FEDERAL COURT OF AUSTRALIA

Caric v Minister for Immigration and Border Protection [2017] FCA 1391

File number:	NSD 463 of 2017
Judge:	**BROMWICH J**
Date of judgment:	28 November 2017
Catchwords:	**MIGRATION** – cancellation of visa on character grounds – request for revocation of cancellation decision under s 501CA of the *Migration Act 1958* (Cth) – application for judicial review – whether issue of possible statelessness and indefinite detention was sufficiently raised on the material before the Parliamentary Secretary to the Minister – whether Parliamentary Secretary failed to consider the legal consequences for the applicant of the decision not to revoke the cancellation of her visa – whether Parliamentary Secretary failed to consider a substantial, clearly articulated argument relying upon established facts – where error established – whether final relief should be withheld on the ground of futility
Legislation:	*Evidence Act 1995* (Cth) ss 79, 144 *Migration Act 1958* (Cth) ss 501, 501CA
Cases cited:	*Australian Communist Party v Commonwealth* (1951) 83 CLR 1 *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151; 139 FCR 292 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 *Gill v Minister for Immigration and Border Protection* [2017] FCAFC 51 *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1 *NBNB v Minister for Immigration and Border Protection* [2014] FCAFC 39; 220 FCR 44 *Parmar v Minister for Immigration and Citizenship* [2011] FCA 760; 195 FCR 186 *R v Army Council; Ex parte Ravenscroft* [1917] 2 KB 504 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57;

(2000) 204 CLR 82

Shrestha v Minister for Immigration and Border Protection [2017] FCAFC 69

Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Law Book Co, 2017)

Date of hearing:	28 September 2017
Date of last submissions:	11 October 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	44
Counsel for the Applicant:	Mr M Robinson SC with Mr J Donnelly
Solicitor for the Applicant:	D'Agostino Solicitors
Counsel for the Respondent:	Ms R Francois
Solicitor for the Respondent:	Mills Oakley

ORDERS

NSD 463 of 2017

BETWEEN:	**MIRJANA CARIC** Applicant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent

JUDGE: **BROMWICH J**

DATE OF ORDER: **28 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. The decision of the Parliamentary Secretary made on 28 February 2017 not to revoke the applicant's visa cancellation be set aside.
2. The applicant's request to the respondent to revoke her visa cancellation be remitted for reconsideration according to law.
3. The respondent pay the applicant's costs of and incidental to these proceedings as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 This is an application for judicial review of a decision made by the **Parliamentary Secretary** to the respondent, the Minister for Immigration and Border Protection, not to revoke the mandatory cancellation of the applicant's visa on character grounds.

Background

2 The applicant was born in 1965 in the former Socialist Federal Republic of Yugoslavia. She came to Australia with her parents at the age of two. She has lived in Australia since 27 May 1968 as the holder of a Class BF transitional (permanent) visa, having never become an Australian citizen. She has not left Australia since arriving here as a child.

3 On 22 April 2016, a delegate of the Minister cancelled the applicant's visa under s 501(3A) of the *Migration Act 1958* (Cth). The cancellation was mandatory by reason of the applicant's extensive criminal history over many years, the details of which are not in dispute and are not material to the issues raised in this application. She had been given multiple warnings of the risk of visa cancellation if her criminal activities were to continue.

4 On 26 April 2016, the applicant applied to have the delegate's visa cancellation decision revoked under s 501CA of the *Migration Act*. It was not suggested that there were other than ample reasons for the visa cancellation to have taken place, having regard to the applicant's criminal history in isolation from the rest of her circumstances. Revocation of that cancellation was instead sought largely upon the bases of the applicant's compelling personal circumstances and the impact that her removal from Australia would have on child relatives and other family members.

5 On 28 February 2017, the Parliamentary Secretary decided not to revoke the delegate's visa cancellation decision. On 29 March 2017, the applicant applied for judicial review by this Court of the Parliamentary Secretary's decision. There was no objection to the Minister being named as the respondent to the proceeding.

