FEDERAL COURT OF AUSTRALIA

Kolora v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCA 1583

Appeal from:	*Kolora v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCCA 1805
File number:	QUD 282 of 2021
Judgment of:	**THOMAS J**
Date of judgment:	13 December 2023
Catchwords:	**MIGRATION** – appeal from judgment of the Federal Circuit and Family Court of Australia (Division 2) (**FCFCOA**) – where FCFCOA dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) – where Tribunal affirmed decision of delegate of Minister to refuse to grant the appellant a provisional partner visa – whether Tribunal erred in failing to take into consideration best interests of the appellant's Australian citizen child in considering whether compelling and compassionate circumstances could be established – appeal allowed
Legislation:	*Migration Act 1958* (Cth) *Migration Regulations 1994* (Cth)
Cases cited:	*Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565; [2021] FCAFC 195 *Bhatti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1583 *BJU17 v Minister for Immigration and Border Protection* [2021] FCA 111 *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184 *Gjonej v Minister for Immigration and Border Protection* [2015] FCA 159 *Kolora v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCCA 1805 *Maharjan v Minister for Immigration and Border Protection* (2017) 258 FCR 1; [2017] FCAFC 213

McNamara v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1096

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

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273

NRFX v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 187

Nweke v Minister for Immigration and Citizenship [2012] FCA 266

Perez v Minister for Immigration and Multicultural Affairs (2002) 119 FCR 454; [2002] FCA 450

Plaintiff M1/2021 v Minister for Home Affairs (2022) 400 ALR 417; [2022] HCA 17

Poroa v Minister for Immigration and Border Protection (2017) 252 FCR 505; [2017] FCA 826

Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1480

Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2021) 286 FCR 89; [2021] FCAFC 141

Sami v Minister for Immigration and Citizenship (2013) 139 ALD 1; [2013] FCAFC 128

Selliah v Minister for Immigration and Multicultural Affairs [1999] FCA 615

Tuiketei v Minister for Immigration and Border Protection [2018] FCA 206

VUAX v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 238 FCR 588; [2004] FCAFC 158

Waensila v Minister for Immigration and Border Protection (2016) 241 FCR 121; [2016] FCAFC 32

Wan v Minister for Immigration and Multicultural Affairs (2001) 107 FCR 133; [2001] FCA 568

Weng v Minister for Immigration and Citizenship (No 2) (2011) 121 ALD 77; [2011] FCA 444

Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights

Number of paragraphs:	159
Date of hearing:	14 March 2022
Counsel for the Appellant:	Mr L Boccabella
Solicitor for the Appellant:	HSC Lawyers
Counsel for the First Respondent:	Mr JD Byrnes
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent filed a Submitting Notice

ORDERS

QUD 282 of 2021

BETWEEN:	**ALUMECI KOLORA** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **THOMAS J**

DATE OF ORDER: **13 DECEMBER 2023**

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to Minister for Immigration, Citizenship and Multicultural Affairs.
2. Leave is granted to the appellant to rely on Grounds 1 and 3 of the notice of appeal filed on 2 September 2021.
3. The appeal be allowed.
4. The orders of the Federal Circuit Court of Australia made on 5 August 2021 be set aside and in lieu thereof it be ordered that:
   (a) the decision of the second respondent of 3 July 2020 be set aside;
   (b) the matter be remitted to the second respondent, differently constituted, for determination according to law.
5. The first respondent pay the appellant's costs of and incidental to the appeal in this Court, as agreed or taxed.

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

REASONS FOR JUDGMENT

THOMAS J:

BACKGROUND

1 This is an appeal from a decision of the Federal Circuit Court of Australia (**FCCA**). The FCCA dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) made on 3 July 2020 to affirm a decision of a delegate of the responsible Minister to refuse to grant the appellant a Partner visa.

2 The appellant is a citizen of Fiji who arrived in Australia on 21 August 2016 on a tourist visa. Later that same day, she and an Australian citizen, Mr Rashid Ali, underwent an Islamic marriage ceremony (***Nikah***). On 31 May 2017, the appellant lodged a combined application for a Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BS) (Subclass 801) visa. At all material times, Mr Ali remained legally married to, but separated from, a person other than the appellant. On 31 March 2019, the appellant and Mr Ali had a daughter together.

3 On 29 January 2018, a delegate of the respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**), refused to grant a Subclass 820 visa on the basis that the relationship between Mr Ali and the appellant did not meet the definition of "de facto relationship" in s 5CB of the *Migration Act 1958* (Cth) (**Act**).

4 On 6 February 2018, the appellant applied to the Tribunal for review of the delegate's decision. The appellant responded to a request from the Tribunal for further information about her relationship with Mr Ali by providing various photographs and documents. On 31 March 2020, the appellant and Mr Ali appeared before the Tribunal to give evidence and make oral submissions. On 3 July 2020, the Tribunal affirmed the delegate's decision not to grant the visa, as it was not satisfied that Mr Ali and the appellant had been in a de facto relationship for a period of at least 12 months prior to lodgement of the visa application; nor that there were compelling or compassionate grounds to waive this requirement.

5 On 5 August 2020, the appellant filed an application with the FCCA for judicial review of the Tribunal's decision. On 8 June 2021, the appellant filed a further amended application. On 5 August 2021, the primary judge dismissed the further amended application (*Kolora v Minister*

for Immigration Citizenship, Migrant Services and Multicultural Affairs (No 3) [2021] FCCA 1805).

STATUTORY FRAMEWORK

6 Section 65 of the Act requires that the Minister must grant a visa if satisfied that the criteria are met and must refuse to grant a visa if not so satisfied. Partner visa applications are assessed in two stages, but an applicant applies for both the Subclass 820 and Subclass 801 visas at the same time in a combined application. Assuming the relevant criteria are met, an applicant is first granted a Subclass 820 temporary partner visa, and the application for a Subclass 801 visa remains on foot. At least two years after lodgement of the visa application, if the Minister is satisfied that the relationship is genuine and continuing, a Subclass 801 permanent visa is granted. In this case, the decision under review by the Tribunal was a refusal to grant a Subclass 820 temporary visa, that is, the first stage of the process.

7 Although there are temporal differences in criteria between the temporary and permanent visa stages, for a partner visa application to be successful:

(a) at the time of the visa application the applicant must be married to an Australian or must have been in a de facto relationship with an Australian for at least 12 months unless there are reasons to waive that criteria; and

(b) at the time of the decision the applicant must remain in a genuine and continuing marriage or de facto relationship with that Australian (with some limited exceptions not relevant to this appeal).

8 The provisions in issue in this matter are those setting out the criteria for assessment of the existence of a de facto relationship. Section 5CB of the Act relevantly provides as follows:

> **5CB De facto partner**
>
> *De facto partners*
>
> (1) For the purposes of this Act, a person is the ***de facto partner*** of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.
>
> *De facto relationship*
>
> (2) For the purposes of subsection (1), a person is in a ***de facto relationship*** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:
>
> (a) they have a mutual commitment to a shared life to the exclusion of all others; and

(b) the relationship between them is genuine and continuing; and

(c) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis; and

(d) they are not related by family (see subsection (4)).

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

…

9 Pursuant to s 5CB(3), reg 1.09A of the *Migration Regulations 1994* (Cth) (**Regulations**) makes provisions in relation to whether or not a de facto relationship exists:

1.09A De facto partner and de facto relationship

(1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

…

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day to day household

expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long term one.

…

10 Regulation 2.03A of the Regulations provides additional criteria in relation to visa applications based on the existence of a de facto relationship; relevantly:

2.03A Criteria applicable to de facto partners

(1) In addition to the criteria prescribed by regulations 2.03 and 2.03AA, if a person claims to be in a de facto relationship for the purposes of a visa application, the criteria in sub-regulations (2) and (3) are prescribed.

…

(3) Subject to subregulations (4) and (5), if:

(a) a person mentioned in subregulation (1) applies for:

…

(iv) a Partner (Provisional) (Class UF) visa; or

(v) a Partner (Temporary) (Class UK) visa; or

…; and

(b) the applicant cannot establish compelling and compassionate circumstances for the grant of the visa;

the Minister must be satisfied that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application.

…

11 Regulations 2.03A(4) and 2.03A(5) provide exceptions to reg 2.03A(3) if the relationship has been registered under State or Territory law or involves the holder of a humanitarian visa.

