Federal Court of Australia

Ogawa v Finance Minister [2021] FCA 59

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| File number: | QUD 112 of 2020 |
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| Judgment of: | **SNADEN J** |
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| Date of judgment: | 5 February 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW –** judicial review – refusal to grant act of grace payment – whether applicant afforded procedural fairness – whether decision legally unreasonable – whether decision was otherwise tainted by jurisdictional error – application dismissed |
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| Legislation: | *Administrative Decisions (Judicial Review) Act* 1977 – ss 3, 5, 6 and 7*Australian Human Rights Commission Act* 1986 (Cth) – sch 2; ss 7, 11 and 29*Migration Act 1958* (Cth) – ss 189 and 351*Public Governance, Performance and Accountability Act 2013* (Cth) – s 65*International Covenant on Civil and Political Rights.* Opened for signature 16 December 1966. 999 UNTS 171 arts 2, 9. (entered into force 23 March 1976)*United Nations Convention on the Rights of the Child*. Opened for signature 20 November 1989. 1577 UNTS 3. (entered into force 2 September 1990)  |
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| Cases cited: | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *CRU18 v Minister for Home Affairs* [2020] FCAFC 129 *Griffith University v Tang* (2005) 221 CLR 99*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Minister for State of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273*Ogawa v Minister for Immigration and Multicultural Affairs and Another* [2006] 156 FCR 246*R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389  |
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| Division: |  |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Number of paragraphs: | 100 |
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| Date of hearing: | Determined on the papers |
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| Date of last submission/s: | 1 September 2020 (applicant)28 August 2020 (respondent) |
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| Solicitor for the Applicant: | The Applicant filed submissions on her own behalf |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | QUD 112 of 2020 |
|   |
| BETWEEN: | DR MEGUMI OGAWAApplicant |
| AND: | FINANCE MINISTERRespondent |

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| order made by: | SNADEN J |
| DATE OF ORDER: | 5 February 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent’s costs of the application, to be assessed in default of agreement in accordance with the court’s Costs Practice Note (GPN-COSTS).

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

REASONS FOR JUDGMENT

SNADEN J:

1. On 27 July 2019, the applicant, Dr Ogawa, applied to the Commonwealth Department of Finance for what is known as an “act of grace” payment under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (hereafter, the “**PGPA Act**”). By means of written correspondence dated 21 May 2020 (and via the agency of his duly-appointed delegate), the respondent (hereafter, the “**Minister**”) made a decision to decline that application (hereafter, the “**AOG Application**”).
2. By an amended originating application dated 28 May 2020, Dr Ogawa seeks prerogative relief to set aside the Minister's decision (hereafter, the "**AOG Decision**") and to have her AOG Application determined according to law. Her application was the subject of a case-management hearing that took place on Friday, 3 July 2020. The matter was on that day listed for trial to take place on Wednesday, 26 August 2020. In the weeks that followed, Victoria (where my chambers are based) succumbed to the grip of a “second wave” of the COVID-19 pandemic by which calendar year 2020 was so wretchedly beset. As a result, my chambers (and those of the majority of the judges of this court’s Victorian registry) were deemed off-limits and the court was left with little option but to cancel many of its scheduled hearings. The trial in this matter did not escape that fate.
3. In the face of that extreme inconvenience, the parties consented—very sensibly, if I might say—to my determining the application on the papers. Orders were made for the preparation and filing of written submissions and evidence, and the court’s judgment was reserved with effect from 11 September 2020.
4. For the reasons that follow, the application will be dismissed with costs.

# Background

1. The relevant background to the AOG Decision dates back to 2003. It emerges without material controversy from the evidence that the parties adduced. For Dr Ogawa, that evidence assumed the form of three affidavits, sworn respectively on 25 April 2020, 5 June 2020 and 14 July 2020. For the Minister, it assumed the form of a single affidavit affirmed on 24 June 2020 by his delegate—and the maker of the AOG Decision—Mr Gareth Sebar.
2. In September 2003, Dr Ogawa was the holder of a student visa, which had been issued to her under the *Migration Act 1958* (Cth) (hereafter, the “**Migration Act**”). That visa was due to expire in March 2004; but, on 29 September 2003, it was instead cancelled. The circumstances that animated that cancellation are neither known nor material. Whatever they were, they were set at nought by a later decision of what was then known as the Migration Review Tribunal, the effect of which was that that cancellation was set aside. Unfortunately for Dr Ogawa, that occurred on 9 June 2004, after her visa had expired. The setting aside of the cancellation was, then, largely (if not entirely) academic.
3. Later in June 2004, Dr Ogawa made an application for judicial review in respect of the Migration Review Tribunal’s decision to set aside the cancellation of her visa. Again, her purpose in doing so is neither known nor material. I record it merely because it apparently had the effect of entitling her to a bridging visa: a circumstance that assumes some prominence, as will shortly be seen. By that (bridging) visa, Dr Ogawa was permitted to remain in Australia until 28 days after the determination of her judicial review application (or any subsequent and related appeal or appeals).
4. Dr Ogawa’s judicial review application did not succeed. An application for leave to appeal from that decision to a full court of this court also failed. Undeterred, Dr Ogawa then filed an application for special leave to appeal that outcome in the High Court. On 20 January 2005, that special leave application was deemed to have been abandoned, apparently in default of Dr Ogawa’s filing a written case and a draft notice of appeal.
5. That brought to an end Dr Ogawa’s attempts to judicially review the Migration Review Tribunal’s decision (by which, it might be remembered, she *succeeded* in setting aside the cancellation of her student visa). 28 days later—that is, on 17 February 2005—Dr Ogawa’s bridging visa expired and she became an unlawful non-citizen for the purposes of the Migration Act.
6. There then ensued a series of communications between Dr Ogawa and the Department of Immigration and Multicultural Affairs, the overall gist of which was that Dr Ogawa’s migration status needed to be regularised. Those communications notwithstanding, Dr Ogawa remained in Australia without a valid visa (or, at the very least, without a visa that the Commonwealth considered was valid). On 19 May 2006 and pursuant to s 189 of the Migration Act, she was apprehended by the Australian Federal Police and detained at the Villawood Immigration Detention Centre (hereafter, the “**VIDC**”). She remained there for 68 days, after which she was released on a bridging visa.
7. In 2011, Dr Ogawa lodged with the Australian Human Rights Commission (hereafter, the “**AHRC**”) a written complaint against the Department of Immigration and Citizenship (as it was by then known) concerning her detention at the VIDC. That application was not reproduced in the evidence that the court received but the report published by the AHRC in respect of it was. That report (hereafter, the “**AHRC Report**”) contained the following particulars of Dr Ogawa’s complaint:

20. On 2013 June 2011, Dr Ogawa lodged a written complaint with the Commission. She alleged that she was detained unreasonably at VIDC and that her detention violated her human rights as housing detention was denied for no reason. Dr Ogawa was detained at VIDC for 68 days, from 20 May 2006 to 26 July 2006.

21. On 29 June 2011, Dr Ogawa submitted:

I could not make a complaint to the Commission earlier because: i) I did not know that the Commission can help me in this case; and ii) in any event, I was in and out of jail frequently which made it virtually impossible to deal with this complaint. I should also add that my mental disorder makes me avoid anything which causes bad memories.

