FEDERAL COURT OF AUSTRALIA

ENT19 v Minister For Home Affairs [2021] FCAFC 217

Appeal from:	*ENT19 v Minister For Home Affairs* [2020] FCCA 2653
File number:	NSD 1272 of 2020
Judgment of:	**COLLIER, KATZMANN, WHEELAHAN JJ**
Date of judgment:	26 November 2021
Catchwords:	**MIGRATION** — appeal from decision of the Federal Circuit Court to dismiss an application for judicial review of a decision to refuse to grant a Safe Haven Enterprise visa — where Minister not satisfied that the grant of the visa was in the national interest under cl 790.227 of the *Migration Regulations 1994* (Cth) — where appellant convicted of, and sentenced for, a people smuggling offence but recognised as a refugee at risk of serious harm in his country of nationality and where appellant satisfied all other visa criteria and there was no evidence that he was entitled to enter and reside in a country other than his country of nationality, whether Minister did not consider the prospect of refoulement and the potential breach by Australia of its non-refoulement treaty obligations — whether, if so, the Minister was bound to do so — whether primary judge erred by making a finding of fact in the absence of evidence — whether Minister's decision legally unreasonable because appellant not found to be a person whom the Minister considered a danger to Australia's security within s 36(1C) of the *Migration Act 1958* (Cth) or because it was made for the purpose of further punishing the appellant
Legislation:	*Acts Interpretation Act 1901* (Cth) s 25D *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 *Evidence Act 1995* (Cth) s144 *Migration Act 1958* (Cth) ss 5H, 5J, 35A, 36, 37A, 46A, 65(1), 195A, 197AB, 197C, 198(6), 496(1), 501(1) *Migration Regulations 1994* (Cth) Sch 2, cl 790.227 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Opened for signature 10 December 1984. 1465 UNTS 85 art 3. (entered into force 26 June 1987)

Convention Relating to the Status of Refugees. Opened for signature 28 July 1951. 189 UNTS 137 arts 33, 42(1). (entered into force 22 April 1954)

International Covenant on Civil and Political Rights. Opened for signature 16 December 1966. 999 UNTS 171. (entered into force 23 March 1976)

Protocol Relating to the Status of Refugees. Opened for signature 31 January 1967. 606 UNTS 267. (entered into force 4 October 1967)

Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)

Cases cited:

Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20 [2021] FCAFC 195

Al-Kateb v Goodwin (2004) 219 CLR 562

BAL19 v Minister for Home Affairs [2019] FCA 2189; 168 ALD 276

Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1

Commonwealth of Australia v AJL20 [2021] HCA 21; 95 ALJR 567; 391 ALR 562

Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135

CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 282 FCR 62

Djalic v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 139 FCR 292

Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; 77 ALJR 1088; 197 ALR 389; 73 ALD 321

Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1

Hands v Minister for Immigration and Border Protection (2018) 267 FCR 628

Hernandez v Minister for Home Affairs [2020] FCA 415

Jione v Minister for Immigration and Border Protection (2015) 232 FCR 120

KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 279 FCR 1

Lim v Minister for Immigration (1992) 176 CLR 1

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Home Affairs v Omar (2019) 272 FCR 589

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566

Minister for Immigration and Multicultural and Indigenous Affairs v Huynh (2004) 139 FCR 505

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A (2020) 279 FCR 475

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19 [2021] FCAFC 153

MNLR v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs [2021] FCAFC 35

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1

NBMZ v Minister for Immigration and Border Protection (2014) 220 FCR 1

O'Sullivan v Farrer (1989) 168 CLR 210

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379

Plaintiff S4/2014 v Minister for Immigration and Border Protection (2014) 253 CLR 219

Plaintiff S156/2013 v Minister for Immigration and Border Protection (2014) 254 CLR 28

Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2) (2015) 255 CLR 231

R v Mackellar; ex parte Ratu (1977) 137 CLR 461

Re Barbaro and Minister for Immigration and Ethnic Affairs (1980) 3 ALD 1

Re Gungor and Minister for Immigration and Ethnic Affairs (1980) 3 ALD 225

Re Patterson; Ex parte Taylor (2001) 207 CLR 391

Re Sergi and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 224

Re v Connell; Ex parte The Hetton Bellbird Collieries Ltd (1944) 69 CLR 407

Taulahi v Minister for Immigration and Border Protection (2016) 246 FCR 146

	Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 172 *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	154
Date of hearing:	29 April 2021
Counsel for the Appellant:	Dr J Donnelly
Solicitor for the Appellant:	Scott Calnan Lawyer
Counsel for the Respondent:	Ms R Francois
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1272 of 2020

BETWEEN:	**ENT19** Appellant
AND:	**MINISTER FOR HOME AFFAIRS** Respondent

ORDER MADE BY:	**COLLIER, KATZMANN, WHEELAHAN JJ**
DATE OF ORDER:	**26 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court dated 6 November 2020 be set aside and in lieu thereof it be ordered that:
   (a) A writ of certiorari issue directed to the respondent quashing the decision of the respondent dated 13 May 2020.
   (b) A writ of mandamus issue directed to the respondent requiring her to determine the appellant's application for a Safe Haven Enterprise (Class XE) Subclass 790 visa according to law.
   (c) The respondent pay the costs of the applicant in an amount fixed in accordance with the prevailing schedule.
3. The respondent pay the costs of the appellant of and incidental to the appeal, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

COLLIER J:

1 I have had the benefit of reading in draft the judgments of Justice Katzmann and Justice Wheelahan. For the reasons given by Justice Wheelahan, I agree that the appeal should be allowed.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Collier.

Associate:

Dated: 26 November 2021

REASONS FOR JUDGMENT

KATZMANN J:

Introduction

2 In *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [3] Allsop CJ, with whom Markovic and Steward JJ agreed, observed that:

> Public power, the source of which is in statute, must conform to the requirements of its statutory source and to the limitations imposed by the requirement of legality. Legality in this context takes its form and shape from the terms, scope and policy of the statute and fundamental values anchored in the common law … The consequences of these considerations are that where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament.

3 This appeal is concerned with a decision made by the Minister personally to refuse to grant a form of temporary protection visa known as a Safe Haven Enterprise Visa (**SHEV**) to a person found to be a refugee with a well-founded fear of serious harm in his country of nationality and who posed no security risk to Australia. The legal effect of the Minister's decision was that the appellant would have to be removed to that country as soon as practicable and in the meantime held in immigration detention indefinitely. The substantive question on the appeal is whether in these circumstances, the Minister's decision, which was based on the determination that the grant of the visa was not in the national interest, was affected by jurisdictional error.

4 Subsection 65(1) of the *Migration **Act** 1958* (Cth) provides that, after considering a valid application for a visa, the Minister must grant the visa if satisfied, amongst other things, that the criteria for the visa prescribed by the Act or Regulations have been satisfied. The grant of a visa may also be refused if the applicant does not satisfy the Minister that he or she passes the character test (s 501(1)). The power to grant or refuse a visa may be exercised by the Minister personally or through a delegate (s 496(1)). One important criterion for the grant of any kind of protection visa is that the Minister is satisfied that the applicant for the visa is a non-citizen in Australia in respect of whom Australia has protection obligations because the

person is a refugee (s 36(2)(a)). As the type of protection visa for which the appellant applied is a SHEV, another criterion of which the Minister must be satisfied at the time of the decision is that the grant of the visa is "in the national interest" (see *Migration* ***Regulations*** *1994* (Cth), Sch 2 cl 790.227).

5 The appellant is an Iranian national who entered Australia by sea from Indonesia without a valid visa on 14 December 2013, landing on Christmas Island. This meant that he was an "unauthorised maritime arrival" within the meaning of the Act (s 5AA), was then ineligible for a permanent protection visa, and could only apply for a temporary protection visa, such as a SHEV, if the Minister determined that it in the public interest to allow him to do so (s 46A).

6 Between 2012 and 2013, while waiting in Indonesia for a boat to take him to Australia where he hoped to be granted asylum, the appellant unlawfully facilitated the passage of other asylum seekers from Indonesia to Australia. On 3 February 2017 he lodged an application for a SHEV. On 13 October 2017 he was convicted in the District Court of New South Wales of the aggravated offence of smuggling a group of at least five non-citizens contrary to s 233C of the Act and sentenced to eight years imprisonment, with a non-parole period which expired on 9 December 2017 upon which he was transferred to immigration detention. The sentencing judge observed that the appellant had played a "people management role" which was "essential to carrying out the scheme".

7 The Minister was not satisfied that the grant of the SHEV was in the national interest because the appellant had been convicted of playing an essential role in unlawful people smuggling and said that granting him a protection visa would send "the wrong signal" to people who might be considering engaging in similar conduct, "potentially weakening Australia's border protection regime" and the policy that underpins it. He also said that granting a protection visa to such a person might "erode" the confidence of the community in the protection visa program. This was apparently the first time the national interest criterion had been invoked to refuse a protection visa to a person who had been convicted of a people smuggling offence.

8 The appellant applied unsuccessfully to the Federal Circuit Court for judicial review of the Minister's decision. In this appeal he claims that the primary judge erred in failing to find that the decision was affected by jurisdictional error on two bases: first, because the Minister failed to have regard to the legal and practical consequences of his decision and second, because the Minister's decision was legally unreasonable and/or illogical and irrational for a number of reasons.

9 For the reasons that follow the appeal must be allowed.

Background

10 The appellant's application was first refused in May 2018 when a delegate of the Minister determined that he was not a person in respect of whom Australia has protection obligations. The matter was then referred to the Immigration Assessment **Authority** who, after reviewing the merits of the application, was satisfied that he was a genuine refugee.

11 The Authority determined that the appellant was an Iranian national and Iran would therefore be "his receiving country", that he had converted to Christianity in Australia, that his conversion was genuine, that he continues to be involved in "Christian activities" based on his genuine commitment to the religion, that if returned to Iran he would continue to practise his faith and would proselytise, and that he was liable to be charged with apostasy.

