Administrative Appeals Tribunal

**DECISION RECORD**

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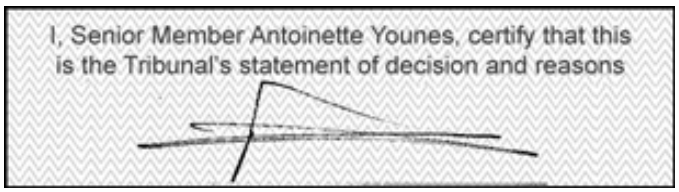
| **DIVISION:** | Migration & Refugee Division |
| **APPLICANT:** | Mr Abdul Aziz Al Jourani |
| **CASE NUMBER:** | 1908336 |
| **HOME AFFAIRS REFERENCE(S):** | BCC2016/2511985 CLF2010/340 CLF2011/141629 |
| **MEMBER:** | Antoinette Younes |
| **DATE:** | 12 August 2021 |
| **PLACE OF DECISION:** | Sydney |
| **DECISION:** | The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 155 (Five Year Resident Return) visa. |




Statement made on 12 August 2021 at 1:26 PM

## STATEMENT OF DECISION AND REASONS

## APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass (155) (Five Year Resident Return) visa under s 109(1) of the *Migration Act 1958* (the Act).

2. The delegate cancelled the visa on the basis that the applicant had breached s 101 of the Act. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.

3. The applicant appeared before the Tribunal on 16 June 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.

4. The applicant was represented in relation to the review.

5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

## CONSIDERATION OF CLAIMS AND EVIDENCE

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

7. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

8. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the notice issued under s 107 complied with the statutory requirements.

### Section 375A Certificate

9. In the course of the hearing, the Tribunal advised the applicant that Departmental file number BCC2016/2511985 contains a s 375A Certificate in relation to folios 42 to 49 (identity assessment report) on the basis that it would be contrary to public interest to disclose that material because disclosure "*may disclose lawful methods for preventing, detecting and investigating breaches or evasions of the law which would all be likely to prejudice the effectiveness of those methods*".

10. The Tribunal advised the applicant that it considered the certificate to be valid and invited submissions. The representative advised the Tribunal that the applicant has previously obtained a copy of the documents subject to the certificate.[1]

[1] Subsequent to the hearing, the Tribunal confirmed that the Department had released the documents.

11. The Tribunal advised the applicant that it would discuss any potentially adverse information in accordance with the procedural fairness requirements.

**The applicant's background and protection claims**

12. The delegate's decision record provides information about the applicant's circumstances.

13. The applicant arrived in Australia on 5 January 2010 as an undocumented Unauthorised Maritime Arrival (UMA). He stated that his name is *Abdul Aziz Saoud AL JOURANI* and that he was born on 1 January 1973 in Kuwait. During the entry interview, the applicant claimed that he and his family are stateless Bedouns from Kuwait, and that they fled Kuwait in 1992 and went to live in Iraq.

14. On 13 February 2010, the applicant applied for a Refugee Status Assessment (RSA) and on 30 March 2010, he was found not to be a refugee. He subsequently applied for an independent review on 31 March 2010 and on 26 May 2010, the Independent Merits Review (IMR) made a positive recommendation. As part of that application, the applicant provided a statement claiming that he is stateless: he does not have "*lawful citizenship in Iraq… I obtained my Iraqi passport unlawfully…"*

15. The applicant applied for a protection visa on 7 September 2010 and in support, he provided a Statement dated 13 February 2010 essentially claiming that he was born in Kuwait on 1 January 1973, that his parents were Bedoun who were permitted to reside in Kuwait but they were not citizens, that in 1992 his parents were deported to Iraq, and that in 1992, "*my parents applied for Iraqi citizenship. It was difficult to get for them and they had to bribe government officials in order to obtain it. In my citizenship certificate it says that my father was born in Iraq, this is not correct but otherwise we wouldn't have been granted citizenship. After we received Iraqi citizenship, I bought a farm in Safwan. Settling in Iraq was difficult because we weren't accepted by the locals...".*

16. The application for a protection visa included Form 866 Part C. In response to questions 1, 4,8, 19, 20, 23, 28, 30, 53, 41, 42 and 43 of Part C, the applicant indicated that his family name is *Al Jourani* and that his given name is *Abdul Aziz.* He gave no answer to the question of whether he is known by any other name. He stated that his place of birth is *Al Magua, Kuwait* and that his citizenship at birth is stateless. He gave no answer to the question of current citizenship, stating that he is a "*Kuwaiti Bedoon - Kuwait did not acknowledge us as citizens. See RSA statement for more details".* He stated that he does not have a current travel document, but that he did have a *"False Passport…Smuggler took it from me."* He indicated that he is seeking protection in Australia so that he does not have to go back to *"Iraq and Kuwait."* He referred to the RSA statement to explain why he left Iraq and that he fears returning because he would be ill-treated.

17. In the RSA statement, the applicant claimed that:

- In 2003, their lives became more difficult. After the fall of the Saddam regime, Shia militia groups formed, including the prominent group Al Mehdi's Army, which controlled their area between 2003 and 2008.

- In December 2005, he was self-employed as a truck driver. He became friends with a person who was working with the British Army. That person gave him well-paid jobs to deliver goods for the British army. Although this was risky, he was happy to get the job. The Al Mehdi's Army was monitoring trucks that were travelling the route between customs in Safwan and the airport in Basrah.

- In early December 2005, he received a threatening letter from the Al Mehdi's Army, telling him to leave the area because of his cooperation with foreign forces. A few weeks later, when he was travelling between Safwan and Basrah, he was shot at and hit by several bullets from a distance. The neighbours took him to hospital, he was treated and sent home the same day. His wife was upset and wanted him to stop working for the foreign forces. He stayed at home for a short while but as he needed income, he returned to work. Other drivers told him that they were paying bribes to Al Mehdi's Army to be left alone and so he paid US$1,000 a month. He continued working and bribing until 2008 when the Al Mehdi's Army split up into various groups and infiltrated the government and the police.

- In June 2008 his son became ill from a brain tumour and died in November 2009. During the last treatment, a nurse made a fatal mistake and he wanted to lodge a complaint with the health department. When reporting at reception, he was asked to wait, and a group of people came. They asked him to follow them outside and he was taken to Al Fadila's party office. They insisted on him not complaining and threatened him; they said that they knew he is Sunni and that he was working with foreign forces. He was fearful and he gave them US$2,000. They took the money but threatened to return. His wife heard them. She was frightened and insisted on him leaving. He took his wife and children to his in-laws' house where they are hiding.

- He fears returning to Iraq:

> If I would go to a different area in Iraq I would have to register. Being a Sunni and having a Kuwaiti accent I wouldn't be safe anywhere. Everywhere in Iraq are militia and terrorists. There is no safe place in Iraq. The north of Iraq is safer than the south of Iraq for Sunnis but it's not possible for me to settle there, because I'd need a guarantor, which I don't have. A Sunni from Kuwait or Basrah is always suspicious in the north and not welcome.
>
> The south of Iraq is not the same for me because I'm a Sunni. There are many Shia militia groups operating in the south targeting Muslim Sunnis…
>
> I believe I'm targeted for three reasons: because I am a Sunni; because I have a Kuwaiti accent; and because I have been working with the foreign forces. This makes me very suspicious for both Shia militia in the south as well as the Sunnis in the north. There is no place for me to live safely in Iraq.

18. The IMR on 26 May 2010 accepted that the applicant had a well-founded fear of persecution and on 8 September 2010, the applicant was granted a protection visa.

**Events subsequent to the visa grant**

19. As discussed during the hearing, the delegate's decision record notes that on 13 November 2010, the applicant departed Australia. In his outgoing passenger card, he indicated that the country in which he would spend most of his time abroad was Syria.

20. On 13 February 2011, the applicant returned to Australia having in his possession an Iraqi passport in the name of *Abdul Aziz S Janhan.* The passport was issued in July 2007 and was due to expire in July 2011. The passport was issued in Basrah and showed that the applicant was born in Nasrea in 1973. The passport contained an arrival stamp for Iraq dated 14 November 2010 and a departure stamp from Iraq dated 11 February 2011. The applicant had in his possession copies of Iraqi passport biodata pages for his children.

21. The applicant also had in his possession an Iraqi Nationality Certificate issued on 21 December 2010 by the Directorate of Nationality of Al Basrah Iraq, in the name of Abdel Aziz Saoud Janaan born in 1973 in Zikar, Iraq. The document refers to the father's name as Saoud Janaan and mother's name as Noora Naifa. Both parents' places of birth are recorded as Zikar.

**NOTICE OF INTENTION TO CONSIDER CANCELLATION (NOICC/NOTICE) OF THE PROTECTION VISA SUBCLASS 866 – 2011**

22. On 5 May 2011, the Department sent to the applicant a NOICC referring to potential incorrect answers provided by the applicant in the application for a protection visa essentially relating to the applicant's name, place of birth, citizenship at birth, the use of a passport or travel document, as well as the answer that the applicant was seeking a protection in Australia so that he did not have to return to Iraq and Kuwait. The Notice also referred to the applicant's return to Iraq soon after being granted the protection visa, as well as the possession on his return to Australia of an Iraqi passport together with a range of other identity documents relating to the applicant's family. On 28 May 2012, a delegate decided not to cancel the applicant's protection visa Subclass 866.

23. On 9 September 2015, the applicant was granted the Resident Return Visa Subclass 155, the cancellation of which is subject to this review.

**NOICC OF THE SUBCLASS 155 VISA – 2018**

24. On 9 February 2018, the Department sent to the applicant a NOICC again referring to the information provided by the applicant in his application for a protection visa, as well as his return to Iraq soon after he was granted the visa, and the documents which were found to be in his possession on his return to Australia.

25. An email of 4 June 2018 confirms that a decision has been made to pursue under s 109 the cancellation of the Subclass 155 visa "*based mostly on the same non-compliance relating to the previous section 109 process in 2011/12*".

**RESPONSE TO THE NOTICE OF 2018**

26. In an email to the Department on 20 February 2018, the applicant requested that his visa not be cancelled and indicated that he has suffered and that if he were to return to Iraq, he would be *prosecuted.*

27. In support of the response, the applicant provided his Statement dated 25 May 2011, submissions dated 30 May 2011 in response to the Notice of May 2011, and a copy of the Delegate's decision not to cancel the visa dated 28 May 2012.

