FEDERAL COURT OF AUSTRALIA

SZVUI v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 809

File number:	NSD 43 of 2024
Judgment of:	**THAWLEY J**
Date of judgment:	23 July 2024
Catchwords:	**MIGRATION** – application for judicial review of decision refusing visa application – decision made personally under s 501(1) of the *Migration Act 1958* (Cth) – whether applicant was denied procedural fairness – whether applicant put on notice of a conclusion that child marriage violates the rights of children under international law or laws – applicant not put on notice – whether that finding was a critical issue on which the decision turned or sufficiently important as to warrant providing an opportunity to be heard – finding not an issue on which the decision turned or sufficiently important – no denial of procedural fairness **MIGRATION** – whether Minister overlooked relevant material when finding the applicant had not shown remorse – whether Minister overlooked relevant material when finding that there was no evidence that the applicant had engaged with Mental Health Services – whether Minister overlooked relevant material when finding that the applicant had not engaged with rehabilitation courses in prison – Minister did not overlook material **MIGRATION** – whether remorse or rehabilitation findings illogical or irrational – reasoning on remorse and rehabilitation not illogical or irrational – application dismissed
Legislation:	*Migration Act 1958* (Cth) *Crimes Act 1900* (NSW)
Cases cited:	*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 293; 49 FCR 576 *Degning v Minister for Home Affairs* [2019] FCAFC 67; 270 FCR 451 *Korat v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 59

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12; 98 ALJR 610

Milne v Minister for Immigration and Citizenship [2011] FCAFC 41; 120 ALD 405

Minister for Immigration and Border Protection v SZMTA [2019] HCA 3; 264 CLR 421

Minister for Immigration and Border Protection v WZARH [2015] HCA 40; 256 CLR 326

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; 185 CLR 259

Muin v Refugee Review Tribunal [2002] HCA 30; 76 ALJR 966

Nathanson v Minister for Home Affairs [2022] HCA 26; 276 CLR 80

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17; 275 CLR 582

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; 214 CLR 1

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; 241 CLR 252

Soliman v University of Technology, Sydney [2012] FCAFC 146; 207 FCR 277

Stojic v Deputy Commissioner of Taxation [2018] FCA 483

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; 228 CLR 152

SZLPO v Minister for Immigration and Citizenship [2009] FCAFC 51; 177 FCR 1

Virapornsawun v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCATrans 29 at 179-190

Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	126
Date of hearing:	16 July 2024
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	SAM Legal & Migration
Counsel for the Respondent:	Mr B D Kaplan and Mr R P Harvey

Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 43 of 2024

BETWEEN:	**SZVUI** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**THAWLEY J**
DATE OF ORDER:	**23 JULY 2024**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs as agreed or assessed.

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

REASONS FOR JUDGMENT

THAWLEY J:

INTRODUCTION

1 The applicant applies for judicial review of a decision of the Minister for Immigration, Citizenship and Multicultural Affairs to refuse his application for a Bridging E (Class WE) visa. The Minister's decision was made under s 501(1) of the *Migration **Act** 1958* (Cth), which permits the Minister to refuse to grant a visa "if the person does not satisfy the Minister that the person passes the character test". The "character test" is defined in s 501(6).

2 The applicant is a citizen of Lebanon. He arrived in Australia on 20 June 2013 as a holder of a Student (Class TU) visa. On 6 February 2014, the applicant was arrested by NSW Police and charged under s 66C(1) of the *Crimes Act 1900* (NSW) with 25 counts of having sexual intercourse with a child between the ages of 10 and 14 years. The child was the applicant's wife, under Sharia law, whom he married when she was 12 years of age on 12 January 2014 at the child's father's home in Raymond Terrace, New South Wales. The Minister's reasons included:

> [17] The New South Wales Police Facts Sheet indicates the following information. On 6 February 2014, the Child Abuse Squad received the information regarding the victim, a 13 year old girl (born on 5 February 2001) who was living in a domestic/sexual relationship with [the applicant] …
>
> [18] The detectives interviewed the victim, who confirmed that on 12 January 2014, when she was 12 years old, she married [the applicant] in an Islamic ceremony, with the permission of her father. During the interview, the victim stated that [the applicant] had been known to her father for about two months having met through the mosque in Newcastle, New South Wales. The victim stated that she had been having sexual intercourse with [the applicant], twice on their wedding day and on a daily basis since the wedding day. I note that the victim turned 13 on 5 February 2014, meaning that most of the incidents of penile/vaginal intercourse took place when she was 12 years of age. During the interview, the victim also stated that she had been informed that Sharia Law overrides the Australian law, and that her husband ([the applicant]) was trying to register as her legal guardian in order to receive Centrelink benefits …
>
> [19] I note that [the applicant], who was subsequently arrested and interviewed by the police, confirmed that he entered into an Islamic marriage with the victim, and admitted to having sexual intercourse with her. I note the New South Wales Police Facts Sheet indicates that [the applicant] showed no remorse during the interview and was confident that he committed no crime. Subsequently, [the applicant] was served with a Provisional Apprehended Violence Order to protect the victim and her family …

3 On 10 March 2014, the applicant's student visa was cancelled and he was subsequently taken into immigration detention.

4 Whilst in immigration detention, the applicant applied for two bridging visas. Each application was unsuccessful as were his applications for merits review. The applicant also unsuccessfully applied for a protection visa whilst in immigration detention. This application was refused and merits review and judicial review were both unsuccessful.

5 On 6 March 2015, the applicant was convicted in the District Court of New South Wales of "persistent sexual abuse of a child". He was sentenced to 10 years' imprisonment with a non-parole period of seven years and six months.

6 The applicant was released from prison on 5 August 2021 and returned to immigration detention. In May and September 2022, the applicant made his third and fourth applications for bridging visas, both of which were denied. Merits review of the fourth application was unsuccessful.

7 On 8 January 2023, the applicant made a request for ministerial intervention under ss 195A and 197AB of the Act. This remains undecided. On 10 January 2023, the applicant made a fifth bridging visa application, which was refused on the same day. An application for merits review was unsuccessful. On 13 June 2023, the applicant made a sixth bridging visa application, which was refused two days later. An application for merits review was unsuccessful.

8 On 22 September 2023, the applicant sought ministerial intervention under s 48B of the Act to permit the lodging of a second application for a protection visa. The applicant made a seventh application for a bridging visa the same day. It is this seventh application for a bridging visa which is the genesis of the present proceedings. On 4 October 2023, the applicant was issued a Notice of Intention to Consider Refusal (**NOICR**) to grant him a bridging visa. The applicant's representative responded to the NOICR with submissions and evidence on 23 October 2023. The Minister sent two further letters inviting comment.

9 On 19 December 2023, the Minister made a decision to refuse the applicant's application for a bridging visa. This is the decision the subject of this application for judicial review.

10 There are five grounds of review.

11 Before addressing those grounds, it is relevant first to say something about the Minister's reasons for decision.

THE MINISTER'S REASONS

12 The Minister concluded that the applicant had not satisfied him that the applicant passed the character test: at [9]. There was no dispute on this application that the applicant did not satisfy the "character test" in s 501(6) of the Act given this conviction – see: ss 501(6)(a) and s 501(7).

13 The Minister then considered whether to exercise his discretion to refuse the visa application. In doing so, the Minister considered the applicant's written submissions of 22 October 2023 which addressed *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 99**), acknowledging that he was not legally bound to comply with the direction: at [11]. The Minister considered: the five "primary considerations" in paragraph 8 of Direction 99: at [13] to [101]; two of the four "other considerations" in paragraph 9 of Direction 99: at [102] to [126]; and additional matters: at [127] to [130].

14 The Minister summarised his findings at [131] to [137] and recorded his ultimate conclusion at [138], namely a decision to exercise the discretion in s 501(1) to refuse to grant the visa.

15 Of particular relevance to the five grounds of judicial review, the Minister's reasons included:

> **Protection of the Australian community**
>
> …
>
> Nature and seriousness of conduct
>
> …
>
> [19] … I note the New South Wales Police Fact Sheet indicates that [the applicant] showed no remorse during the interview and was confident that he committed no crime …
>
> …
>
> Risk to the Australian community
>
> [22] In making my assessment regarding the risk that may be posed by [the applicant] to the Australian community, I have had regard, cumulatively, to:
>
> - the nature of the harm to individuals or the Australian community should [the applicant] engage in further criminal or other serious conduct; and
> - the risk of further criminal or other serious conduct, taking into account the likelihood of [the applicant] reoffending and evidence of rehabilitation.
>
> [23] Having regard to the nature of [the applicant's] conduct in the past, as outlined above, I consider that any future offending of a similar nature would have the potential to cause physical and psychological injury to members of the

Australian community. Furthermore, I consider that child marriage violates the rights of children under domestic and international laws and has widespread and long term consequences for the victim, being the child bride. I also consider the harm posed to children who have been unable to consent to engaging in sexual conduct with an adult.

[24] In assessing the likelihood of [the applicant] reoffending in the future, I have considered factors that may assist to explain [the applicant's] past conduct, as well as his more recent conduct, remorse and rehabilitation.

