DECISION-MAKING IN THE NATIONAL INTEREST?

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The character provisions of the Migration Act 1958 contain extraordinary powers for the Minister for Immigration and Border Protection, acting personally, to refuse or cancel visas without affording non-citizens natural justice or merits review and to overturn lawful decisions of merits review tribunals. The powers are restricted to cases where 'the national interest' arises.

This article considers whether the 'national interest' requirement has been operating as a check on these extraordinary powers. We particularly draw on the judgments of Gaudron and Kirby JJ in Re Patterson; Ex parte Taylor[1] *to argue that the 'national interest' must be given independent operation as a precondition to the exercise of the relevant powers. In Re Patterson, Gaudron J identified that the national interest required separate and distinct consideration beyond the person failing the character test and Kirby J interpreted the 'national interest' as involving an emergency or threat to the nation as a whole.*

A line of cases have applied Gaudron J's requirement without applying Kirby J's interpretation of the 'national interest' itself. We argue that these decisions have approached the 'national interest' as if it were an open discretion and left little work for the 'national interest' as a precondition to the discretion otherwise conferred by the relevant provisions. Our concern is that insufficient attention has been given to the specific legislative context of the national interest requirement. Being a precondition to the exercise of a statutory power that significantly interferes with the rights and freedoms of an individual, it should be closely scrutinised by the Courts.

The *Migration Act 1958* (the *Act*) is strewn with references to 'the national interest' to support a partialist[2] immigration system, favouring Australian citizens over non-citizens. The stated purpose of the *Act* is 'to regulate, *in the national interest*, the coming into, and presence in, Australia of non-citizens'[3] and a number of powers within the *Act* allow the Minister for Immigration and Border Protection (the Minister) to act 'in the national interest' in areas of contentious public policy.[4] In this article, we will focus upon visa cancellations on character grounds where the national interest arises.

The character provisions in ss 501-501A of the *Act* contain extraordinary powers for the Minister for Immigration and Border Protection (the Minister) to act personally to refuse or cancel visas without affording non-citizens natural justice or merits review and to overturn lawful decisions made by the Administrative Appeals Tribunal. The powers are restricted to cases where the national interest arises. The article begins by discussing the nature and operation of the relevant provisions and then examines the particular challenges that a legislative requirement to act in the national interest creates for judicial review.

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The character provisions

Sections 501-501B of the *Act* provides three powers that the Minister may exercise personally where it is in the national interest to do so. The powers are:

- to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test: s 501(3);
- to set aside a decision of a delegate of the Minister or of the Administrative Appeals Tribunal (AAT) that is favourable towards a visa applicant/ visa holder and substitute the decision with a decision to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test: s 501A; and
- to set aside a decision of a delegate of the Minister to refuse or cancel a visa which would ordinarily be reviewable before the AAT and substitute it with a personal decision to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test, with the new decision not being reviewable before the AAT: s 501B.[5]

Each of these powers may only be exercised by the Minister personally and cannot be delegated.[6]

For a decision under s 501(3) natural justice does not apply.[7] For a decision under s 501A the Minister may elect whether or not natural justice applies.[8] Natural justice has not been excluded for a decision under s 501B. Merits review is not available for any of these decisions.[9]

Significantly, these are not the only powers by which visas for non-citizens may be refused or cancelled on character grounds. A non-citizen may be refused a visa or have her or his visa cancelled solely because she or he fails the immigration character test and without any consideration of 'the national interest'.[10] It is only decisions made without affording the non-citizen natural justice or to overturn a decision made by the Administrative Appeals Tribunal in the non-citizen's favour where the Minister must be satisfied that the decision would be in the national interest.

The terms of these three distinct powers identified above are distinct because the decisions to be made are distinct, but they share common requirements and structure. It is instructive to commence by looking at the terms of s 501(3):

> 501(3) The Minister may:
> (a) refuse to grant a visa to a person; or
> (b) cancel a visa that has been granted to a person;
> if:
> (c) the Minister reasonably suspects that the person does not pass the character test; and
> (d) the Minister is satisfied that the refusal or cancellation is in the national interest.

The Minister's discretion to refuse or cancel a non-citizen's visa under s 501(3) arises where three conditions are met:

- the person subject to the decision is an alien under the Commonwealth Constitution- (which equates to a person who is not an Australian citizen);[11]

- the Minister reasonably suspects that the person does not pass the character test; and
- the Minister is satisfied that the decision is in the national interest.

The character test

The character test is defined in subsection 501(6) of the *Act*. It is an important part of the legislative context in which the Minister makes character decisions 'in the national interest'.

Section 501(6) includes a large range of situations in which a non-citizen may not pass the character test, such as if the non-citizen has an 'association' with a person or a group suspected by the Minister of being involved in criminal conduct,[12] or there is a significant risk the non-citizen will engage in criminal conduct in Australia.[13]

In the majority of cases considered in this article, the person failed the character test because she or he had a substantial criminal record,[14] defined in s 501(7) as including a sentence of imprisonment for 12 months or more[15] or two or more sentences where the total imprisonment is two years or more.[16] Section 501(7) covers terms of imprisonment imposed in any country, including for matters not considered crimes in Australia and not reflecting adversely upon a person's morals.[17] An assessment that a non-citizen does not pass the character test is not necessarily an assessment of a person's character; it is a singular character test that covers a range of conduct.

The national interest

In the Second Reading Speech for the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998, the then Minister for Immigration and Multicultural Affairs, Phillip Ruddock, said that the accountability of the Minster to Parliament and the Australian community meant that he should have power to act in the national interest in exceptional cases.[18] He went on to say that 'the government of the day…ought to be able to take responsibility,' as proposed in s 501A, to overturn decisions of the Administrative Appeals Tribunal (AAT) against the national interest.[19]

The High Court has not conclusively ruled on the interpretation of the national interest in the context of the character test. However, in *Re Patterson; Ex parte Taylor*[20] both Gaudron and Kirby JJ discussed the term in a case of a s 501(3) cancellation that was quashed on other grounds.

