FEDERAL COURT OF AUSTRALIA

McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3) [2022] FCA 258

File number:	WAD 98 of 2021
Judgment of:	**COLVIN J**
Date of judgment:	23 March 2022
Catchwords:	**MIGRATION** - application for judicial review of a decision made personally by the Minister to refuse the revocation of a visa cancellation under s 501CA of the *Migration Act 1958* (Cth) - where the Minister received a brief from the Department consisting of a submission with recommendations and copies of representations and other materials as attachments - where the Minister's decision was recorded by circling options presented in the brief - whether the Minister failed to exercise personally the power under s 501CA and in fact delegated the exercise of the power to officers of the Department - consideration of the extent to which the Minister may be assisted by officers of the Department in deliberative process - whether the Minister must consider representations personally - whether the Minister failed to give proper, genuine and realistic considerations to the merits of the applicant's representations - whether the Minister's reasons for decision failed to respond to a substantial, clearly articulated argument, whether the decision of the Minister was legally unreasonable, illogical or irrational - application allowed - liberty to apply for relief in the nature of mandamus
Legislation:	*Migration Act 1958* (Cth) ss 13, 14, 193, 198, 501, 501CA, 501G
Cases cited:	*Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132; (2019) 271 FCR 595 *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91; (2021) 285 FCR 43 *Bushell v Secretary of State for the Environment* [1981] AC 75 *C Incorporated v Australian Crime Commission* [2010] FCAFC 4 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; (2017) 252 FCR 352

ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 569

ETA067 v The Republic of Nauru [2018] HCA 46

Folau v Minister for Immigration and Border Protection [2017] FCAFC 214; (2017) 256 FCR 455

GBV18 v Minister for Home Affairs [2020] FCAFC 17; (2020) 274 FCR 202

Mason v Minister for Home Affairs [2020] FCA 1787

Maxwell v Minister for Immigration and Border Protection [2016] FCA 47; (2016) 249 FCR 275

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

Minister for Home Affairs v Omar [2019] FCAFC 188; (2019) 272 FCR 589

Minister for Immigration and Border Protection v MZZMX [2020] FCAFC 175; (2020) 280 FCR 1

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611

Minister for Immigration and Multicultural Affairs v W157/00A [2002] FCAFC 281; (2002) 125 FCR 433

Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19 [2020] FCAFC 166; (2020) 280 FCR 178

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41

Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Douglas (1996) 67 FCR 40

Navarrete v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1723

Navoto v Minister for Home Affairs [2019] FCAFC 135

Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521

Plaintiff S297/2013 v Minister for Immigration and Border Protection [2014] HCA 24; (2014) 255 CLR 179

QJMV v Minister for Home Affairs [2021] FCA 136

Stambe v Minister for Health [2019] FCA 43; (2019) 270 FCR 173

Tervonen v Minister for Justice and Customs (No 2) [2007] FCA 1684

Tickner v Chapman (1995) 57 FCR 451

	Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125; (2021) 285 FCR 187 *Williams v Minister for Justice and Customs of the Commonwealth of Australia* [2007] FCAFC 33; (2007) 157 FCR 286 *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 6
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	122
Date of last submissions:	16 February 2022 (Respondent)
Date of hearing:	15 February 2022
Counsel for the Applicant:	Ms L De Ferrari SC with Dr J Donnelly (pro bono)
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Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

WAD 98 of 2021

BETWEEN:	**JOSEPH LEON MCQUEEN** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Respondent

ORDER MADE BY:	**COLVIN J**
DATE OF ORDER:	**23 MARCH 2022**

THE COURT ORDERS THAT:

1. The decision made by the respondent on 14 April 2021 not to revoke the cancellation of the visa of the applicant be set aside.
2. The matter be remitted to the respondent for determination according to law.
3. There be liberty to the applicant to apply for relief by way of mandamus.
4. The respondent pay the applicant's costs of the application to be assessed on a lump sum basis by a registrar if not agreed.

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

REASONS FOR JUDGMENT

COLVIN J:

1 In September 2019, Mr Joseph McQueen was sentenced to a term of imprisonment following his conviction on charges of selling and offering to sell or supply methylamphetamine, possession of methylamphetamine, possession of unlawful property and offering to sell or supply cannabis. In consequence of the imprisonment being for more than 12 months, as required by s 501(3A) of the *Migration Act 1958* (Cth), his visa was cancelled. The cancellation occurred on 13 November 2019.

2 Having been notified of the cancellation of his visa, Mr McQueen made representations to the Minister on 22 November 2019 seeking the revocation of the decision to cancel his visa. On 12 June 2020, he finished serving his custodial sentence and was released into immigration detention. It appears that there had been a period when he was remanded in custody prior to the imposition of his sentence that counted as time served towards his sentence. On 11 December 2020, a senior advisor from the Minister's office indicated that a decision should be prepared for the Minister's consideration concerning the representations made by Mr McQueen. That was more than a year after Mr McQueen had made his representations and six months after he had completed his sentence and had commenced being held in immigration detention by reason of the cancellation of his visa.

3 More than four months later, the Minister was provided with a submission from an assistant secretary of his department dated 22 March 2021 (**Submission)**. It attached four documents described as follows:

Attachment 1	Decision Page
Attachment 2	Index of Relevant Material for Mr MCQUEEN
Attachment 3	Statement of Reasons
Attachment 4	Relevant material

4 The first page of the Submission described its subject as the consideration of the revocation of Mr McQueen's visa cancellation. It then described his 'Location' in the following terms:

> *Mr MCQUEEN is currently detained at Yongah Hill Immigration Detention Centre and has been in immigration detention since 12 June 2020. It is recommended that you make your decision during the business week, in view of the immediate effect of any revocation decision on liability for detention.*

The reference to 'liability for detention' was not explained.

5 Also on the first page was a table headed 'Recommendations'. It set out five numbered paragraphs, with options that could be selected. The first page concluded with provision for the signature of the Minister. The recommendations and options for selection were as follows:

1.	note that on 13 November 2019 a departmental delegate cancelled the Class BB Subclass 155 Five Year Resident Return Visa of Mr MCQUEEN under s501(3A) of the Act (original decision), and Mr MCQUEEN applied for revocation of that decision under s50lCA of the Act.	noted/please discuss
2.	indicate whether you wish to consider this case personally or refer it to the departmental delegate.	consider personally/refer to departmental delegate
3.	if you decide to consider this case personally, record your decision on, and sign, the Decision Page at **Attachment 1**.	revoke/not revoke
4.	if you do not revoke the original decision to cancel Mr MCQUEEN's visa and agree with the reasoning set out in the draft Statement of Reasons at **Attachment 3**, sign the statement with any amendments you consider necessary.	signed/not signed/ please discuss
5.	if you do not revoke the original decision to cancel Mr MCQUEEN's visa he will remain in immigration detention until his removal from Australia.	noted/please discuss

6 In answer to interrogatories administered by Mr McQueen, the Minister stated that to the best of his information and belief he received 'the brief' prepared by the Minister's department (which I take to be the Submission and attachments) at Parliament House in Canberra on 13 April 2021 around 10.00 am. The Minister's decision not to revoke the cancellation of Mr McQueen's visa was made the next day. As to the time and place where the Minister made his decision the Minister said:

> To the best of my knowledge, information and belief I made the decision not to revoke the mandatory cancellation of the Applicant's visa under s 501CA of the Migration Act (Decision) inside my personal residence in North West Sydney at around 4:20pm on 14 April 2021.

Therefore, there was a window of 30 hours and 20 minutes within which the brief was first received by the Minister and the decision was made by him.

7 The Minister's decision was recorded by circling the following options as to each of the five paragraphs in the Recommendations (as set out above):

(1) noted;

(2) consider personally;

(3) not revoke;

(4) signed;

(5) noted.

8 In addition, the Minister circled option (c) on Attachment 1 and signed and dated that page. Attachment 1 was expressed as follows:

> **DECISION BY A MINISTER FOR HOME AFFAIRS UNDR S501CA(4) OF THE MIGRATION ACT 1958**
>
> The following is my decision under s501CA of the *Migration Act 1958* (Cth) (the Act) in relation to the original decision under s501(3A) to cancel Mr Joseph Leon MCQUEEN's Class BB Subclass 155 Five Year Resident Return Visa.
>
> (Please circle the option you select)
>
> ***Revocation outcomes***
>
> (a) Mr MCQUEEN has made representations about revocation of the original decision in accordance with the invitation and I am satisfied that Mr MCQUEEN passes the character test. Accordingly, the power in s501CA of the Act is enlivened and I revoke the original decision to cancel Mr MCQUEEN's Class BB Subclass 155 Five Year Resident Return Visa.
>
> OR
>
> (b) Mr MCQUEEN has made representations about revocation of the original decision in accordance with the invitation and I am not satisfied that Mr MCQUEEN passes the character test. However, I am satisfied that there is another reason why the original decision should be revoked. Accordingly, the power in s501CA(4) of the Act is enlivened and I revoke the original decision to cancel Mr MCQUEEN's Class BB Subclass 155 Five Year Resident Return Visa. Mr MCQUEEN is to be warned about his future conduct in relation to s501 of the Act.
>
> OR
>
> ***Non-revocation outcome***
>
> (c) Mr MCQUEEN has made representations about revocation of the original decision in accordance with the invitation and I am not satisfied that Mr MCQUEEN passes the character test. Nor am I satisfied that there is another reason why the original decision should be revoked. Accordingly, the power in s501CA(4) of the Act to revoke the original decision is not enlivened and Mr MCQUEEN's Class BB Subclass 155 Five Year Resident Return Visa remains cancelled. My reasons for this decision are set out in the attached Statement of Reasons.

9 Attachment 1, as signed by the Minister, was produced to the Court by the Minister as a print out of a photographic image. It was described as 'Decision Record'. The photograph shows a ring binder of materials open at Attachment 1. The binder is sitting on the lap of a person and the photograph appears to be taken from the point of view of that person. The photograph also shows part of what I find to be the steering wheel of a motor vehicle. The folder is shown as having four red tabs marked one to four. Behind tab 4 were yellow tabs marked with letters. I infer from the form of the Submission and its attachments and the location in the folder of Attachment 1 that the folder contained what was described by the Minister as the brief from his department comprising, at least, the Submission and the attachments. That is to say, the folder depicted in the photograph is the actual folder that was provided to the Minister.

10 The photograph also depicts two 'sign here' tabs. One is pointed at the foot of Attachment 1, the other is attached to a later page. I infer that the relevant page for the second 'sign here' tab was the last page of the statement of reasons, being Attachment 3. As has been noted, the photograph shows the selection of option (c) of the Decision Record and the Minister's signature having been ascribed at the foot of the page.