12 The Authority observed that non-Muslims in Iran are prohibited by law from proselytising and that activities of that nature are punishable by death. It found that there was a real chance that, if he were returned to Iran, the appellant would be monitored, arrested, charged and detained because of his beliefs and the public manifestation of them, and that country information indicates that arbitrary arrest, torture and ill-treatment of detainees are common in Iran. In particular, the Authority noted:

> International sources report that commonly reported methods of torture and abuse include prolonged solitary confinement, threats of execution or rape, forced virginity tests, sexual humiliation, sleep deprivation, electroshock, burnings, the use of pressure positions, severe and repeated beatings, and the denial of medical care. Human rights organisations have reported that authorities have systematically failed to investigate allegations of torture and other ill-treatment, and have sometimes threatened to subject complainants to further torture and long sentences.

13 Consequently, the Authority determined that the appellant had a well-founded fear of persecution in Iran by reason of his religion in that he could face serious harm in Iran, that the essential and significant reason for the harm was his religion, and that the harm he feared involves systematic and discriminatory conduct throughout Iran because it emanates from the Iranian authorities operating under national laws. Accordingly the Authority concluded that he satisfied the definition of refugee in s 5H(1) of the Act and remitted the decision of the delegate for reconsideration with the direction that the appellant was a refugee within the meaning of s 5H(1).

14 Pursuant to several international treaties to which Australia is a party, Australia owes non-refoulement obligations. They include the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (together the **Refugees Convention**); the *International Covenant on Civil and Political Rights* (**ICCPR**), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (the **CAT**). Article 33(1) of the Refugees Convention, for example, prohibits a contracting state from expelling or returning (refouling) a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The prohibition applies subject to the exception in Article 33(2), namely, where there are reasonable grounds for regarding the person to be a danger to the security of the country in which he or she is or, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. The obligation of the contracting state is non-derogable: see Article 42(1). Similarly, Article 3 of the CAT prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being tortured. Article 13 of the ICCPR stipulates that "[a]n alien lawfully in the territory of a State Party to the … Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ...".

15 The ICCPR also relevantly provides in Article 9(1) that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

16 A breach by Australia of its obligations under international treaties to which it is a party is a breach of international law, and may expose Australia to the consequences to which Allsop CJ referred in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 (***CWY20***) at [12]–[13].

17 On 14 October 2019 the Minister, acting personally, exercised his discretion under s 501(1) to refuse to grant the SHEV on the ground that the appellant did not satisfy him that he passed the character test. The Minister concluded that the appellant posed an unacceptable risk to the

Australian community because there was an "ongoing risk" of reoffending. The appellant applied for judicial review of the Minister's decision and by consent, a judge of this Court ordered that writs of certiorari and mandamus issue to quash the decision of 14 October 2019 and require the Minister to determine the appellant's application for a visa according to law. In making these orders, the Court noted that the Minister accepted that the application had to be allowed on the ground that the decision was affected by jurisdictional error because no probative basis had been identified for the conclusion that the appellant posed an ongoing risk to the Australian community.

18 In his reasons for refusing to grant the visa on character grounds, the Minister noted that the appellant's family had decided to leave Iran after their home was raided and that he and other family members were assaulted by the authorities on a number of occasions. He also acknowledged that "the circumstances leading to his offending were somewhat unique in that [the appellant] was an asylum seeker trying to reach Australia, albeit by unlawful means". He noted that the family had travelled to Indonesia where they remained for some time and that they made more than one attempt to come to Australia. The first attempt failed, the Minister said, as their boat was full of holes and they were forced to turn back. The smuggler demanded more money from them but they had lost all their money and possessions when the boat sank. They then decided that the appellant would stay behind in Indonesia and assist the smuggler while the rest of the family travelled to Australia. Evidently, a submission was made to the Minister that the appellant worked for the smuggler in order to obtain enough money to make his own way to Australia on another boat.

19 On 27 April 2020 the appellant lodged an interlocutory application seeking an order compelling the Minister to make a decision on his visa before 11 May 2020.

20 On 5 May 2020 the Minister's Department put the appellant on notice that his participation in "the business of people smuggling contrary to Australian law" might cause the Minister to refuse to grant him a visa in the national interest because to do otherwise "could undermine the integrity of the protection visa program and Australia's border protection regime, a key element of which is the deterrence of people smuggling". The appellant was invited to comment and on 8 May 2020, he provided a statement and submissions to the Department in response to the invitation.

21 In his statement to the Minister the appellant acknowledged the seriousness of his offending but also drew the Minister's attention to the circumstances in which he found himself and of

which the sentencing judge was satisfied. The appellant noted that the judge was satisfied on the balance of probabilities that:

- His participation in the people smuggling venture was to obtain passage to Australia in order to be reunited with his family.
- He played a people management role, which was essential to the venture, but he was not the organiser.
- His moral culpability was significantly reduced because he was motivated by his desperation to be reunited with his family, his vulnerability, and his lack of resources.
- The organisers had taken advantage of him.
- He had good prospects of rehabilitation and was unlikely to reoffend.
- He understood the impact of his offending on Australian society and had expressed "genuine contrition and remorse".

22 He informed the Minister that, if his visa were to be refused on national interest grounds, he would remain in detention indefinitely as he would not choose to return to Iran where he would "face torture and death". He pleaded that his case was not one of a "people smuggler" who "willingly breached Australia[n] sovereignty" or benefited financially from the assistance he provided. Rather, he impressed upon the Minister that he committed the offence because he was desperate to be reunited with his family and of his fear of significant harm in Iran. He said he had "good prospects of rehabilitation".

23 In his submissions to the Minister, prepared by his counsel, the appellant contended that the national interest criterion in Sch 2 cl 790.227 of the Regulations must be read down so as not to include the potential for refusal of a protection visa on character grounds, otherwise the Minister could refuse a visa on character grounds outside s 36(1C) of the Act, which would be at odds with ***BAL19*** *v Minister for Home Affairs* [2019] FCA 2189; 168 ALD 276, in which the power in s 501(1) to refuse to grant a visa was held not to apply to an application for a protection visa.

24 The appellant also contended that it would be legally unreasonable to conclude that the grant of a protection visa could undermine the integrity of the protection visa and border protection regime given his conviction for people smuggling if he satisfied the relevant character criterion reflected in section 36(1C) of the Act.

25 I note parenthetically that about six weeks after these submissions were lodged Full Courts in *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at [104] (Bromberg J), [302] (O'Callaghan and Steward JJ) and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475 at [8] (Allsop CJ, Kenny, Besanko, Mortimer and Moshinsky JJ) held that the aspect of *BAL19* upon which counsel had relied had been wrongly decided.

26 On 11 May 2020 the Department made a submission to the Minister. It advised the Minister of the interlocutory application and informed him that it was scheduled for hearing on 13 May 2020. The Department also advised the Minister that the only outstanding criterion that needed to be satisfied for the appellant to be granted the visa was the criterion in Sch 2 cl 790.227. The submission identified certain matters for the Minister to take into account.

27 On 13 May 2020, the Minister, once again acting personally, refused to grant the visa on the ground the Department had flagged, namely, that he was not satisfied that it was in the national interest to do so. On 22 May 2020, the Minister issued a "conclusive certificate" under s 473BD of the Act which prevented review of the Minister's decision by the Authority.

The Minister's reasons

28 The Minister began by summarising the appellant's circumstances. He mentioned the appellant's nationality, the place in Iran from which he fled, the date of his departure and his arrival and his status as an "unauthorised maritime arrival". He also purported to summarise the Authority's decision. While he mentioned that the Authority was satisfied that the appellant has a well-founded fear of persecution in Iran for the reason of his religion, he did not mention the Authority's findings concerning the nature and seriousness of the harm he could face if he were returned to Iran. He said that he accepted that the Authority had found that Australia has protection obligations in respect of the appellant. He then referred to the appellant's conviction and sentence and certain statements made by the sentencing judge concerning the nature of his offending. He also mentioned the Department's warning to the appellant and its invitation to comment and some of the matters put by the appellant and his counsel in response to the invitation.

29 Under the heading "consideration", the Minister proceeded to give his reasons for refusing the visa. As those reasons are fairly brief, it is convenient to cite the substance of them in full.

After referring to the terms of s 65 of the Act and cl 790.277, the Minister wrote (without alteration):

> 10. I have taken into consideration the comments [the appellant] and his representative have made in response to the invitation to comment as summarised above. These include a consideration of [the appellant's] role in the people smuggling enterprise, **his protection needs** and the scope of operation of the national interest criterion in his case.
>
> 11. In deciding whether I am satisfied that it is in the national interest to grant a SHEV to [the appellant], I am required to make an evaluative judgement. I am entitled to make that judgement having regard to a range of matters that may inform the national interest, the content of the national interest being in large part a political question.
>
> 12. I do not accept [the appellant's] submission that refusing to grant him a SHEV on the basis of clause 790.227 would be a refusal to grant the visa "on character grounds", a matter dealt with by section 36(1C) of the Act. Rather, a refusal to grant [the appellant] a SHEV on the basis of clause 790.227 is because of my assessment of other adverse impact that granting a protection visa to a person who has been convicted of people smuggling would have on Australia's border protection regime, and the policy that underpins it.
>
> 13. I regard protecting and safeguarding Australia's territorial and border integrity, which includes measures to combat people smuggling, to be matters that clearly go to the national interest. In my view, granting a protection visa to a person who has been convicted of people smuggling would send the wrong signal to people who may be contemplating engaging in similar conduct in the future, thereby potentially weakening Australia's border protection regime. It is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa.
>
> 14. I consider also that it is in the national interest to maintain the confidence of the Australian community in the protection visa program. People smuggling is the antithesis of the values underlying the protection visa program since it involves taking advantage of, and exploiting those seeking protection by smuggling them across borders. The grant of a protection visa to a non-citizen who has been convicted of people smuggling may erode the community's confidence in the program. This is an additional reason why I consider that granting a SHEV in the present case would not be in the national interest.
>
> 15. With regard to matters specific to [the appellant], even if he were to undertake not to disclose that he has been granted a protection visa, in my opinion there are so many ways by which the grant of the visa may become known (including, for example, through the Australian media or the Senate estimates process) that it is unrealistic to think that it could not become publically known.
>
> 16. I consider that the granting of a SHEV in the circumstances outlined above would not be in the national interest.