Gaudron J's statements in relation to the term national interest were not focused upon interpreting the term per se, but upon criticising the Department for failing to advise the Minister[21] that consideration of whether a non-citizen passes the character test must be a separate consideration to whether the national interest arises in a particular case. She stated that the 'national interest considerations are separate and distinct from the question of whether or not a person passes the character test.'[22] Her Honour did, however, suggest that the conduct which caused the person to fail the character test could also satisfy the national interest criterion, such as where the conduct was 'more likely than not to cause discord in the Australian community,'[23] circumvented immigration laws or involved particularly serious crimes.[24]

Kirby J noted that there are a wide range of considerations potentially relevant to the national interest and that it could not be given a confined meaning.[25] However, he found that it was 'impossible to regard' the facts of the case (a long term resident of Australia convicted of child sex offences on parole) 'as sufficient to sustain a reasonable or rational conclusion'

that it was in the national interest to cancel Mr Taylor's visa since there was no emergency and no significant threat to the 'nation as a whole' or the 'community of the nation'.[26]

Kirby J described the term as follows:

> The expression the national interest is different from 'the public interest'. In the Migration Act, it takes colour from the emergency circumstances in which it applies and the peremptory procedures which then, exceptionally, govern the case...something more [than a substantial criminal record] was obviously intended by requiring, additionally [to the character test not being met] that the danger to national interest justified the ministerial decision...
>
> While it might be said that the general problem of paedophilia and criminal offences against children is one involving 'the national interest', the decision to be made by the minister under s 501(3) of the Migration Act is not made at such a level of abstraction. It is one personal to the visa holder…On that level, the materials contained in the minute, upon which the respondent based her decision, did not afford any reasonable or rational foundation for a conclusion that cancellation of the prosecutor's visa was 'in the *national* interest'. The jurisdictional fact necessary to attract the second condition of which a Minister was to be satisfied before making a decision under s 501(3) was, therefore, not present.[27]

Gaudron and Kirby JJ's respective discussions of the national interest in this case took different approaches. Gaudron J focused upon the steps involved in the process, while Kirby J focused upon the absence of what he described as the jurisdictional fact of the national interest necessary to enliven the power. They both found the decision to be invalid and their judgments are not in conflict. Since Gaudron J did not seek to define the national interest it cannot be concluded that she agreed or disagreed with Kirby J's approach.[28]

However, Kirby J's approach has not been adopted by the Federal Court in subsequent cases. In *Madafferi*[29] the Full Federal Court (in a joint judgment) stated that 'His Honour set a high threshold for the enlivening of the national interest criterion... and [w]ith respect to that view, the bar of national interest does not seem to be set that high by the words of the Act which must be the primary guide to legislative intention.'[30]

In our respectful view, a high threshold approach for the interpretation of provisions that impact upon individual rights and freedoms is consistent with the principle of legality. This principle of statutory interpretation[31] was employed by the Full Federal Court when it interpreted part of the character test in a different national interest character case: *Haneef.*[32] The case concerned cancellation of a temporary work visa, which the Court described as having granted the applicant 'valuable rights', including the right 'to live here, to be at liberty here, to be with his wife here, and to work here.'[33] Cases such as those discussed by the Court concerning a permanent resident's 'right to community' raise even stronger rights. In *Haneef*, the Court applied the principle of legality to support an interpretation of the association ground of the character test (s 501(6)(b)) that limited its impact upon individuals with visas. In our respectful view, the line of authority referred to by the Court[34] to demonstrate the applicability of the principle of legality to interpreting s 501(6)(b) is equally apt for deciding between interpretations of the national interest as it applies to character decisions under s 501(3), 501A and 501B of the *Act*.

The Court in *Madafferi* held that the question of the national interest was 'an evaluative one entrusted by the legislature to the minister to determine according to his satisfaction'[35] and found that the Minister had not erred in law or acted unreasonably in being satisfied that the national interest was enlivened in the case in which Mr Madafferi had been convicted of offences involving violence, attempted extortion and drug possession. In *Maurangi v Bowen*[36] the plaintiff challenged the Minister's construction of the national interest by arguing that the Minister did not have regard to any matters other than the plaintiff's failure to pass the character test in determining that it was in the national interest to cancel the plaintiff's visa and overturn the AAT's decision. Lander J rejected that submission and stated:

> It does not follow that simply because the Minister relied upon the fact that a visa holder cannot pass the character test because of the visa holder's criminal record and *decided that the visa holder's criminal record was the ground for finding that the cancellation was in the national interest* meant that the Minister proceeded in jurisdictional error.[37]

Lander J went on to emphasise the very broad scope of the criterion, saying, 'In my view it is for the Minister to determine when a person's criminal history is such that it is in the national interest to cancel that person's visa, providing of course that the Minister exercises the discretion reasonably.'[38] Although a person's failure to pass the character test and national interest are separate criteria, they may be satisfied by the same facts.[39]

In the case of *Plaintiff S156* the High Court recently considered the national interest in relation to s 198AB of the *Act*, which gives the Minister power to designate that a country is a regional processing country if the Minister thinks that it is in the national interest to do so.[40] Section 198AB(3) requires the Minister to have regard to whether the country has given assurances that it will not *refouler* a person taken to that country and will make or permit an assessment of whether the person is a refugee. The Minister may also have regard to any other matter which, in the Minister's opinion, is in the national interest. In *Plaintiff S156*, the Court stated that 'what is in the national interest is largely a political question',[41] and rejected arguments based on failure to consider relevant factors and unreasonableness. The statutory context of 'the national interest' in s198AB is significantly different from the character provisions, especially considering the nature of the decision being made. Kirby J's approach in *Re Patterson* is important in recognising that the factors considered in exercising judgment about visa cancellation on character grounds must be applicable to the individual.

Discretion

Section 501(3) confers a broad discretion[42] upon the Minister to refuse or cancel the visas of non-citizens who do not pass the character test where the Minister is satisfied that the refusal/cancellation is in the national interest. Section '501 prescribes the failure to satisfy the character test as a condition precedent to the exercise of the discretion to cancel a visa and does not create a presumption as to how the discretion should be exercised.'[43] The same can be said of the national interest condition precedent in s 501(3). Once both are satisfied the Minister is then free to exercise that discretionary power as he or she sees fit in the circumstances. That is the way in which each of the national interest powers discussed here is structured. It is also the way in which the powers enabling visa refusal or cancellation on character grounds without a national interest requirement operate.