22. On 8 August 2011, Dr Ogawa submitted that her detention was arbitrary, in breach of the ICCPR, and referred to the decision of Cowdroy J of the Federal Court in *Ogawa v Minister for Immigration* [2006] FCA 1694 (15 December 2006).

23. On 14 September 2011 Dr Ogawa sought to add a further allegation to her complaint, that the Department’s refusal to pay her compensation for arbitrary detention is a breach of her human rights. On 27 September 2011 the Commission confirmed that this will now be considered as part of her complaint. I have now made a finding of arbitrary detention. Accordingly, I will consider any recommendations as to compensation in part 7 below.

In the absence of some apparent reason not to, I infer that that summary is accurate.

1. The reference to the decision of Cowdroy J requires explanation. Upon the commencement of her detention at the VIDC, Dr Ogawa appears to have applied for a bridging visa (or, potentially, for some form of recognition that the bridging visa that she was given in 2004 remained extant). That application was declined. She subsequently sought judicial review of that decision, initially in what was then known as the Federal Magistrates Court and, ultimately, in this court. Both attempts failed but, in both forums, some comment was made about the unfortunate consequences that arose from the initial cancellation of Dr Ogawa’s student visa in 2003. It appears (although it is neither clear nor material) that, at the time that that cancellation was set aside (which, it might be recalled, took place after the visa’s scheduled expiry date), it was not possible for Dr Ogawa to apply for a new student visa from within Australia (the time for her doing so having expired at the date that her student visa expired). That reality has, apparently, since inspired legislative amendment.
2. Comment was also made in those cases about Dr Ogawa’s attempts to invoke other methods in the service of her cause. In addition to her various attempts to cure her increasingly precarious migration status through processes of judicial review, Dr Ogawa also petitioned the Minister for Immigration and Multicultural Affairs for a favourable exercise of discretion under s 351 of the Migration Act. Again, it is not clear precisely what it was that Dr Ogawa sought via that process; but it is apparent enough that it was recognised—both by Dr Ogawa and by the relevant department—as a potential avenue through which her migration status could be regularised.
3. It appears, however, that a view was taken that Dr Ogawa could not pursue both avenues—judicial review and ministerial discretion—at the same time. The AHRC Report records the following background (which, again, in the absence of a reason not to, I assume is accurate):

6. On 30 June 2004, Dr Ogawa made an application to the Minister to intervene in her case and grant a student visa under s 351 of the *Migration Act 1958* (Cth) (Migration Act). However, in accordance with Ministerial Guidelines, her request was not considered at this stage as she had commenced judicial review proceedings.

7. On 22 September 2005, the Department:

Advised Ms Ogawa that it was appropriate for her to resume her request to the Minister as she no longer had any court proceedings against the Department, and that if she did so she would be entitled to another bridging visa on the basis of her s 351 application.

8. In response, on 22 September 2005 Dr Ogawa stated in an email to the Department:

…I wish to prepare the documents to the Minister for consideration of the Ministerial Intervention after my judicial review in relation to the cancellation of my student visa is concluded.

9. On 30 September 2005, the Ministerial Intervention Unit withdrew her request for Ministerial Intervention. This withdrawal of her request for Ministerial Intervention had consequences for Dr Ogawa. It meant that Dr Ogawa did not meet the requirements for a Bridging E visa, as she had no current application for Ministerial Intervention that was being assessed by an office against the Ministerial guidelines.

10. The decision of the Ministerial Intervention Unit to regard Dr Ogawa’s application for Ministerial Intervention as having been abandoned (rather than deferred) has been the subject of some judicial criticism. In *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), Scarlett FM noted:

That was not what the Applicant sought. She sought a deferment, or a postponement, or an adjournment. She did not seek to withdraw it. She did not seek to regard it as having been abandoned. In my view the Ministerial Intervention Unit… or the Department… cannot escape criticism.

1. On 27 February 2014, the President of the AHRC, Professor Gillian Triggs, published the AHRC Report. Therein, Professor Triggs expressed her opinion that Dr Ogawa’s detention at the VIDC had offended the protection against arbitrary detention for which Article 9 of the *International Covenant on Civil and Political Rights* done in New York on 23 March 1976 (hereafter, the “**ICCPR**”) provides; and, thereby, had amounted to a breach of Dr Ogawa’s human rights (or rights colloquially so known). Central to that finding was Professor Triggs’s conclusion that the Department of Immigration and Citizenship had “…not explained why Dr Ogawa could not reside in the community or in a less restrictive form of detention (if necessary with appropriate conditions imposed to mitigate any risks) while her immigration status was resolved”. In other words, Professor Triggs concluded that Dr Ogawa’s detention was arbitrary (and, therefore, contravened the protections inherent within the ICCPR) because it occurred at the VIDC and not some other location. Professor Triggs recommended that Dr Ogawa be issued with an apology and be paid $50,000.00 in compensation.
2. The AHRC Report was provided to the then Commonwealth Attorney-General, Senator George Brandis, under cover of a letter also dated 27 February 2014. That letter recorded in summary form the opinions that Professor Triggs had formed, as well as responses to them that she had apparently received from the Secretary of the Department of Immigration and Citizenship, Mr Martin Bowles. For reasons that will later become apparent, it is convenient to reproduce that correspondence in full (omitting formalities):

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Dr Megumi Ogawa.

I find that the Commonwealth acted inconsistently with or contrary to the human rights of the complainant. I find that the Commonwealth’s failure to place Dr Ogawa in a less restrictive form of detention was arbitrary under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

By letter dated 4 December 2013, Mr Martin Bowles, Secretary of the Department of Immigration and Citizenship, provided a response to my findings and recommendations. I set out his response below.

The Department notes Professor Triggs’ findings that:

*The Commonwealth acted inconsistently with or contrary to the human rights of the complainant. Professor Trigs has also found that the Commonwealth’s failure to place Dr Ogawa in a less restrictive form of detention was arbitrary under article 9 of the ICCPR.*

Response by the Secretary of the Department of Immigration and Border Protection to Recommendations 1 and 2 of the Notice of Findings by the President of the Australian Human Rights Commission under section 29(2)(a) of the *Australian Human Rights Commission Act 1986* (Cth) into human rights complaints by Dr Megumi Ogawa.

While we note your findings, it is the Department’s view, as stated in the responses of 19 March 2012 and 14 May 2013, that Dr Ogawa was detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act), and her immigration detention has not been and is not arbitrary.

**Recommendation 1**

*I consider that the Commonwealth should pay to Dr Ogawa an amount of compensation to reflect the loss of liberty cause by her detention at VIDC.*

*Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of $50 000 is appropriate.*

**DIAC Response**

Not accepted.

Compensation is only paid on the basis of potential legal liability where there is a meaningful prospect of liability in relation to the matter. The Department does not consider that there is any legal liability in relation to Dr Ogawa’s detention.

Further, compensation is only paid under the Compensation for Detriment caused by Defective Administration (CDDA) scheme where the department was defective in its administration and this resulted in a financial detriment, as outline in Finance Circular 2009/09 (the guidelines). The department is of the view that no compensation is payable under the guidelines in relation to Dr Ogawa’s detention.

**Recommendation 2**

*In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Dr Ogawa for the breaches to her human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.*

**DIAC Response**

Not accepted.

