# FEDERAL CIRCUIT COURT OF AUSTRALIA

*ENT19 v MINISTER FOR HOME AFFAIRS* *[2020] FCCA 2653*

Catchwords:
MIGRATION – Review of a decision to refuse a protection visa in the national interest made personally by the Minister – applicant claiming a fear of harm in Iran – applicant recognised as a refugee by the Immigration Assessment Authority – Minister refusing the visa because of the applicant's involvement in people smuggling – Minister issuing a conclusive certificate preventing merits review – whether the Minister failed to have regard to the consequences of his decision – whether the Minister acted in a procedurally unfair manner – or made an unreasonable, illogical or irrational decision considered – no jurisdictional error.

Legislation:
*Acts Interpretation Act 1901* (Cth), s.25D
*Australian Citizenship Act 2007* (Cth), s.25
*Australian Security Intelligence Organisation Act 1979* (Cth), s.4
*Migration Act 1958* (Cth), ss.4, 5H, 33, 35A, 36, 65, 196, 197C, 198, 338, 473BD, 476
*Migration Regulations 1994* (Cth)

Cases cited:
*Ali v Minister for Home Affairs* [2020] FCAFC 109
*Anderson v Director-General of the Department of Environmental and Climate Change* (2008) 251 ALR 633
*Australian Crime Commission v NTD8* (2009) 177 FCR 263
*Ayoub v Minister for Immigration* [2015] FCAFC 83
*Brown v Minister for Home Affairs* [2018] FCA 1722
*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576
*CPCF v Minister for Immigration* (2015) 255 CLR 514
*CPJ16 v Minister for Immigration* [2020] FCA 980
*DFTD v Minister for Home Affairs* [2020] FCA 859
*Djalic v Minister for Immigration* (2004) 139 FCR 292
*DMH16 v Minister for Immigration* [2017] FCA 448
*EGH19 v Minister for Home Affairs* [2020] FCA 692
*EHF17 v Minister for Immigration* [2019] FCA 1681
*F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295
*Graham v Minister for Immigration* (2017) 263 CLR 1
*Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438
*Jione v Minister for Immigration* (2015) 232 FCR 120

*Kassem v Minister for Home Affairs* [2019] FCA 1196
*Kaur v Minister for Immigration* (2017) 256 FCR 235
*Leiataua v Minister for Immigration* (2012) 208 FCR 448
*Maurangi v Bowen* (2012) 200 FCR 191
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
*Minister for Home Affairs v Brown* [2020] FCAFC 21
*Minister for Immigration v Anthonypillai* (2001) 106 FCR 426
*Minister for Immigration v Jia* (2001) 205 CLR 507
*Minister for Immigration v Huynh* (2004) 139 FCR 505
*Minister for Immigration v Nystrom* (2006) 228 CLR 566
*Minister for Immigration v Stretton* [2016] FCAFC 11
*Minister for Immigration v SZGUR* (2011) 241 CLR 594
*Minister for Immigration v SZJSS* (2010) 243 CLR 164
*Minister for Immigration v SZMDS* (2010) 240 CLR 61
*Minister for Immigration v Yusuf* (2001) 206 CLR 323
*Murad v Minister for Border Protection* [2016] FCA 876
*MZAGK v Minister for Immigration* (2014) 226 FCR 311
*NBMZ v Minister for Immigration* (2014) 220 FCR 1
*NBNB v Minister for Immigration* [2014] FCAFC 39
*Plaintiff S297/2013 v Minister for Immigration & Anor* (2015) 255 CLR 231
*R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407
*Re Gungor v Minister for Immigration* (1980) 3 ALD 225
*Re Minister for Immigration; ex parte Lam* (2003) 214 CLR 1
*Re Minister for Immigration; Ex parte Palme* (2003) 216 CLR 212
*Re Sergi v Minister for Immigration* (1979) 2 ALD 22
*Snedden v Minister for Justice* (2014) 230 FCR 82
*SZBEL v Minister for Immigration* (2006) 228 CLR 152
*SZBYR v Minister for Immigration* (2007) 81 ALJR 1190
*Taulahi v Minister for Immigration* [2016] FCAFC 177
*Tuncok v Minister for Immigration* [2004] FCAFC 172
*WAHP v Minister for Immigration* [2004] FCAFC 87
*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492
*Wong v Minister for Immigration* [2002] FCA 959

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|---|---|
| Applicant: | ENT19 |
| Respondent: | MINISTER FOR HOME AFFAIRS |
| File Number: | SYG 1425 of 2020 |
| Judgment of: | Judge Driver |
| Hearing date: | 2 September 2020 |

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|---|---|
| Delivered at: | Sydney |
| Delivered on: | 6 November 2020 |

**REPRESENTATION**

| | |
|---|---|
| Counsel for the Applicant: | Dr J Donnelly |
| Solicitors for the Applicant: | Scott Calnan Lawyer |
| Counsel for the Respondent: | Ms R Francois |
| Solicitors for the Respondent: | Australian Government Solicitor |

## ORDERS

(1) The application filed on 12 June 2020 is dismissed.

# FEDERAL CIRCUIT COURT
# OF AUSTRALIA
# AT SYDNEY

## SYG 1425 of 2020

**ENT19**
Applicant

And

**MINISTER FOR HOME AFFAIRS**
Respondent

## REASONS FOR JUDGMENT

## Introduction and background

1. The applicant seeks judicial review of a decision of the Minister for Home Affairs made personally on 13 May 2020 to refuse the applicant a Safe Haven Enterprise Visa (SHEV) under s.65 of the *Migration Act 1958* (Cth) (Migration Act).

2. The Minister was required to refuse the visa under s.65 because he was not satisfied that the grant of the visa was in the national interest and the applicant thereby failed to meet the criterion specified in clause 790.227 of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations).

3. The Minister was not satisfied that the grant of the SHEV was in the national interest because the applicant had been convicted of playing an essential role in unlawful people smuggling and that granting him the benefit of a protection visa would undermine Australia's border protection regime and the policy that underpins it.[1] The Minister also considered the national interest by reference to the public confidence in the protection visa programme.[2]

[1] Court Book CB 26 [12]–[13]
[2] CB 26 [14]

4. This Court has jurisdiction to review the Minister's decision because on 22 May 2020 the Minister issued a conclusive certificate under s.473BD of the Migration Act which prevented the review of his decision under Part 7AA and his decision was not otherwise reviewable under Part 5 or Part 7.[3] Accordingly, the Minister's decision is not a "primary decision" within the meaning of s.476(4) for the purpose of s.476(2)(a) of the Migration Act.

5. The following background material is drawn from the submissions of the parties.

6. The applicant is an Iranian national from a named location in the Alborz province.[4]

7. On 27 March 2012, the applicant departed Iran.[5]

8. On 14 December 2013, the applicant arrived in Australia.[6]

9. During 2012–2013, the applicant unlawfully facilitated the passage of asylum seekers from Indonesia to Australia.[7]

10. On 3 February 2017, the applicant lodged the application for the SHEV.[8]

11. On 13 October 2017, the applicant was convicted in the District Court of New South Wales of a people smuggling offence and sentenced to eight years imprisonment.[9] The sentencing judge observed that the applicant had played a "people management role" which was "essential to carrying out the scheme".[10]

12. On 28 May 2018, the delegate refused to grant the visa.[11] The delegate concluded that the applicant would not face serious harm in Iran as a Christian convert, a failed asylum seeker, a person who was convicted

[3] see ss.338(1)(d) and 411(2)(c) of the Migration Act
[4] CB 2 [1]
[5] CB 2 [1]
[6] CB 2 [1]
[7] CB 24 [5(a)]
[8] CB 2 [1]
[9] CB 24 [5(b)]
[10] CB 24 [5(c)]
[11] CB 2 [2]

of people smuggling in Australia, due to the Minister's Department's data breach or for any other reason.[12]

13. The matter was then referred to the Immigration Assessment Authority (Authority). On 9 July 2018, the Authority determined that the applicant was a refugee within the meaning of s.5H(1) of the Migration Act based on his conversion to Christianity in Australia.[13] The Authority remitted the matter for reconsideration.[14]

14. On 14 October 2019, the Minister personally exercised his discretion under s.501(1) of the Migration Act to refuse the SHEV as the applicant did not pass the character test.[15]

15. On 24 December 2019, *BAL19 v Minister for Home Affairs*[16] was handed down by the Federal Court which held (erroneously in the Minister's submission[17]) that s.501 was not available as a basis to refuse protection visas.

16. On 20 February 2020, the Minister's decision under s.501(1) of the Migration Act was set aside by the Federal Court (apparently on a ground unrelated to *BAL19*).

17. In late April 2020, the applicant made an application to the Federal Court to compel the Minister to make a decision in relation to the SHEV.