In exercising the discretion the Minister is given a power both to determine what is relevant and to determine the preferable decision in the circumstances.

In *Klein v Domus*, Dixon CJ commented on Parliament's intentions in conferring a discretion as follows:

> …the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment *to give effect to his view of the justice of the case*.[44]

Dixon CJ's statement highlights the personal nature of the decision and the perception of justice. The discretion is critical to the operation of the character test and was used in Parliament to justify the broad terms of the character test.[45] Without the discretion, decision-makers would be required on the terms of the character test to refuse and cancel the visas of people whom the Australian community would not consider to be of bad character. The discretion enables a critical judgment to be made after weighing up competing

considerations. As was found in *Minister for Immigration and Citizenship v Li*, this must be done in a way which is rational according to 'the rules of reason', and is limited by the subject matter, scope and purpose of the legislation. [46] French CJ in that case balanced the traditional understanding of a discretion (such as in *Klein v Domus*) with Dixon J's statement in *Shrimpton v Commonwealth* that 'complete freedom from legal control, is a quality which cannot…be given under our *Constitution* to a discretion' that would otherwise 'go outside the power from which the law or regulation conferring the discretion derives its force.'[47]

Grounds of review

Judicial review of decisions made under ss 501 and 501A is limited by the terms of the statute. Administrative law 'confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with the statute which creates and confers the power.'[48] Section 75(v) of the *Constitution* does not protect grounds of review; it only protects the Court's jurisdiction[49] to act where acts are done outside the limits of statutory power. There are some limitations, referred to as 'the *Hickman* conditions', which apply to every power and cannot be excluded by statute. These require 'that a decision is a bona fide attempt to exercise power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power.'[50] Furthermore, an exercise of discretionary power must be exercised reasonably 'according to rules of reason and justice'[51] A decision that does not adhere to these basic requirements is taken not to be a decision at all.[52] In some cases a ground of review may be completely excluded by the terms of a statute, such as the exclusion of natural justice in s 501(3). Other grounds of review may be available but may have a very limited operation because of the scope of the legislative power, as in review on the grounds of failure to take into account a relevant consideration, discussed below. [53]

In this section we consider the scope of judicial review of character decisions made personally by the Minister by reference to the national interest. We contend that the national interest raises particular difficulties for judicial review that have not yet been resolved.

Jurisdictional fact

A decision will be invalid on account of jurisdictional error where a jurisdictional fact necessary for the exercise of the power does not exist. This term refers to a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion.[54] Provided the s 501 power is only used towards aliens,[55] it is the decision-maker's state of mind, not a set of objective facts, that create the pre-conditions for the exercise of power.[56]

For s 501(3) and s 501A the critical pre-conditions are that (i) the Minister reasonably suspects the person does not pass the character test and (ii) the Minister is satisfied that the refusal or cancellation is in the national interest.[57]

Reasonable suspicion person does not pass the character test

In considering the scope of the 'national interest' criterion some consideration should be given to the first pre-condition of a failure to pass the character test, since this defines the scope of cases in which the Minister may consider whether the national interest arises.

A jurisdictional fact based on a 'reasonable suspicion' is not unreviewable,[58] but it sets a low bar. Courts will not substitute their own judgment for that of the decision-maker, who alone is responsible for forming the relevant state of mind.[59]

A suspicion has long been accepted to mean 'something more than a mere idle wondering.'[60] In *Goldie v Commonwealth*, the Full Federal Court found that holding a 'reasonable suspicion' imposed an obligation 'to make due inquiry to obtain material likely to be relevant for the formation of that suspicion.'[61] Given the way in which s 501(6) is worded a person passes the character test unless the Minister finds as a matter of fact that one of the matters in 501(6) applies.[62]

A decision that a person does not pass the character test because they have a substantial criminal record[63] 'can only be determined by means of an objective finding by the Minister.'[64] Other matters, such whether a person does not pass the character test because of an association,[65] their past and present criminal and/or general conduct[66] or the significant risk they pose to the Australian community,[67] are matters requiring a judgment to be made by the Minister. However, the Minister's decision will be invalid if this judgment is made applying the wrong legal test[68] or where the Minister was not actually satisfied in the manner required by the *Act*[69] – such as where there was no or inadequate material for the Minister to be satisfied of the matters set out in s 501(6). A reasonable suspicion can be sustained in circumstances where the decision-maker is mistaken as to the true situation.[70] A reasonable suspicion involves a subjective/objective test where a decision-maker's subjective belief is judged according to whether it was reasonably formed in the circumstances at the time of decision.

Satisfaction that refusal or cancellation in the national interest

The criteria for judicial review with respect to a subjective jurisdictional fact were discussed by Lord Wilberforce in *Secretary of State of Education and Science v Tameside Metropolitan Borough Council* and cited with approval by Gummow ACJ and Kiefel J in *SZMDS*:

> Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then…the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account. [71]

Judicial review includes consideration by a Court as to whether a decision-maker has applied the correct legal test in forming a stating of satisfaction and whether, applying the correct legal test, there is material capable of supporting the conclusion reached as a reasonably formed conclusion. If there are no facts before the Minister capable of enabling the Minister to reasonably and rationally form the view that the national interest arises, the Minister will not have formed a state of satisfaction in the legally required sense and his or her decision will be invalid at law. However, determining whether the facts existed to enable the formation of a valid state of satisfaction requires consideration of the relevant legal test. Whether there are sufficient relevant facts for the Minister to be satisfied that the national interest arises requires consideration of what is meant by the national interest.