(Emphasis added.)

The judgment below

30 In the court below the appellant claimed that the Minister's decision was vitiated by jurisdictional error on three grounds. The primary judge rejected all of them. Ground 2 of the amended application pleaded that the appellant was denied procedural fairness because he was deprived of the opportunity to make submissions on the proposition contained in the Minister's reasons that it is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa. The appeal does not call into question the conclusions of the primary judge on this ground. In these circumstances it is unnecessary to refer to them.

31 By *ground 1* the appellant alleged that the Minister failed to have regard to the legal and practical consequences of the decision, namely that the statutory effect of refusing to grant him a visa was his refoulement to Iran where he faced the real risk of persecution.

32 The primary judge considered that contravention of Australia's obligations under international law was not irrelevant to the Minister's determination of what was in the national interest but confessed to difficulty understanding why it was a mandatory consideration in the present case when the Authority had already determined the question.

33 In any case, his Honour considered that the Minister had not failed to have regard to the legal and practical consequences of his decision. To the contrary, his Honour found that he had done so. The only reasons seem to be in [91] and do not appear to address the issue.

34 By *ground 3* the appellant alleged that the decision was legally unreasonable, illogical and irrational because the Minister:

(a) failed to appreciate the legal and practical consequences of the decision;

(b) effectively reasoned that non-citizens convicted of people smuggling could never be granted a protection visa;

(c) treated Australia's security as including "protection of Australia's territorial and border integrity from serious threats" but did not find that the appellant represented a danger to Australia's security under s 36(1C) of the Act; and

(d) refused the visa for the substantial purpose of deterring others, such that his purpose was punitive.

35 The primary judge characterised the "real question" raised by this ground to be whether the Minister's decision involved the inflexible application of a rule of policy contrary to Parliament's intention (at [148]–[149]).

36 His Honour noted that nowhere in ss 36 and 501 of the Act is there a mandated rule that a non-citizen convicted of people smuggling should always be refused a protection visa (at [150]), and therefore Parliament did not intend to introduce a policy to that effect (at [152]).

37 Observing that the national interest criterion is "at large", his Honour said that it would be an error to use it as an effective duplicate for the criteria in s 36(1A) and 36(1C), which relevantly provide that an applicant for a protection visa must not be a person whom the Minister considers on reasonable grounds is a danger to Australia's security or, having been convicted of a particularly serious crime, is a danger to the Australian community. But his Honour held that "the purview of the Minister's consideration was wider than the national security criteria". His Honour held that "[t]he Minister adopted a rule or policy based on the value of the border protection and the importance of maintaining the integrity of it". He said that "[t]he policy logically applied regardless of whether [the appellant] presented a risk to national security" (at [154]).

38 His Honour further held (at [155]) that the adoption of that policy was not a decision to impose a punishment on the appellant. He said that, while there was an "unmistakable concept of deterrence in the Minister's decision", "it was not directed at [the appellant] as an individual". Rather, "it was dealt with at a higher level of abstraction, consistent with the Minister's view of what the national interest required". In other words, the Minister's concern was with general, rather than specific, deterrence.

39 His Honour accepted that it would be an error for the Minister to adopt a national interest criterion which involved the inflexible application of a rule of policy. He observed, however, that as this was the first occasion that the national interest criterion has been used to refuse a protection visa, it was "hard to contend that the Minister's decision involved the inflexible application of policy", particularly when the appellant was given an opportunity to make submissions regarding why there should be an exemption to the policy (at [156]).

40 For all these reasons the primary judge was not persuaded that the Minister's decision was legally unreasonable or illogical.

The appeal

41 Two grounds of appeal were pleaded in the notice of appeal:

> **Ground 1: The primary judge erred in failing to find that the respondent's decision was affected by a jurisdictional error on account of a failure to have regard to the legal and practical consequences of the decision.**
>
> **Particulars**
>
> 1. The primary judge erred in finding that it is difficult to understand why Australia's non-refoulement obligations and the consequences of removing the appellant to his country of origin would be a mandatory consideration for the respondent in dealing with the national interest criterion ([90]).
>
> 2. The primary judge erred in finding that the Iranian authorities would not accept the appellant if he returned to Iran involuntarily ([91]). There was no evidence adduced in support of this finding.
>
> 3. The primary judge erred in finding that the respondent did not fail to have regard to the legal and practical consequences of his decision ([93]).
>
> 4. The respondent did not legally consider or take into account that, if the visa were refused, the appellant would be the subject of refoulement to Iran, where he faced the real risk of persecution.
>
> **Ground 2: The primary judge erred in failing to find that the respondent's decision was affected by a jurisdictional error on account of legal unreasonableness and/or illogicality and irrationality.**
>
> **Particulars**
>
> 1. The appellant repeats the particulars at Ground 1 above. The primary judge erred in finding that: '[given] the inability of the Australian government to return [the appellant] to Iran involuntarily, [the appellant] would remain in detention' ([148]).
>
> 2. The primary judge erred in failing to find that the respondent's decision revealed extreme illogicality or irrationality ([154] and [157]). The appellant was not taken to represent a danger to Australia's security for s 36 of the *Migration Act 1958* (Cth) but was taken to represent a danger to Australia's security when considering clause 790.277.
>
> 3. The respondent's decision was made for the substantial purpose of deterring others – and thus serves (impermissibly) as a punishment of the appellant. The primary judge erred in concluding otherwise ([155]).

42 On 22 April 2021, the Minister filed an interlocutory application seeking to adduce new evidence on the appeal, namely the complete transcript of the proceedings before the Federal Circuit Court and a report of the Department of Foreign Affairs and Trade in relation to Iran dated 14 April 2020 (**DFAT report**). The DFAT report relevantly stated at [5.27] that "Iran has a global and longstanding policy of not accepting involuntary returns". While initially resisting the application, the appellant's counsel ultimately conceded that the DFAT report was

relevant to the question of whether the Minister's failure to consider the legal and practical consequences of his decision was material. On this basis, orders were made during the hearing of the appeal to admit into evidence both the transcript and the relevant paragraph of the DFAT report.

The issues

43 The appeal raises the following issues:

(1) whether the Minister failed to have regard to the legal and practical consequences of refusing to grant the appellant a visa;

(2) if so, whether that was a jurisdictional error in that the consideration of those consequences was a matter he was required to take into account in determining what was in the national interest or because it was legally unreasonable not to consider them;

(3) whether the primary judge erred by making a finding without evidence that Iran does not accept involuntary returnees;

(4) whether the Minister's decision was affected by jurisdictional error in that it was legally unreasonable, illogical and/or irrational because the appellant had not been held to be a danger to Australia's security under s 36(1C)(a) of the Act; and

(5) whether the Minister's decision was affected by jurisdictional error in that it was legally unreasonable, illogical and/or irrational because it was made for the purpose of further punishing the appellant.

44 The first three issues arise from ground 1 of the notice of appeal, the particulars of which are also relied on in support of ground 2. The last two issues arise from ground 2 alone.

45 The Minister filed a notice of contention in which he pleaded that:

> 1. The primary judge should have also held that the exercise of the Minister's subjective satisfaction in determining the 'national interest' in clause 790.227 of Schedule 2 of the *Migration Regulations 1994* is not equivalent to the exercise of the Minister's discretion under s 501 of the *Migration Act 1958* (Cth) (**Act**) and subjective state of satisfaction under s 501CA of the Act (at [65] to [68], [71]–[74], [86]).
>
> 2. The primary judge should also have held that legal and/or practical consequences of the Minister's decision were not a mandatory relevant consideration and that error would only arise if the Minister's failure to consider those matters caused the decision to be legally unreasonable (at [75]–-[80]).

46 It is convenient to deal first with the third issue.

Did the primary judge err by making a finding without evidence of the uncontentious fact, not disputed below, that Iran does not accept involuntary returnees?

47 This question arises out of the statement of the primary judge in [91] of his reasons that the Iranian authorities would not accept the appellant if he returned involuntarily. It is common ground that there was no evidence before the primary judge on the question, although the transcript of the hearing and the other evidence filed in support of the Minister's application to adduce new evidence on the appeal indicates that evidence was available and could have been given. The Minister submitted that the primary judge was entitled to take judicial notice of this matter. In this Court the Minister's counsel submitted that the Iranian policy was not reasonably open to question and was capable of verification by reference to a document the authority of which cannot reasonably be questioned. That document was presumably the DFAT report in relation to Iran, which was annexed to an affidavit in support of the Minister's interlocutory application to adduce further evidence on the appeal.

48 No application was made to adduce the evidence before the primary judge. Rather, the primary judge said that he understood that the appellant would fall within a class of persons who could not be involuntarily returned to Iran because Iran would not accept them. His Honour indicated that, unless there was a factual dispute about it, he would proceed on the basis that the appellant could not be involuntarily returned to Iran.

49 The primary judge should not have proceeded in this way.

50 The fundamental problem with the primary judge proceeding in this way is that the application in the court below was for judicial review of the Minister's decision. Not only was the DFAT report not placed before the primary judge but, as his counsel accepted, it was not before the Minister.

51 It was not open to the primary judge to find, as he effectively did, that the appellant could not be involuntarily returned to Iran. His Honour could only do that if the fact in question was jurisdictional and Iran's position on involuntary returnees was not a jurisdictional fact.

52 If it was an issue raised by the application in the court below, proof of knowledge that was not reasonably open to question and was either (a) common knowledge in the locality in which the proceeding is being held or generally or (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned, could have been acquired by the primary judge in any way his Honour thought fit and he would be required to take that knowledge into account: *Evidence Act 1995* (Cth) s 144(1)-(2).