18. On 5 May 2020, the Minister's Department wrote to the applicant and sought his comment upon the adverse information held by the Minister with respect his criminal offending in the context of clause 790.227 and the national interest.[18]

19. The correspondence from the Minister's Department indicated that consideration was being given to refusal of the applicant's protection

[12] CB 2 [2]
[13] CB 1ff
[14] CB 9
[15] CB 50ff
[16] [2019] FCA 2189
[17] *KDSP v Minister for Immigration* [2020] FCAFC 108 and *Minister for Immigration v BFW20* [2020] FCAFC 121
[18] CB 12ff

visa under the national interest criterion in clause 790.227 of Schedule 2 to the Regulations.[19]

20. The applicant was informed that as he participated in the business of people smuggling contrary to Australian law, this may lead the Minister to not being satisfied that the grant of a SHEV to the applicant is in the national interest because to grant the applicant such a visa "could undermine the integrity of the protection visa program and Australia's border protection regime, a key element of which is the deterrence of people smuggling".[20]

21. On 7 May 2020, the applicant and his counsel provided written submissions in response to the Minister's Department's letter.[21]

22. On 11 May 2020, the Minister's Department provided a submission to the Minister.[22]

23. As noted above, on 13 May 2020, the Minister determined that he was not satisfied that it is in the national interest to grant the applicant a protection visa under clause 790.227 of Schedule 2 to the Regulations.[23] Accordingly, the Minister purported to refuse to grant the applicant the relevant protection visa under s.65 of the Migration Act (reviewable decision).[24]

**Legislative scheme**

24. Section 4(1) identifies that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens."

25. Section 35A(3A) specifies that there is a class of protection visa to be known as "safe haven enterprise visas".

26. Section 33(3) states that the "regulations may prescribe criteria for a visa or class of visa" which includes the class of visa provided by s.35A of the Migration Act.

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[19] CB 12-15
[20] CB 13
[21] CB 27ff
[22] CB 17ff
[23] CB 26
[24] CB 26

27. Section 65(1) of the Migration Act provides that:

> *Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:*
>
> *(a) if satisfied that:*
>
> *(i) the health criteria for it (if any) have been satisfied; and*
>
> *(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and*
>
> *(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and*
>
> *(iv) any amount of visa application charge payable in relation to the application has been paid;*
>
> *is to grant the visa; or*
>
> *(b) if not so satisfied, is to refuse to grant the visa.*

28. Clause 790.2 of Schedule 2 to the Regulations identifies there are "primary criteria" all of which must be satisfied by an applicant for the SHEV. The primary criteria are divided into "time of application" criteria in clause 790.21 and "time of decision" criteria in clause 790.22. Clause 790.227 is a "time of decision" criterion which provides that:

> *The Minister is satisfied that the grant of the visa is in the national interest.*

29. The Minister submits that s.501(1) of the Migration Act also permitted the discretionary refusal of the SHEV if the Minister was not satisfied that the applicant passed the "character test" defined in s.501(6) of the Migration Act.

30. Unlike the position at the time when *NBMZ v Minister for Immigration*[25] was decided and which considered mandatory considerations with respect to s.501:

a) nothing in the Migration Act or Regulations incorporate by reference the articles of the Refugees Convention[26] or the Refugees Protocol[27] as the basis for the grant of a protection visa including the SHEV; and

b) section 197C now expressly provides that:

*Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198*

*(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*

*(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.*

*(noting the phrase "non-refoulement obligations" is defined in section 5(1) and includes the Refugees Convention and the Refugees Protocol.)*

## The present proceedings

31. These proceedings began with a show cause application filed on 12 June 2020. The applicant now relies upon an amended application filed on 11 August 2020. The grounds in the application as amended are:

*Ground 1*

*The decision of the respondent was affected by a jurisdictional error on account of a failure to have regard to the legal and practical consequences of the decision.*

[25] (2014) 220 FCR 1; see [56], [65]–[103], [136]
[26] Convention relating to the Status of Refugees done at Geneva on 28 July 1951
[27] Protocol relating to the Status of Refugees done at New York on 31 January 1967

*Particulars*

*Strand 1*

*(a) The statutory effect of a decision to refuse a protection visa is the removal of the non-citizen from Australia as soon as practicable.*

*(b) The Minister did not consider or take into account the fact that, if the visa were refused, the applicant would be the subject of refoulement to Iran, where he faced the real risk of persecution.*

*(c) The Minister considered a* Departmental Submission*, which incorrectly advised that as a result of visa refusal, the applicant will have to remain in detention unless another visa is granted.*

*(d) In fact, by the operation of ss 197C and 198 of the* Migration Act 1958 *(Cth) (the Act), if the protection visa were refused, the applicant would be removed to Iran as soon as reasonably practicable.*

*Strand 2*

*(e) The respondent's acceptance of the fact that the Immigration Assessment Authority (IAA) had found that Australia owed protection obligations to the applicant should not be viewed as an acceptance by the respondent of the factual substratum for that finding. There is no direct finding at all in the respondent's statement of reasons to the kind of serious harm the applicant may realistically face if removed to Iran.*

*(f) Even if it were to be assumed in the respondent's favour that he had personally read the IAA's reasons for decision, there is nothing in his statement of reasons which indicates that he appreciated or understood that the IAA had upheld the applicant's refugee claim and the basis upon which that conclusion had been reached, most notably regarding the finding that there was a real risk that the applicant would face serious harm (i.e. arrest, charged, detained, torture, ill-treatment, severe and repeated beatings, and the denial of medical care).*

*(g) The respondent's discussion of the IAA's decision concerning the applicant is pitched at such a high level of generality that neither the applicant nor any reasonable reader of the respondent's statement of reasons could be confident that the*

*respondent has appreciated (and accepted) that one of the harms feared by the applicant (as accepted by the IAA) was that the applicant would face serious harm if he were returned to his country of origin.*

*(h) The respondent needed to squarely grapple with the legal and practical consequences of the decision and lawfully weigh up the competing considerations which were relevant to the exercise of the jurisdictional fact in clause 790.227 of Schedule 2 of the* Migration Regulations 1994 *(Cth) (Regs), namely whether the non-refoulement obligations arising from the applicant's claim outweighed other adverse factors related to the national interest.*

*(i) The respondent simply failed to turn his mind actively to analyse and make relevant findings in respect of the legal and practical consequences of the decision being made. The failure is all the more poignant in circumstances where the IAA had accepted those claims.*

*Ground 2*

*The decision of the respondent was affected by a jurisdictional error on account of a breach of procedural fairness.*

*Particulars*

*(a) The Minister reasoned,* inter alia*, that it is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa (benefit finding).*

*(b) As a matter of procedural fairness, the Minister was required to give the applicant an opportunity to make a submission on this aspect of the "national interest" (i.e. benefit finding), which was not apparent from its nature or the terms of the Act under which it is made. Further, the adverse conclusion reached by the Minister concerning the benefit finding would not obviously be open on the known material.*

*Ground 3*

*The decision of the respondent was affected by a jurisdictional error on account of legal unreasonableness, illogicality, and irrationality.*

*Particulars*

*Strand 1 [Legal and Practical Consequences]*

*(a) The applicant repeats all of the particulars of Ground 1 here.*

*Strand 2 [Chance of a Favourable Outcome]*

*(a) In effect, the Minister reasoned that non-citizens convicted of people smuggling were not permitted to be granted a protection visa in Australia (mandated rule).*

*(b) In substance, the approach adopted by the Minister introduced a mandated rule that the applicant could never satisfy (i.e. as the applicant was convicted for people smuggling, the applicant was a non-citizen, and the applicant applied for a protection visa).*

*(c) In this regard, the Minister's reasoning and the conclusion reached were capricious or arbitrary.*

*Strand 3 [Implications of Satisfying s36(1C) of the Act]*

*(a) By implication, the Minister's decision-making process reveals extreme illogicality or irrationality.*

*(b) For the purposes of s36(1C) of the Act and clause 790.277 of Schedule 2 to the Regs, the Minister treated Australia's 'security' to include the cognate consideration of 'protection of Australia's territorial and border integrity from serious threats'.*

*(c) The applicant was not taken to represent a danger to Australia's security for s 36(1C) of the Act but was taken to represent a danger to Australia's security when considering the national interest criterion in clause 790.277.*

*Strand 4 [Impermissible Punishment of the Applicant]*

*(a) The exercise of statutory power under the Act for the sole or* substantial purpose *of deterring others would serve (impermissibly) as punishment of the criminal non-citizen.*

*(b) The refusal decision made was for the* substantial purpose *of deterring others – and thus serves (impermissibly) as a punishment of the applicant.*

*(c) The applicant was expressly informed that the grant of a protection visa to him could undermine the integrity of the protection visa program and Australia's border protection regime, a 'key element' of which is the deterrence of people smuggling.*

*(d) The decision of the respondent has the character of being legally unreasonable.*

32. I have before me as evidence the court book filed on 28 July 2020. Both the applicant and the Minister filed pre-hearing written submissions (including submissions in reply from the applicant) and made extensive oral submissions through their counsel at the trial on 2 September 2020. I have been assisted significantly by those submissions in what is a novel case.