With respect to the view that the Commonwealth acted inconsistently with or contrary to the procedures established by law within the meaning of Article 9(1) of the ICCPR, the Department continues to rely on its previous submissions that Dr Ogawa’s immigration detention was lawful, being in accordance with the relevant provisions of the Migration Act, and was not arbitrary. Dr Ogawa refused to cooperate with the departmental attempts to assist her to regularise her status.

As per standard practice of facilitating the removal of any detainee who has a history of non-compliance, she was held in immigration detention whilst arrangements were made for her travel to Japan. Her removal did not eventuate because she applied for …[another] visa (which was refused). Dr Ogawa’s immigration detention was a proportionate measure, taken only following departmental attempts to resolve Dr Ogawa’s situation using other methods. The measure was aimed at the legitimate goal of maintaining the integrity of the migration system and was proportionate to that goal.

Accordingly, given the Department maintains that Dr Ogawa’s immigration detention was lawful and not arbitrary, there is no basis for the payment of compensation or provision of a formal apology and therefore, there will be no action taken with regard to these recommendations.

Please find enclosed a copy of my report.

Yours sincerely,

Gillian Triggs

**President**

Australian Human Rights Commission

1. The chronology, then, is apparent enough: before finalising and publishing the AHRC Report, Professor Triggs provided the Department of Immigration and Citizenship with details of her conclusions, to which Mr Bowles then responded. The departmental response was equally plain: it (or those through whom it acted) did not share Professor Triggs’s view that Dr Ogawa’s detention at the VIDC was relevantly arbitrary and did not accept either of the recommendations that she made in light of that view.
2. It is obvious enough that those departmental conclusions have not since altered: Dr Ogawa has not received any apology in respect of her detention at the VIDC and no compensation has been paid to her. It was presumably in light of those realities (or at least the latter of them) that Dr Ogawa made the AOG Application.

# Legislative framework

1. Section 65(1) of the PGPA Act provides (and, at all relevant times, provided):

**65 Act of grace payments by the Commonwealth**

1. The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances.

Note 1: A payment may be authorised even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability.

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity’s annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

…

1. The PGPA Act does not define what might or might not constitute “special circumstances”. There is no other legislative fetter on the very broad discretion that the section confers.
2. As might already be apparent, the *Australian Human Rights Commission Act* 1986 (Cth) (hereafter, the “**AHRC Act**”) assumes potential significance insofar as its provisions, or their application over the course of the present controversy, might inform the existence or otherwise of “special circumstances”.
3. The AHRC is established by s 7 of that enactment. Its functions are the subject of s 11. Relevantly, they include:

…

(f) to:

(i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and

(ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry;…

1. Section 3 of the AHRC Act relevantly defines “[H]uman rights” as “…the rights and freedoms recognised in the Covenant…” The reference to “the Covenant” is a reference to the ICCPR, the English text of which is reproduced as Sch. 2 to the AHRC Act.
2. Article 9 of the ICCPR provides as follows:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

…

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

1. Section 29(2) of the AHRC Act provides (and provided) as follows:

**29 Reports to contain recommendations**

…

(2) Where, after an inquiry into an act done or practice engaged in by a person, the Commission finds that the act or practice is inconsistent with or contrary to any human right, the Commission:

(a) shall serve notice in writing on the person setting out its findings and the reasons for those findings;

(b) may include in the notice any recommendations by the Commission for preventing a repetition of the act or a continuation of the practice;

(c) may include in the notice any recommendation by the Commission for either or both of the following:

(i) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice;

(ii) the taking of other action to remedy or reduce loss or damage suffered by a person as a result of the act or practice;

(d) shall include in any report to the Minister relating to the results of the inquiry particulars of any recommendations that it has made pursuant to paragraph (b) or (c);

(e) shall state in that report whether, to the knowledge of the Commission, the person has taken or is taking any action as a result of the findings, and recommendations (if any), of the Commission and, if the person has taken or is taking any such action, the nature of that action; and

(f) shall serve a copy of that report on the person and, if a complaint was made to the Commission in relation to the act or practice:

(i) where the complaint was made by a person affected by the act or practice—shall serve a copy of that report on the complainant; or

(ii) if the complaint was made by another person—may serve a copy of that report on the complainant.

# The AOG Application and decision

1. In the written application that she made for an act of grace payment, Dr Ogawa noted that:

The Australian Human Rights Commission reviewed the matter and the President reported the outcome to the Attorney-General in which she recommended, amongst others, the payment of compensation…

1. In answer to why she considered that an act of grace payment would be appropriate, Dr Ogawa noted:

Australia is a party to the International Covenant on Civil and Political Rights (‘ICCPR’). Article 2(3) of the ICCPR requires Australia to ensure that there is an effective remedy for a person whose rights or freedom was violated and that any person claiming such a remedy has a right to have his or her claim determined by a competent authority. Under s 20 of the *Australian Human Rights Commission Act 1986* (‘AHRC Act’), the Australian Human Rights Commission has the function to enquire into a Government’s act in breach of the ICCPR and on 27 February 2014, the President of the Australian Human Rights Commission reported to the Attorney-General such and the recommended remedies. Since the Australian Human Rights Commission does not have power to enforce the remedies and the Minister for Immigration, Chris Bowen MP, refused the payment to compensate for the arbitrary detention under the Compensation for Detriment caused by Defective Administration scheme in April 2012, the act of Grace Payment is the only way for Australia to adhere to the ICCPR in my case.

1. Before making his AOG Decision, Mr Sebar (on behalf of the Minister) invited and received written submissions from the Department of Home Affairs (as it was by then known), which were later shared with Dr Ogawa. As might be anticipated, those submissions opposed the making of an act of grace payment in relation to Dr Ogawa’s detention at the VIDC (or otherwise in connection with the AHRC Report).
2. In his AOG Decision, Mr Sebar (on behalf of the Minister) traced the background to Dr Ogawa’s detention and the competing submissions for and against the making of an act of grace payment. For the most part, the relevant background has already been summarised; but Mr Sebar also recorded the following findings, namely that:
* As a result of the dismissal of the High Court proceedings, [Dr Ogawa’s] Bridging Visa expired 28 days thereafter, namely on 17 February 2005.
* On 22 September 2005, the Department advised [Dr Ogawa] that it was appropriate for [her] to resume [her] request to the Minister as she no longer had any court proceedings against the Department, and that if [she] did [she] would be entitled to another bridging visa on the basis of [her] s351 application.
* In [her] response, on 22 September 2005 [Dr Ogawa] stated in an email to the Department “…I wish to prepare the documents to the Minister for consideration of the Ministerial Intervention after my judicial review in relation to the cancellation of my student visa is concluded.”
* On 30 September 2005, the Ministerial Intervention Unit withdrew [Dr Ogawa’s] request for Ministerial Intervention. This withdrawal of [her] request for Ministerial Intervention had consequences for [her]. It meant that [she] did not meet the requirements for a Bridging E visa, as [she] had no current application for Ministerial Intervention that was being assessed by an officer against the Ministerial guidelines. The decision of the Ministerial Intervention Unit to regard [her] application for Ministerial Intervention as having been abandoned, rather than deferred has been the subject of some judicial criticism. In *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), Scarlett FM noted “…That was not what the Applicant sought. She sought a deferment, or a postponement, or an adjournment. She did not seek to withdraw it. She did not seek to regard it as having been abandoned.”
* [Dr Ogawa was] advised…on a number of occasions by email and telephone that [her] BVE granted in relation to [her] judicial review proceedings had ceased due to the abandonment of [her] application to the High Court. [She was] also advised that [she] needed to attend a departmental office to regularise [her] immigration status as [she was] currently an unlawful non-citizen. [She] did not act on any of the Department’s directions.
* The Department was required by law to detain [her] as [she was] an unlawful non-citizen. Section 189 of the Migration Act also imposes a duty on an officer to undertake reasonable searches and inquiries, in order to ground a decision to detain a person.
1. Those observations (or some of them) proceeded upon Mr Sebar’s acceptance of what the Department of Home Affairs submitted in opposition to the making of an act of grace payment.
2. In forming his conclusion about Dr Ogawa’s AOG Application, Mr Sebar considered whether or not there were any “special circumstances” by reason of which he might consider that an act of grace payment was appropriate. Under the heading “Reasons”, he recorded the following:

I have considered that your detention was lawful and a correct proportionate measure, taken only following departmental attempts to resolve your situation using other methods. I have also considered that your detention was a direct result of your non-compliance with the directions of Home Affairs officers and that the events that followed were within your capacity to control and your responsibility.

I have considered that circumstances for this Act of Grace claim are not special circumstances as outlined in the resource management guide, which would warrant an Act of Grace payment. I have considered that the actions of the Home Affairs in detaining you has not created an unintended or inequitable result to you, [and that] the legislation has been applied correctly and as intended. Finally, I have considered that the legislation or policy has not had an unintended, anomalous, inequitable or otherwise unacceptable impact on your circumstances.

I consider that even though the AHRC recommended the payment of $50,000 in compensation, a recommendation of the AHRC does not give rise to an entitlement. I have considered that the Department of Home Affairs (then Department of Immigration and Citizenship) did not accept the recommendation of the AHRC, which was their prerogative. As above, the Department noted that the detention was lawful and not arbitrary and as such, there was no basis for compensation. I agree with the Department[’]s views that the detention was not arbitrary and was lawful. I further accept the Department[’]s comments that you refused [to] cooperate to legalise your status, dispute their numerous attempts which resulted in your detention.

1. Under the heading “Conclusion”, Mr Sebar recorded as follows:

On balance, I am not satisfied there are…special circumstances that would make an act of grace payment appropriate in this instance.

I have considered that Home Affairs attempted to assist you on numerous occasions to regulate your visa status and that it was your refusal to cooperate with their attempts to assist you in regularising your immigration status which ultimately lead to your detention. It was your choice to remain in the community as an unlawful non-citizen liable for detention despite multiple warnings from the Department. For the above reasons, I do not accept that this act creates a special circumstance that would make compensation by the Commonwealth appropriate.

# Dr Ogawa’s challenge to the AOG Decision

1. In order to obtain the relief that she seeks, Dr Ogawa needs to demonstrate that the AOG Decision was one that was beyond what Mr Sebar (on behalf of the Minister) was authorised to make under the PGPA Act. To that end, Dr Ogawa advances the following propositions, namely that:
2. the AOG Decision involved a breach or breaches of procedural fairness;
3. the AOG Decision took account of irrelevant considerations;
4. the AOG Decision failed to take account of relevant considerations;
5. the AOG Decision proceeded upon an error or errors of law that betray a misunderstanding on Mr Sebar’s part of the statutory process that he was required to discharge; and
6. the AOG Decision was legally unreasonable.
7. Each of those contentions is explored in detail below.

# Breach of procedural fairness

1. By her written submissions in support of the application, Dr Ogawa complains that the AOG Decision involved her being denied procedural fairness in three ways. First, she contends that Mr Sebar, in making his decision, had occasion to consider material with which she was not provided. Second, she complains that his decision was made without input from Professor Triggs. Third, she submits that she ought to have been (but wasn’t) given notice in advance of his intention to make a decision refusing to grant her an act of grace payment.
2. The Minister does not contend that he was under no obligation to afford Dr Ogawa procedural fairness. Instead, he submits that he did so; and that none of the denials upon which this aspect of her case proceeds is made out.
3. I deal in turn with each of the three complaints that Dr Ogawa agitates.

## Failure to provide material that was considered

1. In his AOG Decision, Mr Sebar (on behalf of the Minister) noted the existence of the AHRC Report and that the Department of Immigration and Citizenship (as it was then known) had indicated that it did not accept either of the recommendations to which that report gave voice (namely, that Dr Ogawa be issued with an apology and be paid $50,000.00 in compensation for her detention at the VIDC). Mr Sebar recorded the reasons that Mr Bowles had given Professor Triggs in support of that position. It is apparent that those reasons were taken from the correspondence that Professor Triggs sent to Senator Brandis on 27 February 2014 (under cover of which—or together with which—the AHRC Report was provided). It is not controversial that Dr Ogawa was in possession of that correspondence prior to the making of the AOG Decision. Indeed, she was invited to make submissions about its importance.
2. It is also not in controversy that Dr Ogawa was (and is) aware that the Department of Immigration and Citizenship did not accept Professor Triggs’s recommendations. In her written submissions to the court, Dr Ogawa noted (as the chronology outlined above records) that:

…after receiving [her] complaint, the Australian Human Rights Commission collected relevant information from both [Dr Ogawa] and the Department of Immigration, made a preliminary finding and recommendations and put them to both parties, gave an opportunity to the Department of Immigration to respond, and then made a final finding and recommendations that were later included in the President’s report to the Attorney-General.

1. Dr Ogawa suggests that the AOG Decision appears to have proceeded upon (or otherwise to give) “…the wrong impression that the AHRC made findings of the Applicant’s arbitrary detention and the recommendation for the payment of compensation first and then Mr Martin Bowles responded so that the matter of arbitrary detention was not finally determined”. Although it could be clearer, she apparently is of the view that Mr Sebar, having attributed to the Department of Immigration and Citizenship (or to the Department of Home Affairs, as it was more contemporarily known) an expression of opposition to Professor Triggs’s recommendations, must have had regard to something that post-dated the AHRC Report, with which she was not provided.
2. The true position is clear enough. Mr Sebar did not have regard to information that post-dated the AHRC Report. Insofar as he recorded in his decision the Department of Immigration and Citizenship’s rejection of Professor Triggs’s recommendations, he did so on the strength of what Professor Triggs herself recorded in her correspondence to Senator Brandis (specifically, that her findings were disputed and that her recommendations had not been accepted). There was, then, no regard had to information or material that Dr Ogawa didn’t have.
3. Dr Ogawa’s complaint seems to be that Mr Sebar (on behalf of the Minister) misunderstood the proper chronology of events: that he seemed to labour under the misapprehension that the Department of Immigration and Citizenship had expressed its opposition to Professor Triggs’s recommendations *after* the AHRC Report was published. Respectfully, I do not accept that any such misunderstanding emerges from the terms of the AOG Decision; but, regardless, it wouldn’t matter if it did. Any such error of fact (if there was one) was within the Minister’s jurisdiction under the PGPA Act to make: see, in that vein, *CRU18 v Minister for Home Affairs* [2020] FCAFC 129, (“***CRU18***”), [29]-[31] (Wigney, Jackson and Snaden JJ). Further and in any event, it is not clear how any such mistake was in any way material to the AOG Decision. Whether it did so before or after the AHRC Report was published, it is plainly the case that the Department of Immigration and Citizenship did not—and, in its present incarnation, still does not—accept the findings or recommendations that Professor Triggs made. Insofar as he proceeded to make his decision on that understanding, Mr Sebar did not err.
4. It is plain from the structure and content of her submissions that Dr Ogawa’s real criticism is that Mr Sebar did not accept the correctness of Professor Triggs’s findings, including her view that Dr Ogawa’s detention at the VIDC had been arbitrary. One might well understand why Dr Ogawa would feel aggrieved by Mr Sebar’s failure to agree with the views that Professor Triggs had expressed in the AHRC Report; but this court has no jurisdiction to gainsay Mr Sebar’s conclusions. Mr Sebar was not obliged to agree with Professor Triggs and it is not for this court to determine either way whether her conclusions were right. Mr Sebar was entitled—indeed, probably bound—to turn his mind to that question in considering whether or not there were special circumstances that warranted the making of an act of grace payment. That he did so in a way that conflicted with Dr Ogawa’s—or, for that matter, Professor Triggs’s—views on the topic is not reason enough to impugn his decision as the product of jurisdictional error.