Factors contributing to past conduct

…

[26] I note that in response to the NOICR dated 23 October 2023, [the applicant] has not submitted any personal statements in regards to the circumstances of his offending. I take into consideration the New South Wales Police Facts Sheet which state that [the applicant] had '*failed to understand that his alleged offences are against the law*' and that '*he was confident that he had committed no crime*' … I also note [the applicant's] statement at a departmental interview dated 16 September 2014, where he stated that he had not committed a crime under Sharia Law …

Remorse and rehabilitation

[27] I note the following factors are relevant to [the applicant's] remorse and insight into his offending. The New South Wales Statement of Material Facts dated 7 April 2014, illustrates that during the questioning, [the applicant] showed no remorse and was confident that he had committed no crime … During his protection visa interview, dated 16 September 2014, [the applicant] appeared to display poor insight into his offending and appeared to blame the 12 year old victim for his criminal offending stating – '*wife had full say in whether she got married to the applicant…* and that *'… she had forced her father to get married to the applicant…'* …

[28] I also note that [the applicant] made full admissions to having sexual intercourse with the victim …

[29] I note that [the applicant] expressed contrition for the events in early 2014, which led him to be convicted of persistent sexual abuse of a child, which was acknowledged at the AAT hearing dated 24 January 2023 …

[30] I have given consideration to the Submission from [the applicant's] representative Dr Jason Donnelly. Dr Donnelly acknowledges [the applicant's] past conviction stating that [the applicant] has made significant efforts towards rehabilitation, which demonstrates his commitment to becoming a responsible and contributing member of society …

[31] I take into consideration that [the applicant] has completed a number of courses while in detention that include Early Childhood Development, Data Science and Machine Learning Fundamentals & Code, Child Safety for Parents, Basic Parenting 101, Positive Parenting, Healthy Relationship Child Psychology and SMART Recovery. I note that most of these courses were completed within the past year. [The applicant] has not engaged in any rehabilitation courses in prison, and given the very serious nature of the offending, I take into account that [the applicant] did not take any proactive steps, while in prison, to address the causes of his offending.

[32] I also note that [the applicant's] representative stated that [the applicant] has engaged with Mental Health Services, and completed the SMART Recovery program. However, I have no evidence before me to verify this statement. I also note that I have no independent evidence in the form of psychological or counselling assessment to affirm [the applicant's] rehabilitation …

…

[34] I also take into account [the applicant's] representations, in summary, his desire to start a family with his [second] spouse, [Ms O], which is a motivating factor for him to not reoffend. I also note letters of support from Ms [O] who acknowledges [the applicant's] convictions and describes him as *'reformed man'* and dedicated father and a husband. [Ms O] has also provided evidence that she is willing to support her husband financially, and provide an assurance bond upon his release from Villawood IDC **Attachments S1** [being the written submission dated 22 October 2023], **Attachment U1** [being a statement of the applicant's second wife] and **Attachment U2** [being a statutory declaration of the applicant's second wife].

[35] I take into consideration the members of [the applicant's] extensive prosocial and extended family who have provided support and who are willing to assist [the applicant] financially, emotionally, practically and also offer him employment upon his release. I also note that [the applicant's] extended family, friends and members of the community have acknowledged his past criminality and describe him as a genuine person, a decent man and a reformed individual **Attachments S1** [the 22 October 2023 submission] and **Attachments Wl-W31** [being 31 letters of support and references].

…

Recent adverse conduct

[37] I take into consideration [the applicant's] incidents while in detention at Villawood IDC, as recent as 21 July 2023, relating to abusive aggressive behaviour including two separate incidents where he verbally and physically assaulted staff …

[38] [The applicant's] representative has not made any submissions in relation to the above incidents **Attachment S1** [the 22 October 2023 submission].

Conclusion on risk to the community

[39] I have found that the nature of [the applicant's] conduct is very serious. I have further found that persistent sexual abuse of a child has the potential to cause physical or psychological injury to members of the Australian community. Moreover, I found that the flow-on effects of harm caused by similar offending has the potential to impact on family members and friends of the victim and more broadly across the Australian community.

[40] I have considered the submissions on behalf of [the applicant]. I acknowledge that familial ties and significant prosocial support will act as deterrents against [the applicant's] further offending. I have also taken into account remarks from the AAT hearing that confirm [the applicant's] contrition. While I give some weight to [the applicant's] recent efforts in rehabilitation, I note his recent adverse behaviour in detention shows an increased risk of reoffending.

[41] I find that [the applicant] has shown a lack of remorse for his offending as evidenced in the NSW Statement of Facts. I also find that [the applicant] has

not demonstrated any insight or awareness into the causes and impact of his offending or expressed any empathy for the victim of his offending, a 12 year old girl. I also note that [the applicant] has not addressed his violent conduct at the Villawood IDC. I consider all of the above factors to be significant to an increased risk of reoffending.

[42] I have considered that, should [the applicant] engage in similar conduct again, it may result in psychological and physical harm to members of the community. I have given this weight in favour of visa refusal.

Family violence conduct

…

[49] Therefore, I find that [the applicant] has engaged in conduct that constitutes family violence relating to forced marriage.

Seriousness of family violence that occurred

[50] Having determined that [the applicant's] conduct, as set out above, constituted family violence, I have considered the seriousness of that conduct.

…

[53] [The applicant's] representative has not made any specific submissions with respect to the primary consideration concerning family violence or forced marriage conduct. Nonetheless, I have noted [the applicant's] rehabilitation efforts as set out under the heading Risk to the Australian community. I also note that [the applicant] has not undertaken any offending-appropriate counselling which gives me some pause that [the applicant] has clear understanding of the drivers of his offending, or the impact of his behaviour on a minor.

[54] As discussed above, [the applicant] has expressed no remorse and no insight into his offending and sought to blame the victim stating that she forced her father to allow her to marry [the applicant].

GROUND 1

Introduction

16 Ground 1 centres on the Minister's reasons at [23] (applicant's emphasis added):

> Having regard to the nature of [the applicant's] conduct in the past, as outlined above, I consider that any future offending of a similar nature would have the potential to cause physical and psychological injury to members of the Australian community. Furthermore, **I consider that child marriage violates the rights of children under** domestic and **international laws** and has widespread and long term consequences for the victim, being the child bride. I also consider the harm posed to children who have been unable to consent to engaging in sexual conduct with an adult.

17 This reasoning is located in that part of the reasons which addresses the first primary consideration, namely "protection of the Australian community from criminal or other serious conduct" and – within that section – under the heading "Risk to the Australian community".

18 The first primary consideration is addressed in paragraph 8.1 of Direction 99. The matters in paragraph 8.1(2)(a) and (b) are further addressed in paragraphs 8.1.1 and 8.1.2, respectively. The Minister addressed the "nature and seriousness of conduct" (paragraph 8.1(2)(a)) at [15] to [21] and "risk to the Australian community" (paragraph 8.1(2)(b)) at [22] to [42]. Paragraph 8.1.2 of Direction 99 provides:

> **8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct**
>
> (1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.
>
> (2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:
>
> a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
>
> b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:
>
> i. information and evidence on the risk of the non-citizen re-offending; and
>
> ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).
>
> c) where consideration is being given to whether to refuse to grant a visa to the non-citizen — whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

19 Ground 1 is in the following terms:

> **1. The Minister denied the applicant procedural fairness.**
>
> a. First, the Minister found that child marriage violates the rights of children under international laws ([23]) (the **international law finding**).
>
> b. Second, the applicant was never put on notice of the international law finding. Direction 99 says nothing about considering the future risk of harm of a non-citizen in the context of breaching international laws. No correspondence sent to the applicant otherwise put the applicant on notice of the proposed international law finding.

> c. Third, the [Minister's] error was material. The [Minister's] error infected the [Minister's] assessment of weight in relation to an adverse primary consideration held against the applicant. Where an applicant has been deprived of a chance to make submissions on a topic of relevance, "reasonable conjecture" from established facts about the decision-making process will readily show a reasonable possibility that the outcome would have been different: *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 [35].

Summary of submissions

20 The applicant submitted that:

(a) the Minister denied the applicant procedural fairness by making the finding that "child marriage violates the rights of children under … international laws" without putting the applicant squarely on notice that this finding would be made: AS[4];

(b) the applicant was never put on notice that the Minister would consider whether the applicant's conduct constituted a breach of international law and that "the adverse conclusion that flowed from the … finding was not an obvious finding based on the material that was before the applicant": AS[5].

21 The applicant noted that paragraph 8.1.2 of Direction 99 does not make any reference to whether a non-citizen's offending contravened international law.

22 The Minister submitted that:

(a) The applicant was put on notice that the lawfulness of child marriage was being considered by the Department of Home Affairs. In this regard, the Minister:

- referred to a letter to the applicant dated 2 November 2023 which attached further material including an earlier protection visa decision and invited further comment;
- submitted that the applicant should have been aware that the Minister might have turned his mind to the international characterisations of the applicant's criminality because of subparagraphs 8.5(2)(b) and (e) of Direction 99; and
- noted that the applicant had himself relied upon the *Convention on the Rights of the Child*.

(b) Properly understood, the Minister was assessing the risk of harm to the Australian community. Whether child marriage was properly characterised as involving a violation of the rights of a child under international law was not the real issue.

(c) The applicant had not discharged his onus of establishing that any breach of procedural fairness was material.