33. It should be noted at the outset that this case raises an issue of some real public importance in Australia. That is because I was informed at the trial that the national interest criterion has not been used before to refuse a protection visa to an applicant convicted of people smuggling.[28] Further, this application raises important questions concerning the statutory interaction between s.36(1C) of the Migration Act and the national interest criterion in clause 790.227 of the Regulations.

34. It is useful also to state at the outset the Minister's position as follows:

> *It is also important to emphasise that in refusing the grant of the SHEV, the Minister was not exercising a discretion such as that arising under section 501 of the Act which involved weighing competing considerations. Rather, in this case, the Minister did not form the required* state of satisfaction *with respect to the visa criterion specified in clause 790.227 that the grant of the visa was in the national interest. The Minister's lack of satisfaction with respect to this criterion then required the visa to be refused under section 65 of the Act. The Minister's state of mind in this regard was thus a subjective jurisdictional fact. This distinction is relevant to the taxonomy of determining whether there is any judicially reviewable error by the Minister: see* Ali v Minister for Home Affairs *[2020] FCAFC 109 at [43].*
>
> *In summary, for the reasons that follow, the Minister's subjective lack of satisfaction as to the national interest criterion in clause 790.227 could only be vitiated by:*
>
> *(a) legal unreasonableness;*

[28] CB 18 [4]

*(b) lack of procedural fairness by reference to any undisclosed adverse personal information about the applicant held by the Minister; or*

*(c) any error by the Minister in understanding the proper construction of clause 790.227.*[29]

*None of those errors are established in this case. Further, nothing in the subject matter, scope or purpose of the Act otherwise confines the breadth of the subjective judgment to be made by the Minister as to national interest.*

# Consideration

## Ground 1 – did the Minister fail to have regard to the legal and practical consequences of his decision and, if so, what are the consequences?

### Applicant's contentions

35. Ground 1 asserts that the decision of the Minister was affected by a jurisdictional error on account of a failure to have regard to the legal and practical consequences of the decision to refuse the applicant the relevant protection visa.

36. The criterion in clause 790.227 is unfettered in its terms. Nevertheless, the law imposes certain limits on the exercise of such a legal criterion. The subject matter, scope, and purpose of the Migration Act may also require that certain considerations be taken into account.[30] In the case of an applicant for a protection visa, one of those considerations is the statutory (that is, legal) consequences of visa refusal.[31]

37. The breadth of the criterion under clause 790.227 can be accepted; a broad power remains, however, confined by the subject matter, scope, and purpose of the Migration Act.[32] The decision of the Minister was made within the framework of the Migration Act.[33] The statutory effect

[29] *S297/2013 v Minister for Immigration & Anor* (2015) 255 CLR 231
[30] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39; *Minister for Immigration v Huynh* (2004) 139 FCR 505 at [71]
[31] *NBMZ* at [6]
[32] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505
[33] *NBMZ* at [8]

of a decision to refuse a visa is the removal of the applicant from the country as soon as practicable, and in the meantime, detention.[34]

38. The Minister must take into account the Migration Act and its operation in making a decision; to make a decision without taking into account what Parliament has prescribed by way of legal consequence is to fail to take into account the legal framework of the decision.[35] At a functional level, this is reinforced in that the legal consequences of the decision are important in human terms: indefinite detention pending removal.[36]

39. The Minister was required to take into account the legal and practical consequences of his decision. These consequences flowed from the terms of the Migration Act.[37] A material omission from a briefing paper may affect the decision-making process based on it.[38]

40. The written reasons of the Minister may, and generally will (subject to a contrary finding of fact), be taken to be a statement of those matters adverted to, considered and taken into account; and if something is not mentioned, it may be inferred that it has not been adverted to, considered or taken into account.[39]

**Strand 1**

41. First, in this case, it is to be inferred from his statement of reasons that the Minister did not consider or take into account the fact that, if the visa were refused, the applicant would be the subject of refoulement to Iran. This was the effect of ss.196, 197C, and 198 of the Migration Act. The applicant contends that this matter could not lawfully be overlooked.

42. At [10] of the Minister's decision, the Minister merely noted that he had taken into consideration the applicant's "protection needs". The Minister did not make plain what he meant by the applicant's "protection needs". Further, no express reference was made to the fact that as a result of

[34] *NBMZ* at [8]
[35] *NBMZ* at [9]
[36] *NBMZ* at [9]
[37] *NBMZ* at [10], [177]
[38] *Peko-Wallsend Ltd* at 30–31, 45 and 65–66; *NBMZ* at [16].
[39] *NBMZ* at [16]; *Acts Interpretation Act 1901* (Cth), s.25D; *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [89] and [133]

refusing the applicant a protection visa under s.65 of the Migration Act, the applicant would be removed to Iran as soon as reasonably practicable.

43. At [15], the Minister only considered "matters specific to [the applicant]" in the context of the applicant's proposed undertaking not to disclose that he has been granted a protection visa. Read in context, the Minister's consideration of the applicant's circumstances did not take into account the applicant's removal to Iran as a result of visa refusal in this case.

44. Secondly, the preceding submissions are also supported by the surrounding circumstances leading to the purported decision made by the Minister in this case. In the *Departmental Submission* provided to the Minister (11 May 2020) concerning the applicant's protection visa application, it was noted:[40]

> *6. Information which you should take into account in considering the national interest criterion is also provided below.*
>
> *…*
>
> *35.* [The applicant] *is a person in respect of whom Australia has protection obligations; if his visa is refused,* [the applicant] *will remain an unlawful non-citizen. He could not be removed to Iran without breaching Australia's non-refoulement obligations.* [The applicant] *will have to remain in detention unless another visa is granted.*

45. The *Departmental Submission* to the Minister that the applicant will have to remain in detention unless another visa is granted is said to have been legally erroneous. This is said to be because, by the operation of s.197C of the Migration Act, if the protection visa were refused, the applicant would be removed to Iran as soon as reasonably practicable.[41]

46. Given the "misplaced" *Departmental Submission* that the applicant would not be removed from Australia, the applicant submits that the Minister acted upon a misunderstanding of the legal and practical consequences of his decision. That is, the Minister did not consider the real possibility that the applicant would face persecution if refouled to Iran (because the Minister acted on an incorrect legal assumption that

[40] CB 19, 22
[41] *DMH16 v Minister for Immigration* [2017] FCA 448 at [26]

the applicant would remain in detention indefinitely unless granted another visa).

47. The *Departmental Submission* to the Minister was signed by the Minister personally, and a decision made that the Minister would "consider personally" the case being presented.[42] Given that context, it can be inferred that the Minister had regard to the information reflected in the *Departmental Submission*.[43]

**Strand 2**

48. The applicant relies upon the particulars reflected in his amended application at Ground 1 (Strand 2). In simple terms, the Minister is said to have failed to grapple with the legal and practical consequences of his decision; that is, visa refusal meant that the applicant faced the real prospect of facing serious harm and/or persecution upon a return to Iran. There is said to have been no active intellectual engagement with this significant material matter in this case.[44]

**Minister's contentions**

49. Ground 1 (and its "Strands") is in fact two grounds of review based upon the contention that the Minister failed to consider two mandatory relevant considerations, being non-refoulement and the harm the applicant would face in Iran.

**There are no mandatory relevant considerations to the Minister's consideration of the "national interest" in clause 790.227**

50. The Minister states that the applicant's submissions assume, without explanation, that the many cases concerning jurisdictional error with respect to discretionary decisions weighing competing considerations under s.501 of the Migration Act apply equally to the subjective jurisdictional fact as to the national interest required to be formed by the Minister under clause 790.227. In particular, the applicant's reliance upon *NBMZ* (supra) fails to grapple with the now very different statutory

[42] CB 17-23
[43] *Ayoub v Minister for Immigration* [2015] FCAFC 83 at [49]
[44] *EGH19 v Minister for Home Affairs* [2020] FCA 692; *CPJ16 v Minister for Immigration* [2020] FCA 980

scheme and the entirely different statutory context of clause 790.227 set out above.

51. In the Minister's submission, two recent decisions of the Federal Court also highlight why the applicant's assumption is fatally flawed and that the cases with respect to the s.501 discretion do not equally apply to clause 790.227.