## Failure to hear from Professor Triggs

1. Dr Ogawa submits that Mr Sebar’s failure to invite Professor Triggs (or, perhaps, her successor) to comment upon whether or not an act of grace payment should be made was a denial of procedural fairness. By her written submission, Dr Ogawa contended:

Had the delegate invited the President to comment, he would have received at the very least, if not more, the same explanation which the Applicant would have made and the delegate would have found difficulty in overriding the decisions of the Federal Court, the Federal Magistrates Court and the President.

1. The basis upon which that submission was advanced is unclear. Neither the Federal Court nor the Federal Magistrates Court (now known, of course, as the Federal Circuit Court of Australia) has had occasion to express any concluded view as to the correctness of the findings that Professor Triggs recorded in the AHRC Report. Indeed, that report post-dates Dr Ogawa’s excursions to those jurisdictions (or, at least, the apparently relevant excursions to those jurisdictions) by many years.
2. Further, it is not at all apparent to me how Mr Sebar’s failure to invite the AHRC to comment upon Dr Ogawa’s AOG Application could be thought to involve any failure to afford her procedural fairness. The reasons for which the AHRC (through Professor Triggs) was drawn to the conclusions that were recorded in the AHRC Report are a matter of record. Although not bound by them, Mr Sebar had no authority—and did not purport—to set them aside. He simply chose, as he was entitled to, not to draw equivalent findings in the context of the AOG Application.
3. In any event, the suggestion that a failure to invite comment from the AHRC involved a denial of procedural fairness is weaker still given that any such invitation would almost certainly (and very properly) have been declined: *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, 35-36 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).
4. Mr Sebar’s failure to invite comment from Professor Triggs or the AHRC is not a reason sufficient to impugn his decision as the product of jurisdictional error.

## Failure to give notice in advance

1. Dr Ogawa contends that Mr Sebar, in making his AOG Decision, “…failed to accord with procedural fairness in that [he] did not provide [her] with notice of his intention to make a decision refusing to authorise the grace payment in spite of Art 2 paragraph 3 of the ICCPR”. Her submission continued:

Art 2 paragraph 3 of the ICCPR requires the Commonwealth to ensure that any person whose rights recognized by the ICCPR are violated will have an effective remedy and the ‘General Comment No.31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ adopted by the Human Rights Committee on 29 March 2004 clarified that the effective remedy entails appropriate compensation.

1. Article 2(3) of the ICCPR provides as follows:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

1. In support of her contention, Dr Ogawa relies heavily on the observations of Mason CJ and Deane J in *Minister for State of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, (“***Teoh****”)*. Their Honours in that case held that, upon Australia’s ratification of the *United Nations Convention on the Rights of the Child* done in New York on 20 November 1989, there arose a “legitimate expectation” that administrative decision-makers would act in accordance with the provisions of that convention when making decisions that concerned children. Importantly in the context of this matter, their Honours observed (at 291-292):

…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. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

1. *Teoh* has been the source of much judicial consideration, not all of it supportive. It is not necessary here that I should attempt to navigate that substantial body of jurisprudence. Dr Ogawa cannot be understood to have possessed any legitimate expectation that her AOG Application would be decided in her favour. It did not turn upon acceptance or rejection of the proposition that her detention at the VIDC was offensive to the ICCPR. It turned, instead, upon whether or not Mr Sebar (on behalf of the Minister) considered that there were special circumstances that warranted the making of a payment. That the latter might properly have been informed by the former is of little moment.
2. It is not easy, in any event, to identify any legitimate expectation on Dr Ogawa’s part with which Mr Sebar’s AOG Decision might be said to have been inconsistent. By her written submissions, Dr Ogawa appeared to suggest that she had a legitimate expectation that Mr Sebar would “…exercise the discretion in conformity with the terms of the [ICCPR]”. Even assuming that to be so, it is not immediately apparent how that might assist. The obligation created by article 2(3) of the ICCPR is to ensure that victims of human rights abuses have access to processes through which they might secure remedial measures. There doesn’t seem to be any suggestion that Australia, as a signatory to the ICCPR, lacks such processes.
3. Mr Sebar was not obliged, whether by reason of authority (including *Teoh*)or otherwise, to give advance notice of a decision to decline Dr Ogawa’s AOG Application. His failure to do so is also of little moment.

## Conclusion

1. I do not accept that the AOG Decision involved any denial of procedural fairness.

# Consideration of an irrelevant matter

1. Dr Ogawa contends that the AOG Decision was the product of jurisdictional error (and, thereby, is vulnerable to correction by means of prerogative relief) because Mr Sebar took account of an irrelevant consideration. Specifically, Dr Ogawa complains that Mr Sebar erred by taking account of the fact that she had failed in an earlier attempt to secure compensation in connection with her detention.
2. That earlier attempt to secure compensation was made under what is apparently known as the Scheme for Compensation for Detriment Caused by Defective Administration (hereafter, the “**CDDA Scheme**”). The nature of that scheme and Dr Ogawa’s attempted employment of it went largely unexplored in the evidence. By way of submission, Dr Ogawa complained that “…the consideration and conclusion of the Department of Home Affairs, namely that there was no special circumstance because there was no defective administration, was a fundamental error.”
3. The glaring shortcoming inherent in that submission is that Mr Sebar (on behalf of the Minister) did not conclude that there were “no special circumstances because there was no defective administration”. The fact that Dr Ogawa had tried and failed to secure compensation under the CDDA Scheme was, of course, a circumstance of which Mr Sebar took account in determining whether or not to make an act of grace payment. He was entitled (if not bound) to have regard to it to that end because it was something that might logically inform his assessment as to whether or not there existed “special circumstances” for the purposes of s 65(1) of the PGPA. But to constitute that consideration as the sole (or even primary) basis upon which Mr Sebar drew his conclusion as to the appropriateness of making an act of grace payment is to misunderstand how it was that that conclusion was drawn.
4. This aspect of Dr Ogawa’s challenge is not made out.

