FEDERAL COURT OF AUSTRALIA

ENT19 v Minister for Home Affairs [2022] FCA 694

File number(s):	NSD 1272 of 2020
Judgment of:	**RAPER J**
Date of judgment:	15 June 2022
Catchwords:	**MIGRATION** – interlocutory application seeking a writ of peremptory mandamus or an order in the nature of mandamus directing the Minister to grant the visa – where the Minister had not been satisfied that the grant of the visa was in the national interest under cl 790.227 of the *Migration Regulations 1994* (Cth) – where the Full Court issued a writ of mandamus requiring the Minister to determine the appellant's application for a visa according to law – where the appellant alleged there had been unreasonable delay on the Minister's part in complying with the Court's order – whether the Court should make supplemental orders in the form sought – application allowed
Legislation:	*Acts Interpretation Act 1901* (Cth) s 19 *Federal Court of Australia Act 1976* (Cth) s 38(2) *Migration Act 1958* (Cth) s 5AA, s 5H(1), s 36(2)(a), s 46A, s 65, s 66(2), s 233C, s 501(1), s 501(3) *Federal Court Rules 1979* (Cth) O 54A, r 17 *Federal Court Rules 2011* (Cth) *High Court Rules 2004* (Cth) r 25.13.4 *Migration Regulations 1994* (Cth) cl 790.227 Federal Court of Australia Rules (Amendment) 1988 No. 54 (Cth) Select Legislative Instrument 1988 No. 54 (Cth) Explanatory Statement
Cases cited:	*Applicant S422 of 2022 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 89; 138 FCR 151 *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27; 268 FCR 424 *ASP15 v Commonwealth* [2016] FCAFC 145; 248 FCR 372 *BAL19 v Minister for Home Affairs* [2019] FCA 2189 *Thornton v Repatriation Commission* (1981) 52 FLR 285; 35 ALR 485 *BFW20 by his Litigation Representative BFW20 v Minister*

	for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 562 *BHL19 v Commonwealth of Australia (No 2)* [2022] FCA 313 *Davis v Military Rehabilitation and Compensation Commission* [2021] FCA 1446 *DFE16 v Minister for Home Affairs* [2021] FCA 1151 *ENT19 v Minister for Home Affairs* [2020] FCCA 2653 *ENT19 v Minister for Home Affairs* [2021] FCAFC 217 *EPU19 v Minister for Home Affairs* [2020] FCA 541 *EVX20 v Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1079 *FAK19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1571 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108; 279 FCR 1 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 By His Litigation Representative BFW20A* [2020] FCA 615 *Plaintiff S297/2013 (No 1)* [2014] HCA 24; 255 CLR 179 *Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2)* [2015] HCA 3; 255 CLR 231 *Sebastian v State of Western Australia* [2008] FCA 926
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	101
Date of hearing:	9 – 10 June 2022
Counsel for the Appellant:	Ms L Ferrari SC with Dr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the Respondent:	Mr H Bevan SC with Mr J Wherrett
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1272 of 2020

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

ORDER MADE BY:	**RAPER J**
DATE OF ORDER:	**14 JUNE 2022**

THE COURT ORDERS THAT:

1. Order 2(b) of the orders made on 26 November 2021 requiring the Minister to determine the appellant's application for a Safe Haven Enterprise (Class XE) Subclass 790 visa according to law be made on or before 27 June 2022.
2. The respondent pay the appellant's costs of and incidental to the interlocutory application filed 10 April 2022 and as amended on 2 June 2022, as agreed or taxed.
3. The determination of the basis upon which the costs are payable under Order 2 be stood over to a date to be fixed in the event that the parties are unable to reach agreement.
4. The appellant's interlocutory application filed 10 April 2022 and as amended on 2 June 2022 stand over to a date to be fixed.
5. There be liberty to apply on 2 days' notice in writing.

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

REASONS FOR JUDGMENT

RAPER J:

1 By amended interlocutory application dated 1 June, filed 2 June 2022, the appellant sought, (not including the proposed orders as to costs):

(a) a peremptory writ of mandamus commanding the respondent, the **Minister** for Home Affairs, to grant the appellant the protection visa for which he has applied (a Safe Haven Enterprise (Class XE) Subclass 790 visa (**SHEV visa**)), forthwith;

(b) alternatively to (a), an order requiring the Minister to comply with order 2(b) of the orders made by Justices Collier, Katzmann and Wheelahan on 26 November 2021 on or before a date not more than 7 days after the date of this order.

2 The appellant has appealed previously from a decision of the Federal Circuit Court of Australia (**FCCA**) (now the Federal Circuit and Family Court of Australia). In that decision, the primary judge dismissed an application for judicial review of the Minister's decision: *ENT19 v Minister for Home Affairs* [2020] FCCA 2653 (***ENT19 (FCCA)***). The Minister was not satisfied that the grant of a SHEV visa was in the national interest. The appellant's appeal in the **Full Court** of the Federal Court of Australia was successful: *ENT19 v Minister for Home Affairs* [2021] FCAFC 217. The Full Court ordered, on 26 November 2021, inter alia:

> 2(b) A writ of mandamus issue directed to the respondent requiring her to determine the appellant's application for a Safe Haven Enterprise (Class XE) Subclass 790 visa according to law.

3 As at the time of the current application, the Minister has failed to make a decision regarding the appellant's application for a SHEV visa.

4 It is questionable whether the appellant's application is interlocutory in nature given the orders made on 26 November 2021 were final in nature. Nonetheless, this Court is not yet *functus officio* given the Court retains the power in the same suit to make supplemental orders determining the rights of the parties: *Sebastian v State of Western Australia* [2008] FCA 926 at [26] – [27]. As a consequence, this Court has jurisdiction to make supplemental orders to aid the enforcement of the orders of the Full Court made on 26 November 2021.

Background

5 The appellant is an Iranian national. On 14 December 2013, he entered Australia by sea from Indonesia without a valid visa and landed on Christmas Island as an "unauthorised maritime

arrival" within the meaning of s 5AA of the *Migration Act 1958* (Cth) (the **Act**). This meant the appellant was ineligible for a permanent protection visa and could only apply for a temporary protection visa, such as a SHEV visa, if the Minister determined that it was in the public interest to allow him to do so: s 46A of the Act.

6 Between 2012 and 2013, the appellant unlawfully facilitated the passage of other asylum seekers from Indonesia to Australia.

7 On 3 February 2017, the appellant lodged an application for a SHEV visa.

8 On 13 October 2017, the appellant was convicted of the aggravated offence of smuggling a group of at least five non-citizens contrary to s 233C of the Act in the District Court of New South Wales. The appellant was sentenced to eight years' imprisonment. Following the expiry of the non-parole period on 9 December 2017, the appellant was transferred to immigration detention.