23 More specific and detailed submissions are addressed in the discussion below.

Consideration

Principles

24 A substantial part of the argument in relation to Ground 1 proceeded by reference to the Full Court's decision in *Commissioner for Australian Capital Territory Revenue v* ***Alphaone*** *Pty Ltd* [1994] FCA 293; 49 FCR 576. The facts in *Alphaone* may be summarised as follows:

- Alphaone purchased businesses which traded in X-rated videos under licences which could not be transferred to it. Alphaone applied to the Commissioner for ACT Revenue for an X-rated video licence.
- The Commissioner wrote to Alphaone stating that, if Alphaone was trading, it should cease pending determination of the application, noting that trading would be an offence under s 25 of the relevant Act. The Commissioner noted that there would be delay in processing the application because evidence would be needed so as to assess whether Alphaone was a fit and proper person to hold a retail X-rated video licence: at 578.
- Later correspondence from the Commissioner indicated that the Commissioner would not be assessing the question of whether Alphaone was a fit and proper person only on the basis of information supplied by Alphaone: at 579. This later correspondence repeated that it would be a breach of the relevant Act to trade without a licence and that the applicant could be liable for prosecution: at 579-580.
- Alphaone instructed solicitors to write to the Commissioner contending (spuriously) that a licence had already been issued and threatening proceedings for a declaration that Alphaone was entitled to be issued with a licence.
- The Commissioner responded by confirming that no licence had been issued, that a decision would be made on the available material and that the Commissioner was aware that Alphaone had been selling X-rated videos without a licence contrary to the advice which had been given to Alphaone that such sales were in breach of the relevant Act: at 580-581.

- Officers within ACT Revenue recommended refusal of the licence, referring to evidence that Alphaone was continuing to trade unlicensed and stating that evidence had been gathered to show that Alphaone had contravened s 25 of the Act.
- Alphaone's application was refused and it requested a statement of reasons.

25 The Full Court summarised the statement of reasons in the following way at 582:

> A statement of reasons for the refusal to grant a licence was provided by the Commissioner on 23 October 1992. He referred to the letters of 3 and 5 August 1992 warning Alphaone that it would be in breach of the Act if it traded in X-rated videos without a licence. He stated his conclusion that Alphaone had traded in such videos without a licence and in this connection adverted to reports from his officers who had visited premises conducted by the company, the statement in Alphaone's application that it would commence trading in X-rated videos and the sale agreement with Skyborough Pty Ltd which implied that Alphaone had taken over the running of its businesses. On this finding the Commissioner took the view that Alphaone had committed a blatant breach of the Act and that this reflected "extremely adversely upon the Applicant's fitness and propriety to hold a licence". He continued:
>
> > It was for this reason alone that I refused to grant to the Applicant a retail 'x' rated video licence as I indicated to it in my letter of 17 September 1992. A copy of this letter is attached and it forms part of this statement.

26 The Full Court expressed the general propositions about the content of procedural fairness in the following way at 590-591:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material: *Dixon v Commonwealth* (1981) 55 FLR 34 at 41. However, as Lord Diplock said in *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:
>
> > … the rules of natural justice do not require the decisionmaker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished.

27 The first two sentences of this passage were quoted with approval by the High Court in ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [32], that Court emphasising: "*That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and content of adverse material".

28 Returning to *Alphaone*, at 591 the Full Court continued its exposition of general propositions by stating:

> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: *Kioa v West* at 587 (Mason J), 628 (Brennan J). Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case: *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506 (Fox J), 513 (Neaves J). In *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469 at 499, Lockhart J expressly agreed with the observations of Fox J in *Sinnathamby* on this point. See also *Geroudis v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 19 ALD 755 at 756-757 (French J) and *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* [[1991] FCA 501; 31 FCR 100] at 103 (Keely J), 119 (Gummow J).

29 The Full Court then turned to what it described as "qualifications" to the general propositions, which I take to refer predominantly to the proposition that "a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case". The Full Court stated at 591-592 (emphasis added):

> The general propositions set out above may be subject to qualifications in particular cases. Two such qualifications were enunciated by Jenkinson J in *Somaghi* at 108-109:
>
> 1. **The subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it**: *Kioa v West* at 587 (Mason J); *Sinnathamby* at 348 (Burchett J); *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 (Burchett J).
>
> 2. **The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material**: *Minister of Immigration and Ethnic Affairs v Kumar* (unreported, Full Court, Federal Court, 31 May 1990); *Kioa v West* at 573, 588 and 634.
>
> His Honour observed that those qualifications may be no more than an application of the general requirement of procedural fairness in particular cases. As Gummow J there said [(1991) 102 ALR 339] at 359 [or (1991) 31 FCR 100]:
>
> > … in a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or materials provided by the third party, but what is seen to be the conduct of the applicant in question.
>
> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. **That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse**

> **conclusion which has been arrived at which would not obviously be open on the known material**. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question …

30 The Full Court concluded that there was no breach of procedural fairness (at 592): there was "no doubt that the need to demonstrate that Alphaone was a fit and proper person to hold a licence was brought to the attention of its directors"; the company was told that the Commissioner was aware that it was selling X-rated videos without a licence; the company did not deny that it was trading in the videos, but asserted that it was not open to the Commissioner to use that fact against the company; there was no failure of procedural fairness in the Commissioner concluding that the company was trading in X-rated videos without a licence; and the reference to evidence from third parties was superfluous having regard to the admissions made by the company's solicitors. The Full Court continued:

> The real question in this case is whether he could, without inviting further submissions, conclude that the company's conduct was such that it was not a fit and proper person to hold the licence. That question can be answered confidently in the affirmative. Accepting the validity of so much of s 5 of the Act as requires a licence to sell "X" videos by retail, the company's attitude was contemptuous and dismissive of its legal obligations. It was an obvious and natural evaluation of its conduct in that respect which led to the conclusion that it was not a fit and proper person …

31 Having regard to *Alphaone* and more recent cases, the principles can be expressed in the following way.

32 What is necessary and appropriate to ensure a fair opportunity of being heard depends on the particular factual and statutory context, the rules of procedural fairness being flexible and adaptable so as to be appropriate in a given case and so as to avoid practical injustice – see: *SZBEL* at [26] and [29]; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [19]-[20]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [37]-[38]; ***Korat*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 59 at [25].

33 The ultimate question is: what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework, and the factual context, within which the decision is to be made?: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326 at [30] (Kiefel, Bell and Keane JJ), read with *SZBEL* at [26]; *Korat* at [24].

34 It is essential to examine the statutory and factual context in order to reach a conclusion as to what procedural fairness requires in the circumstances of any given case: *Korat* at [27]. Absent statutory modification, procedural fairness requires the party affected to be given the opportunity of ascertaining the relevant issues: *SZBEL* at [32]. Many of the issues will be capable of being ascertained from the factual and statutory context. Some issues may not be sufficiently capable of being ascertained from the factual and statutory context. Thus, for example:

- Procedural fairness "would ordinarily require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made": *Alphaone* at 591. The applicant is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn, where those issues are not apparent from the factual and statutory context.
- The applicant is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by, or known to the applicant, which is not an obvious and natural evaluation of that material: *Alphaone* at 591.
- If the decision-maker has obtained adverse material from sources other than the applicant, procedural fairness would ordinarily require an opportunity to be afforded to rebut or qualify that information by further information or submission: *Alphaone* at 591-592. The duty to provide an opportunity to comment may not be adequately discharged simply by providing the adverse material to the applicant. It might be necessary to explain the relevance of the material where that would not otherwise be obvious: *Degning v Minister for Home Affairs* [2019] FCAFC 67; 270 FCR 451 at [12] (Allsop CJ); at [147]-[152] (Thawley J, dissenting in the result but not as to principle).

35 It is therefore necessary to examine the whole of the circumstances in context, including the material given to the applicant and the extent to which the applicant's attention was directed to the relevance of the material, in ascertaining whether procedural fairness was afforded The ultimate assessment is whether the applicant was provided a *fair* opportunity of ascertaining the critical issues, being those of sufficient importance to the decision so as to engage the obligation. A decision-maker does not need to disclose every matter to be taken into account or every integer of his or her thought processes before making a decision: *Alphaone* at 591.

Application

Factual and statutory context

36 The general factual context, known to the applicant, included that the applicant had been charged with 25 counts of having sexual intercourse with a child (whom he had married when she was 12 years of age). This led to his visa being cancelled on 10 March 2014 and him being taken into immigration detention and his being sentenced to 10 years' imprisonment on 6 March 2015.

37 The specific factual context included that the applicant was applying for a bridging visa and that the Minister or his delegate was considering refusing the visa application on character grounds. The applicant was informed by the NOICR dated 4 October 2023 that consideration would be given to whether to refuse the visa application on character grounds under s 501(1) of the Act. The letter attached a significant amount of material. The letter invited the applicant to consider Direction 99, a copy of which was attached. The letter included:

> Read Direction No. 99 carefully. In preparing any response to this notice, you may wish to make submissions relating to the Primary Considerations and Other Considerations specified in PART 2 to the extent relevant to your circumstances. You may also wish to note that Annex A of Direction No. 99 includes information for decision-makers on how to apply the character test provisions.