53 But he could only do so if he gave the other party the opportunity to make submissions to ensure that that party was not unfairly prejudiced: Evidence Act, s 144(4). The primary judge did indicate that he proposed to proceed on the basis that the appellant could not be involuntarily returned to Iran, "subject to submissions". In proceeding on this basis his Honour obtained the agreement of the Minister's counsel. At no time, however, did he ask the appellant's counsel whether he also agreed or whether he wanted to make submissions on the matter. This was an error. For this reason, even if the other conditions in s 144 of the Evidence Act were satisfied, the primary judge was not entitled to take judicial notice of it.

Did the Minister fail to consider the legal and practical consequences of refusing to grant the appellant a visa?

54 The reason the primary judge gave for finding (at [93]) that the Minister did not fail to have regard to the legal and practical consequences of his decision was flawed.

55 The reason his Honour gave was this (at [91]):

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

56 His Honour's reasoning was flawed first because he apparently took judicial notice of the Iranian policy without giving the appellant the opportunity to make submissions on the question and secondly because he failed to address the appellant's grievance. The appellant's grievance was that the Minister failed to take into account the fact that the legal consequence of refusing him a visa was that he would be refouled, regardless of his wishes. The effect of s 198(6) read with s 197C, was that, irrespective of whether he chose not to ask the Minister to remove him from Australia, he had to be removed as soon as practicable unless the Minister decided to grant him a visa under s 195A: *MNLR v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2021] FCAFC 35 at [96] (Wigney J) and [157] (SC Derrington J, Perram J agreeing); see also, *CWY20* at [11] (Allsop CJ). If there was no prospect of his removal from Australia, as the primary judge suggested at [92] of his reasons, the legal justification for his indefinite detention would arise for consideration: cf. *Commonwealth v **AJL20*** [2021] HCA 21; 95 ALJR 567; 391 ALR 562 at [26] (Kiefel CJ, Gageler, Keane and Steward JJ).

57 The appellant submitted that the Minister had not given consideration to refoulement for the following reasons. First, the Minister merely noted that he had taken the appellant's "protection needs" into account and did not make it plain what he meant by the appellant's protection needs. Second, the Minister did not expressly refer to the fact that the appellant would be removed to Iran as soon as reasonably practicable if the application were refused. Third, the Minister only considered "matters specific to [the appellant]" in the context of an undertaking proposed by the appellant not to disclose that he had been granted a protection visa. Fourth, the Departmental submission advised the Minister that the appellant would remain in detention indefinitely unless granted another visa and did not mention "the fact" that s 198 required the appellant to be removed to Iran as soon as reasonably practicable if his visa application were refused. Fifth, the omission of this "fact" apparently caused the Minister to misunderstand the legal and practical consequences of his decision and to act on the incorrect legal assumption that the appellant would remain in detention indefinitely unless granted another visa. Sixth, the Minister failed to have "active intellectual engagement" with the real prospect of "serious harm/persecution" the appellant would face on returning to Iran, there being "no direct finding" as to the kind of harm he might realistically confront on his return. Seventh, there is nothing in the Minister's reasons to indicate that he appreciated or understood that the Authority had upheld his refugee claim and the basis upon which it had done so.

58 The appellant's assertion that there was nothing in the Minister's reasons to show that the Minister appreciated or understood that the Authority had upheld his refugee claim or the basis for it cannot be accepted. The Minister expressly acknowledged in his summary of the appellant's circumstances the Authority's direction that the appellant satisfied s 5H(1) of the Act, that he was therefore a person in respect of whom Australia has protection obligations under the Refugees Convention, and that the Authority was satisfied that he had a well-founded fear of persecution in Iran because of his religion.

59 The Minister submitted that it was apparent he had considered the legal and practical consequences of his decision from his statement that the Authority had found that Australia had protection obligations in respect of him, his summary of the appellant's submissions, and his statement that he had taken those submissions into account.

60 The Minister's submission must be rejected.

61 It is one thing to mention these findings by the Authority. It is another to acknowledge the consequences of those findings and more particularly to consider those consequences for the purpose of determining whether it was in the national interest that he be granted a visa.

62 The Minister made no reference in his reasons to what would happen to the appellant if he were to refuse to grant him a SHEV. While he said he had taken into account the appellant's submissions, he did not say that he accepted that the appellant would remain in indefinite detention as the appellant had surmised nor did he advert to the contents or effect of s 198(6) of the Act which, when read with s 197C, require an officer to remove from Australia an unlawful non-citizen whose visa application has been finally determined against him or her despite Australia's non-refoulement obligations.

63 This Court has repeatedly explained what it means for an administrative decision-maker to consider something. It was not in dispute that a statutory obligation to consider a particular matter involves engaging in an "active intellectual process": see ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [36] to [46] (Griffiths, White and Bromwich JJ).

64 It is not apparent from the Minister's reasons that he was conscious at the time he made his decision of the extent of the harm the Authority found he could face if he were to return to Iran. While the Minister referred to the appellant's statement that he would not choose to return "where he would face torture and death", the Minister did not say whether he understood that this was the fate the appellant potentially had in store for him if he were repatriated against his will. When referring to the Authority's findings, the Minister did not mention the nature of the harm the Authority found he could face. His summary of the appellant's "submissions", which included the appellant's statement, was brief. Without more, a statement that he had taken into account an applicant's submissions does not evince any intellectual engagement with them. See, for example, *Carrascalao* at [47] and *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [35]–[40] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

65 The Minister submitted that he clearly understood that refoulement could be a consequence of refusing the visa by reference to the fact that he had said so in his reasons for refusing to grant the appellant a visa on character grounds. The Departmental submission annexed (as attachment C) a copy of those reasons.

66 Furthermore, the Departmental submission stated at [35] under the heading "Sensitivities" that:

> [The appellant] is a person in respect of whom Australia has protection obligations; if his visa is refused, [the appellant] will remain an unlawful non-citizen. He could not be removed to Iran without breaching Australia's non-refoulement obligations. [The appellant] will have to remain in immigration detention unless another visa is granted.

67 The appellant submitted that, because the Minister's s 501 decision had been set aside by the Court for jurisdictional error, the Minister had not considered the legal and practical consequences even in that context, presumably because, once the decision was set aside, it is taken not to have been made. "A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all": *Minister for Immigration and Multicultural Affairs v* ***Bhardwaj*** (2002) 209 CLR 597 at [51] (Gaudron and Gummow JJ).

68 *Bhardwaj* may not be to the point, but even if it be accepted that the Minister properly considered Australia's non-refoulement obligations when deciding not to grant the appellant a visa on character grounds, that does not assist the Minister here. This was not a new decision invoking the same power; it was a different decision involving a different criterion.

69 It is reasonable to believe that the Minister read the submission but there are at least three reasons to believe that the Minister did not take into account the prospect that the appellant would be refouled to Iran in breach of Australia's non-refoulement obligations.

70 First, the Minister did not advert in his reasons to the prospect of refoulement in breach of Australia's international obligations. The Minister's written reasons will generally be taken to be a statement of the matters to which the Minister adverted, took into account and considered and, if something is not mentioned in the reasons, it may be inferred that it was not taken into account or considered: ***NBMZ*** *v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [16] (Allsop CJ and Katzmann J), citing *Acts Interpretation Act 1901* (Cth), s 25D, and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [89] and [133].

71 Second, the appellant stated that he would not willingly return to Iran and would choose to remain in detention. The Minister did mention this statement, but he did not say what he made of it. The appellant's statement was beside the point; the legal consequence of refusing to grant the visa and not granting him another was that he would be removed from Australia. In attaining the state of satisfaction required by the relevant criterion, the Minister was not just required to address the appellant's representations; his task was wider than that because he had to proceed in a way that was consistent with the Act, and upon a correct understanding of the

law: ***Plaintiff S297****/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [21] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ); *CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 62 at [117] (Griffiths J); ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

72 Third, the Department told the Minister that he would have to remain in immigration detention unless another visa were granted. The Minister had the power, but not the duty, to grant the appellant another visa under s 195A of the Act or make a residence determination under s 197AB but only if he thought it was in the public interest to do so. It is clear from his reasons that he did not contemplate either option. There was no evidence of a third country in which the appellant had the right to enter and reside. And there was no suggestion that the appellant would be granted a visa under s 195A, presumably because the Minister's power to grant a visa under s 195A can only be exercised in the public interest and he did not think it in the public interest to do so. On the basis of the material that was before the Minister at the time of his decision, the legal consequences of refusing to grant the appellant a SHEV were that he would be refouled to Iran and, in the meantime, held in indefinite detention (see, for example, *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [120], [123] (Kenny and Mortimer JJ)). The former would expose the appellant to the risk of torture and death and put Australia in breach of its international non-refoulement obligations. If in fact there was no real prospect of refoulement because of an Iranian policy, as the primary judge believed, then by what power could the appellant be held in indefinite detention?

73 Notably in submissions in the court below, the Minister said that his reasons "made plain that [he] considered these personal circumstances [by which he meant the possibility of refoulement or indefinite detention] to be immaterial to the national interest in protecting Australia's borders" and that was "sufficient". But these were not mere "personal circumstances". They were the legal consequences of a decision to refuse to grant the visa. And the submission that the Minister considered them to be immaterial to the national interest is effectively an admission that the Minister paid no regard to those consequences. If so, the admission was well made as it is apparent, for the reasons given above, that the Minister did not consider them. The next question is whether it was a jurisdictional error not to.

Was the Minister bound to take into account the legal and practical consequences of refusing to grant the visa and/or was it legally unreasonable not to?

74 The primary judge said that it was difficult to understand why Australia's non-refoulement obligations and the consequences of removing the appellant to his country of origin would be a mandatory consideration for the Minister in dealing with the national interest criterion, "at least on the facts of this case". Those facts were that the Authority had determined those questions "authoritative[ly]" and had remitted the consideration of the remaining criteria to the Minister.