9 In May 2018, a delegate of the Minister refused the appellant's application on the ground that the appellant was not a person in respect of whom Australia has protection obligations.

10 The matter was subsequently referred to the Immigration Assessment **Authority**. The Authority determined that the appellant was a genuine refugee pursuant to s 5H(1) of the Act on the basis that he had a well-founded fear of persecution in Iran in that he could face serious harm in Iran, that the essential and significant reason for the harm was his religion, and that the harm he feared involves systemic and discriminatory conduct throughout Iran because it emanates from the Iranian authorities operating under national laws. The Authority remitted the decision of the delegate back to the Minister for reconsideration.

11 On 14 October 2019, the Minister, acting in his personal capacity, exercised his discretion under s 501(1) of the Act to refuse to grant a SHEV visa on the basis the appellant did not pass the character test.

12 On 20 February 2020, this Court set aside the Minister's decision under s 501(1) of the Act, and made orders that:

> 1. A writ in the nature of certiorari issue directed to the respondent quashing its decision dated 14 October 2019.
>
> 2. A writ of mandamus issue directed to the respondent requiring it to determine the applicant's Safe Haven Enterprise (Class XE) visa application according to law.
>
> 3. The respondent to pay the applicant's costs, as agreed or taxed.

13 Importantly, for the purpose of the appellant's application for peremptory mandamus, the Court noted in its orders on that date:

> 4. The respondent accepts that the application must be allowed on the basis that the decision of the respondent dated 14 October 2019 is affected by jurisdictional error. The respondent concedes that a critical conclusion, being that the applicant posed an unacceptable risk of harm to the Australian community, relied on a finding that the applicant had an *"ongoing risk"* of reoffending for which no probative basis is identified.

14 On 27 April 2020, the appellant made an application to this Court to compel the Minister to make a decision in relation to his SHEV visa on or before 11 May 2020.

15 On 13 May 2020, the Minister determined that he was not satisfied that it was in the national interest to grant the appellant a SHEV visa on the basis that the appellant had been convicted of playing an essential role in unlawful people smuggling. The Minister found that if the appellant was granted a protection visa, it would send "the wrong signal" to others engaging in similar conduct, might "potentially [weaken] Australia's border protection regime" and policy, and might "erode" the confidence of the community in the protection visa program.

16 In a decision delivered on 6 November 2020, the FCCA dismissed an appeal for judicial review of the Minister's decision: *ENT19 (FCCA)*.

17 On further appeal in the Full Court, the appellant was successful and the orders of the FCCA were set aside as set out in paragraph 2 above.

Introductory matters at the commencement of the hearing

18 This matter has been before a number of duty judges since April 2022. As a consequence of timetabling orders, the Minister filed evidence of Mr Luke Morrish, Assistant Secretary of the Character and Cancellation **Branch** in the **Department** of Home Affairs, affirmed on 24 May 2022, and submissions on 2 June 2022. This evidence addressed the appellant's initial application which did not include the proposed order for peremptory mandamus. It also represented the Department's state of affairs, including its projections as to when it would be able to make the SHEV visa decision *prior to* the current Minister being appointed. The current Minister was appointed on 1 June 2022. In the Minister's submissions dated 2 June 2022, the Minister submitted (regarding when it could make a decision):

> On 1 June 2022, Ms Clare O'Neil MP was sworn in as Minister for Home Affairs. However, since her appointment, it has not been possible to ascertain her views in relation to whether she would like to make a decision on the appellant's visa application personally. Again, the Department considers it appropriate, given departmental policy as well as the fact that the original refusal decision was made by the Minister personally, that the new Minister be asked whether they wish to make the decision personally (Morrish [36]). It is also not clear how long

> it will take to establish processes and procedures for the processing of visa applications generally, or the processing of the appellant's application in particular under a new government (Morrish [34], [37]). In this regard, the appellant is correct to say that it is not clear whether the representation from the Minister's office on 20 May 2022 remains current (AS [27]). **Notwithstanding that uncertainty, the Department's prediction is that the earliest a decision could be made in the present circumstances is 22 July 2022** (Morrish [38]).
>
> (Emphasis added)

19 However, prior to the luncheon adjournment, Counsel for the Minister indicated that the Minister was prepared to consent to an order to the effect as set out in paragraph 1(b) of these reasons but that the date by which the Minister was to make her decision was 30 June 2022, and to the payment of the appellant's costs on an ordinary basis as agreed or taxed. Counsel for the appellant indicated that her client was prepared to accept orders substantially in the same form as proposed by the Minister but that the date for performance be 23 June 2022 and that the application be adjourned with a date to be fixed if the parties are unable to come to an agreement as to the basis upon which the costs were to be paid.

20 After the luncheon adjournment, the Minister tendered further orders it would consent to, which comprised:

> 1. The Respondent comply with order 2(b) of the orders made by Justices Collier, Katzmann and Wheelahan on 26 November 2021 on or before 5pm on Monday, 27 June 2022.
> 2. The Respondent pay the Appellant's costs of and incidental to the interlocutory application filed 10 April 2022 and as amended on 2 June 2022, as agreed or taxed.
> 3. Order 2 is made without prejudice to any application by the Appellant for the costs subject of order 2 to be paid on an indemnity basis.
> 4. The Appellant's interlocutory application filed 10 April 2022 and as amended on 2 June 2022 stand over to a date to be fixed.
> 5. There be liberty to apply on 2 days' notice in writing.

21 The appellant's counsel indicated that those orders were not acceptable to her client and the matter proceeded.

22 Accordingly, the hearing of the application commenced by reason of the inability for the parties to agree to the proposed date upon which the Minister would make her decision, being a difference of four days.

23 However, despite the appellant's preparedness to accept on 9 June 2022 that the Minister be given until 23 June 2022 to make her decision, on 10 June 2022, the appellant handed up to the Court proposed Short Minutes (also showing his changes to the Minister's short minutes from the previous day) which comprised:

> ~~1. The Respondent comply with order 2(b) of the orders made by Justices Collier, Katzmann and~~

~~Wheelahan on 26 November 2021 on or before 5pm on Monday, 27 June 2022.~~

(a) A peremptory writ of mandamus is issued, commanding the Respondent to grant to the Appellant the visa for which he applied on 3 February 2017, forthwith.

(b) [Alternatively to (a)] The Respondent must comply with order 2(b) of the orders made by Justices Collier, Katzmann and Wheelahan on 26 November 2021 by no later than 1 pm AEST on Friday, 17 June 2022.

(c) [Alternatively to (a) and (b)] The Respondent must comply with order 2(b) of the orders made by Justices Collier, Katzmann and Wheelahan on 26 November 2021 by no later than 1 pm AEST on the day that is 7 days from the date of this order.