11 No explanation was given by the Minister as to why the record of the Minister's decision was produced to the Court in that manner. Nor was any explanation provided as to the circumstances in which the photograph was taken. Submissions were advanced for Mr McQueen to the effect that the photograph was taken in the garage of the Minister's private residence in Sydney after he had driven from Canberra on 14 April 2021. It appeared to be common ground that the Minister had indeed driven from Canberra to his home in Sydney on that date. Even so, there is no basis to infer that the photograph was taken at the time the Minister made his decision or that it indicates that the decision was made whilst seated in the driver's seat of a motor vehicle. I make no such finding.

12 I do infer that the photograph was taken for the purpose of communicating the making of the decision. This is supported by the fact that it depicts what appears to be the brief of materials provided to the Minister by his department and the fact that the photograph was produced to this Court by the Minister as the record of his decision. In the absence of any evidence on behalf of the Minister explaining its circumstances and taking account of the endorsement above the recommendation asking on 22 March 2021 for a decision 'during the business week', I also infer that the existence of the relevant record in that form indicates a degree of urgency

(albeit belated) in the making of the decision that resulted in the transmission of the photographic record of the decision.

13 Nonetheless, Mr McQueen was notified of the decision to revoke the cancellation of his visa on 27 April 2021 almost two weeks after the decision was made.

14 In the above circumstances, Mr McQueen seeks review of the Minister's decision not to revoke the cancellation of his visa on the basis of alleged jurisdictional error.

The grounds of review

15 Four grounds of review are advanced. I will record them in the order in which they were addressed in submissions and restate them to reflect the separate claims advanced in two of the grounds. The grounds of review are to the following effect:

(1) Despite purporting to do so, the documents signed by the Minister did not record a decision that was made by the Minister personally and were a form of de facto delegation to the departmental officer or officers who prepared the Submission and drafted the Statement of Reasons.

(2) The Minister failed to give proper, genuine and realistic consideration to the merits of the representations advanced by Mr McQueen by reason of:

  (a) the circumstances in which the decision was made;

  (b) the absence of reasons as to why the expectations of the Australian community should count against revocation; and

  (c) the failure to consider the claim by Mr McQueen that if his partner and children were to relocate with him to the United States he feared that their children would face racism and isolation because their parents were an inter-racial couple.

(3) The Reasons for Decision failed to respond to a substantial, clearly articulated argument being the claim to the effect stated in ground 2(c).

(4) In three respects there were defects in the reasoning process in the Reasons for Decision which meant that the decision of the Minister was legally unreasonable, illogical or irrational, namely:

  (a) the failure to make findings concerning the expectations of the Australian community and how they were to be held against revocation;

  (b) the failure to resolve the claim stated in ground 2(c); and

(c) the failure to consider each integer of the claim made concerning the best interests of minor children.

16 In order to deal with these grounds, particularly grounds (1) and 2(a), it is necessary to first consider the nature of the power being exercised by the Minister and the way in which he may properly be assisted by his departmental officers in the exercise of that power in circumstances where he was making a personal decision that was not delegated to any departmental officer.

The personal exercise by the Minister of the power conferred by s 501CA

17 Section 501(3A) of the *Migration Act* requires the Minister to cancel the visa of any person where the Minister is satisfied that the person does not pass the character test specified in the Act due to the person being sentenced to a term of imprisonment of 12 months or more. However, the *Migration Act* provisions do not leave matters there. The Act goes on in s 501CA to mandate the taking of further steps. It does so by requiring the Minister (a) to give notice of the decision to cancel the visa; (b) to provide the person with information that the Minister considered was the reason or part of the reason for the visa cancellation; and (c) to invite the person to make representations to the Minister about revocation of the decision to cancel his visa: s 501CA(3). It then provides that if representations are made in accordance with the invitation then the Minister, if satisfied that there is 'another reason' to do so, may revoke the original decision to cancel the visa.

18 Taken together, these provisions have been determined to require the Minister, if representations are made within the specified period (a) to form a state of satisfaction as to whether there is a reason other than the person not passing the character test why the original decision to cancel the visa should itself be revoked; (b) in forming that state of satisfaction, to give real and genuine consideration to each substantial or significant and clearly expressed claim made in the representations; and (c) to revoke the cancellation if a state of satisfaction is formed that there is reason to revoke the visa cancellation: see *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [85]-[89] (Middleton, Moshinsky and Anderson JJ); *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 272 FCR 589 at [34]-[41] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ); *GBV18 v Minister for Home Affairs* [2020] FCAFC 17; (2020) 274 FCR 202 at [31]-[32] (Flick, Griffiths and Moshinsky JJ); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166; (2020) 280 FCR 178 at [15] (McKerracher, Kerr and Wigney JJ); and *Tohi v Minister for*

Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125; (2021) 285 FCR 187 at [3]-[4] (Katzmann J), [100] (O'Bryan J), [51] (Derrington J in dissent).

19 Recently, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41, the High Court (Keane, Gordon, Edelman, Steward and Gleeson JJ) said at [13] that the statutory scheme 'necessarily requires the Minister to consider and understand the representations received'. Their Honours also emphasised that what may constitute 'another reason' is a matter for the Minister, but the power must be exercised reasonably and in good faith.

20 Like the present case, *Viane* concerned an instance where the power under s 501CA(4) was exercised by the Minister personally. As to that aspect, the High Court observed at [19]:

> In exercising the power conferred by s 501CA(4) of the Act, the Minister is free to adopt the accumulated knowledge of the Minister's Department ('the Department'). Indeed, it is now well established that the Minister may adopt as the Minister's own written reasons a draft prepared by a departmental officer, provided that such reasons actually reflect the reasons why the Minister had reached her or his decision.

21 The footnote to the above passage references three decisions by Full Courts of this Court.

22 The first is *Minister for Immigration and Multicultural Affairs v W157/00A* [2002] FCAFC 281; (2002) 125 FCR 433 at [39]. In that case, the Full Court was concerned with s 501G(1) which, relevantly for present purposes, requires that where a decision is made under s 501CA refusing to revoke the cancellation of the visa of a person, the Minister must give the person a written notice that sets out the decision and the reasons for the decision. In the context of that requirement, Branson J (Goldberg and Allsop JJ agreeing) said:

> I doubt that s 501G(1) is intended to require that the notice therein referred to should emanate from the Minister in the sense that it must be drafted by the Minister. In my view, it would be sufficient for the Minister to adopt as his or her own written reasons prepared by a departmental officer provided, of course, that such reasons actually reflected the reasons why the Minister had reached his or her decision. However, I respectfully agree with the Supreme Court of Canada that a document that does not purport to explain why a decision has been reached is not transmogrified into reasons for that decision by ministerial adoption.

23 The second is *C Incorporated v Australian Crime Commission* [2010] FCAFC 4 at [59]. In that decision the view expressed in *W157/00A* was referred to with approval by Black CJ Mansfield and Bennett JJ.

24 The third is *Folau v Minister for Immigration and Border Protection* [2017] FCAFC 214; (2017) 256 FCR 455. It was a case where a decision had been made by the Minister in a manner that has some similarity with the present case. Mr Folau did not challenge the correctness of the views expressed in *W157/00A* to the effect that the Minister may adopt reasons prepared by someone else if the reasons actually reflected the Minister's own process of reasoning: at [78]. Murphy and Burley JJ collected together a number of authorities concerning the circumstances in which there may be concern as to whether reasons prepared by others were in fact the reasons of a decision-maker who adopted them. The reasoning of their Honours at [85]-[93] by reference to those authorities (as now apparently approved by the High Court) is, with respect, very instructive for present purposes and for that reason I set out the reasoning substantially in full (my emphasis added in bold):

> The decisions in *Navarrete* and *Maxwell* are directly on point. They concerned visa cancellation decisions under s 501(2) made by the Minister personally, where the Minister adopted draft reasons prepared by a departmental officer. In *Navarrete* (at [39]) Allsop J said that his concern was with the legality of decision making, not with whether the Minister's use of draft reasons was conducive to poor decision-making and he reiterated his approval of Branson J's view in *W157/00A*. In *Maxwell*, Perry J inferred (at [31]) that the Minister adopted the draft reasons prepared by the Department because:
>
> (a) the Department's brief to the Minister contained all the relevant material for the decision;
>
> (b) in making the visa cancellation decision the Minister signed a statement that he had considered all relevant matters;
>
> (c) the Minister made a decision consistent with the draft reasons prepared by the Department; and by crossing-out the 'non-cancellation outcomes' on the Issues Paper and by signing the base of the page, the Minister expressed her intention to select the 'cancellation outcome' option which expressly adopted the draft reasons by stating that '[m]y reasons for this decision are set out in the attached Statement of Reasons.'
>
> Her Honour said that in those circumstances the fact that the draft reasons were not prepared by the Minister personally was not relevant.
>
> **In our view it is open to distinguish *Navarrete* and *Maxwell* from the present case because, in both cases, the Court said that there was no evidence pointing to a contrary inference.** In *Navarrete* Allsop J said (at [40]):
>
> > If the Minister gave no consideration to the terms of the draft, for instance because the author was known to be reliable and she was prepared to sign a memorandum from that person without giving it consideration, it might be said that there was jurisdictional error for the failure by the Minister to make the decision personally. However, there was no evidence here upon which I could conclude otherwise than that the draft reasons were adopted by the Minister as her own reasons after due consideration and that she made the decision for herself and adopted the draft reasons therefor.
> >
> > (Emphasis added.)

In *Maxwell* Perry J said (at [32]) that there was 'no evidence establishing otherwise than that the Minister made the decision personally in an independent exercise of her discretion.' See also *Wozniak v Minister for Immigration and Border Protection* [2017] FCA 44 at [74] – [76] (Burley J). However, because of the admitted facts, in the present case there is some evidence pointing the other way.

In *Lek v Minister for Immigration, Local Government and Ethnic Affairs* [1993] FCA 297; (1993) 43 FCR 100 at 122 Wilcox J said, and we agree, that:

> … the use by decision makers of reasons devised by others is a matter that should excite concern about the possibility that individual decisions were taken in accordance with an overriding rule or policy or at the direction or behest of others.

Such concerns are likely to be deepened by the Minister's apparent practice of adopting draft reasons prepared by others in every visa cancellation and refusal decision he makes, without amendment.

One might reasonably ask why Parliament would provide the Minister for Immigration and Border Protection with a personal power to cancel a visa (as an alternative to having the decision made by a delegate), and oblige the Minister to give reasons for doing so, if Parliament understood or intended that in every case the Minister would adopt, without change, the draft reasons prepared by departmental officers. Such a practice has a tendency to undercut Parliament's intention to provide a right to merits review where a visa cancellation decision is made by a delegate rather than by the Minister personally.