TRIBUNAL DECISION

12 The Tribunal decision record began by summarising the delegate decision under review ([1]-[5]), erroneously referring to the regulations setting out the criteria for a Subclass 801 visa rather than a Subclass 820 visa. Having found that the appellant and Mr Ali are not legally married ([6]-[8]), the Tribunal considered whether the appellant and Mr Ali are in a de facto relationship ([9]-[19]). After referring to s 5CB of the Act, the Tribunal stated:

> 10. … Regulation 2.03A then provides for additional visa criteria that are not part of the 5CB(2) definition, that apply where a person claims to be in a de facto relationship for the purposes of a visa application. The additional criteria are:
>
> - The parties are both at least 18 years of age; and
> - The applicant must have been in the de facto relationship for at least 12 months immediately prior to making the visa application, unless compelling and compassionate circumstances for the grant of the visa exist.
>
> 11. In forming an opinion as to whether the [appellant] and Mr Rashid Ali are in a de facto relationship, consideration must be given to all of the circumstances of their relationship. This includes evidence of the financial and social aspects of the relationship; the nature of the parties' household, and their commitment to one another as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions, which must be answered: *He v MIBP* [2017] FCAFC 206.

13 The Tribunal proceeded to assess the relationship against those criteria, finding that the evidence did not support the existence of a genuine de facto relationship ([12]). In relation to the nature of the household, the Tribunal noted that "[t]he [appellant] and Mr Ali reside together in Mr Ali's house at [address] and together have an infant daughter". Regarding social aspects of the relationship, the Tribunal found that "the [appellant] and Mr Ali attend the Mosque together most Fridays as well as accompany one another and their daughter during most outings

outside the home". In relation to the nature of the commitment between the appellant and Mr Ali, the Tribunal found (at [12(d)]) that:

> Other than what has been asserted by Mr Ali in his oral testimony before the Tribunal, there is no satisfactory evidence of contact and communication between the [appellant] and Mr Ali between 13 October 2015 and 21 August 2016. There is also no evidence before the Tribunal regarding the exclusivity of their relationship prior to 21 August 2016.

14 The Tribunal noted the birth of their daughter on 31 March 2019, before concluding:

> The [appellant] and Mr Ali have lived together continuously since 21 August 2016 and now claim to provide one another with companionship and emotional support, and say that they each regard their relationship as a permanent one. The Tribunal has not been able to form a concluded view regarding the *bona fides* of those assertions.

15 The Tribunal then turned to the additional criteria in reg 2.03A:

> 14. The applicant must also have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds, or is applying for a permanent humanitarian visa.
>
> 15. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds, or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. In light of the matters traversed in paragraph 12 (above) the Tribunal is not satisfied that the [appellant] had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
>
> 16. Therefore, the issue before the Tribunal is whether the visa applicant can establish compelling and compassionate circumstances for the grant of the visa: r.2.03A(3). The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211. No compelling or compassionate circumstances have been identified to the Tribunal by either the [appellant] or by Mr Ali as to why the 12 month requirement should be overlooked in their case, and none are discernible on the evidence. Accordingly, the Tribunal **is not** satisfied that there are compelling and compassionate circumstances for the grant of the visa.
>
> 17. For these reasons the Tribunal **is not** satisfied that the [appellant] meets the additional criteria prescribed in r.2.03A.
>
> 18. In circumstances wherein the [appellant] does not satisfy the 'time of application' criteria it is unnecessary for the Tribunal to make a determination regarding the 'time of decision' criteria, in cl. 820.221.
>
> (emphasis in original)

16 The Tribunal concluded that the criteria for grant of the visa were not met and affirmed the decision under review.

FCCA DECISION

17 The further amended application to the FCCA contained four grounds of review. The first ground took issue with the Tribunal's erroneous references to the Regulations setting out the criteria for a Subclass 801 visa, rather than a Subclass 820 visa. The third ground contended that it was legally unreasonable for the Tribunal not to have made further enquiries about the religious significance of the *Nikah* to the genuine nature of the relationship between Mr Ali and the appellant. These grounds have not been pursued in this appeal. The other two grounds before the primary judge were as follows (at [11]):

> 2. The [Tribunal] committed jurisdictional error when it failed to be satisfied that the [appellant] had been in a de facto relationship for at least the period of 12 months ending immediately before the date of application, for the purposes of regulation 2.03A(3) of the *Migration Regulations* 1994 (See paragraph 15 of the decision).
>
> …
>
> 4. The [Tribunal] committed jurisdictional error when it failed to correctly form a view as to whether or not the [appellant] was in a de facto relationship for the purposes of Section 5CB of the Migration Regulations 1994 (Cth).
>
> (errors in original; particulars omitted)

18 In relation to Ground 2, the primary judge found that, in circumstances where the appellant and Mr Ali had not lived together prior to the appellant's arrival in Australia on 21 August 2016, the Tribunal was entitled to conclude that they had not been in a de facto relationship on 31 May 2016, that being the date 12 months prior to the date on which the appellant made the visa application (at [26]). The primary judge found that Ground 2 sought to find fault with "eyes too keenly attuned to error" (at [28]) and that, in the way it cavilled with the Tribunal's findings about the nature of the relationship, it sought impermissible merits review (at [30]).

19 The primary judge found that Ground 4 was a recasting of Ground 2, which also sought impermissible merits review of the Tribunal's findings as to the nature of the relationship (at [35]). The primary judge went on to find (at [37]) that the decision did not lack an evident and intelligible justification; nor could it be considered legally unreasonable in the sense considered in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 (***Li***).

20 The primary judge concluded that the further amended application for review lacked merit and that it should be dismissed.

GROUNDS OF APPEAL

21 The grounds of appeal in this Court are particularised as follows:

1. The learned trial judge erred by failing to find that the [Tribunal] misinterpreted and/or misapplied Reg 2.03A of the *Migration Regulations 1994* (Cth);

   Particulars

   (a) Reg 2.03A(3) requires the appellant to establish "*compelling and compassionate circumstances for the grant of the visa*";

   (b) The moment in time to assess if there are "*compelling and compassionate circumstances for the grant of the visa*" is the moment when the visa comes to be granted;

   (c) For the [Tribunal] this is (at the earliest) at the time of its decision which, in this case, is 3 July 2020;

   (d) As 3 July 2020, the [Tribunal] found the appellant and her sponsor had an infant child [the daughter], who was an Australian born Australian citizen, born on 31 March 2019;

   (e) Part of the matrix of factors which would make up an assessment of "*compelling and compassionate circumstances for the grant of the visa*", as at 3 July 2020 would be an assessment of what might be in the best interests of an Australian born Australian citizen child;

   (f) To any extent necessary the appellant also relies on Australia's ratification of the Convention on the Rights of the Child and the incorporation of that Convention into various directions by the Minister being in particular Article 3 which obliges Australian authorities to do the following:

   > ***Article 3***
   >
   > *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

   (g) The [Tribunal] did not conduct that assessment (referred to in subparagraphs (e) and (f) above), as the [Tribunal] appeared to be focused only on the date of the visa application, 31 May 2017 and not the facts matters and circumstances in existence as at 3 July 2020.

   (h) As such the [Tribunal] failed to properly assess "*compelling and compassionate circumstances for the grant of the visa*" and thereby failed to properly interpret and apply Reg 2.03A(3).

2. The learned trial judge erred by failing to find that the [Tribunal] misinterpreted and/or misapplied s5CB of the *Migration Act 1958* (Cth) and/or Reg 1.09A.

   Particulars

   (a) the [Tribunal] did not apply the principles outlined in *Sai Chi Noriman Mak v Immigration Review Tribunal and the Minister of Immigration,*

Local Government and Ethnic Affairs [1994] FCA 918; (1994) 48 FCR 314 (1994) and *Bretag v Immigration Review Tribunal and Minister for Local Government and Ethnic Affairs* (unreported 29/11/91 Judgment No. 755/1991) namely, that evidence of subsequent events could be admitted where it might be relevant to the existence of a fact as at the earlier time.

(b) The later fact was the birth and life of [the daughter] the Australian born Australian citizen child of the relationship, in the life and household of the appellant;

(c) The existence of [the daughter], the Australian born Australian citizen child of the relationship would have thrown light on the bona fides of the relationship, among other things;

(d) The above facts, matters and circumstances were absent from the pathway of reasoning of the [Tribunal];

(e) As a consequence the [Tribunal] failed to properly interpret and apply s5CB of the *Migration Act 1958* (Cth) and/or Reg 1.09A.

3. The learned trial judge erred by failing to find that the [Tribunal]'s decision was unreasonable.

(bold and italics in original)

22 In relation to Ground 1, counsel for the appellant conceded during oral submissions that the appellant and Mr Ali were unable to demonstrate the existence of a de facto relationship in the 12 months preceding the visa application. The remaining issue in relation to that ground is whether the Tribunal erred in its assessment of "compelling and compassionate circumstances for the grant of the visa" pursuant to reg 2.03A(3).

23 The gist of Ground 2 is that the Tribunal did not properly assess whether the appellant and Mr Ali were in a genuine de facto relationship at the time of the visa application or at the time of the Tribunal decision, with particular reference to the existence of their daughter. During oral argument, counsel for the appellant did not press Ground 2 on the basis that the existence of a de facto relationship on and after the date of the visa application is of no moment if Ground 1 is not made out.