# Failure to take account of relevant considerations

1. Dr Ogawa complains that, in making the AOG Decision, Mr Sebar failed to take account of considerations of which the PGPA Act required that he take account; and that, in consequence of those failures, his decision should be set aside as the product of jurisdictional error. Four such considerations are identified: first, that the Department of Immigration and Citizenship (hereafter, “**DIAC**”) did not appeal the AHRC Report, or otherwise seek to have it set aside; second, that the Commonwealth Attorney-General similarly made no such efforts; third, that the ICCPR requires that those whose human rights are infringed should be afforded appropriate remedies; and, fourth, that the circumstances that led to Dr Ogawa's detention had been the subject of critical comment in earlier proceedings brought in this court.
2. It is convenient to deal with each contention separately.

## The department’s failure to appeal

1. Dr Ogawa complains that Mr Sebar, in making his AOG Decision, erred by not taking account of the fact that DIAC failed to (or, perhaps, opted not to) appeal the AHRC Report. That, she says, was a consideration of which Mr Sebar was obliged to take account; and his failure to do so serves as a basis upon which to impugn his AOG Decision as the product of jurisdictional error.
2. For present purposes, it might readily be accepted that a decision-maker’s failure to take account of something that he or she ought to have taken into account in the process of making his or her decision is a circumstance that might (subject to questions of materiality) bespeak jurisdictional error. Whether or not a particular consideration has factored as one of which a decision-maker took account when making a decision is a question of fact. In most cases—and this one is no different—it is established as a matter of inference, usually from the fact that the consideration was or was not referred to in the decision-maker’s written reasons. It is not in contest that the reasons published in support of the AOG Decision make no reference to the fact that DIAC did not appeal the AHRC Report (or otherwise seek to challenge it by further legal process). It is that absence of reference that underlies Dr Ogawa’s submission that Mr Sebar failed to take account of that reality and that his decision is vulnerable to prerogative relief on account of that failure.
3. It is not immediately apparent how it is that DIAC’s failure to appeal (or, perhaps, its decision not to appeal) or otherwise challenge the AHRC Report might serve as a consideration that logically informs the existence or otherwise of "special circumstances" for the purposes of the AOG Application. Dr Ogawa's written submissions did not descend to analysis at that level and I confess some scepticism on that front.
4. Even assuming, however, that such a failure (or decision) should qualify as a relevant consideration of which the Minister (via the agency of Mr Sebar) was obliged to take account, I would not infer that he failed to do so. Mr Sebar cannot sensibly be thought to have made his decision unconscious of the obvious reality that the AHRC Report had not been the subject of subsequent challenge by DIAC. Plainly enough, any such challenge, had it occurred, would have dramatically altered the factual landscape that Mr Sebar was charged with surveying. It was obvious from the fact that that landscape did not disclose any such challenge that no such challenge had, in fact, been made. The notion that Mr Sebar should be understood not to have appreciated that reality simply because he didn’t advert specifically to it in the reasons that he published in support of his AOG Decision is, with respect, fanciful.
5. In truth, Dr Ogawa’s complaint is not that Mr Sebar was unaware of or failed to appreciate the absence of challenge to the AHRC Report; but that he was not drawn to conclude that “special circumstances” existed by reason of that fact. In that respect, Dr Ogawa’s complaint is revealed for what it is: an attack on the merits of Mr Sebar’s decision, rather than on his jurisdiction to make it. Dr Ogawa suggests that the absence of legal challenge to the AHRC Report should have served as proof that special circumstances warranting an act of grace payment existed. In the mind of another decision-maker, it might well have; but Mr Sebar was not obliged so to find and this court has no power to gainsay his conclusion.
6. Furthermore, the analysis above presupposes that DIAC had some capacity to challenge the AHRC Report. It is to be recalled that the AHRC Report was prepared in compliance with the requirements of s 29(2) of the AHRC Act (above, [25]). It did nothing more than recommend that Dr Ogawa be issued an apology and be paid compensation in relation to her detention at the VIDC. Those recommendations took form under the light of Professor Triggs’s conclusions that Dr Ogawa’s detention was arbitrary (and, therefore, in breach of a human right). They did not create any legal rights or duties, and Professor Triggs’s conclusions, persuasive or otherwise, were no more binding upon anybody than Dr Ogawa’s own opinions.
7. Those realities acknowledged, was the AHRC Report—or either or both of the recommendations to which it gave voice—open to legal challenge? Dr Ogawa contends that it was (and they were) and in two ways. First, she says that it was open to DIAC to apply to have the AHRC Report set aside under the *Administrative Decisions (Judicial Review) Act* 1977 (hereafter, the “**ADJR Act**”); second, that it could have applied to that same end for prerogative relief.
8. It is difficult to see how the department might have secured prerogative relief. Relief of that nature is typically declined in the absence of some utility in granting it: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ). That utility might be thought to be lacking where, as here, the decision that is sought to be impugned is one that has no legal effect (in the sense that it does not create or affect legal rights, duties, privileges or immunities). Even assuming that it was the product of relevant error—a writ of certiorari does not lie in respect of a report (or decision) of that character: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580-581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan CJ). Although put with admirable force (and with due respect to her), Dr Ogawa’s contention that DIAC was able but chose not to apply for prerogative relief to have the AHRC Report set aside is unsound.
9. For largely the same reasons, Dr Ogawa’s contention about the potential application of the ADJR Act must also fail. The susceptibility of a decision to review under that enactment depends, for present purposes, upon its qualifying as “…a decision of an administrative character made…under an enactment”: ADJR Act, ss 3(1), 5, 6 and 7. In *Griffith University v Tang* (2005) 221 CLR 99, Gummow, Callinan and Heydon JJ said (at 130-131 [89]):

The determination of whether a decision is ‘‘made…under an enactment’’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, **the decision must itself confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must derive from the enactment. A decision will only be ‘‘made…under an enactment’’ if both these criteria are met...

(emphasis added)

1. I do not accept that DIAC had available to it an avenue or avenues by which to have the AHRC Report set aside. Mr Sebar, then, cannot, in the present (act of grace) context, fairly be criticised for failing to take account of the fact that no such avenues were pursued. Even had I been satisfied to the contrary, I do not (for the reasons that I have already recorded) accept that Mr Sebar failed to appreciate the fact that DIAC took no steps to challenge the AHRC Report. That reality was as apparent as gravity; and it cannot safely be inferred that, when making his AOG Decision, Mr Sebar did so unconscious of it.
2. It follows that I do not accept that the AOG Decision should be impugned as the product of jurisdictional error because of any failure on Mr Sebar’s part to take account of the fact that DIAC did not seek to challenge the AHRC Report.

## The Attorney-General’s failure to appeal

1. Dr Ogawa advanced materially identical submissions concerning the failure of the Commonwealth Attorney-General to challenge the AHRC Report. She contended that Mr Sebar was obliged to, but did not, take account of that failure (or that decision, as the case may be) when making his AOG Decision; and that, by reason of his not having done so, his decision should be set aside for want of jurisdiction to make it.
2. For the same reasons as are outlined in the previous section with respect to DIAC, I do not accept that Mr Sebar erred by failing to take account of the fact that the Commonwealth Attorney-General failed to (or opted not to) legally challenge the AHRC Report. I do not accept that the Attorney had available to him any such mechanism; and, even if that’s wrong, I do not accept that Mr Sebar’s decision proceeded upon any want of consciousness that no such challenge had been pursued.
3. This aspect of Dr Ogawa’s challenge to the AOG Decision, therefore, also fails.

