Plaintiff M1-2021 – A Watershed Moment for Character Cases in Australian Migration Law

Dr Jason Donnelly*

Dr Donnelly is a Senior Lecturer in Law at the Western Sydney University School of Law. Dr Donnelly's research focuses on migration law, statutory interpretation and public law. Dr Donnelly is also a Barrister of the Supreme Court of New South Wales and the High Court of Australia.*

Introduction

There is little doubting that *Plaintiff M1-2021 v Minister for Home Affairs* [1] (*Plaintiff M1*) is one of the most important decisions ever decided by the High Court of Australia in the context of character cases decided under Part 9 of the *Migration Act 1958* (Cth) (the Act).[2]

The decision of Plaintiff M1 was published on 11 May 2022. In just over a year, *Plaintiff M1* has been cited in over 370 cases.[3] It is, in practical terms, a watershed judgment in Australian public law and for migration lawyers who practice in character cases that consider Part 9 decisions under the Act.[4]

Much can be written about the importance of *Plaintiff M1*. In this article, the question is considered as to whether *Plaintiff M1* implicitly overruled an important aspect of the ratio in the Full Court of the Federal Court of Australia decision of *Viane v Minister for Immigration and Border Protection*[5] (*Viane*).

As will be discussed, an important aspect of the ratio in *Viane* has been cited in 96 decisions.[6] Plainly, in those circumstances, the Full Court judgment of *Viane* is an important decision. Given that context, it is worth considering the ongoing correctness of *Viane* in light of *Plaintiff M1*.

Viane

The appellant was born in American Samoa and had lived in Australia for 25 years.[7] He was a New Zealand citizen derived from his uncle who had adopted him; he had never lived in New Zealand.[8] The Minister (acting personally) refused to revoke the mandatory cancellation of the appellant's Special Category visa (subclass 444) under s 501(3A) of the Act.[9] The appellant had been sentenced to 12 months' imprisonment for domestic violence of his partner.[10] They had a 15-month-old daughter.[11]

On appeal, before the Full Court of the Federal Court of Australia, the issue for determination by the court was whether the Minister had denied the appellant procedural fairness by failing to consider that he, his partner, and daughter would face "significant impediments" and the hardship for his partner in living in Samoa.[12]

First, Justice Colvin concluded that primary judge failed to consider the appellant's substantial argument that there would be hardship for the appellant's partner if she relocated to Samoa (whose language and cultural barriers were raised for revocation of the visa cancellation).[13] In failing to consider this hardship for the partner, the Minister made jurisdictional[14] error.[15]

Second, Justice Colvin also found that the Minister's non-revocation decision had a consequence - "another reason" referred to in s 501CA(4)(b)(ii) of the Act - and this matter was not considered by the Minister.[16] The substantial argument was not considered by the primary judge and amounted to a denial of procedural fairness.[17]

Third, for Justice Colvin, the denial of procedural fairness resulted in practical injustice; the appellant was deprived of the Minister's consideration of a significant matter in determining whether the required state of satisfaction had been reached.[18]

Fourth, Justice Reeves expressly stated that he agreed generally with the reasoning of Justice Colvin.[19] Justice Rangiah agreed that the appeal should also be allowed, although his Honour preferred to express his own reasons for coming to that view.[20]

At this point, it is important to emphasise that the later decision of the High Court of Australia in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*[21] was not an appeal from the Full Court *Viane* decision. The High Court decision involved the same non-citizen but involved a later instalment of the litigation and was concerned with other legal issues.
It is clear enough that the *Viane* judgment in the Full Court applied orthodox principles[22] of Australian administrative law. The Full Court in *Viane* applied[23] an important procedural fairness principle reflected in the High Court decision of *Dranichnikov*.[24] Justices Gummow and

* Source: 'Doctor Jason Donnelly', Western Sydney University Staff Profiles (Web Page) <https://www.westernsydney.edu.au/staff_profiles/WSU/doctor_jason_donnelly>.

Callinan (with whom Justice Hayne agreed) held that to fail to respond to a "substantial, clearly articulated argument relying upon established facts" was at least to fail to accord the applicant natural justice.[25]

The genesis for this article comes from paragraph [64] of the reasoning of Justice Colvin in *Viane*. There, the learned judge said this:

> There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.[26]

As alluded to above, this aspect of the reasoning of Justice Colvin has been cited with apparent approval in many cases in Australia.[27]

So, in summary, Justice Colvin concluded that the subjective jurisdictional fact in s 501CA(4)(b)(ii) of the Act was only enlivened if the reason carried 'sufficient weight or significance'.[28] But, as the next section shows, this impugned aspect of the reasoning in Viane is arguably no longer good law.