75 The appellant claimed that this was a jurisdictional error because the subject matter, scope and purpose of an Act may (implicitly) require that certain considerations must be taken into account (*Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* (1986) 162 CLR 24 at 39–40 per Mason J); the consequences of removal were consequences that "flowed from" the terms of the Act (*NBMZ* at [10] per Allsop CJ and Katzmann J; [177] per Buchanan J); and the statutory or legal consequences of visa refusal have to be taken into account (*NBMZ* at [8] per Allsop CJ and Katzmann J).

76 The appellant submitted:

> The [Minister] needed to squarely grapple with the legal and practical consequences of the decision and lawfully weigh up the competing considerations which were relevant to the exercise of the jurisdictional fact in cl 790.227 of Sch 2 of the Regs; namely, whether the non-refoulement obligations arising from the appellant's claim outweighed other adverse factors related to the national interest criterion.

77 In any event, the appellant submitted, since he had squarely raised the issue of non-refoulement obligations with the Minister, the Minister was bound to address it as a matter of procedural fairness (***Viane*** *v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at [25]).

78 It is convenient to deal with the last submission first.

79 In *Viane* at [25] Rangiah J observed that in ***Dranichnikov*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088; 197 ALR 389; 73 ALD 321 at [24], in the context of an application for a protection visa, Gummow and Callinan JJ (with whom Hayne J agreed) held that a failure to respond to a "substantial clearly articulated argument relying upon established facts" was at least a denial of natural justice. His Honour also cited the Full Court's remarks in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [63] that, in the light of *Dranichnikov,* it was plain that "a failure by the [Refugee Review] Tribunal to deal with a claim raised by the evidence and the

contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error".

80 The submission should not be entertained because it is outside the scope of the notice of appeal and no application was made to amend the notice of appeal.

81 It was common ground that, if the Minister failed to have regard to the legal and practical consequences of visa refusal, and this was a relevant consideration in the sense discussed by Mason J in *Peko-Wallsend*, then the Minister would have fallen into jurisdictional error. In *Peko-Wallsend* at 39–40 Mason J observed that an application for judicial review of an administrative decision on the ground that in the exercise of a discretionary power the decision-maker failed to take into account a relevant consideration, can only succeed if the consideration is one which the decision-maker was bound to take into account in making the decision. Such an obligation may be express or implied. Where there is no express requirement to do so, the question whether a particular consideration is, by implication, one the decision-maker is bound to take into account is to be determined by reference to the subject-matter, scope and purpose of the legislation.

82 The appellant submitted that the legal and practical consequences of the Minister's decision was one such matter, relying principally on what was said in *NBMZ.* I will come back to *NBMZ.* But first it is necessary to say something about the scope of the relevant criterion.

83 It is well established that what is in the national interest is largely a political question: *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40]. Moreover, the "national interest" has been described as an expression of "considerable breadth": *Carrascalao* at [156]. But it is not without limits: *Graham* at [57]. One such limit is that the Minister's satisfaction must be one which is reached reasonably: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [167] (Gummow and Hayne JJ, Gleeson CJ agreeing at [1]); *CWY20* at [140] (Besanko J, with Allsop CJ, Kenny J, Kerr J and Charlesworth J agreeing).

84 In *Plaintiff S297* the High Court held that the Minister's decision to refuse to grant a protection visa because he was not satisfied it was in the national interest to do so was unlawful when the sole reason he was not so satisfied was that the visa applicant was an unauthorised maritime arrival. The Court accepted that the Minister "may properly have regard to a wide range of

considerations", some of which may be seen as "bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office" (at [18]). The Court acknowledged that "[s]ome of those considerations may admit of the formulation of rules of more or less general application which can be understood as expressing some aspect of the Minister's understanding of what may or may not be 'in the national interest'" (at [19]). Nevertheless, the Court held that the status of unauthorised maritime arrival could not be treated as a sufficient reason in itself for refusing to grant a visa which the applicant had lawfully sought because s 46A of the Act exhaustively prescribed the visa consequences flowing from that status.

85 In *NBMZ* at [6]–[10] Allsop CJ and I held that in the exercise of the power to refuse to grant a protection visa the Minister is required to take into account the legal consequences of his decision. At [8] we observed that, although the breadth of the discretion is broad, it is confined by the subject matter, scope and purpose of the Act; that the Minister's decision is made within the statutory framework; and the statutory effect of such a decision is removal of the applicant from the country as soon as practicable and, in the meantime, detention. At [9] we held:

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

86 *NBMZ* was concerned with the exercise of the power in s 501, which is unquestionably a discretionary power. So, too, were many of the other authorities on which the appellant relied both before the primary judge and this Court. But the primary judge considered that those authorities were relevantly indistinguishable. The Minister challenges his Honour's decision on this point in his notice of contention.

87 The primary judge accepted at [65] of his reasons that cases dealing with different provisions of the Act must be considered in relation to the statutory context but said that "an artificial distinction should not be drawn between the exercise of a discretion and the formation of a state of satisfaction based upon a broad subjective criterion". His Honour described the Minister's decision in this case as "a subjective one", involving "a mental process indistinguishable from the exercise of a discretionary power".

88 The Minister submitted that:

> [W]hile the considerations in section 501(1) or (2) of the Act and the satisfaction as to

> "another reason" in section 501CA(4) of the Act might ultimately be the "same" (AB 184 [73]), they are not analogous to clause 790.227 of the Regulations. In so far as the primary judge considered otherwise at [86], his Honour, with great respect, erred...

89 Clause 790.22 of the Regulations is headed "Criteria to be satisfied at time of decision". Clause 709.227 simply states:

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

90 It is true that in determining whether or not he is satisfied that the grant of the visa is in the national interest for the purposes of cl 790.227, the Minister is not exercising a discretionary power. Rather, he is making an evaluative judgment: cf. *CWY20* at [91] (Besanko J). It is also true that the effect of the legislation is that a person owed protection obligations can be refused a visa on that basis alone and there can be no doubt that this was the legislative intention. But the Minister's submission should not be accepted.

91 His Honour's remarks were unexceptionable. Indeed, they accord with a long line of authority in the High Court concerning the similarly broad expression "in the public interest". Those cases include *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J); ***O'Sullivan v Farrer*** (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); and ***Pilbara Infrastructure*** *Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), cited in *CWY20* at [138]–[139] (Besanko J). It is sufficient for present purposes to refer to what was said in *O'Sullivan v Farrer* at 216 for the statement made in *Pilbara Infrastructure* was substantially identical:

> [T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view": *Water Conservation and Irrigation Commission (NSW) v Browning,* per Dixon J.
>
> (Footnote omitted.)

92 To similar effect was the following observation by Buchanan J in *Jione v Minister for Immigration and Border Protection* (2015) 232 FCR 120 at [17], which the primary judge cited:

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

in the public or national interest.

93 Further, the Minister's submissions assumed that in deciding whether it is in the national interest to grant a visa to an applicant the Minister has no obligation to take into account the legal and practical consequences of his decision. With respect to the legal consequences, that is by no means self-evident, particularly when those consequences have implications not only for an applicant but also for the nation. Besides, there is authority against the Minister's assumption.

94 In *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at [84], which the primary judge cited, the Full Court (Kenny, Flick and Griffiths JJ) remarked:

> The fundamental principle that *NBMZ* confirms is that, in making a decision under the *Migration Act*, the Minister is bound to take into account the legal consequences of a decision because these consequences are part of the legal framework in which the decision is made. Indeed, in making any decision in exercise of a statutory power, the legal framework in which that decision is made must be taken into account. That framework includes the direct and immediate statutorily prescribed consequences of the decision in contemplation. Another expression of this fundamental proposition is the well-established principle that a broad statutory discretion is nonetheless limited by the subject matter, scope and purpose of the Act that creates it …

95 The Minister's submissions were dismissive of the reliance the primary judge placed on these remarks, insisting that they should not be taken out of their context, which was the exercise of the broad discretion under s 501. But the primary judge did not take them out of context. The principle the Full Court said *NBMZ* confirmed was not a principle confined to the exercise of discretionary powers in s 501.

96 The Full Court has rejected the notion that consideration of the national interest requires the Minister to take into account particular matters personal to the visa holder. In *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Huynh*** (2004) 139 FCR 505 at [74], Kiefel and Bennett JJ said:

> The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens: s 4(1). To advance that object, provision is made for the removal or deportation from Australia of non-citizens whose presence is not permitted by the Act: s 4(4). If the Minister were able, consistent with the object of the Act, to consider a matter as broad as the national interest, in determining whether a person ought to be permitted to remain in Australia, it does not seem possible to imply some obligation on the Minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed.

See also *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Nystrom*** (2006) 228 CLR 566 at [125]–[129] (Heydon and Crennan JJ), Gleeson CJ at [1] and Gummow and Hayne JJ at [39]–[41] agreeing.

97 There is no reason to think these remarks would not apply equally to the Minister's consideration of the national interest for the purpose of the criterion in Sch 2 cl 790.227. That was the view the primary judge reached. Consequently, his Honour considered himself bound by *Huynh.*

98 But there is a difference between considering matters personal to a visa holder or visa applicant, especially matters of the kind to which the Full Court referred in *Huynh,* and considering matters that necessarily result from the application of the Act. The prospects of refoulement and indefinite detention are matters of the latter kind. Australia's international treaty obligations are of particular relevance to any consideration of the national interest. One such obligation is Australia's obligation under Article 33 of the Refugees Convention, which is the foundation for some of the rights to protection for which the Act provides. A similar obligation arises from Article 3 of the CAT, which is the foundation for other rights to protection enshrined in the Act. The Full Court in *Huynh* was not concerned with such a matter. Neither was the High Court in *Nystrom.*

99 The Minister also submitted that:

> The "national interest" in clause 790.227 is a single distinct political determination to be made in the context where the legislation intends that a person owed protection obligations will be refused the visa on that consideration alone. The national interest in such circumstances is not rationally capable of changing because the consequence is that a person may be detained for an indeterminate period or refouled: that is the express statutory context of the decision. In other words, the legal and practical consequences are inherent in the decision because the criterion applies expressly to the SHEV.