28. In his Statement of 25 May 2011, the applicant indicated:

- His name is Abdul Aziz Al Jourani. Subsequent to the family being deported to Iraq in 1992, his parents obtained Iraqi citizenships and identity documents by bribing officials. Although the documents contained his parents' real names, they had a false place of birth as Iraq, not Kuwait. He obtained his Iraqi citizenship and identity documents in 1993 through bribery. He gave a copy of his Iraqi citizenship to the Department.

- On 5 May 1994, he married his wife in Iraq and they had eight children but one died in 2009. Through bribery, all his children were given identity documents soon after their births.

- He left Iraq in November 2009 because he is a Sunni and was born in Kuwait. He is perceived as having worked with foreign forces. At the time of his departure from Iraq, neither his wife nor his children had Iraqi passports or citizenship documents. When he left Iraq, his family moved to live with his in-laws.

- Before he left Iraq on 10 November 2009, through a friend, he obtained a forged passport, which he used to travel by land from Iraq to Iran as well as by air to Malaysia. People smugglers took the passport from him whilst he was in Indonesia. He left behind an Iraqi passport which he had obtained in July 2007. His name shown on the passport is Abdul Aziz S Janhan which is his grandfather's name and also part of the applicant's name. The passport is a genuine document and the information contained in it is correct except for his place of birth, which is noted as Nasrea, south of Baghdad in Iraq, rather than Kuwait. He obtained this passport through bribery.

- He did not use the genuine passport to leave Iraq in November 2009 because it is a passport with an "S" serial number and his understanding is that he could only travel on an A" series passport. When he arrived on Christmas Island and he was asked about a passport, he did not tell them about this passport because he was told by Iraqi officials that the passport would not work anywhere in the world. Moreover, he did not think that the passport existed; there were new passports G and A which he did not have. When he completed the application documents on Christmas Island, he did disclose that his name included "*Janhan*" in response to question 4(a) of Form 80.

- Subsequent to the grant of the protection visa, he was given an Australian travel document. He was desperate for his wife and children to come to Australia. His wife was very depressed about the loss of their son and she was not coping. His father became very ill with a heart condition. He asked the Department whether the family could come to Australia without passports and he was advised that that would not be possible. It was also not possible for his wife and children to organise their own passports in Iraq without a husband and a father to make arrangements. He therefore made a decision to return to Iraq to see his wife and children as well as his ill father. He knew that this would be very difficult and dangerous but he had no choice. His original plan was to return to travel to Syria to meet his father who was going to travel with the applicant's wife and children. He obtained a visa from the Syrian embassy in Canberra which was placed on his Australian travel document. Prior to travelling, he contacted his father and was advised that his father was too sick to travel to Syria so he had to change his plans and travel to Iraq.

- He left Australia on 13 November 2010 and he travelled on his Australian travel document. In his passenger card he stated that he was travelling to Syria as he had originally planned. He was worried that if he had said that he was going to Iraq, the Australian authorities would not allow him to leave.

- Subsequent to leaving Australia, he flew to Brunei, then Dubai and Basrah, using his travel document. When he arrived in Basrah, his brother was able to meet him before he went through passport control by bribing the officials. His brother gave him the old Iraqi passport and he entered Iraq on that passport because had he used the Australian travel document, he would have been targeted as a foreigner.

- The applicant stayed in Basrah for the whole time he was in Iraq and lived at his father's place where his wife and children had moved to. He knew it was very dangerous for him so he stayed in the house as much as possible.

- During his stay in Iraq, he managed to organise passports for his wife and children and he also took his wife to hospital. After his son passed away, his wife was not the same and she was suffering from depression. His children had not been to school for three years. It was difficult and dangerous to obtain passports and he was afraid that he would be recognised and detained.

- When he left Iraq on 11 February 2011, he travelled on his old Iraqi passport as the Australian document was not stamped. After he arrived in Dubai, he used the Australian travel document to get to Brunei and later to Australia. On his arrival in Australia on 13 February 2011, he was stopped by immigration and he produced his old Iraqi passport with the exit and entry stamps for Iraq. He also had a notebook with him which contained his friends' phone numbers and names, as well as the phone number of his immigration caseworker.

- He did not mislead the Department at Christmas Island when he said that he could not return to Iraq because he would be detained, tortured and imprisoned. He was extremely fearful of returning to Iraq but did it because he had to help his wife and father. He was in hiding for most of the time that he was in Iraqi and he was fortunate not to have been recognised and detained. He did not give a different identity when he applied for a protection visa than the identity in his Iraqi passport. The photograph in his Iraqi passport is of him and the name *Janhan* is part of his name which he did put in the application form.

- His protection visa should not be cancelled and if he were to return to Iraq, he would be recognised and detained by the authorities. He is scared of the militia. He and his family would be in danger. He risked his life and he wants his family to be here for their safety as well as to have a better future.

**Submissions dated 30 May 2011**

29. Former counsel for the applicant, Mr Nicholas Poynder, provided a background to the circumstances of the applicant noting that the applicant denies that he provided incorrect information in relation to his identity or that he incorrectly claimed in his protection visa application that he could not return to the Iraq because he would be detained, tortured and imprisonment.

30. Mr Poynder contended that:

- The applicant has shown great courage by returning to Iraq in order to "*rescue*" his family in Iraq. The applicant travelled to Iraq despite his continued fear and the fact that he was not detained or ill-treated on his return to Iraq does not indicate that the applicant never had or no longer has a well-founded fear. The applicant remained in hiding and was "*perhaps fortunate*" not to be identified when he ventured out and made contact with the authorities.

- A recognised refugee is not a person who will almost be guaranteed to face persecution on their return to their home country. The phrase *well-founded fear* has relevantly been defined by the Courts to mean a real chance of persecution and the fact that a person did not, upon return for a very short period of time, suffer persecution, will not mean that the person no longer faces a real chance of persecution.

- The correct information is that the applicant obtained an "S" series passport in July 2007 through bribery of the authorities. It is well known that Iraqi passports can be obtained by bribing the authorities and the fact that the applicant had an "S" series

passport which was no longer useful for travel would not have impacted on the decision to grant him the visa.

- Despite having genuine fear, the applicant returned to Iraq in order to assist his family as well as his father, including to obtain travel documents for his wife and children to leave Iraq. The applicant continues to fear harm and he is anxious for his family to join him in Australia.

***Minister for Immigration and Border Protection v Makasa* [2021] HCA 1 (*Makasa*)**

31. Although the current review concerns cancellation pursuant to s 109 of the Act, the Tribunal received submissions contending that the case of *Makasa* is relevant to the Tribunal's determination of this review.

32. By way of background, the High Court in *Makasa* considered the cancellation regime under s 501(2).

33. Section 501(2) provides:

> The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test.

34. The powers conferred by s 501(1) and by s 501(2) can be delegated by the Minister under s 496 of the Act. Where a delegate of the Minister exercises the power conferred by s 501(1) to refuse to grant a visa to a person, or exercises the power conferred by s 501(2) to cancel a visa that has been granted to a person, s 500(1)(b) of the Act allows the person to apply to the AAT for review of the decision of the delegate.

35. Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides that "*For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing*" to affirm, or vary, or set aside the decision under review.

36. Section 501A of the Act confers powers by which the Minister is permitted to override a decision made by a delegate or by the AAT on review. The Minister can override a decision not to exercise the power conferred by s 501(1) to refuse to grant a visa and instead decide to refuse to grant the visa. The Minister can also override a decision not to exercise the power conferred by s 501(2) to cancel a visa and instead decide to cancel the visa.

37. The background in *Makasa* is that in 2009, Mr Makasa was convicted in the District Court of New South Wales of four offences, including one offence of aggravated sexual assault, which was later set aside on appeal to the Court of Criminal Appeal. The other three were offences of sexual intercourse with a person aged between 14 and 16 years of age, for which he was sentenced to three concurrent terms of imprisonment each of two years with a non-parole period of 12 months.

38. A delegate of the Minister in 2011 found that Mr Makasa failed to pass the character test by reason of the sentences imposed in respect of the 2009 convictions and exercised the discretion conferred by s 501(2) of the Act to cancel Mr Makasa's permanent residence visa. Mr Makasa appealed to the AAT. In 2013, the AAT exercised the power conferred by s 501(2) of the Act to make a decision under s 43(1)(c)(i) of the AAT Act setting aside the decision of the delegate and substituting a decision that the visa should not be cancelled.

39. In 2017, Mr Makasa was convicted in the Local Court of New South Wales of two further offences, one for non-compliance with a reporting obligation and the other for driving under the influence of alcohol, for which he was disqualified from driving for 12 months and fined $1,200. The Minister became aware of the 2017 convictions and was satisfied that Mr Makasa failed to pass the character test by reason of the sentences imposed in respect of the 2009 convictions, and taking the 2017 convictions into account in the exercise of the discretion, the Minister personally exercised the power conferred by s 501(2) of the Act to cancel Mr Makasa's permanent residence visa.

40. The Court in *Makasa* held that there was no difference between a cancellation process that resulted in a decision not to cancel a visa and a decision to cancel a visa, as either decision constitutes the end-point of the exercise of the cancellation power (at [41]). The Court held that the power to cancel Mr Makasa's visa under s 501(2) had been 'spent' following the delegate's decision which was subsequently set aside by the Tribunal, and that there was no legal basis to re-exercise that same cancellation power in respect of the same circumstances.

**Applicant's submissions to the Tribunal - 15 February 2021**

41. In the submissions, the representative provided a background in relation to the circumstances relating to the first and second cancellations, and contended that:

- The cancellation of the Subclass 155 visa raises an issue for determination, namely whether the delegate was capable of exercising the power under s 109 in circumstances where on the basis of the same information, a different delegate had made an earlier decision not to cancel a previous visa held by the applicant. This issue arises out of the case of *Makasa*.

- Although the Tribunal has jurisdiction to review the matter, the effect of *Makasa* is that the delegate did not have the power to cancel the Subclass 155 visa. The Tribunal cannot exercise any greater power than the one exercised by the Minister or the delegate. As the delegate did not have power to cancel the Subclass 155 visa, the Tribunal can only set aside the delegate's decision and substitute it with the decision not to cancel the visa. The Tribunal cannot affirm the delegate's decision to cancel the Subclass 155 visa.