The power for the Minister to personally decide to cancel a visa pursuant to s 501(2), coupled with his obligation to provide reasons for the decision pursuant to s 501G, cannot mean that it is permissible to merely rubber stamp reasons prepared by the Department, and the Minister is required to do more than just review reasons prepared by somebody else. The Minister must engage in an active intellectual process (*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 at [46] (Griffiths, White and Bromwich JJ)) and he must give proper, genuine and realistic consideration to the merits of the particular case: *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48 at [29] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). **Before adopting any draft reasons as his own the Minister must decide that they accurately reflect his own reasons**: *W157/00A* at [39].

Whether the Minister gave proper, genuine and realistic consideration to the merits of Mr Folau's case is one of fact. **It was not straightforward for Mr Folau (or indeed any person adversely affected by a visa cancellation decision) to establish that the Minister did not give proper consideration to the merits of the case but that may not be the position in every case.** Depending on the case, further evidence adduced through, for example, a more detailed notice to admit or targeted interrogatories may assist an affected person in bridging the evidentiary gap.

In the present case the materials show that the Minister:

(a) was provided all the relevant materials to make a personal decision in relation to Mr Folau's case;

(b) selected the option in the Submission which stated that he wished to consider Mr Folau 's case personally, and signed and dated it;

(c) selected the 'cancellation outcome' in the pro forma decision which included statements that the Minister had decided to exercise his discretion to cancel

> Mr Folau 's visa and that '[m]y reasons for this decision are set out in the attached Statement of Reasons', and signed and dated it; and
>
> (d) signed and dated the draft reasons.
>
> **That provides a strong basis to conclude that the Minister gave proper consideration to the merits of Mr Folau's case and after doing so adopted the draft reasons as his own reasons. While the admitted facts point to a contrary inference, they are insufficient to outweigh what are, in effect, express statements by the Minister that he personally made the decision for the reasons he signed and dated.**
>
> In our view Mr Folau did not discharge his onus to show that the Minister made the jurisdictional error alleged, and did not establish that the primary judge erred in reaching the conclusion that he did. We dismiss ground four of the appeal.

25 The references to *Navarrete* and *Maxwell* in the first paragraph of the above passage are to *Navarrete v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1723 and *Maxwell v Minister for Immigration and Border Protection* [2016] FCA 47; (2016) 249 FCR 275. The reference to the admitted facts is to the following facts (set out at [71]):

> 1. The Minister was given an 'Issues' paper … and a draft 'Statement of Reasons' … under cover of a 'Submission' … .
>
> 2. The Minister signed the 'Statement of Reasons' without making or requesting any amendments to it.
>
> 3. From the date he became the Minister until 17 March 2016, the current Minister for Immigration and Border Protection has made other cancellation and refusal decisions under s 501 of the Act (the other decisions).
>
> 4. All of the Statements of Reasons in respect of the other decisions (the other statements) were prepared by somebody else and signed by the Minister.
>
> 5. The Minister made or requested no changes to any of the other statements before signing them.

26 It may be observed that the reasons of Perry J in *Maxwell* rested in part upon the express statement by the Minister in that case that she had considered all relevant matters. The reasoning in *Folau* concerned whether the adoption in that case of draft reasons without amendment (in the context of evidence of a practice of that kind in other cases) might form the basis for a conclusion that the Minister did no more than review the reasons. The evidence advanced to support a claim that the Minister had not personally undertaken the required deliberative task was confined to that aspect. As is explained below, there are other factual circumstances in the present case beyond the adoption of draft reasons prepared by the Minister's department that are advanced to support the claim of jurisdictional error on the basis

that the Minister did not undertake the deliberative task personally (ground 1), or did not do so sufficiently to conform with the requirements of s 501CA(4) (ground 2(a)).

27 As to whether it may be inferred that a Minister read what was contained in a briefing note, in *Stambe v Minister for Health* [2019] FCA 43; (2019) 270 FCR 173, Mortimer J observed at [74]-[75] as follows:

> As a general principle, I consider it reliable and appropriate to infer, consistently with the purpose and practice of ministerial briefing notes, that a Minister reads a briefing note with which she or he is provided, where that briefing note is intended to provide the Minister with sufficient information to make a decision about whether or how to exercise a statutory power. Sometimes there may be evidence which assists the drawing of such an inference, such as handwriting, or marks such as circles or underlining, by the Minister on the contents of a briefing note itself. Such evidence is not necessary for the inference to be available and drawn, but it may be persuasive.
>
> Of course, the drawing of such an inference may be actively contested by admissible evidence. If it is not, then it would tend to undermine the practice of executive decision-making at ministerial level if supervising Courts were to require direct evidence that the contents of each briefing note were read by a Minister. Whether an inference should be drawn in an individual case will remain a matter for each judge in the circumstances, but for my own part I consider this an appropriate general approach.

28 The decision in *Stambe* concerned the exercise by the Minister for Health of a personal power to substitute a decision made by the Secretary with a different decision. The Minister's power to substitute a different decision was conditioned on the Minister being satisfied as to two matters. However, importantly for present purposes, the formation of the state of satisfaction was not required to be formed after considering representations. Therefore, the observations concerning Ministerial decision-making relate to a power of a different kind to that which is the subject of the present application.

29 *Stambe* was delivered on 29 January 2019. Very shortly thereafter, Mortimer J was a member of the Full Court that heard argument in *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132; (2019) 271 FCR 595. In that case (which also concerned a decision under s 501CA(4) by a Minister acting personally), a decision had been made by the Minister personally in the exercise of the power conferred by s 501CA in a similar manner to the decision in the present case (by circling responses to recommendations and adopting reasons prepared in advance of the decision). As to that course, Mortimer J observed at [23](c):

> The Assistant Minister's reasons appear to have been prepared in advance of the exercise of power. They are dated the same day as the circled note indicating the exercise of power (28 February 2017). Their length and content founds an inference

> that they were drafted and prepared before the Assistant Minister indicated how he proposed to exercise the power. How the reasons came to be drafted, and by whom, or what the Assistant Minister was told in any briefing note from the Department are not matters to which the evidence descends. Of course, one danger with this practice is that the repository of the power is persuaded (one way or the other) not by the material and the representations made by an individual, but by the reasoning and views of her or his officers responsible for drafting the explanation for the conclusion the officers have (apparently) recommended. While it may be accepted that there is nothing necessarily unlawful about a member of the executive such as a Minister or Assistant Minister accepting recommendations made by Departmental officers, and subsequently adopting an explanation for an exercise of power which has been drafted by such officers, there will be a line beyond which this practice may turn into a de facto delegation of decision-making power, with a consequent failure by the repository of the power to consider independently and genuinely the merits of the decision to be made. Since these matters were not part of the grounds of review at first instance or in this appeal, no more need be said, other than to recognise the potential for such an approach to become an unlawful one.

30 Plainly, the observations of Mortimer J are *obiter*. However, the reference to the absence of any evidence of a briefing note is significant in the context of her Honour's earlier views expressed in *Stambe*. As is the recognition that there is nothing necessarily unlawful in the course that had been followed. It reflects established authority concerning the adoption of draft reasons prepared by departmental officers being the authorities recently approved by the High Court in *Viane*. Also, it is significant that her Honour makes clear that there was no evidence of what was contained in any briefing note. Therefore, the issues that arise in the present case from the form and content of the Submission and the conclusions that may be drawn from those matters did not arise.

31 The observation by Mortimer J concerning the potential for such practices to develop into a de facto delegation of the exercise of a personal power by the Minister provided the foundation for much of the case advanced to support ground 1. It was said to be an 'important case'. It was said that there was further evidence in the present case that called in question whether the reasons as adopted by the Minister were, in fact, the Minister's reasons. Those matters are addressed below when dealing with ground 1.

32 Reliance was also placed upon the reasons of Kenny J in *Mason v Minister for Home Affairs* [2020] FCA 1787 at [97] where her Honour identified some similarities with the circumstances that pertained in *Splendido.* However, the error advanced in that case was not to the effect that the reasons for decision were not those of the Minister and accordingly that aspect was not addressed.

33 Reference was also made to the reasons of Allsop CJ in *QJMV v Minister for Home Affairs* [2021] FCA 136 when dealing with an application to administer interrogatories. In allowing the application, the Chief Justice said at [10]:

> The decision in question was one to be made personally by the Minister and the matter of inappropriate delegation is one that has been referred to by judges of the Court and I only make reference descriptively to *Assistant Manager for Immigration and Border Protection v Splendido* [2019] FCAFC 132; 271 FCR 595 at [23] and *Mason v Minister for Home Affairs* [2020] FCA 1787 at [97], where Mortimer and Kenny JJ, respectively, referred to the question. Relevant to that claim is, in my view, how long the Minister took examining the matter. There is no particular claim alleging a lack of proper, genuine and realistic consideration but that does not mean that the length of attention to such an important decision to the applicant would not require an amount of consideration of papers.

34 The above passage goes no further than the earlier authorities which recognise that the Minister personally must undertake the required consideration and it is for the applicant for review to demonstrate that reasons adopted by a Minister for a personal decision were not the reasons of the Minister. The Court's evaluation as to whether the reasons are those of the Minister brings into account the lawful possibility that the Minister may adopt a draft prepared by a departmental officer as the reasons of the Minister where the draft actually reflect the reasons why the Minister reached the decision.

Ground 1: Alleged de facto delegation

The facts relied upon to support ground 1

35 In addition to the matters concerning the photographic record of the decision (about which I have already indicated my findings), Mr McQueen relied upon the following matters:

(1) The process of consideration of the representations made by Mr McQueen commenced with a request from 'a Senior Advisor' in the office of the Minister to prepare a submission for the Minister's consideration.

(2) The submission that was prepared took the form of a brief which had the characteristics that have been described (in particular, it was presented as a Submission with a first page that listed five matters under the heading Recommendations).

(3) It may be inferred from the above events, the form of the brief and the extent of the documents produced by the Minister in response to the application for judicial review that:

(a) the Minister gave no personal guidance as to what was to be addressed in the draft reasons (in particular as to what considerations the Minister wanted to take into account and which of those would be given primary weight);

(b) there was no earlier draft of the reasons; and

(c) there was no request for a countervailing set of draft reasons for consideration by the Minister.

(4) The recommendations to the Minister were expressed in terms that contemplated a sequence by which the Minister first decided whether to make the decision personally, then (if he decided to proceed personally) made his decision whether to revoke the cancellation of the visa and then considered the draft statement of reasons to see whether he agreed with the reasoning.

(5) The Minister was directed where to sign by the 'sign here' stickers.

(6) The Minister made no notation on the brief save to circle where indicated and sign where indicated.

(7) The Minister made no change to the draft reasons.

(8) Taking account of his Ministerial responsibilities, time to sleep and eat, time to travel and the extent of the material that the Minister was required to consider, there was quite limited time from when the Minister received the brief to when he made the impugned decision for him to undertake the personal consideration required.