The Federal Court has found that the fact of the determination being specific to a particular case (the relevant national interest being about whether a particular individual's visa should be refused or cancelled) does not necessitate that the Minister's consideration of the national interest must be specific to the individual. It may be answered at a broad level.[72] As stated in *Gbojueh*,

> The exercise calls for a broad evaluative judgment. It calls for the minister's satisfaction in relation to a power that may only be exercised personally by the minister...Political responsibility and accountability is reposed in the minister in relation to a subject matter of wide scope. All of that, strongly suggests that the minister is left largely unrestrained to determine for him or herself what factors are to be

> regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest.[73]

The Federal Court has also found that where the Minister has considered the nature and circumstances of a non-citizen's crime and potential for future harm from the non-citizen re-offending the Minister has not impermissibly limited the concept of the national interest to a local or personal level.[74]

Difficulties arise on judicial review when a statutory power interfering with individual rights and liberties is conditional upon 'a subject matter of wide scope' where relevant considerations are determined by a decision-maker 'left largely unrestrained'. It is well established that a non-judicial officer of the Commonwealth cannot determine conclusively the limits of her or his own jurisdiction.[75] This is the role of the Courts and this role extends to cases in which a statutory power rests upon the formation of a state of mind. Latham CJ emphasised the importance of this role in *The King v Connell and Another,* stating*:*

> It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he has to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal.[76]

The Federal Court has consistently required that the Minister must determine the matter of national interest as a precondition to the exercise of discretion.[77] However, this precondition has been approached as if it were an open discretion for the Minister to decide. In *Maurangi*, Lander J described the determination of this precondition as a 'discretion' which must be exercised reasonably.[78] In *Huynh*, the Full Court stated that 'the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa...[and that requiring the Minister to consider the visa holder's level of involvement in offences] would cut across that *broad discretion*.'[79]

In several Ministerial decisions considered by the Federal Court it is difficult to see how the national interest requirement adds to the requirements that must be met for the exercise of discretionary power. In a number of cases the approach has been upheld where the Minister took the view that cancellation of a visa is in the national interest because there was a risk that the visa holder may recommit the crime that led to his or her failure to pass the character test (even if the risk was low).[80]

This line of cases uses the reasoning of Gaudron J in *Re Patterson* outlined above as a starting point. It focuses upon the nature of the crime committed as founding the satisfaction of national interest, which was an approach approved by Gaudron J. However, as explained above, Gaudron J did not define what it was about the nature of the crime committed that would satisfy the national interest requirement. In grappling with this task the Federal Court has not adopted Kirby J's approach that for the national interest to be satisfied (by the nature of the crime) there must be a significant threat to the 'nation as whole' or the 'community of the nation'. The Federal Court has focused upon the 'something' referred to by Gaudron J, which may be as confined in scope as the nature and circumstances of the offences committed being serious. This approach is illustrated in the judgment of *Euta Leiataua v Minister for Immigration and Citizenship*,[81] in which the applicant argued that in deciding where the national interest lay it was not enough for the Minister to identify that the non-citizen had committed heinous offences. It was argued that this did not identify a consideration at a significantly abstract level to engage the national interest, as it simply attached the label 'heinous' to the applicant's offences and was an approach giving rise to a

situation where almost every offence bearing that description would engage the national interest.[82] The Court rejected the applicant's argument and held as follows:

> ...I could not accept...that the respondent decided the matter of national interest simply by attaching the label 'heinous' to the applicant's offences. ...he described the offences as heinous because it was his view that 'they involved [the applicant] taking advantage of a number of girls under the age of 16 for his own sexual gratification'... In doing so, the respondent went beyond what was required for the applicant not to pass the character test. He was basing himself on 'something in the nature, or the seriousness of [the applicant's] conduct, of in the circumstances surrounding it'.
>
> In this context it is worth noting how little a conclusion that a particular person did not pass the character test by reason of having a substantial criminal record, as defined, would tell one about the facts and circumstances surrounding the case at hand. *Almost inevitably as it seems to me, once a decision-maker identifies those facts and circumstances – and most certainly in cases of sexual offences committed against minors – there will be the 'something' referred to by Gaudron J.* The nature of the facts and circumstances may inform the exercise of the decision-maker's discretion under s 501(2), of the Minister's assessment of the national interest under s 501A(2), or his or her discretion under that subsection. But, however the matters arises, once the actual facts of the case are taken into account, it would, in my view, be infrequently the case that the decision-maker had merely carried over his or her conclusion with respect to the character test into later stages of the decision.[83]

With respect to His Honour, this approach risks giving no independent operation to the national interest requirement in the context of character decisions – which was a requirement inserted by Parliament in addition to the discretionary power to refuse or cancel visas of non-citizens who do not pass the character test. Under s 501(1) and s 501(2) the Minister has the power to refuse or cancel a non-citizen's visa on character grounds without being satisfied that the refusal or cancellation is in the national interest. The national interest is an additional requirement that was inserted for exceptional cases in which decisions could be made personally by the Minister without natural justice or merits review and to overturn decisions of merits review tribunals.

With respect, we agree with His Honour's observation that failing the character test on account of having a substantial criminal record discloses little about the facts and circumstances of a case given the scope of the character test described above. This is why it is critical that character decisions (made by reference to the national interest or not) are discretionary decisions. This is reflected in the structure of the provisions and was a significant aspect of Parliamentary discussions about these provisions, as highlighted above.

However, the character provisions are structured so that there is an additional step for decisions made 'in the national interest'. Identification of the facts and circumstances giving rise to a non-citizen's 'substantial criminal record' as being sufficient for the national interest to be satisfied without identifying how the national interest is satisfied fails to give independent operation to this additional requirement.

Natural justice

Where it is not excluded by statute, natural justice is a critical aspect of the process by which national interest character decisions must be made and the broad scope of the national interest means that careful attention needs to be given to whether a person is given notice of matters the Minister will consider. However, the Minister is only required to provide natural justice for national interest decisions where he or she elects to do so. As explained below, the Minister is never required to follow a process providing natural justice for national interest character decisions.

The classic statement of the principle of natural justice was made by Mason J in *Kioa v West*:

> …when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[84]

Natural justice is chiefly engaged by adverse material before the decision-maker. A person has a common law right to respond to adverse material that is credible, relevant and significant to the decision.[85] Procedural fairness in the context of character decisions also entitles a non-citizen to hold a legitimate expectation that the Minister will treat the best interests of children as a primary consideration in the making of the decision.[86] Once a breach of procedural fairness is established an applicant will ordinarily be entitled to relief unless the Court is persuaded that the breach could not have made a difference to the outcome.[87]

Natural justice can lawfully be excluded by statute in express words.[88] This is the course Parliament took with regard to the Minister's personal power under s 501(3)[89] and repeated for s 501A(3).[90] The exclusion of natural justice is a valid legislative choice in these two sections, and the parallel powers of sub-ss 501A(2) and 501A(3) have created an administrative choice for the Minister to grant or not to grant natural justice in overturning a valid decision of the Administrative Appeals Tribunal (AAT).