100 I do not accept these submissions. The mere fact that the criterion is applied to applications for a SHEV does not mean that the decision-maker can ignore the prospect of refoulement or indefinite detention when considering whether it is in the national interest in a particular case to grant a SHEV. The primary judge was right to observe that the appellant's refugee status had been determined by the Authority. As his Honour surmised, *that* issue would not need to be considered further. But that is no answer to the appellant's complaint. Neither are the passages in *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [61]–[65] upon which the Minister also relied.

101 As Griffiths J pointed out at first instance in *CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1855 at [73], since the object of the Act is to regulate in the national interest the entry to, and presence in, Australia of non-citizens, the suite of provisions which address the issue of non-refoulement and the grant of protection visas in order to comply with Australia's non-refoulement obligations are intended to serve the national interest. The suite of provisions includes s 35A (which establishes the protection visa as a class of visa) and s 37A (which creates the class of temporary safe haven visas); s 36 (which lays down the principal criteria for the grant of a protection visa); ss 5H and 5J (which define who is a "refugee"); and s 197C.

102 In the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), which inserted a number of the provisions with which this appeal is concerned, stated at [105] and [122] that:

> The term national interest has a broad meaning and **refers to matters which relate to Australia's standing**, security and interests. For example, **these matters may include** governmental concerns related to such matters as public safety, border protection, the prevention of transnational and organised crime, national security, defence, Australia's economic interests, **Australia's international obligations** and its relations with other countries.
>
> (Emphasis added.)

103 Australia's standing in the international community could be adversely affected by a decision to refuse to grant a protection visa to a person, like the appellant, who has been found to be a refugee.

104 In *CWY20* Allsop CJ addressed the place of international law and international obligations within the national interest calculus. His Honour stated at [5] that a violation of an international treaty or customary law "is a violation of international law *qua* law". His Honour considered that this was a point of importance, which he developed at [6]–[9] of his reasons with reference to leading international law texts and other materials, and many pieces of Commonwealth legislation since 1945 where the "national interest" has been used as an evaluative touchstone. His Honour concluded at [10] that:

> Australia's international obligations and violation thereof can thus be seen to bear directly and naturally on the conception of the "national interest".

105 At [12] the Chief Justice referred to the sources of Australia's non-refoulement obligations, as I have in these reasons at [14] above. He observed at [13] that a breach of international treaty

obligations may have certain legal consequences but, regardless of whether those consequences arise, a breach of international treaty obligations is a breach of international law, "which is a breach of law":

> Article 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), and the principle of *pacta sunt servanda*, impose upon the Australian Government an obligation to observe and perform, in good faith, those treaties to which it is a party. Failure to do so exposes the nation to responsibility for internationally wrongful acts under the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, commended by the General Assembly on 28 January 2002, A/RES/56/83 and on 8 January 2008, A/RES/62/61, in which case Australia may face legal consequences (Art 28), including, but not limited to: cessation and non-repetition (Art 30), reparation (Art 31) in the form of restitution (Art 35), compensation (Art 36) and satisfaction (Art 37), in addition to countermeasures (Art 49). Whether or not these legal consequences in fact arise, a breach of a treaty is a breach of international law, which is a breach of law nonetheless.

106 In paragraphs [14] and [15], his Honour concluded:

> Thus, part of the national interest can be seen *necessarily* to be the question of whether a decision should be made that may lead, pursuant to the (then) command of Parliament, and depending on the circumstances, to a state of affairs where Australia would act in breach of its treaty obligations, being in this case a rule expressly recognised by Australia and other contracting states to the relevant conventions: that is, in breach of international law, and *in that sense* unlawfully.
>
> It goes without saying that it is a matter for the Executive to determine whether it is in the national interest for a given visa to be cancelled. Within any such decision, if it be relevant, the violation of international law, qua law, is *intrinsically and inherently* a matter of national interest, and therefore within the subject of evaluation. So much has been recognised in other Commonwealth legislative regimes, and so much ought to be recognised in the context of the *Migration Act* in respect of non-refoulement obligations.
>
> (Emphasis added.)

107 In the present case, the Minister erroneously confined his assessment of the national interest by focussing on the type of offence the appellant had committed, the appearance of granting a protection visa to such an offender, and the implications of doing so for Australia's border protection policy. The primary judge erred in holding otherwise. The Minister was entitled to take those factors into account. They were not irrelevant to the national interest. But the implications for Australia of returning the appellant to his country of nationality in breach of Australia's non-refoulement obligations were also intrinsically and inherently relevant, for the reasons identified by Allsop CJ in *CWY20*, including because a breach of international legal obligations is a legal consequence of the decision. So, too, was the prospect of indefinite

detention for, unless the detention were for a lawful purpose, detaining the appellant indefinitely could put Australia in breach of its obligations under the ICCPR.

108 Further, as in *CWY20*, in the particular circumstances of the present case no reasonable decision-maker could lawfully calculate whether it was in the national interest to grant the applicant a visa without considering both these prospective eventualities. Even if detaining the appellant indefinitely were lawful, as a legal consequence of his decision the Minister was bound to take it into account before determining whether he could be satisfied that it was in the national interest to grant the appellant a visa.

109 The remaining question is whether the error was jurisdictional. That depends on whether the error was material in the sense that it could have made a difference to the outcome of the appellant's application: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ). In answering that question, the observations made by Kerr and Mortimer JJ (Allsop CJ agreeing) in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [174] must be borne in mind:

> The weight to be given to the executive dimension of Australia's non-refoulement obligations was of course a matter for the [Minister] to decide. This Court cannot substitute itself in the undertaking of such an evaluative task. In undertaking an assessment on materiality, where there are reasonable and rational choices to be made in fact finding, it is not appropriate for the supervising court to attempt to place itself in the mind of the [Minister], and speculate about what would or could have changed a particular [Minister's] mind. To do so brings the court into the merits of the decision. Rather, the supervising court must assume a [Minister] acting fairly and reasonably, with a mind open to persuasion, would give active and genuine consideration to all matters relevant to its review, including the matter which was erroneously omitted, or misconceived, and which caused it to exceed its jurisdiction. See generally *Martincevic v Commonwealth* [2007] FCAFC 164; 164 FCR 45 at [67]-[68], *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66; 276 FCR 75 at [70]; *PQSM v Minister for Home Affairs* [2020] FCAFC 125; 279 FCR 175 at [69]-[73].

110 Counsel for the Minister submitted, in effect, that the information as to Iran's policy contained in the DFAT report indicates that a failure by the Minister to consider the effect on the national interest of a breach by Australia of its non-refoulement obligations could not have made a difference to the Minister's decision.

111 The evidence in question appears at [5.27] of the report. It reads:

> Iran has a global and longstanding policy of not accepting involuntary returns. Historically, Iran has refused to issue temporary travel documents (*laissez-passers*) to

> facilitate the involuntary return of its citizens from abroad. In March 2018, Iran and Australia signed a Memorandum of Understanding on Consular Matters. This includes an agreement by Iran to facilitate the return of Iranians who arrived after March 2018 and who have exhausted all legal and administrative avenues to regularise their immigration status in Australia. A *laissez-passer* can be obtained from an Iranian diplomatic mission on proof of identity and nationality.

112 That information certainly indicates that the appellant's refoulement to Iran was an unlikely consequence of the Minister's decision. But in the absence of a third country to which he could be removed, the inevitable consequence of refusing to grant the appellant's application was that he would be indefinitely held in immigration detention. That was not merely a practical consequence of the decision, it was also a legal consequence. Assuming the Minister was acting fairly and reasonably, with a mind open to persuasion, giving active and genuine consideration to all relevant matters, including the matters he erroneously omitted to consider, I am persuaded that there was a realistic possibility that his decision could have been different. In these circumstances, the Minister's error was material and therefore jurisdictional.

Was the Minister's decision affected by jurisdictional error in that it was legally unreasonable, illogical and/or irrational because the appellant had not been found to be a danger to Australia's security under s 36(1C)(a) of the Act?

113 It is well established that where a statute requires an opinion to be formed or state of satisfaction to be reached as a precondition to the exercise of a statutory power or the performance of a statutory duty the opinion must be formed or the state of satisfaction must be reached reasonably: see, for example, *Re v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 (Latham CJ); *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [34] (Gleeson CJ, Gummow, Kirby and Hayne JJ). As Gageler J observed in *Minister for Immigration and Citizenship v* ***Li*** (2013) 249 CLR 332 at [90], "[e]ach is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject-matter, scope and purposes of the statute".

114 It will be recalled that particular 2 of ground 2 of the notice of appeal reads:

> The primary judge erred in failing to find that the respondent's decision revealed extreme illogicality or irrationality ([154] and [157]). The appellant was not taken to represent a danger to Australia's security for s 36 of the *Migration Act 1958* (Cth) but was taken to represent a danger to Australia's security when considering clause 790.277.

115 At [154] the primary judge said:

> While the national interest criterion is at large it would be an error to use it as an effective duplicate for the criteria in ss 36(1A) and 36(1C). In the present case, the purview of the Minister's consideration was wider than the national security criteria. The Minister adopted a rule or policy based on the value of border protection and the importance of maintaining the integrity of it. The policy logically applied regardless of whether the applicant presented a risk to national security.

116 The primary judge's reasons at [157] were not to the point.

117 Sections 36(1A) provides that an applicant for a protection visa must satisfy both the criteria in subs (1B) and (1C) and at least one of the criteria in subs (2).

118 One of the criteria in subs (2) was (and is) that the applicant for the visa is "a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee". Having regard to the direction of the Authority, the Minister must have been satisfied that the appellant satisfied this criterion.

119 Subsections (1B) and (1C) were (and) are in the following terms:

> (1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).
>
> (1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:
>
> (a) is a danger to Australia's security; or
>
> (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.
>
> Note: For paragraph (b), see section 5M.