36 Based on the evidence, I make findings in the above terms.

37 However, in accordance with the authorities, the question remains whether the applicant has demonstrated by those factual matters that even though (a) the record of the decision and the Statement of Reasons were attested with the Minister's signature; and (b) the Minister was able to make his personal decision by adopting reasons prepared by a departmental officer as his own where they reflected the Minister's actual reasons, the Minister did not himself decide the outcome but in fact delegated the making of the decision to officers of his department by simply adopting the draft reasons.

The contentions advanced for Mr McQueen as to ground 1

38 Necessarily implicit in the contentions advanced to support ground 1 is a claim that the Minister did not himself consider the materials and simply signed what had been placed before him. It is implicit because ground 1 is a claim that, as a matter of fact, the decision made was not the

act of the Minister but rather the act of the departmental officers who prepared the brief. It is a claim that, in the manner in which the decision was made, the task was in fact delegated to the departmental officers.

39 At times, the submissions concerning ground 1 merged into matters advanced to support ground 2(a) to the effect that the Minister, in all the circumstances, failed to give proper, genuine and realistic consideration to the merits. However, the conceptual distinction between the two grounds is a significant one. In order to establish ground 1, it must be demonstrated by Mr McQueen that, in fact, it was not the Minister but his departmental officers who made the decision. A ground of that kind is not made out by demonstrating insufficiency or incompleteness in the consideration of the representations and supporting materials undertaken by the Minister. In such a case, the Minister makes a decision but it may lack the requisite degree of deliberation required by the statutory provision. To show that the Minister made no personal decision at all, the claim must go beyond demonstrating a jurisdictional defect in the course of the making of the decision by the Minister and show that the Minister did not make any decision.

40 The claim of de facto delegation was to the effect that in all the circumstances the Minister simply adopted, without personal deliberation on the merits, what had been put forward by departmental officers. It was said, in effect, that the evidence established that there had been no active engagement with the materials at all or that the consideration of them was so negligible or cursory that it could not amount, in fact, to a decision by the Minister himself. Rather, his actions involved attesting his signature to a decision that had been made by those who prepared the brief. This was a claim that, in fact, the Minister did no more than rubber stamp or approve what had been presented to him.

41 It was also submitted that the Statement of Reasons could not have been formulated to record what was in the mind of the Minister when he selected the option not to revoke because he was directed to look at the Statement of Reasons after making his decision. On that basis it was said that the subsequent adoption of those reasons was to give the decision the character of a decision that was made for reasons prepared by those responsible for drafting the Statement of Reasons. The submission to that effect seemed to assume that there had been a decision by the Minister but maintained that it was made for undisclosed reasons because the reasons signed by the Minister could not have been his own given the way in which the Minister was instructed by his department to make his decision. Alternatively, it may have been a way of emphasising

the claim that the Minister himself did not deliberate but rather selected option (c) of the Decision Record and then turned to see whether he agreed with the reasoning of his department (rather than first forming his own reasons and seeing whether the department's draft reasons accorded with his own).

Did the Minister simply rubber stamp or approve what was provided to him?

42 The brief provided to the Minister did not, in terms, invite him to simply rubber stamp or approve what had been prepared by his Department. On the first page of the Submission, the Minister was presented with the five enumerated matters under the heading 'Recommendations'. The second matter invited him to indicate whether he wished to consider the case personally and the Minister responded by circling the option 'consider personally'. The Submission provided by the Minister's department also made plain the position. It stated (para 6):

> **It is open to you to personally consider this matter or refer the matter to the departmental delegate for a decision.** The Act is clear that should you personally exercise the power to not revoke, such a decision is not reviewable by the Administrative Appeals Tribunal. However, it would be open to Mr MCQUEEN to seek judicial review of **your decision** in the Federal Court of Australia.
>
> (emphasis added)

43 The Submission continued (para 8):

> Please record your decision on, and sign, the Decision Page at **Attachment 1**. If you do not revoke the original decision, a draft Statement of Reasons is at **Attachment 3** for your consideration. If you agree with the reasoning set out in the draft Statement of Reasons, sign the statement with any amendments you consider necessary.

44 The Decision Page has already been quoted. It begins with the statement 'The following is my decision under s 501CA(4) … '. The option selected by the Minister (option (c)) is expressed in the first person and ends by stating: 'My reasons for this decision are set out in the attached Statement of Reasons'.

45 On the other hand, the use of the term 'Recommendations' is somewhat problematic. It suggests that what the Minister was being asked to do was to consider a series of departmental recommendations and indicate whether he agreed with them. For reasons given below, that was not a course that conformed to the requirements of s 501CA when it came to a personal exercise of the power by the Minister. However, the significance of that aspect of the Submission must be evaluated in a context where, as has been noted, the Recommendations

themselves referred expressly to the Minister choosing whether to make the decision personally or by delegate. The Minister clearly chose the former.

46 As has been noted, it was submitted, in effect, that the Minister did not make the decision personally. This involved putting together four propositions. First, a submission to the effect that the Minister was required to personally consider all of the material and could not be assisted in that task by officers of his department. Second, a submission to the effect that the amount of time that would be required to undertake that task personally would be measured in hours having regard to the nature of the material, much of which is handwritten. Third, a submission to the effect that the following facts showed that the Minister could not have undertaken a consideration that required a number of hours of deliberation, namely:

(1) the limited window in time between receipt of the brief by the Minister and the making of the decision;

(2) the likely extent of other demands upon the time of the Minister during that window;

(3) the nature of the decision to be made, which I take to be a reference to the significance of its subject matter for the future life circumstances of Mr McQueen and those members of his family in Australia with whom he has close ties;

(4) the absence of any marking by the Minister on the brief;

(5) the photograph depicting the page of the signed record of the decision on the lap of a person in the driver's seat of a car;

(6) the pressure to make an immediate decision by reason of the delay between the preparation of the brief (it is dated 22 March 2021) and the receipt of the brief by the Minister himself (being 13 April 2021) in circumstances where there had already been very considerable delay from the time of the representations by Mr McQueen (22 November 2019) and the request from the Minister's office for the brief (11 December 2020); and

(7) the absence of any evidence from the Minister.

Fourth, a submission to the effect that as the Minister had insufficient time to undertake the deliberative task personally he did no more than adopt what had been prepared by his department without considering and understanding the representations and forming his own views as to their merits.

First, was the Minister required to personally consider all of the material without assistance by officers of the department?

47 As has been noted, where the Minister personally (and not by delegate) forms the required state of satisfaction for the purposes of s 501CA(4), the statutory scheme requires the Minister himself 'to consider and understand the representations received': *Viane* at [13]. The submission advanced for Mr McQueen on the present application was to the effect that the Minister had to himself read the materials and form a personal view concerning their significance. It may be accepted that the Minister had a duty to engage in an active intellectual process with respect to the representations in order to perform his statutory task: *Omar* at [34]-[41]. It may be further accepted that where the Minister considered that he should have regard to particular matters in the representations in forming the required state of satisfaction and those matters depended upon factual claims then the Minister was required to make findings as to those factual matters: *Viane* at [14]. However, the submission advanced for Mr McQueen was to the effect that if the Minister did not delegate the making of the decision under s 501CA by forming the required state of satisfaction then personal performance of that task meant that the Minister could not be aided in undertaking that task by the Submission from his department and he had to undertake the whole deliberative task himself.

48 In *Tickner v Chapman* (1995) 57 FCR 451, a Full Court of this Court was concerned with an application for judicial review of a decision made by a Minister acting personally under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) which required the Minister to consider a report and any representations attached to the report as well as such other matters as the Minister thinks relevant before making a decision.

49 Black CJ observed that the Minister must personally consider the report and any representations attached to it: at 462. His Honour then reasoned as follows at 462-463:

> It is not surprising that the Minister should be required personally to participate in this way in a process that may lead to a declaration under s 10. The powers given to the Minister under the Act for the purposes of protecting Aboriginal heritage are capable of affecting very seriously the interests of third parties, and for this reason the Parliament has provided for decision-making at the highest level. It is this feature of the scheme of the Act - the explicit requirement that the Minister consider the representations - that removes the process under s 10 from the general rule that a Minister is not expected to do everything personally: see the observations of Brennan J in *FAI Insurances Ltd v. Winneke* [1982] HCA 26; (1982) 151 CLR 342 at 416 adopting Lord Reid's comments in *Ridge v. Baldwin* [1963] UKHL 2; (1964) AC 40 at 72; cf. *O'Reilly v. State Bank of Victoria Commissioners* [1983] HCA 47; (1983) 153 CLR 1 at 11-12 per Gibbs CJ. The express requirement that the Minister consider the representations also gives rise to a more precisely defined duty binding on the Minister than the Minister's duty to consider matters in connection with satisfying

himself or herself that a grant of land should be made under s 11 of the Aboriginal Land Rights (Northern Territory) Act 1976: cf. *Minister for Aboriginal Affairs v. Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 30-1 per Gibbs CJ, at 37-9 per Mason J and at 63-5 and 65-6 per Brennan J.

The requirement of substantial and non-delegable personal ministerial involvement is consistent with the evident intention of s 10, as I have described it earlier in these reasons, that interested persons will have an effective opportunity to provide information and to express opinion concerning important issues involved in the consideration of an application under s 10(1) and that the decision-maker, the Minister, shall make an informed decision on the questions in issue, having considered the representations of interested persons.

It must also be remembered that the obligation to consider, imposed separately upon both the reporter and the Minister, is an obligation to consider each representation. The degree of effort that the consideration of a particular representation may involve will of course vary according to its length, its content and its degree of relevance.

50 Then, dealing with the facts, his Honour said at 464-465:

… As I have said, the consideration of a representation involves an active intellectual process directed at that representation and again the point must be made that s 10 is explicit in its requirement that not only must the reporter give consideration to the representations but the Minister must do so as well. A report, written after due consideration of the representations by the reporter, might or might not, 'reflect' them. In either event, the section makes it clear that the Minister must personally consider the representations and it is the representations that must be contemplated, not another document which is thought by someone else 'adequately to reflect' the representations.

This does not mean that the Minister is denied the assistance of a staff member in the process of considering the representations. A staff member might, for example, sort the representations into categories. He or she might put together all the representations that are in common form so that they can be considered together. In some cases, a summary of technical supporting material, such as legal and financial documents, might be provided and it would certainly be in order, in my view, for a competent staff member to assist the Minister by making sure that supporting technical documents were what they purported to be. I would not rule out the possibility of some representations being quite capable of effective summary, yet there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it.

Examples of the sort of representation that would need to be read personally may be found amongst the 400 or so representations forwarded with, and notionally attached to, Professor Saunders' report. Some of these make important points by the use of photographs and the form of some representations conveys meaning in other ways. Such representations need to be seen to be 'considered'.

Whilst, then, a Minister may certainly have assistance for the purpose of considering representations, they must be truly considered and the process adopted in the present case, relying as it did upon Ms Kee's opinion about the adequate 'reflection' of the representations, was insufficient. I therefore conclude that the trial judge was correct in holding that the obligation imposed by s 10(1)(c) of the Act to consider the representations had not been fulfilled.