52. First, in *Hernandez v Minister for Home Affairs*,[45] Charlesworth J explained why the protection visa application process would not result in the same consideration of Australia's non-refoulement obligations as that which should be undertaken in visa cancellation decisions under s.501 (and revocation of such a decision in s.501CA(4)). This was due to the *additional visa criteria* required to be satisfied in s.65 of the Migration Act. Her Honour stated at [61]-[65]:

> *The second issue was whether there was any legal or practical difference between a case where non-refoulement obligations are identified in the course of exercising the power conferred by s 501CA(4) of the Act and a case where such obligations are identified in the course of exercising the power conferred by s 65 on an application for a protection visa.*
>
> *In my view there is a material difference.*
>
> *Had the Minister determined that Australia owed non-refoulement obligations to Mr Hernandez, that would be a factor capable of weighing in favour of revocation of the cancellation decision in the exercise of the discretionary power conferred by s 501CA(4). The existence of the obligation is clearly capable of furnishing "another reason" why the cancellation decision should be revoked. At the very least, it would be open to the Minister to conclude that Australia's reputational interests may be adversely affected by a decision resulting in the deportation of a person in contravention of Australia's obligations under international law. Accordingly, meaningful consideration of the issue may have made a difference to the ultimate outcome.*
>
> *On the other hand, if the decision-maker responsible for assessing Mr Hernandez's visa application were to make findings of fact giving rise to non-refoulement obligations at international law, the existence of those obligations would be irrelevant to the exercise of the mandatory power conferred by s 65. The decision-maker*

[45] [2020] FCA 415

*would be compelled under s 65(1)(b) to refuse to grant the visa if not satisfied that the requirements of s 65(1)(a) were met.*

*The course of decision making under Direction 75 exposed Mr Hernandez to the probable consequence that he may be refused a protection visa notwithstanding that he was a person to whom Australia owed non-refoulement obligations under international law. That is because none of the matters falling for determination under s 65(1)(a) turned on the existence or non-existence of refoulement obligations as the case may be. Whilst the issue might arise if the matter were referred to the Minister for consideration under s 501 of the Act (and so return full circle to the Minister's attention), Direction 75 directed the decision-maker not to make any such referral without first determining whether the visa application should be refused by reference to s 36(1C) or s 36(2C)(b). The circumstance that Mr Hernandez was a person to whom Australia owed non-refoulement obligations would be irrelevant in determining either character related criteria. Moreover, the circumstance that Mr Hernandez was liable to be deported in accordance with s 197C of the Act in contravention of Australia's obligations under international law would be an irrelevant consideration in determining whether the protection visa should or should not be granted in the exercise of the bifurcated power conferred by s 65. I should add that on this application it was not submitted by the Minister that s 197C rendered non-refoulement obligations an irrelevant consideration in the exercise of the power conferred under s 501CA(4) and the Minister did not in fact proceed on that basis in exercising the power."*

53. Secondly, in *Ali* (supra) the Full Federal Court approved *Hernandez* at [110]ff while also focusing on the broader range of non-refoulement obligations which might be breached and which would not be considered in the protection visa process under s.65 of the Migration Act.

54. In addition to those two recent cases, the Full Federal Court had previously held generally that the concept of the "national interest" is inherently broad. In *Huynh*, the majority (Kiefel and Bennett JJ) stated with respect to the breadth of the s.501 discretion by reference to the "national interest" in s.4(1) of the Migration Act at [74]:

*A reference to those matters confirms the breadth of the Minister's discretion. The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens: s 4(1). To advance that object provision is made for the removal or deportation from Australia of non-citizens whose presence is not*

*permitted by the Act: s 4(4). If the Minister were able, consistent with the object of the Act, to consider a matter as broad as the national interest, in determining whether a person ought to be permitted to remain in Australia, it does not seem possible to imply some obligation on the Minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed. By way of illustration, the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa, where there has been a sentence to imprisonment for the requisite term. To construe the section as requiring the Minister to consider factors such as the level of involvement of the visa holder in the offences would cut across that broad discretion. It follows in our view that the obligation of which his Honour the primary judge spoke cannot be read into s 501."*

55. *Huynh* has not been overruled and, on the contrary, it was been cited with approval by the High Court in *Minister for Immigration v Nystrom*.[46] It has also been applied in *Leiataua v Minister for Immigration*.[47] Similar observations about the breadth of the national interest consideration have been made in cases such as *Wong v Minister for Immigration*[48] and *Maurangi v Bowen*.[49]

56. In so far as the applicant relies upon *CPJ16*, that case concerned an exercise of *discretion* by the Minister by reference to, among other things, the national interest in s.501A(2) in the context of setting aside a character decision under s.501. That again is said to distinguish it from this case.

57. Further, while the Minister's primary position is that *CPJ16* is clearly distinguishable by reason of its different statutory context, for completeness the Minister also submits that:

    a) nothing in his Honour's reasons properly explained how he reached the conclusion at [52], contrary to earlier authority such as *Huynh* (surpa), that it was a mandatory relevant consideration to consider the personal and international ramifications of the refoulement of *CPJ16* in the Minister's subjective determination of the *national interest*. The Minister's formal submission is that

[46] (2006) 228 CLR 566 at 606 at [127]
[47] (2012) 208 FCR 448 at [21]-[22]
[48] [2002] FCA 959 at [33]ff per Tamberlin J
[49] (2012) 200 FCR 191 at [68]ff per Lander J (and the cases cited therein)

[52] is wrong. Indeed, unless international obligations are incorporated into the Migration Act, it is well-established that there is no proper basis to treat such obligations as mandatory relevant considerations with respect to decision-making under the Migration Act. As McHugh and Gummow JJ observed in *Re Minister for Immigration; ex parte Lam*[50] at [101]:

> *[I]n the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in Teoh accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error.*

and

b) while Rares J referred to an "active intellectual engagement" with the national interest at [43] and [49], his Honour's reasons are, with respect, better understood as holding that the Minister's reasons were legally unreasonable.[51]

**Even if the legal and practical consequences of refoulement and indefinite detention were mandatory, they were considered**

58. The Minister further contends that even if (contrary to the above submissions), the Minister was required to consider mandatory considerations such as the practical and legal consequences of his decision, there is no doubt that the Minister did consider the significant harm the applicant would face if returned to Iran and that the applicant would refuse to return to Iran and thus face indefinite detention. The Minister stated expressly that he had considered those matters.[52]

59. There is also said to be no doubt that the Minister understood the correct legal position under s.197C of the Migration Act and the question of non-

[50] (2003) 214 CLR 1; see also *CPCF v Minister for Immigration* (2015) 255 CLR 514 at [385] (Gageler J), [490]-[491] (Keane J); *Kaur v Minister for Immigration* (2017) 256 FCR 235 at [22] – [23] (Dowsett, Pagone, Burley JJ); *Snedden v Minister for Justice* (2014) 230 FCR 82 at [147] (Middleton and Wigney JJ, Pagone J agreeing at [242]); *Australian Crime Commission v NTD8* (2009) 177 FCR 263 at [66] (Black CJ, Mansfield and Bennett JJ).

[51] see his Honour's references in *CPJ16* at [46] and [49] to *Graham v Minister for Immigration* (2017) 263 CLR 1 at [57]

[52] CB 25 [7] and [10]

refoulement because he had referred to it in his earlier s.501 decision.[53] In any event, the applicant did not claim he would be refouled as either a legal or practical consequence of the Minister's decision; rather he submitted he would refuse to return to Iran and thus be indefinitely detained.[54]

60. Further, the applicant's reliance upon the Ministerial submission allegedly being "incorrect" with respect to indefinite detention and non-refoulement is said to be disingenuous given that the Ministerial submission simply reflects the applicant's position that he would refuse to return to Iran.[55]

61. In so far as it alleged that the Minister failed to have an "active intellectual engagement" with the harm faced by the applicant upon return to Iran, it has often been observed that this type of ground potentially conceals an impermissible challenge to the merits of a decision rather than a challenge to whether the decision has been made in accordance with law.[56]

62. The Minister submits again, that putting aside the fact that the applicant in fact submitted he would refuse to return to Iran and thus be indefinitely detained (and not refouled), this is not a case where the Minister's reasons were simply silent and did not refer to the applicant's submissions about the harm he might face if he was returned to Iran. That fact had been clearly stated in Minister's reasons and the Minister also expressly stated he considered it.[57] Again, the Minister had also written more extensively about the non-refoulement question in his previous decision.[58] Further, the Minister's reasons are said to have made plain that the Minister considered these personal circumstances to be immaterial to the national interest in protecting Australia's borders. That is said to have been sufficient.

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[53] CB 58 [48]
[54] CB 29 [19]
[55] see CB 29 [19] and CB 22 [35]
[56] *Minister for Immigration v SZJSS* (2010) 243 CLR 164 at [29]–[36]; *Minister for Immigration v Anthonypillai* (2001) 106 FCR 426 at 442 [65]; *Anderson v Director-General of the Department of Environmental and Climate Change* (2008) 251 ALR 633 at 650–651 [56]; and cf Tracey J in *MZAGK v Minister for Immigration* (2014) 226 FCR 311 at [44] to [51]; *Murad v Minister for Border Protection* [2016] FCA 876 at [54]-[56] per Bromwich J
[57] CB 52-53 [7], [10]
[58] CB 57 [44]–[50]

63. The Minister contends that, in substance, this aspect of Ground 1 seeks no more than impermissible merits review and expresses an emphatic disagreement with the Minister as to his subjective state of mind about border protection in the national interest.

64. In submissions in reply, the applicant takes issue, in particular, with the distinction drawn in the Minister's submissions between the exercise of discretion (for example, in cancelling a visa) and the formation of a state of satisfaction in refusing to grant a visa.

