[2023] HCATrans 111

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No M20 of 2023

B e t w e e n -

MOUNIB ISMAIL

Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Defendant

GAGELER J
GORDON J
EDELMAN J
GLEESON J
JAGOT J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON WEDNESDAY, 6 SEPTEMBER 2023, AT 10.02 AM

MR D.J. HOOKE, SC: May it please the Court, I appear with my learned friends, **MR J.D. DONNELLY** and **MR J.R. MURPHY** for the plaintiff. (instructed by Zarifi Lawyers)

MR R.C. KNOWLES, KC: Your Honour, if it pleases the Court, I appear with my learned friend **MR N.D.J. SWAN** for the defendant. (instructed by Australian Government Solicitor)

GAGELER J: Mr Hooke.

MR HOOKE: Thank you, your Honour.

GAGELER J: Mr Hooke, I should say you sought orders by consent concerning the amendment of the application. Those orders are made.

MR HOOKE: May it please the Court. As your Honours know, the plaintiff moves on the amended application filed on 1 September. In support of that application on the substantive matter, we read the affidavit of Ziaullah Zarifi made on 27 March 2023, and the affidavit of the plaintiff made on 3 May 2023, and the affidavit of Halima Chakik made on 28 June 2023.

We also require an extension of time under section 486A of the *Migration Act*. In support of that application, or aspect of the application, we read the affidavit of Ziaullah Zarifi of 3 May 2023 and that of the plaintiff of the same date. We have addressed the application for extension of time in our written submissions, and as we apprehend the position of the defendant, it is not opposed, although not the subject of expressed consent. Unless there is anything that the Court wishes me to address, we would rely on our written submissions in relation to the extension of time.

Could I, before taking your Honours to the grounds, ask your Honours to take up very briefly the *Migration Act,* which is in volume 1 of the joint book of authorities, and if I could ask your Honours first to go to section 501, which is at page 18. The power here engaged is in subsection (1):

> The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

The discretion reposed in the power is unfettered, subject to what comes. At subsection (6) your Honours see the character test and at subsection (7), relevantly here:

> A person has a ***substantial criminal record*** if –

Relevantly, paragraph (d):

> the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more –

Section 499, with which your Honours are well familiar, permits the Minister to:

> give written directions to a person or body having functions or powers under this Act –

but does not empower by subsection (2):

> the Minister to give directions that would be inconsistent with this Act or regulations.

And subsection (2A), of course, requires that:

> A person or body –

Relevantly here, the delegate:

> must comply with a direction under subsection (1).

The direction here, as your Honours know, is Direction 90, to which I will come in addressing the grounds in due course. Could I then invite your Honours to ground 1 which, as your Honours know, is a complaint in relation to the consideration of the primary consideration, the interests of a minor child. The delegate's reasons in relation to that ground are conveniently found at page 56 of the application book, where, having addressed the position of other minor children, the delegate says at paragraph 75:

> I acknowledge that Mr ISMAIL has listed the name Mariam Chakik under minor children in the Personal Circumstances form dated 30 August 2022.

The existence of this child and the contention in relation to her status as a minor requiring consideration under the direction is not only raised in the Personal Circumstances Form but is in the mind of the delegate. Unfortunately, the delegate then continues and says:

> However, Mr ISMAIL has provided no further information regarding this person including their age. Therefore I am unable to determine if there would be any effects on Mariam Chakik –

and then an odd comment:

> if she is indeed a minor child –

As the affidavit of Halima Chakik discloses, there was information readily available and easily obtainable which answered the query at the end of that paragraph:

> if she is indeed a minor child –

in the form of a birth certificate. The delegate had the contact details of Ms Chakik, the child's mother. The delegate was in regular back-and-forth contact with the representative of the plaintiff and indeed with the plaintiff himself. The delegate requested further information from the plaintiff and from the plaintiff's representative in relation to aspects of the matter that were of concern and, in our submission, ought to have raised a query in relation to Mariam, it being something that had, in our submission, obviously been overlooked for the reasons that Ms Chakik deposes to in her affidavit.

GAGELER J: Now, when you say "ought", what is the principle that you are invoking?

MR HOOKE: What we say about that, your Honour, is that the direction mandated consideration of the interests of each minor child who might be affected by the decision. We say the delegate was aware of the existence of this child and of the fact that she was, even on the material in the Personal Circumstances Forms, scanned as it was, a child who had daily contact with the plaintiff.

Those matters standing alone ought to have engaged the delegate's mind on the issue of whether a child in daily contact with the plaintiff would be somebody who would be affected by the decision. We say, first of all that, as a matter of the exercise of the jurisdiction, the delegate was bound to make the inquiry to enable that jurisdiction to be properly discharged.

GAGELER J: Is there an intermediate principle that you rely upon?

MR HOOKE: The principle is that in order to exercise the jurisdiction – I will take your Honours to, perhaps, *Teoh* and *SZIAI*, to explain this, but we say that in order to properly discharge the jurisdiction where a matter, the subject of mandatory consideration, arises on the material before the delegate the failure to place themselves in a position where something is obvious and easily obtainable, or not, involves a constructive failure to exercise jurisdiction in simply ignoring it.

EDELMAN J: Mr Hooke, a similar submission was put before this Court in, I think, *DUA16*, and the way the Court treated that was to say that there is no general duty to inquire or to get information that exists somehow independently of the statute, but that in exercising a power, and one would extrapolate from that also in the performance of a duty, an authority must act reasonably. Is that not really what this amounts to? It cannot really amount to a submission that an authority is required, in the performance of any statute, to do absolutely everything that is necessary and make every possible inquiry for the purposes of discharge of its jurisdiction.

MR HOOKE: We accept that, your Honour, and we do not put the submission as high as having a duty in every case, to chase every rabbit down every burrow. We would not be heard to say that.

GORDON J: Can I test that? Accepting that, when one looks at – and you took us to, I think, page 114 of the book, I assume is the personal circumstances, minor children reference to Mariam being listed. Is that - - -

MR HOOKE: Yes, your Honour.

GORDON J: What does a delegate then do, or a decision-maker then do when, on the next page, they are asked to attach documents:

> **Describe your relationship with each child/ren above, including the role you play in his/her life**

And there is no reference to her in those materials.

MR HOOKE: No, there is not.

GORDON J: Then, just to complete it, that, of course, postdates earlier documents in July. Again, Mr Ismail's own written statement, where there is no reference to this young woman. If you accept it is not an obligation to chase every rabbit down every hole, one then comes back to the facts of this case, and the difficulty is that that is the only reference we have got, and there is no additional material, which is what I think 115 is intending to do, and that is to, in effect, explain the relationship with each of these children.

MR HOOKE: No, your Honour, we accept that there was a deficiency in the information that was provided to the delegate. Indeed, by definition, whenever this question arises, there will be a deficiency in the information that has been provided, otherwise the question does not arise.

GAGELER J: From your answer to Justice Edelman I take it that you accept the burden of showing that the failure to inquire was unreasonable?

MR HOOKE: Yes, and the authorities, I have to say, are a little diverse in terms of the treatment of this ground, whether it is a constructive failure to exercise jurisdiction, whether it is unreasonable, or whether it is a denial of procedural fairness.

GAGELER J: You were going to take us to *Teoh*. In *Teoh* I think it is put in terms of unreasonableness, procedural form of unreasonableness.

MR HOOKE: It is, and then in *SZIAI* it is put more on the basis of a constructive failure to exercise jurisdiction. It may be that in different cases with different facts and different statutory contexts the complexion of the complaint changes. For example, in *Teoh*, it was a failure to obtain information that bore adversely on Mr Teoh's credit and circumstances, so it manifested more as an unreasonable/procedural fairness complaint. In this case, we say it is unreasonable, we say that in its manifestation it also amounts to a constructive failure to exercise the jurisdiction. It is - - -

EDELMAN J: But the jurisdiction is exercised, it is just – I mean, what it boils down to in your submission is just that it is – you say it is exercised unreasonably.

MR HOOKE: Yes, or incompletely.

EDELMAN J: Yes.

MR HOOKE: It is because the delegate never puts themselves in a position to properly discharge what is required under clause 8.3 of the direction. Your Honours have the reference at court book 114. That is the extent of the information that was before the delegate. We say that that must have raised the antennae, and indeed it did because we know that from paragraph 75 of the delegate's reasons.

Your Honours have in the court book – and I do not want to delay trawling through it, but between pages 259 and 278, and also at 106, your Honours have a series of pieces of email and correspondence that passed between the plaintiff, his representative, and the delegate going backwards and forwards. What your Honours will see from that correspondence is, as we say in our written outline, that the process of decision making in this case was an informal one. We do not criticise that. It was a dynamic one in which, as I said earlier, the delegate was making requests for information where more information was required. It would have been a very simple matter to include in one of those requests, or indeed, to make a separate request for some further information about Mariam.

What we know from Ms Chakik's affidavit is that there was information available. The birth certificate which established that she was a minor child, despite the reservation expressed in paragraph 75, and also it is open to the Court to infer, and we would submit that the Court would infer, that that inquiry would also have prompted some further information about the relationship between the plaintiff and Mariam, which is also set in Ms Chakik's affidavit. That, then, would have put Mariam in a position where her interests could be considered by the delegate in the manner envisaged and required by clause 8.3 of the direction. We say that not to take that simple step was unreasonable in all of the circumstances.

GLEESON J: Mr Hooke, just going back to appeal book 114, was there evidence that Mariam is within "your minor children (including biological children, adopted children, or step-children)"?

MR HOOKE: Is there evidence?

GLEESON J: Yes.

MR HOOKE: Yes. It is in Ms Chakik's affidavit.

GLEESON J: But is it that she is a stepchild or an adopted child? The evidence is that she is not a biological child.

MR HOOKE: No, she is not. She is the sister-in-law's child, that is the sister of the plaintiff's partner. She does not fit in to those categories, and nor indeed do the other two children who are mentioned on page 114.

GLEESON J: One of the inquiries that the delegate might have made was the provision of information to support her position as a biological, adopted, or step child?

MR HOOKE: Yes, although, interestingly, the form does not conform with the inquiry that is mandated by the direction, because the direction does not limit the minor children whose interests are required to be considered to - - -

GLEESON J: I think it does, because there is a provision on page 116 for other minor children.

MR HOOKE: Your Honour is quite right, yes. It is plain that the completion of the form in that respect does not marry up with the query at the head of the table on that page. One might, of course, as your Honour says, expect that the delegate might have raised that as a question, but it is just another factor that we say would aid in the proposition that it was unreasonable not to make some further inquiry.

GORDON J: I was going to ask another question about that, because on 117, in relation to those non-listed children, it says:

> Described in the attached documentation in my –

I assume it is:

> immi account and in statement from –

Do you know what that actually says?

MR HOOKE: Your Honour, we do not. I suspect, though, that it is Halima Chakik, which is - - -

GORDON J: I see, thank you.

MR HOOKE: - - - the mother of those three children identified at 114.

GORDON J: Thank you.

GAGELER J: Another strand of your argument on ground 1 is the fact that it has complied with Direction 90, or at least that is how it would be as in writing. Is that really a different point?

MR HOOKE: I am sorry, your Honour?

GAGELER J: Is it a different point from the failure to inquire?

MR HOOKE: No, it is not in reality. It really is a - - -

GAGELER J: It is either an unreasonableness ground or not, as you put it.

MR HOOKE: Not entirely, because we say that – and perhaps this feeds into the unreasonableness, but we say that the delegate cannot have done that which was required by clause 8.3 without having made the inquiry. We say that the inquiry should have been made, but we say, independently, that in failing to do so, the delegate failed to comply with 8.3. They are definitely interrelated, but one perhaps focuses more on the unreasonableness, the other perhaps focuses more on the constructive failure to exercise the jurisdiction.

GAGELER J: Thank you.

MR HOOKE: They do run together but – could I take your Honours briefly to the authorities. If your Honours have volume 2 of the book of authorities, the first is *Minister for Immigration v Teoh* 183 CLR 273, which is at tab 4 of volume 2. If your Honours would go to page 48 of the joint book of authorities, page 289 of the report, towards the foot of 289 about six lines up in the reasons of Chief Justice Mason and Justice Deane, their Honours say:

> In *Videto v Minister for Immigration and Ethnic Affairs*, Toohey J, after observing that "[a]s a broad proposition, I do not think that the Act imposes an obligation on a decision-maker to initiate inquiries", went on to indicate that in some situations such an obligation might arise. In *Prasad v Minister for Immigration and Ethnic Affairs*, Wilcox J, with reference to s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), said –

And their Honours set out a well-known passage from *Prasad* which I will not read to your Honours. Their Honours continued:

> His Honour went on to express a tentative preference for the intermediate position –

That being that:

> the court is entitled to consider those facts which were known to the decision-maker, actually or constructively, together only with such additional facts as the decision-maker would have learned but for any unreasonable conduct by him.