2. The Respondent pay the Appellant's costs of and incidental to the interlocutory application filed 10 April 2022 and as amended on 2 June 2022, as agreed or taxed.

3. Order 2 is made without prejudice to any application by the Appellant for the costs the subject of order 2 to be paid on an indemnity basis.

4. The Appellant's interlocutory application filed 10 April 2022 and as amended on 2 June 2022 stand over to a date to be fixed.

5. There be liberty to apply on 2 days' notice in writing.

24 On 14 June 2022, I made the following orders:

1. Order 2(b) of the orders made on 26 November 2021 requiring the Minister to determine the appellant's application for a Safe Haven Enterprise (Class XE) Subclass 790 visa according to law be made on or before 27 June 2022.

2. The respondent pay the appellant's costs of and incidental to the interlocutory application filed 10 April 2022 and as amended on 2 June 2022, as agreed or taxed.

3. The determination of the basis upon which the costs are payable under Order 2 be stood over to a date to be fixed in the event that the parties are unable to reach agreement.

4. The appellant's interlocutory application filed 10 April 2022 and as amended on 2 June 2022 stand over to a date to be fixed.

5. There be liberty to apply on 2 days' notice in writing.

25 What follows are my reasons for making these orders.

Consideration

26 These reasons will address *first,* the appellant's claim for peremptory mandamus, and then *secondly,* his alternative claim for an order compelling the Minister to make the decision not *forthwith* but either by 17 June 2022 or within seven days of the date of the Court's order.

The claim for peremptory mandamus

27 By way of brief summary, the appellant contends that a writ of peremptory mandamus be made:

(a) by reason of the orders made by Perry J on 20 February 2020 and the Court's notation of the Minister's concession, that there was no probative basis to contend that the appellant had an "*ongoing risk"* of reoffending such that he posed an unacceptable risk

of harm to the Australian community, the Minister no longer has a "pathway" to refuse his visa under s 501;

(b) by reason of (a), the appellant's application for a SHEV can only be granted or refused under s 65 of the Act. All of the relevant criteria under s 65 have been satisfied and have been satisfied since 15 December 2021, and accordingly "there remains nothing further to be done in considering the application"; and

(c) the terms of the order made by the Full Court on 26 November 2021 that a writ of mandamus issue required a return be made by 10 December 2021 (by reason of the application of the ***High Court Rules*** *2004* (Cth) given the purported insufficiency in the ***Federal Court Rules*** *2011* (Cth)) and the Minister made no return. Therefore, given the return date of the writ made was legally insufficient (by reason of there being no return date), a peremptory writ of mandamus may issue by application of the reasoning of the High Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2)* [2015] HCA 3; 255 CLR 231 **(*Plaintiff S297/2013 (No 2)*)**.

28 The High Court has described peremptory mandamus as commanding "performance of the duty which was the subject of the writ but remains unperformed": see *Plaintiff S297/2013 (No 2)* at [39]. "Legal insufficiency" grounds peremptory mandamus. The High Court went on to adopt what the editors in the first edition of *Halsbury's Laws of England* said, namely "where the applicant obtains judgment upon the argument of a point of law raised in answer to a return or other pleading or after pleading to the return, the applicant is entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ" (Emphasis omitted).

29 The case of *Plaintiff S297/2013 (No 2)* is the only like occasion where such a writ has been ordered. In *Plaintiff S297/2013 (No 2),* the Minister was compelled to grant the plaintiff a permanent protection visa. The plaintiff had entered Australia by sea at Christmas Island and then applied for a protection visa. In 2012, the Minister determined that it was in the public interest that the plaintiff be permitted to make a valid application for a protection visa. However, in February 2013, a delegate refused to grant the visa. The refusal was the subject of judicial review proceedings before the Refugee Review Tribunal. In May 2013, the Tribunal remitted the matter to the Minister for reconsideration as the Tribunal was satisfied that the plaintiff satisfied the criterion for the grant of a protection visa under s 36(2)(a) of the Act. The Minister did not decide the plaintiff's application. The plaintiff applied for a writ to be issued in the High Court in December 2013 compelling the Minister to grant the visa.

30 In intended satisfaction of the writ (which allowed either the Minister to consider and determine the Plaintiff's application for a visa according to law or show cause why it had not been done) the Minister decided that he was not satisfied that it was in the "national interest" to grant the plaintiff the visa because the Minister saw "the national interest" (with respect to the cl 866.226 criterion) as requiring refusal of a Protection (Class XA) visa to "any and every" unauthorised maritime arrival: at [13]. The High Court found that the Minister could not attach determinative and adverse significance to the plaintiff's status as an unauthorised maritime arrival in addition to those consequences which the Act expressly attributes to that status. Accordingly, the Court held that the cl 866.266 criterion did not permit the Minister to treat the plaintiff's status as an unauthorised maritime arrival as sufficient to justify the conclusion that it was not in the national interest to grant the plaintiff the visa which he sought: at [21].

31 The High Court found, at [40]:

> the Minister should not be given a further opportunity to identify some reason for not granting the plaintiff the visa which is sought. In response to the writ, the Minister decided the application on the one basis that has been identified – that the national interest required that no unauthorised maritime arrival should be granted a Protection (Class XA) visa. That basis for the decision was legally wrong.

32 As can be seen from the short exposition of the circumstances and reasons for this decision above, *Plaintiff S297/2013 (No 2)* arose in circumstances different from the current proceedings. Consistent with the history from which writs for peremptory mandamus arose, a markedly different procedural history occurred in that case. There, the writ was issued with a time limit for compliance. Thereafter, the Minister in intended satisfaction of the writ, made a decision. It was that decision, narrow on its terms, about which the High Court found error and was able to limit the bases for the Minister's decision to its terms.

33 On the present application, I decline to make orders for peremptory mandamus for the following reasons.

34 *First*, the decision in *Plaintiff S297/2013 (No 2)* is not determinative of this matter; it is distinguishable. The Minister has not made a decision in intended satisfaction of the writ.

35 *Secondly*, contrary to the appellant's submission that "there is nothing further to be done" in processing the appellant's application, the Minister has not decided whether a visa should be granted or refused under ss 65 and/or 501 of the Act. The Minister, for the purposes of making a decision under s 65, should have regard to the latest relevant information, as circumstances change. As observed by Steward J in ***EPU19*** *v Minister for Home Affairs* [2020] FCA 541 at

[52], the language of s 65 supports that conclusion as it "requires the Minister to be satisfied, amongst other things, that the applicable criterion 'have been satisfied' (s 65(1)(a)(ii)) and that the grant of the visa is not prevented by 'any other provision of this Act or any other law of the Commonwealth' (s 65(10(a)(iii))". It remains open for the Minister (or a delegate of the Minister if the Minister decides not to make the decision personally) to refuse to grant the visa on the basis that it is not "in the national interest".