6 While the applicant relies upon five grounds of review, which are detailed and addressed below, the outcome of each ultimately turns on whether the Parliamentary Secretary failed to consider the real possibility that the applicant might be stateless and would face the prospect of indefinite detention in Australia consequent upon a decision not to revoke her visa

cancellation. That possibility was said to have been raised on the material before the Parliamentary Secretary and, in particular, in a submission that there were large questions remaining as to whether any of the states emerging from the breakup of the former Yugoslavia would recognise the applicant's citizenship.

7 It was, quite properly, not disputed by the Minister that, if a real possibility of indefinite detention had been raised before the Parliamentary Secretary, a failure by the Parliamentary Secretary to consider that issue would amount to a jurisdictional error, based on the Full Court's decisions in ***NBMZ*** *v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1 and ***NBNB*** *v Minister for Immigration and Border Protection* [2014] FCAFC 39; 220 FCR 44. In both of those cases, the Full Court concluded that an adverse visa decision could not be made without regard to the *legal* consequences of the decision. In each of those cases, indefinite detention was the legal consequence in issue. Counsel for the Minister argued that, on a proper reading of the material before the Parliamentary Secretary, this was not a case where such an obligation had arisen.

8 By the time of the hearing, an issue had emerged as to whether, if jurisdictional error was found, the Court should nonetheless withhold relief in the exercise of its discretion upon the ground of futility. That issue is addressed at the end of these reasons.

The material before the Parliamentary Secretary and his reasons

9 The Parliamentary Secretary had before him a detailed submission with some 20 attachments. In his decision record, he expressly stated that he had considered "*all evidence before [him]*", such that he must be taken to be cognisant of all of the material in both the submission and attachments.

10 The relevant part of the Parliamentary Secretary's reasons grounding the present challenge are conveniently contained in a discrete section as follows, being the only part of those reasons that addressed the issue of the applicant's return to some part of the former Yugoslavia:

> **Extent of impediments if removed**
>
> 29. In coming to my decision about whether or not I am satisfied that there is another reason why the original decision should be revoked, I have had regard to the impediments that Ms CARIC will face if removed from Australia to her home country in part of what was the Federal Republic of Yugoslavia in establishing herself and maintaining basic living standards.
>
> 30. Ms CARIC is a 52 year old woman. She has advised she has been an active

> drug addict from many years, particularly to heroin, and as such has been a long-term participant, and continues to be, on the methadone program to treat this addiction.
>
> 31. I have considered that Ms CARIC has never travelled outside of Australia in the 49 years she has lived here, has no family or friends anywhere other than in Australia, can only speak English and is '*absolutely horrified*' at the prospect of being deported to a country she knows nothing about.
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> 32. I have had regard to the various letters of support from Ms CARIC's family and friends in which they have all expressed their concerns for her safety, welfare, state of mind and her ability to survive in another country away from her family.
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> 33. Ms CARIC's legal representative has submitted that she has no familial or social ties to the area which constitutes the Former Republic of Yugoslavia, would not be able to find work there because of her ongoing back issues, is unlikely to receive any government benefits and as such could end up homeless, which could lead to the shortening of her life. I accept that having been away from her country of origin for close to 50 years and having no personal support network there together with her health and substance abuse issues, that it would be extremely difficult for her to make the necessary adjustments to life there.

11 The material before the Parliamentary Secretary that went to the issue of the applicant's return to what was formerly Yugoslavia was as follows:

(1) In a request for revocation form dated 26 April 2016, the applicant left the box for "*Country of Citizenship*" blank and also stated that she did not know anything about the place where she was born, apart from it being a war-torn country full of refugees.

(2) In an accompanying personal details form, the applicant:

  (a) wrote that she was born in Yugoslavia, with no further details;

  (b) left blank the entry for citizenship and ticked a box "*no*" to indicate she did not have a passport or travel/identity document; and

  (c) in answer to a question about her fears as to what would happen to her on return to her country of citizenship, stated that she had never lived anywhere other than Australia, asking rhetorically where she would return to.

(3) In a form containing further accompanying details submitted by her solicitor, the applicant:

  (a) recorded her country of citizenship as "*Croatia*" under the section titled "*personal details*";

(b) recorded her place of birth as "*Croatia (Formerly Yugoslavia?)*" under the section titled "*personal data*", and again ticked a box reading "*no*" to indicate that she did not have a passport or travel/identity document; and

(c) in answer to a question about her fears as to what would happen to her on return to her country of citizenship, stated that she did not speak any language other than English and had no way to "*communicate with members of the Croatian community*" and had an "*inability to have drug treatment in Croatia or family support*".