- The reasons for judgment in *Makasa* were given at the same time as those in *Minister for Home Affairs v Brown* [2020] FCAFC 21 *(Brown)*, as each matter raised the same issue. *Brown* came before the Full Court following the judgment of Colvin J at first instance. The High Court recorded the following in relation to Colvin J's judgment:

> Colvin J took the view that, once exercised in respect of facts constituting a failure to pass the character test to decide not to cancel a visa, the power conferred by s 501(2) of the Act cannot be re-exercised in respect of the same failure to pass the character test to decide to cancel the visa.

- In relation to the judgment of Allsop CJ, Kenny and Banks-Smith JJ, being the majority in the FCAFC proceedings, the High Court stated:

> Their view was that the power conferred by s 501(2) of the Act becomes incapable of being re-exercised to cancel a visa in respect of a failure to pass the character test only upon the making by the AAT of a decision under s 43(1)(c)(i) of the AAT Act setting aside a decision made by a delegate and substituting a decision that the visa should not be cancelled.

> Thus, Colvin J and Allsop CJ, Kenny and Banks-Smith JJ all took the view in Brown that the statutory scheme evinced an intention contrary to the unconstrained application to s 501(2) of the Act of s 33(1) of the AI Act[2]. The main difference between them was as to the point at which the power conferred by s 501(2) of the Act becomes incapable of being re-exercised. Unlike Colvin J, Allsop CJ, Kenny and Banks-Smith JJ interpreted the earlier decision of the Full Court in *Parker v Minister for Immigration and Border Protection* as having decided that the Minister can re-exercise the discretion conferred by s 501(2) of the Act to cancel a visa based on the same failure to pass the character test as had founded an earlier exercise of discretion by a delegate not to cancel the visa. Applying the standard for overruling prior decisions of the Full Court that has been adopted as a matter of policy in the Federal Court, their Honours were not prepared to hold that Parker was "plainly wrong".

- The High Court preferred the approach of Colvin J "*To the extent that Parker contains reasoning to the contrary, that reasoning is not to be followed*". The High Court held:

> Hence, s 501A of the Act must be read as manifesting a legislative intention to exclude re-exercise by the Minister or a delegate of the more general power conferred by s 501(2) of the Act, read in light of s 33(1) of the AI Act, to revisit and reverse a previous decision of a delegate not to cancel a visa made in the exercise of the power conferred by s 501(2) where there has been no change to the factual basis on which the previous decision-maker, be it the Minister or a delegate or the AAT, formed a reasonable suspicion that the visa holder did not pass the character test in making the previous decision not to cancel a visa.

- The High Court held:

> The result, in short, is that a decision of a delegate or the AAT not to cancel a visa made in the exercise of the power conferred by s 501(2) of the Act on the basis of facts giving rise to a reasonable suspicion that a visa holder does not pass the character test is final, subject only to ministerial override in the exercise of the specific power conferred by s 501A. The Minister or a delegate can re-exercise the power conferred by s 501(2) to cancel the visa if subsequent events or further information provide a different factual basis for the Minister or a delegate to form a reasonable suspicion that a visa holder does not pass the character test at the first stage of the requisite two-stage decision-making process. But neither the Minister nor the delegate can rely on subsequent events or further information simply to re-exercise the discretion to cancel the visa at the second stage of the decision-making process. That result is in harmony with the holding of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* that s 33(1) of the AI Act does not operate on the power conferred by s 501(2) of the Act to extend to permit the Minister to respond to representations urging re-exercise of the power to revoke the cancellation of a visa by reference to considerations going to the exercise of discretion. To the extent that the decision of the Full Court in Parker can be read to suggest that s 33(1) of the AI Act authorises re-exercise of the power conferred by s 501(2) of the Act to cancel a visa by reference to events subsequent to an earlier exercise of the power not to cancel the visa which bear only on the exercise of discretion, Parker must be taken to have been wrongly decided.

- Contrary to the findings of the majority in the Full Court of the Federal Court in *Brown* and *Makasa*, this matter cannot be distinguished simply because the decision not to cancel the protection visa was made by the delegate as opposed to the AAT. The High Court, at least in the context of decisions made under s 501 "*has clearly*

[2] *Acts Interpretation Act 1901* (Cth).

*established the authority who makes the final determination in respect of a particular power is irrelevant to whether the section 501 power can be re-exercised*". Moreover, as in the case of s 501A, the Minister has the power to override a decision of the delegate, or the Tribunal, not to cancel a person's visa. The conferral of this power shows an intention to exclude the re-exercise of the same power absent a relevant change in circumstances, i.e. to exclude the operation of s 33(1) of the *Acts Interpretation Act 1901* (Cth) (the AI Act).

- *Makasa* concerned the relationship between powers conferred by ss 501 and 501A, whereas in the case of Mr Al Jourani, the Subclass 155 visa was cancelled pursuant to s 109 of the Act. Section 501A authorises the Minister to set aside the decision of a delegate or the AAT not to cancel a person's visa. Similar to s 501A, s 133A authorises the Minister to set aside the decision of a delegate or the AAT not to cancel a person's visa. Both sections provide the Minister with the power to set aside a favourable decision in circumstances where the Minister is satisfied that it would be in the public or national interest to do so, that is, for a reason that is unrelated to the exercise of the powers under ss 109 or 501. Sections 133A and 501A, operate to prevent the re-exercise of the power in s 109 in the absence of any change in circumstances.

- It is accepted that s 501A provides the Minister with the power to override an earlier decision with respect to "*a visa",* whereas s 133A is expressed in terms overriding a decision with respect to "*the visa*." In the case of Mr Al Jourani, there are two decisions, one relating to the protection visa and the other concerning the Subclass 155 visa issued in 2015, both made pursuant to s 109. In *Makasa*, Justice Edelman put the following to the Minister's Senior Counsel: "*So the [Minister's] position is effectively that 501(2) could just be - assuming there is no national interest engaged or anything like that, 501(2) can be re-engaged every time the Minister disagrees with a Tribunal decision, so the process could just go up and down forever?*" Although Mr Al Jourani's protection visa enabled him to remain in Australia indefinitely, it only authorised him to travel to and from Australia for a period of five years. Mr Al Jourani was required to obtain a further visa, namely the Subclass 155 visa, if he wanted to be able to travel after the initial travel authority expired. If he could not obtain Australian citizenship prior to the travel authority attached to the Subclass 155 visa expiring, he would need to obtain a further Subclass 155 visa should he wish to extend his ability to travel to and from Australia. The process of obtaining a Subclass 155 visa after a Subclass 155 visa could go on for as long as Mr Al Jourani remains a permanent resident as opposed to an Australian citizen.

- If s 133A is interpreted as referring to only the visa in respect of which a s 109 decision was made, it would "*lead to the absurd result that (i) someone in Mr Al-Jourani's position – who has obtained a further visa because he was no longer able to travel on his initial visa – would be liable to have their subsequent visa cancelled; while (ii) a person who receives a favourable decision under section 109 in respect of their initial visa, and then choses to remain on that visa for the rest of their life (as they are entitled to do), would be immune from having that visa cancelled pursuant to section 109 – assuming no change in circumstances – on that basis…To adopt such an interpretation could, to paraphrase Justice Edelman, result in a process that, for a particular cohort of people but not others, goes up and down forever*". Section 133A should not be interpreted in a way that permits the re-exercise of the power in s 109 in circumstances where there has been no material change in the visa holder's circumstances; this includes where the visa holder has been granted a subsequent visa.

- There has not been a material change in Mr Al Jourani's circumstances. The particulars set out in the NOITCC of the Subclass 155 visa were based on "*precisely the same set of facts that were set out in the First Notice, i.e. they only related to the statements made by Mr Al Jourani during his application for a Protection visa, his return to Iraq and the documentation found in his possession upon returning to Australia"*. In the language of the High Court, there has been "*no change to the factual basis on which the previous decision-maker"* made their decision.

**Submissions of the Secretary, Department of Home Affairs**

42. In a letter dated 6 May 2021, the Tribunal invited submissions from the Secretary, Department of Home Affairs (Secretary) in relation to the applicant's review and, in particular, in response to the questions as to whether the AAT has jurisdiction to review the cancellation of the Subclass 155 visa and if so whether the Tribunal would be compelled to set aside the decision and substitute it with the decision not to cancel the visa.

43. The Secretary submitted that:

- The Tribunal has jurisdiction to review a decision that has in fact been made, regardless of whether it is a legally effective decision. The Tribunal must conduct the review and it is not *"compelled"* to set aside the delegate's decision and substitute it with a decision not to cancel the visa. The Tribunal must review the delegate's decision on its merit and then make one of the decisions in s 349(2) of the Act.

- *Makasa* related to the exercise of the power in s 501(2) of the Act, particularly the second exercise of s 501(2) with respect to the same visa. The Court's reasons are focused upon the particular power in s 501(2) and whether it can be re-exercised from time to time - the answer to which "*turns on the construction of s 501(2)".* The Court's reasons do not deal with s 501 as a whole, or any of the other powers in s 501.

- The Tribunal, and the Federal Court have held that *Makasa* cannot be "*directly applied"* to another of the powers in s 501[3]. The High Court's reasons in *Makasa* "*say nothing at all about (and does not purport to be about) any other cancellation power in the Act - such as s 109 or s 116. Those other cancellation powers arise in a different statutory context to s 501(2) and involve different pre-conditions to their availability. The differences in the structure and operation between s 501(2) and the other cancellation powers in the Act is a reason why the reasoning in Makasa cannot simply be applied to those other powers - and was why Derrington J found Makasa not to be "directly applied" to another sub-section of s 501 (ie s 501 (3A)).*"[4]

- The specific facts of *Makasa* are relevant to understanding the Court's reasoning. Mr Makasa held only one (permanent) visa from 2004 onwards. The decision of the delegate under s 501(2) in 2012 to cancel Mr Makasa's visa, the Tribunal's 2013 decision under s 501(2) not to cancel the visa, and the Minister's 2018 decision under s 501(2) to cancel the visa were made in relation to the *one visa*. Each decision-maker relied on *precisely* the same limb of s 501(6) of the Act to find that Mr

[3] *Zyambo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 545 at [45]; *PYDZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1138 at [32]-[36].
[4] *Zyambo* at [43].