24 In relation to Ground 3, counsel for the appellant submitted during oral argument that the error contended for in Ground 1 could be framed either as a species of jurisdictional error or as legal unreasonableness in the sense found in *Li*.

ISSUES FOR DETERMINATION

Consideration of the best interests of the daughter

25 The first issue for determination is whether the Tribunal was required, but failed, to consider the best interests of the daughter when determining the existence of "compelling and compassionate circumstances for the grant of the visa" for the purposes of reg 2.03A(3). In this regard, the parties dispute whether the interests of a child in the position of the daughter must be considered in the assessment of the satisfaction of the subjective criteria in reg 2.03A(3). If the Tribunal was not required to take those interests into account, then a failure to do so could not be a jurisdictional error.

26 The second issue, in the alternative to the first, is whether the Tribunal's consideration of the best interests of the daughter in its assessment of "compelling and compassionate circumstances" for the purposes of reg 2.03A(3) evinces illogical reasoning, or resulted in a legally unreasonable decision. The appellant referred to this in written and oral submissions as whether the Tribunal had "properly considered" the daughter when determining whether "compelling and compassionate circumstances" existed.

Leave to raise new ground and adduce new evidence

27 There is a third issue raised by the Minister that also only needs to be determined if the contended error is made out. The Minister submitted that the grounds of appeal comprised new arguments not raised in the FCCA proceedings and accordingly required leave.

28 The principles applicable to whether leave should be granted to argue a new issue on appeal were set out in the Full Court's decision in *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158 (***VUAX***) at [46]-[48] (per Kiefel, Weinberg and Stone JJ) as follows:

> Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration and Multicultural Affairs* [2000] FCA 1348]; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].
>
> In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:
>
> > It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

> The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. **The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated.** Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.
>
> (emphasis added)

29 The Minister also contended that the appellant required leave to file and rely on a transcript of the Tribunal hearings to support the grounds of appeal. The salient authority in relation to the admission of new evidence on appeal is *Sami v Minister for Immigration and Citizenship* (2013) 139 ALD 1; [2013] FCAFC 128, where the Full Court said (at [7]):

> Generally, if the evidence could have been adduced below by the exercise of reasonable diligence it will not be admitted on appeal: see, for example, *Moore v Minister for Immigration and Citizenship* (2007) 161 FCR 236; 97 ALD 50; [2007] FCAFC 134 at [4]–[7]. Further, unless the evidence is of such relevance and weight that its admission would be likely to lead to a different result it also will not usually be admitted on an appeal. In the present case, the potential relevance and weight of the proposed fresh evidence must be assessed having regard to the limits on the court's jurisdiction to review the decision of the AAT — that is, for jurisdictional error only, no review of the merits of the AAT's decision being permissible by this court either at first instance or on appeal.

30 At the hearing, I indicated that, to allow full argument on the merits of the grounds of appeal, I would reserve the questions of whether leave is required and, if so, whether leave should be granted.

APPELLANT'S SUBMISSIONS

Consideration of the best interests of the daughter

31 The appellant contended that the existence of her Australian-born Australian citizen daughter was a necessary element of determining whether there were compelling and compassionate circumstances for the grant of the visa. The appellant submitted that the Tribunal's decision record only makes passing reference to the daughter and does not refer to her interests at all in its findings in relation to compelling and compassionate circumstances for the grant of the visa (at [16]).

32 In contending that this omission amounted to jurisdictional error, the appellant sought to rely on a line of authority, commencing with *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 (***Teoh***), regarding the significance of Australia's accession to the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577

UNTS 3 (entered into force 2 September 1990) (**Convention**). This line of authority will be considered below.

33 The appellant submitted that the failure of the Tribunal in this matter to identify and evaluate the interests of the daughter was a jurisdictional error of the nature identified in *Teoh* and *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 (***Promsopa***). The appellant submitted that there were a number of obvious alternative consequences for the daughter which the Tribunal did not grapple with at all:

(a) that the appellant mother would take the daughter to Fiji and leave the father Mr Ali in Australia;

(b) that the appellant would return to Fiji alone and leave the daughter with Mr Ali;

(c) that the appellant and Mr Ali would return to Fiji and leave the daughter with relatives; or

(d) that the appellant, Mr Ali and the daughter would relocate to Fiji, depriving the daughter of the benefits of being an Australian citizen resident in Australia.

34 The appellant contended that, had the Tribunal "properly considered" the daughter's interests, it would have grappled with what those interests were and assessed those interests as part of making its decision.

35 The appellant submitted that, to the extent the Tribunal omitted consideration of the daughter on the misunderstanding that circumstances should be assessed as at the time of the visa application (which preceded her birth by 22 months), rather than as at the time of its decision, it fell into jurisdictional error (*Waensila v Minister for Immigration and Border Protection* (2016) 241 FCR 121; [2016] FCAFC 32 (per Dowsett, Robertson and Griffiths JJ)).

36 Alternatively, the appellant sought to reason by analogy that the Tribunal's failure to "properly consider" the interests of the daughter was legally unreasonable in the sense found in *Li*. The appellant pointed to the following passage from *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565; [2021] FCAFC 195 (***CWY20***), a case concerning the exercise by the Minister of a personal power in s 501A(2)(e) of the Act to cancel a visa if the Minister considered that to do so was "in the national interest". At issue in that case was the extent to which the Minister was required to consider Australia's obligations arising under various international agreements not to *refouler* a person to a place

they fear harm. Besanko J (with Allsop CJ, Kenny, Kerr and Charlesworth JJ agreeing) found (at [157]):

> First, [the Acting Minister] submitted that bearing in mind that Australia's non-refoulement obligations is not a mandatory relevant consideration in the decision-maker's consideration of the national interest under s 501A(2)(e) of the Act, it would be a decidedly odd result to conclude in those circumstances that, nevertheless, the Acting Minister acted unreasonably because he failed to take into account Australia's non-refoulement obligations as part of the national interest. As I understood the argument, it was that a conclusion of legal unreasonableness was effectively a failure to take into account a mandatory relevant consideration under another guise. In my opinion, there is no incongruity or oddity in holding that Australia's non-refoulement obligations is not a mandatory relevant consideration in every case and in concluding that, in a particular case, a failure to consider Australia's non-refoulement obligations in the context of the national interest gave rise to a state of satisfaction as to the national interest not attained reasonably.

37 The appellant submitted that, in the circumstances of this case, the Tribunal could not reasonably have come to a conclusion about compassionate and compelling circumstances unless it took into account the principles arising from the Convention.

38 During oral argument, counsel for the appellant submitted that it would also be legally unreasonable for the Tribunal, when assessing whether compelling or compassionate circumstances existed sufficient to satisfy reg 2.03A, to have taken into account its findings regarding the factors in reg 1.09A in [12] of its decision record because those factors were not relevant to that assessment.

39 The appellant sought to rely on *Weng v Minister for Immigration and Citizenship (No 2)* (2011) 121 ALD 77; [2011] FCA 444 (per McKerracher J) to argue that, in order for the Tribunal to find that the appellant "cannot establish compelling and compassionate circumstances for the grant of the visa", the Tribunal needed to be positively satisfied of a negative and its opinion had to be reasonably formed. The appellant contended that, if the Tribunal had any doubt as to the existence of compelling and compassionate circumstances, reasonableness required that it determine the question in the appellant's favour.

Leave to raise new ground and adduce new evidence

40 The appellant submitted that the grounds as particularised in this appeal were a recasting of the grounds before the primary judge following further analysis of the identified issue. The appellant contended that the interpretation of reg 2.03A was central to both the Tribunal and FCCA decisions. To the extent that the grounds of appeal are taken to be new arguments, the appellant pointed to the passage emphasised in bold text in *VUAX* above, which was cited with

approval in *Maharjan v Minister for Immigration and Border Protection* (2017) 258 FCR 1; [2017] FCAFC 213 at [31] (per Gilmour J and Mortimer J (as her Honour then was)) and in *Bhatti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1583 (***Bhatti***) at [126] (per Mortimer J (as her Honour then was)).

41 The appellant submitted that the transcript was not adduced below in order to limit costs, rather than due to a forensic decision, and should be admitted now to enable the appellant to identify the factual foundation for her contentions (*BJU17 v Minister for Immigration and Border Protection* [2021] FCA 111 at [117] (per Greenwood J)).

MINISTER'S SUBMISSIONS

Consideration of the best interests of the daughter

42 The Minister submitted that it cannot be said that the Tribunal was not aware of, or did not have regard to, the daughter. The Minister pointed out the numerous times that the daughter was mentioned in the reasons, such as at [12] of the decision record. The Minister contended that, given the daughter is mentioned in the Tribunal's reasons, there was no reason to think that the Tribunal did not take her interests into account when making its determination pursuant to reg 2.03A, and a conclusion that it did not engage in an active intellectual process should not be lightly drawn.