51 Burchett J summarised with the evidence concerning the way in which the report and representations were considered by the Minister at 474-475 of his Honour's reasons in the following manner:

> The report of Professor Saunders was received in draft form at the office of the Minister in Canberra during the evening of Thursday 7 July 1994. The Minister was not there, and the draft was transmitted by facsimile to him at his electoral office in Sydney. This copy of the draft included a representation received from the State Minister for Transport and an anthropological report prepared by Dr Deane Fergie which formed part of the representations of the Aboriginal Legal Rights Movement, but without the confidential annexures to that anthropological report. It was not until the following day, that is Friday 8 July 1994, at about 9.45 am, that a complete copy of the report of Professor Saunders, together with the accompanying representations, was delivered by courier to the Minister's Canberra office. These facts appear clearly enough from the affidavit of the Minister's adviser, Ms Kee. This affidavit does not suggest that any copy of the representations received on 8 July was forwarded to the Minister, who remained in Sydney up to the time when he made the decision on Saturday 9 July 1994 at about 11.15 am. Ms Kee indicates that it was necessary to send a declaration in the appropriate terms to him by facsimile, and to receive a return facsimile with his signature for her to take to the Government Printer at about midday for gazettal. The declaration was in fact published in the Commonwealth Gazette on Sunday 10 July 1994. Although it is clear that the Minister did not see the representations, apart from the two documents sent to him by facsimile, Ms Kee (she says) 'advised the Minister that the report of Professor Saunders reflected the matters which were raised in the representations attached to the report'. She also told him that 'there was nothing contained within (the confidential annexures to the report of Dr Fergie) which did not support the information contained in the Saunders Report concerning the nature of the significance of the area to the Ngarrindjeri women'. In addition to giving this evidence, Ms Kee told the Court that the Minister's handwriting appeared on his copy of the report of Professor Saunders and the representation from the State Minister for Transport.
>
> In cross-examination, it became clear that Ms Kee had not herself read all of the representations, and there was some vagueness as to just what she had read.

52 His Honour then set out the finding of the primary judge to the effect that the Minister had not complied with the statutory obligation to consider the representations. As to that finding his Honour concluded at 476-477:

> Having reviewed the evidence for myself, as it appears in the appeal books, I respectfully express my unhesitating concurrence in the Judge's finding that the representations were not considered. They were certainly not seen, with the exceptions I have already indicated; and the evidence makes it plain that such information about them as the Minister received by telephone was wholly inadequate to enable it to be said, as a matter of fact, that he had, in any reasonable sense of the word, 'considered' the representations. On many matters, it was Ms Kee who considered them, to the extent that she did so, and what she communicated to the Minister was her own value judgment about them, and about the validity of the conclusions Professor Saunders had reached in relation to them.
>
> In my opinion, it was not open to the Minister to hand over to Ms Kee his responsibility to consider the representations. His task under s 10, the Act makes clear (by s 31), is

not to be delegated. Undoubtedly, he may receive the assistance of staff, but ultimately it is for him, in a case involving s 10, to fulfil the requirement expressed in the statute by the words 'has considered the report and any representations attached to the report'. Those representations are there because the Act imposes a duty upon the reporter, by s 10(3)(b), not only herself to 'give due consideration to any representations', but also 'when submitting the report, (to) attach them to the report'. So the Act makes provision to ensure that the Minister will receive the representations. That is not an idle formality, but in order that he may consider them. His obligation to do so is expressed in the very same form of words which requires him to consider the report itself - he is required to consider 'the report and any representations'. The one verb 'has considered' has equally for its objects both the report and the representations; it can hardly have a different meaning with respect to the representations from that which it has with respect to the report.

What is it to 'consider' material such as a report or representations? In my opinion, the Minister is required to apply his own mind to the issues raised by these documents. To do that, he must obtain an understanding of the facts and circumstances set out in them, and of the contentions they urge based on those facts and circumstances. Although he cannot delegate his function and duty under s 10, he can be assisted in ascertaining the facts and contentions contained in the material. But he must ascertain them. He cannot simply rely on an assessment of their worth made by others: cf. *Jeffs v. New Zealand Dairy Production and Marketing Board* (1967) 1 AC 551 at 568-569. It is his task to evaluate them, a task he can only perform after he knows what they actually are. In a case involving a board which had a duty to 'consider' a report, Laskin J, speaking for the Supreme Court of Canada, said: 'Certainly, the board must have the report before it': *Walters v Essex County Board of Education* (1973) 38 DLR (3d) 693 at 697. When Gibbs CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 30-31 conceded that the Minister, in the circumstances of that case, was not obliged 'to read for himself all the relevant papers', and that it 'would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department', he also made it plain that the summary must 'bring to his attention' all material facts 'which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial'. That was in the context of legislation expressly empowering the Minister, as Mason J pointed out at 46, to delegate his powers and to refer matters to another authority.

53 Kiefel J (as the Chief Justice then was) found the factual position to be as follows (at 494):

The Minister had read the report of Professor Saunders and likely also the representation of the State Minister. It was not clear whether he had read the report of Dr Fergie and the various letters provided to him. The evidence disclosed that this was the extent of documents physically provided to him. It was not suggested that he had actually read the representations. There were over four hundred of them. They had only arrived on 8 July, the day before the Minister signed the declaration, and the Minister had a busy schedule. The emergency declarations would expire on 10 July 1994. A member of his staff had however gone through them and said in evidence that she had discussed the subject and contents of them with the Minister. His Honour found, however, that her description of the discussion was 'vague and nebulous'. With respect to the written submission from the Ngarrindjeri women, Professor Saunders provided a general, but not detailed, account of it in her report and provided an opinion upon it. The Minister did not read the contents of the envelope which was sealed and marked with the caution that the contents were not to be read by men. The process then undertaken was one whereby the female staff member read the contents of it and advised the Minister that there was nothing in Professor Saunders' report which did not

> have a basis in the detailed representation. The issues raised by the Ngarrindjeri women were elevated to importance in Professor Saunders' report and they were, his Honour found, relied upon heavily by the Minister in the exercise of his power to make the declaration.

54 Her Honour then deal with what was required by the obligation to consider and found at 495:

> To 'consider' is a word having a definite meaning in the judicial context. The intellectual process preceding the decision of which s 10(1)(c) speaks is not different. It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the Minister is required to know what they say. A mere summary of them cannot suffice for this purpose, for the Minister would not then be considering the representations, but someone else's view of them, and the legislation has required him to form his own view upon them.

55 Later, at 497 her Honour said:

> I have earlier said that the Minister may seek the assistance of his staff. A 'consideration' of the representations does not in my view require him to personally read each representation. But it may be as well for him to do so, for if his staff are to convey what is contained within them, they must do so in a way which provides a full account of what is in them. If they do not, the Minister will not have considered something he is obliged to, and in this respect the observations of Gibbs CJ in *Peko-Wallsend* at 30 as to what results are apposite. It may vitiate his decision.

56 It can be seen that all members of the Court found that the Minister was required to consider the representations personally. Although the Minister could be assisted to a degree, ultimately he could not act upon a summary of that which he was required to consider because he was required to form his own view of the representations. Further, where the representations that he was required to consider depended upon factual matters, the task of considering the representations required him to form his own view of the facts.

57 Each member of the Court in *Tickner v Chapman* referred to *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24. In that case it was claimed that the Minister was bound to take into account certain material in reaching his decision where that material showed that the position had changed since the provision of a report as to matters which the Minister was required to consider. The Minister was said to have failed to take that material into account. In that context, Gibbs CJ (in adding a few remarks to his general agreement with the reasons of Mason J) said at 30-31:

> Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of

> the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law.

58 As to the same point, Mason J said at 37-38:

> During argument, counsel for the Minister sought to raise an additional point, the effect of which was to deny that the Minister had failed to take into account the respondents' submissions. It was argued that where submissions are made to a Minister and summarized by his departmental officers in a way that omits certain details, and the Minister then makes a decision on the basis of that summary, it cannot be said that the Minister has failed to take those omitted details into account. He is entitled to delegate to his staff the function of deciding what weight, if any, should be given to a particular fact, and in the present case there was no evidence that the departmental officers had failed to consider those facts.
>
> This submission, which was neither raised in the courts below nor listed as a ground of appeal in the Notice of Appeal to this Court, proceeds on the assumption that the Minister had power to delegate part of his decision-making function under s 11 to his Department and that he exercised this power by splitting the function, leaving his staff to decide what facts or matters would be taken into account. Section 76(1) of the Act authorizes the Minister, by an instrument of delegation signed by him, to delegate to a person any of his powers under the Act, other than those in Pt IV and the power of delegation. A power, when so delegated and exercised by the delegate, shall, for the purposes of the Act, be deemed to have been exercised by the Minister (s 76(2)). The Act contains no other express power of delegation. The presence of an express statutory power of delegation does not necessarily exclude the existence of an implied power to delegate or, to express it more accurately, to act through the agency of others …
>
> However, there is nothing in the nature, scope and purpose of the power conferred by s 11, or in the context in which it is to be found, that makes it susceptible to this treatment. The Minister's function under the section is a central feature of the statutory scheme … [The features of the Minister's power] combine to compel the conclusion that the Minister's function under s 11 is to be exercised by him personally unless he delegates it pursuant to s 76.
>
> There is no evidence that the Minister delegated his decision-making function under s 76 or otherwise. And in any event the appellants should not be permitted to raise for the first time in this Court an argument which, if raised at first instance, might have been answered by evidence. Accordingly, the submission must be rejected.

59 Brennan J dealt with the role that may be performed by departmental officers in the following way at 65-66:

> The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions.

> The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision.

60 As to the other two members of the Court, Deane J generally agreed with Brennan J and Dawson J agreed with Mason J. As was observed in *Williams v Minister for Justice and Customs of the Commonwealth of Australia* [2007] FCAFC 33; (2007) 157 FCR 286 at [27] (Gyles, Allsop and Buchanan JJ), the 'most influential statement in *Peko-Wallsend* is contained in the judgment of Mason J'.

61 It can be seen that the extent to which the Minister might draw upon assistance from departmental officers in making his personal decision was not part of what the Court was required to determine in *Peko-Wallsend*. The issue in that case concerned the significance of the fact that the department did not draw to the attention of the Minister matters that the Court found the Minister was required to take into account (even though they were not to be found in the report on which the Minister might otherwise act in making his personal decision). It was not suggested that the Minister had done so by relying on some form of briefing from his department. Therefore, the Court was not dealing with the issue that arose in *Tickner v Chapman* and arises in the present case which concerns the extent to which an obligation to consider the contents of particular documents (and make findings based upon those contents) which the Minister must undertake personally can be assisted by officers from the Minister's department.