Implicitly Overruled?

In *Plaintiff M1*, Chief Justice Kiefel and Justices Keane, Gordon and Steward concluded that in the context of applications considered under s 501CA(4)(b)(ii) of the Act, an administrative decision-maker was not required[29] to determine whether the non-citizen was owed non-refoulement obligations.[30]

For the plurality, one available outcome for an administrative decision-maker was to defer assessment of whether a non-citizen was owed non-refoulement obligations on the basis that it was open to the non-citizen to apply for a protection visa under the Act.[31]

Regrettably, the plurality judgment is a blight on human rights for non-citizens in Australian immigration detention. The effect of the plurality judgment is to defer legal consideration of Australia's international law obligations and has the real potential to lead to continued prolonged indefinite detention for unlawful non-citizens.

The plurality judgment in *Plaintiff M1* overruled considerable jurisprudence in the Federal Court of Australia on the relevant subject matter.[32] It is in that context that *Plaintiff M1* is a watershed judgment in this area of Australian law.[33] The swathe of Federal Court and Full Federal Court decisions inconsistent with the majority in *Plaintiff M1* were overruled in footnotes.[34]

The plurality judgment in *Plaintiff M1* tends to undermine the rule of law in Australia. Lord Bingham saw the rule of law as meaning, inter alia, that the law is accessible, intelligible, clear and predictable.[35] The effect of the plurality judgment took away accessibility of the law by permitting a decision-maker to defer consideration of Australia's international non-refoulement obligations. The plurality judgment also took away predictability of Australian law, overruling what was considered settled law in relation to the duties of an administrative decision-maker under s 501CA(4) of the Act.

For the reasons that follow, it is reasonably arguable that *Plaintiff M1* has implicitly overruled the reasoning of Justice Colvin in *Viane*.

First, the plurality concluded that s 501CA(4) of the Act confers a wide discretionary power on a decision-maker to revoke a decision to cancel a visa held by a non-citizen if satisfied that there is "another reason" why that decision should be revoked.[36]

To reconcile the statutory power in s 501CA(4)(b)(ii) of the Act as requiring a threshold of 'sufficient weight or significance' does not sit comfortably with a broad discretionary power. The former appears to place considerable limits on the invocation of the impugned statutory power whereas the latter does not.

Second, in *Plaintiff M1*, it was said that what can constitute "another reason" are unlimited, other than that they must be reasons other than whether the person has passed the character test.[37] If that approach is correct, then the impugned reasoning of Justice Colvin in *Viane* cannot be correct (because, as observed above, the *Viane* test places considerable limits on the invocation of the statutory power in

501CA(4)(b)(ii) of the Act).

Third, not one member of the bench in *Plaintiff M1* endorsed the impugned reasoning of Justice Colvin in *Viane*. Further, no member of the bench in *Plaintiff M1* expressly determined that s 501CA(4)(b)(ii) of the Act was only enlivened if the reason carried 'sufficient weight or significance'. Although not determinative, that fact alone is enough to raise an eyebrow about the continuing correctness of the *Viane* test. After all, *Plaintiff M1* has become a leading High Court case on the correct operation of s 501CA(4)(b)(ii) of the Act.

Fourth, the plurality emphasised that in making a decision under s 501CA(4)(b)(ii), the delegate was required to apply Direction 65.[38] That was because Direction 65 was a ministerial direction made pursuant to s 499(2A) of the Act.[39] Direction 65 provided no guidance to decision-makers that s 501CA(4)(b)(ii) of the Act was only invoked if the impugned reason carried 'sufficient weight or significance'.

Direction 65 has long since been repealed.[40] Successive ministerial directions,[41] being Direction 79, Direction 90 and Direction 99 also do not reconcile s 501CA(4)(b)(ii) as only being invoked if the reason carries 'sufficient weight or significance'. Again, although not determinative, it is rather strange that the threshold of 'sufficient weight or significance' apparently applies to s 501CA(4)(b)(ii) of the Act but decision-makers are not advised as such in the relevant ministerial direction.

