance from the contention raised by proposed ground 2, being that the delegate constructively failed to exercise the jurisdiction conferred on the delegate to decide whether to grant the protection visa by not addressing an "integer" of the plaintiff's claims for protection. However, before a conclusion to that effect could be reached, the plaintiff's claim that he could not undergo gender-affirming surgery in Malaysia had to be at least *capable* of satisfying the delegate, on the material before the delegate, that the plaintiff was owed protection obligations²¹ or complementary protection²² under the Act. If the claim was incapable of meeting that threshold, then the alleged error could not have been material as there is no realistic possibility that a failure to address that claim could have yielded a different decision.²³

27 To the extent that the protection visa application relied on the delegate being satisfied that Australia owed protection obligations to the plaintiff because he is a refugee,²⁴ the plaintiff's claim concerning the unavailability of gender-affirming surgery in Malaysia had to be capable of amounting to "serious harm" to the plaintiff within the meaning of s 5J(4)(b) of the Act.²⁵ To that end, s 5J(5) provides:

"Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of *serious harm* for the purposes of that paragraph:

- (a) a threat to the person's life or liberty;
- (b) significant physical harassment of the person;

21 *Migration Act 1958* (Cth), ss 36(1A)(b), 36(2)(a).

22 *Migration Act 1958* (Cth), ss 36(1A)(b), 36(2)(aa).

23 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [7].

24 See *Migration Act 1958* (Cth), ss 5H(1)(a), 36(2)(a).

25 A person is a refugee if, amongst other matters, they have a "well-founded fear of persecution": *Migration Act 1958* (Cth), s 5H(1)(a). To have a "well-founded fear of persecution", the persecution must "involve serious harm to the person": *Migration Act 1958* (Cth), s 5J(4)(b).

9.

- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person's capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

28 To the extent that the protection visa application relied on the delegate being satisfied of the plaintiff's claim to complementary protection under s 36(2)(aa) of the Act, the unavailability of gender-affirming surgery in Malaysia had to be capable of giving rise to, amongst other things, a "real risk" that the plaintiff would suffer "significant harm" if returned to Malaysia. Section 36(2A) defines "significant harm" as being suffered where a non-citizen is "arbitrarily deprived of his or her life", subjected to the death penalty, "subjected to torture", "subjected to cruel or inhuman treatment or punishment", or "subjected to degrading treatment or punishment".

29 As the issues concerning "serious harm" and "significant harm" were not addressed in the parties' initial submissions, the Court requested additional submissions addressing whether an inability to access gender-affirming surgery in Malaysia is, of itself, capable of amounting to "serious harm" or "significant harm" as defined by the Act.

30 The plaintiff submitted that his inability to access gender-affirming surgery could have successfully engaged Australia's protection obligations and founded a complementary protection claim because that inability: (i) "denies him from expressing a fundamental part of his self-identity as a man"; (ii) exposes him to harm as a lesbian "given his wish to change sexual preference" and the fact that "same sex acts are illegal in Malaysia"; and (iii) "arises in a context of exposure [in Malaysia] to the serious and significant harm faced by lesbians and transgender persons, such as re-education, harassment, violence, arrest and potential prosecution".

31 The defendant accepted that, in a particular case, it may be open to find that the denial of a particular medical treatment or service may result in serious harm or significant harm as defined but added that "[s]uch a finding would be sensitive to the individual facts and circumstances". The defendant submitted that, on the material before the delegate, which referred only to the plaintiff's "dream" of "becom[ing] a man", the "unavailability of gender-affirming surgery in Malaysia

was not capable of amounting to serious or significant harm in respect of the plaintiff in the present case".

32 The defendant's submissions must be accepted. The type of jurisdictional error alleged by the plaintiff is a failure by the delegate to address the protection visa application on the basis that the plaintiff wished to undergo gender-affirming surgery and could not do so in Malaysia. The complaint is not of any failure of the delegate to address whether the plaintiff would suffer discrimination or adverse treatment on his return to Malaysia by reason of his status as a transgender person. The plaintiff did not identify any forms of harm to which he would be subjected on his return to Malaysia if he did not undergo gender-affirming surgery and did not recount any circumstances of having hidden his transgender identity while he lived in Malaysia. There was no material before the delegate to the effect that the plaintiff would suffer any particular adverse physical or mental consequences if he was required to return to Malaysia not having undergone gender-affirming surgery.