## Failure to mention the ICCPR

1. Dr Ogawa contended that, in making his AOG Decision, Mr Sebar was obliged to take account of the requirement set out in article 9 of the ICCPR (above [24]) that member states afford enforceable compensation rights to the victims of human rights abuses. Because he did not mention that consideration in the reasons that he gave for his decision, he should, so the submission continued, be understood not to have taken account of it; and, by reason of that failure, failed correctly to exercise the jurisdiction that the PGPA Act conferred upon him.
2. I do not accept that contention. It presupposes that Dr Ogawa’s detention at the VIDC was effected contrary to the requirements of the ICCPR: in other words (to put it in colloquial terms), that her detention amounted to a breach of her human rights. Plainly enough, Mr Sebar turned his mind to that issue, as he was entitled (if not bound) to. He did not share Professor Triggs’s view that Dr Ogawa’s detention at the VIDC was arbitrary and effected contrary to the protections afforded by the ICCPR (or by the legislation that gives them domestic effect). Even if he was wrong about that—that is to say, even if Dr Ogawa’s detention should properly be understood as having been effected contrary to the requirements of article 9 of the ICCPR—Mr Sebar’s conclusion to the contrary is not, in and of itself, sufficient to impugn his decision as one that he lacked jurisdiction to make. The character of Dr Ogawa’s detention was not a jurisdictional fact for the purposes of assessing whether or not an act of grace payment should be made to her. At worst, Mr Sebar’s conclusion was an error that he had jurisdiction to make: see, in that vein, the observations made in *CRU18*, [29]-[31] (Wigney, Jackson and Snaden JJ).
3. Having concluded as he did, it is neither material nor surprising that Mr Sebar would refrain from making any reference in the reasons for his decision to the obligation to afford enforceable compensation rights for which article 9 of the ICCPR provides. His failure to do so does not equate with a failure to take account of a relevant consideration.
4. Respectfully, this aspect of Dr Ogawa’s challenge to the AOG Decision is unsound.

## Failure to mention the decision of the Federal Court

1. Dr Ogawa’s written submissions contained the following contentions:

75. The delegate in the ‘Reasons’ of his statement of reasons for the decision wrote: ‘Finally, I have considered that the legislation or policy has not had an unintended, anomalous, inequitable or otherwise unacceptable impact on your circumstances’.

76. Had he had regard to the Federal Court decision in *Ogawa v Minister for Immigration and Multicultural Affairs* [2006] FCA 1694, the delegate would have needed to reason why he so considered when the Federal Court’s observation was completely contrary to that conclusion.

77. Therefore, the decision made without taking account of the Federal Court’s observation is affected by a jurisdictional error.

1. Respectfully, this aspect of Dr Ogawa’s application is more difficult to follow than the others. As I appreciate it, her complaint is that the circumstances that led to her detention at the VIDC involved unintended, anomalous, inequitable or otherwise unacceptable impacts upon her; and that Mr Sebar would not wrongly have concluded otherwise had he taken account of comments made by this court in 2006.
2. Although Dr Ogawa did not precisely identify them, it would appear that the comments to which she refers were those of Cowdroy J in *Ogawa v Minister for Immigration and Multicultural Affairs and Another* [2006] 156 FCR 246, 253-255 [47]-[56]. For ease of reference, it is convenient to reproduce them:

47. Ms Ogawa has been the unfortunate victim of three circumstances which I shall shortly summarise.

*1. Migration Review Tribunal Decision favourable to Ms Ogawa*

48. On 9 June 2004 the Migration Review Tribunal found that the delegate’s decision to cancel her Student visa should be set aside on the ground that the Tribunal was not satisfied that any breach of the visa had occurred. Because of a delay in the delivery of that decision, the visa had already expired. Scarlett FM observed at [48]:

I have commented that this decision was not handed down until 9th June 2004. By that time the Applicant’s student visa had already expired on 15th March 2004. What happened is that the Tribunal handed to the Applicant a worthless victory. It set aside the decision to cancel a student visa after the time when the visa, had it not been cancelled, would already have expired. This, to my mind, placed the Applicant in a difficult, if not impossible, position.

49. Despite His Honour’s observations, he considered that there was nothing which could be done by him and held at [51]:

Regrettably for the Applicant, my finding in respect of the earlier decision does not assist her in this case. In my view the situation, notwithstanding the rather unfortunate treatment she has received from, originally the Migration Review Tribunal and the Ministerial Intervention Unit of the Respondent Minister’s Department, leave her in the situation that there is no jurisdictional error, that her application must be dismissed.

*2. Withdrawal of s 351 application*

50. Ms Ogawa’s application under s 351 was, without her instructions, withdrawn from consideration.

51. Scarlett FM said at [37]-[39]:

I would say, however, that it is quite clear from the material that appears in Ms S’s email to the Applicant and the quote from the Applicant of 22nd September 2005, from the Applicant to Ms P of the Department, that it was never the intention of the Applicant to withdraw her request for Ministerial Intervention under the provisions of s 351 of the Migration Act.

It is quite clear that the Applicant was asking for that application for Ministerial Intervention to be deferred until the conclusion of the proceedings for judicial review. It was the action of the First Respondent Minister, or the delegate thereof, in the Ministerial Intervention Unit, to bring the Applicant’s application for Ministerial Intervention to an end.

That was not what the Applicant sought. She sought a deferment, or a postponement, or an adjournment. She did not seek to withdraw it. She did not seek to regard it as having been abandoned. In my view the Ministerial Intervention Unit of the officer of the First Respondent Minister, or the Department of the First Respondent Minister, cannot escape criticism.

Scarlett FM then observed at [41]:

What the Applicant asked, quite reasonably, was for that request to be deferred until she had completed her quest to obtain a favourable order by means of the process of judicial review. It is easy to understand, and as I said, it is not at all unreasonable. In my view the decision by the Ministerial Intervention Unit to regard that application as at an end was, to my mind, unreasonable and in some circumstances not fair to the Applicant.

52. However, the email stating that the application was being withdrawn was apparently not received by her. Even if it had been received by her, the Minister gave the clear indication that she was able to apply again. The email states:

If in the future you wish to request the Minister to intervene in your case under s 351 of the *Migration Act 1958* it is open for you to make such a request.

53. Scarlett FM expressed his clear opinion that the manner in which Ms Ogawa’s application for Ministerial intervention was dealt with by the Minister’s office was unfortunate. He also observed that the Tribunal “somewhat regretfully” reached its finding on this issue.

*3. Reinstatement of special leave to appeal to the High Court*

54. Since the decision of Scarlett FM, Callinan J has ordered that Ms Ogawa’s special leave application be reinstated. Accordingly, her special leave application has not been abandoned. Orders of the High Court, subject to any contrary order made by the Court or a Justice, take effect from the date on which they are given or made (see *High Court Rules*, Pt 8, r 8.02). Since this application has been revived it would follow that Ms Ogawa’s judicial review proceedings have not been completed. It is on this basis that Ms Ogawa claims that the Bridging visa issued to her on 6 July 2004 has also revived.

55. This Court is not able to take into account events which have occurred subsequent to the determination of Scarlett FM and on this appeal can only determine whether His Honour erred. Accordingly this Court is unable to provide the remedy which would give effect to the recent events referred to above.