36 *Thirdly,* consideration of the "national interest" is *not* limited to whether or not the appellant poses an unacceptable risk of harm to the Australian community.

37 As stated by the High Court in *Plaintiff S297/2013 (No 2)* at [18], for the Minister to be satisfied that the grant of the visa is in the "national interest", it involves "a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member, and, thus, affect the Minister's continuance in office" and may involve the application of "a publicly stated government policy": at [20].

38 *Fourthly,* the Court accepts the Minister's submission that the appellant equates incorrectly ss 501 and 65 (read with cl 790.227 of the *Migration Regulations 1994* (Cth)). Refusal under s 501 requires the Minister to refuse a visa if the person does not satisfy the Minister that the person passes the character test. That question is distinct from the Minister's consideration of the national interest, which is an *additional* requirement where national justice is not afforded under s 501(3). Accordingly, if a person satisfies the character test, refusal under s 501 may not be available, but refusal under s 65 may still be available on the basis that the person fails the national interest criterion under cl 790.227.

39 It cannot be inferred that there is bias or prejudgment from the fact that the briefing notes identify a number of potential bases for the refusal given the requirement, in the case of a refusal, to specify the criterion that was not satisfied together with written reasons: s 66(2) of the Act. Where a decision-maker decides not to refuse the visa and is otherwise satisfied as to the criteria, it will be granted: s 65 of the Act. The briefings came from the Branch, which is concerned with identifying possible bases for cancellation. It is clear also that the Branch adverted, in the briefing note, to other branches providing such a grant, namely the "protection visa delegate" as referred to in the briefing note, dated 19 May 2022.

40 *Fifthly*, it is not a case where the Minister has taken no steps to process the visa. Whilst, for the reasons given below, the Court is of the view there has been an unreasonable delay, even if that

is so, the appellant has not satisfied the Court that a writ of peremptory mandamus should be made.

41 *Lastly,* whilst for the reasons which follow, the Full Court's order was returnable within 14 days, by reason of the applicability of the *High Court Rules*, this does not militate against the other reasons for why such an order for peremptory mandamus should not be made.

42 I accept the submission of the appellant, for the reasons which follow, as to why the *High Court Rules* are applicable.

43 In this context, the appellant argued that whilst there was not a date specified in the Full Court's writ of mandamus, the Minister was required to comply with r 25.13.4 of the *High Court Rules* (given the purported insufficiency in the *Federal Court Rules*: see s 38(2) of the ***Federal Court of Australia Act*** *1976* (Cth)) which requires unless otherwise ordered by the Court or a Justice, a writ of mandamus must be returnable within 14 days of the service of the writ.

44 Section 38(2) of the *Federal Court of Australia Act* provides:

> **38 Practice and procedure**
>
> ...
>
> (2) In so far as the [*Federal Court Rules 2011* (Cth)] for the time being applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply, *mutatis mutandis*, so far as they are capable of application and subject to any directions of the Court or a Judge, to the practice and procedure of the Court.

45 Rule 25.13.4 of the *High Court Rules* provides:

> Unless otherwise ordered by the Court or a Justice, a writ of mandamus must be returnable within 14 days from service of the writ.

46 The term "insufficient" was explored in *Applicant S422 of 2022 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 89; 138 FCR 151. Dowsett and Lander JJ found at [34] that "[t]he notion of 'insufficiency' implies some inadequacy in the Federal Court Rules as they apply to a particular case".

47 The Minister submitted, *inter alia*, that the *High Court Rules* do not apply given:

(a) There is no "insufficiency" in the *Federal Court Rules* given it connotes "inadequacy", and the absence of an express time limit does not mean that the *Federal Court Rules* are "inadequate" to deal with the consequences of a decision to issue a writ of mandamus.

(b) Such a construction is supported by the relevant legislative history which was described by the Minister as:

> In 1984, the *Federal Court Rules 1979* (Cth) were amended to include a time limit for the return of a writ of mandamus (see *Federal Court Rules (Amendment) Act* 1984 (Cth)). In particular, Rule 17 of Order 54A provided that "[u]nless otherwise ordered by the Court or Judge, the writ shall be returnable within 7 days". In 1988, Order 54A was amended to remove the specific time limit for the return of a writ of mandamus (see *Federal Court of Australia Rules (Amendment)* 1988 (Cth)). The Explanatory Statement for the amendment relevantly stated (p 2, emphasis added):
>
> > A replacement Order 54A has been made to facilitate applications for relief under s 39B of the Judiciary Act 1903; mandamus, prohibition or injunctions against Commonwealth officers. The Federal Court's existing Order 54A was modelled on the High Court practice. The Rule now made is simple and enables applicants for relief under the Administrative Decisions (Judicial Review) Act 1977 to claim relief under s 39B in the same application.
>
> (Emphasis removed)

(c) It would be unusual if the deliberate decision to move *away* from the model supplied in the *High Court Rules* now meant that the silence in the *Federal Court Rules* on the question of time limits was construed as impliedly importing the relevant time limit from the *High Court Rules*.

(d) The *High Court Rules* may provide *guidance* as to what constitutes an appropriate time limit for the return of a writ of mandamus but that does not mean that an automatic 14-day time limit applies absent a Federal Court order to the contrary.

48 However, this submission is not accepted for the following reasons.

49 A review of the legislative history reveals that, prior to the removal of the specific time limit from the Order in 1988, the *Federal Court Rules 1979* (Cth) contained a number of rules which dealt specifically with the return of a writ of mandamus, pleading to the return and when a peremptory writ of mandamus may be issued. All of those provisions were removed at the same time as the removal of the time limit. It is not apparent that there was a "deliberate" decision to move away from the High Court model rather according to the Explanatory Statement it was done for "simplicity purposes" (Federal Court of Australia Rules (Amendment) 1988 No. 54 (Cth) Select Legislative Instrument 1988 No. 54 (Cth) Explanatory Statement).

50 A review of the current *Federal Court Rules* does reveal the "insufficiency" when one considers the absence of any rules regarding writs of mandamus, time frames, and consequential rules concerning their return, pleading to their return and when a peremptory writ in mandamus may be issued.

51 This view has been shared by a number of judges of this Court. The appellant relied upon a number of Federal Court authorities, which he asserted proved that this Court has accepted that the High Court Rules applied. In *BHL19 v Commonwealth of Australia (No 2)* [2022] FCA 313 at [206], Wigney J sought guidance from and assumed the application of the *High Court Rules*. Whilst, in ***FAK19*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1571, there was an assumption by Charlesworth J that the *High Court Rules* applied (at [53]), there did not appear to be specific argument regarding their applicability and the Minister did not oppose the application.