33 In these circumstances, grounds one and two must be assessed by determining whether the plaintiff's inability to obtain gender-affirming surgery in Malaysia, of itself and without more, was capable of amounting to "serious harm" for the purposes of engaging Australia's protection obligations or of amounting to "significant harm" for the purposes of a claim to complementary protection.

34 We do not accept that the material before the delegate could demonstrate that the plaintiff's inability to access gender-affirming surgery in Malaysia (and nothing more) amounted to "serious harm" for the purposes of s 5J(4)(b) of the Act. Such a claim was not (of itself) capable of satisfying s 5J(5)(a)-(d) or (f) of the Act. Although not necessarily synonymous, s 5J(5)(e) reflects the observation of the plurality in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*²⁶ that "[o]rdinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution". The concept of "serious harm" and the limbs of s 5J(5) pose an objective test. The material before the delegate was not capable of demonstrating that an inability to access gender-affirming surgery in Malaysia (and nothing more) involved the denial of a "basic" service (including medical treatment), in the sense that lack of access to that surgery would "offend[] the standards of civil societies which seek to meet the calls of common humanity".²⁷

26 (2000) 201 CLR 293 at 303 [29].

27 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303 [29].

35 Similarly, on the material before the delegate, the plaintiff's inability to have gender-affirming surgery in Malaysia (and nothing more) was incapable of amounting to "significant harm" for the purposes of a claim to complementary protection. There was no material suggesting that an inability of that kind involves any circumstance within the scope of that defined term.²⁸ For a person to be subjected to "cruel or inhuman treatment or punishment"²⁹ the conduct must involve the intentional infliction of "severe" pain or suffering (whether physical or mental), or pain or suffering (whether physical or mental) that could reasonably be regarded as cruel or inhuman in nature.³⁰ To constitute "degrading treatment or punishment"³¹ there must be "an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable".³² In the absence of any material before the delegate regarding either the effect on the plaintiff of not undertaking gender-affirming surgery before returning to Malaysia or the intentions (or otherwise) of the Malaysian government in not making such surgery available, there was no material before the delegate capable of demonstrating that the plaintiff's inability to access gender-affirming surgery would constitute an *intentional* infliction of physical or mental pain or suffering or would *intentionally* cause extreme humiliation which is unreasonable.³³

36 Accordingly, proposed grounds 1 and 2 are not established.

Proposed ground 3: alleged failure to consider DFAT report

37 Proposed ground 3 of the plaintiff's application contends that the delegate's decision was affected by jurisdictional error, being an alleged failure to have regard to parts of the Report that concern "loan sharks" as required by s 499(2A) of the Act. Section 499(1) of the Act empowers the Minister to give written directions to persons such as the delegate regarding the performance of their functions or exercise of their powers under the Act. Section 499(2A) obliges such persons to

28 *Migration Act 1958* (Cth), s 36(2A)(a)-(e).

29 *Migration Act 1958* (Cth), s 36(2A)(d).

30 *Migration Act 1958* (Cth), s 5(1) (definition of "cruel or inhuman treatment or punishment").

31 *Migration Act 1958* (Cth), s 36(2A)(e).

32 *Migration Act 1958* (Cth), s 5(1) (definition of "degrading treatment or punishment").

33 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 372 [26]-[27].

comply with such a direction. Such a direction was issued, *Direction No 84 – Consideration of Protection Visa Applications* ("Direction 84"), on 24 June 2019. Direction 84 requires a decision maker such as the delegate to take into account country information assessments prepared by DFAT "expressly for protection status determination purposes", where that information is relevant in making their decision. The plaintiff contends that the delegate did not properly consider the contents of the Report and that the delegate's failure to do so constitutes jurisdictional error.

38 The delegate's reasons contain numerous references to the Report. However, the plaintiff contends that the delegate failed to have regard to part of the Report that states that persons who are unable to service their debts may face societal discrimination and a real or perceived risk of violence from loan sharks. The plaintiff also refers to parts of the Report stating that "[t]here is significant societal shame associated with not being able to repay a loan shark", "[s]ources report that an individual who is unable to service a debt from a loan shark risks threats or actual physical violence", and "DFAT understands that authorities tend to be unsympathetic towards individuals who have accessed loan shark services, regarding them as having participated in an illegal practice".