62 There is a further important distinction evident from the reasoning in *Viane*. It is between the source of factual material that the Minister may bring to bear in undertaking any fact finding that may be required in order to undertake the personal deliberative task entrusted to the Minister (on the one hand) and the making of those findings, the consideration of their significance and the attribution of weight to matters arising from those findings (on the other hand). In *Peko-Wallsend* at 66, Brennan J cited the following from *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95:

> To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise.'

63 Therefore, it is entirely appropriate for officers of the Minister's department to brief the Minister as to technical and factual matters known to the Department. However, there is an important line to be drawn when a decision-making power is being exercised by the Minister personally. In such cases, Parliament has seen fit to allow or require the deliberative task to be performed by the Minister. A statutory power of that kind is exceeded if the Minister delegates all or any of that deliberative responsibility. In a case like the present, that has particular significance because an exercise of the power under s 501CA(4) by a delegate of the Minister is amenable to merits review, but a personal exercise of the power is not. In either case reasons are required. Plainly, where the Minister acts personally, it is the Minister who is to be accountable for the performance of the responsibility to consider the representations in order to undertake the particular deliberative task required by s 501CA(4).

64 Other judges have dealt with the role of departmental officers in the making of decisions by Ministers in a range of contexts.

65 In *Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Douglas* (1996) 67 FCR 40, a Full Court comprising Black CJ, Burchett and Kiefel JJ dealt with a claim that the Minister had failed in fact to adequately consider relevant representations in making a personal decision under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Applying the decision in *Tickner v Chapman* it was observed that the Minister had a duty to consider the representations that had been made and that duty was 'a personal non-delegable task, and a failure to carry it out may result in the Minister's decision being set aside': at 60.

66 Their Honours concluded at 63 that the state of the evidence was as follows:

> It showed that there was a task which would take some days to complete, and that there were available only a few days, if that, for the Minister to do so. His adviser had been

> working on the one set of the representations over Easter, and there was nothing to indicate the Minister was in his office, where the representations were located, until 5 April, the day before the declaration was made. There was no discussion with the adviser who had read them, and no other apparent means by which the Minister could have informed himself of their content. In these circumstances, a conclusion that the Minister most likely did not have access to the representations, and had no time to consider them was open. The critical factor, it seems to us, which emerges from the evidence is the strong suggestion that the Minister simply had insufficient opportunity to read the representations. And there was no cogent evidence to suggest otherwise.

67 In *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1521, Buchanan J differentiated between cases where the decision was required to be made personally and instances where there was permitted delegation (at [98]-[99]), placing the decision in *Tickner v Chapman* in the former category.

68 In *Williams v Minister for Justice and Customs of the Commonwealth of Australia*, the members of the Full Court said by reference to *Peko-Wallsend* that reliance upon a departmental summary 'is clearly not inconsistent with a requirement for personal knowledge but, where attention to the facts is a necessary element in the performance of a Minister's administrative decision-making role, the necessary facts must be sufficiently disclosed': at [24]. It was said that the reasons of Gibbs CJ, do not support any proposition that 'the Minister may be left in ignorance of relevant facts or may simply rely on the advice or recommendations of others where relevant facts are not revealed': at [25].

69 To like effect is the reasoning of Rares J in *Tervonen v Minister for Justice and Customs (No 2)* [2007] FCA 1684 at [28]-[29] where his Honour said (referring to *Peko-Wallsend*):

> A full and accurate summary of all material matters and facts ordinarily would enable a minister to discharge a function which legislation required be performed personally by the minister. A minister who acted on such a full and accurate summary would not have delegated any part of the decision-making process to the officials who prepared the summary. If, on the other hand, the summary or other material provided by the department or the minister's advisers omitted a material fact, then the minister would not make a decision on the basis of what parliament required him or her to take into account. Thus the minister would not perform the very function which parliament intended be performed … Indeed, depending on the volume of material, a full and accurate, but succinct, summary of material may assist a minister properly to perform the function of exercising the discretion personally confided upon him or her by the statute.
>
> Where a statute requires a minister to exercise a discretion personally and the material put before him or her by the department fails to draw to his or her attention a relevant fact which is not insignificant or insubstantial, a valid decision cannot be made because the minister will not have before him or her all relevant material … If a department were to determine which facts or matters are provided to the minister for him or her to take into account to exercise such a discretion, then the decision-making function will be bifurcated impermissibly, because the department will have assumed a delegation

> of power which the statute did not permit: namely, the power to decide what facts and matters the minister may take into account. That bifurcation is not permitted where the statute requires the minister personally to exercise the discretion …
>
> (citations omitted)

70 In *ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 569, Stewart J expressed a similar view at [59]:

> It would not be unreasonable for the Minister to rely on a summary of the relevant facts furnished by the officers of their Department. No complaint could be made if the departmental officers, in this summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to their attention a material fact which they are bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that they will have failed to take that material fact into account and will not have formed their satisfaction in accordance with the law.

71 In *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; (2017) 252 FCR 352, the Minister argued that in respect of his personal exercise of a similar power to that exercised in the present case that he was entitled to rely upon the department's summaries of underlying material and also that he had some familiarity with the cases having made previous decisions. For those reasons he submitted that the time that he had spent considering whether or not to cancel the visas of the applicants 'could not be determinative': at [30] (Griffiths, White and Bromwich JJ). As to that submission, the Full Court held at [61]:

> In addition to the features of the statutory scheme just identified, it may be accepted that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including have them prepare summaries of information for review by him. There are, however, at least three qualifications to that proposition:
>
> (a) any such summary which is materially deficient may give rise to an inference that the decision-making process was not properly conducted by the Minister …;
>
> (b) the use of a departmental summary may not be appropriate when what is sought to be summarised is a substantive argument (as opposed to an assertion of fact). Attempts to summarise material of this kind may be fraught, because the manner of the summary may cause some of the substantive force which the document may otherwise have had to be lost; and
>
> (c) the Minister's entitlement to have regard to a summary or submission prepared by his Department must take into account any statement or indication in such a document which advises the Minister of the need for him or her personally to consider relevant information in a document which is summarised, as is the case here in respect of the Department's submissions concerning both [applicants].
>
> (citations omitted)

72 In that case, it appears that the Minister was presented with documents that had some similarity to the brief provided to the Minister in the present case. However, in that case, the time available to the Minister to consider the materials was extremely limited: at [123]-[127]. The Full Court concluded that the Minister had 'insufficient time to engage in the requisite active intellectual process'. In doing so, the Full Court made an assessment that 43 minutes was available to the Minister to make the decision and 'that 43 minutes represents an insufficient time for the Minister to have engaged in the active intellectual process which the law required of him in respect of both the cases which were before him': at [129].

73 Drawing these authorities together, it appears that in a case like the present the extent of assistance that may be obtained from departmental officers is confined. There appear to be five relevant propositions that can be derived from the cases. First, there is a material distinction between the kind of assistance that may be obtained from departmental officers in undertaking the required deliberation and the kind of assistance that may be provided in preparing draft reasons. There can be no delegation of the deliberative task itself. It must be undertaken by the Minister personally. The nature and extent of the deliberation that must be undertaken will depend upon the particular statutory provision. However, whatever the legislation specifies as to the nature and extent of deliberation, a personal exercise of the power requires the Minister to perform the whole of the deliberative task. Second, when it comes to the expression of the reasons of the Minister, the Minister may adopt as the Minister's own reasons a draft prepared by an officer of his department provided the draft reflects the Minister's own reasons. Third, where the Minister's task requires the consideration of representations made, the Minister must consider the representations personally and in most instances that will require a consideration of the representations themselves (either because the deliberative obligation requires their personal consideration or because the detail and nuance of such representations is apt to be lost through any attempt to summarise them with the consequence that the Minister would not be personally informed by the actual content of the representations in undertaking the required deliberation). Fourth, where it is necessary to make findings as to factual matters relied upon to support representations, the Minister may rely upon a summary of those factual matters provided that it is materially complete and accurate. Fifth, unless the Minister is confined to only considering the representations (which is not the present case), the Minister may rely upon his department as the source of additional technical and factual information that the Minister may then bring to account in undertaking his personal consideration.

74 There is consistency in these propositions because they all reflect the need for the Minister to personally perform the whole of the deliberative task.

Second, in the present case, would the time required to undertake the deliberative task be measured in hours?

75 In the present case, the representations and materials to be considered by the Minister are not voluminous. They comprise some 230 pages. Their contents are not technical. There is no complexity as to medical information or detailed material that may bear upon predictive assessments as to the future likelihood of reoffending of the kind that may be found in some cases of the present kind. One of the documents is simply a complete print out of the history of prison visits to Mr McQueen from 12 November 2017 to 25 November 2019. It occupies some 27 pages. There are a number of letters of support from people known to Mr McQueen. Some of the materials are handwritten, but they are legible and not difficult to decipher. In short, it is not difficult to read through the materials from beginning to end and gain an understanding of the representations made. I have done so.

76 In my view, to read the materials in a manner that would be needed in order to consider the representations within them (taking account of the seriousness of the consequences of the decision for the person concerned) and sift what is important and evaluate matters that should be given weight as well as the relative weight to be given to those matters in order to form the required state of satisfaction would be a task that could not be undertaken in less than an hour. Whether it would take longer would depend upon how familiar the person was with the nature of the task and the extent to which the person had already formed views, as a matter of policy, as to the kinds of matters that might generally be sufficient to satisfy the person that they amount to 'another reason' for the revocation of the visa cancellation.

77 I note that the Minister has some familiarity with the exercise of the power and similar powers under the *Migration Act*. The nature of the assessment to be undertaken though of obvious importance to the person concerned is not particularly complex in a case like the present. At the time of answering interrogatories in this matter the Minister had made a total of 442 decisions under Part 9 of the *Migration Act* and in the period from 22 December 2020 to 14 April 2021 had made 15 such decisions. There is no suggestion that the Minister made any other such decision at or about the time of the decision concerning Mr McQueen.

Third, to what extent was the Minister assisted by his department in undertaking the deliberative task in the present case?

78 Reference has already been made to the nature and extent of the deliberative task to be undertaken under s 501CA. It was described in *Viane* at [12]-[22]. The following matters emerge from those reasons as to the deliberation required to be undertaken by the Minister personally:

(1) In order to form the required state of satisfaction, the Minister was required to consider and understand the representations received.

(2) Deciding whether or not the Minister is so satisfied might be the product of necessary fact-finding.

(3) By inference from (1) and (2), any such fact-finding was required to be undertaken by the Minister.

(4) In undertaking any fact-finding the Minister was not confined to the facts in the representations and may use his own personal or specialised knowledge and is free to adopt the accumulated knowledge of his department concerning those facts.

(5) The proposition in (4) concerns the source of the factual material that the Minister may bring to account and does not detract from (1), (2) and (3).

(6) The topics that may be traversed in the representations may involve matters of judgment especially when weighing factors for and against revocation.

(7) By inference from (6) any such judgment is required to be undertaken by the Minister.