(4) In a signed statement dated 9 May 2016, the applicant said (omitting unnecessary detail) that:

(a) she was born in Yugoslavia in 1965 and understood that "*Yugoslavia is no longer a sovereign state in the world*"; and

(b) she was "*absolutely horrified at the prospect of being deported to a country that [she knew] nothing about, wherever that may be*".

(5) In written submissions furnished on behalf of the applicant by her migration agent and dated 9 May 2016 (**applicant's submissions**), it was stated:

> 28. The applicant understands that she was born in the former kingdom of Yugoslavia. However, the applicant is not entirely sure what town or area in that territory she was born. Perhaps more importantly, the applicant is not even clear if the modern equivalent of the applicant's place of national origin is Croatia.
>
> 29. In those circumstances, large questions remain as to whether the applicant's place of national origin would recognise her for citizenship. If that is the case, then the applicant cannot be deported from Australia (and places the applicant in the precarious position of having no lawful residence of any sovereign state in which to reside).
>
> …
>
> 34. Otherwise, the applicant only speaks the English language fluently. In those circumstances, absent speaking another language, the applicant would suffer extraordinarily in seeking to make a life for herself in the territory formerly known as Yugoslavia. The applicant has no ties of any kind to that region of the world, or for that matter any region of the world other than Australia.
>
> 36. Further, the inescapable conclusion is likely to be that the applicant would become homeless if she was deported to the territory formerly known as Yugoslavia. …
>
> …
>
> 38. The applicant is currently 51 years of age. The applicant's health is not the best. There are substantial language and cultural barriers, given that the applicant was brought up in Australia since the age of

> two. The applicant does not speak Croatian. There is no evidence that [the] applicant will attract positive social, medical and economic support in her place of national origin. In those circumstances, the applicant would suffer extraordinarily difficult impediments if removed from Australia.

Was the issue of possible indefinite detention sufficiently raised on the material before the Parliamentary Secretary?

12 Senior counsel for the applicant submitted that the material before the Parliamentary Secretary sufficiently raised as an issue the possibility that the applicant would be stateless and face the prospect of indefinite detention if the cancellation of her visa were not revoked. In response, it was submitted by counsel for the Minister that the submissions and material detailed above gave rise to no more than speculation as to the topic of statelessness and indefinite detention. In those circumstances, it was submitted that there is no jurisdictional error in failing to consider the issue, citing ***Djalic*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151; 139 FCR 292 at [87].

13 The Minister would have had the better argument but for [29] of the applicant's submission before the Parliamentary Secretary, reproduced at [11(5)] above. That paragraph squarely raised an apparently serious question as to whether the applicant's place of origin would recognise her for citizenship purposes, and specifically asserts that if not, she could not be deported from Australia. While the submissions do not take the final step of adverting to indefinite detention, that must be the obvious and inevitable prospect for a stateless person in Australia if their visa has been cancelled and the cancellation decision is not revoked.

14 Having regard to the nature of the issue raised at [29] of the applicant's submission to the Parliamentary Secretary, the following passage in *Djalic* relied upon by the Minister is distinguishable (emphasis added):

> 87 The appellant submitted that the Minister had failed to take account of a relevant consideration, namely whether the appellant could be repatriated to any part of the former Yugoslavia. This was a relevant consideration, however, only if s 501(2) of the *Migration Act*, in its proper construction, compelled the Minister to take it into account. No cogent reason was put forward to construe s 501(2), which confers a power to cancel a visa, to require the Minister to consider whether the appellant could actually be removed to the former Yugoslavia. Once the appellant's visa was cancelled, he became liable to detention and removal from Australia. **There was no evidence that there would be in fact be any difficulty in removing the appellant to Serbia or some other part of the former Yugoslavia.** If such a difficulty is encountered it may give rise to other issues. **But there is nothing in the legislative structure to indicate that a potential difficulty in removing a non-citizen must be taken into account by the Minister**

when deciding whether or not to cancel the non-citizen's visa.