43 The Minister further contended that, in any event, it would not have been a jurisdictional error for the Tribunal not to consider the best interests of the daughter when making a determination pursuant to reg 2.03A. The Minister submitted that this was so for several reasons, which could be distilled into the following six points:

(a) First, the Minister submitted that the Tribunal correctly stated the requirements of reg 2.03A at [10] and proceeded to deal with those requirements and whether they had been met as at the time of its decision. This showed that it was alive to the requirements of the regulation and that it had made its assessment accordingly. The Minister contended that the Court should not read the Tribunal's reasons with an eye for error and it should not assume that the Tribunal applied the incorrect test unless that appeared clearly from the reasons (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-2 (per Brennan CJ, Toohey, McHugh and Gummow JJ) (***Liang***); *Selliah v Minister for Immigration and Multicultural Affairs* [1999] FCA 615 at [39] per Emmett J).

(b) Second, the Minister relied on the finding in *Tuiketei v Minister for Immigration and Border Protection* [2018] FCA 206 at [58] that "it was for the appellant and the sponsor to bring forward any particular matters they wanted the Tribunal to take into account" in relation to establishing "compelling and compassionate circumstances". The Minister submitted that it was evident even from the transcript on which the appellant sought to rely that the appellant had not put the existence of the daughter to the Tribunal in a manner directed to establishing "compelling and compassionate circumstances". Accordingly, the Minister submitted that the Tribunal was not obliged to give notice to the appellant before determining that it was not satisfied of the existence of "compelling and compassionate circumstances" for the grant of the visa.

(c) Third, even if the appellant had raised the existence of the daughter in connection with establishing "compelling and compassionate circumstances", the Tribunal would not have been required to take into account the best interests of the daughter. This is said to be because the daughter's interests were not a consideration mandated by the statutory provisions relevant to the Tribunal's determination under reg 2.03A. On that basis, it could not have been a jurisdictional error for the Tribunal not to have had regard to her interests (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).

(d) Fourth, this case was distinguishable from the *Teoh* line of authority relied on by the appellant. This was said to be because those cases involved the exercise of a discretionary power, in a different statutory framework which obliged the decision-maker to take into account the best interests of children once those interests has been squarely raised in submissions. It was in that context that the Courts have found a procedural fairness obligation in relation to any departure from the principles arising under the Convention.

(e) Fifth, the Minister sought to rely on *McNamara v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1096 (***McNamara***) to contend that the interests of the daughter were not a mandatory consideration by virtue of the Convention, regardless of whether the *Teoh* line of cases could be distinguished on the basis of the power being exercised.

(f) Sixth, whether "compelling and compassionate circumstances" were made out required the subjective satisfaction of the Tribunal, with no mandatory considerations. In this regard, the Minister pointed to the finding of Allsop CJ (at [13]) in *Gjonej v Minister*

for Immigration and Border Protection [2015] FCA 159 that "[g]iven the failure to satisfy the Tribunal that they had been in a relationship for 12 months, it was necessary for the success of Mr Gjonej's application that the Minister be satisfied that there were compelling and compassionate circumstances for the grant of the visa". The Minister submitted that, since this involved a subjective test, the Court could not disturb the Tribunal's conclusion, absent legal unreasonableness.

44 The Minister submitted that these six reasons also demonstrated that the Tribunal's state of non-satisfaction in relation to the waiver in reg 2.03A was logically arrived at and open to it and not legally unreasonable. The Minister pointed to the Tribunal's numerous unfavourable findings in relation to the financial and social aspects of the relationship as well as the nature of both the household and the relationship itself. This included findings connected to the daughter, such as that one of Mr Ali's sources of income was parental allowance. The Minister contended that the Tribunal was entitled to incorporate its findings regarding the genuineness of the relationship in its weighing exercise in evaluating whether there were compelling and compassionate reasons for the grant of the visa.

Leave to raise new ground and adduce new evidence

45 The Minister submitted that both the appellant's challenge to the Tribunal's determination as to "compelling and compassionate circumstances" and her reliance on the Convention are new grounds that were not advanced below. The Minister submitted the complaint in the FCCA regarding reg 2.03A concerned an alleged error in finding that the de facto relationship was not yet 12 months old at the time of the visa application and the relevance of the birth of the daughter to that finding. The Minister submitted that the absence of any explanation for why the grounds raised in the appeal had not been raised by counsel before the primary judge weighed against the grant of leave.

46 In relation to the transcript, the Minister submitted that the appellant had not shown that her representatives could not, with "reasonable diligence", have adduced it in the FCCA proceedings. The Minister also contended that, as the grounds of review lacked merit, the evidence would not have led to a different result at trial.

CONSIDERATION

47 The essence of Ground 1 was that the Tribunal was required to give weight to the best interests of the appellant's daughter as a primary consideration in determining whether there were any

"compelling and compassionate circumstances for the grant of the visa" which, the appellant claims, was not done.

48 The Minister's first contention as to this ground was that the Tribunal was alive to the requirements to consider the best interests of the daughter and that the appellant's real complaint is that they disagreed with the Tribunal's decision and sought a merits review. To that end, the Minister raised three contentions:

(1) the Tribunal's conclusion cannot be disturbed by the Court (unless it is alleged to be illogical which it is not in the present case);

(2) the appellant did not put forward specific matters that should have been considered by the Tribunal as "compelling and compassionate circumstances". Additionally, the Tribunal member expressly stated being aware of the daughter and therefore clearly engaged in an active intellectual process;

(3) the Tribunal's conclusion was logical and open to it as:

  (a) the Tribunal had made numerous unfavourable findings regarding the nature of the appellant's relationship;

  (b) the Tribunal was clearly aware of and gave weight to the daughter, which is reflected in the decision;

  (c) the Tribunal noted that the appellant has a young son who still resides in Fiji with the appellant's auntie;

  (d) the appellant did not rely on the daughter as a "compelling and compassionate circumstance"; and

  (e) it was a matter for the Tribunal to be satisfied and the Tribunal was not satisfied after considering the evidence and the circumstances, which should not be disturbed by the Court.

49 It is not in dispute between the parties that the decision-maker is to take into account "compelling and compassionate circumstances" as at the time of the visa decision, not at the time of the visa application.

50 In support of the proposition that the appellant's daughter should have been taken into account as a primary consideration, the appellant drew attention to the ratification of the Convention.

51 It is also not in dispute that international conventions do not form part of Australian law unless they have been validly incorporated into law by statute. That matter was confirmed again by the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417; [2022] HCA 17 (***Plaintiff M1/2021***) and was also discussed in *NRFX v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 187 (***NRFX***) (per Derrington J (with whom Collier and Downes JJ agreed)).

52 The best interests of the child are not specifically mentioned in reg 2.03A. For example, there is no guidance expressly set out which requires that the best interests of a child must be considered when considering whether an applicant has established "compelling and compassionate circumstances for the grant of a visa".

53 The fact that there was no express reference does not mean that such interests should not be taken into account.

54 As to whether the decision-maker was required to take into account the interests of the daughter as a primary consideration, the appellant referred to *Teoh* as supporting the proposition that the decision-maker, nevertheless, should have taken the interests of the daughter into account as a primary consideration.

55 As a matter of completeness, I will consider *Teoh* and the cases that follow.

Teoh **line of authority**

Minister for Immigration and Ethnic Affairs v Ah Hin Teoh **(1995) 183 CLR 273**

56 In *Teoh*, when considering Art 3 of the Convention, the majority found that, while the Convention had not been enacted into Australian law, unless there was a statutory intent to the contrary, Australia's entry into the Convention gave rise to a legitimate expectation "that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course" (at 302 per Toohey J).

57 Mr Teoh was granted a temporary entry permit in 1988 to enter Australia. He married an Australian citizen the same year. She had previously been the de facto spouse of Mr Teoh's deceased brother. At the time of the marriage, Mrs Teoh had one child from her first marriage

and three children from her de facto relationship with Mr Teoh's brother. Since being married, Mr and Mrs Teoh had three more children.

58 Mr Teoh applied for resident status before the expiry of the temporary entry permit (which expired February 1989). Before the grant of residence in November 1990, Mr Teoh was convicted for being involved with the importation, and in the possession, of heroin and sentenced to six years' imprisonment.

59 In January 1991, Mr Teoh was informed that his application for residence was refused on grounds that he was not of "good character". He applied to the Immigration Review Panel (**IRP**) for a review of the decision. Amongst the claims raised before the IRP, Mr Teoh's wife, mother-in-law and former employer raised claims of compassionate grounds.

60 Pursuant to a document called "Integrated Departmental Instructions Manual, Grant of resident status, Number 17", Mr Teoh was required to be of good character to be granted resident status. The IRP was not satisfied that he was of good character and did not consider there to be any compassionate grounds which were sufficiently compelling to justify the waiver of this requirement.