Makasa did not pass the character test - ss 501(6)(a) and (7)(c), although reliance on another limb of the character test would potentially have been open.[5]

- In *Makasa*, there was no exercise of power under s 109(1) and no "re-exercise" had arisen**.** The subject matter of s 501(2) of the Act is *"a visa*" (not a *"person"*). A decision made under s 501(2) is in relation to a particular visa that has been granted. Section 109(1) is also a power to cancel *"the visa*" in relation to which the Minister has given the s 107 Notice. It is common for non-citizens to hold different visas and each of those different visas can be the subject of cancellation decisions under the various cancellation powers in the Act.

- In *Makasa,* the Court held (at [42]) that "*whether the decision is to cancel the visa or not to cancel the visa, the decision is therefore the end point of an exercise of the power conferred by s 501(2) of the Act".* Their Honours continued (at [43]) that "*the consequence is that, if the Minister or a delegate is to make a subsequent decision to cancel a visa under s 501(2) of the Act, superseding a decision of the Minister or a delegate in the first instance or of the AAT on review not to cancel the visa, that subsequent decision can only occur through a re-exercise of the power conferred by s 501(2) of the Act"* and then, at [44], described the "*determinative question"* as "*whether, and if so when, the power conferred by s 501(2) of the Act, having once been exercised by the Minister or a delegate in the first instance or re-exercised by the [Tribunal] on review not to cancel a visa, can be re-exercised by the Minister or a delegate to cancel the visa".*

- Mr Makasa only held one visa throughout the relevant time period and each of the 2012, 2013 and 2018 decisions under s 501(2) was a decision made in relation to the *same* visa. The Court was not referring to different visas. The decision to cancel the applicant's Subclass 155 visa was made at a time that the protection visa no longer existed. "*Logically, there cannot be an exercise of power to cancel the Resident (Return) visa many years before it had been granted. In circumstances where the delegate's 3 April 2019 decision was the first exercise of power, pursuant to s 109(1), in relation to the Resident (Return) visa, the power in s 109(1) could not, at the time of making that decision, have already been "spent". The power in s 109(1) of the Act was available to be exercised, for the first time, in relation to that visa. The exercise of s 109(1) in April 2019 was not a "re-exercise" of that power. It follows that, unlike in Makasa, no issue arises as to whether s 33(1) of the Acts Interpretation Act 1901 (Cth) permitted the "re-exercise" of s 109(1) in April 2019. Makasa concerns a different factual scenario and does not speak to the circumstance where different decisions are made to cancel different visas. Nothing in Makasa denies that the power in s 109(1) was available to be exercised by the delegate, in April 2019, in relation to the Resident (Return) visa*". The May 2012 decision related to the applicant's protection visa and the April 2019 decision related to the Subclass 155 visa. The protection visa had ceased and no exercise of the power in s 109(1) had occurred, prior to April 2019, in relation to the Subclass 155 visa.

- The suggestion that the applicant might need to obtain further Resident (Return) visas in the future and that this "*might go on for as long as [he] remains a permanent resident as opposed to an Australia citizen*", would lead to *"absurd"* results but no *"absurdity" is identified* or a reason to conclude that s 109(1) was not available for exercise in April 2019. What visas the applicant might or might have in the future is "*mere speculation and does not provide a sound basis for interpreting s 109(1) in the*

[5] *Makasa* at [48].

*way he desires. That a future (different) visa Mr Al Jourani holds might be subject to an exercise of power under s 109(1) (or any other cancellation power in the Act) simply reflects Parliament's intention as reflected in the wording used and the operation of the Act - and that s 109(1) (and eg s 501(2)) are powers in relation to "a" or "the" particular visa held by a person*". The suggestion that a person who holds a visa, which has been the subject of a decision under s 109(1) not to cancel, and then remains on that visa, is *"immune"* from subsequent cancellation under s 109(1) is *plainly wrong*. *Makasa* concerns a different provision in the Act, subject to different statutory pre-conditions for its availability, and is not applicable to s 109(1).

- Section 133A(1) is a power permitting the Minister (personally) to set aside a decision not to exercise the power in s 109(1) in relation to a particular visa, and to then cancel that same visa – "*That is plain from the grammatical structure of s 133A(1)…Section 133A(1) is referring throughout, and consistently, to the one visa …. Section 133A(1) is not, on its plain words, directed to a situation (as here) where a delegate has decided not to cancel one visa, but circumstances arising later lead to the Minister wishing to cancel a different visa…Section 133A(1) does not provide an apt analogy with s 501A and does not mean that the reasoning in Makasa is applicable to the present circumstances*". The applicant's contention that s 133A limits the availability of s 109(1) in this case "*also ignores the effect of s 118(1) of the Act"* which provides that the powers in ss 109 and 133 A, among other things, *"are not limited, or otherwise affected, by each other".*

- In relation to the applicant's reference to a comment made by Edelman J during the hearing of *Makasa,* that comment is one made by a single judge and does not form any part of the Court's actual reasoning in its judgment. The Federal Court has warned against relying on transcripts of hearings in the manner sought by the applicant. *Makasa* does not apply to s 109(1) of the Act and there is no cogent reason to find, as a matter of statutory construction, that the Court's approach to s 501(2) of the Act in *Makasa* is also applicable to s 109(1) of the Act. The two powers are not analogous or identical in nature. Section 109(1) must also be read in the context of s 107A, which expressly permits a decision-maker to rely on non-compliance in respect of *"any previous visa held by the person*".

- Even if the Tribunal were to find that *Makasa* applied to s 109(1), s 109(1) would still be available for exercise in the applicant's case. Although *Makasa* does not permit the decision-maker under s 501(2) to rely on *precisely* the same facts or circumstances to find that a visa holder does not pass the character test, it does allow a decision-maker to rely on a different basis for finding that a visa holder fails the character test in order for s 501(2) to be re-exercised.

- It is correct that the 2012 and 2018 decisions under s 109(1) arise out of the answers the applicant provided in his 2010 application for the protection visa, however, the s 107 notice of May 2011, and the s 109(1) decision not to cancel the protection visa specified non-compliance, and made a finding of non-compliance, with s 101(b) of the Act. Whereas the s 107 notice of February 2018 and the s 109(1) decision to cancel the Subclass 155 visa in April 2019 specified non-compliance, and made a finding of non-compliance, with ss 101(a) and (b). The 2018 decision made findings concerning non-compliance with an additional provision and the decision makes findings of non-compliance that were not made in the 2012 decision. The applicant provided a response to the s 107 notice which is a *new matter which the decision-maker was required to consider before being permitted to cancel the visa under s 109(1).* Importantly, the February 2018 s 107 notice raised the reassessment of

any *non-refoulement* obligations and identified relevant new, as well as up-to-date, country information relating to those obligations. The applicant was invited to comment upon this matter.

- The assessment of the non-refoulement obligations was taken into account in deciding to cancel the visa. The 2018 s 107 notice and decision under s 109(1) did not rely on "*precisely the same circumstances",* or exactly the same facts, as the earlier decision. The High Court "*made clear that the cancellation process may be re-enlivened where subsequent events or further information provide a different factual basis for forming the requisite satisfaction that the process of cancelling a visa is engaged*".

**Applicant's further submissions – dated 10 June 2021**

44. The Tribunal received submissions from Dr Donnelly, who appeared as counsel for Mr Makasa,[6] in response to the above submissions of the Secretary. The submissions contended that:

    - The delegate's finding that the applicant did not comply with s 101 of the Act was an unlawful exercise of power. Sections 107-109 provide a *prescriptive administrative process* that commences with the issue of a s 107 Notice and its finality has legal consequences. Once there has been a finding of non-compliance by the non-citizen with s 108(b) of the Act, but there is an exercise of discretion favourable to the non-citizen, the jurisdictional fact under s 108 is spent. In this case, once the 2012 decision was made, the Minister or his or her delegate, is not permitted to recommence the *administrative process* under s 107 of the Act in 2018 and give particulars of the possible non-compliance related essentially to a jurisdictional fact that had been resolved previously through the exercise of executive power that ended with the 2012 decision.

    - The statutory effect of s 112 is that a subsequent s 107 Notice "*must relate to another instance of possible non-compliance*. *Section 112 implicitly recognises that once a 's 107 Notice' has been resolved under s 108 of the Act, the jurisdictional fact underpinning that non-compliance is spent in the context of the exercise of executive power*. The purpose of s 112(2) is that a subsequent s 107 Notice must relate to another instance of non-compliance. Although it is accepted that s 112(2) of the Act does not *squarely apply t*o the applicant's case, it does show Parliament's concern about the consequences of a favourable decision.

    - Accepting that the phrase "the visa" in s 112(2) is a reference to the same visa subject of the non-cancellation decision, the initiation of the process under s 107 cannot materialise again unless there has been 'another instance of non-compliance'. In the applicant's case, there has not been another instance of non-compliance. The grounds concerning the 2018 Notice are reflected in the 2011 Notice, which is contrary to Parliament's legislative intent. Under s 133A(1) of the Act, if a delegate makes a favourable decision relating to a non-citizen under s 109, the Minister may set aside that decision if satisfied, among other things, that it is in the *public interest* to do so, similar to s 133A(3), although "*the rules of procedural fairness are expressly abrogated under that statutory power… The legislative implication of s 133A recognises an exception to the application of s 112 of the Act; namely that the original statutory non-compliance could be*

[6] *Makasa v Minister for Immigration and Border Protection* [2020] FCAFC 22; (2020) 376 ALR 191; and *Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639.

*revisited if the Minister personally intervened, exercising the broad public interest power to set aside a decision of his or her delegate"*.

- No other statutory exception is reflected in the Act to negate the application of s 112 so the inference is that once a statutory non-compliance matter has been decided favourably in relation to a non-citizen, the jurisdictional fact underpinning that statutory non-compliance cannot be revisited. "*The existence of s 133A provides considerable contextual support for construction of s 108(b) that would not permit a re-exercise of the power based upon the same facts*."

- Legal reasonableness concerns the lawful exercise of power and is an essential element of lawful decision-making. Having regard to established principles, it would be legally unreasonable for the Tribunal to conclude that both the 2018 Notice and 2019 decision were lawful exercises of power. It is clear that the 2018 Notice and the 2019 decision make findings that relate to a jurisdictional fact that was resolved. It must be concluded that the 2018 Notice and 2019 decision are *plainly unjust* and *capricious*; it is an attempt to revisit an earlier exercise of power by the Minister concerning a jurisdictional fact that was ultimately resolved in favour of the applicant. The delay between the statutory non-compliance and the initiation of the cancellation process 2018 can be characterised as *capricious* and *plainly unjust.*

- Being prescriptive as a whole about the circumstances in which a visa may be granted, cancelled, or revoked, it is *"unlikely, within the scheme of the Act, that the right may be subject to ongoing review and revision once an assessment has been made that it should not be cancelled in particular circumstances"*. It is inconsistent with the Act to revisit the question of whether a visa should be cancelled once a decision has been made, *on particular facts*. There would be substantial uncertainty and jeopardy.