Natural justice applies to decisions under s 501A(2), and has been applied with a high level of vigilance given the effect of such decisions on individuals. For s 501A(2) decisions concerned with whether an AAT decision should be set aside, the Federal Court has held that the Minister must put an applicant on notice if he intends to take into account evidence rejected by the AAT.[91] Furthermore, a failure to adequately draw a non-citizen's attention to the 'potential importance' of whether cancellation of his visa was in the national interest was held to constitute a denial of procedural fairness in a s 501A(2) decision because it affected his opportunity to understand the legal and factual issues he needed to address before a decision was made.[92]

The wide scope of the national interest increases the importance of the Minister specifying issues that he or she as Minister views as relevant to his or her considerations so that a visa holder/visa applicant may address those matters in submissions to the Minister. In *Durani*[93], Dr Durani had his visa cancelled after committing sexual offences against patients. The Minister cited the repugnance of those offences to the Australian community and the need to preserve public confidence in the health system and the skilled migration program as relevant to his consideration of the national interest. The Court allowed the appeal on the basis that it was not obvious that the Minister would take the view that because Dr Durani came to Australia as a skilled migrant his commission of crimes in the course of his work as a doctor would bring Australia's skilled migration program into disrepute and undermine public confidence in the skilled migration program and that this matter was relevant to the national interest.

Section 501C provides a limited opportunity for a person subject to visa cancellation under s 501(3) or s 501A(3) 'to make representations to the Minister…about revocation of the original decision.'[94] The Minister is only given power to revoke the decision if 'the person satisfies the Minister that the person passes the character test.'[95] This cannot be said to equate to natural justice – even belatedly – because the person does not have an opportunity to respond to matters that the Minister considered in exercising his/her discretion. It only allows the person to challenge the Minister's reasonable suspicion that the person did not pass the character test, negating the existence of the jurisdictional fact. In *Re Patterson* a majority of the High Court found a s 501(3) decision had been invalidly made where the decision-maker had cancelled a visa on the erroneous understanding that the visa holder would be given an opportunity to make representations seeking revocation of the decision. Since the visa holder had a 'substantial criminal record' there was, in effect, no

opportunity for him to seek revocation and an invitation to make representations in relation to revocation was a futile exercise. [96]

Failure to consider a relevant factor

The leading case for a failure to consider a relevant factor is *Peko-Wallsend*.[97] Failure to consider relevant factors, like other grounds of judicial review, depends on the nature of the power, and this form of review only extends to matters which the decision-maker was bound to take into account.[98] For a decision under s 501(3) or s 501A the Minister is bound to consider the jurisdictional facts discussed above (whether a person passes the character test and whether it is in the national interest for a non-citizen's visa to be refused or cancelled) and material critical to determining whether these facts are in existence, but given that the Minister can form a view that the national interest is enlivened because of the nature of a non-citizen's criminal record, the material that the Minister is bound to take into account for a s 501(3) decision may be no more than material establishing their immigration status[99] and their criminal record.[100] If Australia owes non-refoulement obligations to the non-citizen, legal consequences of indefinite detention must be taken into account but this does not arise from the national interest requirement.[101]

The absence of any criteria for the exercise of discretion under s 501 means that, prima facie, there are no factors which the Minister is required to take into account. As Deane J elucidated in *Sean Investments v MacKellar*:

> …where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. [102]

The approach to relevant considerations for the exercise of national interest character powers is the approach generally taken to unfettered discretionary powers, both at the stage of considering the national interest requirement and at the stage of the exercise of discretion. In *Gbojueh*, Bromberg J, stated that 'the authorities which have considered s 501A(2) (and in a similar context the reference to the national interest in s 501(3)), make it clear that the matters that the minister may take into account in determining the national interest are largely matters for the minister.'[103] His Honour added that 'the Minister is left largely unrestrained to determine for himself or herself what factors are to be regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest.'[104] Under s 501(3), the absence of natural justice means that a person may not be able to place relevant matters before the Minister and the Minister determines the relevant matters without input from the person subject to the decision.

In *Gbojueh,* Bromberg J identified a relevant mandatory consideration that the minister is bound to take into account both when determining the national interest in character cases and in the subsequent exercise of discretion. This consideration is 'the potential for harm to the Australian community'.[105] His Honour found it arose from 'the subject-matter, scope and purpose'[106] of the character provisions within the *Act*. It is relevant to note that constitutional constraints also require the s 501 powers be used for the protection of the Australian community and not for the purpose of punishment.[107]

Bromberg J explained that factors relevant to the mandatory consideration of potential harm to the Australian community include the seriousness of the conduct leading to the failure to pass the character test and the extent of the non-citizen's rehabilitation.[108]

With respect to the national interest determination, Bromberg J held that this consideration may be evaluated on a broad view by reference to the type of offences committed without

the Minister looking into the specific circumstances in which the offence occurred or details of the non-citizen's rehabilitation.[109] Therefore, in that case, the Minister's failure to take into account the correct circumstances in which the offence occurred and the rehabilitation efforts of the non-citizen did not constitute a failure to take into account 'the potential for harm to the Australian community' in the manner required when determining the question of the national interest. This arose from the 'broad-based and impersonal perspective from which the national interest is to be considered.'[110] However, if the Minister looks at circumstances specific to the non-citizen in considering the national interest that will not constitute an impermissible irrelevant consideration.[111]

What it does suggest is that for character decisions, the national interest must have some rational connection to removing a risk of criminal behaviour, security threat or societal discord. It seems to exclude, for example, a national interest only concerned with economic benefits to Australia.