38 The applicant's representative provided a response to the invitation on 23 October 2023. The response included:

- a letter from SAM Legal & Migration Consultancy;
- written submissions dated 22 October 2023 signed by Dr Donnelly of Counsel which addressed the considerations referred to in Direction 99;
- certificates in relation to various courses completed by the applicant;
- a statement and a statutory declaration from the applicant's second wife, whom he married on 23 January 2023 whilst in detention (they have not lived together as a couple); and
- numerous statements in support of the applicant and his character.

39 The NOICR was followed by two further letters inviting further comment. The Minister relied upon one of these, namely a letter dated 2 November 2023. That letter is addressed further below in the context of the Minister's argument that – if procedural fairness did require the Minister to invite comment upon his view that child marriage violates the rights of children

under international laws – then he had in any event put the applicant sufficiently on notice that this conclusion might be reached.

Did procedural fairness require the Minister to invite comment upon his view that child marriage violates the rights of children under domestic and international laws?

40 As mentioned, the applicant focusses on a particular part of [23] of the Minister's reasons. It is helpful to set out [22] to [24] again for context, emphasising the words particularly relied upon by the applicant in relation to Ground 1:

> **Protection of the Australian community**
>
> …
>
> Risk to the Australian community
>
> [22] In making my assessment regarding the risk that may be posed by [the applicant] to the Australian community, I have had regard, cumulatively, to:
>
> - the nature of the harm to individuals or the Australian community should [the applicant] engage in further criminal or other serious conduct; and
> - the risk of further criminal or other serious conduct, taking into account the likelihood of [the applicant] reoffending and evidence of rehabilitation.
>
> [23] Having regard to the nature of [the applicant's] conduct in the past, as outlined above, I consider that any future offending of a similar nature would have the potential to cause physical and psychological injury to members of the Australian community. Furthermore, **I consider that child marriage violates the rights of children under** domestic and **international laws** and has widespread and long term consequences for the victim, being the child bride. I also consider the harm posed to children who have been unable to consent to engaging in sexual conduct with an adult.
>
> [24] In assessing the likelihood of [the applicant] reoffending in the future, I have considered factors that may assist to explain [the applicant's] past conduct, as well as his more recent conduct, remorse and rehabilitation.

41 It is often observed that the reasons for administrative decisions should be read in a fair and balanced way, or in a common-sense manner, and that the reasons should not be construed minutely or zealously with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 271-272. The principle is protean and account should be taken of the particular administrative and statutory context, including any statutory obligation to furnish reasons, and the nature and qualifications of the decision-maker: *Stojic v Deputy Commissioner of Taxation* [2018] FCA 483 at [104].

42 The task is not one of seizing upon infelicities in language, or identifying incorrect usage of language, with the result that the technical meaning of what was said bespeaks error. Likewise, a fair and balanced reading of reasons should not be so blinkered as to avoid discerning error where, for example, it is apparent that something has been overlooked: *Soliman v University of Technology, Sydney* [2012] FCAFC 146; 207 FCR 277 at [57]. Ultimately, the object is to discern from the reasons what the true basis for the decision was in order to determine whether, in making the decision, the decision-maker exceeded the express or implied limits of the decision-making authority conferred by the relevant statute.

43 At [23], the Minister was addressing the "Protection of the Australian community from criminal or other serious conduct" and, more particularly, "the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct". The essence of what the Minister was stating was that child marriage violates the rights of children and causes long term harm to the child. Read in context – including the location of the sentence in the reasons as a whole – it is clear that the Minister was focussed on the harm caused to a child by an adult marrying that child. In that context, the Minister stated that he considered child marriage violates the rights of children under domestic and international laws. The reference to "domestic and international laws" was a general one intended to state in a general way the source of the child's rights which the Minister considered were violated by child marriage. The precise nature and source of those rights was not important and was not identified. In this part of his reasons, the Minister was not purporting to consider or determine whether the applicant had breached (or might in the future breach) any particular law, domestic or international. That was not the central or important issue. Rather, the important issue was the harm caused to a child by child marriage.

44 The Minister considered that child marriage caused harm to children and involved long term consequences. The applicant was squarely on notice that this was an issue, given his conviction and the fact that risk of harm is a central consideration in Direction 99 and likely to be considered by the Minister.

45 A distinction must be drawn between:

(a) ensuring an applicant is capable of ascertaining the critical or important issues in order to provide a fair opportunity of being heard; and

(b) exposing, before a decision is made:

(i) each and every one of the reasons for determining the critical issues in a particular way; or

(ii) each of the various non-critical matters taken into account or non-critical findings made in the context of addressing the critical issues.

46 The critical and important issues must be capable of being ascertained in order to provide a proper opportunity to be heard, but the latter need not.

47 There may not always be a bright dividing line, and views may differ as to where precisely the line is located in any particular case. The ultimate answer lies in considerations of fairness.

48 The critical issue of concern to the Minister was the harm caused by child marriage and the risk of reoffending. The characterisation of child marriage as involving a violation of the rights of a child under international law or laws was not a critical issue on which the decision turned and it was not treated by the Minister as such an issue. Given the known circumstances referred to earlier, procedural fairness did not require the Minister to invite comment upon his view that child marriage violates the rights of children under international law or laws.

Did the Minister put the applicant on notice of his view that child marriage violates the rights of children under domestic and international laws?

49 The Minister submitted that, in any event, the Minister put the applicant on notice that he might conclude that child marriage violates the rights of children under international law or that the Minister might address international characterisation of the applicant's conduct.

50 In this regard, in addition to the statutory and factual background referred to earlier, the Minister relied on his letter of 2 November 2023 and emphasised certain provisions in Direction 99.

51 The letter to the applicant dated 2 November 2023 referred to the NOICR dated 4 October 2023 and the applicant's response dated 23 October 2023 and advised that "the Department has received further information which may be taken into account when making the decision whether to refuse to grant you a visa". The applicant was invited to comment on the further information. The "further information" – which was attached to the letter – consisted of:

(a) the decision record of a delegate of the Minister with respect to a Protection (Class XA) visa application dated 16 September 2014 (**protection visa decision**); and

(b) a decision record of the Administrative Appeals Tribunal dated 24 January 2023.

52 The letter dated 2 November 2023 did not point to any particular aspects of the attached material said to be of any particular relevance to any particular issue. Rather, the letter simply provided the decision records and invited comment.

53 The Minister relied on the protection visa decision which included a section entitled "Underage marriage". This included (Minister's emphasis in bold):

> *Underage marriage*
>
> The Lebanon Daily Star reported in March 2014 that girls as young as nine can marry if approval is given by a sheikh. The UNHCR has raised grave concerns at the rate of underage marriages in Lebanon of Syrian refugees. Plans are already afoot by the National Commission for Lebanese Women to tackle the problems associated with underage marriage. In August 2014, Agence France reported that *according to a source close to those working on the draft law, it would require that marriages involving children below the age of consent receive approval from a civil judge as well as a religious tribunal. The draft law will eventually be presented to Lebanon's parliament but could face significant opposition from religious leaders, traditionally resistant to any attempt to erode their monopoly over personal status issues.*
>
> In February 2014, the English language version of Al-Akhbar reported on four girls aged 11, 12, 14 and 15. All of these girls were married and pregnant. Muslim clerics officiated their marriages. The report further stated that the Lebanese government condoned this under the cover of religion. One of those girls was kidnapped by her groom. In another report discussing the problems with early marriage, the Daily Star noted that, *Lebanese law has adopted the same definition of "child" as described by the 1989 Convention on the Rights of the Child (CRC), which Beirut signed in 1991.* ***According to the convention, and for the purpose of civil obligations and contracts, a child is any person below the age of 18. The marriage of anyone under this age, then, is considered a breach of the convention****.*

54 The applicant did not provide any further comment in relation to the material attached to the Minister's letter of 2 November 2023. The Minister submitted that procedural fairness was afforded, but the applicant did not avail himself of the opportunity so afforded.

55 The reasons of the delegate with respect to the protection visa decision of 16 September 2014 arose in the context of the question of whether there was substantial grounds for believing that there was a real risk of significant harm for the purposes of s 36(2)(aa) of the Act. The applicant had contended that he would face harm in the form of an honour killing to restore respect to his family name. The fear of an honour killing was not as a consequence of the marriage, because the marriage itself was not of concern it being legal under Sharia law. Rather, it was the shame which he had been brought on the family name by reason of the adverse media reporting which was the cause of the applicant's fear of an honour killing.

56 The decision-maker: (a) accepted that the applicant was married according to Sharia law; (b) was satisfied that the applicant would be exonerated from any wrongdoing in accordance with

Sharia law if he had engaged in pre-marital sex (which the applicant stated he had not); (c) was satisfied that the applicant had not acted outside of Sharia law, which has a major influence in Lebanon; and (d) did not consider the applicant had breached any Lebanese criminal law.

57 The passage in the delegate's reasons upon which the Minister relied as providing sufficient notice is a quote from a publication from a media outlet. At best, the passage can be read as indicating that the author of the article from the Lebanon Daily Star considered that the marriage of anyone under the age of 18 is a breach of the *Convention on the Rights of the Child*.