Their Honours continued:

> Just as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course.

Their Honours then express at least a tentative acceptance of the correctness of that approach in an appropriate case. The topic was picked up then in *SZIAI* which is in volume 3 of the joint bundle at tab 19, starting at page 440 of the book.

GAGELER J: Can we get the Commonwealth Law Report references as well, please?

MR HOOKE: Yes, your Honour. I do not believe it is in the Commonwealth Law Reports, your Honour. It is *SZIAI* - - -

GAGELER J: You are right, this is ALJR, yes.

MR HOOKE: It is 83 ALJR 1123.

GAGELER J: Thank you.

EDELMAN J: Which tab is that one, sorry?

MR HOOKE: Tab 19, your Honour.

EDELMAN J: Thank you.

MR HOOKE: Before coming to the expression of the principle in relation to inquiry, the reasons of the plurality at paragraph [18] on page 444 of the bundle emphasise that in this case proceedings before the Tribunal we would say a fortiori at least as much in the case of a delegate making a decision in the first instance:

> proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word "inquisitorial" has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is not itself a contradictor to the cause of the applicant for review.

Skipping the next sentence:

> The relevant ordinary meaning of "inquisitorial" is "having or exercising the function of an inquisitor", that is to say, "one whose official duty it is to inquire, examine or investigate". As applied to the Tribunal "inquisitorial" does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the *Migration Act.* The core function, in the words of section 414 of the Act, is to "review the decision" which is the subject of a valid application –

Here, of course, the core function is that in 501(1). Over the page at paragraph [25], having addressed *Prasad* and *Teoh*, the plurality said:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question

> whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.

Their Honours say there are two reasons for that, and it is perhaps important to distinguish why they do not arise in this case. The first reason in paragraph [26] is:

> there was nothing on the record to indicate that any further inquiry by the Tribunal, directed to the authenticity of the certificates, could have yielded a useful result.

That is not this case, because we know from Ms Chakik's affidavit that there was readily available information that would have been yielded by the most cursory of inquiries, frankly. At the top of the right-hand column, on 1129:

> The second reason is that the response made by SZIAI's solicitors to the Tribunal's letter . . . itself indicated the futility of further inquiry.

And that is not this case either, for the reason that I have just explained. That is why, in answer to the question Justice Edelman raised with me earlier and in discussion with Justice Gageler, we put it as a matter of unreasonableness, but we also couch it in terms of a constructive failure to exercise jurisdiction. That is the way that the deficiency that resulted from the unreasonable failure was characterised by the plurality in *SZIAI*.

EDELMAN J: Is not your alternative way, though, of characterising it, consistently with *SZIAI*, to put the bar in this case higher than your primary way? In other words, if 8.3 is interpreted consistently with the usual process of interpretation that the determination about cancellation or refusal under section 501 needs to be undertaken in a reasonable way consistently with *Teoh* then a conclusion that it was undertaken in a reasonable way would necessarily, would it not, mean that the jurisdiction had been exercised, or the process properly undertaken? In other words, it is one thing to say that an application of 8.3(1) is unreasonable and it seems at the moment, to me, that it is a much higher burden to say, well, there was no application of 8.3 at all.

MR HOOKE: Your Honour is probably right, and it is for that reason that we bifurcate ground 1 and either limb of it is sufficient for us to succeed.

EDELMAN J: Yes.

MR HOOKE: We put the argument in both ways, and I accept that, to a degree, they travel one with the other. But it really is, I suppose, a question of what the consequence of the unreasonable failure to inquire is and whether that is a matter of legal unreasonableness or whether it goes to the exercise of jurisdiction per se.

GLEESON J: The critical fact must be more than that the child was affected by the decision, must it not?

MR HOOKE: Yes, in that it – well, the critical fact is – for the delegate's determination is, first of all, whether there is a minor child who is affected by the decision, or might be affected by the decision, and if there is, which we know there is, whether the interests of that child weigh in favour of the grant of a visa or against it, or whether it is neutral.

But either way, or in any of those three instances, the delegate has to make a decision and to do it in a circumstance in which the delegate knows that there is a representation about a minor child there and simply makes no inquiry, shuts their eyes to it, and somewhat glibly dismisses it on the basis that, well, maybe they are not even a minor child despite the clear representation that they were at 114 of the court book, we say is unreasonable and fails to engage with the question required under 8.3.

Could I then take your Honours to *Uelese*, which is in volume 2 of the court book at tab 5, it starts at page 82 of the book of authorities. It is at 256 CLR 203. What is said by the plurality in *Uelese* goes a long way to answering the approach of the Minister to this ground, which is basically to say, well, it was a matter for the plaintiff to put up his case, and if there were deficiencies in it then he lives with that outcome. It picks up on the same concepts that were dealt with by the Court in paragraph 18 of *SZIAI*, and at page 221 of the report, paragraph 61, in dealing with a similar submission the plurality said:

> Counsel for the Minister developed a submission that the interests of the appellant's two youngest children were not "relevant" to the Tribunal's review within the meaning of cl 7(1)(a) of Direction 55. It was said that because the appellant had not included their interests in the case he sought to present to the Tribunal, their interests were not relevant. This submission should be rejected for a number of reasons. First, it depends upon a misreading of cl 7(1)(a) of

> Direction 55: the best interests of an applicant's minor children in Australia are "relevant" if such children exist and that fact is known to the Tribunal.

That, of course, in the context of minor children, albeit not a biological or adopted child of the plaintiff is this case. Their Honours continued:

> Secondly, the Minister's submission seeks to import into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading. That approach is inappropriate to the kind of review undertaken by the Tribunal.

A fortiori here:

> In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, this Court cautioned against transposing the language and mindset of adversarial litigation to inquisitorial decision-making of the kind authorised by s 500 of the Act. It is true, as the Full Court of the Federal Court rightly observed in *Jagroop*, that both s 500 of the Act and the AAT Act "contemplate participation by both the applicant and the Minister in the [Tribunal] hearing". Section 500(6H) expressly contemplates that the applicant will present a "case"; and it is implicit that the Minister will also present a "case". That having been said, it would be to give undue weight to conceptions drawn from adversarial litigation to accept that the Tribunal was not required to take into account the interests of the appellant's two youngest children because he had not sought to advance their interests as a positive part of his case.
>
> Whether or not the appellant sought to make the interests of those children a positive aspect of his case, the Tribunal was obliged by s 499 of the Act and the terms of Direction 55 to take into account the interests of any minor children of which it was aware in determining his application for review. By virtue of s 499 and Direction 55, one of the primary considerations for the Tribunal concerned the interests of children who were not themselves represented in the proceedings before the Tribunal. The requirement of cl 9.3 of Direction 55 to consider the best interests of minor children in Australia affected by the decision is imposed on decision-makers in terms which are not dependent on whether an applicant for review argues that those interests are relevant as part of his or her "case".

Over the page, halfway down paragraph 65, their Honours continue:

> The Minister argued that the paucity of evidence about the appellant's two youngest children in consequence of the way the appellant's case was presented meant that the Tribunal could not be satisfied one way or the other as to where the best interests of the appellant's children lay. This aspect of the Minister's argument must also be rejected.
>
> It is apparent that the paucity of evidence referred to in the last sentence of the passage from the reasons of the Tribunal cited above was not due to the unavailability of material evidence. The Tribunal not only declined to act upon the information which was put before it by Ms Fatai, but it also failed to make even the most cursory inquiry to follow up on this information.

The information that was put before it, or sought to be put before it, by Ms Fatai, in that case, was information that had been served on the Minister inside the time required by section 500(6H) of the Act. The Tribunal determined in those circumstances that it would soldier on but not receive the evidence.

What is plain, though, in our submission, from that passage is that the plurality had in mind that where a like situation arose as here, and where there was a simple and easy means of inquiry, in this case, through open and responsive lines of communication with both the plaintiff and his representative, that sort of basic inquiry was required to be made. If there is no answer to the obligation to consider the interests of that child, there was a paucity of information on the material at that time before the decision-maker. We say the same operates here.

The authorities were, on this issue, uniquely drawn together by Justice Nettle in *Wei v Minister* 257 CLR 22, which is in the same volume, volume 2, of the joint book at tab 6, at page 135 of the book of authorities, page 39 of the report. In paragraph 49, his Honour said, having dealt with other aspects of the case:

> It does not follow, however, that there is nothing which can be done for the plaintiff. In *Prasad v Minister for Immigration and Ethnic Affairs*, Wilcox J held that, although it is not enough to establish jurisdictional error on the part of an administrative decision-maker that the court may consider that the sounder course for the decision-maker would have been to make further inquiries, where it is obvious that material is readily available which is centrally relevant to the decision to be made, and the decision-maker proceeds to make the decision without obtaining that information, the decision may be regarded as so unreasonable as to be beyond jurisdiction.

So, there is the unreasonableness aspect –

> In *Ex parte Helena Valley/Boya Association (Inc)*, Ipp J, sitting as a member of the Full Court of the Supreme Court of Western Australia, applied Wilcox J's reasoning in *Prasad* in order to conclude that a local council had failed properly to apply its mind to the question which needed to be decided in determining whether to approve a planning application. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J expressly approved of Wilcox J's reasoning in *Prasad* and of its application in appropriate cases. And in *Minister for Immigration and Citizenship v Le*, Kenny J surveyed the course of authority following *Prasad* and held that it was legally unreasonable for the Migration Review Tribunal to fail to make an obvious inquiry. Based on those decisions, in *Minister for Immigration and Citizenship v SZIAI*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ similarly concluded that there may be circumstances in which a merits reviewer's failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, can be seen to supply a sufficient link to the outcome of review to constitute a constructive failure to exercise jurisdiction.

So, there is the constructive failure to exercise jurisdiction aspect. It is for that reason that we say that the authorities sort of move between different labels for perhaps the same complaint.

GAGELER J: Is it said on either side that section 501D and Regulation 2.53 of the Migration Regulations have any bearing on this issue?

MR HOOKE: Could I take your Honour's question on notice?

GAGELER J: Yes.

MR HOOKE: We are not aware that the Minister says that it - - -

GAGELER J: The question arises from the first page of the form containing the relevant personal circumstances, page 109. That gives you the statutory framework for the provision of this information. If we are talking in terms of failure to exercise jurisdiction those provisions may be of some relevance. But you can possibly take that on notice.

MR HOOKE: I will take that on notice, if I may, your Honour. Your Honour, I apprehend that there is no – just looking at the context in which those provisions arose, there is no doubt in the power of the delegate

to seek and obtain information as they see necessary. That would be the statutory basis of the power that we say ought to have been exercised and was, in respect of different issues.

I have already addressed the nature of the decision-making process that was being undertaken, and the interactions between the delegate and the plaintiff and its representative, which is picked up at paragraph 8 of our oral outline, and also at paragraph 9, which deals with the material that we say would have been unearthed by the making of any inquiry.

I should say clearly that it is part of our submission that, had an inquiry even been made as to the date of birth and, to pick up Justice Gleeson's point, also of parentage of Mariam, it is probable that – having regard to the representation that the plaintiff had, that the inquiry, even limited to those matters, would have provoked a response from the plaintiff, certainly from his representative, that engaged with the nature of the relationship as well. We say it is a very small step to take the hint from the inquiry about the age of the child to recognise that there was a deficiency in relation to the material concerning the nature and extent of the relationship.

We say that – as indeed has occurred in relation to the evidence in this Court, in response to the delegate's decision, that an inquiry from the delegate would have provoked a similar response and a more fulsome one than simply the date of birth. The Minister takes a materiality point in relation to this ground. In our submission, it could not be gainsaid that the interests of a minor child, being a primary consideration under the direction assuming a finding, that the child's best interests favoured the grant of a visa when weighed into the complex of matters in a case such as this could have led to a different outcome.

We know that there were a number of children who were considered by the delegate. In our submission, it would be to impose a level of artificiality on the holistic nature of the decision-making process under this provision to suppose that a delegate might not have come to a different conclusion had they considered the interests of yet another child whose interests were affected by the decision.

Your Honours, could I then turn to ground 2? Ground 2 concerns what we say is an unreasonable double-counting or double-weighting of the issue of family violence. This ground involves a closer attention to the decision of the delegate. I would ask your Honours to take up that decision, starting at page 43 of the Court book. By way of background, at paragraph 5, your Honours see that the reason that the delegate is not satisfied that the plaintiff passed the character test was two suspended

sentences of imprisonment for driving whilst disqualified. Over the page, at paragraph 11, the delegate says that:

> As required by the Direction, I have taken into account the following matters as primary considerations –

and sets out the format as the subject of clauses 8.1, 8.2, 8.3 and 8.4. The delegate then turns, at paragraph 13, to the protection of the Australian community under clause 8.1. At paragraph 15, the delegate considers "Nature and seriousness of conduct" and says:

> The Direction indicates that acts of family violence, regardless of whether there is a conviction . . . are viewed very seriously by the Australian Government and the Australian community.