15 Following *NBMZ* and *NBNB*, the last sentence in the above quote from *Djalic* must now be read in the context of the requirement to take into account the legal consequences of a decision, such as the possibility of indefinite detention that might flow from a decision not to revoke the cancellation of a person's visa.

16 In the present case, the submissions and material advanced on the applicant's behalf go beyond making an unsubstantiated assertion of the mere "*difficulty*" that may be involved in removing her to the former Yugoslavia. The emphasised part of the applicant's submissions at [29], in the context of the rest of the material before the Parliamentary Secretary, raised a substantive question as to the legal consequences of a decision not to revoke the visa cancellation. That is, the case advanced on behalf of the applicant unavoidably raised the question of whether she would face the prospect of indefinite detention in Australia if the cancellation decision were not revoked. In those circumstances, the issue was not a matter that could be overlooked, disregarded or allowed to pass without proper consideration in the determination of the request for revocation of her visa cancellation: *NBMZ* at [178].

17 Similarly, consideration of the express claim raised at [29] of the applicant's submissions was also required in the proper exercise of jurisdiction by reason of its character as a "*substantial, clearly articulated argument relying upon established facts*": ***Dranichnikov*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at [24].

18 It is important to emphasise in this context that it is no part of this Court's role to assess the validity of the claim made, unless, perhaps, it is manifestly spurious. Provided the claim went beyond idle speculation and raised a serious issue of a kind capable of producing a different decision, the Parliamentary Secretary was required to consider it. The question of whether, upon proper consideration, the issue raised of indefinite detention would necessarily or inevitably be determined adversely to the applicant goes to the exercise of the discretion to withhold relief, rather than to the existence of jurisdictional error.

19 It was not disputed that the assertion in the applicant's submissions at [29] was not canvassed in the submissions to the Parliamentary Secretary, and was not addressed in the Parliamentary Secretary's reasons. In those circumstances, I am satisfied that the Parliamentary Secretary's reasons disclose a failure to consider the issue of possible indefinite detention. In accordance with the authorities set out above, that failure was a jurisdictional error.

The grounds of review

20 It is sufficient that the finding of jurisdictional error above sustains one or more of the grounds of review. Strictly speaking, there is no need to go further. However, in deference to the efforts of the parties in providing written submissions on each ground, and the possibility that this may not be the end of the debate, some view should be expressed on each.

21 The above reasons for finding jurisdictional error mean that ground 1 must succeed, at least insofar as the Parliamentary Secretary failed to have regard to the legal consequences of his decision, namely, that the applicant might face the prospect of indefinite detention in Australia.

22 Ground 2 asserts jurisdictional error by reason of the Parliamentary Secretary's failure to identify the specific country the applicant would be sent to upon removal from Australia and to give consideration to her position pending resolution of that issue. That ground cannot be sustained. The Parliamentary Secretary's reasons indicate that the applicant would be sent to some part of the former Yugoslavia, with it being evident that the precise country had not yet been ascertained. Without more, and absent the basis for error identified by ground 1, that did not raise for consideration a possibility of statelessness and indefinite detention. As was the case in *Djalic*, it represented no more than a potential difficulty in removing the applicant to some part of the former Yugoslavia. It was not necessary to know, at the visa cancellation/non-revocation stage, which of the countries emerging from the breakup of the former Yugoslavia the applicant would be returned to. The applicant made it clear that she had come from [the former Socialist Republic of] Croatia, but was not sure if that was still within the borders of [the now Republic of] Croatia. Absence of that precise knowledge was not of itself a jurisdictional error, provided there was nothing to indicate as an issue that none of the countries emerging from the collapse of Yugoslavia would be likely to recognise the applicant for citizenship purposes. That problem is the gravamen of ground 1, not ground 2.

23 Ground 3 is expressed in terms of a denial of procedural fairness (or natural justice), relying on what was said by Gummow and Callinan JJ in *Dranichnikov* at [24], to the effect that a failure to respond to a "*substantial, clearly articulated argument relying upon established facts was at least to fail to accord … natural justice*". This ground of review succeeds, but only to the extent that it is another way of expressing ground 1.

24 Ground 4 asserts that there was no evidence or other material to justify the decision of the Parliamentary Secretary. In substance, this was another way of asserting an obligation to

identify precisely which country the applicant would be sent to. As such, it is a reworking of ground 2, and must fail for the same reason.