- The 2019 decision is directly in tension with what Justice Colvin said in *Brown v Minister for Home Affairs* [2018] FCA 1722 at [37]. "*Nothing in the Minister's written submissions have, with respect, grappled with his Honour's reasoning in this regard…it is unlikely, within the scheme of the Act, that the right may be subject to ongoing review and revision…The Minister's preferred construction would, to borrow the words of Colvin J in Brown, introduce substantial uncertainty and jeopardy in respect of the rights conferred by visas if they could be subject to repeated consideration as to whether they could be cancelled by reference to the same factual position in respect of matters 'giving rise to a power to cancel a visa'*.

- In this case, it does not matter that the Minister purported to cancel a different visa. The jurisdictional fact underpinning the 2012 decision was made based on particular grounds and the 2019 decision is "*nothing more than the Minister seeking to revisit the same factual position in circumstances that enlivened the cancellation power under s 108 of the Act in 2012…Contrary to the Minister's submissions, the new factual circumstances in the 2019 decision related to the exercise of discretion are irrelevant… a decision to refrain from cancelling a visa could be revisited, the visa-holder would, notwithstanding such favourable determination, remain at risk of future cancellation upon the same factual basis as grounded the original decision…That would be an unsatisfactory basis for continued residence in this country…Neither outcome is consistent with the strict regulatory regime established by the Act".* There must be new facts that form the basis for the non-compliance.

45. The Tribunal received further submissions from the applicant concerning *Makasa* and the merits of the applicant's claims. The Tribunal has given regard to those submissions.

**FINDINGS on the relevance/application of *Makasa***

46. The applicant is contending that although the Tribunal has jurisdiction to review the application, the Tribunal is compelled to set aside the decision under review and substitute it with a decision not to cancel the visa.

47. There is no dispute and the Tribunal finds that it has jurisdiction to review the delegate's decision. The Tribunal is satisfied that it must conduct the review and for the reasons explained below, the Tribunal is not *"compelled"* to set aside the delegate's decision and substitute it with a decision not to cancel the visa. The Tribunal finds that it must make a decision in accordance with s 349(2) of the Act on the merit of the case.

48. Central to the applicant's submissions is *Makasa*. Given that focus, the Tribunal considers it appropriate to discuss that case in more detail. In *Makasa*, the question for determination was whether the Minister could re-exercise the power conferred by s 501(2) of the Act to cancel a visa on character grounds given that the AAT had set aside the delegate's decision to cancel the visa and substituted a decision that the visa should not be cancelled. The High Court held that the power to cancel Mr Makasa's visa under s 501(2) had been 'spent' following the delegate's decision which was subsequently set aside by the Tribunal, and that there was no legal basis to re-exercise that same cancellation power in respect of the same circumstances.

49. In *Makasa*, the Court referred to the function of merits review, with the AAT being empowered to stand in the shoes of the primary decision maker, and on s 501A manifesting a legislative intention to exclude re-exercise by the Minister or delegate of a more general power to revisit and reverse a previous decision not to cancel a visa where there has been no change to the factual basis (at [51], [52] and [55]). That is, the AAT's jurisdiction to undertake merits review, the principle of finality in administrative decision making and the existence of an alternative, more specific, cancellation power in s 501A each evidence a contrary intention to the power in s 501(2) being exercisable 'from time to time'. The exception to this was that the cancellation power could be re-enlivened or re-exercised if there were subsequent events or further information that provided a different factual basis for the cancellation (at [49]). The Court held that there was no difference between a cancellation process that resulted in a decision not to cancel a visa and a decision to cancel a visa, as either decision constitutes the end-point of the exercise of the cancellation power (at [41]). In addition, the Court expressly rejected the findings of Allsop CJ, Kenny and Banks-Smith JJ in *Brown v MHA* (2020) 275 FCR 188 that the power conferred by s 501(2) only became spent after a decision of the AAT had been made under s 43(1)(c)(i) of the AAT Act to set aside the cancellation decision, preferring instead the reasoning of Colvin J in *Brown* at first instance that the power was spent once the Minister, or his or her delegate, had made their decision (at [23] and [27]).

50. The Tribunal is of the view that there are significant and critical differences between this case and *Makasa*. The cases relate to different statutory regimes and the re-exercise of power in relation to the same visa. The Tribunal observes that *Makasa* related to the exercise and re-exercise of power in s 501(2) of the Act in relation to the same visa, which is not the case in this instance. The Court's reasons in *Makasa* do not deal with other powers under s 501 or cancellation powers such as s 109 or s 116. The applicant's visa was cancelled under s 109 of the Act and not s 501. The Tribunal gives weight to the Secretary's observations that the Tribunal, and the Federal Court, have held that *Makasa* cannot be

"*directly applied"* to another of the powers in s 501[7] and that the High Court's reasons in *Makasa* "*say nothing at all about (and does not purport to be about) any other cancellation power in the Act - such as s 109 or s 116. Those other cancellation powers arise in a different statutory context to s 501(2) and involve different pre-conditions to their availability. The differences in the structure and operation between s 501(2) and the other cancellation powers in the Act is a reason why the reasoning in Makasa cannot simply be applied to those other powers - and was why Derrington J found Makasa not to be "directly applied" to another sub-section of s 501 (ie s 501 (3A)).*"[8] In this case and in relation to the Subclass 155 visa, the power under s 109(1) had not been exercised and no occasion for its "re-exercise" had arisen. It is correct that power was exercised not to cancel the applicant's Subclass 866 visa but it cannot be extrapolated that any other visa cannot be cancelled even on the same basis. The decision not to cancel the Subclass 866 was the "*end point*" in relation to that specific visa.

51. As pointed out in the Secretary's submissions, the structure and operation of s 109(1) differ significantly to s 501(2). Section 501(2) is enlivened if a decision-maker forms an assessment that the non-citizen does not pass the character test. In contrast, the power in s 109(1) may be exercised following a prescribed procedure which includes an assessment that there was non-compliance by the visa holder in the way described in the s 107 notice, consideration of any response to the s 107 notice, and giving regard to considerations prescribed by reg 2.41 of the Migration Regulations 1994 (Cth) (the Regulations).

52. The Tribunal is persuaded by the submissions that a future different visa might be subject to an exercise of power under s 109(1) is consistent with "*Parliament's intention as reflected in the wording used and the operation of the Act - and that s 109(1) (and eg s 501(2)) are powers in relation to "a" or "the" particular visa held by a person."*

53. The applicant acknowledges that the 28 May 2012 decision not to cancel his visa concerned the Subclass 866 visa, which ceased on 9 September 2015. On the same day, he was granted the Subclass 155 visa. The decision to cancel the Subclass 155 visa was made at a time when the Subclass 866 had ceased. Mr Makasa only held one visa and all the decisions under s 501(2) were made in relation to the same visa. The Tribunal is satisfied that the Court in *Makasa* was not referring to circumstances where different visas were held. In relation to the Subclass 155 visa, the power in s 109(1) had not been "spent" and it was not a "re-exercise" of power. There is therefore no issue as to whether s 33(1) of the AI Act permitted the "re-exercise" of s 109(1) in relation to the Subclass 155 visa. The Tribunal is of the view that the Court's reasoning in *Makasa* focussed upon the availability of a *specific* power in the Act - s 501(2) - and turned on the construction of s 501(2) itself, in the context of the Act, the AAT and the AI Act.

54. The Tribunal notes that the Court in *Makasa* was particularly focussed on the review function of the AAT, which could potentially be reduced to a 'mockery' - *"to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review"[9]. The function of the AAT, in other words, is "to do over again" that which was done by the primary decision-maker[10]. The function would be reduced to a*

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[7] *Zyambo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 545 at [45]; *PYDZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1138 at [32]-[36].

[8] *Zyambo* at [43].

[9] *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51].

[10] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 315 [100], quoting *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502.

*mockery were the subject-matter of the decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review(at [50])".* In the applicant's case, there has not been an application for review by the AAT so the essential reasoning of potentially the function of the AAT being reduced to a mockery is not relevant in this case and cannot be confused with the facts of this case.

55. The Tribunal accepts the applicant's submissions that ss 107-109 provide a *prescriptive administrative process* that commences with the issue of a s 107 Notice and its finality has legal consequences, including being a *spent* jurisdictional fact. However, that spent jurisdictional fact relates to the same visa that ended and the applicant was granted the Subclass 155 visa.

56. The applicant has made submissions relating to the impact of s 112. Section 112 of the Act provides:

> Action because of one non-compliance does not prevent action because of other non-compliance
>
> (1) A notice under section 107 to a person because of an instance of possible non-compliance does not prevent another notice under that section to that person because of another instance of possible non-compliance.
>
> (2) The non-cancellation of a visa under section 109 despite an instance of non-compliance does not prevent the cancellation, or steps for the cancellation, of the visa because of another instance of non-compliance.

57. The applicant's contention that the statutory effect of s 112 is that a subsequent s 107Notice must relate to another instance of possible non-compliance does not consider that s 112(2) is a reference to the same visa, which is not so in this case. The Tribunal, however, notes that this is partly conceded by the applicant who accepts that s 112(2) of the Act does not apply to the applicant's case, although contends that this shows Parliament's concern. Central to the applicant's submissions is that s 107 cannot materialise again unless there has been 'another instance of non-compliance'. The applicant's contention that as there is no other statutory exception reflected in the Act to negate the application of s 112, the inference is that once a statutory non-compliance matter has been decided favourably to a non-citizen, the jurisdictional fact underpinning that statutory non-compliance cannot be revisited, is inconsistent with the fact that s 112 is referring to the same visa.

58. The applicant made submissions that s 133A should not be interpreted in a way that permits the re-exercise of the power in s 109 in circumstances where there has been no material change in the visa holder's circumstances, which includes if the visa holder has been granted a subsequent visa. The applicant contends that the *existence of "s 133A provides considerable contextual support for construction of s 108(b) that would not permit a re-exercise of the power based upon the same facts"*.