Your Honours will notice that the seriousness with which those matters are viewed by the Australian Government are again picked up in 8.2 and by the Australian community in 8.4. At paragraph 16 and following there is a discussion of the facts of the domestic – family violence offending. At paragraph 18 your Honours see about five lines down that the plaintiff:

> is stated to have pushed or grabbed the left arm of the victim. Mr ISMAIL let go . . . both parties sat down inside the house and continued their conversation . . . the argument continued to escalate with Mr ISMAIL standing over the victim. The victim . . . walked into the bathroom where she began crying and Mr ISMAIL is stated to have attempted to comfort the victim.

And she then left the premises "without further issue". That is the first event. The second one is at paragraph 21. She was having a meeting at a house they were building:

> the architect and plumbers . . . Mr ISMAIL appeared from inside the house and approached her yelling and screaming profanities. He walked up to the victim, bridging up with his face about ten centimetres from hers.

Over the page at 22 the delegate concludes:

> I find these offences to be acts of family violence and therefore viewed as very serious –

There is then a discussion of the other offences, all of which were traffic offences. At 31, at the conclusion of 31, there was an issue about the completion of an arrivals card, but the finding is that he did not:

> intentionally provide false or misleading information to the Department –

At 32:

> I find that there has been a frequency to Mr ISMAIL's offending. I find that while some of his offences are very serious and other are not as serious, cumulatively I find that they have had an impact on the community and, when viewed in totality, display a disregard for Australian laws and amount to very serious offending.

Then at 33:

> Therefore, I find Mr ISMAIL's offending conduct to be very serious in nature. I have attributed this consideration significant weight for refusal of Mr ISMAIL's visa application.

Curiously, that is a limb which feeds into the consideration of the protection of the community when married together with the next section which deals with the risk to the community, but the delegate seems to have regarded it as something requiring independent weighting in paragraph 33. At 34 the delegate turns to the second limb of 8.1, the risk to the Australian community, and finds that, unsurprisingly, if there were future offending of a family violence nature it would have the potential to cause harm to members of the community.

Over the page at paragraph 40 through to 42 the delegate deals with remorse and rehabilitation and at 43 deals with Ms Heba Chakik's position, both as his partner and as victim, and your Honours see what she had to say in paragraph 43. At 45 she and her family are regarded as a positive factor in his rehabilitation. At 48 it is recorded that the plaintiff:

> never wants to be in a position again where his Australian visa is impacted.

At 49 the delegate says:

> While I accept that Mr ISMAIL may have ceased his involvement in criminal activities in the last two years, when considering his overall criminal history which spans some ten years and included sentences of imprisonment, I note that Mr ISMAIL has had periods of time in the past where he has refrained from offending only to be involved in further more serious offending some years later.

Now, that of course is a reference to the traffic offences which were then followed by the family violence offences. It is not as though, despite the

impression one might get from paragraph 49, he was involved in a criminal milieu with escalating criminal behaviour. The conclusion then follows:

> the nature and seriousness of Mr ISMAIL's conduct is very serious –

There were:

> a number of factors that may have contributed in part to Mr ISMAIL's offending behaviour . . . Mr ISMAIL has shown some insight and taken some thought towards rehabilitation.

But:

> I have found that on balance there remains a likelihood that Mr ISMAIL will reoffend.

At 52:

> Considering the nature and seriousness of Mr ISMAIL's conduct, the potential harm to the Australian community should the non-citizen commit further offences or engage in other serious conduct, and taking into account the likelihood of Mr ISMAIL reoffending, I consider that the need to protect the Australian community from criminal or other serious conduct weighs significantly in favour of visa refusal in this case.

So, within that single consideration there are two points at which the delegate gives the family violence aspect negative weight. It may be that what was intended was to fold paragraph 33 into paragraph 52, but that is not what the delegate says. At paragraph 53 the delegate turns to the consideration in clause 8.2 of the direction, that is "Family violence conduct". The delegate says at 53:

> The Direction also requires decision-makers to consider, as a primary consideration, any family violence committed by a non-citizen with an application for a visa. In this regard, the Direction states that the Government has serious concerns about non-citizens who engage in family violence being given the privilege of entering or remaining in Australia.

Your Honours will recall the same attribution of concern to the government at paragraph 15 of the reasons in considering protection of the community under clause 8.1. At 58, the delegate finds, uncontroversially, that the plaintiff has engaged in conduct constituting family violence as defined in the direction, then considers the conduct and reviews again the statement of Ms Heba Chakik at paragraph 62, and traverses matters of remorse and

rehabilitation at paragraph 63 and 64. The delegate observes at paragraph 65 that:

> There is no evidence before me which indicates that Mr ISMAIL has engaged in any further acts of family violence since 23 November 2020, an I note that the enforceable ADVO expire on 31 August 2022 with no further breaches –

Then, concluding on 8.2, the delegate says at paragraph 66:

> The Direction makes it clear that the problem of family violence is regarded very seriously by the Australian Government and the community –

Again, hark back to paragraph 15 –

> but also states that '*the Australian Government's concerns regarding this consideration are proportionate to the seriousness of the family violence engaged in by the non-citizen*'.

At 67, the delegate says:

> Bearing this in mind, together with the above information concerning Mr ISMAIL's specific conduct, I find that the family violence in this case should be regarded as serious. Accordingly, I have attributed this consideration significant weight in refusing Mr ISMAIL's visa application.

So, that is an aspect, in our submission, of at least the second, if not the third, occasion on which the family violence offending has been brought to account in a significant way by the delegate, and this becomes relevant in relation to ground 3. The Minister describes the purpose of 8.2 and the finding at 67 as being to give weight to the conduct in its own right. Whatever that might mean. We will return to that in relation to ground 3 in due course, but where - - -

GAGELER J: Mr Hooke, when you speak in due course, your original estimate was an hour and a half in oral submissions. Are we getting through this?

MR HOOKE: Perhaps I will deal with ground 3 as we are here. We say that the nature of the conduct itself assumes significance in two ways under the direction. One is as a matter of protection of the community which is taken up under clause 8.1, the other is in relation to the expectations of the community arising from the conduct. It is uncontroversial that the same

facts can bear upon different considerations viewed through different lenses with different perspectives.

But we submit that there is no legitimate purpose disclosed by 8.2, unless it be tied back to either the protection of the community or the community's expectations, and if it be the case that 8.2 really attaches to one or the other of those then it is a clear case of double counting, not for the legitimate purpose of looking at things through different prisms for different purposes but simply to add weight for weight's sake. We submit that that is impermissible, either because it involves some undisclosed but irrelevant consideration or because – as the delegate's finding at 67 reveals, in our submission, because the inquiry is entirely backward-looking, so, we would submit, not protective in nature.

It involves a punitive purpose which is impermissible, in our submission, in the context of administrative decision-making and would offend the separation of powers. It is for that reason, we say, that if it be the case, as the Minister seems to submit in this Court, that 8.2 attaches weight to past conduct in its own right, to use the Minister's words, then we say that that is punitive and impermissible, and that 8.2 is, for that reason, invalid.

If it be otherwise valid, we say that it involves an irrelevant consideration and causes the discretion under 501(1) to miscarry. The delegate at paragraph 76 turns then to clause 8.4, the "Expectations of the Australian community". Your Honours - - -

EDELMAN J: Sorry, Mr Hooke, just trying to understand your ground 3. If you are right that Direction 8.2 is invalid because it is effectively a direction to engage in punitive conduct and could not be so authorised by 499 of the Act, that would not necessarily invalidate the decision, would it? All it would do is it would just say the decision, by reference to a concern of family violence, needs to be related back to the broad considerations that the Act permits regard to be had to.

MR HOOKE: Yes, subject to the unreasonableness, in our submission, of counting it again simply for the sake of it. Part of what we say in relation to ground 2 – and this is where the two grounds are opposite sides of the same coin in a sense, part of what we say in relation to ground 2, and we do not understand the Minister to contend otherwise, is that 8.2 does not, in fact, attach back to protection or community expectations. The Minister's submissions, as we understand them, contend that 8.2 requires that the fact of family violence be given weight in its own right.

GORDON J: Just so I understand that, is it your contention that 8.2 does not permit reference back? I thought you were saying you wanted reference back.

MR HOOKE: We say under ground 2 that, if it is to be read as not having the punitive aspects that we say, in the alternative under ground 3, that it does, then we say it must then attach to either protection or expectations. And that, in so doing, what it does – if slavishly applied as the delegate seems to have done here, what it does is to unreasonably attribute weight to the same facts for the same purpose on multiple occasions. That is, if it attaches to protection, then it is already taken up in 8.1, so it effectively double-counts in respect of protection. If it attaches to expectations of the community, that is already in terms taken up in clause 8.4, and so it has the same effect under clause 8.4 of double-counting.

GLEESON J: But why is it that the Minister cannot simply express a value as an inherit value that does not need to be tested by reference to consequences and say this is a value that we are going to identify, which is that we do not welcome people who engage in family violence. And it does not require testing of whether people are injured, it does not require testing of whether it makes people in the community feel nervous. It is just a value that we are going to apply.

MR HOOKE: Your Honour, if it stood alone and did that purpose, then it may be a permissible exercise of the direction-making power. But here those very factors are taken up in 8.1 and taken up in 8.4 in terms. Indeed, in 8.1, as the delegate said at paragraph 15 and on a number of other occasions in dealing with 8.1, it is a concern of the Government that this conduct should not occur. That expression is already found in terms in 8.1 and it is found in terms again in 8.4.

GORDON J: Do you accept that the considerations and matters that that are required to be considered overlap? What is the complaint then? You want to overlap but you do not want to overlap in a way which constrains the way in which they do the overlapping. It is apparent they overlap. You can see that in the way in which the delegate themselves have written the reasons for decision. They are clearly aware of the fact that these things have a multiple – these issues arise in different occasions in different ways and that I am not doing it in a box, I am not doing mechanically, I am trying to recognise that that there is overlap.

MR HOOKE: What we say about that is that it – I think I acknowledged at the outset of addressing this ground, that there is no doubt that matters overlap and can be looked at through different prisms for different purposes, and we accept that. But what we say here is that 8.2 really adds nothing to what is found in 8.1 and 8.4. What it does, in our submission, if

applied as the delegate applied it here, which is almost by rote following the terms of the direction, is it introduces multiple occasions where the same factor is given weight for a purpose for which it has already been directly given weight. We say that that is unreasonable, irrational, illogical.

GAGELER J: Mr Hooke, we normally take a 15-minute adjournment. Have you finished ground 1?

MR HOOKE: Ground 1, yes.

GAGELER J: Ground 2?

MR HOOKE: Almost ground 2, your Honour, yes.

GAGELER J: Almost. We might finish that first and then take the 15-minute adjournment.

MR HOOKE: Thank you, your Honour. In relation to ground 2, to finish it up, could I give your Honours reference, by analogy, to Justice Perram's decision in *Bale v Minister* [2020] FCA 646, it is in volume 3 of the joint book of authorities at page 185, tab 9. I say "by analogy" because there is no authority in point of which we are aware where this consideration has been dealt with in the way in which we have put it.

Justice Perram was dealing with a situation where the complaint was that the delegate had not considered that the interests of the applicant's wife in her capacity also as a victim of her offending. To have been taken into account that she would be adversely affected by the decision as his wife, Justice Perram said, having recounted that background at paragraph 25, at 26:

> I do not accept this argument because whichever way one looks at it, the fact that Mr Bale's wife desired for him to remain in Australia was taken into account by the Tribunal. Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously . . . And, as [54] of the Tribunal's reasons shows, the Tribunal was well-aware that she was one of his victims.
>
> The only way to outflank that problem would be to submit that there was some aspect of the wife's evidence as a victim which was different from her evidence as a spouse. Such evidence might be readily enough imagined . . . It may well be that evidence of that kind would have engaged cl. 14.4(1) independently of cl. 14.2(1)b).

There were similar expressions by the Full Court and the Federal Court in *XXBN v Minister*, which is not in the bundle. I will just give your Honours the reference to it: it is [2022] FCAFC 74, at paragraphs 52 and 53, where Justice Perram's reasons in *Bale* were picked up and applied. What we say, by extension, of what Justice Perram said, is that just as a decision-maker is not required to take into account a matter for more than one purpose because, unless, as his Honours says at paragraph 27, there is a basis for looking at it through a different prism that it really be unreasonable to do so. We say, by extension of reasoning, that is what occurs under our ground 2.