58 During oral argument, the Minister referred to the fact that the applicant himself deployed the *Convention on the Rights of the Child* in the submissions dated 22 October 2023 and in his second wife's statement. That is true, but the reference to the Convention was made in the context of addressing the best interests of the two children of the applicant's second wife and the submission that it would not be in their interest to remove the applicant from Australia. The Minister submitted that all the Minister did was to make an observation, or finding, "about other aspects of the Convention": T36. I am unconvinced that the Minister had the *Convention on the Rights of the Child* in mind in saying what he did at [23]. If he did, it must be observed that the Convention:

(a) defines a child to be "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier": Article 1; and

(b) does not directly address child marriage, albeit some of its provisions are relevant to the topic.

59 The Minister submitted that the following matters put the applicant on notice that the decision-maker might turn his mind to whether the visa applicant had been a party to a forced marriage or had engaged in conduct that might be considered to constitute conduct of "serious international concern":

- the nature of the decision to be made – namely, a character-related decision under s 501; and
- the terms of the legislation under which that decision was to be made, which included subparagraphs (b) and (e) of paragraph 8.5(2) – see: *Milne v Minister for Immigration and Citizenship* [2011] FCAFC 41; 120 ALD 405 at [54].

60 Paragraph 8.5 of Direction 99 includes (Minister's emphasis):

8.5 Expectations of the Australian Community

(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

…

b) causing a person to enter into, or **being party to** (other than being a victim of), **a forced marriage**;

…

e) **involvement or reasonably suspected involvement in** human trafficking or people smuggling, or in **crimes that are of serious international concern** including, but not limited to, war crimes, crimes against humanity and slavery; or

…

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.

61 In my view, the passages in the delegate's protection visa decision and the parts of paragraph 8.5 of Direction 99 relied upon did not provide a sufficient opportunity to ascertain that the Minister might reach a view that child marriage violates the rights of children under international law or laws. The delegate who decided the protection visa decision did not conclude that child marriage contravened any international law and the delegate concluded that child marriage did not contravene Sharia law or any Lebanese criminal law.

62 Paragraph 8.5 of Direction 99 addresses the expectations of the Australian community (the fifth primary consideration), whereas the relevant part of the Minister's decision about which complaint is made ([23]) related to protection of the Australian community (the first primary consideration).

63 I do not accept that the applicant should have been aware that the Minister might have turned his mind to international characterisations of the applicant's conduct in relation to the first primary consideration by reason of subparagraphs 8.5(2)(b) or (e) of Direction 99. There was nothing in the factual or statutory context, or the material provided to the applicant in the NOICR or subsequently, which fairly revealed that subparagraphs 8.5(2)(b) or (e) were critical or important to the Minister's consideration of the first primary consideration.

A residual submission

64 The Minister submitted that the duty to afford procedural fairness in exercising the power under s 501(1) did not require the Minister to identify the source, or general nature, of the material that led to any accumulation of knowledge about a particular matter, referring to: *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966 at [263]-[264], [267] (Hayne J); *SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51; 177 FCR 1 at [149]-[151]; *Virapornsawun v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 29 at 179-190 (Gordon J).

65 As I noted in argument, that proposition is quite confined. It does not gainsay the general proposition that the rules of procedural fairness ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues. Contrary to what I understood to be the Minister's submission, the fact that a particular conclusion on a particular issue is based on specialised knowledge does not have the result that the rules of procedural fairness do not require that the *issue* be brought to the attention of an applicant if the issue is a critical or important one which is not obvious on the known material.

Materiality

66 For reasons given earlier, I do not accept that the issue of whether child marriage violated the rights of children under international law was a critical issue about which the Minister was required by the rules of procedural fairness to provide the applicant an opportunity for comment. However, if I am wrong in that view, then there would have been a denial of procedural fairness because the issue was not obvious on the known material and the applicant was not afforded a fair opportunity of addressing it. The question would then arise as to whether the denial of procedural fairness was material such that the applicant had established jurisdictional error. On this hypothesis, the question of materiality must necessarily be approached on the basis that the issue was sufficiently important to the Minister's decision as to require it to be notified to the applicant for comment.

67 It is now settled that issues of materiality go to the existence of jurisdictional error and do not only arise separately as a matter relevant to the discretion to grant relief – see: ***LPDT** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 98 ALJR 610 at [6] and compare, for example: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at [44] and [45] (Bell, Gageler and Keane JJ) and [81]-[95] (Nettle and Gordon JJ). The underlying basis for the High Court's resolution of its earlier competing views on this topic is the presumption of statutory construction that Parliament intended that a failure to comply with an express or implied condition on the grant of power will not lead to invalidity unless it is material: *LPDT* at [6]. In its application to this case: procedural fairness must be afforded in respect of a decision under s 501(1) and the presumption is that Parliament intended that any breach of that requirement would only lead to invalidity if the breach was material in that the outcome might have been different. The question whether a denial of procedural fairness was material is one which arises in considering whether an established breach of procedural fairness gives rise to jurisdictional error.

68 For a denial of procedural fairness to constitute jurisdictional error, the denial must have deprived the applicant of a realistic possibility of a different outcome: ***Nathanson** v Minister for Home Affairs* [2022] HCA 26; 276 CLR 80 at [1]. There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on a critical issue: *Nathanson* at [33]. In *LPDT* at [12] to [16], the plurality stated (footnotes omitted, italicised emphasis in original, bold emphasis added):

> [12] Where the jurisdictional error alleged is one concerned with the process of the decision making, such as a denial of procedural fairness, what must be proved by the applicant will depend upon the precise error alleged to have occurred in the decision-making process, having regard to any relevant statutory provisions within the applicable legislative framework …
>
> [13] The applicant must satisfy the court on the balance of probabilities that the alleged error in fact occurred. Unless the error is of a type such as those identified at [6] above (where the error is always material and therefore jurisdictional), whether the error is, or is not, material is determined by inferences drawn from the evidence adduced on the application.
>
> [14] The question in these cases is whether the decision that was in fact made *could*, not *would*, "realistically" have been different had there been no error. "Realistic" is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. **Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous**.

> [15] What must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error. In some cases, it will be sufficient to show that there has been an error and that the outcome is consistent with the error having affected the decision. **Where the error is a denial of procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision-maker would have approached the applicant's further evidence or submissions with an open mind. In those cases, it is "no easy task" for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome. Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained.** This case affords an example.
>
> [16] In sum, **unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met** (and curial relief will be justified subject to any issue of utility or discretion).

69 In his submissions, the Minister invited the following assumptions for the purposes of analysing whether any denial of procedural fairness was material:

- the Minister notified the applicant that he considered that child marriage violates the rights of children under international law;
- the applicant responded that it did not for various reasons; and
- the Minister accepted those submissions.

70 The Minister submitted that the sentence in [23] would read the same as it did, but with the words "and international" deleted. The sentence would therefore have read:

> I consider that child marriage violates the rights of children under domestic laws, and has widespread and long-term consequences for the victim, being the child bride.

71 The Minister submitted that there was no indication elsewhere in the Minister's reasons that the international characterisation of child marriage was a matter that was given any consideration or weight in the exercise of the discretion conferred by s 501(1). The Minister submitted that it was difficult to see how, had the words "and international" not appeared in [23], the outcome could *realistically* have been different, emphasising that the High Court in *LPDT* at [14] had contrasted a realistic possibility of a different outcome with one which was "fanciful or improbable".

72 If I am wrong in my conclusion that the characterisation of child marriage as involving a violation of the rights of the child under international law – be it the *Convention on the Rights of the Child* or some other international law – was a critical issue on which the decision turned or one of importance (sufficient to require the Minister to have notified the applicant about it), then I consider that materiality has been established. I am unable affirmatively to exclude the possibility that: (a) further information would have been provided to the Minister which might have affected the Minister's initial thoughts on the topic of whether child marriage violated the rights of children under international law; and (b) this might have had an effect on his ultimate conclusion. I consider it more probable than not that the Minister's ultimate decision would not have changed, but that is not the relevant test – see: *LPDT* at [16]. I note that, apart from the *Convention on the Rights of the Child* (which does not directly address child marriage), no other international law of relevance was identified in the evidence.

Conclusion in relation to Ground 1

73 Ground 1 is not made out because procedural fairness did not require the Minister to invite comment on the question whether child marriage violates the rights of children under international law or laws. That was not an issue on which the decision turned and was not otherwise of sufficient importance as to require an invitation to the applicant to comment.

74 If I am wrong in that conclusion, I would have allowed Ground 1, because:

(a) the applicant was not in a position to ascertain that the question of whether child marriage violated the rights of children under international law or laws was a critical issue on which the decision turned or one of importance to the outcome;

(b) if the issue was a critical or sufficiently important issue (contrary to my view), then the applicant was denied procedural fairness as a consequence of not being in a position to ascertain that it was an issue and not being invited to comment upon it; and

(c) the denial of procedural fairness was material, because it cannot affirmatively be concluded that the outcome would inevitably have been the same, with the result that jurisdictional error would have been established.

GROUND 2

Introduction

75 By Ground 2 the applicant contends that the Minister "failed to complete the exercise of his jurisdiction" by overlooking or misunderstanding relevant material on the topic of remorse.

The Minister made the impugned "lack of remorse finding" in the first sentence of [41] of his reasons:

> I find that [the applicant] has shown a lack of remorse for his offending as evidenced in the NSW Statement of Facts.