52 However, this Court has more clearly accepted the applicability of the *High Court Rules* in two other cases. In *EVX20 v Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1079, Logan J, at [39], found that the *Federal Court Rules* were insufficient. In *EPU19*, at [54] and [55], Steward J accepted the applicability of the operation of the *High Court Rules* where a writ of mandamus had been issued:

> 54. Having said that, and acknowledging the events that have transpired since the original orders were made, I formed the view at the hearing on 17 April 2020 that it was appropriate to impose a deadline on the Minister. The next question was what timeframe should be afforded for compliance. The *Federal Court Rules 2011* (Cth.) (the "*Federal Court Rules*") are of limited assistance because they do not address how the Court is to issue writs of mandamus. In such circumstances, if a writ were to be issued by the Court, it would need to apply the *High Court Rules 2004* (Cth.) (the "*High Court Rules*"). That is because of s. 38(1) and (2) of the *Federal Court of Australia Act* which provide as follows:
>
> > (1) Subject to any provision made by or under this or any other Act with respect to practice and procedure, the practice and procedure of the Court shall be in accordance with Rules of Court made under this Act.
> >
> > (2) In so far as the provisions for the time being applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply, *mutatis mutandis*, so far as they are capable of application and subject to any directions of the Court or a Judge, to the practice and procedure of the Court.
>
> 55. Under r. 25.13.4 of the *High Court Rules*, a writ of mandamus is returnable with 14 days after its service unless otherwise ordered by the Court or a Justice. Under r. 25.13.5, an affidavit must be filed either stating that the act commanded by the writ has been done or giving reasons why the act has not been done. In February 2020, the Court did not issue a writ of mandamus but an order in the nature of mandamus. In my view, the time limit prescribed by the *High Court Rules* provide an ample analogy of what time should be taken by a respondent to comply with that type of order. Here, the Minister has been working on this matter for nearly two months. That is too long. All things considered, it was my view that the usual time limit of two weeks should be sufficient for the Minister to complete his task under s. 65 of the *Act*. However, due to the COVID-19 pandemic, I added an extra week for compliance.

53 Accordingly, the preferable view is the Minister was required, by operation of the *High Court Rules*, to act by return within 14 days. However, despite this being so, it does not follow that a writ of peremptory mandamus *must* be made the reasons already expressed in this decision.

Alternative orders sought

54 Alternatively, the appellant seeks orders that the decision be made either by 17 June 2022 or within seven days of the date of the Court's order.

55 Sections 65 and 501 of the Act do not specify a time within which a valid visa application must be determined. In *Plaintiff S297/2013 (No 1)* [2014] HCA 24; 255 CLR 179, Crennan, Bell, Gageler and Keane JJ, found that the Minister must perform his or her duty within a reasonable time to be determined by the Court:

> 37. The Act, in contrast, is silent as to the period within which the Minister must make such a decision in respect of a valid application for a visa of a class other than a protection visa. **The duties of the Minister to consider a valid application for a visa of a class other than a protection visa and to make a decision granting or refusing such a visa are, by implication, to be performed within a reasonable time**. Section 51(2) acknowledges that implication in providing that the fact that an application has not been considered or disposed of, when a later application has, 'does not mean that the consideration or disposal of the earlier application is unreasonably delayed'. What amounts to a reasonable time is ultimately for determination by a court, on an application for mandamus against the Minister under s 75(v) of the *Constitution* or equivalent statutory jurisdiction, having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act.
>
> (Footnotes omitted; emphasis added)

56 Similarly, in ***ASP15*** *v Commonwealth* [2016] FCAFC 145; 248 FCR 372, the Full Court (Robertson, Griffiths and Bromwich JJ) said at [21] – [23]:

> 21. The Minister submitted that the test for determining whether an inferred "reasonable time" limit for making an administrative decision has been exceeded, based on long-standing authority in *Thornton v Repatriation Commission* (1981) 52 FLR 285 *(Thornton)* at 292, is:
>
> > … whether there are circumstances which a reasonable man might consider render this delay justified and not capricious. In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity.
>
> 22. This passage from *Thornton* has been referred to with approval by:
>
> (1) Murphy J sitting as a single judge of the High Court *in Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36 at 36–7 (also reported as *Re Federal Commissioner of Taxation; Ex parte Australena Investments Pty Ltd* (1983) 50 ALR 577 at 578);
>
> (2) the Privy Council in *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1293; and
>
> (3) the Full Court in *Bidjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation* (2001) 106 FCR 203 at [21] (citing a quote from *Wang*).
>
> 23. The passage from *Thornton* is an authoritative statement of the appropriate test to be applied in deciding whether or not a delay by an administrative decision-maker is reasonable for the purposes of a statute that does not provide a specific indication of when a decision is required to be made. All parties in the appeal were agreed that the

Thornton test was appropriate to apply here.

57 The issue that arises for determination on the current application is whether relief is founded upon the appellant's allegation that the Minister in this proceeding has not complied with an order of the Court that has not been stayed. The Minister submits that there are three discrete time periods by which to assess whether the time taken for the Minister to determine the appellant's SHEV visa application is reasonable:

(1) the period between the Full Court's order (26 November 2021) and the dismissal of the Minister's special leave application (5 May 2022);

(2) the period between the Minister's special leave application (5 May 2022) and the Australian federal election (21 May 2022);

(3) the period following the Australian federal election (21 May 2022) to present day.

58 However, care needs to be taken when considering the evidence by reference to these periods. The assessment must be by reference to all that has transpired since the 26 November 2021 order and where the duty of the Minister is considered not by reference to the specific acts or omissions taken by individuals holding the position from time to time. For this reason, my consideration will proceed by reference to the period between the Full Court's order and the dismissal of the Minister's special leave application and the period from 5 May 2022 to the present day.

59 Once a delay is established which calls for explanation, then the persuasive onus might shift to the Minister to establish what that explanation was: *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27; 268 FCR 424 at [59].

The time between the Full Court's order and the dismissal of the Minister's special leave application

60 The evidence revealed that after the making of the Full Court's order, on 15 December 2021, the Protection Visa Assurance Section referred the appellant's case to the Complex and Controversial Cases Section for character consideration. The evidence was that the referral noted that the application was on an "indicatively positive pathway", which meant that the other criteria in relation to the appellant's SHEV application were satisfied pending character assessment. Also on 15 December 2021, the Complex and Controversial Cases Section advised that a client brief was being prepared and that any referral would require further consideration due to ongoing litigation. On the same day, the Department provided a client brief to the Minister for Home Affairs recommending that no further decision be made with respect to the

appellant's application, pending the finalisation of the forthcoming application for special leave to the High Court. No further steps were taken to progress the appellant's visa application until after the Minister's special leave application was dismissed on 5 May 2022.