To finish ground 3, could I ask your Honours to take up the decision of the Full Court of the Federal Court in *NMBZ v Minister* which is in volume 3 of the joint book, at tab 22. It is reported at 220 FCR 1, if I could invite your Honours to page 513 of the book, page 40 of the report, in paragraph 192 of Justice Buchanan's reasons:

> If the Minister's decision was to avoid the charge that he was intent on some form of punishment (normally the preserve of the courts) then his assessment of whether the applicant should be granted a visa should also have been directed to some assessment of the consequences for the Australian community if the applicant was granted a visa. Normally, there should be an attempt to assess the likelihood of similar, or other, criminal conduct of the kind which had aroused the Minister's displeasure and provoked the censorious conclusion that the applicant had demonstrated a fundamental disrespect for Australian laws, standards, and authorities. That is because the discretion to be exercised under s 501 is fundamentally forward, rather than backward, looking. It concerns the future, not the past.

Hence our complaint that if clause 8.2 operates for its own sake in its own right in the backward-looking way that the delegate applied it, then, in our submission, the appropriate inference to be drawn is that its purpose – and certainly its effect – in this case was a punitive way and not a legitimate one.

Can I just say briefly on that, the paragraphs that follow in Justice Buchanan go on to deal with the question of deterrence which had been raised by the Minister in that case as a justification for the consideration. That does not arise in this case. The Minister does not submit in this case that clause 8.2 is there for the purpose of deterrence. There is no submission that has been made, at least to this point, to the effect that it has a legitimate purpose in that respect, distinct from that of punishment.

So, when one looks at the following passages of Justice Buchanan and, indeed, in the joint reasons of Chief Justice Allsop and Justice Katzmann at paragraphs 28 to 31, that blurring of the line between deterrence as a legitimate purpose and deterrence as an element of punishment, does not need to trouble your Honours in this case. That deals with ground 3.

GAGELER J: Thank you. Very well. We will take our 15-minute adjournment at this stage.

MR HOOKE: May it please the Court.

AT 11.24 AM SHORT ADJOURNMENT

UPON RESUMING AT 11.39 AM:

MR HOOKE: Thank you, your Honour. Your Honours, ground 4 concerns the final primary consideration, being the expectations of the Australian community. What we say is that, as a matter of principle, consideration of the expectations of the community as explained by clause 8.4 must involve the calibration of the weight to be given to that matter according to the circumstances of the particular visa applicant, and we submit that that did not occur here.

The delegate dealt with this issue at page 56 of the court book at paragraph 76 to 79, and your Honours will see that there is a description of what the direction requires. There is a reference in 77 to the "specified kinds of conduct" engaged in by the plaintiff, relevantly, again, "acts of family violence". The delegate notes that he:

> has engaged in conduct of that nature, I find that he raises serious character concerns and the community expectation described above applied in this case.

Paragraph 78 refers to the expectations applying "regardless" of whether there is:

> a measurable risk of causing physical harm to the Australian community.

At 79:

> I have proceeded on the basis that the Australian community's general expectations about non-citizens, as articulated in the Direction, apply in this case. I have attributed this consideration significant weight in favour of refusal of Mr ISMAIL's visa application.

The reason we say that the individual circumstances of the plaintiff needed to be weighed in the balance here is well-explained by two decisions of the Federal Court, which are in volume 3 of the joint book of authorities. The first is *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396, which is at tab 15 of volume 3, starting at page 302, a decision of Justice Beach.

If your Honours turn to 307 of the joint book of authorities, paragraph 25 of his Honour's reasons, his Honour sets out the passages from the – in this case, the Minister's – reasons for dealing with community expectations. What your Honours will notice in passing is that paragraph 62 of the Minister's reasons in that case, subject to variations to account for the names or visa cancellation or refusal, and the type of offending – paragraph 62 is identical to paragraph 76 of the delegate's reasons in this case.

Paragraph 63 is identical to paragraph 77 of the delegate's reasons in this case; paragraph 64 is identical to the delegate's reasons in paragraph 78 in this case; and paragraph 68, the last four lines are identical to the delegate's reasons in paragraph 79 in this case. The Minister in *Kelly* did refer to matters that might be attributable individually to Mr Kelly, but Justice Beach concluded that he had not taken them into account in ascribing weight to the consideration of the expectations of the community. Indeed, at paragraph 28, Justice Beach observed:

> The Minister then went on to state and accept the following matters, but only after his finding of "significant weight" in [68]. The same obtains here in the structure of the delegate's reasons. The matters personal to the plaintiff in this case commenced at paragraph 83 of the delegate's reasons and followed. If your Honours would then turn to paragraph 97 of Justice Beach's decision at the foot of page 322 of the joint book, his Honour – having discussed the Full Court of the Federal Court's decision in *FYBR* – observed that it:
>
> > establishes that the community expectations consideration does not incorporate all the countervailing factors from the person's specific circumstances.

And that is the submission that the Minister makes in this case, and we do not argue with that. However, his Honour went on to hold that:

> Instead, these individual factors are brought to account when deciding what relative weight to give community expectations.
>
> But the Minister, having found that "the broader Australian community's general expectations . . . apply in this case" (at [68]), then and without any explanation and before anything else (see [69] et seq) immediately states that he "attributed this consideration significant weight against revocation of the cancellation of Mr Kelly's visa".

So too here. At paragraph 100 his Honour continues in the discussion of the personal factors and fact that they had been left out of consideration of the weight to be given to community expectations, made reference to:

> the very serious impact of an adverse decision on him noting his medical diagnosis and inability to travel.

Of course, there are significant parallels in this case, because, as your Honours know, Mr Ismail is presently stateless and stranded in Lebanon, unable to have the follow-up to the surgery performed on his eyes shortly before he departed, for understandable humanitarian reasons, so much so that when last the subject of evidence, he had lost the sight in one eye. So, there were compelling matters in this man's personal circumstances that we say ought to have been weighed into the - - -

GAGELER J: What is this ground? Is it a misconstruction or misapplication of clause 8.4 of the direction? Is that the way you put it?

MR HOOKE: Your Honours, we say that it is an unreasonableness ground, and we also say that it is a failure to comply with the direction, and I will indicate why.

EDELMAN J: But the unreasonableness cannot be unmoored from any specific duty.

MR HOOKE: No, I accept that, your Honour. What we say is that the reading of Direction 90 that Justice Beach favoured, and Justice Bromberg also favoured in *Ali*, which is the next case I want to take your Honours to, is that it brings together clause 8.4 with paragraphs 5.1(2) and 5.2(5), each of which direct the decision-maker to have regard to the individual circumstances of the case in applying the matters in the direction and undertaking the weighing process that is required, and we say that that simply did not happy in this case. As in *Kelly*, as in *Ali*, there was simply a

lurch from a recitation of matters in which seems to be a fairly boilerplate way.

GLEESON J: Is the weighing not at paragraph 115, at 62 of the application book?

MR HOOKE: There is a weighing of the various considerations. But what your Honour will not find in the delegate's treatment of 8.4 – other than by what I described as the "lurch" from the recitation to the attribution of significant weight adverse to the plaintiff – is any consideration of how or why it is that that weight comes to be attached. So, then when it comes to the overall weighing exercise that your Honour refers to at paragraph 115, the well is already poisoned in the sense that there has been an unreasonable, in our submission, attribution of weight in dealing with that primary consideration.

JAGOT J: How does this argument fit with 8.4(4)?

MR HOOKE: It fits very neatly, with respect, your Honour. What 8.4 says is what Justice Beach is dealing with at paragraph 97, and that is that one does not look to the individual circumstances to determine what the expectations of the community would be in an individual case. The expectations of the community are a construct that is deemed to exist. What Justice Beach and Justice Bromberg say in these cases is that rather what is required is that in determining the weight to be attributed to that construct – which exists in the abstract – one has to weigh it according to the circumstances of the individual case. So, it does not go to the content of the expectation. It goes, rather, to the way that one weighs the expectation as a primary consideration.

EDELMAN J: If you are right and there has been a breach of 8.4, is that a jurisdictional error?

MR HOOKE: Yes, your Honour.

EDELMAN J: Is that because 499(2)(a) makes any breach of directions jurisdictional? Or this particular breach?

MR HOOKE: Subject to materiality, we would submit any breach. But we say that where it goes to a mandatory and primary consideration and the way that that is to feed into the exercise of power under 501, it is jurisdictional. Can I give your Honours reference to, also, paragraphs 107 and 108 of Justice Beach? I do not want to read it to your Honours, but it is consistent with what I have taken your Honours to already.

GORDON J: Can I ask one factual question, Mr Hooke, just to clear up one matter? What are we to make of the end of 77 and the cross-reference back to the:

> character concerns and the community expectation described above –

Is that not taking into account his own personal circumstances?

MR HOOKE: No, your Honour, because all that is being taken into account there is the fact and nature of the offending. That operates only to engage 8.4, it does not add any quality or colour to it beyond that.

The other decision I wish to take Your Honours to on this ground is the decision of Justice Bromberg in *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559, which is at tab 8 of volume 3. If your Honours look at page 175 of the joint book of authorities, at paragraph 65 Justice Bromberg sets out the reasons of the Minister for the disposition of this expectation ground for consideration.

Paragraph 64 of the Minister is identical to the delegate's paragraph 76, 65 equals 77, 66 equals 78 – there is no difference. Justice Bromberg then at paragraph 70 dealt with the raising of – or the way in which the ground that he upheld was formulated. He said:

> In the course of the hearing, another way of expressing the possibility of jurisdictional error . . . arose. The alternative, process based, possibility of jurisdictional error was raised by the Court . . . and was the subject of post-hearing submissions . . . whether, in attaching significant weight towards non-revocation to the community expectations consideration, the Minister assessed the weight to be attached to that consideration without having regard to the applicant's personal circumstances.

His Honour then addressed Justice Beach's decision in *Kelly* and, at 84, came to the same conclusion as had Justice Beach in *Kelly*. At 86, His Honour set out what:

> a reasonable Minister with a proper understanding of the Direction would have –

understood and "appreciated", and at 87:

> A fair reading of . . . the Minister's decision suggests that the Minister did not appreciate any of those matters.

GORDON J: Can I ask one question about that? In *Ali*, Justice Bromberg at 86 seems to have placed some weight, at least, on the fact that representations were made by the applicant in that case directed at this precise question.

MR HOOKE: Yes.

GORDON J: We have nothing like that in your case, do we?

MR HOOKE: No, what we have is a – we have representations which were expressed to be in regard to the various considerations in Direction 90, and that appears at page 139 of the court book in paragraph 48 of the plaintiff's statement of 21 July 2022.

GORDON J: Thank you.

MR HOOKE: Justice Bromberg concluded at paragraph 91 that:

> an inference is available and should be drawn that in determining that the community expectations consideration should be given "significant weight ... towards non-revocation of the visa cancellation", the Minister did not have any regard to the personal circumstances relied upon by the applicant in relation to that consideration.

GAGELER J: Do you say that is this case?

MR HOOKE: We do, but not in as pellucid terms as *Ali*, because *Ali*, as Justice Gordon points out, did have the benefit of representations that were directed seriatim to the paragraphs of the direction.

GAGELER J: So, if it is not as pellucid, what is it? What is the point?

MR HOOKE: We say it is sufficient. It is sufficient to engage the obligation to weigh the personal circumstances in the consideration of the community's expectations, and we say that just as it was, in our submission, clear to Justice Beach and Justice Bromberg that those matters were relevant in that way to primary consideration 8.4, the fact that the relevant representations were made and that they were expressed to be made to the relevant – and directed to the relevant considerations under Direction 90. That brings them into the umbrella of matters that the delegate, in our submission, was required to consider.

Your Honours, finally, your Honour Justice Gageler asked me a question before the break about section 501D and Regulation 2.53. Those operate to impose a presumptive time limit of 28 days on responding to a

request for information from the Minister. It might bite if our complaint was that we had submitted material out of time and it had not been taken into account, but this is a different case. Our submission here is that we submitted material within time that should have caused a particular course to be taken, so it is different, and that, of course, avails because section 56 of the Act always permits the Minister to obtain further or additional information, even after that 28-day period has closed.

Justice Edelman asked a question about whether compliance with an invalid direction, if 8.2 be invalid, takes the decision outside jurisdiction. We say yes. In addition to what I said in answer to your Honour's question, we say that because 499(2A) requires compliance with the direction if the direction be invalid, and the delegate has proceeded to make a decision in purported reliance upon it and compliance with it, then that necessarily is jurisdictional departure.

Your Honours, otherwise, we rely on our written submissions and unless there is anything further, those are our submissions.

GAGELER J: Thank you, Mr Hooke. Mr Knowles.