61 On appeal to the High Court, Mason CJ and Deane J held that there was a legitimate expectation that administrative decision-makers would act in conformity with the Convention and "treat the best interests of the children as 'a primary consideration'" (at 291). Their Honours held (at 291-292) that:

> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way …
>
> But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

62 Toohey J held (at 302) that:

> In any event it is not that decision-makers must give effect to the precept that "the best interests of the child shall be a primary consideration". There may be other interests carrying equal weight. Rather, a decision-maker who does not intend to treat the best interests of a child as a primary consideration must give the person affected by the decision an opportunity to argue that the decision-maker should do so.
>
> (footnote omitted)

63 Gaudron J, agreeing with the majority, held (at 304) that:

> Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare. Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker.

64 However, Gaudron J expressed the principle in terms of procedural fairness (at 305):

> There is a want of procedural fairness if there is no opportunity to be heard on matters in issue. And there is no opportunity to be heard if the person concerned neither knows nor is in a position to anticipate what the issues are. That is also the case if it is assumed that a particular matter is not in issue and the assumption is reasonable in the circumstances. In my view and for the reasons already given, it is reasonable to assume that, in a case such as the present, the best interests of the children would be taken into account as a primary consideration and as a matter of course. That being so, procedural fairness required that, if the delegate were considering proceeding on some other basis, she should inform Mr Teoh in that regard and give him an opportunity to persuade her otherwise. It did not, however, require her to initiate inquiries and obtain reports about the future welfare of the children and, in this respect, I agree with the judgment of Mason CJ and Deane J.

65 McHugh J, dissenting, did not consider that any legitimate expectation arose and noted (at 314):

> It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision has no knowledge.

Vaitaiki v Minister for Immigration and Ethnic Affairs (1998) 150 ALR 608

66 The Full Court in *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (***Vaitaiki***) applied *Teoh*. Burchett and Branson JJ (Whitlam J dissenting) allowed the appeal.

67 *Vaitaiki* concerned a deportation order that had been made against the appellant who had been convicted and sentenced on two charges. The appellant had three children (the **older children**) from a previous marriage to an Australian citizen, and another three children (the **younger children**) to another Australian citizen who was his de facto wife. It was accepted by the Tribunal that the de facto wife and the younger children would return with the appellant to Tonga upon his deportation.

68 Burchett J summarised the principle of *Teoh* (at 612) as "if a decision were to be given by an administrator which did not accord with the principle that the best interests of any children concerned were to be a primary consideration, the administrator would first be required to give adequate notice and an opportunity for the presentation of a case against the taking of such a course". Burchett J applied *Teoh* (at 616) by saying "as no notice had been given within the

meaning of the majority judgments in *Teoh*, [the Tribunal] was required to take the best interests of the children into account as a primary consideration". This reasoning was based on the Tribunal's reasoning that the younger children would "return" to Tonga, which "ignored the younger three children's position as Australian citizens, their family and social ties with Australia and the broad disruption to their lifestyle and expectations which was to be brought about" (at 618). Branson J, agreeing with Burchett J, considered that the reasons of the Tribunal did purport to act in conformity with the Convention, but that nowhere did the Tribunal seek to identify what would be the best interests of the children and therefore failed to "give proper, genuine and realistic consideration to the children's best interests" (at 631).

69 Whitlam J considered that *Teoh* was decided by reference to the requirement of procedural purposes (at 629) and distinguished *Vaitaiki* from *Teoh*. His Honour, after setting out the decision of the Tribunal at 628, found that the "tribunal was not obliged by virtue of the Convention to accord more weight to the interests of the appellant's children than to the need to protect Australian society". His Honour considered it was very clear that the Tribunal had taken the appellant's children's best interests into account, as the Tribunal had referred to dealing with the children's best interests "as a primary consideration for procedural purposes" (at 629), dealt with the question of the appellant's imminent separation from the older children and found that the best interests of the younger children would be to move to Tonga as contemplated.

***Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133; [2001] FCA 568**

70 The Full Court in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133; [2001] FCA 568 (***Wan***) applied *Teoh* and *Vaitaiki* and allowed the appeal.

71 In *Wan*, the appellant was married to an Australian citizen with whom he had two children, who were also Australian citizens. He was refused a permanent residence (general-spouse) visa on the grounds that he was not of good character, based on his past criminal conduct, and advised that he would be deported to China.

72 The Full Court considered *Teoh* and *Vaitaiki*. In the Court's view, the starting point for the Tribunal's consideration, which flowed from those authorities, was to identify the best interests of the children with respect to the visa application (at [26]). The Court then considered how the Tribunal had referred to the children and how the Tribunal had turned to consider how the interests of the children would be affected if they accompanied their father to China or if they

remained in Australia while their father lived in China. The Court held that the "Tribunal was concerned to identify, not what decision would be in the best interests of the children, but rather how the children's interests would be affected by a decision to refuse to grant their father a visa" (at [27]).

73 The Court continued that, even if they were wrong in concluding that the Tribunal did not identify what the best interests of the children were, it was inescapable that the Tribunal did not treat the best interests of the children as a "primary consideration" (at [31]).

***McNamara v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1096**

74 The applicant was a British citizen who arrived in Australia on 1 December 1999 on a visitor's visa permitting her to remain in Australia for three months. On 6 March 2001, she applied for a Partner (Temporary) (Class UK) visa, claiming to have commenced a de facto relationship with her nominator on 15 February 2000. Prescribed criteria for such a visa were set out in Schedule 2 of the Regulations, including that the applicant satisfied the "Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria".

75 The question before Whitlam J was whether the applicant had any compelling reasons for the waiver of the visa requirements outlined in Schedule 3 of the Regulations, which required the applicant's visa application to be made within 28 days of becoming a person without a substantive visa. The applicant submitted that she was denied procedural fairness because she had the legitimate expectation that the Tribunal would act in conformity with the Convention and treat the interests of her children as a "primary consideration", when considering whether to waive the Schedule 3 criteria, as "compelling reasons". Whitlam J dismissed the appeal.

76 The Minister submitted that the scheme of the Act precluded the Tribunal taking the expectation into account. Whitlam J accepted the Minister's contention and said (at [9]):

> It is axiomatic that s 65 of the Act requires the decision-maker to be 'satisfied' of various matters. Section 65 does not confer a power to be exercised as a discretion. In the present case it was the 'Schedule 3 criteria' that required attention. The application of those criteria would result in the applicant being obliged to leave Australia and to apply from overseas for residence on spouse grounds. The consequences for her children were at the forefront of the reasons advanced by the applicant for not applying the Sch 3 criteria. The applicant was not denied the opportunity to present any material or argument on this topic. Neither the transcript of the Tribunal hearing nor the applicant's affidavit show any procedural unfairness. Before the Tribunal decided whether to waive the Sch 3 criteria, it was not obliged to give any notice to the applicant

by virtue of the ratification of the United Nations Convention.

77 Whitlam J held that a fair reading of the Tribunal's reasons showed that it was conscious of the consequences of the application of the Schedule 3 criteria on the lives of the applicant and her children (at [11]).

***DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184**

78 The appellants in *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184 (***DXQ16***) were a husband and wife from the Islamic Republic of Iran. They arrived in Australia in 2010 with their first child and claimed to be stateless. They were subsequently granted a protection visa in 2011 and later had a second child, who was an Australian citizen. In 2015, the Minister suspected the appellants were not stateless following the family's two visits to Iran, which the appellants admitted had been a lie. The appellants' visas were cancelled pursuant to s 109 of the Act.

79 Steward J (at [27]) noted that the concept of legitimate expectation, as expressed by Mason CJ and Dean J in *Teoh*, had since "fallen out of favour in Australia" where the "more 'modern' way of expressing the principle" could, the appellants submitted, be found in the judgment in *Teoh* of Gaudron J at 305. Nevertheless, Steward J considered himself (at [37]) bound to follow and apply *Teoh*, noting that it was still considered good law in Australia, referring to Perry J in *Poroa v Minister for Immigration and Border Protection* (2017) 252 FCR 505; [2017] FCA 826 at [51]: "While the Minister pointed to statements in the authorities casting doubt upon the decision in *Teoh*, the Minister accepted that the principles in *Teoh* have not been directly overruled and that, for present purposes, they remain good law".

80 Steward J identified the two decisions of the Full Court in *Wan* and *Vaitaiki*, both of which had applied *Teoh*. However, although Steward J considered himself bound by *Wan* and *Vaitaiki*, Steward J noted (at [34]) that they may be misstating the principles in *Teoh*:

> Their Honours in *Teoh* specifically did not state that a decision maker is bound to take into account the best interests of any children as a primary consideration. That was because Art. 3(1) did not (and does not) form part of the domestic law of Australia … Rather, a decision maker is obliged to give notice if she or he intends to act inconsistently with the Convention. The giving of notice affords the applicant with an opportunity to answer it.