79 In the present case, the Minister was provided with the Submission which was some 12 pages in length. It attached all of the material that had been submitted by way of representations as well as factual material obtained by the department. It began with the five recommendations. At no point did the Submission indicate that the Minister was required to consider all of the attached material to form his own understanding of the representations and to undertake his own fact-finding based upon that personal consideration where necessary. On the contrary, for the following reasons, the form in which the Submission was expressed and provided to the Minister indicated that personal consideration of that kind was not required, namely:

(1) It provided on the front page for a response by circling options in response to the five 'Recommendations'.

(2) It provided a very small space for 'Minister's Comments'.

(3) It presented in the body of the Submission a summary of the representations made thereby indicating that it was appropriate for the Minister to act upon that summary in forming the required state of satisfaction (being a course that the Minister could not lawfully follow for reasons that have been given).

(4) It invited the Minister to form and record his decision on the Decision Page which contained no suggestion that the Minister was required to personally consider and understand the submissions received.

(5) It was included in a folder of materials with 'sign here' tabs on the Decision Page and the signing page for the draft Statement of Reasons.

(6) It proposed a sequential approach by which the Minister recorded his decision on the Decision Page and then turned to the draft Statement of Reasons to see whether he agreed with those reasons when the statutory task required him to undertake his own deliberation based upon a personal consideration of the representations and all the materials, to then form his own reasons (including as to any necessary fact finding) and then consider whether those reasons were adequately expressed in the draft.

(7) Option (c) on the Decision Page (being the option selected by the Minister) did not include any statement to the effect that Minister had personally considered the representations and the factual material and made his own factual findings. It simply recited the fact that representations had been made and stated, relevantly, that the Minister was not satisfied that there was 'another reason' why the visa cancellation decision should be revoked.

80 Having regard to the way in which the Minister was briefed and the absence of any evidence from the Minister or any member of his department (despite the nature of the grounds advanced and the nature of the interrogatories administered), I find that the Minister followed the instruction he was given. He approached the matter on the basis that the Submission afforded a summary of the representations upon which he could lawfully act and that he should first form his view as to whether the make a decision personally, then (if he decided to act personally) he was to form the required state of satisfaction. Thereafter, if he decided not to revoke he should consider the draft Statement of Reasons to see whether they were in accord with his own. He considered those reasons and was satisfied that they accorded with his own view. As to the last step, there is no evidence to suggest that the Minister did not act on the basis of the express terms of the brief and I find that he signed the reasons after reading them and satisfying himself that they expressed his own reasons. I attach no significance to the fact

that there were no draft reasons to support a decision to revoke the visa cancellation. Reasons were only required if a decision was made not to revoke.

81 Much was made in oral submissions for Mr McQueen of the unlikely prospect that the draft of the Statement of Reasons prepared without any prior indication from the Minister as to his reasoning and before the Minister had considered the materials might manage to accord with the Minister's own view. However, the submission to that effect fails to give due regard to the extent to which the Minister has formulated the policy to which effect must be given in making such decisions. In the present case, the request by Mr McQueen for revocation of the cancellation of his visa was made using a standard form. It contained the following statements as to what to include as reasons for requesting revocation:

> IF A DELEGATE OF THE MINISTER CONSIDERS YOUR CASE
>
> To assist you in formulating your response, please note that in deciding whether to revoke or to not revoke the mandatory cancellation of your visa, a delegate of the Minister must use Ministerial Direction 79 as a guide to help them make the decision. Direction 65 is attached. Please read it thoroughly to understand what a delegate of the Minister must consider about your situation In order to decide whether revoking your cancellation is appropriate.
>
> IF THE MINISTER CONSIDERS YOUR CASE
>
> If the Minister personally decides to revoke or not revoke your mandatory cancellation, he/she does not have to use Direction 79 to guide him/her in making his/her decision, though it provides a broad indication of the types of issues he/she may take into account. For this reason, you may wish to address the elements of the Direction in your response.

82 Noting the apparent typographical error in referring to the earlier version of the direction at one point, these matters disclose that the policy formulated in the direction is a broad indication of the issues that the Minister may take into account. The direction is a detailed document. Its terminology is used throughout the draft of the Reasons for Decision. Given the guidance provided by the policy it could not be said that experienced officers of the Minister's department are unlikely to be able to prepare draft reasons of a kind that would sufficiently reflect the Minister's reasons to enable them to be adopted by the Minister in accordance with the practice recently approved in *Viane*. Nor is it inconsistent with the proposition that the reasons are the Minister's reasons that in reading them after making his decision he is satisfied that they are reasons with which he concurs in the sense that they sufficiently capture his views as to be properly described as an expression of the reasons for his decision.

83 Even so, as was noted in *Viane* (and as was submitted for the Minister in this case) had the Minister adopted reasons that were not his own reasons, it would not necessarily follow that the Minister had not undertaken the deliberative task required by s 501CA(4) where the Minister was acting personally. It would mean only that the Minister had failed to provide the reasons required by s 501G(1). It would depend upon all the circumstances as to whether it could be inferred that the Minister's state of satisfaction had not be formed at all or had not been performed in the required manner. However, as I do not accept that there is a factual basis to conclude that the Minister's own certification of the reasons as being his own reasons is not accurate, there is no need to consider that aspect further.

84 As to the assistance provided by officers of the Minister's department, I am reinforced in reaching my conclusions to the effect that the Minister acted upon the summary in the Submission by the fact that limited time was available to the Minister to make the decision together with the urgency with which he was asked to approach, and did approach, the task. These are matters which, in the absence of explanation, make it much less likely that the Minister personally read and considered the representations made to him.

85 No attempt was made by the Minister to justify the Submission as a complete and accurate summary of the representations of such that the consideration of the Submission may be equivalent to a personal consideration by the Minister of the representations themselves. In any event, the content of the Submission was not of that character. It was not possible to discern the full sense and content of the representations made without regard to the documents in which the representations were expressed. It follows that the Minister was assisted by departmental officers in undertaking the statutory task in a manner that was not lawful. In doing so, he failed to undertake his deliberative task of forming a personal state of satisfaction by considering and understanding the representations. Instead, he acted on the basis of the summary of the content of those representations provided in the Submission.

Fourth, did the Minister have insufficient time to undertake the deliberative task and did he do no more than adopt what had been prepared by his department?

86 The conclusion I have reached as to the extent of the role of officers of the Minister's department in the making of his decision does not support the conclusion that the Minister, as a matter of fact, delegated his statutory task. That is because I have not concluded that the Minister failed to form his own decision. Nor do I find that there was insufficient time for the

Minister to have undertaken the deliberative task or that he did no more than rubber stamp what had been prepared by his department.

87 This is not a case where the Minister was invited by the Submission to simply approve or ratify in some way a decision that had been made by officers of his department. For him to approach the task in that way would have required the Minister to act in a manner that was contrary to what he was told in his brief. For reasons that have been given, the evidence does not provide a basis for that conclusion.

88 The matters to which I have referred are matters relevant to ground 2(a). However, they do not establish ground 1.

89 For those reasons I find that ground 1 has not been made out.

Ground 2: Alleged failure to give proper, genuine and realistic consideration

90 As to ground 2(a), for reasons that have already been given, in all the circumstances the Minister failed to give the necessary personal proper, genuine and realistic consideration to the merits of the representations. The Minister could only do so by personally considering and understanding the representations made and that required him to read the attachments to the Submission. As I have found that he did not undertake the task in that manner, ground 2(a) should be upheld.

91 Therefore, it is not necessary to consider grounds 2(b) and (c). However, I will deal with them briefly. They were both based upon the false premise that the way in which matters were addressed in the reasons was sufficient to found the conclusion that the Minister did not have regard to particular aspects of the representations. As was made clear by the High Court in *Viane*, where the Minister acts personally, it is not the case that the Minister must refer to every aspect of the representations in the reasons and make findings. Nor is a failure to refer to a matter in the reasons proof that the Minister failed to engage intellectually with those matters.

92 As to ground 2(b), the complaint concerns the following statement in the conclusion of the Statement of Reasons at para 106:

> I concluded that Mr MCQUEEN represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community and the expectations of the community, outweighed the best interests of his children as a primary consideration, and any other considerations as described above.

93 It was submitted that no reasons were provided as to why community expectations should be held against Mr McQueen, yet it was one of two reasons deployed to outweigh the interests of his children and other considerations described. Further, it was submitted that the topic was not addressed in the Submission. However, the obligation is to consider the representations and to make findings if necessary as to those matters. The issue of unacceptable risk is not said to be a matter that was addressed by the representations.

94 Further, I accept the submission for the Minister that the reference to community expectations is to invoke a policy perspective about such matters which does not require further elaboration. ground 2(b) should not be upheld.

95 As to ground 2(c), the claim is to the effect that the Minister did not consider the claim by Mr McQueen that if his partner and children were to relocate with him to the United States he feared their children would face racism and isolation because their parents were an inter-racial couple.

96 The Reasons for Decision state at paras 49-50:

> Mr MCQUEEN has a Caucasian mother and an African American father and submits that his family encountered an 'extreme amount of racism and prejudice' all his life. Mr MCQUEEN states that he had a hard time growing up in the USA and struggled with isolation and issues of his own racial identity. He stated that he did not want that for his family and that was part of the reason he chose to immigrate. Should his family re-locate, he fears the racism and isolation they may experience from being an interracial couple. He states that he did not want to raise his children around the hateful influences that come with inter-racial relationships.
>
> I accept that Mr MCQUEEN is likely to experience practical and emotional hardship if he is removed from Australia and thereby separated from his family. I have also had regard for Mr MCQUEEN's absence from the USA for over 24 years. Alternatively I find that he would experience hardship if his family also relocate and suffer hardship as a result such as he has described.

97 In my view, the claim was stated in para 49 and dealt with in the final sentence of para 50. There is no merit in ground 2(c).

Ground 3: Alleged failure to respond to a clearly articulated argument

98 For reasons given in relation to ground 2(c), ground 3 is without merit.

Ground 4: Alleged unreasonable, illogical or irrational reasoning

99 For reasons already given, it could not be said that there was unreasonableness by reason of the reasoning process as to the matters the subject of ground 4(a) and (b).

100 Ground 4(c) raises a different matter. It alleges that there was a failure to address each integer of the claim concerning the best interests of minor children. Reliance is placed upon the particular at para 3(e) of the application. The point seems to be that the aspect of the hardship to the children addressed in the reasons at paras 49-50 (quoted above) was brought to account when considering impediments if Mr McQueen was removed from Australia but was not considered in the part of the reasons that concerned the interests of the children (approached by the Minister as a primary consideration). It appears to be alleged that the failure to consider this 'integer' as part of the reasons as to the interests of the children gives the whole decision the requisite character of being legally unreasonable or illogical.