76 This finding is made under the heading "Conclusion on risk to community".

77 The applicant submitted that:

(a) fifteen witnesses provided written testimony affirming the applicant's remorse, but the Minister did not explicitly acknowledge or address this body of evidence in his reasons, demonstrating a lack of engagement with the material: AS[12]-[15]; and

(b) the applicant's remorse was central to the Minister's findings on the risk to the Australian community should the applicant be granted a visa and then reoffend such that the relevant evidence had to be properly considered: AS[16].

78 The Minister submitted that there is no jurisdictional error on the basis that the reasons for decision do, in fact, engage with the impugned material and the Minister therefore fulfilled his obligation to consider it.

Consideration

79 The Minister was obliged to "read, identify, understand and evaluate" the relevant material: ***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 at [24]. In *Plaintiff M1*, the majority held that (at [27]) (footnotes omitted):

> [I]f review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error.

80 The first sentence of [41] of the Minister's reasons must be read in context. In his reasons, the Minister distinguished between the lack of remorse initially shown by the applicant and more recent expressions of remorse. This is particularly clear when regard is had to what was said at [24] – "more recent conduct, remorse and rehabilitation" – and the references to recent expressions of "contrition" at [29] and [41]. The reference in [29] and [41] to "contrition" and the AAT decision of 24 January 2023 is a reference to what the AAT stated at [65] of its reasons (at AB335):

> In passing, the Tribunal notes it expressed sympathy (as did the differently constituted Tribunal in its reported decision of 3 October 2022 referred to above at para [9]) for

> the situation that [the applicant] and his family, especially, Ms [O] and her 2 young children find themselves. It also expressed its best wishes for their wedding to be celebrated on 23 January 2023. The Tribunal acknowledged [the applicant's] expressed contrition for the events in early 2014 which led to him being convicted of persistent sexual abuse of a child, his 7½ year jail sentence and his current detention in the Villawood IDC. It complimented [the applicant] for his demonstrated commitment to on-going personal and professional development as evidenced by his completion of the qualifications referred to above at para [13], in particular, IACET's *Basic Parenting 101* course completed 16 December 2022.

81 The Minister was also concerned about the applicant's personal expressions of remorse. The Minister did, however, consider the statements relied upon by the applicant which addressed remorse. As noted earlier, in his reasons at [35], the Minister expressly took into account the comments of the applicant's "extensive prosocial and extended family" which the Minister summarised as acknowledging his past criminality and describing him as "a genuine person, a decent man and reformed individual". The attachments referred to at the end of [35] include the 22 October 2023 submission and each of the fifteen letters the applicant contends were not properly considered. Those letters included:

- Adel El-dadoun at AB179:

  > [The applicant] acknowledges his past mistakes and has served his sentence, demonstrating genuine remorse. I earnestly believe that he now stands on the precipice of reformation, eager to rebuild his life and make meaningful contributions to the Australian community.

- Sarah Kanj at AB183:

  > It pains me to acknowledge that [the applicant], like many, faltered along his path. However, what sets him apart is his genuine remorse and steadfast dedication to self-improvement. While mistakes are a part of human nature, the ability to recognize, learn, and grow from them is commendable, and [the applicant] embodies this growth.

- Samih Sayed at AB184-5:

  > Moreover, [the applicant's] unwavering dedication to personal growth is further showcased by his consistent efforts towards rehabilitation. He is deeply remorseful for his past actions and has actively sought ways to rectify them, including attending relevant educational programs and counselling [sic].

- Samiha Saadie at AB186:

  > [The applicant] did make a mistake in the past, for which he served his due time. However, he deeply regrets his actions and has since shown immense remorse and dedication to right his wrongs.

- Sahar Saadie at AB189:

  > I deeply empathize with the gravity of the mistake he made, but I've also seen his heartfelt remorse. That mistake does not define him. Rather, it's his intent

to make amends, his resilience, and his undeniable potential that speak volumes about his character.

- Sandra Bajkovec at AB192:

  While the gravity of his charges cannot be dismissed, it's imperative to note that [the applicant] has spent his sentence reflecting and making amends. I have witnessed firsthand the profound remorse he feels and the strides he has taken towards self-betterment. Everyone makes mistakes, but it's one's commitment to learning and growing from them that truly defines character. In this regard, [the applicant] has shown nothing but dedication to being a better version of himself.

- Riad Saadieh at AB193:

  Although [the applicant's] mistake was grave, he has paid the price by serving his sentence. From my numerous interactions with him, I have come to understand the depth of his remorse and his genuine intent to rectify his past mistakes. Furthermore, I believe that if [the applicant] had been fully cognizant of the ramifications of his actions, he would have chosen a different path.

  I recognize that such decisions hold immense weight and come with their own set of challenges. However, I sincerely believe in the power of redemption and the potential for individuals to change and grow. [The applicant], I feel, is one such individual, eager for a chance to reintegrate into our society and prove his worth.

- Noura Saadie at AB196:

  Life is full of challenges and growth, and while [the applicant] had his moments of error in the past, it is vital to acknowledge the transformative journey he has undertaken since then. I have seen him mature, express deep remorse for his past mistakes, and take responsibility for his actions. His dedication to personal growth and commitment to rectifying past mistakes is genuinely commendable.

- Nazreen Kanj at AB198:

  Despite his previous mistake, which he deeply and genuinely regrets, [the applicant's] essence as a person is fundamentally pure and genuine.

  While everyone's journey is marked by highs and lows, few have the courage and integrity to confront their missteps head-on, learn from them, and endeavor [sic] to grow beyond them. [The applicant's] time behind bars has been both a crucible of remorse and a testament to his promise of transformation.

- Nada Kanj at AB200:

  The one transgression [the applicant] committed does not overshadow the decade of upright behavior, humility, and growth I've witnessed. His remorse is palpable, and his commitment to making amends is unquestionable.

  [The applicant's] time in detention, the challenges he's faced, and the introspection he has undergone have only further solidified his dedication to respecting the law of this land. I firmly believe that his many years behind bars have offered not just punishment, but also an opportunity for profound personal growth and understanding.

- Nada Saadie at AB203:

> Everyone's journey has its adversities, and [the applicant's] past is no exception. However, the true testament of a person's character is not their fall, but their rise. I've observed him acknowledge his mistakes and take purposeful strides toward personal growth and self-improvement.
>
> …
>
> One of the qualities I admire most in [the applicant] is his dedication to turning over a new leaf. His commitment to personal development is commendable, and his earnest endeavors [sic] to rehabilitate should be recognized and supported.
>
> As a proud Australian, I champion the values of fairness, opportunity, and redemption. [The applicant's] case represents each of these ideals. I passionately advocate for giving him an opportunity to reintegrate, contribute, and showcase his genuine reformation.

- Moustafa Kanj at AB205:

> [The applicant] made a mistake, and he feels very sorry for it. I have watched him for many years and can say he is a good person.

- Malak Kanj at AB207:

> He deeply regrets any past errors and possesses a strong desire to rectify and make amends.

- Joanne Ali Ahmad at AB209:

> One cannot ignore the setbacks [the applicant] has faced, but it's equally crucial to note his genuine remorse and the transformative journey he has embarked upon. His commitment to rectifying his past mistakes has been genuine. This dedication towards personal growth and rehabilitation is noteworthy. Having seen the person he is today, I stand convinced of his ability to contribute meaningfully and positively to our community.

- Hind Saadie at AB211:

> While [the applicant] experienced setbacks and made mistakes in the past, his commitment to self-betterment and accountability is truly commendable. His genuine remorse and determination to mend his ways are testaments to his character's strength.
>
> …
>
> [The applicant's] journey of personal growth is a beacon of hope for many. The time he spent reflecting upon his actions and his unwavering commitment to reform are notable. His quest for rehabilitation and betterment showcases his dedication to a brighter, responsible future.

82 In submissions, counsel for the applicant focussed on the language of "reformed individual" in the Minister's reasons at [35]. The applicant submitted that a "reformed individual" and a "remorseful individual" are not the same thing: 'remorse' is an emotional state; 'reform' refers to a change in behaviour or character.

83 It may be accepted that there is a difference between remorse and reform, but reasons for decision are not to be read in a pedantic way. A reformed individual is generally one who acknowledges past wrong. A person who shows no remorse is unlikely to convince others he or she is reformed. Leaving those observations to one side, I am not satisfied that the Minister failed to consider what was said by the relevant people about remorse given the Minister's statement at [35] concerning the assessment, by the applicant's family and friends, of the applicant's past conduct, his reformation and his present state as a genuine and decent man.

84 I am not satisfied that the Minister overlooked the general statements about the applicant's remorse. A fair reading of the Minister's reasons at [35], in the context of the reasons as a whole, is that the Minister accepted more recent expressions of remorse. This is clear when regard is also had to the Minister's reference at [24] of his reasons to "more recent conduct, remorse and rehabilitation" and the references to "contrition" at [29] and [41].

85 I am satisfied that the Minister considered and evaluated the relevant material to which he expressly referred. Each of the supporting statements about remorse was general in nature. The statements did not need to be addressed individually in the reasons for decision. As was said in *Plaintiff M1* at [25]: "[t]he requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations".