**Resolution**

65. In relation to the first ground, the Minister seeks to distinguish cases relied upon by the applicant which deal with character decisions in the exercise of discretion under s.501 of the Migration Act. While cases dealing with different provisions of the Migration Act must be considered in relation to the statutory context, an artificial distinction should not be drawn between the exercise of a discretion and the formation of a state of satisfaction based upon a broad subjective criterion. In the present case, the Minister formed a state of dissatisfaction concerning the national interest in clause 790.227 of Schedule 2 to the Regulations. That decision was a subjective one and, in my view, involved a mental process indistinguishable from the exercise of a discretionary power.

66. In *Jione v Minister for Immigration*[59] at [17], Buchanan J held:

> *Like the concept of the "public interest", the national interest is a broad and often indeterminate test, until the circumstances of a particular case come into focus. Even then, a large discretion is usually given to those charged with the assessment of matters in the public or national interest.*

67. Secondly, as the Full Federal Court outlined in *Ali v Minister for Home Affairs*[60] at [109]:

> *In those cases, as with the present, the process concerning the application of s 501CA(4) ended with the subjective jurisdictional fact not being satisfied such that the discretionary power was not enlivened. Consequently, the alleged errors related to the decision-*

[59] (2015) 232 FCR 120
[60] [2020] FCAFC 109

> *maker's omission to consider the impact of non-refoulement obligations in the course of ascertaining whether the required state of satisfaction had been reached and not in the exercise of any discretion. In this sense, whether the issue was considered under s 65 or s 501CA(4)(b)(ii), the nature of the statutory power was the same.*

68. As the Full Federal Court in *Ali* recognised, decisions made under s.501CA(4) of the Migration Act involved a subjective jurisdictional fact. In an analogous circumstance, forming a state of satisfaction for the national interest criterion in clause 790.227 of Schedule 2 of the Regulations also involves a subjective jurisdictional fact.

69. I also do not accept the Minister's contention that s.501(1) of the Migration Act also permitted the discretionary refusal of the SHEV if the Minister was not satisfied that the applicant passed the "character test" defined in s.501(6) of the Migration Act. While that section may have supported a lawful refusal of the SHEV, it must be borne in mind that the Minister's earlier purported use of s.501(1) to refuse the applicant's protection visa was quashed by the Federal Court.[61] The Minister conceded in that case that the decision relied on a finding that the applicant had an "ongoing risk" of reoffending for which no probative basis was identified.

70. No further evidence has been presented to me to justify the exercise of the power under s.501(1) in the present case.

71. There is a question whether cases concerning jurisdictional error with respect to discretionary decisions weighing competing considerations under s.501 apply equally to the subjective jurisdictional fact as to the national interest required to be formed by the Minister under clause 790.227.

72. Three arguments raised by the applicant suggest an affirmative answer to that question.

73. First, as the Full Federal Court in *Ali* at [109] made plain, the "process concerning the application of s.501CA(4) ended with the subjective jurisdictional fact not being satisfied". Similarly, the national interest criterion in clause 790.227 of Schedule 2 of the Regulations also

[61] CB 19 [10]

involves the application of a subjective jurisdictional fact and a state of satisfaction test. At [109] in *Ali*, the Full Federal Court expressly recognised "whether the issue was considered under s.65 or s.501CA(4)(b)(ii), the nature of the statutory power was *the same*".

74. Secondly, as also outlined by counsel for the applicant, forming a state of satisfaction as to the national interest criterion in clause 790.227 involves a broad level of discretionary decision-making by the Minister.[62] Considered in that context, the cases concerning a broad level of discretionary decision-making under s.501 of the Migration Act may apply with equal force when considering the issue of forming a state of satisfaction under clause 790.227.

75. Thirdly, the Minister submitted that there are no mandatory relevant considerations to his consideration of the "national interest" in clause 790.227. This submission is too broad to be accepted. The Minister's submission, with respect, fails to grapple with authority from the Full Federal Court on the topic.

76. In *Taulahi v Minister for Immigration*[63] at [84], the Full Federal Court held:

> *The fundamental principle that* NBMZ *confirms is that, in making a decision under the Migration Act, the Minister is bound to take into account the legal consequences of a decision because these consequences are part of the legal framework in which the decision is made. Indeed, in making any decision in exercise of a statutory power, the legal framework in which that decision is made must be taken into account. That framework includes the direct and immediate statutorily prescribed consequences of the decision in contemplation.*

77. Further, as Snaden J remarked recently in *DFTD v Minister for Home Affairs*[64] at [34], *Taulahi* would seem to suggest that the principle applies as much to an exercise of power under s.501CA(4) of the Migration Act "as to the exercise of any other power". The Minister has not engaged with *Taulahi* at all in his submissions.

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[62] *Jione* at [17]
[63] [2016] FCAFC 177
[64] [2020] FCA 859

78. Fourthly, the Minister next submitted that the "applicant's reliance upon *NBMZ*…fails to grapple with the now very different statutory scheme and the entirely different statutory context of clause 790.227". The Minister made a similar argument in *Kassem v Minister for Home Affairs*.[65] In rejecting the Minister's contention at [73], Stewart J held:

> *In my view the reasoning of Allsop CJ and Katzmann J in the referenced paragraphs of NBMZ and NBNB, namely that the Minister must take into account the Act and its operation in making a decision and to make a decision without taking into account what Parliament has prescribed by way of legal consequence is to fail to take into account the legal framework of the decision, applies equally to a decision under s 25 of the Citizenship Act.*

79. In other words, Stewart J in *Kassem* was prepared to apply the "implied mandatory consideration principle of legal consequences" established in *NBMZ* to the "very different statutory scheme" and "entirely different statutory context" of s.25 of the *Australian Citizenship Act 2007* (Cth).

80. For completeness, the Full Federal Court judgments of *NBMZ* and *NBNB v Minister for Immigration*[66] remain good law. Those successive Full Federal Court judgments have not been overruled and were, as seen above, applied in *Kassem* (a decision which the Minister has not appealed).

81. I also agree with the applicant's submissions concerning the decisions in *Hernandez* and *Ali*.

82. The decisions of *Hernandez* and *Ali* are not necessarily against the applicant. As to *Hernandez*, the following can be noted:

    a) that case involved an application for judicial review of a decision made by the Minister for Home Affairs under s.501CA(4) of the Migration Act ([1]). As such, what Charlesworth J stated about s.65 of the Act was *obiter*; being a different statutory power than s.501CA(4);

[65] [2019] FCA 1196
[66] [2014] FCAFC 39

b) that case involved a question as to whether the Minister failed to engage with a substantial or significant representation raised ([14], [56], [68]). That is not an issue in this case;

c) at [61], Charlesworth J found that there was a material legal or practical difference between a case where non-refoulement obligations are identified in the course of exercising the power conferred by s.501CA(4) of the Migration Act and a case where such obligations are identified in the course of exercising the power conferred by s.65 on an application for a protection visa. However, Charlesworth J did not consider the legal operation of clause 790.227 in Schedule 2 of the Regulations at all;

d) at [64], in *obiter*, Charlesworth J held that if the:

> *decision-maker responsible for assessing [the non-citizen's] visa application were to make findings of fact giving rise to non-refoulement obligations at international law, the existence of those obligations would be irrelevant to the exercise of the mandatory power conferred by s 65.*

e) nothing said by Charlesworth J at [64] is authority for the proposition that non-refoulement obligations are irrelevant to the Minister forming a state of satisfaction concerning the national interest criterion in clause 790.227. That latter legal criterion invokes a broad level of discretionary decision-making;

f) at [65], Charlesworth J outlined that "none of the matters falling for determination under s.65(1)(a) turned on the existence or non-existence of refoulement obligations as the case may be". However, once again, this judicial analysis said nothing about the application of refoulement obligations under clause 790.227 of the Regulations;

g) at [65], Charlesworth J determined that the question of non-refoulement obligations was irrelevant in determining either character-related criteria under ss.36(1C) or 36(2C)(b) of the Migration Act. That is not controversial. However, unlike the character criteria in s.36 of the Migration Act, clause 790.227 invokes a broad level of discretionary considerations that are not as constrained by the jurisdictional fact reflected in s.36 of the Migration Act;

h) at [65], Charlesworth J determined the:

> *circumstance that [the non-citizen] was liable to be deported in accordance with s 197C of the Act in contravention of Australia's obligations under international law would be an irrelevant consideration in determining whether the protection visa should or should not be granted in the exercise of the bifurcated power conferred by s 65.*

i) in my view, it could not reasonably be suggested that contravention of Australia's obligations under international law is an irrelevant consideration for the national interest criterion in clause 790.227. Indeed, Charlesworth J did not consider *NBMZ* or *Taulahi* in *Hernandez*. In fairness to her Honour, that was probably because the statutory operation of clause 790.227 did not fall for consideration in *Hernandez*.

83. *Ali* was another case involving an appeal concerning s.501CA(4) of the Migration Act at [1]. As such, anything the Full Federal Court stated about the statutory operation of s.65 of the Migration Act is *obiter.* At [110], the Full Federal Court in *Ali* stated:

> *As the observations of Charlesworth J in* Hernandez *demonstrate, for the purposes of s.65, the question is whether the Minister is satisfied that the specific criteria for a protection visa in s.36(2) are met.*

84. Nothing the Full Federal Court stated in *Ali* at [110] is against the applicant. Like *Hernandez*, *Ali* did not consider the statutory operation of clause 790.227 of Schedule 2 of the Regulations. Furthermore, *Ali* did not consider *NBMZ* or *Taulahi*.