81 Relevantly, Steward J found that the differing statutory contexts in issue in these cases did not affect how *Teoh* was to be applied (at [53]):

> I do not consider that the fact that the statutory context before me differs from the statutory contexts considered in the decisions relied upon by the appellants relevantly affects how the *Teoh* ground should have been considered by the Tribunal. That is because there was no dispute before me that the decisions of the Tribunal were, to use the terminology of the Convention, actions concerning children.

82 Steward J held the reasons of the Tribunal did not expressly make clear, nor could it be inferred, that the Tribunal evaluated the best interests of the children and weighed the interests against any other factor. His Honour found that, while the Tribunal "plainly took into account" the children's best interests (at [54]), the Tribunal may not have "appreciated the significance of the need to give those interests 'primary' consideration" (at [55]). The relevant ground of appeal was therefore made out.

***Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480**

83 The appellant in *Promsopa* applied for a provisional partner visa and a partner visa in December 2012, both of which were sponsored by her husband, Mr Potter (whom she had married in September 2012). The appellant was granted the provisional partner visa in April 2013 and travelled to Australia in May 2013.

84 The appellant's relationship with Mr Potter ended in January 2015 and she began a relationship with Mr Walker (a UK citizen who resided in Australia on a temporary visa) around or shortly after January 2015. The appellant was granted the partner visa in March 2015. In October 2015, the appellant gave birth to an Australian citizen child, the father of whom was Mr Walker.

85 The relationship between the appellant and Mr Walker ended a year later, in October 2016, because Mr Walker drank alcohol heavily and subjected the appellant to abuse and violence.

86 In June 2018, the Minister notified the appellant of an intention to cancel her visa on the basis that she had failed to notify the Department of changes to her circumstances prior to the grant of the partner visa. The appellant did not respond to the notification and in July 2018, a delegate of the Minister cancelled the appellant's partner visa.

87 Allsop CJ, referencing the decision of *DXQ16*, also considered himself bound to follow the cases of *Wan* and *Vaitaiki* (at [71]). Allsop CJ held (at [71]) that the Tribunal had failed to properly consider the best interests of the child affected by the decision. At [54]-[55], Allsop CJ summarised the guidance provided by *Vaitaiki* and *Wan*, as well as his Honour's decision in *Perez v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 454; [2002] FCA 450 (***Perez***):

> 54 The Full Federal Court decisions of *Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5; 150 ALR 608 and *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568; 107 FCR 133 provide guidance on how a Tribunal is to give proper, genuine and realistic consideration to the best interests of children affected by the decision. In *Wan*, the Full Court found that the failure of the decision maker to identify anywhere in his written reasons what the best interests of the children indicated, was of particular significance: see *Wan* at [26]. The Full Court at [30] set out elements of the best interests of the children which had not been elucidated by the Tribunal: that the children as citizens of Australia would be deprived of the country of their own and their mother's citizenship and "of its protection and support, socially, culturally and medically, and in the many other ways evoked by, but not confined to, the broad concept of lifestyle", citing *Vaitaiki* at 614; the resultant social and linguistic disruption of their childhood as well as the loss of their homeland; the loss of educational opportunities available to the children in Australia; and their resultant isolation from the normal contacts of children with their mother and mother's family.
>
> 55 As I said in *Perez v Minister for Immigration and Multicultural Affairs* [2002] FCA 450; 119 FCR 454 at [118], the interests of the children are considerations in respect of their human development – their health, including their psychological health and happiness, their social and educational development as balanced, nurtured young citizens of this country. This is not a check list, but an illustration of the kinds of considerations relevant to these young people which form their best interests in connection with a decision of the Minister.

88 Allsop CJ considered that the "best interests of the child" was more than a label and required the decision-maker to properly address and weigh the different factors (at [79]):

> The Minister's submission fails to recognise that the weighing exercise undertaken by the Tribunal in [49] and [50] was done so in the context of the conclusions it made in respect of the content or substance of the child's best interests. As discussed above, the Tribunal failed to consider a number of important claims in its assessment of the best interests of the child; its conclusion as to what was in the best interests of the child, and the factors that informed that conclusion, were reached without considering all legally necessary material involved. When the Tribunal stated that it would place greater weight on the failure under s 104 "if it were wrong in this assessment" it was referring to its conclusion that the best interests of the child would not be adversely affected by the cancellation. This is not a reference to the correctness or otherwise of the underlying findings made by the Tribunal in relation to the content and circumstances affecting the child's best interests. The "best interests of the child" is not merely a label; it is an important subject informed by a number of different factors and considerations as to different aspects of the child's wellbeing, many of which were left unremarked upon by the Tribunal. The weight to be given to the best interests of the child is dependent upon the substance of those best interests and the factors that have informed them. The decision maker failed to address and to give proper consideration to aspects which properly informed the best interests of the child. The substance of the best interests is different to what the decision maker understood it to be. The weight to be given to those best interests in the Tribunal's ultimate assessment of whether to cancel the visa or not will also be different. It is in this respect that the Tribunal's error is material; if the Tribunal had properly addressed and then assessed the best interests of the child and had not, in its one-dimensional analysis, incorrectly ascertained the substance of the best interests, then the weight to be given to the best interests of the child in the Tribunal's ultimate reasoning and conclusion could have

been different.

89 The Minister submitted before Allsop CJ that the procedural fairness rulings in *Teoh* only applied where the Minister had an unfettered discretion and that s 109 of the Act did not allow an unfettered discretion as the Minister had to be satisfied of (a), (b) and (c). Like Steward J in *DXQ16*, Allsop CJ did not accept that submission (at [71]).

***Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417; [2022] HCA 17**

90 The statutory context of *Plaintiff M1/2021* revolved around s 501CA of the Act in circumstances where a delegate of the then Minister for Immigration and Border Protection was reviewing the cancellation decision of the plaintiff's visa. The plaintiff made representations that he would face "persecution, torture and death" were he to return to South Sudan. The delegate of the Minister did not revoke the cancellation decision as the delegate was not satisfied that the "plaintiff passed the character test or that there was 'another reason' why the Cancellation Decision should be revoked" (at [4]).

91 The delegate of the Minister stated under a heading "International non-refoulment obligations" that it was unnecessary to determine whether any non-refoulement obligation was owed in circumstances where the plaintiff could apply for a protection visa (at [5]). The plaintiff subsequently applied for, and was refused, the grant of a protection visa.

92 The plaintiff applied to the High Court for constitutional writs seeking to quash the decision of the delegate of the Minister and to compel the delegate of the Minister to exercise the power under s 501CA of the Act according to law. The question of law presented to the High Court was "whether, in deciding whether there was 'another reason' to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the Migration Act, the Delegate was required to consider the plaintiff's representations which raised a potential breach of Australia's international non-refoulement obligation where plaintiff was able to make a valid application for a protection visa".

93 The majority (Kiefel CJ, Keane, Gordon and Steward JJ) held (at [20]) that:

> Australia's international non-refoulement obligations, as distinct from the criteria for the grant of a protection visa, are addressed separately and later in the scheme of the Migration Act in the context of removal. That distinction is important. In point of constitutional principle, an international treaty (or customary international law obligations of a similar nature) can operate as a source of rights and obligations under domestic law only if, and to the extent that, it has been enacted by Parliament. It is only Parliament that may make and alter the domestic law. The distinction also has significant consequences for discretionary decision-making under powers, such as

> s 501CA, conferred by statute and without specification of unenacted international obligations: such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error.
>
> (footnotes omitted)

94 The majority contended (at [29]) that:

> Where the representations *do* include, or the circumstances *do* suggest, a non-refoulement claim by reference to *unenacted international non-refoulement obligations*, that claim may be considered by the decision-maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error – they are not part of Australia's domestic law.
>
> (italics in original; footnotes omitted)

***NRFX v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 187**

95 *NRFX* involved a citizen of the United Kingdom whose visa was subject to mandatory cancellation under s 501(3A) of the Act. The applicant's visa was cancelled, and a delegate of the Minister refused to revoke the cancellation decision. The appellant lodged an application for review in the Tribunal, which set aside the delegate's decision and substituted its own, revoking the cancellation decision.

96 Subsequently, the Minister exercised his power under s 501BA(2) of the Act to set aside the Tribunal's decision and cancel the appellant's visa for the reason that the appellant did not pass the character test and that it was in the national interest to do so. The Minister noted that the appellant's family included the appellant's daughter with his partner and the appellant's daughter from a previous relationship.

97 Two questions were raised before the Full Court (at [34]):

> The first is whether the Minister's decision or decision-making process would cause any breach of Australia's obligation under Arts 9 and 12 of the Convention. The second is whether, assuming that it would cause such a breach, it would be unreasonable for the Minister to fail to consider the breach or the prospect of such a breach in his assessment of the national interest for the purpose of s 501BA(2)(b) of the Act.