86 It is also instructive to read the Minister's reasons against the 22 October 2023 submission, referred to in the Minister's reasons at [35]. That submission refers to the lack of remorse as identified in the NSW Police Facts Sheet at [3]:

> The New South Wales Police Facts Sheet (dated 4 March 2014) provide details in relation to the applicant's criminality in Australia:
>
> - The accused is a 26-year-old male living in Guildford West on a Student Visa, having been in Australia for about 5 months. He has family connections in Sydney but no strong ties to Australia. Police are wary about granting him bail due to potential contact with the victim and concerns about him fleeing due to the gravity of the charges. He shows no remorse and doesn't recognize the illegality of his alleged actions.

87 The 22 October 2023 submission does not otherwise refer to remorse. The manner in which the Minister addressed the submissions, including the way in which they are addressed in the reasons, must be assessed in the context of how the submissions were put.

88 It might finally be noted that, in the context of the applicant's ties to Australia, the Minister again engaged with the material which had been provided, stating:

> [72] I have taken into account statutory declarations and letters of support from [the applicant's] family members with respect to his visa consideration and any impacts they may experience if his visa is refused **Attachments W1, W2, W9-W12, W14, W15, W17-W19, W23, W26, W28 and W30**.
>
> [73] I acknowledge that above-mentioned family members have known [the applicant] for an extended period of time and have interacted with him within familial relations in Lebanon and in Australia. I also note that all of above-mentioned family members are aware of [the applicant's] criminal convictions and describe him as reformed individual, with desire to reintegrate into Australian society.
>
> [74] I take into consideration submissions from [the applicant's] family, friends and members of the community including the statutory declarations from [the applicant's] brother… who are offering employment to [the applicant] upon his release in addition to an assurance bond and accommodation **Attachments S1, W1 and W2**.
>
> [75] I also note letters of support from [the applicant's] friends, extended family in Australia, Ms [O's] friends and Lebanese community representatives… **Attachments S1, W3-W8, Wl3, W16, W17, W19-W22, W24, W25, W27 and W29**.
>
> [76] I acknowledge that some of [the applicant's] friends and extended family members have known him for substantial period of time from Lebanon and from his time spent in Australia. I also note that all of the above-mentioned friends, community members and extended family acknowledge [the applicant's] past conviction and describe him as responsible and reformed man, who is dedicated to being a better version of himself.

89 All of this supports a real engagement with the material provided and does not suggest any misunderstanding of that material. The fact that the Minister addressed the material more at [72] to [76] indicates that the Minister considered that the material was of greater significance to the consideration about ties to the Australian community.

90 Ground 2 has not been made out.

GROUND 3

Introduction

91 By Ground 3, the applicant contends that the Minister "failed to complete the exercise of his jurisdiction" by overlooking or misunderstanding relevant material when finding that there was no evidence before him to verify that the applicant had engaged with "Mental Health Services". This finding was made in the context of the Minister's consideration of the applicant's remorse and rehabilitation and the risk to the Australian community of the applicant reoffending if granted a visa.

92 Ground 3 focusses on the Minister's reasons at [32]:

> I also note that [the applicant's] representative stated that [the applicant] has engaged with Mental Health Services, and completed the SMART Recovery program. However, I have no evidence before me to verify this statement. I also note that I have no independent evidence in the form of psychological or counselling assessment to affirm [the applicant's] rehabilitation **Attachment S1** [the written submission dated 22 October 2023].

93 The applicant submitted that three witnesses had corroborated the applicant's engagement with mental health services and that the Minister's finding that there was "no evidence" demonstrates that the Minister overlooked that evidence: AS[21]. The relevant evidence was summarised in the applicant's submissions as follows: AS[20].

- [Ms O] provided a statement and confirmed that the applicant undertook therapy sessions in immigration detention: AB128-130.
- Samih Sayed confirmed that the applicant undertook counselling as part of his rehabilitation journey: AB184-185.
- Samiha Saadie confirmed that the applicant attended counselling sessions as part of his rehabilitation journey: AB186-187.

94 The Minister submitted that none of the statements amounted to verification that the applicant had engaged with Mental Health Services or completed the SMART Recovery program. The Minister submitted at RS[39]:

> The Minister was therefore justified in making the finding he did in the second sentence in [32] (AB 24). *A fortiori*, the Minister rightly observed that he had "no independent evidence in the form of psychological or counselling assessment to affirm [the applicant]'s rehabilitation" (AB 24 [32]). This statement is consistent with the finding at AB 26 [53] that the applicant had "not undertaken any offending-appropriate counselling which g[a]ve [him] some pause that [he] has [a] clear understanding of the drivers of his offending, or the impact of his behaviour on a minor".

Consideration

95 The Minister's reference at [32] to what was stated by the applicant's representative was a reference to Dr Donnelly's written submissions provided to the Minister and dated 22 October 2023. This is also made clear by the Minister's reasons at [31], which stated:

> [31] I take into consideration that [the applicant] has completed a number of courses while in detention that include Early Childhood Development, Data Science and Machine Learning Fundamentals & Code, Child Safety for Parents, Basic Parenting 101, Positive Parenting, Healthy Relationship Child Psychology and SMART Recovery. I note that most of these courses were completed within the past year. [The applicant] has not engaged in any rehabilitation courses in prison, and given the very serious nature of the offending, I take into account that [the applicant] did not take any proactive steps, while in prison, to address the causes of his offending.

96 The 22 October 2023 submission included the following at [7] to [12] (at AB109-110):

[7] *Growth Development and Rehabilitation*. This submission seeks to establish the sincerity and depth of rehabilitation undertaken by the applicant during their time in immigration detention. Rehabilitation is an essential consideration in immigration decisions, especially when it indicates a genuine commitment to integration and positively contributing to society.

[8] Rehabilitation is the process by which individuals reintegrate into society by reestablishing stable lives, mending past behaviours, and actively seeking personal growth. Successful rehabilitation not only benefits the individual but also contributes positively to the community by reducing recidivism and fostering societal cohesion.

[9] The applicant, during their time in detention, has demonstrated a proactive approach to personal growth and rehabilitation. The following programs, undertaken by the applicant, are indicative of their commitment:

(a) **Early Childhood Development 101**: Provides knowledge about the fundamental phases of a child's development, essential for individuals planning to start or reconnect with their families.

(b) **Data Science and Machine Learning Fundamentals & Code+**: Demonstrates a commitment to acquiring modern skills and aptitudes, suggesting the applicant's intention to integrate into the job market and contribute positively to the economy.

(c) **Child Safety for Parents, Basic Parenting 101, Positive Parenting Techniques**: These programs collectively signify the applicant's dedication to becoming a responsible and nurturing parent. Their completion is a testament to the applicant's commitment to family values and raising children in a safe and positive environment.

(d) **Healthy Relationships**: Indicates an understanding and appreciation of the importance of mutual respect, trust, and communication in interpersonal relationships.

(e) **Child Psychology 101**: Further underscores the applicant's commitment to understanding child welfare and creating a supportive environment for young ones.

(f) **Smart Recovery**. The SMART Recovery (Self-Management and Recovery Training) is an international non-profit organisation that offers free, secular support groups to individuals who desire to gain independence from addictive behaviours, including substance abuse and addiction. The program provides an alternative to Alcoholics Anonymous (AA) and other 12-step groups. SMART Recovery's approach is built on a structured four-point program: Building and maintaining motivation; Coping with urges; Managing thoughts, feelings, and behaviors [sic]; and Living a balanced life.

(g) **Mental Health Consultation**. Mental Health Consultation in immigration detention offer multiple benefits, both to the detainees and the system as a whole: Early Identification and Intervention; Improved Well-being; Cultural Sensitivity; Reduced Self-harm and Suicidality; Stress Reduction for Staff; Prevention of Long-term Trauma; Prevention of Long-term Trauma.

[10] While past conduct is a valid consideration, the genuine efforts made towards rehabilitation should be accorded significant weight. The applicant's active

pursuit of education, parenting skills, and personal development demonstrates their commitment to becoming a responsible and contributing member of society.

[11] The range and nature of the programs completed by the applicant, spanning from personal relationships to professional skills, highlight a holistic approach to rehabilitation. It is therefore respectfully submitted that the applicant's rehabilitative efforts be acknowledged and given due weight in any immigration decisions.

[12] The applicant's actions, as demonstrated by their course completions, indicate a sincere commitment to integrating into society, upholding family values, and contributing positively. This dedication to personal growth and societal contribution should be deemed a positive factor in the assessment of their immigration status.

97 The applicant had furnished 8 certificates to the Minister. The documents at Attachments T1 to T8 were the following:

T1. Certificate of Course Completion for Early Childhood Development 101

T2. Certificate of Course Completion for Data Science and Machine Learning Fundamentals

T3. Certificate of Course Completion for Code+

T4. Certificate of Course Completion for Child Safety for Parents

T5. Certificate of Course Completion for Basic Parenting 101

T6. Certificate of Course Completion for Positive Parenting Techniques

T7. Certificate of Course Completion for Healthy Relationships

T8. Certificate of Course Completion for Child Psychology 101

98 It is apparent from [31] and [32] of the Minister's reasons, read with [9] of the 22 October 2023 submission and attachments T1 to T8, that that the reference to "SMART Recovery" in [31] is a mistake.

99 The Minister's observation at [32] was that the statements at (f) and (g) of [9] of the 22 October 2023 submission were unverified. None of the material referred to by the applicant in submissions in relation to Ground 3 verifies the statement made in the submission of 22 October 2023. None of the material referred to by the applicant verified that the applicant had engaged with Mental Health Services (which is a reference to what is referred to in the submission as Mental Health Consultation) or that he completed the SMART Recovery program. The Minister's statement at [32] is accurate.