Fifth, beyond *Plaintiff M1*, there are other reasons why the *Viane* test is arguably wrong. The words 'sufficient weight or significance' do not appear in s 501CA(4)(b)(ii) of the Act. In other words, the *Viane* test places an unnecessary gloss on the statutory language.[42] *Plaintiff M1* can be seen as more supportive of a requirement that express words be present before reading a requirement into legislation.[43]

In contrast, Parliament has elsewhere used legislation with a very specific and direct level of specificity. For example, in s 36(2C)(a) of the Act, a non-citizen is taken not to satisfy the criterion mentioned in s 36(2)(aa) if the Minister 'has serious reasons for considering…' Under s 36(2C)(b), a non-citizen is taken not to satisfy the criterion mentioned in s 36(2)(aa) if the Minister 'considers, on reasonable grounds….'

The point is a simple one. Had Parliament intended that s 501CA(4)(b)(ii) of the Act only applied if the reason carried 'sufficientweight or significance', it would have said as such. But it has not.

Sixth, there are also some statements in the High Court judgment of *Viane*[44] that appear to be in tension with the implied reasoning of Justice Colvin. The Full Bench of the High Court in *Viane* said this:

> What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case.[45]

The impugned reasoning of Justice Colvin has prescribed a reason (i.e. sufficient weight or significance) that is not expressly mandated by s 501CA(4)(b)(ii).

As the High Court explained in *Viane*, deciding whether or not to be satisfied that "another reason" exists might be the product of necessary fact finding, or the product of making predictions about the future, or it might be about assessments or characterisation of an applicant's past offending.[46]

Conclusion

The High Court decision of *Viane* was cited extensively in *Plaintiff M1*.[47] Together, these two High Court cases must surely place considerable doubt on the continuing correctness of the Viane test espoused by Justice Colvin.[48] But, as alluded to earlier in this article, the impugned reasoning of Justice Colvin continues to be cited (with apparent approval) from various Tribunal members and some judges of the Federal Court of Australia.

The rule of law doctrine means that justice will be done according to laws that are certain and knowable in advance.[49] As discussed above, the plurality judgment in *Plaintiff M1* has placed the state of law in character cases under the Act in a state of flux and uncertainty.

In fairness to Justice Colvin in *Viane*, the subjective state of satisfaction test reflected in s 501CA(4)(b)(ii)[50] of the Act received little judicial treatment from the High Court of Australia when Viane in the Full Court was decided. Further, it is not clear on the reasons for judgment in *Viane* that the parties to the litigation said a great deal about the statutory operation and scope of s 501CA(4)(b)(ii).[51] The case

was largely litigated on a claimed breach of procedural fairness, applying orthodox principles in Australian administrative law.[52]

Although it can be accepted that every meaningful sentence involves pragmatics and requires some inferences to be drawn,[53] the inference Justice Colvin sought to draw in *Viane* is simply not open. It remains to be seen, as contended in this article, whether the impugned reasoning of Justice Colvin in Viane will survive. Time will tell.

END NOTES

[*] Senior Lecturer, Western Sydney University; Barrister-at-Law.

[1] *Plaintiff M1-2021 v Minister for Home Affairs* (2022) 96 ALJR 497 ('*Plaintiff M1*').

[2] See Emma Dunlop, 'Plaintiff M01/2021 V Minister for Home Affairs' (2022) Winter) *Bar News: Journal of the NSW Bar Association* 18.

[3] See further Damien O'Donovan, 'The Ghost of Teoh – International Law and Domestic Discretionary Decision-Making' (2022) 29 *Australian Journal of Administrative Law* 195.

[4] For a detailed analysis of the relevant statutory powers in Part 9 of the *Migration Act 1958* (Cth), see Jason Donnelly, 'Life after FYBR – The Expectations of the Australian Community in Migration Character Cases' (2023) 30 *Australian Journal of Administrative Law* 139, 140-142.

[5] *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 ('*Viane*').

[6] As of 11 September 2023.

[7] Viane (n 5) [35].

[8] Ibid.

[9] Ibid [8].

[10] Ibid [5].

[11] Ibid [45].

[12] Ibid [14].

[13] ibid [32].

[14] See further Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 395, 396–397.

[15] *Viane* (n 5) [32].

[16] Ibid [107].

