Federal Court of Australia

Williams v Minister for Immigration and Border Protection [2021] FCAFC 182

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| Appeal from: | *Williams v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 814 |
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| File number: | VID 445 of 2020 |
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| Judgment of: | **ALLSOP CJ, WHITE AND ROFE JJ** |
|  |  |
| Date of judgment: | 19 October 2021 |
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| Catchwords: | **MIGRATION** – review of decision under s 501CA of the *Migration Act 1958* (Cth) refusing to revoke cancellation decision – where Department failed to provide the appellant with police charge brief in relation to a pending charge despite attempts to obtain brief – where Department refused to grant extension of time to make representations in order that the appellant could obtain the brief – whether denial of procedural fairness – whether Minister obliged to have regard to most up-to-date information in all circumstances – whether failure to provide police charge brief to appellant or to grant an extension of time to make representations amounts to jurisdictional error – no denial of procedural fairness – no free-standing obligation that the Minister have regard to most up-to-date information – no jurisdictional error – appeal dismissed |
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| Legislation: | *Judiciary Act 1903* (Cth) s 79  *Migration Act 1958* (Cth) s 501CA  *Migration Regulations 1994* (Cth)  *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 9, 28, 73, 182, 183) |
|  |  |
| Cases cited: | *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24  *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431  *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505  *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441  *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430  *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82  *SZJTQ v Minister for Immigration and Citizenship* [2008] FCA 1938; 172 FCR 563  *Williams v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 814 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 91 |
|  |  |
| Date of last submissions: | 15 September 2021 |
|  |  |
| Date of hearing: | 19 August 2021 |
|  |  |
| Counsel for the Appellant: | Ms S C B Brenker (Pro Bono) |
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| Counsel for the Respondent: | Mr R Knowles QC with Ms R Amamoo |
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| Solicitor for the Respondent: | Sparke Helmore |

ORDERS

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|  | | VID 445 of 2020 |
|  | | |
| BETWEEN: | SIMON MICHAEL WILLIAMS  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  Respondent | |

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| --- | --- |
| order made by: | ALLSOP CJ, WHITE AND ROFE JJ |
| DATE OF ORDER: | 19 OCTOBER 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth):
   1. the Progress Report of Dr Michael Davis, prepared in respect of the appellant under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) and dated 27 May 2015 (**Davis Report**), and any reference to the contents thereof, to the extent it or they be held on the Court file not be released to the public (excepting the parties to this appeal and their legal representatives) otherwise than pursuant to an order of a judge of the Court.
   2. The unredacted version of the reasons of the Full Court not be published and not be made available to any person other than a party to the proceeding otherwise than pursuant to an order of a judge of the Court.
   3. Within 14 days the parties make comments to the Court upon the appropriateness for publication of the draft redacted version of the judgment with which they have been supplied.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1. This is an appeal against orders made by a judge of the court dismissing with costs an application for judicial review of a decision made by the Assistant Minister for Immigration and Border Protection on 14 March 2017 not to revoke under s 501CA(4) of the ***Migration Act*** *1958* (Cth) an earlier decision to cancel the appellant’s visa on character grounds: see *Williams v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 814.
2. There are two grounds of appeal pressed, being first, that the primary judge erred in finding that the appellant was afforded procedural fairness and thus in failing to find that the decision was affected by jurisdictional error in that it was reached without affording him procedural fairness and that that error was material; and, secondly, in failing to find that the decision was affected by jurisdictional error because it was made without the Assistant Minister acting on the basis of the most current information available to him.
3. For the reasons that follow the appeal should be dismissed with costs.

## The appellant’s circumstances

1. The primary judge described the appellant’s circumstances up to the cancellation of his visa at [7]–[11] of this reasons (J[7]–[11]) as follows:

[7] The applicant is a citizen of Sri Lanka who came to Australia on 20 January 1988 as a nine year old child. The applicant’s father held a skilled labour visa, and the applicant entered Australia as a dependent family member. The applicant’s name at that time was Sanjeewa Gayan Rajakaruna. He is now known as Simon Michael Williams. The applicant was granted a Return (Residence) (Class BB) visa, subclass 155 (Five Year Resident Return) on 29 January 1998.

[8] Since arriving in Australia, the applicant has been convicted of a number of criminal offences, the most relevant of which are as follows.

[9] On 4 February 2009, following a protracted series of criminal proceedings, including two successful appeals, upon pleas of guilty the applicant was convicted in the County Court of Victoria of one count of rape and one count of assault, both of which occurred on 27 September 2000. The sentencing judge described the applicant’s offending behaviour as “abhorrent and repugnant” and as “being of a serious kind” and sentenced the applicant to a term of imprisonment of five years for the rape and to a concurrent term of one year for the assault. The sentencing judge fixed a non-parole period of three and a half years, which had expired at the time of sentencing. On 22 December 2010, a delegate of the Minister, having regard to the applicant’s offending, considered cancelling the applicant’s visa under s 501(2) of the Act. The delegate decided not to cancel the applicant’s visa, and formally warned him that future criminal conduct could result in visa cancellation.