MR KNOWLES: Thank you, your Honours. Just on that first point in relation to section 501D, for our part we do not perceive it as being particularly relevant to the issues in this case on the basis that it relates to information given in respect of the character test and passing the character test, as distinct from what might then flow in the second stage of decision-making under section 501 and the exercise of the discretion. So, the provision is couched in those terms and the regulation is made pursuant to that provision for that purpose in respect of information about that issue, as distinct from information about discretion.

GAGELER J: I see. And do you agree that section 56 is the appropriate source of power to acquire further information?

MR KNOWLES: On my feet, as I stand before your Honours, yes, on the basis that that is a decision-making power in respect of, pardon me, a power in respect of visa applications that are made, and that would certainly be applicable here.

GAGELER J: Yes. So, the 501 power is kind of a discrete exercise of power but in the context of a visa application.

MR KNOWLES: Indeed.

GAGELER J: And so, the procedural provisions relating to the application and the processing of the application are applicable in this context.

MR KNOWLES: Yes.

GAGELER J: Thank you.

MR KNOWLES: Can I start with some just general submissions in respect of the statutory scheme and the direction itself? Just in respect of section 501(1), I just a moment ago adverted to the structure of the provision insofar as it sets up two stages for decision-making, the first being whether or not a person satisfies the decision-maker of being able to pass the character test; and the second – and only if that has not occurred, that the person does not satisfy the decision-maker – involves the exercise of discretion. And it is that second stage that we are concerned with here, given that there is no dispute about the inability on the part of the plaintiff to satisfy the decision-maker as to passing the character test.

On the second stage, as we have indicated in our outline of oral argument, we emphasise the point that the Act, and in particular section 501, does not expressly provide for any considerations that in exercising the discretion, a decision-maker is bound to take into account, nor are there any considerations that are stipulated that a decision-maker is bound not to take into account. As such, on the basis of general principle, subject to implication from the subject matter, scope and purpose of the Act, the discretion is otherwise unconfined by the terms of the statute, at least. In terms of that purpose, we have referred to section 4 of the *Migration Act* which provides that:

> The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

And that notion of what is in the "national interest" is obviously a broad an amorphous concept, and I will come back to that in due course.

GLEESON J: So, what is the impact of non-compliance with the direction?

MR KNOWLES: What is the impact of non-compliance with the direction by a decision-maker in this case? Well, it would be contrary to the Act and, in particular, section 499(2A) of the Act which requires compliance with the direction. Obviously, then – I think there is no issue between the parties on this – that would then be subject to considerations of materiality as to whether or not any error in failing to comply with the direction was material and therefore gave rise to jurisdictional error.

EDELMAN J: Although Mr Hooke put some of his failure to comply with a direction submissions in terms of unreasonableness, which would not attract a materiality consideration, would it?

MR KNOWLES: Well, perhaps so, but in this case it is difficult to understand how a failure to comply with the direction is either – it either exists or it does not. It is not as though there is an unreasonableness conditioning on compliance with the direction itself. So, I must say, I - - -

EDELMAN J: At least in written submissions, one of the submissions in relation to ground 4 seemed to be an implied failure to comply with a – or a failure to comply with an implied obligation to bring active intellectual consideration to the process. The active intellectual consideration might itself require a reasonableness of the process.

MR KNOWLES: Yes, I understand. Well, perhaps in those circumstances if that were made good there might be an argument on which it might be said that materiality were not applicable. We would say one does not even get to that position in this case, having regard to the arguments that we make in respect of ground 4, which I will come to in due course.

In terms of the direction in this case, obviously I have just alluded to the requirement that the directions must be consistent with the Act as well as the regulations. Provided that it is not inconsistent with – pardon me, I have not alluded to that, but that is another component of section 499, in section 499(2). Provided that the direction is not inconsistent with the Act or the regulations, then it will be valid, we say, and must be complied with. And insofar as what a direction can do, it can provide guidance about what permissible considerations within the range of considerations that are permissibly relevant must be taken into account where relevant to the individual circumstances of a particular case in the exercise of a discretion under section 501.

In this regard, we would say that a direction such as Direction 90 may refer to a very broad range of considerations that must be taken into account, provided that the considerations are not stated to be exhaustive or required to be given particular weight in every single case, regardless of the merits of the particular case. Previous directions, particularly Direction No. 17 – and the plaintiff has referred to cases about that direction at certain points in his submissions – were found to be invalid on the basis of one or both of those defects. We would say neither of those appear here, and I will come back to why we say that in a moment.

The direction may also specify the broad range of considerations that must be taken into account provided it does not concern matters which, on a proper construction of section 501, a decision-maker is bound not to take into account – and, as we say, there has not being anything identified by the plaintiff in that regard, that is, a consideration that one is mandatorily prohibited from having regard to.

The direction can also refer to a broader range of considerations provided that they are only required to be taken into account where relevant to the particular circumstances of a case. In other words, where the direction does not lead to or require a decision-maker not to have regard to the merits of an individual case. Again, we would say that none of those matters have been shown to exist here, such that none of those defects exist in respect of Direction 90.

Perhaps if I can just go to some aspects of the direction to highlight that submission and why we say that. The direction – at least insofar as I intend to go to it – the version – a copy of it is in the application book beginning at page 302. It is also in the authorities, volume 6, tab 42. But, in the application book, if one goes to page 304 under the headings "Preamble" and then "Objectives", one sees in paragraph 5.1(4), it said that:

> The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 –

relevantly, and we would say that is important insofar as what the direction does is it provides guidance about what matters must be taken into account and how. Similar and related to that, one sees across the page, under the heading "Principles" that, at paragraph 5.2:

> The principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse –

as is applicable here:

> a non-citizen's visa under section 501 –

and I will come back to that in a moment. Just returning back to the objectives, though, Your Honours will see in paragraph 5.1(2), it says:

> Where the discretion to refuse to grant . . . a visa is enlivened –

as is the case here:

> the decision-maker must consider the specific circumstances of the case in deciding whether to exercise that discretion.

So, there is a clear direction that the approach to the overall exercise of discretion should not be undertaken without regard to the individual merits of the case. Similarly, back at the principles – and apologies for jumping back and forth here – if one goes to the second sentence under that heading, it is observed:

> The factors (to the extent relevant in the particular case) that must be considered in making a decision . . . are identified in Part 2.

Again, a factor need not be taken into account if it is not relevant to the particular case, and should not. That is emphasised again in paragraph 5.2(5), towards the bottom of that page where it said:

> Decision-makers must take into account the primary and other considerations relevant to the individual case.

Then, moving forward to the next page, the exercise of discretion guidelines in Part 2 – again, similar points are made in paragraph 6, that is, the following considerations identified must be taken into account "where relevant to the decision". In paragraph 7(2) it importantly states that:

> Primary considerations should generally be given greater weight than the other considerations.

And this was a reason for which previous iterations of the direction were found to be invalid, in that they did not include a word along the lines of "generally" such that they fettered the discretion in such a way by requiring that in each and every case – regardless of the individual merits – primary considerations should always be greater weight. Obviously, the fact of the word "generally" being included there leaves it open to decision-makers to give them less weight in a particular case that might arise. I also note paragraph 7(3), which states:

> One or more primary considerations may outweigh other primary considerations.

That comes back to a point that we will make in due course in respect of the absence of an arithmetical, mathematical, mechanical process in exercising the discretion under section 501. The direction actually reflects that, ultimately, insofar as it contains matters such as what is found in paragraph 7(3). I will return to that, because there are cases that pick up this point – recent cases. One is the case of *Demir*, a decision of Justice Kennett in the Federal Court on this very issue.

Now, nowhere in the direction is it stated that the primary and other considerations are set out in an exhaustive way. In fact, when one has regard to other paragraphs of the direction, one can see that, in fact, the contrary is clearly indicated. In this regard, if I can take your Honours to page 311 of the application book, and in particular paragraph 9, headed "Other considerations". There it said that:

> In making a decision under –

relevantly, here:

> section 501(1) . . . other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to) –

Then there are certain matters that are specified. But the point is that where there are other considerations that are relevant to a particular making of a decision, they ought to be "taken into account". Again, a clear indication of the direction validly providing guidance but not in a way so as to fetter the exercise of discretion under section 501(1), as it is in this case.

That is all I wanted to say about the Act and the direction in general terms. If I can now turn to ground 1. As we have apprehended it, it contains two aspects. One is the application construction of paragraph 8.3(1) aspect, and the other is the duty to enquire aspect. Particularly in respect of the duty to inquire component of the first ground, it is important to have regard to the circumstances of this case. In that respect, without wanting to repeat matters to which my learned friend has already taken the Court, if I can highlight some further factual matters in terms of the circumstances of this case that we would seek to refer your Honours to.

As mentioned earlier to your Honour Justice Gageler, obviously there was an application for a return resident visa that was made in April of 2022. Perhaps I should briefly go to that. That is contained at pages 294 to 299 of the application book. Initially – and this became apparent and was part of the reason why there was an ongoing series of communications between the Department. I should say, not the delegate, by the way. Just to be clear, it was not the delegate who was actually communicating with the plaintiff. That might have been an impression that one could gather from the submissions made by our learned friends. It was actually somebody within the Department separate from the delegate.

Part of the reason why there was that back-and-forth between the Department and the plaintiff and the plaintiff's representative was because

of an initial statement in the application which your Honours will have seen at page 297 in respect of "character declarations", and "prior convictions" in any country. Initially – and I do not seek to make anything of this in respect of the plaintiff – it is more just to explain the process and what occurred subsequently, but initially the plaintiff had stated that he had answered "No", in response to the question:

> Has the applicant ever been convicted of an offence in any country –

And had answered, "No", to:

> Has the applicant ever been the subject of a domestic violence or family violence order –

and so on. One sees that on page 297 about three-quarters or so down the page. As I say, there were subsequently exchanges in respect of the visa application between the Department and the plaintiff, and on 21 July - - -

GLEESON J: Just before you leave that, at 295 there is an answer to a question about citizenship.

MR KNOWLES: Yes.

GLEESON J: Is that correct?

MR KNOWLES: This is a point that – your Honours will recall there is a statement of agreed facts, then there is the plaintiff's chronology. We do not accept the chronology insofar as it departs from the statement of agreed facts, and I can say that it is very deliberate that the statement of agreed facts does not include the detail that is included in the chronology about the plaintiff being stateless. So, for our part, it is not accepted, but I am not suggesting it is not a matter that is in contention as such. It is certainly the case that in this application, as presented by the plaintiff himself, he represented that he held a travel document, being a passport – a Lebanese passport.

GAGELER J: Is this a record of interview? The document we are looking at, at page 294, what is it? Is it a departmental record of responses to questions?

MR KNOWLES: I think it is just an electronic application form - - -

GAGELER J: I see.

MR KNOWLES: - - - that is submitted online by filling in information online.

GORDON J: I think you can see at the bottom of the front page it says the registered user is Mr Ismail, who has lodged it.

MR KNOWLES: Yes. Yes, thank you, your Honour. So, the next part of the procedural history that I just wish to take your Honours to, was an email from the plaintiff's legal representative on 21 July 2022, which one will find at page 277 of the application book. Now, this comes back to a point that I think your Honour Justice Gordon made earlier, that in respect of the statements that were attached to the Personal Circumstances Form, they had previously been provided. They had been provided by the plaintiff's legal representative back in July of 2022, and this is the email by which they were conveyed to the Department.

One of the matters that was pressed in the written submissions that does not seem to have been pressed any longer, at least in oral submissions – it may be that it is maintained – was that there was a lack of urgency attending the making of the decision by the delegate and that is a reason why – part of the factual matrix that goes to why it was legally unreasonable in this case not to make an inquiry. We would just make the observation generally, as one sees here and throughout correspondence between the plaintiff and his representative on the one hand and the Department on the other, that there are repeated indications of the urgency with which a decision should be made.

So, it is not fair to say that somehow there was no urgency or that the delegate could not have been conscious of any urgency in this case. One sees that, as I say, in communications subsequently in August. An example is at application book page 269, which I do not propose to take your Honours to, also in the preceding and the subsequent page in the email chain at 268 – that is, that urgency is reiterated. Both of those emails are in August and that continued all the way up until September which post-dates what I am going to come to in a moment, in respect of the notice of intention to consider refusal. And in terms of the correspondence in September by which that sense of urgency was conveyed, I would just refer your Honours to pages 261 and 263 of the application book.

The next relevant matter that occurred was that there was, one might say, a taking of this application outside of the ordinary stream of decision-making in respect of visa applications, by which a decision would have been made pursuant to section 65 of the *Migration Act*, taking it and moving it into a character-related decision-making process under section 501 and that was done by way of provision of a notice of intention to consider cancellation, which was provided to the plaintiff on 30 August 2022, and one sees that at pages 98 to 103 of the application book.