61 For the reasons which follow, I accept that the Minister may justify delay where he or she is exhausting his or her rights of appellate review.

62 Previous authorities have recognised that reasonable time may include the time for a High Court application to be determined. In ***Thornton*** *v Repatriation Commission* (1981) 52 FLR 285; 35 ALR 485, in the context of the respondent Commission having deferred making a decision on the applicant's application pending the handing down by the High Court of a decision, Fisher J held at 291:

> In my opinion the reasonableness of the delay on the part of the Commission is a matter for objective determination, the question being whether a reasonable man acting in good faith could consider the decision to delay until the High Court hands down its judgment as appropriate or justified in the circumstances, or whether it was capricious and irrational.

63 In that case, the applicant contended that the delay was unreasonable because "the Commission was not entitled to wait on the decision of the High Court but was obliged to act on the view of the law laid down by the Full Court of the Federal Court" (at 291). The Court rejected that argument at 292:

> The question is whether there are circumstances which a reasonable man might consider render this delay justified and not capricious. In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity. Moreover, it is a delay for a finite and not an indefinite period. Admittedly it is uncertain when the High Court will hand down its decision, but one is not entitled to assume that there will be any excessive delay.

64 The test in *Thornton* has been applied by this Court on numerous occasions in the context of decisions under s 65 of the Act: *ASP15* at [23] per Robertson, Griffiths and Bromwich JJ; *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108; 279 FCR 1 at [176] per O'Callaghan and Steward JJ; *Davis v Military Rehabilitation and Compensation Commission* [2021] FCA 1446; 174 ALD 166 at [18] per Logan J; *DFE16 v Minister for Home Affairs* [2021] FCA 1151 at [69] per Nicholas J.

65 There is however authority to the converse. In ***BFW20*** *by his Litigation Representative BFW20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 562 per Colvin J, which was an appeal from the decision in ***BAL19*** *v Minister for Home Affairs* [2019] FCA 2189 per Rares J, the Minister had deferred making a decision on the

applicant's application for a visa until the appeal from *BAL19* had been determined. The applicant sought a writ of mandamus requiring the Minister to make a decision.

66 In *BFW20*, Colvin J stated, at [62] – [63]:

> 62. The sequence of events that have caused the applicant to be pressing for the consideration of his application at this time do not alter the law now to be applied. At this time, that law is determined by whether *BAL19* is plainly wrong. **The existence of the appeals does not alter the law that is now required to be administered**. The reasonableness of delays in the consideration of the protection visa application is not to be adjudged by reference to the Minister's view that the decision in *BAL19* is wrong. That is not the state of the law. On a substantive determination of the question (as distinct from a consideration of an appropriate interim position pending any such determination) it is not a matter that could justify the Minister delaying consideration of the application according to law.
>
> 63. What the Minister claims is that the statutory power conferred under the Migration Act could itself justify the Minister taking account of the fact that he is challenging the correctness of a decision as to the law that he is administering. That is a misconception because it seeks to construe the powers conferred by the Act as justifying non-observance of the limits of those powers. If the Court adjudges that *BAL19* is not plainly wrong and should be applied then it is not reasonable for the Minister to delay adjudication of the protection visa application. **The reasonableness of his actions is to be measured by reference to what the law requires him to do.**
>
> (Emphasis added)

67 However, *BFW20* concerned a case where the delay arose not by the Minister seeking to challenge in the High Court the specific decision relating to the applicant but seeking deferral whilst another case, *BAL19*, was being challenged.

68 Relatedly, there is authority to the effect that if the Minister were required to make a decision on the visa application (and not wait until after their special leave application had been decided), that further decision would render a special leave application moot.

69 In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 By His Litigation Representative BFW20A* [2020] FCA 615, the Minister appealed *BFW20* and sought a stay of the orders of Colvin J until the determination of the appeal on the basis that, if the Minister were to make a decision on the applicant's visa application, the subject matter of the appeal would be moot. Besanko J granted the stay and stated, at [20]:

> As I have said, I accept that the subject matter of the appeal will be lost if a stay is not granted. In other words, if the order for a writ of mandamus stands, then the Minister is required to consider the respondent's application for a SHEV without regard to s 501 of the Act. The Minister may be compelled to grant the visa before the appeal is heard. Should the Court on appeal hold that *BAL19* was wrongly decided and that the Minister is able to refuse an application for a protection visa pursuant to s 501(1), then in this case, the Minister would no longer be in a position to do so. At the same time, I accept that the appellants do not suffer prejudice in the same way as, for example, a person with a commercial interest in the outcome of an appeal. Nevertheless, there is an important public interest in the due and proper administration of the Act. It is true that should the appeal be successful, there is a prospect that

> the Minister could cancel, under s 501, any visa granted in the interim in the absence of a stay. But it can be put no higher than a possibility at this stage. Even if counsel for the respondent was taken to have conceded the point (and I am not sure that he did), it is a matter of law about which I am not prepared to express a definite opinion on an application for a stay.

70 However, in *FAK19*, Charlesworth J made a time-limited mandamus order directed to the Tribunal in the context of the Tribunal having deferred making a decision while a special leave application was pending.

71 It is accepted that it is unsatisfactory that the Minister did not seek a stay of the Full Federal Court's orders made on 26 November 2021. It is also accepted that by not doing so, the Minister deprived the appellant of the ability to seek any orders (which may have been favourable to the appellant) at the time of any consideration of a stay application. However, despite that failure, it remains open for the Minister to rely on the fact of its special leave application (and the time it took to be determined) as justifying the absence of activity (and therefore delay) in considering the appellant's application.

72 Accordingly, it is necessary to determine whether the appellant has established that there has been unreasonable delay on the part of Minister to make a decision with respect to his application since 5 May 2022.

The period after the Minister's special leave application (5 May 2022)

73 The Minister relied on the affidavit evidence of Mr Morrish affirmed on 24 May 2022. Whilst Mr Morrish states that he has not had direct involvement in the appellant's present application for a protection visa, Mr Morrish has been actively involved in this matter to the extent that he is the "Clearance & Contact Officer" who provided final clearance for the updated "Detainee Brief" (authored by others) to the Minister as it has been updated variously since 4 June 2020 and is the person who has liaised directly with Ministerial staffers when submitting the briefs to the Minister.