39 The reasoning of the delegate is summarised above.³⁴ The delegate assessed the plaintiff's claims to protection as they related to "loan sharks" in the context of considering the existence of "effective protection measures" available to the plaintiff in Malaysia.³⁵ The availability of such measures precludes an applicant for a protection visa from satisfying the definition of "refugee" as defined by s 5H of the Act.³⁶ The delegate noted that "[w]hile acknowledging that country information indicates there is some corruption in the police, there is nothing before me that indicates the applicant would be prevented from accessing state protection" and that the "country information [is] indicative of the Malaysian government and law enforcement ... tak[ing] action against loan sharks". The delegate concluded that the plaintiff could access "an appropriate level of state protection in Malaysia such that their fear of serious harm in that country is not well-founded" and the plaintiff "would receive protection from the Malaysian police and judiciary in Malaysia against any threats they face from ... a loan shark".

34 See above at [17]-[22].

35 *Migration Act 1958* (Cth), s 5LA.

36 See *Migration Act 1958* (Cth), ss 5J(2), 5LA; see also *Migration Act 1958* (Cth), s 36(2)(a).

13.

40 Contrary to the plaintiff's contentions, the delegate's conclusion is not "at odds" with the Report. The portions of the Report relied on by the plaintiff do not necessarily undermine the delegate's assessment that there was "nothing" in the materials before them to suggest that the plaintiff would be "prevented" from accessing state protection and that an "appropriate" (ie, effective) level of state protection was available.³⁷ The factual foundation for this proposed ground of the application, namely the alleged inference that the delegate did not have regard to relevant parts of the Report, is not made out.

41 Proposed ground 3 is not established.

Proposed grounds 4 and 5: assessment of risk of future harm

42 Proposed ground 4 contends that in not accepting that Australia owes protection obligations to the plaintiff, or that the plaintiff has a claim to complementary protection, the delegate failed to consider whether the plaintiff may experience harm in the reasonably foreseeable future. Specifically, the plaintiff contends that the delegate failed to address the risk of harm to him arising by reason of the plaintiff's status as a transgender man and his expressed desire to undergo gender-affirming surgery, and his concern that he would be unable to do so in Malaysia.

43 To the extent that ground 4 concerns the plaintiff's desire to undergo gender-affirming surgery, it has already been addressed. To the extent it concerns the plaintiff's transgender status, as noted above, the plaintiff did not assert that he feared harm in Malaysia by reason of such status.³⁸ Although a complementary protection claim does not require the putative visa holder to hold a subjective fear of the relevant harm,³⁹ the delegate's obligation did not extend to addressing a claim that was not identified.⁴⁰

44 Proposed ground 5 contends that there was a failure by the delegate to consider the cumulative effect of the plaintiff's claims for protection, as well as the

37 See *Migration Act 1958* (Cth), s 5LA(2).

38 See above at [32].

39 *DQU16 v Minister for Home Affairs* (2021) 273 CLR 1 at 14 [21].

40 "Assessing the risk that a non-citizen will suffer significant harm within s 36(2A) necessarily involves an assessment of the individual circumstances of the non-citizen and *the basis on which the non-citizen claims that those circumstances give rise to the requisite degree of risk*": *DQU16 v Minister for Home Affairs* (2021) 273 CLR 1 at 13 [19] (emphasis altered).

14.

risk of harm arising from the plaintiff owing money to a loan shark. This ground rises no higher than the other grounds.

45 Proposed grounds 4 and 5 are not established.

Extension of time

46 In light of the failure of each of the proposed grounds of the application, it would be futile to extend the time available for the bringing of the application.

Relief

47 The parties agreed that costs would follow the event.

48 The following orders should be made:

1. The application pursuant to s 486A(2) of the *Migration Act 1958* (Cth) be refused.
2. The application pursuant to r 4.02 of the *High Court Rules 2004* (Cth) be refused.
3. The application for a constitutional or other writ be dismissed.
4. The plaintiff pay the defendant's costs of the proceedings.