And the reason why this notice is important in the procedural history and is relevant to the issue of legal unreasonableness in respect of any inquiry is that one will see that in giving the notice various matters are referred to. There is obviously a series of documents that are referred to on the second page at page 99 of the application book. Then, towards the bottom of that page, it says:

> *Documents previously provided*

And a whole list of the documents that were provided by the plaintiff's legal representative back in July is set out including the statements of the plaintiff himself, his partner, and his partner's sisters. Then, what is said immediately under that at the top of page 100 is:

> You do not need to provide these documents again, however you may wish to submit additional documents/information to update or replace those previously provided.

So, there is a request or – I should not say a request – an opportunity clearly alluded to here for these statements to be elaborated on in some way. I should say then what follows under that immediate paragraph is a reference to the Ministerial Direction and the importance that it will play in decision-making. In particular, it said that Direction number 90 should be read "carefully" given its relevance to that decision-making process.

GAGELER J: Mr Knowles, does this notice have a statutory basis?

MR KNOWLES: I will check on that, but my understanding is obviously that section 501(1) is conditioned by procedural fairness, and this is certainly a formal way in which that is enshrined. I will just perhaps see if I can get a better – I am reliably and ably assisted by my learned junior on this that it is different from other cancellation processes such as – I think it is 119 of the Act or 109 of the Act – 119 – which does have a statutory mechanism set up for providing notice of intention to consider cancellation. In this case it is at common law simply giving content to the procedural fairness obligations that condition the exercise of power under section 501(1).

GAGELER J: Thank you. And in practice I suppose you have the 501 decision, and then there is a section 65 decision that follows as a matter of course, or does that not happen?

MR KNOWLES: I do not think that happens. But there is a part of section 65 which does go to character concerns in respect of the matters that have to be satisfied as to whether or not there is a decision made to grant or

to refuse to grant a visa. I might take that on notice at this point, given that I do not think it is directly a matter that bears on the issues arising in this case.

GAGELER J: No, it is just understanding the procedural context in which a decision under section 501 – which of course can go to cancellation, but here it is going to refusal – how that relates to the process of application and determination of a visa application.

MR KNOWLES: Obviously there are separate review mechanisms in respect of such a decision, and I think I referred a moment ago to the fact that section 65 does pick up matters relating to character, and – again ably assisted by Mr Swan – the relevant provision in section 65 is 65(1)(a)(iii), that does refer to these matters.

EDELMAN J: I think I explored the relationship between those provisions and the departmental processes in some detail in *KDSP v Minister for Immigration* after hearing evidence at some length.

MR KNOWLES: Yes. Perhaps I will move on. Coming back to this document, though, the notice of intention to consider cancellation, at page 101 there is a heading:

> *Providing reasons why your visa application should not be refused even if you do not pass the character test –*

And the second paragraph says:

> If you wish to provide any information to support a submission that your visa should not be refused even if you do not pass the character test, you may do so at any time until the decision-maker has made a decision in this regard. However, it is recommended that you provide any information for this purpose as soon as it is available. The decision-maker is not required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

So, again, there was, one might say, in the factual matrix a putting on notice about the prospect of a decision being made, but in the meantime the need to put on whatever material was thought to be going to assist with the case on behalf of the applicant.

Immediately under that, one sees the reference to the Personal Circumstances Form that was attached, and which was completed. Perhaps, if I might go to that form at this stage, because there were a number of materials that were provided in response – one sees that, perhaps if I go to

page 106 of the application book. Your Honours will there see that the plaintiff's legal representative on 1 September, in response to the notice of intention to consider cancellation, provides a bundle of documents of over 150 pages. That bundle includes some of the materials that have been previously provided – the statements, for instance, are mentioned from July of 2022. Further down the page, one sees again an urging of:

> the Department to make a decision in this matter as a matter of urgency.

And that appears also over at the top of the page, page 107 again. The Personal Circumstances Form is then submitted at this time, and obviously the relevant page that your Honours were taken to is that page 114, and that sets out minor children:

> **all your minor children (including biological children, adopted children, step-children).**

Then it says immediately after that – and your Honours will have seen this – the person completing the form is directed to:

> Provide evidence to support your claims including birth certificates, if available.

To the extent that you have some sort of parental role, the person completing the form is asked to provide evidence in support of those claims. Then, one sees the three children listed there, and I just note – I think a point was made about paragraph 75 of the delegate's decision that it was somehow unusual in some way that the delegate had said at that paragraph – in respect of Mariam – if indeed she was a minor.

The reason why the delegate may well have made that statement is because at least one of the other two people listed here as a minor child – that is, Mahmoud – was above 18 years of age at all times, and one sees that in the materials that were earlier provided in July, and that were attached to the email together with this Personal Circumstances Form. One will see that, just by various places, but, for instance, in the plaintiff's statement, dated 21 July 2022, which is at page 130, relevantly, of the application book. Paragraph 10 in the statement ties in Australia, and various people are mentioned, including Mahmoud. He is said to be 22 years of age, and that is confirmed over the page, at paragraph 15 on page 131.

So, this goes to the issue of providing evidence to support claims and what can be made of just a mere mention of a person's name in a list of minor children in the absence of some additional material. Likewise – and this is a matter that, I guess, has been the subject of some submissions by

the plaintiff – there is a reference in the column at the end of the page – on the last column:

> **How often do you have contact**
>
> . . .
>
> Daily –

it said. But it does not necessarily mean anything about the nature of the relationship or the extent to which visa refusal might have an impact on someone – merely the fact that they have contact on a daily basis – even if that claim were to be accepted in the absence of further evidence.

Indeed, the absence of further evidence despite there being regular contact – and in a context where a person is legally represented and the other two people listed there are the subject of detailed evidence – might suggest something otherwise. Nonetheless, that is not what the delegate did. The delegate simply decided that it was impossible to draw in inference one way or the other, and we say that was entirely appropriate in all the circumstances – for reasons that I will come back to in a moment – and lawful for reasons that I will come back to in a moment.

As your Honour I think Justice Gordon noted, providing evidence to support one's claims is one thing, but the form also requires, at page 115 and following, details of the relationship for each individual child – in other words, details provided separately for each child. What was said in response to that question – or that request for information – was that one should have regard to the statements themselves – that they would provide those details. As we have indicated in our submissions and is borne out on the materials, there is no mention of Mariam in the statements, or in any of the materials, whether it would be by her mother, by any of her aunties – three of them have given statements – or the plaintiff himself. None of them mentioned her in any way expressly or by inference referred to her.

There are also other aspects of the form that do not say anything further about any other person such as Mariam. For instance, the form allows for other relatives to be listed at page 116 and details of relationship there. And at 118, there is a provision to set out numbers of nieces and nephews and the like, and none of that is inserted – understandingly perhaps on the basis that the relationship did not have that degree of familial formality, perhaps; I do not know. But the point is that again, at the bottom of page 118 of the application book, under the heading:

> **FAMILY DETAILS** –

in respect of describing:

> **any current impact . . . or likely impact on them** –

again, it refers the reader of the form to:

> Details provided in documentation issued by my legal representative and as attached to my immi account.

Just on that point about details "provided by my legal representative" – and, again, this is a matter that we would say is a factual matter that goes to the reasonableness of – whether it was legally unreasonable not to make further inquiries. The statements that are provided, and were provided back in July by the plaintiff's legal representative were prepared apparently with some assistance from the legal representative. The reason I say that is when one looks at page 128 of the application book – and this is the first statement of the plaintiff himself, dated 21 July – in paragraph 2, it stated that:

> On or about 16 July 2022, I had a conference with Dr Jason Donnelly. As a result of that conference, I produce this witness statement in relation to my Return (Residence . . . visa application –

That, we would say, goes to the fact of assistance being received, instructions given, and so on, and the statement being prepared in a way where some assistance would have been given about who was referred to and who was not.

The last matter that I wanted to go to in terms of the facts at this point was a matter about the notification of the decision itself. Again, it is not clear to us the extent to which the issue is still pressed, but certainly the written submissions refer to an error in the notification of the decision vis-à-vis review rights and sought to attribute some state of mind to the delegate having regard to the error in the notification letter about review rights.

That notification letter is at pages 35 to 38 of the application book. The only part of it that I wanted to take your Honours to is on page 36; the name, signature and position number of the person who authored the notification letter. That is different to the position number of the delegate which is set out at page 62 of the application book. So, again, we just say that to say that it cannot be inferred that any error in the notification as to review rights was an error which reflected the state of mind of the delegate and, therefore, that issue ought not to be taken into account in respect of arriving at a view as to whether or not, having regard to all of the facts of

this case, the absence of an inquiry was legally unreasonable in all circumstances.

If I could then turn back to the first – I do not propose to go through the statements because we have set out a great length in our submissions as to what was said where. I think, in broad terms, it is clear that very detailed matters were set out in those statements about the two other listed children. There was no mention whatsoever of the third child, the subject of what is said to be an obligation to inquire.

So, in terms paragraph 8.3(1), and the allegation that there was some failure to comply with that – I will not go back to it. It is in the application book at page 309. The paragraph requires decisionmakers to make a determination about whether visa refusal is or is not in the best interests of a child affected by the decision. Clearly, we would emphasise – as was noted in this Court's decision in *Uelese* – that the word "about" is important in that context. One needs to consider the best interest of a child affected by the decision.

In *Uelese* – my learned friend took the Court to some parts of that decision. I will not go back to those, but it is useful to understand the factual context in which matters came to be considered there. That case was one in which the appellant was a New Zealand citizen living in Australia on a visa. The visa was cancelled on character grounds. It was claimed by the appellant before the delegate that he was the father of three minor children born in Australia. On review of a visa refusal decision before the Tribunal, the appellant's partner revealed at the hearing under cross-examination for the first time that the appellant had two more minor children from another relationship.

The case really concerned, at its core, the proper construction of section 500(6H), which relates to restrictions on the Tribunal's considerations of certain information put forward by an applicant in support of the applicant's case before the Tribunal, particularly where information had not been reduced to writing a sufficient time in advance of the hearing when the oral information was given. Obviously, in this case, the Tribunal refused to consider the information and evidence in respect of the two additional children, on the basis that there had not been the subject of any written evidence sufficiently in advance at the hearing.

That was the context in which this Court found that there had been a failure to have regard and make a determination about certain matters. It was a context in which that failure to have regard or make a determination about those two children, and how their interests were affected, arose out of a misunderstanding and misconstruction of section 500(6H). I am conscious of the time.

GAGELER J: Have you finished the *Uelese* point?

MR KNOWLES: I have not, and I anticipate I will be just a few more minutes on *Uelese*.

GAGELER J: Perhaps you should finish that.

MR KNOWLES: I will be very quick. So, I do not think there is any issue that – so, we would say that is quite a distinguishing feature. It also means that what is said and what we rely upon at paragraph 67 is, strictly speaking, obiter or not pertinent to the specific circumstances of this case. I do not think that there is any issue, though, that the relevant direction in that case – although a predecessor of direction 90 was expressed in substantially the same terms – in that case, obviously, the predecessor direction was referring to visa cancellation and not visa refusal but nothing, we would say, turns on that.

We do not take issue with the point in *Uelese* that it is necessary to consider the best interests of minor children – provided that their existence is known, and the Tribunal is aware of that, or the decisionmaker is aware of that. We do not take issue with that. We would say that Mariam's interests – to the extent that there was possible to consider them at all – were taken into account and a determination about whether refusal – so much as it could be made – was made in this case by the delegate.

The only other point we would raise is that our learned friend went to *Uelese* and read certain passages. It is important to read the last sentence in paragraph 65 – which I do not think was read out. It is also important, in this case, to read paragraphs 66 to 68. For present purposes, we note that in paragraph 67, Chief Justice French and Justices Kiefel, Bell and Keane, made clear that:

> There may also be cases where the evidence is such that the only determination which can be made in obedience to cl 9.3(1) –

as it then was:

> is that cancellation is neutral so far as the best interests of any minor child are concerned. In this regard, it is to be noted that –

the relevant paragraph:

> requires a "determination *about* whether cancellation is, or is not, in the best interest of the child" (emphasis added). Sometimes the best

decision "about" whether cancellation is, or is not, in the best interests of the child may be that it is neither.

We would say those observations are apposite in the present case. I think I have finished now with *Uelese*. Thank you, your Honours.

GAGELER J: Thank you, Mr Knowles. We will adjourn until 2.15 pm.

AT 12.50 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15 PM:

MR KNOWLES: Thank you, your Honours. I think just before the break, in connection with *Uelese*, I made a statement about a sentence in the reasons for judgment that had not been read and referred to paragraph 65. That was a mistake on my part. I think it should have been paragraph 66. Essentially, it relates to the fact that the error there arose by reason of a misunderstanding of section 500(6H).