With respect to the exercise of discretion Bromberg J held that the obligation to consider 'the potential for harm to the Australian community' required a different consideration including the circumstances of the offending as are relevant to the assessment of potential risk to the Australian community.[112] As His Honour noted, two persons may be convicted of the same offence, but pose a completely different risk to the Australian community.[113] The level of abhorrence of an offence is a different matter to a risk of reoffending.[114] However, in *Gbojueh* the applicant was refused relief even though the Minister failed to properly take into account the mandatory consideration of his risk of reoffending by relying upon inaccurate information about his participation in rehabilitation programs. The relief was refused because the correct information could not have made a difference to the outcome of the case – since the Minister had decided that he had to be satisfied that there was no risk of the non-citizen reoffending.[115]

Approach to decision making

In exercising s 501 powers in the national interest the Minister must act in good faith,[116] not arbitrarily or capriciously.[117] He or she must not act for an improper purpose.[118] He or she must not fetter his/her discretion or display bias (either actual or apprehended), but instead must have a mind 'open to persuasion' [119] and must not act unreasonably or irrationally.[120] The 'implication of reasonableness...as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power...is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason.'[121]

These are significant restraints upon the exercise of statutory power arising from the nature of statutory power within our system of government. They are also grounds that are very difficult to establish and judges do not lightly draw the conclusion that a Minister of Parliament has acted improperly, unreasonably or irrationally or without a mind open to persuasion.

The breadth and subjectivity of the requirement that the Minister be satisfied that refusal/cancellation is in the national interest incorporates a wide range of views and judges are careful to ensure that they do not substitute their view for that of a legally permissible view formed by the Minister. Nevertheless, the provision must be read in its legislative context, which was critical to Kirby J's conclusion in *Re Patterson* (discussed above) that there was no reasonable or rational foundation for the decision in that case.[122] That case concerned a long-term resident of Australia who had been sentenced to a minimum term of three and a half years for sexual assault and sexual intercourse against children and was on

parole at the time of cancellation of his visa.[123] Kirby J stated that 'while it might be said that the general problem of paedophilia and criminal offences against children is one involving 'the national interest', the decision to be made by the minister under s 501(3) of the Migration Act is not made at such a level of abstraction. It was one personal to the visa holder.'[124] By contrast, in *Leiataua,* Jessup J approached the national interest as authorising an approach in which satisfaction by the Minister could rest alone on serious criminal offences (discussed above) and in this context stated that 'most certainly in cases of sexual offences committed against minors – there will be the 'something' referred to by Gaudron J.'[125] For one judge convictions for sexual offences against minors without more could not reasonably give rise to satisfaction of the national interest, whereas for another they most certainly would. While this difference demonstrates that it is very difficult for judges not to bring their own view of what is reasonable to a case of unreasonableness, in our view it also demonstrates how grounds of review can overlap and how understandings of reasonableness are shaped by statutory interpretation. It was not just the end point, but also the starting point that differed between Kirby J and Jessup J. Whether a decision-maker has unreasonably come to a state of satisfaction about a matter depends upon how the matter is defined – or, in other words, the legal test she or he was required to be satisfied about.

Conclusion

In the context of the character provisions 'the national interest' operates as a very wide term supporting a diversity of views – so long as they are held by the Minister. Apart from the necessity for the Minister to act rationally and with the propriety expected of a minister of parliament, and taking into account the requirements of natural justice when the Minister elects it to apply, the only limitation arising from the case law in relation to the national interest requirement is a requirement to consider potential harm to the Australian community. This may be evaluated at a broad level, without the necessity of consideration of the specific circumstances of the person who will be potentially subject to refusal or cancellation, but it does not require a harm faced by the nation as a whole.

Our concern is that insufficient attention has been given to the specific legislative context of the national interest requirement as an additional pre-condition to the exercise of a broad discretionary power used in relation to individuals. The national interest pre-condition was to distinguish situations in which character decisions could be made without natural justice and merits review or to overturn the decision of a merits review tribunal. Moreover, this precondition is prior to and distinct from the discretion.

Being a precondition to the exercise of a statutory power that interferes with the rights and freedoms of an individual, the 'national interest' requirement should be closely scrutinised by the courts. It would be consistent with the principle of legality for the 'national interest' to be construed narrowly to limit the cases in which the Minister may overturn valid decisions of the AAT and/or deny natural justice to a visa holder subject to a cancellation or refusal decision.

Following Kirby J's approach to the national interest requirement would mean that the cases in which the Minister may cancel or refuse a visa under ss 501(3) and 501A are limited to those affecting the interests of the nation as a whole, rather than those where matters of public interest are present. It would limit the operation of these powers in a manner that is consistent with the terms of the legislation, the principle of legality, the structure of the *Act* (which provides for several different character powers) and the purpose for which the powers were provided.

Postscript

The Migration Amendment (Character and General Visa Cancellation) Bill 2014, before the Parliament at the time of writing (October 2014), would lower the bar for cancellations under s 501. The Bill includes new powers proposed as ss 501(3A), 501BA and 501CA. Section 501(3A) would make cancellation mandatory for some people with substantial criminal records, but would also grant a broad discretion to reverse such a decision under s 501CA(4). Section 501BA provides a mechanism for the Minister to overturn decisions under s 501CA in similar terms to the existing s 501A, to which natural justice would not apply. The Bill also proposes to amend the character test, including lowering the bar of the substantial criminal record for persons sentenced to two or more terms of imprisonment, from a total of 2 years to a total of 12 months, adding a new section for sexually based offences involving a child, amending provisions relating to memberships of groups or organisations and requiring only a risk, rather than a significant risk, of a person engaging in criminal conduct.[126].