98 Derrington J held that there was no breach of Australia's obligation under Arts 9 and 12 of the Convention (at [104]) and also went on to consider whether the Convention was at all relevant to the Minister's decision-making process. Derrington J considered the impact of *Plaintiff M1/2021* and held (at [156]) that:

> The joint majority's statement in *Plaintiff M1/2021* at 507 – 508 [20], as extracted above, was as emphatic as it was clear. As a statement of constitutional principle, it

> both reinforced parliamentary sovereignty and rejected the suggestion that the Executive might have the capacity to create rights or obligations in a domestic setting merely by deciding, of its own accord, to bind Australia to treaties and other international instruments, the rules and normative content of which otherwise find no direct expression in domestic law. As their Honours said, "[i]t is only Parliament that may make and alter domestic law". The necessary concomitant is that the unenacted content of treaties cannot operate "as a source of rights and obligations under domestic law".

99 His Honour concluded (at [169]) that:

> The Minister in the present case was under no obligation to consider the terms of the Convention, or the impact of any actual or prospective breach of those terms, in assessing whether it was in the national interest that the appellant's visa be cancelled. It cannot be said that his decision was unreasonable on account of his omission to consider such matters.

100 As a matter of procedural fairness, the majority in *Teoh* decided that, if a decision-maker intends to make a decision inconsistent with the Convention, notice should be given to the persons affected, who should be given adequate opportunity to respond.

101 *Plaintiff M1/2021* did not involve consideration of the Convention, but related to Australia's international non-refoulement obligations. The principles laid down in *Plaintiff M1/2021* are not, of course, limited to non-refoulement obligations. As it was said (at [20]):

> In point of constitutional principle, an international treaty (or customary international law obligations of a similar nature) can operate as a source of rights and obligations under domestic law only if, and to the extent that, it has been enacted by Parliament. It is only Parliament that may make and alter the domestic law. The distinction also has significant consequences for discretionary decision-making under powers, such as s 501CA, conferred by statute and without specification of unenacted international obligations: such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error.
>
> (footnotes omitted)

102 It is clear from *Plaintiff M1/2021* that considerations which arise under an international treaty (or customary international law obligations of a similar nature) are not mandatory relevant considerations unless they are prescribed to have that nature under domestic legislation. As was said by Derrington J in *NRFX* (at [156]):

> In the administrative law context, it was expressly identified that unenacted international obligations cannot amount to mandatory relevant considerations in the exercise of discretionary decision-making powers under statute in the absence of express specification or incorporation.

103 *Plaintiff M1/2021* is clear in deciding that the decision-maker is under no obligation to consider the requirements set out under international conventions or treaties which are not the subject

of domestic legislation because such unenacted conventions or treaties cannot give rise to "rights and obligations under domestic law".

104 *NRFX* was a case concerning the Convention and applied *Plaintiff M1/2021* in those circumstances.

105 As Derrington J observed in *NRFX*, the decision in that case was whether the Convention "was at all relevant to the Minister's decision-making process", describing the fundamental issue as "whether a treaty, which has not been enacted into Australian domestic law, can have any bearing on the Minister's assessment".

106 As Derrington J described in *NRFX* (at [157]):

> [I]t seems apparent that the majority of the High Court drew a bright line between the effect of those treaty rules and standards that have been incorporated by enactment into Australia's domestic law, and the effect of those that have not. The latter cannot function, either directly *or* indirectly, as a source of rights and obligations under domestic law. The majority did not seem to suggest that the issue lay only with such treaty obligations being treated as a "direct" source of rights and obligations: cf *BNGP* [130]. The cardinal constitutional principle to be observed is that it is for the Parliament and not the Executive to make and alter the domestic law. The majority's reasons eschew the suggestion that the Executive can do so indirectly. It would be somewhat unusual for the norms contained in an unenacted treaty to be ineffective to create rights and obligations directly in domestic law, but then to be recognised as having that effect indirectly by functioning as mandatory relevant considerations in the exercise of statutory powers.
>
> (italics in original)

107 The notion that the provisions of an international convention or treaty are in force domestically only after the passing of domestic legislation is well-established and was so at the time of the decision in *Teoh*.

108 Decided against that background, the majority decision in *Teoh* was that procedural fairness required that, if a decision-maker proposed to make a decision inconsistent with the Convention, notice should be given to the persons affected, who should be given adequate opportunity to respond.

109 The status of the decision in *Teoh* is uncertain.

110 There has been a consistent move away from the principles of *Teoh*, but the decision has not been overturned. For example, in *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 286 FCR 89; [2021] FCAFC 141 (***Ratu***), Farrell, Rangiah and Anderson JJ said:

> 42 The doctrine of legitimate expectations has since been rejected by *obiter dicta* statements of the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [25], [61]-[63], [81]-[83], [116]-[121] and [140]-[148], *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65] and *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [28]-[30].
>
> 43 In addition, to the extent that *Teoh* suggests as a general principle that the ratification of an international treaty gives rise to a presumption or expectation that the executive government will act consistently with the treaty, even in the absence of legislation adopting the treaty as part of domestic law, that reasoning was strongly doubted by a majority of the High Court in *Lam* at [95]-[96], [98], [120]-[121] and [147].
>
> 44 The High Court has not directly overturned *Teoh*. An earlier *ratio* of the High Court is not overturned by later *dicta* of the High Court: cf *Viro v The Queen* (1978) 141 CLR 88 at 151. Further, in *Jacob v Utah Construction & Engineering Pty Ltd* (1966) 116 CLR 200 at 207, 217 and *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 at [3]-[4], the High Court firmly rejected the capacity of lower courts to adjudge its decisions to have been impliedly overruled.

Their Honours considered that the application of *Teoh* was limited to the Convention and did not apply to the International Covenant on Civil and Political Rights (at [47]).

111 The authorities referred to in *Plaintiff M1/2021* as being overruled did not include the line of authorities outlined in these reasons.

112 The question of whether obligations of procedural fairness require that the decision-maker inform the affected party if the decision-maker intends not to make a decision in accordance with the Convention was not directly the subject of the decision in either *Plaintiff M1/2021* or *NRFX*. However, the principle does not sit easily with the decision of the majority in *Plaintiff M1/2021*. As Derrington J correctly (in my opinion) said in *NRFX*, treaty rules and standards that have not been incorporated by enactment into Australian domestic law cannot, as described by the High Court, function directly or indirectly as a source of rights or obligations under domestic law. Again, as Derrington J described, the cardinal constitutional principle to be observed is that it is for the Parliament, and not the Executive, to make and alter the domestic law.

113 When this matter was raised at the hearing, counsel for the appellant, when observing that "Teoh has waxed and waned", indicated that he was not pressing any argument based on procedural fairness. He also observed that legitimate expectation was no longer a consideration.

114 However, counsel for the appellant referred to the decision of Mason CJ and Deane J in *Teoh* (at 291):

> [R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.

and submitted that, against the passage quoted, a decision-maker "with an eye to the principle enshrined in the convention would be looking to the best interests of the children as a primary consideration and asking whether the force of any other consideration might outweigh it". Based upon the current authorities, that submission must be rejected. Considerations which arise under unenacted international conventions are not mandatory considerations.

115 Of course, there is no suggestion that the Tribunal gave notice to the applicant of the intention not to take account of the best interests of the child.

116 The focus of reg 2.03A of the Regulations is to identify compelling and compassionate circumstances for the grant of the visa. Given the wide range of circumstances which might be taken into account, the role of the Tribunal necessarily involves the exercise of a discretion.

117 The decision of the Tribunal involved the consideration of a relationship where the child was accepted to be the product of that relationship. When considering "compelling and compassionate circumstances" associated with the relationship, it seems clear that the interests of a child of the relationship are relevant and potentially the subject of consideration by the decision-maker.

118 As was said in *Plaintiff M1/2021*, the decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before the decision-maker.

119 That must be considered in light of the circumstances of the hearing. For example, a litigant in person may not be able to articulate a position with the same degree of accuracy as might an experienced lawyer.

120 The Minister submitted that the daughter was only raised by the appellant in the context of legitimacy of the de facto relationship and was not raised as a compelling and compassionate ground. I do not accept that proposition. The appellant represented herself before the Tribunal. The father of the child also took part in the hearing. The context of the hearing was a review of the decision of the delegate who was considering whether the appellant was in a genuine spousal relationship with her sponsor.

121 The Tribunal asked whether the appellant had anything else that she wanted to raise, as follows:

> [MEMBER]: Yes, okay, is there anything else you want to tell me?
>
> [THE APPELLANT]: I have a daughter to my husband.
>
> [MEMBER]: Yes, I know that.

122 The Tribunal subsequently heard from Mr Ali, during the course of which Mr Ali was asked whether there was anything else he wanted to add:

> [MEMBER]: Is there anything else you want to tell me?
>
> [MR ALI]: … I don't want to send my daughter back to Fiji. Very poor place there they live in a village with no water there. Hardly electricity there and how my daughter going to suffer there mosquitoes and things there and having to live without my daughter and my wife …
>
> [MEMBER]: Alright.