25 In large part, ground 5 recast the arguments under the preceding grounds of review in terms that the decision of the Parliamentary Secretary was legally unreasonable and/or illogical or irrational. While the applicant's arguments have been accepted in respect of grounds 1 and 3, it may be doubted that the jurisdictional error identified should properly be characterised as legal "*unreasonableness*" for the purposes of ground 5. In any event, nothing turns on the conceptual distinction in this case. As expressed and argued, this ground must fail.

Discretion

26 The applicant seeks an order that the Parliamentary Secretary's decision be quashed and an order be directed to the Minister to reconsider revocation of the applicant's visa cancellation according to law. Although jurisdictional error has been found, the grant of this relief is discretionary and may be withheld on the ground of futility. This is because a court will not grant a writ unless satisfied that it will be effectual: *R v Army Council; Ex parte Ravenscroft* [1917] 2 KB 504 at 511.5. It may not be granted if, inter alia, no useful result could ensue: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 at 400, cited with approval and quoted in *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [56].

27 There is a need for considerable caution before a remedy is withheld on the ground that it could produce no useful result. Full Court authority suggests that the discretion to withhold relief should only be exercised where the eventual outcome is "*crystal clear*": see *Gill v Minister for Immigration and Border Protection* [2017] FCAFC 51 per Griffiths and Moshinksy JJ at [95]; see also ***Shrestha*** *v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [12] and [45] (special leave to appeal to the High Court has been granted in *Shrestha*). Both Full Court decisions quote Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Law Book Co, 2017) at [17.150] as follows:

> There is in all of these instances a real danger in saying that the ultimate outcome is obvious. Unless the eventual outcome is crystal clear, a consideration of the likely outcome might shade into a consideration of the desirable outcome, which is something that must be left to the primary decision-maker.

28 In the present case, the discretion to refuse relief should only be exercised if it is crystal clear that, notwithstanding proper consideration by the Minister or his delegate of the issue of indefinite detention as raised by the applicant, there would be no possibility of a successful outcome for the applicant.

29 To illuminate this issue thus raised, immediately prior to the hearing of the application for review, I caused my associate to send by email to the parties a publication of the United Nations High Commissioner for Refugees (**UNHCR**), entitled *Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia*, European Series, vol 3, no 1 (June 1997) (**UNHCR publication**), being material of the kind that could be before a decision-maker in a case such as this. The UNHCR publication was located on the United Nations' website. The email also reproduced the following passages from the UNHCR publication addressing the issue of citizenship after the dissolution of Yugoslavia:

> With the disintegration of the SFRY [Socialist Federal Republic of Yugoslavia] and in the absence of a Succession Treaty, all States stemming from the SFRY have enacted citizenship laws to determine their initial body of citizens as well as to establish conditions to acquire and lose citizenship. Apart from Bosnia and Herzegovina, none of the other states are signatory to the 1961 Convention on the Reduction of Statelessness. All have confirmed being bound through succession to the 1954 Convention relating to the States of Stateless Persons which was ratified by the SFRY on 9 April 1959. The Socialist Federal Republic of Yugoslavia was characterized by a double level of citizenship, all former SFRY citizens were citizens of the Federal Republic and were also registered with a republican citizenship of one of the six SFRY Republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia).
>
> …
>
> The Law on Croatian Citizenship (No. 53. 8 October 1991, the law on amendments was published under No. 28, 18 May, 1992 and became effective on 26 May 1992) determines two basic rules to define the initial body of citizens of the Republic of Croatia. The first rule is the application of the principle of legal continuity of the republican citizenship: all former SFRY citizens who had the republican citizenship of the Socialist Republic of Croatia on the day of October 8, 1991, regardless of where these persons actually had domicile, automatically became citizens of the Republic of Croatia (Article 30.1).