Endnotes

1 (2001) 207 CLR 391.
2 Amy Nethery, 'Partialism, Executive Control, and the Deportation of Permanent Residents from Australia' (2012) 18 *Population, Space and Place* 729.
3 *Migration Act* 1958 s 4(1).
4 Examples include the Minister's power to declare regional processing countries for asylum seekers arriving in Australia by boat (s 198AB), the Minister's power to decide that a non-citizen be declared an 'excluded person' (s 502) and the Minister's power to issue a conclusive certificate to prevent a non-citizen obtaining merits review of a visa decision (s 339 and s411).
5 See s 500(1)(b) of the *Act* which allows for review of s 501 decisions before the AAT, but only if the decision is made by a delegate of the Minister.
6 Sections 501(4) and 501A(5).
7 Section 501(5).
8 See s 501A(2) and s 501A(3) which provides two alternative powers. Section 501A(6) states that the Minister does not have a duty to consider which power would be the more appropriate power to use.
9 See to s 500(1)(b) of the *Act* which allows for review of s 501 decisions before the AAT, but only if the decision is made by a delegate of the Minister.
10 Refer to s 501(1) and s 501(2) of the *Act.*
11 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v Commonwealth and Another* (2004) 222 CLR 322.
12 Section 501(6)(b).
13 Section 501(6)(d).
14 Section 501(6)(a).
15 Section 501(7)(c).
16 Section 501(7)(d). 'Sentence' refers to head sentence imposed, not sentence served, so it is not reduced by a parole period.
17 Senator Dee Margetts raised the example of Nelson Mandela (*Parliamentary Debates,* Senate, 25 November 1998, 662). His high moral standing on the international stage does not change the fact that he did not pass the 501(6) character test.
Where the terms of the character test have permitted the courts have insisted upon a link between the conduct described in the character test and a person's character or morals. See, for example, *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, upheld on appeal *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
18 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1231 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs); Nethery, above note 2.
19 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1244-5.
20 (2001) 207 CLR 391 ('*Re Patterson*').
21 The parliamentary secretary made the decision in the case, acting as the minister.
22 *Re Patterson* (2001) 207 CLR 391, 418 [78].
23 Ibid, 419 [78].
24 Ibid, 419 [79].
25 Ibid, 502 [330]-[331].
26 Ibid, 503 [332].
27 Ibid 504-505 [336] and [338].
28 Gaudron J did not define the 'something' that must be in the nature or the seriousness of the conduct or circumstances surrounding it to found a satisfaction that the national interest arises.

29 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 (*Madafferi*). The case concerned an exercise of power under s 501A.
30 Ibid, 352-353 [88]-[89].
31 The principle requires that, in the absence of clear words to the contrary, and to the extent consistent with the words of a statute, it will be read to avoid interference with individual rights and freedoms. See *Coco v The Queen* (1994) 179 CLR 427, 437 and *Potter v Minahan* [1908] HCA 63 in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
32 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
33 Ibid, 443 [110].
34 Ibid, see 442-444 [105]-[113].
35 *Madafferi* (2002) 118 FCR 326, 353 [89].
36 (2012) 200 FCR 191. The decision was in relation to s 501A(2).
37 Ibid, 202 [65]. Emphasis added.
38 Ibid, 203 [69].
39 See *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346.
40 *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014).
41 Ibid, [40].
42 Sections 501A and 501B also operate as broad discretions.
43 *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346, 357 [54] (Sackville J).
44 *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473. Emphasis added.
45 For example, see Senator Kay Patterson's address to the Senate in which she said, 'Senator Cooney pointed out that the power under section 501 is a discretionary power which allows the minister or delegate to exercise their discretion to refuse or cancel a visa. This means that, even if people like Anwar Ibrahim did not meet the requirements of a character test, they could still be granted a visa.' *Parliamentary Debates*, Senate, 25 November 1998, 667.
46 (2013) 87 ALJR 681, 629 [23], 630 [26].
47 (1945) 69 CLR 613, 629-630; *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 681, 629 [23].
48 *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).
49 See *R v Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 [156] (Hayne J).
50 *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 ('*S157*'), 493 [34] (Gleeson CJ).
51 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 [65] (Hayne J, Kiefel J and Bell J).
52 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 615; *S157* (2002) 211 CLR 476.
53 For lists of grounds of jurisdictional error, see *Craig v South Australia* (1990) 184 CLR 163; Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007), 335-6.
54 See *Plaintiff M70 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*M70*), 179 [107] (Gummow, Hayne, Crennan and Bell JJ). The Court cites with approval the plurality in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 148 [28].
55 Given the High Court's approach to the aliens power this is no longer a contentious issue and is determined as an objective fact as to whether or not the person is an Australian citizen.
56 Aronson and Groves call a power subject to such jurisdictional facts a 'subjective power', the exercise of which is reviewed on the basis that 'the decision had been made in good faith, upon a proper view of the law, with a consideration of factors required to be taken into account,' and distinguish it from 'hard' jurisdictional facts: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 237.
57 For a decision made under s 501A(2) there is an additional step that the person does not satisfy the Minister that she or he passes the character test, but this adds nothing to the requirements because the Minister could not reasonably suspect that the person does not pass the character test if the person satisfied the Minister that they pass the character test. It merely reflects the fact that 501A(2) provides for natural justice and, in consequence, an opportunity for the person to satisfy the Minister that she or he passes the character test.
58 *Avon Downs Proprietary Limited v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.
59 Ibid.
60 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303.
61 *Goldie v Commonwealth* (2002) 117 FCR 566, 569 (*Goldie*).
62 See *Godley v Minister for Immigration and Citizenship* (2004) 83 ALD 411, 426; *Minister for Immigration & Multicultural & Indigenous Affairs v Godley* [2005] FCAFC 10.
63 Sections 501(6)(a) and (7).
64 *Minister for Immigration & Multicultural & indigenous Affairs v Godley* [2005] FCAFC 10, [48].
65 Section 501(6)(b).
66 Section 501(6)(c).
67 Section 501(6)(d).
68 See for example *Haneef* in which the Minister applied the wrong test on account of his incorrect understanding of 'association' in s 501(b): *Haneef v Minister for Immigration and Citizenship* (2007) 163 FCR 414.