123 Particularly in the case of a self-represented litigant, I am satisfied that the effect of what was said was to raise the best interests of the daughter in all matters, including when considering any compelling and compassionate circumstances. This is clear from a fair reading of the above exchanges.

124 The decision-maker must "read, identify, understand and evaluate" the representations made (*Plaintiff M1/2021* at [24]). The decision-maker must bring their mind to bear upon the facts, and the weight to be afforded is a matter for the decision-maker. The requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness (*Plaintiff M1/2021* at [25]).

125 If 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 (*Plaintiff M1/2021* at [27]).

126 The Minister argued that the Tribunal did give adequate consideration to the best interests of the child.

127 "[C]ompelling and compassionate circumstances for the grant of the visa" is not defined in the Act and, as such, one must look to the ordinary meaning of the words "compelling" and "compassionate". They were defined by the Tribunal as follows: "'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing". Regulation 2.03A of the Regulations requires the

appellant to establish "compelling and compassionate circumstances for the grant of the visa", otherwise the decision-maker is required to consider whether the appellant has been in a de facto relationship for 12 months. While the 12 month period is an objective fact and does not involve any exercise of discretion, the consideration of the factors and of whether "compelling and compassionate circumstances" exist does involve the exercise of a discretion. The decision-maker exercises a discretion and weighs the circumstances of the appellant's case and determines whether they are compelling and compassionate.

128 Did the Tribunal properly turn its mind to the best interests of the child in considering the "compelling and compassionate circumstances for the grant of the visa"?

129 The reasoning in *Vaitaiki* and *Wan* was summarised by Jagot J in *Nweke v Minister for Immigration and Citizenship* [2012] FCA 266 (at [21]):

> Applying the reasoning in *Vaitaiki* and *Wan* it is apparent that the Minister did not in fact treat the best interests of the applicant's children as a primary consideration in the decision whether or not to cancel the applicant's visa. The Minister could not do so because he never confronted the central question of what the best interests of the children required him to decide with respect to the proposed deportation of their father.

See also *Promsopa* at [54].

130 As Allsop J (as his Honour then was) said in *Perez* (at [118]) and reiterated in *Promsopa* (at [55]):

> The interests of the children are considerations in respect of their human development—their health, including their psychological health and happiness, their social and educational development as balanced, nurtured young citizens of this country. This is not a check list, but an illustration of the kinds of considerations relevant to these young people which form their best interests in connection with a decision whether to keep their father away from them in gaol, save for visits, or whether to release him, on appropriate conditions if thought necessary, so that he may be close to them … or freely available to spend time with them.

131 The Tribunal referred to the existence of the daughter three times throughout the decision under the heading "Are the parties in a de facto relationship". While one should not look at the Tribunal's decision with an "eye keenly attuned to the perception of error" (*Liang* at 272), an intellectual balancing was required by the Tribunal, and no such balancing occurred.

132 When considering whether there were any "compelling and compassionate circumstances for the grant of the visa", the Tribunal's reasons simply stated:

> No compelling or compassionate circumstances have been identified to the Tribunal by either the Applicant or by Mr Ali as to why the 12 month requirement should be overlooked in their case, and none are discernible on the evidence. Accordingly, the

> Tribunal is not satisfied that there are compelling and compassionate circumstances for the grant of the visa.

133 The Tribunal did not turn its mind to, nor am I willing to infer that it turned its mind to, the best interests of the daughter as a "compelling and compassionate circumstance". The Tribunal did not identify what the best interests of the child were.

134 In relation to the question of "compelling and compassionate circumstances", the Minister has pointed to the numerous unfavourable findings regarding the de facto relationship of the appellant, including the existence of the appellant's other child, who was presently living with an aunt in Fiji, and the financial convergence of the appellant and her sponsor.

135 As is obvious from the words and format used in the regulation, those matters which are listed in reg 1.09A of the Regulations are said to be relevant to the existence of the de facto relationship for the purpose of s 5CB of the Act. They are not relevant to the consideration of "compelling and compassionate circumstances" under reg 2.03A(3).

136 As outlined in reg 2.03A(3), the Tribunal should first have considered if compelling and compassionate circumstances existed. It was necessary for the decision-maker to consider the matters as follows:

(a) whether the application has been made;

(b) whether the applicant can establish compelling and compassionate circumstances for the grant of a visa; and

(c) if compelling and compassionate circumstances are not established, whether the Minister can be satisfied that the applicant had been in the de facto relationship for at least a period of 12 months immediately before the date of the application.

137 The approach taken by the Tribunal did not follow the requirements of reg 2.03A(3).

138 The consideration of "compelling and compassionate circumstances for the grant of a visa" is not dependent of the factors which must be taken into account when considering whether the de facto relationship has existed. Examples of those factors appear in reg 1.09A.

139 When considering "compelling and compassionate circumstances", the Tribunal should have engaged in an intellectual balancing of the best interests of the daughter. No such balancing, nor even identification of best interests, took place.

140 Having regard to the contents of the reasons, it is clear (and I conclude) that the Tribunal did not give proper, genuine or realistic consideration to the factor raised by the appellant, namely the best interests of her daughter. This amounts to a jurisdictional error.

141 I am also satisfied that the Tribunal did not properly apply the requirements of reg 2.03A of the Regulations.

142 I am satisfied that the Tribunal engaged in jurisdictional error.

143 It follows that the orders of the FCCA made on 5 August 2021 should be set aside and the matter be remitted to the Tribunal.

144 In view of those conclusions, it is not necessary for me to come to any conclusion in relation to appeal ground 1(f).

Leave to raise new ground and adduce new evidence

145 The Minister submitted that this ground was not raised before the primary judge and that leave was required to bring this ground, which should only be granted if it was "expedient in the interests of justice" (*VUAX* at [46]). The factors relevant for the grant of leave are merit, prejudice to the respondent and the explanation for the failure to raise the point, as outlined in *VUAX* (at [48]):

> The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

146 As described previously in these reasons, there was merit in the bringing of this ground.

147 The Minister identified that he may be prejudiced if seeking to appeal this ground as it would require special leave to the High Court. I do not consider that to be strong prejudice.

148 The appellant submitted that this ground was a recast of ground 2 before the primary judge:

> The [Tribunal] committed jurisdictional error when it failed to be satisfied that the Applicant had been in a de facto relationship for at least the period of 12 months ending immediately before the date of application, for the purpose of regulation 2.03A(3) of the *Migration Regulations* 1994 (See paragraph 15 of the decision).

149 I do not agree with the appellant on that point.

150 Regulation 2.03A(3) deals separately with:

(a) the establishment of compelling and compassionate circumstances for the grant of the visa; and

(b) the need to be satisfied that the visa applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application.

151 The only relationship between the two is that, if it is possible to establish compelling and compassionate circumstances, then there is no need for the Minister to be satisfied that the visa applicant has been in the de facto relationship for at least a period of 12 months ending immediately before the date of the application.

152 Ground 2 dealt with whether the appellant has been in a de facto relationship. Consideration of whether compelling and compassionate circumstances can be established is not a re-casting of that ground, but a separate issue.

153 There does not appear to be a strong explanation for why this ground was not raised below, nor do I accept that this ground is a recast of Ground 2 below. The appellant was represented by different counsel below; however, this is not an adequate explanation for why the ground was not raised.

154 I agree with what was said by Mortimer J in *Bhatti* (at [127]):

> Questions of leave will very much depend on the facts of an individual case, and on the merits of the legal arguments sought to be raised, assuming no prejudice to the Minister. Such prejudice to a repeat and institutional respondent is only likely to arise if insufficient notice is given of a new argument, or it is likely that the course of the proceeding in the Court below would have been different. Absent being satisfied of real prejudice, it is unlikely to be in the interests of the administration of justice to allow an exercise of public power that the Court considers is affected by jurisdictional error to stand: see *BKQ16 v Minister for Immigration and Border Protection* [2019] FCA 40; 77 AAR 165 at [73]-[76] and the cases cited therein.

155 Ultimately, taking into account all of those factors, it is necessary for me to consider whether it is expedient in the interests of justice to grant leave to raise the ground. I have come to the view that it is expedient in the interests of justice to grant leave to raise the ground and to allow the admission of the transcript into evidence. The merit of the ground and the lack of significant prejudice outweighs any reasons against granting leave.

DISPOSITION

156 For the reasons set out above, leave is granted for the appellant to rely on Grounds 1 and 3 of the notice of appeal filed on 2 September 2021.

157 The appeal is allowed.

158 The orders of the FCCA made on 5 August 2021 are to be set aside. In their place, I will order that the Tribunal's decision be set aside and the matter be remitted to the Tribunal, differently constituted, for determination according to law.

159 The Minister is to pay the appellant's costs of and incidental to the appeal in this Court.

I certify that the preceding one hundred and fifty-nine (159) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thomas.

Associate: 

Dated: 13 December 2023