30 Further, the email reproduced s 144 of the *Evidence Act 1995* (Cth) as follows, noting, in particular, subsection (4):

> (1) Proof is not required about knowledge that is not reasonably open to question and is:
>
> (a) common knowledge in the locality in which the proceeding is being

held or generally; or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

31 At the commencement of the hearing of the application for review, I raised with the parties the question of whether, pursuant to s 144 of the *Evidence Act*, the UNHCR publication could be taken into account, either in determining the fate of the grounds of review or in considering the exercise of the discretion to withhold relief. Counsel for the Minister contended that the UNHCR publication could be taken into account for both purposes, as denying any real possibility that the applicant is stateless and would face the prospect of indefinite detention. Senior counsel for the applicant submitted that the UNHCR publication could not, and should not, be taken into account for either purpose. Leave was granted for both parties to provide supplementary written submissions after the hearing.

32 The applicant's argument that the UNHCR publication could not, or at least should not, be taken into account for the purpose of determining whether the Parliamentary Secretary's decision was affected by relevant error should be accepted. That determination was required to be confined to the material that was before the Parliamentary Secretary and his reasons. The UNHCR publication was material that could have been before the Parliamentary Secretary, but was not. Whatever awareness might be shown on the part of the Parliamentary Secretary of the continuity of citizenship in the states emerging from the former Yugoslavia cannot ameliorate the error disclosed in his reasons of failing to consider and address the issue of statelessness and indefinite detention as sufficiently raised in the material before him.

33 Two key questions remain. The first is whether the contents of the UNHCR publication can be relied upon pursuant to s 144(1)(a) or (b) of the *Evidence Act*. The second is whether the facts that may be established by a decision-maker on remittal, by reference to the UNHCR publication, negate the reasonable possibility of any conclusion by the decision-maker on

remittal that the applicant is stateless and would face the prospect of indefinite detention if the cancellation of her visa is not revoked.

34 As to the threshold issue, senior counsel for the applicant resisted the Minister's proposition that the Court could properly inform itself by reference to the UNHCR publication.

35 First, it was submitted that, for the purposes of s 144(1)(a), the purported facts contained in the UNHCR publication are not common knowledge in the locality in which the proceeding was being held or generally. It was submitted that the purported facts relate to complex legal and political data of a foreign jurisdiction, and that courts are not entitled to inform themselves of, and take into consideration, particular features of a legal instrument of a foreign state as a matter of judicial notice, citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

36 Secondly, it was submitted that, for the purposes of s 144(1)(b), the purported facts are not capable of verification by reference to the UNHCR publication as a document of which the "*authority … cannot reasonably be questioned*". It was submitted that:

(1) although the publication represents that its contents were written by independent national experts, it is impossible to authenticate the reliability of those experts in the absence of their curriculum vitae;

(2) the expert legitimacy of the publication may be doubted in circumstances where it makes plain that its contents do not reflect "*an in-depth analysis of the various legal positions on the grant of nationality following the dissolution of a State*";

(3) questions of citizenship relating to foreign law are to be resolved as questions of fact by reference to expert opinion, citing *Re Roberts* [2017] HCA 39. The publication is said to be unsatisfactory for this purpose because the particular opinions of the "*independent experts*" are given without identification of the expert witnesses' "*specialised knowledge*". It was suggested that the publication would therefore not be admissible as expert evidence for the purposes of s 79 of the *Evidence Act*;

(4) it is not sufficient that the UNHCR publication might be thought of as a reliable source of information – rather, the standard directed by s 144(1)(b) is "*high*", as considered by Perram J in *Parmar v Minister for Immigration and Citizenship* [2011] FCA 760; 195 FCR 186; and

(5) the Court would not rely upon an "*unofficial translation*" of the *Act of Croatian Citizenship* (6 October 1991), which is annexed to the publication and is said to be partly representative of the subsisting citizenship arrangements in the Republic of Croatia.

37 The Minister's submissions addressed each of the applicant's points in turn. It was submitted that the experts and material relied upon in preparing the UNHCR publication are identified in the report, and could be the subject of independent research by the applicant. It was submitted that the "*authority*" of the UNHCR is not reasonably open to question, having regard to the UNHCR's position as a specialist, independent and international body specifically tasked with, amongst other things, reducing statelessness. It was submitted that, while it might be true that questions of foreign citizenship are to be resolved by expert opinion, the critical question in these proceedings is not which state would recognise the applicant as a citizen but, rather, whether the decision-maker on remittal could find that there is a real possibility that the applicant might face the prospect of indefinite detention. It was submitted that Perram J's comments in *Parmar* should be understood having regard to the different facts of that case, which concerned whether the content of certain business websites met the "*high*" standard required by s 144(1)(b). It was submitted that the fact that the "*Act of Croatian Citizenship*" annexed to the publication is an unofficial translation is not relevant to the issue in these proceedings.