What we would say is, having regard to the passage that I took your Honours to before lunch in paragraph 67, as a point of principle, where there is a paucity of evidence or information before a decision-maker, and that paucity does not result from some misunderstanding of the Act, as was the case in *Uelese*, it is open to a decision-maker to make a determination under paragraph 8.3(1) that is, in effect, neutral, as their Honours mentioned in paragraph 67 of *Uelese.*

That point of principle has been emphasised in the Full Federal Court on a number of occasions. On one occasion, before *Uelese* – and that was in the case of *Paerau.* That case of *Paerau* was in the authorities at volume 2, tab 5, page 77. It was referred to by this Court - - -

GORDON J: Did you say tab 5?

MR KNOWLES: Pardon me, tab 25, volume 4.

GORDON J: Thank you.

MR KNOWLES: Thank you, your Honour. It was referred to in *Uelese* without evident disapproval in paragraph 66. And one of the passages that

was referred to there was paragraph 27 in *Paerau*, which is at page 569 of the bundle of authorities.

GORDON J: Mr Knowles, I am being a bit slow this afternoon. These are authorities for the proposition that you can, in effect, have a neutral assessment.

MR KNOWLES: That is correct.

GORDON J: Thank you.

MR KNOWLES: And the passage from that Full Federal Court decision that I was proposing to take your Honours to very briefly was in the reasons for judgment of Justice Buchanan. As I say, it is cited in *Uelese* at paragraph 66 without any evident disapproval. There, Justice Buchanan said:

> In my respectful view, there could be no objection in any case to the AAT concluding that the best interests of a child did not weigh either for or against the cancellation of a visa, so long as the available material was assessed conscientiously. That is not the same as not stating a conclusion about the issue at all. Similarly, in a case where the evidence did not permit a *proper* conclusion about the issue, there could be objection to the AAT saying so, as it did in the present case.

We would say that is akin to a neutral determination; it does not go one way or the other. That is precisely what has occurred in this case, having regard to paragraph 75 of the delegate's decision.

GORDON J: In relation to ground 1?

MR KNOWLES: That is correct. Yes. So, visa refusal in this case in respect of the best interests of the child named Mariam was, for the purposes of this decision, a neutral matter, and the determination that was made about those best interests was neutral. It did not go either way due to the paucity of information that was before the decision-maker. Having regard to what is said in *Uelese*, at paragraph 67, that was open to the delegate in this case, and lawfully so, in light of the principles enunciated in that paragraph.

GORDON J: Can I put it another way. Is it to say that they took into account the consideration that was set out in that paragraph, but by reference to the information that was provided, and therefore undertook the task?

MR KNOWLES: Yes. That is certainly, as I say, akin to what was said by Justice Buchanan that it is a situation in which the evidence might be said not to permit a proper conclusion about the issue, and there could be no objection to the decision-maker saying so, as it did, in that case, in *Paerau*. We say that is somewhat similar here.

That was all I intended to say about the first aspect of ground 1. In respect of the second aspect, the asserted duty or obligation to inquire, there is no dispute, obviously, that the delegate did not make any inquiries about Mariam's age but, as your Honours will have seen from the written submissions for the defendant, the position taken by the defendant is that there was no duty or obligation to make those inquiries in this case.

GAGELER J: What do you mean, "no duty or obligation"? I mean, you accept that there is a procedural aspect to unreasonableness, and you say it is not engaged on the facts here.

MR KNOWLES: Yes. Yes, that is precisely what we mean. That was the reason why, prior to dealing with this grant in any detail, I did undertake that excursion through the factual history just to highlight some of the matters within those factual circumstances that we say mean that it could not be said in those circumstances that there was legal unreasonableness in the way in which the power under section 501 was exercised by reason of any want of inquiry in the part of the decision-maker.

GORDON J: Just so I understand it, is your argument both on the first and second limbs strengthened, not strengthened, irrelevant to it; the fact that the application or the materials provided detailed information on the other two children?

MR KNOWLES: Yes, that is precisely a point of distinction that we raise.

GORDON J: I see.

MR KNOWLES: And it ties in with a point that I think your Honour Justice Gordon made earlier, which was that page 114 of the application book refers to three people who are said to be minor children and, as observed, one of them, in fact, was not. But then, page 115, in respect of the details about the relationship with those children that the plaintiff has and the way in which they would be affected by any decision to refuse to grant a visa, simply says, refer to the statements. Then one goes to the statements, prepared with the assistance of legal representative, and there are details of the relationship with two of the three, but not with the third that is listed.

In respect of the duty and unreasonableness, obviously, there is – your Honours have been taken to a number of authorities by our learned friends, including *SZIAI*. All I would say about *SZIAI* are the following few points. One, it was a case in which a decision of a Tribunal was concerned, and as was indicated in the plurality reasons, it related to a duty to review. So, there was a different framework that was at play there.

Secondly, what was said, in any event, was obiter, having regard to the concluding words in paragraph 25, where it was said that this does not need to be considered any further, for two reasons, and then they are set out in paragraph 26.

Thirdly, the language of paragraph 25 is couched in very qualified terms, such as, it may be the case that in these particular circumstances it might provide a sufficient link to the outcome of the decision that one could say that there has been a constructive value to exercise jurisdiction. It simply leaves open the possibility without exploring the circumstances in which a failure to make an inquiry will lead to a failure to exercise jurisdiction.

So, there is not a great deal, we would say, to be drawn from *SZIAI* in respect of the duty to inquire point raised by our friends in this case. It may well be that there could have been further inquiries made. It may well be that in a sense that – in a broader sense, not a sense that relates to notions of legal unreasonableness, it might be said to have been potentially desirable to make further inquiries, but it does not follow that a failure to make an inquiry is legally unreasonable and gives rise otherwise to jurisdictional error.

We would say in this case that threshold of showing legal unreasonableness has not been reached on the arguments that are put by our friends in all the circumstances to which I have adverted to earlier. In addition, even taking the rubric that one sees in paragraph 25 of *SZIAI*, it is not entirely clear what the precise discrete critical fact is that is said to be the subject of an obvious inquiry, other than the child's age. Simply knowing age – getting a response to that inquiry and knowing a person's age would not yield any useful information about the nature of the relationship, the effect of visa refusal. Those matters would not be necessarily forthcoming one way or the other. It certainly cannot be said that by knowing the child's age, one would then be in a position to assume, or accept, certain facts about the nature of the relationship or the impact of visa refusal on the person.

GAGELER J: Does that bring you to ground 2?

MR KNOWLES: It does. Thank you, your Honour. Now, in terms of ground 2, for the reasons I have already indicated in the introductory remarks about the direction, the direction provides that there remains an overall weighing and balancing process to be undertaken and that process is left to the individual decision-maker having regard to the particular facts of a given case.

Obviously, the matters – and I think this was conceded earlier. The matters that are the subject of the direction, the various considerations can and do overlap. The way in which matters can be taken into account is such that they might be taken into account, relevant to more than one of the considerations. Obviously, the example that is given is that of family violence in the context of paragraphs 8.1, 8.2, and 8.4 of the direction. But there are other examples that could arise as well. One is the situation that is, perhaps, highlighted by the new ground 4 of the case that is put by the plaintiff – and that is that there might be an overlap between expectations of the Australian community and connection with the Australian community as well. So, there are a range of areas in which, one might say, considerations, in terms of the matters that are relevant to them, will overlap.

It is certainly something that, as your Honours will have seen from the written submissions, has long been recognised by the Federal Court. Particularly, in respect of the two primary considerations – protection of the Australian community and expectations of the Australian community – in that both of them involve, intrinsically, an assessment; at least, as part of addressing the consideration, an assessment of the seriousness of a person's history of conduct and offending.

Coming back to the issue of family violence, we would say that the potential overlap between the relevant paragraphs is actually recognised in the terms of the direction itself, insofar as it refers to family violence in the various places where it does. I should note, it also even refers to – and this has not been alluded to yet, but it also refers to family violence in respect of the best interests of the children in paragraph 8.3(4)(g). So, it is referred to in a number of areas and the potential for consideration of this issue in different areas is actually acknowledged in the direction itself.

The way in which it is taken into account in each of those considerations, however, is different, although there still may be overlap. For example, in respect of protection of the Australian community, that will relate to the risk of harm to the community occasioned by further offending or serious conduct in the future. The expectations of the Australian community, on the other hand, concern the community's expectations as a whole that, as is indicated in the direction, if a person has engaged in certain conduct raising "serious character concerns" such as family violence, they should be refused entry into Australia.

Then, in terms of the family violence consideration itself, that is made clear that it reflects a particular policy concern of the Australian government – as distinct from the Australian community – about persons who have engaged in such conduct having the privilege of entering Australia. That comes back to the point, I think, that your Honour Justice Gleeson raised earlier that, if it is seen as a permissible matter to take into account, there is an ability for a direction such as this to stipulate matters that go to character concerns that might be relevant to regulating the entry into Australia in the national interest. That is a matter that can be the subject of such a direction.

I should say, one test for assessing the direction is whether or not, even if the direction did not exist, it would be permissible for a decision-maker to consider family violence in these various ways, having regard to the very broad discretion inherent in section 501(1). Just because there are these various ways in which family violence can be considered, and even though it may well be that there is overlap insofar as family violence is considered in various contexts, it does not mean – as is asserted by our friends – that it is given weight in an identical way for an identical reason, for the reason I just indicated a moment ago in respect of each consideration dealing with family violence in a distinct way.

I said earlier that that type of approach would involve a mechanical, or arithmetical, or boxed, or siloed approach akin to, I think, what your Honour Justice Gordon mentioned earlier. We would say that that is not what the direction requires, quite clearly, and it was an issue – this issue was considered, as I said earlier, in the case of *Demir*, which is in the authorities at volume 3, tab 11, page 230. It was a Federal Court decision of Justice Kennett. That case concerned non-revocation of visa cancellation, and it was also a case in which the person had engaged in acts of family violence. At page 235 to 236 of the bundle, paragraph 13, his Honour set out various ways in which the Tribunal had considered the issue of family violence in its decision.

I should just pause here, because this is a case which has directly considered this issue, so it is not strictly correct to say that the only case that has considered this issue is the case of *Bale* and *XXBN*. In any event, we would say those cases dealt with a different issue, and I will come back to why we say that in a moment, when I am addressing those cases. What one will see in *Demir* is that – as at paragraph 13 – there are a range of ways in which the Tribunal considered family violence. At paragraph 16, on page 237 of the bundle, your Honours will see the argument that was advanced by the applicant in that case, that, in effect, the decision-maker had double-counted family violence, or more than double-counted family violence by weighing it on repeated occasions.

That argument was addressed by his Honour at paragraphs 22 to 26, and as his Honour observed – and I am not going to read those paragraphs, but I will ask your Honours to read them – it is a decision that is addressed in the reply submissions of the plaintiff; it should come as no surprise that I am referring to it – but we would endorse the observations made by his Honour, with respect, and commend them to the Court, in the sense that the weighing process in a decision-making exercise under section 501 is not a mechanical process. There is something more instinctive and intuitive in it that is not going to be quantifiable.

In that sense, as his Honour observed in that case, there was no suggestion of double-weighing or weighing in some way that was disproportionate by reason of the direction. We would say the same applies here.

GAGELER J: First sentence of paragraph 10 of your outline is directed to the invalidity or validity of the direction. I do not understand it to be part of ground 2.

MR KNOWLES: The invalidity of the direction?

GAGELER J: Yes. I may be wrong.

MR KNOWLES: In that case, I may not press that. Maybe we were proceeding on an incorrect footing there, but I have perhaps misapprehended the submission that was made. But we certainly would say, to the extent that it is argued, it certainly has not been made out that there is any invalidity of the direction in that regard.

GORDON J: Are you responding to the contention that it is punitive? Is that what that is responding to?

MR KNOWLES: Well, that is ground 3.

GORDON J: That is why I am asking.

MR KNOWLES: And I had understood that ground 2 did deal with invalidity. For instance, I am just going back to the application book - - -

GLEESON J: As it is expressed in paragraph 8(b) of the application - - -

MR KNOWLES: Yes, indeed.

GLEESON J: - - - there is a reference to it.

MR KNOWLES: I think we are just dealing with that - - -

GAGELER J: I see. Yes, I see. Thank you.

MR KNOWLES: To the extent that it may still be lying there - - -

GAGELER J: Very well. I should not have taken you off your course.

MR KNOWLES: - - - we do not want to be understood to be making any concessions, given that that is certainly a point that has previously been made, at least. Yes. So, as I say, that analysis in *Demir* could equally apply to the reasons in this case. I mentioned earlier that our learned friends had sought to rely upon the cases of *Bale* and *XXBN*. *Bale* is at tab 9 in volume 3 of the authorities, but I do not propose to take your Honours to it. *XXBN* is not in the authorities. All those cases say in this context is that a decision-maker is not usually required to take a matter into account repetitiously.