120 The Departmental submission indicates that the appellant satisfied both these criteria. For this reason the appellant argued that he was not a person whom the Minister considered, on reasonable grounds, to be a danger to Australia's security and therefore the grant of a protection visa to the appellant would not undermine the protection of Australia's territorial and border integrity from serious threats. The appellant submitted, in substance, that the Minister had not taken account of the effect of ss 36(1A) and 36(1C) when considering whether the criterion in Sch 2 cl 790.277 had been satisfied. By implication, he contended, the Minister's decision-making process reveals "extreme illogicality or irrationality" because the appellant

was not taken to represent a danger to Australia's security for the purpose of s 36(1C) but he was taken to represent a danger to Australia's security for the purpose of Sch 2 cl 790.277.

121 It may be accepted that the Minister was required to take into account the legal framework for his decision. Contrary to the appellant's submission, however, there is no necessary inconsistency between being satisfied that the appellant is not a danger to Australia's security for the purpose of s 36(1C) and not being satisfied that it is in the national interest to grant him a SHEV for the purpose of Sch 2 cl 790.277.

122 "Security" is not defined in the Act. But s 36(1C) should be read in context with s 36(1B). Read in context "security" in s 36(1C) should be taken to mean "security" as defined in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth). That definition arguably includes the concerns that actuated the Minister but is not limited to them. It reads:

> ***security*** means:
>
> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
>
> (ii) sabotage;
>
> (iii) politically motivated violence;
>
> (iv) promotion of communal violence;
>
> (v) attacks on Australia's defence system; or
>
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

123 The Minister decided that granting a protection visa to a convicted people smuggler would have an adverse impact on Australia's border protection regime and the policy that underpins it and that granting the visa would undermine public confidence in the protection visa program. It is simply incorrect to assert, as the appellant did in his notice of appeal, that the Minister took him to represent a danger to Australia's security when considering cl 790.277. The primary judge was correct to find that the Minister's consideration of "the national interest" was wider than the national security criteria in s 36(1C)(a). They are concerned with the risks

to Australia's security posed by the appellant. The Minister's concern was with the risks to Australia's security posed by others.

Was the Minister's decision affected by jurisdictional error in that it was legally unreasonable, illogical and/or irrational because it was made for the purpose of further punishing the appellant?

124 It will be recalled that particular 3 of ground 2 of the notice of appeal alleges that the Minister's decision was made for the substantial purpose of deterring others and therefore impermissibly served as a punishment of the appellant and the primary judge erred in concluding otherwise.

125 The primary judge's conclusion appears in [155] of his reasons for judgment. His Honour said the adoption of the policy he described in [154] was not a decision to impose a punishment on the appellant. His Honour went on to say:

> There was an unmistakable concept of deterrence in the Minister's decision but it was not directed at the applicant as an individual. It was dealt with at a higher level of abstraction, consistently with the Minister's view of what the national interest required.

126 Deterrence is certainly a factor in sentencing and an aspect of punishment for breaches of the criminal law. In ***Djalic*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, a case about a decision to cancel a visa under s 501(2), the Full Court (Tamberlin, Sackville and Stone JJ) remarked at [75]:

> The appellant's argument assumed … cancellation amounted, in effect, to the imposition of punishment by reason of the non-citizen's criminal conduct. The fundamental difficulty with this assumption is that deterrence is a matter that is squarely concerned with the protection of the Australian community. Different views may be held about how far a cancellation decision is likely to have a deterrent effect on other potential (non-citizen) offenders. But the very point of taking account of general deterrence as a factor in making a cancellation decision is to enhance the safety and well-being of the Australian community by discouraging non-citizens from engaging in criminal conduct. It is treated in exactly this way in the Ministerial Direction. The mere fact that deterrence also happens to be an element that courts take into account in sentencing offenders does not convert a cancellation decision under s 501(2) from a protective to a punitive measure …

127 In *NBMZ* at [29] Allsop CJ and I also accepted that it might be legitimate for a Minister to consider that the refusal to grant a visa to a person who has offended in some way may act as a disincentive to others and thereby protect other detainees or the Australian public. But we warned that "care needs to be taken" for there is authority for the proposition that a deportation order made for the sole or substantial purpose of deterring others would serve (impermissibly) as punishment of the criminal: ***Re Sergi*** *and Minister for Immigration and Ethnic Affairs*

(1979) 2 ALD 224 at 231 (per Davies J); ***Re Gungor*** *and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 at 232 (per Smithers J); and see *Djalic* at [76] and ***Tuncok*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42].

128 In *Re Sergi* at 230, Davies J, too, acknowledged that deterrence of others is a factor that the Minister may take into account in deciding whether or not to deport a person who has been convicted of a crime. His Honour noted, however, (at 231) that "it has always been accepted… that an order for deportation is not made by way of punishment of the criminal". He continued:

> If an order for deportation were made in a case where the sole or substantial factor justifying deportation was the deterrence of others from committing a crime, the making of the order of deportation would serve as punishment of the criminal. The additional detriment of deportation would be imposed on him, not because he was himself a danger to the community or a person whose continued presence in Australia was undesirable, but as a detriment or punishment consequent upon the commission of the crime, which detriment or punishment would serve as a deterrent to others from so acting.

129 The power his Honour was exercising was the power then conferred by s 12 of the Act which at that time was in the following terms:

> Where (whether before or after the commencement of this Part) an alien has been convicted in Australia of a crime of violence against the person or of extorting any money or thing by force or threat, or of an attempt to commit such a crime, or has been convicted in Australia of any other offence for which he has been sentenced to imprisonment for one year or longer, the Minister may, upon the expiration of, or during, any term of imprisonment served or being served by that alien in respect of the crime, order the deportation of that alien.

130 In *Re Gungor* at 232 Smithers J observed that:

> Once it appears that the basic reason for the deportation of a particular person is deterrence of others from crime and not that the individual himself is a threat to the Australian community, then deportation is but double punishment in an area of criminal law. Double punishment is in direct and basic conflict with justice. Particularly is it so when it is inflicted according to a general rule which, in almost all cases, ignores degrees of criminality and the circumstances of particular cases and applies only in relation to a particular and limited class of offenders.

131 In *Djalic* at [76] the Full Court also referred to *Re Sergi* and *Re Gungor* but expressly reserved the question of whether a cancellation decision made for the sole or substantial purpose of deterring others could be regarded as "double punishment".

132 In *Tuncok* at [42] the Full Court (Moore, Branson and Emmett JJ) observed that it might be that "if the sole, or a substantial, factor justifying cancellation of a visa were the deterrence of

others from committing a crime, the purpose of the decision may be punitive, which might be an irrelevant consideration", citing *Re Sergi* at 231 and *Re Gungor* at 227 and 232.

133 In the present case, it is indisputable that a substantial, if not the sole, reason the Minister refused to grant the appellant a visa was to deter people smugglers. In his remarks, the sentencing judge emphasised the importance of general deterrence in sentencing a person convicted of a people smuggling offence. Apart from the objective seriousness of the offence, it was the single most important factor accounting for the length of the appellant's sentence. In these circumstances the purpose of the Minister's decision can properly be regarded as punitive and refusing to grant the appellant a visa on this basis does amount to double punishment. That is because the practical effect of the Minister's consideration of the national interest was that in circumstances where the appellant otherwise engaged the criteria for a protection visa, the Minister determined that the appellant should be further punished by being denied a protection visa so as to give effect to considerations of general deterrence of people smugglers, when the appellant had already been sentenced on that basis. The primary judge erred in holding otherwise.

134 The Executive has limited authority under the Act to detain an alien in custody for the purpose of deportation or expulsion. But the Executive has no authority to detain or deport an alien for the purpose of punishment. See, for example *Lim v Minister for Immigration* (1992) 176 CLR 1 at 27–32 (Brennan, Deane and Dawson JJ); *Al-Kateb v Goodwin* (2004) 219 CLR 562 at [45] (McHugh J). In *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26], (cited in *AJL20* at [27]), French CJ, Hayne, Crennan, Kiefel and Keane JJ remarked that:

> [D]etention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

135 For this reason deterrence might well be said to be an irrelevant consideration in determining whether to refuse to grant a visa, even on national interest grounds. While this was not the basis upon which the argument in the present case was put, a decision-maker who is actuated by irrelevant considerations may be said to be acting "unreasonably", that is "legally

unreasonably": see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [27] where French CJ said that:

> In [*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223], Lord Greene MR observed that the word "unreasonable" in administrative law was used to encompass failure by a decision-maker to obey rules requiring proper application of the law, consideration of mandatory relevant matters and exclusion from consideration of irrelevant matters:
>
> > "If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."
>
> That kind of unreasonableness may be taken to encompass unreasonableness from which an undisclosed underlying error may be inferred.

136 Regardless of whether the Minister's decision is legally unreasonable because it amounted to double punishment, for that reason it was not authorised by the Act pursuant to which it was purportedly made and was therefore vitiated by jurisdictional error.

Conclusion

137 The appeal should be allowed. The orders of the primary judge should be set aside, writs of certiorari and mandamus should issue to quash the Minister's decision and direct the Minister to determine the appellant's visa application according to law. The Minister should pay the appellant's costs both in this Court and the court below.

I certify that the preceding one hundred and thirty-six (136) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann.

Associate:

Dated: 26 November 2021

REASONS FOR JUDGMENT

WHEELAHAN J:

138 I have had the benefit of reading and considering in draft the reasons of Katzmann J. I agree with her Honour that the appeal should be allowed. I do so for the reasons that her Honour gives in relation to the Minister's failure to consider the legal consequences of his decision, which included indefinite detention and removal from Australia. Had the Minister considered the legal consequences in his evaluation of the national interest, then for the reasons that her Honour gives, in order to undertake that consideration rationally and reasonably, the Minister was required as part of the evaluation of the national interest to assess whether the decision would place Australia in breach of the international treaty obligations to which her Honour has referred.