38 I do not accept the burden of the applicant's submissions that no reliance can be placed on the UNHCR publication under s 144, remembering that this is for the purpose of ascertaining the question of whether remittal would be futile. The UNHCR is an independent international body, specifically tasked with the reduction of statelessness, among other things. Decision-makers on a range of migration decisions routinely place reliance on UNHCR and other United Nations publications. Such decision-makers are not courts of law. The contents of the publication fall well within the purview of such decision-makers, and may not reasonably be doubted to the extent that they canvass historical legal developments of an open and publicly known nature. Accordingly, I am willing to have regard to the contents of the UNHCR publication as material that would likely be before the decision-maker on remittal, confined to the question of discretion, although care must be taken in characterising the facts that may thereby be established, even by such a decision-maker.

39 It should be emphasised that the UNHCR publication does not purport to provide an in-depth analysis of citizenship law governing the various states emerging from the former Yugoslavia, nor would it be safe to rely upon that publication for such analysis. In particular, it provides information about the fact and general effect of the passing of laws addressing the acquisition and loss of citizenship in the states emerging from the former Yugoslavia and, most relevantly, the provision for continuity of citizenship for citizens of the former Socialist Republic of Croatia.

40 The UNHCR publication suggests that it may be doubted that the applicant is in fact stateless. That is because, unsurprisingly, the states emerging from the disintegration of the former Yugoslavia have enacted laws addressing the issue of continuity of citizenship. That position is supported by the particular reference in the publication to the legal continuity of "*republican citizenship*", and where it is noted that "*all citizens of the former Yugoslavia who also had republican citizenship of the Socialist Republic of Croatia on the day of October 8, 1991, regardless of where those persons actually had domicile, became citizens of the Republic of Croatia*".

41 However, reference to the UNHCR publication cannot be said to lead inescapably to the conclusion that the decision-maker on remittal would find that there is no possibility that the applicant might be stateless and therefore would not face the prospect of indefinite detention if the cancellation of her visa were not revoked. First and foremost, that is because the UNHCR publication is not to be relied upon as an "*in depth analysis*" of the current state of the relevant citizenship laws, noting also that it cannot reflect any changes that might have been implemented since its release in 1997. Accordingly, it cannot safely be relied upon as establishing the current arrangements governing citizenship in the states emerging from the former Yugoslavia, let alone establishing those conclusively.

42 Secondly, although the UNHCR publication assuages some doubt about issues of continuity of citizenship, it is not clear on the material before the Parliamentary Secretary that was in evidence that the applicant in fact had citizenship of the former Yugoslavia at 8 October 1991. Relevantly, the submissions accompanying the applicant's request to revoke her visa cancellation stated that "*large questions remain as to whether the applicant's place of national origin would recognise her for citizenship*". The applicant had also stated in her request for revocation of the cancellation of her visa that she was "*NOT SURE?*" of her citizenship status, albeit that she had entered "*Croatia*" in the box for "*Country of*

Citizenship" under the section for personal details. As to the uncertainty surrounding the applicant's status, senior counsel for the applicant made reference to information in the UNHCR publication that suggests that a child in the former Socialist Republic of Croatia would only have acquired citizenship of the Socialist Republic of Croatia automatically if born within the territory and if both parents had Croatian citizenship. He also referred to information suggesting that where only one parent of a child had such citizenship, the parents would need to have agreed for citizenship to be conferred.

43 Upon remittal, it is possible that the Minister, his delegate or the Parliamentary Secretary may readily be able to address the applicant's concerns about statelessness and allay concerns about the prospect of indefinite detention. Such concerns may also be negated by other factual findings open to the decision-maker on the available material. However, in circumstances where there has been a failure to consider the issue and the outcome is other than inevitable, these are matters best left for the primary decision-maker to determine. The final relief sought by the applicant will be granted accordingly.

Conclusion

44 The application must be allowed with costs.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate:

Dated: 28 November 2017