That is a very different situation to what we are dealing with here. So much was observed by Justice Halley in the matter of *XSLJ*, which I do propose to briefly take your Honours to. That case is at tab 39, volume 5 of the authorities. At paragraph 123, at page 1138 of the bundle, his Honour observed:

> Not being required to take into account a matter "repetitiously" –

as was the issue that was arising in *Bale* and *XXBN*:

> is a fundamentally different proposition to prohibiting a matter being taken into account for two or more mandatory considerations.

As is the argument here:

> The matters to be taken into account in addressing mandatory and other considerations may well overlap, particularly in circumstances where a consideration is expressed in general terms. It is neither desirable nor, in my view, permissible not to have regards to material that is otherwise relevant to a consideration in Direction 79 on the basis that it is more directly relevant to another consideration in that direction.

Again, we would simply say that those cases of *Bale* and *XXBN* are not to the point, as is helpfully indicated by what is said by Justice Halley in *XSLJ*. What is relevant to this case is the case of *Demir*, if there is any Federal Court authority on this proposition directly. But, as we have indicated, as a matter of general principle, there is no reason why a fact, issue or matter

cannot be taken into account in respect of more than one of the considerations in the direction.

Now, it certainly cannot be said that in this case the delegate was not entitled to take into account family violence in respect of the government's concern, to take it into account in respect of the protection of the community, and to take it into account in respect of the expectations of the community. Indeed, that was what the direction actually expressly required that the decision-maker do.

Can I turn now to ground 3. This is the asserted punitive or irrelevant weighing of family violence. It is not clear to us how it is said that the weighing of family violence was done in some irrelevant way but, as to punitive, there is nothing in the actual decision record and the reasons which would suggest that the approach taken by the delegate in exercising the power under section 501(1) was with a punitive purpose. There is nothing stated by the delegate that indicates that the plaintiff, for instance, should be punished for having engaged in family violence, and nor could it be said that anything said by the delegate would lead to that conclusion by way of implication.

It has also been put against us that somehow there had to be some connection to either protection of the Australian community or expectations of the Australian community in order for consideration of family violence not to be punitive in some way. We would simply say, no, and this perhaps echoes a matter that was raised by your Honour Justice Gleeson. In our submission, it is permissible for the government, in terms of the direction, to set out a policy position about a concern that the government has about certain conduct and its inherent status.

There otherwise was a submission made in respect of comments of Justice Buchanan in *NBMZ*. That case was in a very different context to the present case, obviously. We should say Justice Buchanan was not in the majority and his views as expressed in the relevant passages to which your Honours were taken at paragraph 192 go further than what the majority said. In essence, if I can take your Honours to the relevant passage, which is in the authorities at volume 3, tab 22, and page 514 of the bundle - - -

GORDON J: Did you say 514?

MR KNOWLES: Of the bundle, yes – 192 starts on page 513 of the bundle. That was the passage that was read by our learned friends. But it is really 194 that sets out the position and the facts, also, that were relevant in a position taken by all three members of the Full Federal Court. That was - - -

GORDON J: Sorry, I am missing the point, Mr Knowles.

MR KNOWLES: Sorry, insofar as - - -

GORDON J: What does 194 show you that we did not know about before?

MR KNOWLES: The two other members of the Bench, Chief Justice Allsop and Justice Katzmann, also found error, but for reasons that were more confined than those of Justice Buchanan.

GORDON J: Thank you.

MR KNOWLES: So that what Justice Buchanan has found in 192 goes beyond what their Honours found, which is, perhaps, pithily set out in 194 – that is, that there was a failure to deal with or make any assessment of what risk there would be to the Australian community if the applicant was granted a protection visa. That was not dealt with, and that was really the basis upon which there was error found by the court. What was said by Justice Buchanan at 192 does not reflect what was said by the court overall.

Just by way of perhaps emphasising this point, it is certainly so that when one looks at protection of the Australian community and is assessing protection of the Australian community by reference to future risk of harm occasioned by further offending or serious conduct, yes, that involves consideration of the future. It might do it by reference to events in the past to predict something in the future, but that will involve an assessment of the future. But that does not mean that every aspect of the direction itself must always be devoted to considerations exclusively looking to the future. So, to rely on *NBMZ* to suggest otherwise, we would say it is not a safe reliance in all the circumstances.

Can I turn now to ground 4 and the purported failure to consider personal circumstances. At the outset, I will just say that the two cases that are chiefly referred to by the plaintiff, being the cases of *Kelly* and *Ali*, are very different from the circumstances of this case in that there were specific representations or submissions made about the expectations of the community being different to those that were deemed in paragraph 8.4 of the direction by virtue of particular matters. No representation was made along those lines in this case – so, those cases stand in a separate category.

In any event, the underlying position that is put by the plaintiff on this ground is not made out in that personal circumstances were taken into account; they were weighed against the expectations of the Australian community as deemed under 8.4. It cannot be said that the applicant's

circumstances were not taken into account for the purposes of paragraph 8.4. They were, in the sense that he was found to have engaged in certain conduct that meant that it was serious conduct raising serious character concerns such that particular parts of paragraph 8.4 were engaged which would not have otherwise been engaged. So, there was a consideration of the plaintiff's specific circumstances in applying paragraph 8.4.

There is, in the circumstances, no tension between 8.4 and paragraph 5.1, which goes to considering the specific circumstances of the case in exercising the discretion. In any event, when one looks at exercising the discretion overall, the specific circumstances of the case were taken into account and weighed in the balance with those community expectations, as one sees at the end of the delegate's decision in paragraphs 111 to 115.

Just briefly going to that now, at page 62 of the application book. There, as your Honours will see, at paragraphs 111 to 115 there is a consideration of matters in favour of not refusing the visa application. And, in particular at paragraph 113, there is a reference to various matters that would weigh in favour of not refusing, and they are weighed against the matters in paragraph 114. At 115 there is an overall conclusion reached as a result of that weighing process.

So, we would say, in effect, what the plaintiff actually asks or says that the decision-maker should have done in this case in respect of those particular circumstances is what the plaintiff says the decision-maker did but should not have done in respect of family violence. That is, ground 4 relies on an argument that there should have been consideration and weighing of personal circumstances in a repetitious, duplicative way on two occasions.

Otherwise, in respect of ground 4, it cannot be said that there has been any misconstruction or misapplication of paragraph 8.4. Paragraph 8.4(4) is quite clear about the way in which that consideration is intended to operate as reflecting the expectations of the community as a whole and not the expectations of the community in some more limited or confined sense as indicated by particular evidence that might be put forward in some other case. Unless there was anything further, they are the submissions for the defendant. Thank you, your Honour, we otherwise rely on what is set out in writing in the written materials.

GAGELER J: Thank you. Mr Hooke.

MR HOOKE: Thank you, your Honour. Just dealing with a couple of factual matters, Justice Gleeson raised a question in relation to the plaintiff's citizenship. Reference was made to the Personal Circumstances

Form at – I am sorry, to the application for a visa. It is also picked up in the travel document, which is at page 33 of the court book, which your Honours will see is described as a "travel document", not a passport; also at application book 110 in the Personal Circumstances Form where he describes having no citizenship; and at application book 132 in paragraphs 22 to 24 of his statement where he describes his circumstances as a Palestinian refugee in Lebanon.

Our learned friend by way of overview of the direction took the Court to clauses 5.1(2) and 5.2(5), which required the decision-maker to address the individual circumstances in applying the various clauses of the direction. That, with respect, is precisely our complaint in relation to ground 1 and ground 4 and, as I said in answer to Justice Jagot in-chief, those clauses homogenise the specific matters taken up in the particular primary considerations to which we refer, with the overarching obligation to consider each of those matters in the context of the circumstances of the particular visa applicant.

In relation to ground 1, it is true that there was a degree of urgency being urged in relation to the making of this decision. That was for obvious reasons. However, the urgency did not preclude the delegate or the Minister from making proper inquiries, and indeed it did not as a matter of fact. The decision, as it was, was five and a half months in the making. There were numerous exchanges of correspondence, as has been demonstrated, and that does not, in our respectful submission, foreclose the obligation of the defendant to make a decision according to law or to make the inquiry about Mariam.

In relation to the reliance the Minister puts on the legal assistance that the plaintiff had at the time, your Honours will see – I do not ask your Honours to take it up now – but at pages 395 and 396 of the application book, in which pages of the affidavit of the plaintiff appear, but in reverse order – paragraph 16 explains that the legal assistance he was receiving was in the context of some pro bono assistance with the proceedings that the Tribunal determined that lack jurisdiction to deal with.

So, that was the context in which there some assistance being given at the level of the delegate. I raise that because the Minister places such reliance on it and it would be unfair, in our respectful submission, to place great responsibility at the feet of a representative offering pro bono assistance in the context in which it was being provided.

Our learned friend then went to *Uelese* and said it is open to a decision-maker to make a neutral finding on the best interests of a child, and that is so, we accepted that in-chief. But that is not what happened here because, as your Honours know from paragraph 75 of the Tribunal's

reasons, the Tribunal did not even get to the point of accepting that the child was a minor, which rather begs the question how it could then be said that what the Tribunal did was to consider the interests of a minor child and make a finding – neutral or otherwise – in relation to their best interests. That point was not even reached. So, in our submission, this case is, if anything, stronger than *Uelese* and quite readily distinguishable from *Paerau*.

Justice Gordon asked our learned friend whether another way of putting the Minister's position was that the delegate had considered clause 8.3 and made a finding on the material before it. We say, for the reasons I have just articulated, not so in this case because they did not get to that point. My learned friend then sought to distinguish *SZIAI* on the basis that it was a Tribunal decision but, of course, as your Honours know, what the Tribunal was tasked with doing was to review the original decision and redo it in the position of the original decision-maker. So, there is no distinction to be drawn there. If anything, again, the position of the level of the delegation, in our submission, is even more inquisitorial than the position of the Tribunal.

Our learned friend submitted that it was not unreasonable to make even a desirable inquiry, and that might be accepted. But in this case, in our submission, unreasonableness is established by four steps. First, there was an obvious inquiry to be made. Secondly, there was a critical fact in relation to the status and age of the child. Thirdly, the information was readily ascertainable, for the reasons we have already given. Fourthly, the inquiry could, and in our submission would, have yielded useful results, for the reasons we have already given. That chain of reasoning, in our submission, leads to the conclusion of unreasonableness.

In addressing ground 2, my learned friend notably gave no attention to the reasons of the delegate. The Minister sought to address this ground entirely at the level of abstraction of the direction, and, in our submission, that is telling. That is telling for the reasons that your Honours know, from the numerous occasions in the delegate's reasons where separate weight was attributed to the same factors.

That is not to say – as seems to be attributed to us – that we dispute that a single set of facts can have different complexions. We accepted that upfront. But in this case, in a context where our learned friend says that clause 8.2 reflects a policy view of the government as distinct from community expectations, arising out of the seriousness of the conduct, that is precisely the same matter that is described in clause 8.1.1(1) in terms. That, with respect, makes good our submission that this is in fact not a case of looking at the same thing from different perspectives, but the same thing repetitively.

Justice Gageler raised a question about the invalidity argument in ground 2. We did not press that in oral submissions for the reason that neither party has contended in this case that clause 8.2 permits or requires repetitive counting. On that basis, the question of invalidity does not arise. In relation to ground 3, our learned friend seeks to sideline *NBMZ* by reference to the Chief Justice and Justice Katzmann. We gave your Honours reference to their treatment of that issue at paragraphs 28 and 31 in-chief. That is a different proposition not raised here, about deterrence.

Ground 4, our learned friend says the delegate did weigh individual circumstances at paragraph 113, and then seeks to turn our ground 2 on us in relation to the use of personal circumstances. But it takes no imagination, with respect, to see that the personal circumstances being considered under the other considerations of hardship impediments if left in Lebanon and the like is to view those matters through an entirely different prism of perspective to that described by Justice Beach and Justice Bromberg in *Kelly* and *Ali*, where one is looking at how one would bring those matters to bear in adjusting the weight to be given to community expectations.

That is an entirely different angle from which to view those individual circumstances, so we do not fall over our own argument, as the Minister would have it. I am corrected, your Honours. The reference to 8.1.1 being the statement of government policy on family violence should be a reference to clause 8.1.1(1)(a) of the direction.

Unless there is anything further, those are our submissions.

GAGELER J: Thank you, Mr Hooke. The Court will reserve its decision in this matter and will adjourn until 9.45 am tomorrow.

AT 3.04 PM THE MATTER WAS ADJOURNED