100 The applicant has not discharged his onus of establishing that the Minister ignored, overlooked or misunderstood relevant material. Ground 3 is not made out.

GROUND 4

Introduction

101 By Ground 4 the applicant contends that the Minister failed to complete the exercise of his jurisdiction by overlooking or ignoring relevant material when finding that the applicant had not engaged in any rehabilitation courses in prison.

102 The Minister stated:

> [31] I take into consideration that [the applicant] has completed a number of courses while in detention that include Early Childhood Development, Data Science and Machine Learning Fundamentals & Code, Child Safety for Parents, Basic Parenting 101, Positive Parenting, Healthy Relationship Child Psychology and SMART Recovery. I note that most of these courses were completed within the past year. [The applicant] has not engaged in any rehabilitation courses in prison, and given the very serious nature of the offending, I take into account that [the applicant] did not take any proactive steps, while in prison, to address the causes of his offending.

103 It is relevant also to observe that the Minister stated in [40] when summarising his conclusions on risk to the community (emphasis added):

> [40] I have considered the submissions on behalf of [the applicant]. I acknowledge that familial ties and significant prosocial support will act as deterrents against [the applicant's] further offending. I have also taken into account remarks from the AAT hearing that confirm [the applicant's] contrition. **While I give some weight to [the applicant's] recent efforts in rehabilitation**, I note his recent adverse behaviour in detention shows an increased risk of reoffending.

104 The emphasised passage is a reference to the courses which the applicant had taken over the past year in immigration detention referred to by the Minister at [31].

105 The applicant submitted that there was evidence in the form of a letter from the applicant's wife confirming that the applicant had engaged in various rehabilitation programs when in prison, and the Minister's finding demonstrates that he did not consider or engage with this evidence: AS[27]. The applicant's wife's letter included (AB128):

> … I can attest to the fact that my husband has not only completed his sentence but has actively engaged in various rehabilitation programs during his time in prison as well as the detention facility. Since his release from prison and transfer into the detention facility, he has continued therapy sessions and has taken part in various educational programs and courses voluntarily, demonstrating his sincere commitment to personal growth and change.

106 The Minister submitted that the applicant's wife's evidence lacked specificity and that the Minister had no objective evidence before him to demonstrate that the applicant had engaged in rehabilitation programs in prison, including to address the causes of his offending. The

Minister submitted that the applicant's wife's bare assertion in her statement was neither cogent nor central to the Minister's task and was not evidence of a kind with which the Minister was required to engage directly: RS[41].

Consideration

107 In his "Personal Circumstances Form" dated 13 October 2023, the applicant crossed the box for "Course completion certificates for rehabilitation courses, educational or vocational courses or similar": at AB272. The certificates provided were those referred to earlier as Attachments T1 to T8. In the submission dated 22 October 2023 which addressed rehabilitation at [7] to [12] (set out above), no reference was made to a contention that the applicant had engaged in rehabilitation in prison. Rather, the submission was confined to the steps which had been taken in immigration detention.

108 As noted earlier, the Minister's reasons should be understood in the context of how the case was put in the applicant's response which, as mentioned, included written submissions prepared by counsel. No point was made about the applicant's wife's assertion that the applicant had undertaken rehabilitation programs in prison. Indeed, if the written submission had referred to the matter, it would have been immediately apparent that the assertion was no more than that, and that the assertion was unsupported by the material provided with the applicant's response.

109 I have noted earlier that the requisite level of engagement will vary, amongst other things, according to the length, clarity and degree of relevance of the representations: *Plaintiff M1* at [25]. The Minister engaged with the response which the applicant made, including in relation to rehabilitation and the courses which had been undertaken. No point was made in the submissions of 22 October 2023 about rehabilitation in prison. Rather, the applicant contended in submissions that he had undertaken rehabilitation programs in immigration detention and furnished the relevant certificates. The applicant's second wife's assertions about rehabilitation in prison were general and unsubstantiated. The Minister did not overlook Ms O's evidence – see: reasons at [34] and [76].

110 I am not satisfied that the Minister failed to "complete the exercise of his jurisdiction" in the manner alleged by Ground 4.

GROUND 5

111 By Ground 5, the applicant contends that the Minister's decision was affected by jurisdictional error because it was unreasonable, illogical or irrational in its treatment of the evidence of the applicant's "remorse" and participation in the "SMART Recovery" program.

Remorse

112 In respect of "remorse", the applicant focussed on the Minister's findings that the applicant:

(a) had "shown a lack of remorse for his offending as evidenced in the NSW Statement of Facts" at [41] (in that part of the reasons addressing the first primary consideration); and

(b) "[e]xpressed no remorse and no insight into his offending and sought to blame the victim stating that she forced her father to allow her to marry [him]" at [54] (in that part of the reasons addressing the second primary consideration).

113 The applicant submitted that these findings were "deficient in both logical and rational grounding", because members of the applicant's family and his friends had provided "written testimonies explicitly indicating the applicant's remorse for his previous criminal activities in Australia": AS[33].

114 What the Minister was concerned with at [41] and [54] was the applicant's conduct in not himself expressing remorse and in having no insight into his offending and seeking to blame the victim at relevant times in the past. As noted earlier, what was said at [41] and [54] was:

> [41] I find that [the applicant] has shown a lack of remorse for his offending as evidenced in the NSW Statement of Facts. I also find that [the applicant] has not demonstrated any insight or awareness into the causes and impact of his offending or expressed any empathy for the victim of his offending, a 12 year old girl. I also note that [the applicant] has not addressed his violent conduct at the Villawood IDC. I consider all of the above factors to be significant to an increased risk of reoffending.
>
> …
>
> [54] As discussed above, [the applicant] has expressed no remorse and no insight into his offending and sought to blame the victim stating that she forced her father to allow her to marry [the applicant].

115 What was said at [41] (in the section of the reasons relating to the first primary consideration) was a summary of what was stated at [27] (and [37] and [38]).

116 The reference to what was "discussed above" in [54] is a reference to what was said at [27], namely:

> [27] I note the following factors are relevant to [the applicant's] remorse and insight into his offending. The New South Wales Statement of Material Facts dated 7 April 2014, illustrates that during the questioning, [the applicant] showed no remorse and was confident that he had committed no crime ... During his protection visa interview, dated 16 September 2014, [the applicant] appeared to display poor insight into his offending and appeared to blame the 12 year old victim for his criminal offending stating – '*wife had full say in whether she got married to the applicant…* and that *'… she had forced her father to get married to the applicant…'* …

117 What the Minister stated at [54] must be understood in the context that the applicant did not make any specific submissions about family violence or forced marriage. Notwithstanding this, the Minister took into account the applicant's efforts at rehabilitation: at [53]. The Minister's reasons at [54] must be read in the context of the response which had been made and without ignoring what the Minister stated at [53].

118 The Minister referred to, and took into account, the applicant's more recent rehabilitation, remorse and general expressions of contrition – see: [24], [29], and [40].

119 The Minister's concern with the lack of personal expressions of remorse at times in the past is not addressed by assertions made by others that the applicant is now remorseful. The Minister drew a distinction between personal expressions of remorse (see, for example at [27], [31], [40], [41], [53] and [54]) and the statements by others about their subjective assessment of the applicant's remorse (see, for example [30], [34], [35], [61], [72], [73], [75] and [76]). Further, the assertions made by others did not address precisely what stance the applicant now took with respect to his offending.

120 The Minister's reasoning was open and rational and was neither illogical or unreasonable.

SMART Recovery

121 The applicant submitted that there was an inconsistency in [31] and [32] of the Minister's reasons for decision. The applicant put his position as follows at AS[46]:

> In essence, the irrationality lies in the inconsistency with which evidence is treated between the two findings. The [second] finding disregards the representative's statement about the applicant's engagement with programs due to lack of independent verification, yet the [first] finding accepts similar information (course completions) without questioning its validity in the same manner.

122 The Minister submitted at RS[48] that this complaint must fail when [31] and [32] are read fairly:

> At [32], the Minister stated that he had "no evidence before [him] to verify this *statement* (emphasis added). The reference to "this statement" was to the applicant's assertion that he had "engaged with Mental Health Services", *not* that he had "completed the SMART Recovery program". That must be so, because at [31] the Minister's reasons record that he "t[ook] into consideration that [the applicant] has completed a number of courses while in detention that include … SMART Recovery".

123 I do not accept either the applicant's or the Minister's submission.

124 As explained earlier, the reference in [31] to "SMART Recovery" is plainly an immaterial mistake. With the exception of the reference to "SMART Recovery", the references in [31] to the various courses correlate precisely with the certificates being Attachments T1 to T8 provided by the applicant with the 22 October 2023 submission. There was no certificate for "SMART Recovery" and the reference to it in [31] is clearly a mistake. The Minister correctly stated at [32] that there was no verification that the SMART Recovery program had been completed. The Minister did not reason in an inconsistent, illogical or irrational manner.

125 Ground 5 is not made out.

CONCLUSION

126 The application must be dismissed with costs.

I certify that the preceding one hundred and twenty-six (126) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley.

Associate: A Willox

Dated: 23 July 2024