74 Mr Morrish gave evidence that the steps taken since 5 May 2022 included:

> In terms of steps which have been taken since 5 May 2022:
>
> 17.1. On 5 May 2022, an officer from the Department's Legal Group advised officers of my branch that the appellant's visa application should now be progressed.
>
> 17.2. Now produced and shown to me and marked LM-4 is a copy of the email from the Legal Group.
>
> 17.3. On 6 May 2022, Complex and Controversial Cases Section commenced preparing a client brief for the Minister.
>
> 17.4. On 11 May 2022, I emailed the Minister's advisor with a client brief seeking the

Minister's position on whether she would like to make a decision under ss 65 of 501 or [sic] the Act in relation to the appellant, or have a delegate make a decision under s 65 of the Act.

17.5. Now produced and shown to me and marked LM-5 is a copy of my email to the advisor and the client brief dated 11 May 2022 with redactions for claims of legal professional privilege and to remove information relating to an unrelated visa applicant.

17.6. The Minister did not respond to the client brief dated 11 May 2022 before the federal election was held on 21 May 2022.

17.7. On 18 May 2022, the Visa Applicant Character Consideration Unit sent an email to 'WA TPVP Assurance and Protection Visa Assurance' confirming that as there was no new information to consider this case under section 501 the character assessment was considered finalised. This matter was now with Humanitarian Program Operations Branch for further assessment.

17.8. Now produced and shown to me and marked LM-6 is a copy of the email dated 18 May 2022 finalising the Visa Applicant Character Consideration Unit referral.

17.9. On 19 May 2022, I cleared a client brief which was provided to the Minister's office. That brief identified that a further decision under section 65 of the Act could be made by either a delegate or the Minister. It asked the Minister whether she wanted to make a decision, or to leave that to a delegate of the Minister.

17.10. Now produced and shown to me and marked LM-7 is a copy of the client brief dated 19 May 2022, with redactions made for claims of legal professional privilege.

17.11. The Minister did not advise as to whether or not she wanted to make the decision personally before the federal election was held on 21 May 2022. However, the Minister's office emailed me on 20 May 2022 indicating that they agreed to the Department indicating to the appellant that a decision could be made by 31 July 2022.

75 Mr Morrish gave evidence that the election impacted on the usual course by which the Minister would decide to make a decision in character matters in the following way:

The election impacted on the usual course by which the Minister would decide whether to make a decision in character matters.

22.1. There is a regular (usually weekly) meeting between the Character and Cancellation Branch and advisors from the Minister for Home Affairs' office and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs' office. The purpose of this meeting is to discuss matters where a decision may be made under s 501 (1) or s 501 (3) of the Act, and whether one of the Minister's wishes to make a personal decision on any of these matters. I attend this meeting in my capacity as the Assistant Secretary of the Character and Cancellation Branch.

22.2. From 4 to 18 April 2022 I was on leave. On 12 April 2022, Nigel Muir was acting in my position. He emailed advisors from the Minister for Home Affairs' office and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs' office and asked if they wished to drop the weekly meetings and deal with issues on an as needs basis due to the government entering a caretaker period. On 13 April 2022, advisors from both offices agreed to discontinue the weekly meetings.

76 Thereafter, his evidence included that an interim ministry was created which included:

29. On 23 May 2022, an interim Ministry of the Albanese Government was sworn in. In that interim Ministry, the Hon Dr Jim Chalmers MP was sworn in as Treasurer, but also to administer the Department of Treasury, the Department of Home Affairs and the Department of Foreign Affairs and Trade.

77 Just prior to the interim ministry being appointed, on 22 May 2022, he received an all staff email regarding the new arrangements which included an instruction as follows:

> Given the number of pressing matters that the interim Minister will need to deal with in the immediate term, please ensure that only material of the highest priority or material specifically requested by the interim Minister is provided until further notice. In all cases, Divisions should work with their Deputy Secretary or Group Manager and consult with Ministerial and Parliamentary Branch before any material is submitted.

78 At the time of affirming the affidavit (before the appointment of the current Minister for Home Affairs), Mr Morrish stated that he was unable to identify a precise date by which a decision will be made with respect to the appellant's application, stating:

> 38. Given the uncertainties which attend the appointment of a new Minister and the processes which must be completed before a decision is made, I do not believe that I could accurately predict the earliest date by which a decision could be made. If I had to estimate the earliest date by which an expedited decision could be made, I consider it would be 22 July 2022.

79 The Minister did not file any updated evidence after 24 May 2022, particularly after the appointment of the new Minister on 1 June 2022 or after the matter was set down for hearing on 2 June 2022.

80 However, Mr Morrish was asked by Counsel for the Minister at the commencement of his oral evidence as to whether he could give an estimate now as to the time it would take for a decision to be made (by reference to his evidence extracted above) and he stated:

> Certainly, at – the time I gave that estimate was obviously prior to the election being completed. I would – I believe that we may be able to shorten that time period a little, in terms of – the minsters [sic] are now obviously in place, have had some briefings in respect to the operations of the department and, in particular, the character and cancellation branch. And we may be able to constrain that period down to perhaps a three – a four-week period from today's date, for example.

81 To the extent that there was evidence of what steps had been undertaken since the appointment of the new Minister for Home Affairs, that evidence only arose as a result of the appellant having to issue a notice to produce, which uncovered a draft briefing note prepared by a person acting in Mr Morrish's role (whilst he was on a short period of leave between 3 and 8 June 2022).

82 Mr Morrish accepted that once the briefing is cleared by him, it represents "the considered advice of the Department to the Minister".

83 To the extent that there is evidence of the most recent briefing, dated 8 June 2022, it is in draft. There was no evidence from the Minister as to whether it has been drawn to the Minister's attention or when it will be. However, by reason of the consent position put by the Minister's

Counsel, it is accepted that the new Minister will be able to make a decision with respect to the appellant's application by 27 June 2022.

84 For the following reasons, I accept that there has been unreasonable delay since 5 May 2022 in dealing with the appellant's application.

85 I accept the appellant's submission that no distinction should be made between the respective Ministers, the Hon. Karen Andrews MP, the Hon. Dr Jim Chalmers MP and the Hon. Clare O'Neil MP. Regardless of an election and ministerial change, the assessment of the reasonableness of the duties of the Minister (including Acting Ministers) attach to the position, not to the individuals who, from time to time, hold that office: s 19 of the *Acts Interpretation Act 1901* (Cth). However, I do accept that to the extent that there was no person performing the office for a short period and there was a change of government that this must necessarily be taken into account.

86 The evidence revealed that as at 15 December 2021, an employee from the Protection Visa Assurance Branch indicated to the Character and Cancellation Branch that the appellant was on a "indicatively positive pathway" for a SHEV, which Mr Morrish described as meaning that "a decision has been made to have it referred for character assessment". Mr Morrish conceded that save for the cl 790.227 criterion, there was no evidence that any other criteria remained to be considered as part of the appellant's application process.

87 As at 11 May 2022, it is incontrovertible there was a brief ready for the Minister of Home Affairs, which had gone to the Minister's office, and Mr Morrish had informed the Minister's office of the urgency of the matter. However, no response from the Minister was received and no explanation provided.