85. Further, at [110] in *Ali*, the Full Federal Court stated:

> *It is apparent that the standard inherent in the concept of "another reason" [in s501CA(4)] involves matters of opinion, value judgment and policy which accords a degree of decisional freedom to the decision-maker that does not exist in the s 36(2) criteria.*

86. Similarly, the exercise of the national interest criterion in clause 790.227 also involves matters of opinion, value judgment, and policy, which accords a degree of decisional freedom.[67] Considered in that context,

[67] *Jione* at [17]-[21]

contrary to what the Minister has submitted, the cases concerning s.501 of the Migration Act may have direct application to the national interest criterion in clause 790.227 of Schedule 2 of the Regulations.

87. The applicant's submissions concerning the decision in *Huynh* are more problematic and I was not assisted by counsel's reliance upon his own academic writings. I draw from the majority judgments in *Huynh* that the Minister was not bound by an implied obligation to have regard to specific factors personal to the applicant and he was entitled to have regard to broad policy considerations.

88. The applicant placed heavy reliance on the decision in *CPJ16* where at [52], Rares J held:

> *I am of opinion that because of the Minister's acceptance of the 2017 Tribunal decision's findings about how the non-refoulement obligations owed in respect of the applicant arose, it was a mandatory relevant consideration, that he consider, in determining the national interest,* first*, the circumstances and consequences for the applicant of her refoulement, and* secondly*, the consequences for the national interest in refouling a person in breach of Australia's international non-refoulement obligations. He did not do so but dealt with her on a false basis. Those failures led to the decision being affected by material jurisdictional error.*

89. It is difficult to reconcile the above statements by Rares J with the majority judgment in *Huynh.* It does not appear that his Honour was taken to the judgment of the majority in *Huynh*. To the extent that the two decisions are in conflict, I consider myself bound by *Huynh*.

90. At a practical level, it is difficult to understand why Australia's non-refoulement obligations and the consequences of removal of the applicant to his country of origin would be a mandatory consideration for the Minister in dealing with the national interest criterion, at least on the facts of this case. The fact is that the applicant was recognised as a refugee by the Authority. The significance of that is that Australia's non-refoulement obligations, and an authoritative assessment of the risk he faced in Iran, had already been determined by the Authority. The Authority remitted the case to the Minister for consideration of the remaining criteria. The applicant's refugee status having already been determined, it is hard to see why that issue would need to be considered

further in relation to remaining criteria, such as the health criterion or the national interest criterion.[68]

91. In any event, I accept that, on the facts of this case, the Minister did consider the impact on the applicant of his decision. In his submission to the Minister in response to the natural justice letter, the applicant stated that he would not return to Iran voluntarily and stated that the impact upon him of an adverse decision by the Minister would be that he would remain in detention indefinitely. That submission reflected the reality that the applicant could not be refouled to Iran because he would not go voluntarily and the Iranian authorities would not accept the applicant if returned involuntarily.

92. I note in passing that the applicant may have been incorrect in asserting that the consequence for him would be indefinite detention. Immigration detention must serve a legitimate purpose under the Migration Act. If there is no prospect of an applicant being removed from Australia, then it is hard to see what the legal justification of ongoing and indefinite detention of the applicant would be.

93. I find that the Minister did not fail to have regard to the legal and practical consequences of his decision. It follows that I reject Ground 1.

## Ground 2 – was there a want of procedural fairness?

### Applicant's contentions

94. Ground 2 asserts that the decision of the Minister was affected by a jurisdictional error on account of a breach of procedural fairness.

95. The breadth of the criterion "national interest" may require, depending on the circumstances of the particular case, that the Minister give the visa holder an opportunity to make a submission on an aspect of the "national interest" which was not apparent or where an adverse conclusion would not obviously be open on the known material.[69]

96. Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is

[68] It needs to be kept clearly in mind here that the Minister was not deciding whether the applicant is a refugee enlivening Australia's protection obligations to him. He is. Rather, the Minister was deciding whether to grant or refuse a SHEV in the national interest

[69] *Jione* at [46]

entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests.[70] It also extends to require the decision-maker to identify to the person affected any issue critical to the decision, which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at, which would not obviously be open on the known material.[71]

97. In determining that it was not in the national interest to grant the applicant a protection visa, the Minister reasoned, among other things, as follows: "[14]….It is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa" (benefit finding).[72]

98. The applicant contends that the Minister was required to give him an opportunity to make a submission on this aspect of the "national interest" (i.e. benefit finding), which was not apparent from its nature or the terms of the Migration Act under which it is made. Further, the applicant contends that the adverse conclusion reached by the Minister concerning the benefit finding would not obviously be open on the known material.

99. In a natural justice letter dated 5 May 2020, the applicant was informed that because of his criminal conviction for people smuggling, the Minister might not be satisfied of the national interest criterion in clause 790.227.[73] The applicant was informed that the grant of a protection visa to the applicant "could undermine the integrity of the protection visa program and of Australia's border protection regime, a key element of which is the deterrence of people smuggling".[74]

100. The applicant submits that, nowhere in the natural justice letter, is there any clear indication that the national interest criterion in clause 790.227 may not be satisfied because of an apparent perception that a person convicted of people smuggling is seen to get the "benefit" of a protection visa. Further, the contents of the natural justice letter are said to have been expressed at such a broad level of generality, that little could be

[70] *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-2 at [30]
[71] *Alphaone* at 591-2
[72] CB 26 [14]
[73] CB 13
[74] CB 13

gleaned from the expressed phrases of "undermine the integrity of the protection visa program and of Australia's border protection regime".[75]

101. It follows, in the applicant's submission, that the applicant was denied procedural fairness in the terms described above.

**Minister's contentions**

102. Ground 2 is said to overstate the requirements of procedural fairness in this case. It is well established that the content of the requirement is always fact specific to the particular statutory context. In this case, the applicant was only required to be informed of any adverse information about him held by the Minister, have identified to him the nature of the decision being made and be given the opportunity to be heard.[76]

103. The Minister submits that all those things occurred.[77]

104. The applicant's complaint is then that he allegedly did not know and could not have contemplated the Minister would consider the grant of a protection visa to be a "benefit" to him (despite his claim that he could not return home without facing serious harm) and he allegedly could not understand the Minister's reference to Australia's border protection regime and policy and the national interest because it was at "such a broad level of generality".[78]

105. The Minister submits that the applicant has not adduced any evidence to support these claims and, if he did so, the Minister would cross-examine to test these assertions. That is said to be sufficient to dismiss this ground. In any event, such a complaint is said to bring to the fore the oft quoted *dicta* of Lord Diplock in *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry*[79] at 369:[80]

> *... the rules of natural justice do not require the decision-maker to disclose what he is minded to decide so that the parties may have further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only*

[75] CB 12-13
[76] see *Alphaone* at 590–591
[77] CB 12-15 and CB 27-38
[78] applicant's submissions at [32]
[79] [1975] AC 295
[80] see eg *SZBEL v Minister for Immigration* (2006) 228 CLR 152 at [48]

*the most talkative of judges would satisfy it and trial by jury would be abolished.*

106. The only feature of the Minister's decision about the national interest which was personal to the applicant was that he had been significantly involved in unlawful people smuggling. That fact was undeniable.[81] Thereafter, none of the Minister's consideration of the national interest was based on any other adverse consideration of the applicant. Rather, the applicant, as a person significantly involved in people smuggling, was in the category of non-citizen that the Minister considered would undermine Australia's border protection regime and policy and the public confidence in the protection visa programme.

107. The Minister submits that that determination is inherently an exercise of subjective political judgment and opinion. The very purpose of clause 790.227 is that the Minister will exercise his political judgment and form an opinion about the national interest in such a way. As Gaudron, Gummow and Hayne JJ affirmed in *Hot Holdings Pty Ltd v Creasy*[82] at [50]:

> *It has been said that "the whole object" of a statutory provision placing a power into the hands of the Minister "is that he may exercise it according to government policy.*

108. Further, the fact that the Minister's key considerations as to the national interest were opinions (rather than further adverse factual conclusions about the applicant and unknown to him), is said to be another reason that they were not required to be put to the applicant in detail for his comment.[83]

109. Finally, and for completeness, the Minister submits that this case is not comparable to *Jione* at [54]ff. In that case, the Minister had regard to what was said to be the adverse economic consequences of the applicant's criminal offending to extrapolate to potential future economic costs relevant to the national interest. Among other defects, that reasoning involved adverse personal considerations with respect to

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[81] CB 24 [5(c)]
[82] (2002) 210 CLR 438
[83] see *Re Minister for Immigration; Ex parte Palme* (2003) 216 CLR 212 at 219 [20]-[22]; see also by analogy *SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at 1196 at [18]; and *Minister for Immigration v SZGUR* (2011) 241 CLR 594 at 598-599 [9]

the applicant and were not obvious conclusions and thus were required to be stated to the applicant prior to the decision being made.