**Minister's personal powers to cancel visas on s 109 grounds**

59. Section 133A provides that:

> Action by Minister--natural justice applies
>
> (1) If a notice was given under section 107 to the holder of a visa in relation to a ground for cancelling the visa under section 109, and the Administrative Appeals Tribunal or the former Migration Review Tribunal or former Refugee Review Tribunal, or a delegate of the Minis
>
> (a) decided that the ground did not exist; or

(b) decided not to exercise the power in subsection 109(1) to cancel the visa (despite the existence of the ground)

the Minister may set aside that decision and cancel the visa, if

(c) the Minister considers that the ground exists; and

(d) the visa holder does not satisfy the Minister that the ground does not exist; and

(e) the Minister is satisfied that it would be in the public interest to cancel the visa.

Note: The grounds for cancellation under section 109 are non-compliance with section 101, 102, 103, 104 or 105.

(2) The procedure set out in Subdivision C does not apply to a decision under subsection (1).

60. The Secretary submitted and the Tribunal is persuaded that it is *plain from the grammatical structure* that s 133A(1) is referring throughout, and consistently, to the *one* visa, a particular visa, and the substitution of a decision to cancel that visa, and that s 133A(1) is not directed to the situation where a delegate has decided not to cancel one visa but where circumstances arise which later lead to the Minister cancelling a *different* visa. The Tribunal is satisfied that the applicant's contention that s 133A limits the availability of s 109(1) does not give consideration to s 118(1), which provides that the powers in ss 109 and 133A *"are not limited, or otherwise affected, by each other".*

61. Of crucial difference between ss 501(2) and 109(1) is s 107A, which provides:

Possible non-compliances in connection with a previous visa may be grounds for cancellation of current visa

The possible non-compliances that:

(a) may be specified in a notice by the Minister under section 107 to a person who is the holder of a visa; and

(b) if so specified, can constitute a ground for the cancellation of that visa under section 109;

include non-compliances that occurred at any time, including non-compliances in respect of any previous visa held by the person.

62. Section 107A therefore expressly permits a decision-maker to rely on non-compliance in relation to *"any previous visa held by the person*" when considering cancellation under s 109. There is no provision of this or a similar nature applicable to s 501(2). The cancellation of the Subclass 155 visa was based on non-compliance that occurred in relation to the application for the protection visa. This is consistent with s 107A of the Act and as suggested by the Secretary, another reason for finding that the reasoning in *Makasa* is not suitable for application to s 109(1).

63. In relation to s 33(1) of the AI Act, in *Makasa*, the Court found that there was an intention contrary to the application of s 33(1) of the AI Act to s 501(2), where there is *"no change*" to the factual basis on which the prior decision-maker formed a reasonable suspicion that the non-citizen did not pass the character test. In essence, the Court noted an intention not to allow the further re-exercise of s 501(2) by a primary decision-maker *"after re-exercise of that power by the [Tribunal] under the [AAT Act]"* – as otherwise and as outlined above, the Tribunal's merits review function would be *"reduced to a mockery"* – which is not the case

here; there has not been an exercise of the AAT's review function which could be rendered *illusory or reduced to a mockery*, unlike in *Makasa.*

64. In essence and for the above reasons, the Tribunal finds that the applicant's circumstances are different from those in *Makasa* in essential aspects. The Tribunal is satisfied that the power in s 109(1) was available to be exercised by the delegate in April 2019, that the Tribunal is required to review that decision on the merits, and that the Tribunal is not *"compelled"* to make a decision not to cancel the visa based on the premise that the power in s 109(1) was not available to be exercised at all in April 2019.

65. The applicant made submissions concerning legal reasonableness being an essential element of lawful decision-making. The applicant contended that it would be legally unreasonable for the Tribunal to conclude that both the 2018 Notice and 2019 decision were lawful exercises of power. For the reasons explained above, the Tribunal has found that the 2018 Notice and the 2019 decision are a lawful exercise of power and consequently it cannot be concluded that they are *plainly unjust* and *capricious*, or an attempt to revisit an earlier exercise of power, or that the delay between the statutory non-compliance and the initiation of the cancellation process 2018 can be characterised as *capricious* and *plainly unjust.* However, the fact of a previous decision not to cancel is relevant to the exercise of the discretion.

66. Those conclusions lead the Tribunal to consider the case on its merits.

**Was there non-compliance as described in the s 107 notice?**

67. The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s 107 notice was non-compliance with s 101 of the Act.

68. Section 101 of the Act provides that:

> **Visa applications to be correct**
>
> A non-citizen must fill in or complete his or her application form in such a way that:
> (a) all questions on it are answered; and
> (b) no incorrect answers are given or provided.

69. Section 107A of the Act provides that:

> **Possible non-compliances in connection with a previous visa may be grounds for cancellation of current visa**
>
> The possible non-compliances that:
> (a) may be specified in a notice by the Minister under section 107 to a person who is the holder of a visa; and
> (b) if so specified, can constitute a ground for the cancellation of that visa under section 109;
>
> include non-compliances that occurred at any time, including non-compliances in respect of any previous visa held by the person.

70. During the hearing, the applicant stated that he was born in Kuwait on 1 January 1973. He stated that he has 14 siblings, 13 of whom were born in Kuwait and the youngest of whom was born in Iraq. He stated he is a Bedoun and was not considered a citizen of Kuwait. He said the family moved to Iraq in 1992 when he was about 20 years of age. He said he

married in Iraq and that he has seven children, one of whom died at the end of 2009, months before he came to Australia.

71. The Tribunal asked the applicant why he left Iraq; he said in 2003, he faced problems. He said he worked with the Americans and British, using his trailer to move goods including weapons between military bases. He said from around 2004/2005 until 2008/2009 he was doing that work. He said in Iraq he encountered problems and he got injured when he was shot at by the militia. When asked if he was personally targeted, he said the shooting was at "*everyone*". He said he had problems with the militia. He said one doctor who was treating his son made a mistake by injecting treatment in a manner which was not intended. He said the mistake was not intentional but his son died the following day, when he was 10 years old. He said he complained about the doctor to the Department of Health but the doctor informed the militia about the applicant. The applicant was told that he could not complain about the doctor.

72. The Tribunal asked the applicant about any particular incident that led to him leaving Iraq. He said prior to 2003, they were treated well but subsequently, persecutions started. He said he was taken on the day he complained about the doctor but he was not able to provide specific details about when that occurred. The Tribunal referred to information he gave when he was first interviewed and he said it was in November 2009, about five days after his son's death. He said he is frightened to return to Iraq as instability has worsened. He said he would be in danger 100%.

73. The Tribunal discussed with the applicant information contained in the delegate's decision record such as the Statement dated 13 February 2010 claiming that he was born in Kuwait on 1 January 1973, that his parents were Bedouns who were permitted to reside in Kuwait but they were not citizens, that in 1992 his parents were deported to Iraq, and that in 1992, "*my parents applied for Iraqi citizenship. It was difficult to get for them and they had to bribe government officials in order to obtain it. In my citizenship certificate it says that my father was born in Iraq, this is not correct but otherwise we wouldn't have been granted citizenship. After we received Iraqi citizenship, I bought a farm in Safwan. Settling in Iraq was difficult because we weren't accepted by the locals...".* The Tribunal asked and the applicant confirmed that the documents were obtained through bribery.

74. The Tribunal discussed the application for a protection visa including his responses in Form 866 Part C to questions 1, 4,8, 19, 20, 23, 28, 30, 53, 41, 42 and 43 as well as the RSA statement.

75. The applicant responded to the information about the events that occurred subsequent to the grant and to the Tribunal suggestion that the information indicates that incorrect information has been provided, that he is not stateless, and that returning to Iraq soon after the visa grant raises concerns about his claims. The applicant stated that *Abdul Aziz Janhan* as is recorded in the passport is his name. When asked why he did not disclose that name in the application for a protection visa, he said when he entered Christmas Island and from *day one*, he advised of the name and wrote it in Arabic. He said there should be some proof and paperwork. The Tribunal noted the substantial difference between *Janhan* and *Al Jourani*. He reiterated that when he entered Christmas Island he told them about the name *Janhan*. He said when he arrived perhaps he did not understand the questions and he was not well.

76. The Tribunal referred to the written interview records on 27 January 2010 on the applicant's first arrival, where it is noted that his name is *Abdul Aziz Saouad Al Jourani*, suggesting that this is the name he gave. The representative interjected to submit that a cautious approach needs to be adopted as it is difficult to confirm that information.

77. In relation to the passport, the applicant gave evidence that it was not legitimate because it was obtained through bribery. He said he paid money to an official whom he did not know. He said that he gave the money to one person who gave it to another. The Tribunal asked the applicant why the details of the passport were not disclosed in his application for a protection visa; he said he was not asked. He said it was an *S passport* and that he has a document from the Iraqi Ministry saying that an *S passport* is not valid. He said he needed that passport, which also has his son's details, because his son required medical treatment. He said the British army tried to get him help for treatment in England but it was difficult.

78. In relation to the Iraqi Nationality Certificate issued on 21 December 2010 in the name of *Abdul Aziz Saoud Janhan* born in 1973 in Zikar, he said he got the document through the Iraqi Ministry in Safwar through bribery – he said "*everything…through bribe*".

79. The Tribunal indicated to the applicant that returning to Iraq could suggest that he did not fear the claimed harm. He said his wife was unwell and although he was scared, he had to make a sacrifice for the sake of his children who needed passports.

80. The representative reiterated submissions relating to *Makasa* and again contended that there is no non-compliance in the manner described. However, the representative noted that there could be non-compliance but that the non-compliance was based on the facts as known at the time and it must be considered in the context of all the other information as contemplated by s 99. The representative noted that the applicant's claims were prepared in difficult circumstances and that there were no guidelines at the time relating to naming. The representative noted that the grandfather's details are mentioned in the Form 80 – the applicant mentioned *Janaan* which is consistent with all information provided.

81. There is complex and inconsistent information before the Tribunal. Adding to the complexity is that the non-compliance referred to in the s 107 Notice occurred over a long period of time; the applicant arrived in Australia on 5 January 2010. There is information before the Tribunal that on arrival, he gave his name as *Abdul Aziz Saoud AL JOURANI,* that he was born on 1 January 1973 in Kuwait, that he and his family are stateless Bedouns from Kuwait, and that they fled Kuwait in 1992 and went to live in Iraq. He claimed that he obtained his Iraqi passport unlawfully. Those essential claims were made in the application for a protection visa and in documents provided in support such as the Statement dated 13 February 2010, again claiming that he was born in Kuwait, that his parents were Bedoun who were deported to Iraq, and that in 1992, they obtained Iraqi citizenship through bribery.