[17] Ibid [107].

[18] Ibid [109].

[19] Ibid [3].

[20] Ibid [4].

[21] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 395 ALR 403 ('*Viane High Court*').

[22] Most judicial review applications are low-key affairs, often focused on the minutiae of statutory interpretation, and with no accompanying political furore: see Mark Aronson, 'Ministers' Signatures – What Do They Prove?' (2023) 30 *Australian Journal of Administrative Law* 10, 11.

[23] *Viane* (n 5) [25], [77].

[24] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 ('*Dranichnikov*').

[25] Ibid [24].

[26] *Viane* (n 5) [64].

[27] See, for example, *Tran and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2023] AATA 2011 [13]; *Tran and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2023] AATA 2011 [23]; *Pihere and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2023] AATA 1508 [7]; *CDHQ and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 1191 [30]; *BNPB and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 730 [218]; *BLTY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2023] AATA 1064 [96]; *Heaki and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 1107 [101]; *Asad and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2022] AATA 4321 [94]; *ZNKS and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2022] AATA 4223 [11]; *TBQH and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2022] AATA 4975 [21]; *King and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 2907 [139]; *Kura v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1343 [12]; *Aitchison v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 357 [9]; *Uolilo v Minister for Home Affairs* [2020] FCA 1135 [82]; *Williams v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 814; 170 ALD 468 [85]; *HLQV and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 685 [13]; *GBV18 v Minister for Home Affairs* [2019] FCA 1132 [57]; *CNN16 v Minister for Immigration and Border Protection* [2018] FCA 1526 [29].

[28] See further Jason Donnelly, 'Double Counting Family Violence for the Same Purpose – Permissible Decision-making or Legal Unreasonableness?' (2023) 29 *Australian Journal of Administrative Law* 267, 268-269.

[29] Inderpreet Kaur Singh, 'A Matter of Principle and of the Rule of Law: Holding the Executive Accountable for Jurisdictional Error' (2023) 33 *Public Law Review* 330, 336.

[30] *Plaintiff M1* (n 1) [37].

[31] Ibid [9].

[32] Ibid [31]-[35].

[33] Ibid 7 [76].

[34] Mary E Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169, 197-198.

[35] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69-84.

[36] *Plaintiff M1* (n 1) 7 [22].

[37] Ibid [70], [106].

[38] Ibid [16].

[39] Ibid.

[40] Direction 65 was revoked on 20 December 2018. Direction 79 came into effect on 28 February 2019.

[41] See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2015), 300.

[42] Today, jurisdictional error is identified through a process of statutory interpretation: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390–391 [93] (McHugh, Gummow, Kirby and Hayne JJ); [1998] HCA 28; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–574 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); [2010] HCA 1; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 133–134 [27] (Kiefel CJ, Gageler and Keane JJ); [2018] HCA 34.

[43] Oliver Jones, 'Unincorporated Treaties in Judicial Review Proceedings: Some Post Teoh Arguments' (2022) 29 *Australian Journal of Administrative Law* 178, 187.

[44] *Viane High Court* (n 21).

[45] Ibid [13].

[46] Ibid [14].

[47] See footnotes 18, 38, 39, 40, 41, 44, 45, 46, 48, 53 and 57 in *Plaintiff M1* (n 1).

[48] In the past, the High Court endorsed a "grounds-based approach" to determining which legal errors are jurisdictional: see Leighton McDonald, 'Jurisdictional Error as Conceptual Totem' (2019) 42(3) *University of New South Wales Law Journal* 1019, 1026.

[49] Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 94, 98.

[50] See further Jason Donnelly, 'Rethinking the Character Power as It Relates to Refugees and Asylum Seekers in Australia' (2019) 13 *UNSW Law Society Court of Conscience* 97.

[51] See further Chantal Bostock, 'Expulsion: A Comparative Study of Australia and France' (2018) 92 AIAL Forum 87, 88.

[52] See further Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18(3) *Oxford Journal of Legal Studies* 497.

[53] James Edelman, 'Implications' (2022) 96 *Australian Law Journal* 800.

This illustration of native Canadian headdresses aims to represent Indigenous Canadian traditional wear based on documented photos and depictions. Note that this illustration does not aim to be a comprehensive or entirely accurate representation of such cultural attire. Viewer discretion is advised, as the portrayal may contain errors or inaccuracies.