88 I do not accept that much should be made of the fact that it was open for the brief to have gone to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. Mr Morrish's evidence was that it was ordinary departmental practice to go to the Minister for Home Affairs in the first instance. All previous briefs had gone to the Minister for Home Affairs.

89 Whilst, at no stage did Mr Morrish advise Minister Andrews that she could grant the visa pursuant to s 65, I accept Mr Morrish's explanation that the reason why his briefings concerned cancellation options is because that is what his Branch is concerned with rather than the grant process which is dealt with by another Branch.

90 I note that by 18 May 2022, the Visa Applicant Character Consideration Unit had determined that it would not be taking any further action in this case because of its view that "s501 is not available to us for consideration" as the Minister had "previously considered [the application] under s501 of the Act and there is no new information in the client's circumstances regarding their character".

91 Further, on 19 May 2022, Mr Morrish and his Branch still sought to progress the application, and created a revised "Detainee Brief" which identified two potential options as being available – *first* refusal under s 65 of the Act relying solely on the cl 790.227 criterion and *secondly* to take no further action which would mean that the SHEV application would proceed to a delegate to grant (upon all criteria being met) and the appellant would be released from immigration detention. Again, no response was received by Minister Andrews to this brief.

92 It is relevant to consider the inaction of Minister Andrews in the period between 11 and 19 May 2022 and also on or after 19 May 2022 (when the updated brief was provided) in the context of the continued attempts made by Mr Morrish to bring the matter to the Minister's attention. Mr Morrish gave evidence that he had conversations with the Minister's staff during the period and internal conversations with the Program Branch which led to the updating of the brief on 19 May 2022. He also gave evidence that he spoke with the Minister's staff "about the time pressures [and] urgency required with respect to the matter". In addition, Mr Morrish sought an answer from the Minister's staff with respect to what was contained in the brief and went to the Minister's office twice during the caretaker period.

93 Whilst, I accept the evidence of Mr Morrish that there was still a decision that had to be made as at 19 May 2022 and thereafter (and I make no criticism of his efforts), it is apparent that the Minister failed during this period to attend to making a decision and has provided no justification for the delay.

94 I accept factors such as resourcing constraints on the Minister's office and the complexities of concepts such as "national interest" are relevant. In *AQM18*, Besanko and Thawley JJ held at [56]– [57] and [66]:

> 56. The primary judge also considered it relevant to have regard to the demands associated with the Minister's office and the substantial amount of material he was required to consider in respect of the appellant's matter (approximately 360 pages): at J[68]. His Honour stated at J[68]:
>
> > … It is not to the point that that material had previously been considered by a delegate of the Minister and by the Tribunal. The Minister was exercising his discretion personally and therefore was required to bring an independent

> mind to consideration of whether to exercise his discretion pursuant to s 501A(2). Further, the Minister had to consider whether it was in the national interest to exercise his discretion (s 501A(2)(e)); that criterion did not apply to the Tribunal.
>
> 57. We agree that those matters were relevant to the question of whether the delay was reasonable. The weight to give such matters depends on the particular circumstances.
>
> …
>
> 66. The power is one vested personally in the Minister and can be exercised in limited circumstances. In particular, if the Minister "reasonably suspects" a person does not pass the character test and the person "does not satisfy" the Minister that he or she does, then the Minister may refuse (or cancel) the visa only if he is satisfied that it is in the national interest. The power requires natural justice to be afforded and this requires time sufficient to afford it (on the facts here, until 13 April 2017). The power is one directly connected to considerations of national interest. This might involve complex questions not susceptible of speedy resolution or considerations which affect a series of particular cases. Decisions under s 501A(2) affect individuals, but the power to make such decisions — involving as it does broad questions of national interest — is quite different to the power to make decisions concerned with purely private or commercial matters. It is a power which should be exercised after careful consideration given its potential impact on both national interest and the relevant individual.

95 However, the difficulty here is that despite the very long litigious history of this matter and the fact that the Minister has been on notice of this application since April 2022, the Minister has not put on evidence which satisfactorily explains the delay in making the decision in May 2022 (particularly given the efforts of Mr Morrish). Whilst it is accepted that it is open for the Minister to consider the "national interest" and such a task requires proper consideration, the Minister has put on no evidence as to why the delay thus far is justified and why it could not be done in a timely manner.

96 Lastly, there was limited evidence as to what has occurred regarding the processing of the appellant's application since the new Minister has been appointed. However, there was evidence before the Court that steps have been now taken to update the Detainee Brief and that as of 9 June 2022 it was ready to go to the Minister. In addition, it is notable that the new Minister indicated, through her proposed consent orders at the beginning of the hearing, that she had the ability to make a decision more promptly (by 27 June 2022) than had been suggested by the staff of the previous minister (22 July 2022).

97 Accordingly, it is concluded that there has been *"delay"* in the making of a decision in respect of the protection visa application and that such a delay is "*unreasonable"*. Given this conclusion, it follows that the Court can make an order compelling the Minister to make a decision.

98 Whether or not such an order should be made, nevertheless, involves an exercise of discretion. In the exercise of the Court's discretion, I consider that an order should be made.

99 The Minister has effectively assured the Court that the Minister can and will make an order on or before 27 June 2022. It would be preferable if at all possible the Minister make the decision earlier. This time period appears to constitute a realistic and reasonable assessment of the time which the Minister will need given the evidence of Mr Morrish.

100 Whilst it is accepted that the Minister has provided consent orders to the effect that she will make a decision on or before 27 June 2022, it remains prudent for the Court to nonetheless make such an order in the circumstances. There is a heightened need for the appellant to be given certainty as to when the decision will be made considering the very lengthy period of his detention and the delay and uncertainty in the decision-making processes up until this point. The Court appreciates the very real effects any further delay will have on the appellant but at least now there is absolute certainty as to the outer limit of when the decision will be made.

101 In these circumstances, the Court orders:

(1) Order 2(b) of the orders made on 26 November 2021 requiring the Minister to determine the appellant's application for a Safe Haven Enterprise (Class XE) Subclass 790 visa according to law be made on or before 27 June 2022.

(2) The respondent pay the appellant's costs of and incidental to the interlocutory application filed 10 April 2022 and as amended on 2 June 2022, as agreed or taxed.

(3) The determination of the basis upon which the costs are payable under Order 2 be stood over to a date to be fixed in the event that the parties are unable to reach agreement.

(4) The appellant's interlocutory application filed 10 April 2022 and as amended on 2 June 2022 stand over to a date to be fixed.

(5) There be liberty to apply on 2 days' notice in writing.

I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Raper.

Associate:

Dated: 15 June 2022