82. The contradictory information is that the applicant is *Abdul Aziz Saoud Janaan* who is a national of Iraq and not stateless as claimed. The applicant claims that he did mention Janaan and indeed that is noted in the Form 80 dated 13 February 2010. In response to the s 107 notice, it was noted that Janaan is the applicant's grandfather's name, which was provided in Arabic script in the Form 80. There are two documents, namely an Iraqi driver's licence issued on 26 January 1995 and a Republic of Iraq Personal Identity Card issued on 21 October 2007 provided in support of the applicant's application for Australian citizenship, which refer to the applicant's surname as being *Al Jourani*. The Republic of Iraq Personal Identity Card issued on 21 October 2007 contains the following details:

> Name: Abdul Aziz
> Father's name and grandfather's name: Soud Ganhan
> Surname: Aljurani

83. In comparison, the applicant has Iraqi identification documents such as passport number S2872533 in the name of Abdul Aziz S. Janhan, issued on 10 July 2007, and expiring on 9 July 2011, Basrah, and the Iraqi Nationality Certificate issued on 21 December 2010 by the Directorate of Nationality of Basrah, Iraq, in the name of Abdel Aziz Saoud Janaan born 1973 in Zikar. The Certificate records the applicant's father's name as Saoud Janaan and his

mother's name as Noora Naifa. Both parent's places of birth are recorded as Zikar. According to the applicant's children's Iraqi passports, their surname is Al Jawareen.

84. On balance, the Tribunal is satisfied that since his arrival in Australia and throughout the protection application process, the applicant identified himself as *Abdul Aziz AL JOURANI/AL JORANI*, born on 1 January 1973 in Kuwait. There is some documentary evidence to support this claimed name but he has been found to be in possession of Iraqi identity documents bearing the name *Abdul* or *Abdel Aziz Saoud Janaan* on his return from Iraq. The applicant's name on his Iraqi passport and Iraqi Nationality Certificate refer to Abdul Aziz Saoud Janaan (born in 1973 in Zikar, Iraq). There are variations of the spelling of the applicant's name and family names of Abdul/Abd/Abdel Aziz/Abdulaziz/Abdulazeez Saud/Saoud Janhan/Janaan/Ganhan Al Jourani/Al Jorani/Al Gorani and those can be explained by transliteration, transcription and transposition of his Arabic name. In support of his wife's application to migrate, the applicant provided his Iraqi Identity card revealing that the place of birth was Naseriyah, Dhi- Qar. On 13 February 2011, the applicant returned to Australia having in his possession an Iraqi passport in the name of *Abdul Aziz S Janhan.* The passport was issued in July 2007 and was due to expire in July 2011. The passport was issued in Basrah (Iraq) and shows that the applicant was born in 1973 in Nasrea (also known as Nasiriya/Nasrea/Alnasiriyah, Thi Qar/Zikar/ Dhi Qar governorate), Iraq. The passport contained an arrival stamp for Iraq dated 14 November 2010 and a departure stamp from Iraq dated 11 February 2011. The applicant had in his possession copies of Iraqi passport biodata pages for his children. The Tribunal is of the view that those documents are credible evidence that the applicant's correct name is Abdul/Abdel Aziz Saoud Janhan, that he and his children are citizens of Iraq, and that he was born in Nasrea in Iraq in 1973.

85. In explaining the discrepancies, the applicant has claimed that he did advise the Department of the name *Janaan*. He stated that the passport and other documents were obtained through bribery. Although those explanations are plausible, they must be considered in the context of the provided information. Moreover, saying that documents have been obtained through bribery does not assure or give confidence in the applicant's version of events. There is clear and tangible evidence that in his application for a protection visa where question 1 of the Form 866 Part C asks: "What is your full name?", the answer recorded on the form is Family name: *"Al Jourani;* Given name: *Abdul Aziz."* It is also significant that at question 4 of the Form 866 Part C asking "*What other names have you been known by*? (*such as name before marriage, previous married name, alias*)" there is no answer to this question recorded on the form. This was the applicant's opportunity to provide details about other name(s) but he did not. The Tribunal is satisfied that the applicant has provided incorrect answers to questions 1 and 4 on the Form 866 Part C.

86. In relation to question 28 of the Form 866 Part C, asking for "*Details of your current travel document*", the Tribunal considers the answer given to be incorrect because at the time, the applicant did have an Iraqi passport (number S2872533), issued to him on 10 July 2007. In relation to question 53 on the Form 866 Part C, asking "*Is your travel document valid for return to your home country?",* to answer *"no", "don't have one"* is incorrect because at the time the applicant held an Iraqi passport (number S2872533) that did not expire until 9 July 2011. To say that it was an S passport is not convincing or persuasive; there should have been disclosure of the passport and/or an explanation.

87. The findings that the applicant has provided incorrect answers to questions 1, 4, 28 and 53 raise doubts about other responses by the applicant. The Tribunal can only speculate about the applicant's reasons. The Tribunal is mindful that the applicant has been found to be a refugee and the Tribunal is not seeking to revisit all the applicant's claims and entertain a whole new assessment of his claims. However, the finding that he provided incorrect information suggests that he provided incorrect information about his place of birth. The

applicant did not disclose that he held an Iraqi passport (number S2872533) that did not expire until 9 July 2011.

88. On the evidence, the Tribunal is satisfied that in relation to the applicant's answer to question 8 on the Form 866 Part C, asking for his place of birth, the answer given is incorrect because his place of birth is Nasrea, Iraq, not *"Al Magua, Kuwait".* The Tribunal acknowledges that in the Form 80, in response to questions 8 and 9, the applicant did indicate that he had Iraqi citizenship acquired at birth; this is, however, contradicted by his answer to question 6 of the Form 80 that he was born in Kuwait. The Tribunal is satisfied that the passport is credible evidence that the applicant is a citizen of Iraq, and that he was born in Nasrea in Iraq in 1973.

89. In relation to the applicant's return to Iraq, soon after he was granted his protection visa, the Tribunal accepts the applicant's explanations relating to his wife. The Tribunal is of the view that although returning soon after the visa grant raises some doubts about the applicant's claims, it would be harsh and unfair to conclude on this basis that the applicant has provided incorrect information about other aspects of his claims.

90. The Tribunal found some aspects of the applicant's to be credible. However, on balance of the totality of the evidence, the Tribunal does not accept that the applicant is stateless. The Tribunal finds that the applicant is a Bedoun of Iraqi nationality – as evidenced by the passport and other identity documents. In light of that finding, it follows that in relation to question 20 on the Form 866 Part C, asking: "*Your current citizenship (if different to at birth)*", to not provide an answer is incorrect. The answer to question 23 is also incorrect. Question 23 of the Form 866 Part C asks: "*If you are stateless, how, when and why did you lose your citizenship*?" The recorded answer is: "*I am Kuwaiti Bedoon - Kuwait did not acknowledge us as citizens. See RSA statement for more details."* – the applicant is not stateless.

91. For the reasons outlined above, the Tribunal finds that the applicant did provide incorrect answers to questions as outlined above and that consequently, the Tribunal finds that there was non-compliance with s 101 by the applicant in the way described in the s 107 notice.

**Should the visa be cancelled?**

92. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s 107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s 109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s 109(2).

93. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s 107 notice about the non-compliance, and have regard to any prescribed circumstances: ss 109(1)(b) and (c). The prescribed circumstances are set out in reg 2.41 of the Regulations. Briefly, they are:

- ***The correct information***

94. The correct information is that the applicant's surname is Janaan not Al Jourani and that he is not stateless but is a citizen of Iraq and was a citizen of Iraq at the time he applied for the protection visa.

95. The Tribunal gives this aspect weight in favour of cancellation.

- ***The content of the genuine document (if any)***

96. There is no issue relating to a genuine document.

97. The Tribunal gives this aspect neutral weight.

- ***Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document***

98. The applicant was granted the protection visa subsequent to a favourable recommendation by the IMR. It is important to refer to the essential aspects of that decision:

> 23. It is submitted on behalf of the claimant that he is risk of harm from elements of the Al Mehdi Army and the Al Fadhila party. He is said to be of adverse interest to those groups due to his history of working for the British military forces and his complaint about the incompetence of a nurse who is a member of Al Fadhila. It is also claimed that his status as a Sunni in the Shia dominated area and as a Bedoon places him at risk of harm.
>
> 24. I questioned the claimant at length about his history and circumstances and I found him to be credible. I accept that he drove trucks delivering supplies to the British military and that he was targeted by the militia for that reason. I accept that he paid money to the militia to be able to continue this work. I accept that the British military sought to help with his son's medical condition. The fact that the emails concerning that treatment are of US origin is not inconsistent with this claim, as there is substantial interoperability between Coalition forces, as is evidenced by the various uniforms of the soldiers in the photo taken with his son that he has submitted. I accept that the claimant sought to complain about the nurse's incompetent treatment of his son and that this led to a confrontation with Fadhila members. I accept that they were aware of his Sunni Bedoon status and history of working for the British military. I accept that he was threatened by them and fears harm for these reasons.
>
> 25. The updated UNHCR Guidelines indicate that it is possible, in general terms, for Iraqis to return and relocate in central and southern Iraq. However, that position is subject to qualification with respect to certain categories of returnees, in particular, members of religious and ethnic minorities; Iraqis perceived as opposing armed groups or political factions and Iraqis affiliated with the multinational forces. I am satisfied on the evidence that the claimant falls within each of these three categories.
>
> 26. His lack of citizenship and associated status as a Bedoon and his Sunni faith place him in the category of religious and ethnic minorities. His situation in this regard is compounded by the fact that his wife converted from Shia to Sunni and this is unknown to her family or anyone else. The absence of family and religious support networks for him in any other area and his inability, without citizenship, to access any government or social services, make it very unlikely that he could return and relocate in either central or southern Iraq. His negative experience with Al Fadhila after complaining about one of its members, including their threatening manner and their remarks about his Sunni, Bedoon background and his work for the British gives rise to a likely perception on their behalf that he is opposed to their political agenda. Similarly, his years of work for the British would see him as directly affiliated with the multinational forces and at risk from Al Fadhila, the Mahdi Army and other militia groups. The independent evidence is that people who have worked or been associated with the British are being targeted and killed in increasing numbers in southern Iraq. I am satisfied that this punitive behaviour towards people who for, or were associated with, the Multinational forces imputes a political opinion to such people.
>
> 27. The cumulative effect of these matters gives rise to a real chance of harm for the claimant in Iraq. I have carefully considered his claims and evidence and in all the circumstances. I accept that the claimant is at real risk of harm for reasons of political

opinion, race and religion. I am satisfied that the claimant does have a well-founded fear of persecution for Convention.