110. In his reply submissions, the applicant asserts that the opportunity for the applicant to make comments or submissions was not only inadequate but was meaningless.

**Resolution**

111. The Minister's contention that his subjective lack of satisfaction as to the national interest criterion in clause 790.227 could only be vitiated by a lack of procedural fairness by reference to any undisclosed adverse personal information about the applicant held by the Minister is too broad.

112. In *Alphaone Pty Ltd*,[84] the Full Federal Court stated the requirements of procedural fairness as follows:[85]

> *Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.*

113. I accept the applicant's contention that a careful review of *Alphaone* reveals that the rules of procedural fairness go beyond merely an obligation for a decision-maker to disclose "adverse personal information about the applicant held by the Minister". The obligation extends to require the decision-maker to:

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[84] at 591-592 [30]
[85] See *Jione* at[46]-[47]

a) identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made; and

b) advise of any adverse conclusion which has been arrived at, which would not obviously be open on the known material.

114. The obligation on the Minister, in my opinion, was to provide to the applicant an opportunity to engage with the decision the Minister was minded to make. It is apparent from the natural justice letter that the Minister was indicating an intention to adopt a rule or policy that persons such as the applicant, who had been convicted of a people smuggling offence, should be denied a protection visa in the national interest in order to maintain the integrity of Australia's border protection programme.

115. Given the high level of abstraction of the rule or policy proposed to be adopted by the Minister, it was probably futile for the applicant to seek to debate the merits of such policy. Rather, the opportunity afforded the applicant was to advance evidence or submissions as to why he should be treated as an exception to the rule or policy. That is precisely what the applicant sought to do in his submission in response to the natural justice letter.

116. Matters raised by the applicant were dealt with in the submission to the Minister at [25]-[26].[86]

117. The Minister, in his decision at [10],[87] stated expressly that he had taken into consideration the submission by the applicant.

118. In my view, the process followed leading up to the Minister's decision was procedurally fair. I therefore reject Ground 2.

[86] CB 21
[87] CB 25

## Ground 3 – was the decision unreasonable, illogical or irrational?

### Applicant's contentions

119. Ground 3 asserts that the decision of the Minister was affected by a jurisdictional error on account of legal unreasonableness, illogicality, and irrationality.

120. The applicant accepts that it is necessary to identify the point in the decision-making process at which the alleged unreasonableness occurred and to distinguish between alleged unreasonableness in the exercise of discretion and illogical or irrational reasoning in the course of reaching a state of satisfaction which is a jurisdictional fact.[88]

121. Further, the applicant accepts that, in conformity with the manner in which the legislature has granted power, any review by the Court, as to the existence of a subjective jurisdictional fact must be limited to determining whether the state of mind actually reached is one within the range which the legislature intended to be formed as a pre-requisite to the exercise of power.[89]

122. If there are errors in the process by which a state of mind is reached, such as by considering extraneous or irrelevant considerations or by excluding relevant considerations, the state of mind will not be that which the legislature impliedly requires.[90] Similarly, if, in reaching the state of mind, the repository of power has asked themselves the wrong question as a consequence of a mistake of law, the state of mind is not that on which the exercise of power is conditioned.[91]

123. It might also be noted that the Parliament implicitly intends the requisite state of mind should be one which has been formed logically and rationally upon findings of fact which are logically formed upon probative evidence.[92] Further, even if it cannot be detected that an error occurred in the application of law or consideration of the correct matters,

[88] *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at 624 at [39]
[89] *EHF17 v Minister for Immigration* [2019] FCA 1681 [70]
[90] *EHF17* at [70]
[91] *EHF17* at [70]
[92] *EHF17* at [70]

if the conclusion is one which is wholly unreasonable, it can, nevertheless, be inferred that one of the identified errors has occurred.[93]

124. When the claimed error concerns the reasonableness, rationality or logicality of a state of mind which is, or is part of, a jurisdictional fact, courts have been prepared to review it by ascertaining whether it was one which could be formed by a "reasonable man who correctly understands the meaning of the law under which he acts".[94]

125. A conclusion of fact which wants for logical, probative evidence or is not based on logical grounds cannot be the subject of satisfaction as to its existence.[95] Similarly, a conclusion of satisfaction or non-satisfaction after the relevant factual matters have been determined will be invalid if the evaluative path is illogical or irrational.[96]

126. The words "irrational" or "illogical" are used with their proper meaning of devoid of, or contrary to, logic; or ignorant or negligent of, and not in conformity with the laws of correct reasoning.[97] The test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based.[98]

127. The assessment of the fulfilment of a subjective jurisdictional fact is, in essence, a matter of whether the state of mind of a designated person accords with that which the legislature requires.[99] For the reasons that follow, the applicant contends that the Minister's purported non-satisfaction of the national interest criterion, in this case, does not accord with what the legislature requires.

**Strand 1**

128. As outlined under Ground 1, the applicant submits that the Minister acted on the erroneous legal assumption that the applicant would not be removed to Iran as a result of visa refusal. However, for reasons already

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[93] *EHF17* at [70]
[94] *EHF17* at [73]; *Minister for Immigration v Jia* (2001) 205 CLR 507 at 532 per Gleeson CJ and Gummow J; *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 per Latham CJ
[95] *EHF17* at [75]
[96] *EHF17* at [75]
[97] *EHF17* at [77]; *WAHP v Minister for Immigration* [2004] FCAFC 87 at [7]
[98] *EHF17* at [79]; *SZMDS* at [131]
[99] *EHF17* at [84]

given, visa refusal by the Minister meant that the applicant would not remain in immigration detention, the applicant would be removed to Iran and face the real risk of persecution in that country.

**Strand 2**

129. It can be fairly assumed that the Parliament intended the relevant person is to be given the chance of a favourable outcome (at least in the sense of overcoming the initial jurisdictional hurdle) by the repository's engagement in a process that is not illogical or irrational.[100] Here, a fair reading of the Minister's decision is said to demonstrate that the applicant never had a chance of a favourable outcome.

130. In effect, the Minister is said to have reasoned that non-citizens convicted of people smuggling were not permitted to be granted a protection visa in Australia (mandated rule).[101] The Minister is said to have reasoned that the grant of a protection visa to a "people smuggler" might weaken Australia's border protection regime and otherwise erode the Australian community's confidence in the protection visa programme.[102]

131. In substance, the approach adopted by the Minister is said to have introduced a mandated rule that the applicant could never satisfy (i.e. as the applicant was convicted for people smuggling, the applicant was a non-citizen, and the applicant applied for a protection visa). Given the Minister's adoption of the mandated rule, the applicant submits that he never had a chance of a favourable outcome. In this regard, the Minister's reasoning and the conclusion are said to have been capricious or arbitrary.[103]

**Strand 3**

132. There is "an area of decisional freedom" of the decision-maker, within which minds might differ. The width and boundaries of that freedom are framed by the nature and character of the decision and the terms of the relevant statute operating in the factual and legal context of the decision.[104] The Minister must take into account the Migration Act and

[100] *EHF17* at [84]
[101] CB 26
[102] CB 26
[103] *Minister for Immigration v Stretton* [2016] FCAFC 11 at [5]
[104] *Stretton* at [7]

its operation in making a decision; to make a decision without taking into account what Parliament has prescribed is said to fail to take into account the legal framework of the decision.[105]

133. Under ss.36(1A) and 36(1C)(a) of the Migration Act, a criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds, "is a danger to Australia's security". Section 36(1B) makes plain that "security" should be considered in the context of s.4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). Security is defined in s.4(aa) of the ASIO Act to mean, among other things, the protection of Australia's territorial and border integrity from serious threats.

134. The *Departmental Submission* to the Minister demonstrated that "there are no criteria that are now outstanding in relation to the [the applicant's] visa application, other than the criterion in clause 790.277" of the Regulations.[106] Accordingly, the applicant submits that it can be readily concluded that he satisfied the criterion in s.36(1C) of the Migration Act; namely, he is not a person whom the Minister considered, on reasonable grounds, to be a danger to Australia's security. That is, the grant of a protection visa to the applicant would not undermine the protection of Australia's territorial and border integrity from serious threats.

135. The applicant submits that, had the Minister taken into account the statutory effect of ss.36(1A) and 36(1C) of the Migration Act when considering clause 790.277 of the Regulations, it would have become clear to the Minister that he could not subsequently reason that the grant of a protection visa to the applicant posed a danger to Australia's security.

136. In other words, by implication, the applicant contends that the Minister's decision-making process reveals extreme illogicality or irrationality. The applicant was not taken to represent a danger to Australia's security for s.36(1C) of the Migration Act but was taken to represent a danger to Australia's security when considering the national interest criterion in clause 790.277.