69 *R v Australian Stevedoring Industry Board and Another; Ex parte Melbourne Stevedoring Company Proprietary Limited* (1953) 88 CLR 100. In the context of the character test, see *Godley v Minister for Immigration and Citizenship* (2004) 83 ALD 411 upheld on appeal: *Minister for Immigration & Multicultural & Indigenous Affairs v Godley* [2005] FCAFC 10, [54] where the Court found that 'absent any decision by the Minister that the person is not of good character, then the person has passed the character test.'
70 See *Ruddock v Taylor* (2005) 222 CLR 612. In that case the High Court held that an officer could 'reasonably suspect' that a person was an unlawful non-citizen where the person was not in fact an unlawful non-citizen. In such a case of mistaken belief, whether there was a reasonable suspicion will depend upon whether the officer's subjective state of mind and whether that subjective state of mind was reasonably based having regard to the circumstances present at the time the belief was formed.
71 [1977] AC 1014, 1047.
72 *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417 (*Gbojueh*), 427 [49].
73 *Gbojueh* (2012) 202 FCR 417 [44].
74 *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 [41-44].
75 *S157* (2002) 211 CLR 476.
76 [1944] 69 CLR 407, 432.
77 See *Gbojueh* (2012) 202 FCR 417, 426 [14]. In particular, Bromberg J's statement: 'The question whether the discretion should be exercised does not arise until the minister is satisfied that each of the preconditions are met, including that cancellation would be in the national interest.'
78 See *Maurangi*(2012) 200 FCR 191, 203 [69].
79 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, 523 [74]. Emphasis added.
80 See for example *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39.
81 [2012] FCA 1427. The matter concerned a decision of the Minister under s 501A(2) to set aside a decision of the AAT and cancel the applicant's visa.
82 Ibid, [11], [13].
83 Ibid, [13]-[14]. Emphasis added.
84 (1985) 159 CLR 550, 582.
85 *Kioa v West* (1985) 159 CLR 550; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 (*Dagli*).
86 See *Nweke v Minister for Immigration and Citizenship* [2012] FCA 266, particularly paragraph 16. While the impact of *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 has become limited it still applies to give effect to Article of CROC absent a clear statement to the contrary.
87 *Dagli* (2003) 133 FCR 541, 558. As discussed in that case, a statement by the Minister that he had did not take the material into account will not alone be sufficient to show that the material had no impact upon the decision.
88 *Minister for Immigration and Ethnic Affairs v Haoucher* (1990) 169 CLR 648; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259.
89 Section 501(4).
90 Section 501A(4). Both common law and statutory rights of natural justice are excluded, as ss 501(5) and 501A(4) state that Subdiv AB of the *Act*, containing a code of procedure, is excluded in addition to common law rules of natural justice.
91 *Gbojueh* (2012) 202 FCR 417. See especially p 435 [89]-[91].
92 *Ruatita v Minister for Immigration and Citizenship* [2013] FCA 542 (5 June 2013). See especially [46].
93 *Durani v Minister for Immigration and Border Protection* [2014] FCAFC 79 (4 July 2014) (*Durani*).
94 Section 501C(3)(b).
95 Section 501C(4).
96 *Re Patterson* (2001) 207 CLR 391. See especially 398 [1], 419-420 [83] and 453-456 [189]-[197].
97 *Minister for Aboriginal Affairs and Another v Peko-Wallsend Ltd and Others* (1986) 162 CLR 24 (*Peko-Wallsend*).
98 Ibid.
99 See *Minister for Immigration, Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229.
100 With respect to matters that are not mandatory relevant considerations we note that it has been held that obligations owed to non-citizens under international conventions are not mandatory relevant considerations: *Nweke v Minister for Immigration and Citizenship* [2013] FCA 456. See also *Minister for Immigration and Multicultural & Indigenous Affairs v Huynh* (2004) 139 FCR 505 and discussion of relevant considerations by Madgwick J in *Chai v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1460 from [49]; *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346.
101 See *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38.
102 (1981) 38 ALR 363, 375.
103 *Gbojueh* (2012) 202 FCR 417, 426 [43]. His Honour goes on to provide references to a number of judgments.
104 *Gbojueh* (2012) 202 FCR 417, 426 [44].
105 Ibid, 427 [45]. The Full Federal Court endorsed this in *Durani* [2014] FCAFC 79, [27].

106 A mandatorily relevant consideration must be expressly stated by legislation or implied from the subject-matter, scope and purpose of the *Act* conferring the power. This arises from *Peko-Wallsend* (1986) 162 CLR 24. It is sufficient to refer to the discussion in *Gbojueh* (2012) 202 FCR 417, 425 [36].
107 See, discussion in *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38, [28].
108 *Gbojueh* (2012) 202 FCR 417, 427 [46].
109 Ibid, 427-428 [50].
110 *Gbojueh* (2012) 202 FCR 417, 427 [50].
111 Refer to discussion *Gbojueh* (2012) 202 FCR 417, 427 [50].
112 In coming to this conclusion His Honour discussed the tension between the reasoning of *Huynh* and *Lu* on this matter. See *Gbojueh* (2012) 202 FCR 417, 428-429 [51]-[58].
113 *Gbojueh* (2012) 202 FCR 417, 429 [57]-[58].
114 Ibid, 429 [61].
115 *Gbojueh* (2012) 202 FCR 417, 430-431 [68].
116 *S157* (2002) 211 CLR 476, 527 [137].
117 *Miller v Minister for Immigration and Citizenship* [2013] FCA 590, [8].
118 See *Haneef v Minister for Immigration and Citizenship* (2007) 163 FCR 414. In this case the applicant argued (unsuccessfully) that the Minister had acted for an improper purpose in purporting to exercise s 501(3) power because in so doing the Minister was not seeking to facilitate the removal of the applicant from Australia (being the proper purpose of the provision).
119 It was argued that the Minister was affected by bias in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507. The Court accepted bias as a ground of review applicable to Ministers of Parliament and considered differences in terms of the conduct expected of judicial officers and Ministers. With respect to having a mind open to persuasion, see *Gbojueh v Minister for Immigration and Border Protection* [2014] FCA 883, [40].
120 See discussion of these grounds generally in Brian Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia' (2006) 28 *Australian Bar Review* 17, 18.
121 *Minister for Immigration and Citizenship v Li & Anor* (2013) 249 CLR 332, 370-371 [90] (Gageler J).
122 *Re Patterson* (2001) 207 CLR 391, 505 [338].
123 Ibid, 446 [164] (Gummow and Hayne JJ).
124 Ibid, 505[338].
125 *Leiataua v Minister for Immigration and Citizenship* [2012] FCA 1427, [14].
126 Proposed ss 501(7)(d), 501(6)(d), 501(6)(e) and 501(6)(b) respectively.