99. In the course of the hearing, the Tribunal explored with the applicant his protection claims and the Tribunal observes an inconsistency in the information relating to the status of the health practitioner involved; the applicant gave evidence that it was a doctor whereas he told the IMR it was a nurse. Given the lengthy timeframe involved and the applicant's mental and physical health, the Tribunal has decided not to draw adverse inferences on the basis of that inconsistency. The applicant told the Tribunal that he suffers from several medical conditions, including hip and disc problems.

100. On balance, the Tribunal accepts that the applicant is of Bedoun ethnicity (but not stateless), of the Sunni faith, that he worked for foreign forces, that his son died, that the applicant considered that death to be due to the negligent conduct of a health practitioner, and that he was targeted as claimed. In the Tribunal's opinion, whether his surname is Jannan or Al Jourani is not relevant to the IMR's finding. Although being stateless was relevant to the findings, the cumulative reasoning of the Reviewer clearly suggests that the central aspects of the applicant's claims formed the reasons for recommending that the applicant meets "*the definition of a refugee as set out in Article IA of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees as he does have a well-founded fear of persecution for reasons of political opinion and religion.*"

101. The Tribunal gives significant weight to this consideration in favour of the applicant.

- ***The circumstances in which the non-compliance occurred***

102. The non-compliance occurred when the applicant provided incorrect answers in the application for a protection visa, as discussed above.

103. The Tribunal gives this aspect weight in favour of cancellation.

- ***The present circumstances of the visa holder***

104. The applicant has been in Australia as a permanent resident since he was granted the protection visa on 8 September 2010. The applicant's spouse and children live outside of Australia.

105. The applicant has provided evidence that he suffers from various medical conditions, including, hidradenitis suppurativa on the right axilla, asthma, possible moderate sleep apnoea, bilateral necrosis in both hip joints, moderate bulge of spinal discs, depression, anxiety and post-traumatic stress disorder.

106. The applicant advised the Tribunal that he is under specialist care and requires surgery. He emphasised that he needs family support.

107. In relation to the applicant's submissions concerning legal reasonableness being an essential element of lawful decision-making. Although the Tribunal has found that the 2018 Notice and the 2019 decision are a lawful exercise of power and consequently it cannot be concluded that they are *plainly unjust* and *capricious*, or an attempt to revisit an earlier exercise of power, or that the delay between the statutory non-compliance and the initiation of the cancellation process 2018 can be characterised as *capricious*, the Tribunal is of the view that the fact of a previous decision not to cancel is relevant to the exercise of discretion.

108. The Tribunal is of the view that cancellation of a permanent visa is a significant adverse outcome that has the potential of causing, among other things, considerable distress and

one can understand that despite this being a lawful exercise of power, there is a sense of *injustice* if a visa is cancelled essentially on the same and/or similar grounds to those in a decision that has been made previously not to cancel another visa.

109. The Tribunal gives this aspect significant weight in favour of the applicant.

- ***The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

110. The applicant responded to the s 107 Notice. Although in his statement he noted that after his family was deported to Iraq in 1992, his parents obtained Iraqi citizenship and identity documents, he claimed that this was through by bribing officials. He continued to claim that Al Jourani is his surname but in the statement, he noted that the name on the Iraqi passport which he obtained on 10 July 2007 is Abdul Aziz S Janhan, which is his grandfather's name and also part of his name.

111. The Tribunal is satisfied that at no stage did the applicant unequivocally acknowledge that he provided incorrect information.

112. The Tribunal gives this aspect weight in favour of cancellation.

- ***Any other instances of non-compliance by the visa holder known to the Minister***

113. There is no evidence of other instances of non-compliance by the applicant.

114. The Tribunal gives this aspect neutral weight.

- ***The time that has elapsed since the non-compliance***

115. The applicant arrived in Australia on 5 January 2010 and he lodged an application for a protection visa in September 2010. The applicant has therefore been in Australia for over 10 years and the non-compliance occurred over 10 years ago.

116. The Tribunal gives this aspect weight in favour of the applicant.

- ***Any breaches of the law since the non-compliance and the seriousness of those breaches***

117. There is no evidence of any breach of the law since the non-compliance.

118. The Tribunal gives this aspect neutral weight.

- ***Any contribution made by the holder to the community***.

119. The applicant stated that he donates blood and helps kids with cancer.

120. The Tribunal gives this aspect weight in the applicant's favour.

121. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedures Advice Manual, PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

- ***Whether there would be consequential cancellations under s 140.***

122. There is no evidence of any consequential cancellation.

123. The Tribunal gives this aspect neutral weight.

- ***If there are children whose interests would be affected by cancellation, or consequential cancellation, decision-makers should consider the best interests of those children as a primary consideration when deciding whether to cancel the visa.***

124. The applicant has children who do not reside in Australia. The question is whether cancellation or non-cancellation is in their best interests. It is difficult to see how cancelling the applicant's visa is in their best interests.

125. Although not residing in Australia, cancelling the applicant's visa would potentially mean significant hardship to the children who if they meet relevant visa criteria, could reunite with their father in Australia whom they have not seen for many years. It is therefore not in their best interests for the visa to be cancelled.

126. The Tribunal gives this aspect significant weight in the applicant's favour.

- ***Whether the cancellation would lead to the person's removal in breach of Australia's non-refoulement or family unity obligations.***

127. In case of cancellation, the applicant could be detained and removed from Australia. Given the findings of the IMR, with which the Tribunal agrees, the Tribunal is satisfied that there are non-refoulement obligations. The applicant was found to be a refugee and he continues to be a refugee. However, the Tribunal observes that changes to s 197C and the insertion of s 197D by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (No. 35, 2021)* make removal of individuals in breach of non-refoulement obligations less likely.

128. The Tribunal agrees with the applicant's submissions relating to the significance of cancellation of a permanent visa such as the Subclass 155 and that the applicant continues to be a refugee who is owed Australia's protection obligations. As such the Tribunal finds that cancellation would result in breach of Australia's obligations under the Refugees Convention.

129. The Tribunal is mindful that on 16 January 2019, a Departmental officer conducted an International Treaties and Obligations Assessment (ITOA) and found that there is not a real chance that, if the applicant were to be returned to Iraq, he would be persecuted for reason of his race, religion, nationality, membership of a particular social group or political opinion. The officer found that the applicant is not a refugee and Australia does not have a *non-refoulement* obligation to the visa holder in respect of the Refugees Convention. Although the Tribunal acknowledges those conclusions, the Tribunal is not bound by any of the findings made by the officer. The Tribunal's role is to make its own assessments and reach independent conclusions.

130. The Tribunal gives this aspect significant weight in favour of the applicant.

- ***Whether there are mandatory legal consequences, such as whether the person would become unlawful and liable to detention and removal, whether detention is a likely consequence of the cancellation decision and if so, for how long, and whether there are provisions in the Act which prevent the person from***

***making a valid application for any visa without the Minister personally intervening.***

131. In case of cancellation, the applicant could be detained and removed from Australia. The applicant could also be subject to s 46A(1) and barred from making a valid application for a further visa, including bridging visas. He would also be subject to Public Interest Criterion (PIC) 4013 which would have an adverse impact on the applicant's ability to be granted any further visa for a period of three years after a decision to cancel the Subclass 155 visa.

132. Although those potential consequences are lawful, in the applicant's case and given his refugee status as well as his physical and mental health, the Tribunal is satisfied that the consequences carry significant hardship.

133. The Tribunal gives this aspect significant weight in favour of the applicant.

- ***Any other relevant matters (including the degree of hardship that may be caused to the visa holder and any family members)***.

134. The Tribunal considers a finding that a person is a refugee and is therefore owed Australia's protection to be serious and that such a finding should only be disturbed in limited circumstances which obviously include cancellations. The Tribunal is satisfied for the stated reasons that a significant degree of hardship arises in the case of visa cancellation.

135. On balance, the Tribunal is satisfied that the reasons not to cancel outweigh the reasons to cancel the Subclass 155 visa.

136. Having regard to all the relevant circumstances as discussed above, the Tribunal concludes that the visa should not be cancelled.

**DECISION**

137. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 155 (Five Year Resident Return) visa.

Antoinette Younes
**Senior Member**

**ATTACHMENT – *Migration Act 1958* (extracts)**

## 5 Interpretation

(1) In this Act, unless the contrary intention appears:

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

## 97 Interpretation

In this Subdivision:

***application form***, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

***passenger card*** has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

## 98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

## 99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

## 100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

## 101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

(a) all questions on it are answered; and

(b) no incorrect answers are given or provided.

## 107 Notice of incorrect applications

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

(a) giving particulars of the possible non-compliance; and

(b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:

(i) if the holder disputes that there was non-compliance:

(A) shows that there was compliance; and

(B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

(ii) if the holder accepts that there was non-compliance:

(A) give reasons for the non-compliance; and

(B) shows cause why the visa should not be cancelled; and

(c) stating that the Minister will consider cancelling the visa:

(i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or

(ii) if the holder gives the Minister a written response within that period—when the response is given; or

(iii) otherwise—at the end of that period; and

(d) setting out the effect of sections 108, 109, 111 and 112; and

(e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and

(f) requiring the holder:

(i) to tell the Minister the address at which the holder is living; and

(ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.

(1A) The period to be stated in the notice under subsection (1) must be:

(a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or

(b) otherwise—14 days.

(1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:

(a) visas of a stated class; or

(b) visa holders in stated circumstances; or

(c) visa holders in a stated class of people (who may be visa holders in a particular place); or

(d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.

(2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

### 108 Decision about non-compliance

The Minister is to:

(a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and

(b) decide whether there was non-compliance by the visa holder in the way described in the notice.

### 109 Cancellation of visa if information incorrect

(1) The Minister, after:

(a) deciding under section 108 that there was non-compliance by the holder of a visa; and

(b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and

(c) having regard to any prescribed circumstances;

may cancel the visa.

(2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.