137. When considering the national interest criterion, the Minister reasoned at [13] that protecting and safeguarding Australia's territorial and border

[105] *NBMZ* at [9]
[106] CB 18

integrity were matters that "clearly go to the national interest".[107] Be that as it may, the applicant submits that, given that the applicant satisfied s.36(1C) of the Migration Act, the Minister was hamstrung in forming a state of satisfaction as to the national criterion by reference to the Minister's findings made concerning the applicant under s.36(1C).

**Strand 4**

138. The applicant accepts that a Minister may consider that the refusal of a visa to persons who have offended in some fashion may act as a disincentive to others and, in this way, protect other detainees or the Australian public.[108] That might be a legitimate consideration; but care needs to be taken.[109] There is authority that a deportation order made for the sole or *substantial purpose* of deterring others would serve (impermissibly) as punishment of the criminal.[110]

139. The additional detriment of deportation would be imposed on him, not because he was himself a danger to the community or a person whose continued presence in Australia was undesirable, but as a detriment or punishment consequent upon the commission of the crime, which detriment or punishment would serve as a deterrent to others from so acting.[111]

140. In this case, the applicant submits that it appears that the refusal decision made was for the substantial purpose of deterring others, and thus serves (impermissibly) as a punishment of the applicant. In the natural justice letter, the applicant was expressly informed that the grant of a protection visa to him could "undermine the integrity of the protection visa program and Australia's border protection regime, a key element of which is the deterrence of people smuggling".[112]

141. When regard is had to [13]-[17] of the Minister's decision,[113] it is said to be clear that a substantial purpose for the Minister refusing the applicant's protection visa was to deter others "who may be

[107] CB 26
[108] *NBMZ* at [29]
[109] *NBMZ* at [29]
[110] *Re Sergi v Minister for Immigration* (1979) 2 ALD 224 at 231 (per Davies J); *Re Gungor v Minister for Immigration* (1980) 3 ALD 225 at 232 (per Smithers J); and see *Djalic v Minister for Immigration* (2004) 139 FCR 292 at [76] and *Tuncok v Minister for Immigration* [2004] FCAFC 172 at [42]
[111] *Re Sergi* at 231
[112] CB 13
[113] CB 26

contemplating engaging in similar conduct in the future". In the result, it is said to be concluded that to apply further punishment in the form of deportation (i.e. a legal consequence of visa refusal) to the applicant would be an exercise in harshness not appropriate in the conduct of good government or in the best interests of Australia.[114] The applicant thus submits that the decision of the Minister has the character of being legally unreasonable.[115]

**Minister's contentions**

142. Ground 3 is in substance four grounds of review.

143. The first ground is again said to be disingenuous. The applicant submitted to the Minister that he would refuse to return to Iran and would thus be detained indefinitely. The applicant has not adduced any evidence that, contrary to this submission, Iran would accept his involuntary return. In any event, a legal error is not the same as legal unreasonableness.

144. The second ground is essentially that it was legally unreasonable for the Minister to have a clear opinion about border protection and people smugglers when considering the national interest. However, that is said to be quintessentially the purpose of clause 790.227.[116] It also cannot be said that the Minister refused to consider the matters put to him by the applicant.

145. The third ground attempts to rely upon the fact that the applicant satisfied the criteria in ss.36(1A) and 36(1C) of the Migration Act (i.e., not being a current risk to Australia's "security") for a submission that this then precluded the application of the national interest criterion by reference to the protection of Australia's borders. The Minister contends, however, that this submission fails to grapple with the difference between the applicant potentially posing an ongoing risk to national security and the national interest in protecting Australia's borders from people smuggling operations by not encouraging such activity through rewarding non-citizens who are caught engaging in such activities by the later grant of a visa. The Minister submits that there was no unreasonableness or

[114] *Re Gungor* at 233
[115] *Stretton* [2016] FCAFC 11 at [11]
[116] *Hot Holdings Pty Ltd*; see also *Plaintiff S297/2013* at [18]–[19]

illogicality in these quite distinct concepts applying differentially to the applicant.

146. The final ground turns on the underlying but unstated concept of deterrence (or "sending the wrong signal") in the Minister's reasons. However, the Minister's reasons are said to make plain that he was not trying to further punish the applicant but rather seeking to ensure the efficacy of Australia's border protection regime and policies and to protect the public confidence in the protection visa programme in the national interest. In the context of s.501(2), the Full Federal Court has observed that there may be a question as to whether the Minister can exercise his powers solely for the purpose of punishing a non-citizen,[117] but there is said to be no suggestion of such a purpose here. The Minister here properly identified a matter of national interest and made a decision with the express design of furthering that interest.

147. In his submissions in reply, the applicant joins issue on the proposition that he could not be returned to Iran involuntarily and Parliament's intention in ss.36 and 501 of the Migration Act.

**Resolution**

148. To the extent that this ground is based upon the proposition that the applicant faced deportation to Iran as a consequence of the Minister's refusal of the visa, I reject that contention for the reasons given above. The applicant himself, in his response to the natural justice letter, put the factually correct proposition that he would not return to Iran voluntarily and, in consequence of the inability of the Australian government to return him to Iran involuntarily, he would remain in detention. The real question in this case is whether the Minister's decision involved the inflexible application of a rule or policy.

149. The applicant maintains that the decision made by the Minister did involve the inflexible application of a rule or policy, contrary to Parliament's intention.

150. By ss.36 and 501 of the Migration Act, Parliament has carefully legislated the circumstances in which a non-citizen convicted of criminal offending might be refused a protection visa. Nowhere in those sections

[117] see *Djalic* at [66]; *NBMZ* at [28]-[31]

is there a mandated rule that a non-citizen convicted of people smuggling should always be refused a protection visa.[118]

151. As Allsop CJ and Katzmann J held in *NBMZ* at [8]-[9], the decision of the Minister must be made within the framework of the Migration Act. The Minister must take into account the Migration Act and its operation in making a decision. The Minister, in having proper regard to the statutory operation of ss.36 and 501 of the Migration Act, would have readily appreciated that even the application of the broad national interest criterion in clause 790.227 was subject to some limitations.

152. The applicant contends that, it was legally unreasonable for the Minister to introduce a mandated government policy or rule to the effect that non-citizens convicted of people smuggling would always be refused a protection visa on the Minister's watch. That is of course not what Parliament has intended when considering the whole of the Migration Act. If it were otherwise, there would be little point in the enactment of the highly specific and prescriptive character provisions in both ss.36 and 501 of the Migration Act.[119]

153. The Minister submitted that the "Full Court has observed that there may be a question as to whether the Minister can exercise his powers solely for the purpose of punishing a non-citizen". In my view the question is more substantial. In *NBMZ* at [29] the Full Federal Court stated:

> *A Minister may consider that the refusal of a visa to persons who have offended in some fashion may act as a disincentive to others and in this way protect other detainees or the Australian public. That might be a legitimate consideration; but care needs to be taken. There is authority that a deportation order made for the sole or substantial purpose of deterring others would serve (impermissibly) as punishment of the criminal:* Re Sergi and Minister for Immigration and Ethnic Affairs *(1979) 2 ALD 224 at 231 (per Davies J);* Re Gungor and Minister for Immigration and Ethnic Affairs *(1980) 3 ALD 225 at 232 (per Smithers J); and see* Djalic *at [76] and* Tuncok *at [42]*.

154. While the national interest criterion is at large it would be an error to use it as an effective duplicate for the criteria in ss.36(1A) and 36(1C). In

[118] cf Minister's reasons for the decision at CB 53 [12]-[16]
[119] See further *Minister for Home Affairs v Brown* [2020] FCAFC 21 [104]; *Brown v Minister for Home Affairs* [2018] FCA 1722 [37]

the present case, the purview of the Minister's consideration was wider than the national security criteria. The Minister adopted a rule or policy based on the value of border protection and the importance of maintaining the integrity of it. The policy logically applied regardless of whether the applicant presented a risk to national security.

155. Neither was the adoption of the policy a decision to impose a punishment on the applicant. There was an unmistakable concept of deterrence in the Minister's decision but it was not directed at the applicant as an individual. It was dealt with at a higher level of abstraction, consistently with the Minister's view of what the national interest required.

156. Finally, as noted above, it would be an error for the Minister to adopt a national interest criterion which involved the inflexible application of a rule or policy. As this is the first occasion on which the criterion has been used to refuse a protection visa, it is hard to contend that the Minister's decision involved the inflexible application of policy. The applicant was given the opportunity to make submissions as to why he should be an exception to the general rule and he took that opportunity. The Minister states in his decision that he considered the applicant's submissions and there is nothing to support a conclusion that the Minister did not consider those submissions.

157. On the basis of the evidence available to me, I am not persuaded that the decision of the Minister was legally unreasonable or illogical.

158. It follows that I reject the third ground.

## Conclusion

159. The applicant has failed to establish that the decision of the Minister is affected by any jurisdictional error. I will order that the application be dismissed.

160. I will hear the parties as to costs.

**I certify that the preceding one hundred and sixty (160) paragraphs are a true copy of the reasons for judgment of Judge Driver**

Associate:

Date: 6 November 2020