56. I draw these matters to the attention of the Minister for consideration.

1. There is nothing in the comments of Cowdroy J that obliged Mr Sebar to conclude that Dr Ogawa had, by reason of her treatment (and, in particular, her detention at the VIDC), suffered unintended, anomalous, inequitable or otherwise unacceptable impacts; nor, more importantly, that there existed “special circumstances” by reason of which he should consider it appropriate to grant her an act of grace payment. Dr Ogawa’s contention that “…the Federal Court’s observation was completely contrary to [Mr Sebar’s] conclusion” is incorrect.
2. The proceeding before Cowdroy J did not turn upon whether or not the circumstances leading up to (and culminating in) Dr Ogawa’s detention at the VIDC involved impacts upon her that were unintended, anomalous, inequitable or otherwise unacceptable. It is apparent from the manner in which they were concluded that the observations that his Honour made were made merely for the benefit of the Minister, in that they may have assisted in the determination of the application made by Dr Ogawa under s 351 of the Migration Act.
3. Mr Sebar, in considering whether or not there existed special circumstances warranting the making of an act of grace payment, was not obliged to take account of the comments that Cowdroy J recorded in his judgment (as reproduced above). Even assuming that he failed to do so, that failure does not vitiate his AOG Decision.
4. Again, Dr Ogawa’s real complaint is that Cowdroy’s J comments ought to have persuaded Mr Sebar that it was appropriate to make an act of grace payment to her. She attacks Mr Sebar’s conclusions on their merits. One might well understand why; but this court has no power to review his decision on that basis.
5. This aspect of Dr Ogawa’s challenge is not made good.

# Error or errors of law

1. Dr Ogawa contends that the AOG Decision is tainted by an error or errors of law. Specifically, it is said that Mr Sebar, having concluded that Dr Ogawa’s detention at the VIDC was lawful and/or not arbitrary, and that the recommendation that Professor Triggs made concerning the payment of compensation did not create any entitlement on that front, wrongly proceeded to determine that an act of grace payment was not warranted. Whether or not there ought to have been an act of grace payment in her case, so Dr Ogawa’s contention proceeds, did not turn upon those conclusions: instead, it turned upon the existence or otherwise of “special circumstances”. Insofar as he misunderstood that reality, Dr Ogawa submits that Mr Sebar failed properly to exercise the jurisdiction reposed in him.
2. At its core, Dr Ogawa’s contention has a ring of soundness to it: the granting of her AOG Application turned solely upon whether or not Mr Sebar (as the Minister’s delegate) was satisfied that granting it was appropriate because there were special circumstances inclining toward that conclusion. Determining the application on any other basis—including the lawfulness of Dr Ogawa’s detention at the VIDC, for example—would involve a misconstruction of the relevant statutory task.
3. Superficially sound though the submission is, it fails as a matter of practical application. In the search for “special circumstances”, Mr Sebar was entitled (if not bound) to turn his mind to the character of Dr Ogawa’s detention and the nature or effect of Professor Triggs’s recommendations. Findings that the detention was, in fact, lawful and/or not arbitrary, and that Professor Triggs’s recommendation fell short of establishing any enforceable right were potentially (if not plainly) relevant to Mr Sebar’s assessment of whether or not there existed “special circumstances” by reason of which he should consider it appropriate to make the payment that Dr Ogawa requested.
4. Mr Sebar’s reasoning process is apparent enough. He considered that Dr Ogawa’s detention was the inevitable (and indeed statutorily required) consequence of her failure to regularise her immigration status after 17 February 2005 (the particulars of which are explored above, [8]-[10]). That failure was, he reasoned, at least partly of Dr Ogawa’s own making, and her subsequent detention at the VIDC did not involve any semblance of defective administration (for the purposes of the CDDA Scheme or generally). Whether Mr Sebar was right about those matters is not for this court to say. The point remains: it was open to him to reason in the way that he did. That reasoning did not involve any error of law.
5. This aspect of Dr Ogawa’s challenge fails.

# Legal unreasonableness

1. Dr Ogawa’s final contention was that the AOG Decision was legally unreasonable and, therefore, beyond what Mr Sebar had jurisdiction to make. Her contention is that, in circumstances where:
2. her detention at the VIDC was arbitrary;
3. Cowdroy J described her as an “unfortunate victim”;
4. DIAC and the Attorney-General made no attempt to challenge the AHRC Report;
5. the making of an act of grace payment would give effect to the terms of the ICCPR; and
6. it would be an absurd deployment of public funds to have the AHRC consider and make findings and recommendations about her case, only later to be ignored,

the only logical and rational conclusion open to Mr Sebar was that it was appropriate to grant the AOG Application. Any decision other than that, her contention continued, was one that Mr Sebar lacked jurisdiction to make.

1. The principles applicable to legal unreasonableness are not controversial. The power to grant or not grant an act of grace payment under s 65 of the PGPA is, obviously enough, discretionary. The exercise of that power is subject to an implied condition that it be reasonable: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 [29]-[30] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370 [88]-[89] (Gageler J). In *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 (Allsop CJ, Griffiths and Wigney JJ), this court observed (172 [65]):

…the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary... That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. A number of those cases, and the descriptive expressions used in them, are referred to in *Li* and in the judgment of Allsop CJ in *Stretton* (at [5]). The expressions that have been utilised include decisions which are “plainly unjust”, “arbitrary”, “capricious”, “irrational”, “lacking in evident or intelligible justification”, and “obviously disproportionate”. It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a “checklist” exercise... Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

1. Dr Ogawa’s submission on this front proceeds on the footing that Mr Sebar, had he been acting reasonably under the light of the facts with which he was confronted, could not have come to any conclusion other than that it was appropriate to make an act of grace payment to her. Respectfully, that submission is unsustainable. The facts here—even as Dr Ogawa depicts them—do not mandate any particular outcome. Even had he accepted all of the constituent factual assertions upon which this aspect of Dr Ogawa’s challenge rests, it would still have been open to Mr Sebar, acting reasonably, not to have formed the view that it was appropriate to make an act of grace payment.
2. In any event—and perhaps more to the point—Mr Sebar did not accept the factual landscape as Dr Ogawa has painted it. He did not accept that her detention at the VIDC had been arbitrary, and he did not agree with Professor Triggs’s conclusion otherwise. Again, whether or not he was right to form those views is beside the point. He was entitled to form them, and to have them inform his ultimate conclusion about the appropriateness of making an act of grace payment.
3. In truth, Dr Ogawa’s complaint is that Mr Sebar ought to have made a different decision. One might well understand why she takes that view; but it is a different thing altogether to say that something other than what Mr Sebar decided was the only course reasonably open to him. I do not accept that that is the case.
4. This aspect of Dr Ogawa’s challenge is not made good.

# Conclusion

1. None of the discrete grounds upon which Dr Ogawa has sought to impugn the AOG Decision can succeed. The application should (and will) be dismissed.
2. Dr Ogawa contends that the court ought not to make any order requiring her to pay the Minister his costs of successfully defending the application. That, it was submitted, should follow on account of the application qualifying as a “public interest case”. With respect, there is no good reason why the court’s discretion to grant costs should be exercised in this matter in anything other than the usual way. It is appropriate that costs should follow the event. There will be an order that the applicant pay the Minister’s costs.

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| I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 5 February 2021