101 It seems to be alleged that it was unreasonable, illogical or irrational to bring the matters at para 49 of the reasons to bear as part of the impediments if Mr McQueen was removed, but not as a fact that was relevant to the assessment of the best interests of the children if he was removed.

102 The test for unreasonableness is stringent and extremely confined: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [11] (Kiefel CJ), [52] (Gageler J), [135] (Edelman J). The same may be said of any separate review ground based upon illogicality: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [131], [135] (Crennan and Bell JJ); and *Minister for Immigration and Border Protection v MZZMX* [2020] FCAFC 175; (2020) 280 FCR 1 at [23]-[25] (Murphy, O'Callaghan and Anastassiou JJ).

103 As has already been observed, it was a matter for the Minister to determine the matters that might be given weight in determining whether there was another reason to revoke. The Minister had no obligation to bring to account a particular 'integer' advanced by Mr McQueen in forming the requisite state of satisfaction. The Minister was required to consider and understand the representations made, but there was no obligation to then bring any particular aspect of the representations to account or to afford any matter particular weight. In those circumstances, there is no merit in a claim that there was unreasonableness or illogicality in the Minister referring to the 'integer' as to one aspect of the reasons and not in another. It was a course that was within the decisional freedom of the Minister.

104 Further, the failure to refer to the integer might provide the foundation for an inference that the Tribunal considered it not to be material: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [5] (Gleeson CJ), [69] (McHugh, Gummow

and Hayne JJ), see also [35] (Gaudron J); and *ETA067 v The Republic of Nauru* [2018] HCA 46 at [13]-[14] (Bell, Keane and Gordon JJ). The fact that the Minister referred to the 'integer' at one point in the reasons but not another supports the drawing of such an inference in the present case.

105 For those reasons, ground 4(c) should not be upheld.

Relief

106 Mr McQueen seeks an order quashing the Minister's decision made on 14 April 2021 and mandamus to require the redetermination of what he describes as his revocation application. He also seeks an order that the redetermination not be by the Minister acting personally. Finally, he seeks an order for costs.

107 For reasons that have been given there should be an order setting aside the Minister's decision.

108 The application for an order for redetermination by a delegate of the Minister was not addressed in submissions for Mr McQueen. It is a matter for the Minister as to whether there is to be a delegation. As no contention was advanced as to a basis upon which the Court might direct the Minister to make that delegation and no such basis is evident I do not propose to grant relief of that kind.

109 As Mr McQueen has been successful and the principal claim made was that the subject of matters that were relevant to both ground 1 and ground 2(a), I am satisfied that there should be an order for costs in favour of Mr McQueen.

110 Which leaves the issue whether there should be an order by way of mandamus.

111 As has been observed in the course of these reasons there was considerable delay between the making of representations by Mr McQueen and the consideration of those representations by the Minister for the purpose of undertaking the mandatory task conferred by s 501CA(4). Mr McQueen initially commenced these proceedings on his own behalf and there was some delay in him being able to obtain pro bono legal representation. There was further delay occasioned by the manner in which these proceedings have been defended by the Minister. Initially, the Minister indicated that an affidavit would be filed deposing to the circumstances in which the decision was made. In the result that step was not taken and no explanation was given as to why that did not occur. On behalf of Mr McQueen, applications for leave to administer interrogatories were then pursued. They were opposed by the Minister. Leave was

granted for some of the interrogatories and they were administered and answered. All of which led to further delay. All the while Mr McQueen has been held in immigration detention by reason of the mandatory cancellation of his visa under s 501((3A).

112 The mechanism used in the *Migration Act* of mandatory visa cancellation in certain circumstances (s 501(3A)) with provision for the possibility of later revocation of the cancellation (s 501CA) produces the likelihood that delay in the formation of the required state of satisfaction by the Minister will result in the ongoing detention of any person seeking to invoke the mandatory statutory process pursuant to which the Minister must form the required state of satisfaction that may lead to the revocation of the visa cancellation. Further, there may be expected to be cases (like the present case) where the Minister's state of satisfaction is likely to determine whether a person who has lived in Australia for a considerable period of time or otherwise has significant ties to Australia will be unable to re-establish their permission to live in Australia with very significant consequences for that person as well as those who remain in Australia with whom the person has strong connections.

113 Where no time is fixed for a statutory decision to be made, it may be determined as a matter of statutory construction that it must be made within a reasonable period of time: *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; (2014) 255 CLR 179 at [37] (Crennan, Bell, Gageler and Keane JJ).

114 As has been observed, there is a connection between the mandatory cancellation under s 501(3A) and the mandatory obligation imposed by s 501CA. They form a scheme which must be observed by the Minister. In those circumstances, in my view, there is an obligation for the Minister to undertake the statutory task as required by s 501CA within a reasonable period of any representations being made. If that were not so, the Minister could make the decision required by s 501(3A) and then ignore or defer the performance of the requirements of s 501CA, including the formation of the required state of satisfaction as to whether there is another reason why the original decision should be revoked, and thereby treat the power to cancel as if it did not exist within the context of s 501CA. It may be noted that s 501CA(3) itself requires the notification of the cancellation decision and the relevant information and the invitation to make representations to occur 'as soon as practicable'. It would be inconsistent with that express requirement if the Minister could thereafter fail to act with due dispatch in considering any representations and forming the required state of satisfaction. It would also mean that a person could be held in immigration detention indefinitely. That is because the

Migration Act qualifies the statutory obligation to remove an 'unlawful non-citizen' (a non-citizen in Australia who does not hold a visa: see s 13 and s 14) in cases where the procedure in s 501CA must be followed. Section 193(1), s 198(2A) and s 198(2B) provide that where s 501CA applies and a person has made representations about revocation, the obligation to remove does not arise until a decision has been made not to revoke the cancellation. If there is no statutory obligation for the decision to be made within a reasonable period then there could be indefinite detention of a person who seeks revocation of a decision to cancel their visa. Further, the indefinite detention would occur without affording the person natural justice: see s 501(5).

115 It may also be the case that the visa cancellation under s 501(3A) is not conferred independently of the power conferred by s 501CA(4). Rather, the ongoing validity of the former (the cancellation) may depend upon due and prompt performance of the latter (the formation of the required state of satisfaction by reference to the representations if made). The possibility of the conditional nature of the cancellation arises from the following aspects of the legislation.

116 First, there is the express obligation imposed upon the Minister as soon as practicable after the original decision to cancel the visa to provide notice of the decision and relevant information and also to invite representations about revocation. Secondly, the relevant information that must be provided is that which the Minister considers 'would be the reason, or part of the reason, for making the original decision'. In circumstances where the original decision (to cancel the person's visa) has already been made this language is somewhat strange: see the analysis by Banks-Smith and Jackson JJ in *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91; (2021) 285 FCR 43 at [94]-[97]. However, it may reflect the fact that there is to be, in effect, a mandated reconsideration of the making of the original decision to cancel, in a form that involves evaluation as to whether any aspect of the character test is not met and whether there is another reason why the original decision should be revoked. If so, the obligation is to provide information that would be a reason for maintaining the cancellation of the visa. Thirdly, there is the fact that s 501CA refers to revocation of the cancellation. Revocation undoes what has gone before. It takes back, withdraws, annuls or cancels something done previously. It is mostly used in a sense that connotes a form of retraction or calling back. It indicates that the visa cancellation was intended to take effect subject to the possibility that it might be undone. Fourthly, there is express provision to the effect that if the original decision is revoked then 'the original decision is taken not to have been made': s 501CA(5). This too suggests that the possibility of

revocation qualifies the original cancellation. Fifthly, there is express provision to the effect that, in the event of revocation, any detention of the person between the cancellation and revocation is lawful: s 501CA(6). This also indicates that the statutory scheme is intended to provide for a mechanism by which to undo the earlier cancellation and it is because of that characteristic that the provision concerning the lawfulness of detention in the interim is required. Sixthly, s 501(5) provides that the rules of natural justice do not apply to a decision under s 501(3A). In contrast, s 501CA(3) establishes a procedure for notification and an opportunity to make representations for revocation. This later procedure would be empty if it did not qualify the ongoing lawfulness of the visa cancellation. This suggests that natural justice is to be afforded by the mechanism of the procedures to apply to the revocation power and that is why there is no natural justice to be afforded in respect of the cancellation. A conclusion to that effect is also supported by the terms of s 501G which require reasons to be given if a decision is made under s 501CA whereas reasons are not required to be provided for a cancellation under s 501(3A).

117 Finally, there is the absence of any opportunity for evaluative decision making by reference to the personal circumstances of the person concerned under s 501(3A) because the provision operates where the sentence of the kind described has been imposed and does so without natural justice and therefore without any opportunity for the person affected to influence whether the decision is made. This is reinforced by the mandatory language in s 501(3A).

118 All these aspects, coupled with the likely significance of the cancellation decision for the person concerned, are contextual matters which indicate that the subsequent provision of an opportunity to make representations that may lead to revocation was intended to condition the ongoing operation of the cancellation. If that were not so, a failure to conform to s 501CA or an indefinite delay in forming the required state of satisfaction would not affect the validity of the visa cancellation and the ongoing indefinite detention that could result would be lawful. Put another way, s 501(3A) and s 501CA operate together as a scheme with the mandatory cancellation by s 501(3A) being a form of gateway or provisional visa cancellation pending consideration of the broader merits if the person concerned wishes to be heard on the cancellation.

119 The above matters give rise to a different question to that considered in the recent decision in *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 6 which concerned whether the power conferred by s 501CA depends upon the

prior existence of a lawful cancellation decision under s 501(3A). Nevertheless, the reasoning in that case exposes the existence of the link between the provisions.

120 It must be observed that it was no part of the case advanced for Mr McQueen that the ongoing validity of the cancellation was conditional upon the due and punctual performance of the obligation to form the state of satisfaction that I have described. However, those matters serve to reinforce the significance of any delay in the reconsideration of the application by Mr McQueen. Irrespective of whether compliance with s 501CA conditions the ongoing validity of the visa cancellation pursuant to s 501(3A), compliance with its terms is the only means by which a person whose visa has been cancelled by reason of being sentenced to a term of imprisonment has any opportunity to raise considerations personal to them that may justify their visa not being cancelled. Under the terms of the *Migration Act*, the person will be deprived of their liberty while that opportunity is pursued (unless the person submits to removal from Australia). The reasonableness of the time taken to make a decision under s 501CA(4) is to be evaluated in that context.

121 For those reasons, it is to be expected that the formation of the state of satisfaction required upon reconsideration of the representations by Mr McQueen will be made promptly. Beyond references to the delay in making the decision under review, no submissions were addressed to any reason why there may be concern about the time that make be taken upon any reconsideration.

122 In all the circumstances, particularly the long delay by the Minister in making the decision under review, I consider the present to be an appropriate case in which liberty to apply for relief by way of mandamus should be reserved.

I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate: 

Dated: 23 March 2022