139 I agree with her Honour's reasons for the disposition of the appellant's claim that the Minister's decision was illogical or irrational because the appellant had not been found to be a danger to Australia's security.

140 However, I am not persuaded that the primary judge was in error in failing to find jurisdictional error on the ground that the Minister's decision was made for the substantial purpose of deterring others, and thus served as a punishment of the appellant. The primary judge rejected this claim because the decision was not one to impose punishment on the appellant. The judge stated that while "[t]here was an unmistakable concept of deterrence in the Minister's decision … it was not directed at [the appellant] as an individual. It was dealt with at a higher level of abstraction, consistently with the Minister's view of what that national interest required."

141 The appellant submitted that it was clear from the Minister's reasons that a substantial purpose for the refusal to grant the protection visa was to deter others from engaging in people smuggling, and that because the legal consequence of the refusal of the visa was deportation, this constituted a punishment of the appellant that was an exercise in harshness that was not appropriate in the conduct of good government, or in the best interests of Australia, citing *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 at 233. For these reasons, the appellant submitted that the Minister's decision was legally unreasonable.

142 I will address three decisions of the Administrative Appeals Tribunal in its early years that were cited to the court. These decisions were not concerned with jurisdictional error, but were administrative decisions upon a merits review.

143 The first Tribunal decision is of Davies J sitting as a Deputy President in *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224. In that case, the applicant had been convicted of cultivating marijuana, and had served a term of imprisonment. The applicant was an "alien" whom the Minister had determined to deport under the power that then existed under s 12 of the *Migration Act 1958* (Cth). In reviewing the Minister's decision, Davies J at 230 addressed material that showed that the Minister regarded crimes involving illegal drugs with concern, and his Honour considered that the Minister was right to do so. His Honour continued –

> In my view, deterrence of others is a factor which the Minister may take into account. His discretion is unlimited or practically so. …

144 For this latter proposition, Davies J cited the following passage from *R v Mackellar; ex parte Ratu* (1977) 137 CLR 461 at 479 (Mason J) relating to the making of a deportation order under s 18 of the Act, as then in force, which Davies J held to be equally applicable to s 12 and s 13 –

> The discretion is unlimited in scope except in so far as the nature and purpose of the Act may possibly suggest some confinement. And it is not easy to see how any limitation in scope in relation to a power to deport a prohibited immigrant can be derived from an Act which deals with the topic of immigration. The very general words of the section leave the Minister free to take into account government policy on important issues and, where it is thought to be appropriate, the personality and circumstances of the individual.

145 Davies J held at 231 that the above passage supported taking into account as a factor in the making of an order for deportation that the making of the order will serve as a deterrent to other immigrants and aliens from trafficking in illegal drugs. However, his Honour distinguished the position where "the sole or substantial factor justifying deportation was the deterrence of others from committing a crime". In that circumstance, his Honour held that the making of a deportation order would serve as punishment of the criminal. His Honour continued –

> The imposition of the detriment of deportation then amounts to the imposition of a punishment. Punishment is not the function of the Migration Act. It is not one of the ends sought to be achieved by s 12, s 13 and s 18. It must be excluded from one's mind when the factors for and against the making of a deportation order are considered.

146 The next case is *Re Gungor and Minister for Immigration and Ethnic Affairs*, to which I referred above, where Smithers J sat as a Deputy President of the Administrative Appeals Tribunal. In recommending to the Minister that an order for deportation of a person who had been convicted of supplying Indian hemp be revoked, Smithers J stated at 227 –

> In these circumstances deportation of the applicant would constitute further punishment administered, either for its own sake, or as a deterrent to other persons. But punishment according to law is intended to be the factor appropriate for punishment and for deterrence of the offender from repetition of his offence. It is intended also to deter other persons from like offences. Such are the functions of the criminal law. That is the law applicable equally to aliens, immigrants and to Australians. The criminal law is the expression of Parliament as to what, in its view, is requisite for those purposes with respect to all citizens. These functions are not, primarily at any rate, the functions of s 12 of the *Migration Act 1958*. That section is designed primarily to protect the Australian community from the presence of particular offending aliens and not for imposing extra punishment on an offender or by so doing deterring other unnaturalized aliens from particular offences.

147 The above passage was cited with approval by Davies J in *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 14-15. Davies J then added –

> But little purpose is served by characterizing deportation as being not a punishment without recognizing that, if the major factor which moves the making of the deportation order is the desire to deter persons other than the convicted person from committing crimes of a like nature, then the making of an order may serve as an additional punishment because it is a detriment imposed as a consequence of the offence and is imposed with a view to deterring other persons from committing like offences. When a deportation order is made principally for the purpose of deterrence, its affinity with punishment consequent upon a conviction becomes a close one. That is a relevant matter to be taken into account.
>
> I do not wish to say, however, that a deportation order should never be made in a case where it may serve as an additional punishment. Deterrence is, in my view, a relevant factor to be taken into account in the making of a deportation order and, in a case where the criminal is a member of an ethnic group which has been particularly involved in a particular type of crime, it may be proper to make a deportation order though to do so may have or appear to have a punitive effect upon the individual concerned. The important thing is to keep in mind that deportation may have a punitive object and effect when deterrence of other persons looms large among the factors supporting the making of the order.

148 The reference by Smithers J in *Re Gungor* to punishment being a function of the criminal law has a Constitutional dimension. In *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151; 139 FCR 292, the Full Court (Tamberlin, Sackville and Stone JJ) considered whether a decision of the Minister under s 501(2) of the *Migration Act* to cancel the appellant's visa was outside power on the ground that its purpose was to punish the appellant. At [58], the Court stated –

> Chapter III constraints
>
> 58 It is a fundamental principle of the Australian Constitution, flowing from Ch III, that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth. However, the authorities have consistently rejected suggestions that the detention of an

> alien for the purposes of deportation infringes that principle. In *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36 at 95-96, Isaacs J distinguished between deportation as a "punishment for crime" (which Ch III of the Constitution would require to be entrusted to a court) and deportation "as a political precaution". See, too, at 60-61, per Knox CJ; at 132-133, per Starke J. In *O'Keefe v Calwell* (1949) 77 CLR 261, Latham CJ, in a frequently cited passage, said this (at 278):
>
> > Deportation is not necessarily punishment for an offence. The Government of a country may prevent aliens entering, or may deport aliens ... Exclusion in such a case is not a punishment for any offence. Neither is deportation ... The deportation of an unwanted immigrant (who could have been excluded altogether without any infringement of right) is an act of the same character: it is a measure of protection of the community from undesired infiltration and is not punishment for an offence ...

149 The Full Court also referred to *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, where at 27-28 Brennan, Deane and Dawson JJ (Gaudron J relevantly agreeing) stated –

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth. That being so, Ch. III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s. 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.
>
> In exclusively entrusting to the courts designated by Ch. III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else" …
>
> (Footnotes omitted)

150 Relevant parts of the above passage were referred to with approval in *Commonwealth v AJL20* [2021] HCA 21; 391 ALR 562 at [22] (Kiefel CJ, Gageler, Keane and Steward JJ).

151 In relation to the power to cancel a visa, the Full Court in *Djalic* at [66] summarised the position in six propositions, the fifth and sixth of which were as follows –

> 5. Legislation conferring a discretion on the Executive to cancel the visa of a non-citizen or to deport a non-citizen is not characterised as punitive if it can fairly be said to protect the Australian community. This is so even where the pre-condition that must be satisfied for the exercise of the power is the conviction of the non-citizen for a criminal offence or the imposition of a minimum period of imprisonment.
>
> 6. Nonetheless, if in a particular case the decision-maker purports to exercise a statutory power to cancel the visa of a non-citizen or to deport the non-citizen or order to punish the non-citizen and not for protection of the Australian community or some other legitimate objective, the exercise of the power may be ultra vires the statute.

152 The issue raised by the appellant in the present case does not concern the positive exercise of a discretionary power to cancel a visa, or to deport. The statutory question is whether the Minister acted lawfully in his evaluation that the grant of a visa to the appellant was not in the national interest for the reasons given, and whether those reasons were outside the bounds of what is "largely a political question": *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; 254 CLR 28 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

153 The authorities concerning the power of deportation recognise that deterrence of others may be a relevant consideration where the power of deportation is otherwise exercised for the purposes of community protection. What might be precluded, consistent with Full Court's reasoning in *Djalic*, is the exercise of a power of visa cancellation or deportation for the sole or substantial purpose of punishment, absent some other legitimate objective. See also, *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1 at [28]-[31] (Allsop CJ and Katzmann J). A discretionary decision to cancel a visa, or to deport a person who has settled in the Australian community, is distinguishable from a decision involving the refusal of a visa, where the applicant for the visa has never lived in the community outside custody. In the latter circumstance, the decision involves whether the applicant should have permission to enter the Australian community.

154 Katzmann J has set out the material paragraphs of the Minister's reasons at [29]. The Minister's reasons show that the primary objectives to which the Minister had regard were twofold: (1) the national interest in protecting and safeguarding Australia's territorial and border integrity, including measures to combat people smuggling; and (2) the national interest in maintaining the confidence of the Australian community in the protection visa program by declining to grant a visa to a person convicted of people smuggling. Those considerations were matters for

the Minister to identify and consider, and have not been shown to be illegitimate objectives. General deterrence of other potential people smugglers might be seen to be one of the means by which the Minister intended to further the two objectives, but the Minister did not express himself in quite those terms. The Minister stated that granting a protection visa might "send the wrong signal to people who may be contemplating engaging in similar conduct in the future". In my view, any intended deterrent effect of the refusal to grant the visa was subordinate to the two national interest objectives that the Minister identified, which may be regarded as being associated with protection of the community and the Minister's interest in engendering confidence in the protection visa system. Therefore, neither of the primary considerations to which the Minister had regard was irrational, or unreasonable to the high threshold required, and nor did they involve an unlawful performance of the Minister's duty to consider whether the grant of the visa was in the national interest by reference to criteria that was outside the wide bounds of that evaluation.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 26 November 2021