[10] On 16 August 2011, the County Court of Victoria made a supervision order in respect of the applicant pursuant to the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). The supervision order was later confirmed on 8 November 2013 pursuant to s 73(8) of the Act. Upon receipt of information about the making of the supervision order, the Minister considered cancelling the applicant’s visa. On 2 April 2012, the Minister decided not to cancel the applicant’s visa, and again formally warned him that future criminal conduct could result in visa cancellation.

[11] On 27 March 2015, the applicant was convicted in the County Court of Victoria of four counts of breach of his supervision order. He was sentenced to eight months’ imprisonment in total. Consequently, on 7 July 2015, the Minister cancelled the applicant’s visa under the mandatory provisions of s 501(3A) of the Act. That cancellation was on the grounds that the applicant failed the character test because he had a substantial criminal record as defined in s 501(7) of the Act, and that he was at that time serving a term of imprisonment. By a letter dated 7 July 2015, the Department notified the applicant of the cancellation of his visa and invited him to make representations to seek revocation of the decision to cancel his visa. That letter enclosed a number of documents in relation to the applicant held by the Department at that time.

1. On 31 July 2015, the appellant requested the Minister, pursuant to s 501CA(4), to revoke the earlier mandatory cancellation of his visa. On 14 March 2017, the Assistant Minister, acting personally, determined not to revoke the cancellation: deciding that the appellant did not pass the character test (correctly, as he could not) and that there was not another reason to revoke the cancellation decision. The considerable time between July 2015 and March 2017 contained a lengthy process of exchange of correspondence which it will be necessary to discuss.
2. At J[13], the primary judge introduced the facts at the centre of the present debate on appeal:

In making the non-revocation decision, the Assistant Minister had regard to the applicant’s background, including the applicant’s criminal convictions and the prior warnings given to the applicant about visa cancellation, summarised above. The Assistant Minister also had regard to three further criminal charges that were pending against the applicant, two for allegedly soliciting sexual services and the third for an alleged assault. The part of the Assistant Minister’s statement of reasons that addressed those further pending criminal charges stated –

* 1. I note that Mr WILLIAMS has three pending charges that have not yet been determined by a court; two charges relate to allegedly inviting or soliciting sexual services, and one to an alleged assault on his community corrections supervising officer.
  2. I note that the circumstances leading to Mr WILLIAMS’ 2015 convictions for non-compliance with his Supervision Order, form part of the two soliciting charges. I have therefore given these charges some limited weight although noting they have not been determined by a court.
  3. In relation to the alleged assault on his community services officer, the subject of one pending charge, although not yet determined by a court, I note the alleged behaviour is consistent with some of Mr WILLIAMS’ violence-related conduct.

1. The complaints of the appellant focused upon the withholding by the Department of the fact that it had a copy of the police brief *in relation to the assault charge* in its possession and that brief contained information beyond that which the appellant had. (The case was initially put on the basis that the police brief had no more or different information than the appellant already had.) The complaints of the appellant were also directed to the refusal to give the appellant more time to obtain the relevant police briefs. Thus, it was submitted the Assistant Minister failed to afford him procedural fairness. The appellant also complains of the failure of the Department to brief the Minister with a copy of the police brief, which comprises the asserted failure of the Minister to make his decision on the most up to date material available.
2. The correspondence between the Department and Mr Williams’ then legal advisors after the request for revocation was summarised by the primary judge at J[19]–[38] and [40]–[41]. Notwithstanding the length it is appropriate to set the paragraphs out as follows:

[19] By an email dated 26 August 2015, the applicant’s representative lodged a request to the Department under the *Privacy Act 1998* (Cth) and the *Freedom of Information Act 1982* (Cth) for information and documents. That request included a request for “all … information in relation to his criminal charges, hearings and convictions”, and stated that the requested documents were required to prepare the applicant’s submissions to the Department seeking revocation of the cancellation decision. The evidence before the Court does not disclose what, if anything, the applicant received in response to this request.

[20] By an email dated 21 September 2015, the applicant’s representative sent to the Department written submissions in support of the applicant’s revocation request.

[21] By a letter dated 30 August 2016, an officer of the Department informed the applicant and his representative that –

The department has information which has been received and which may be taken into account when making the decision whether to revoke the decision to cancel your visa under s 501CA of the Migration Act. The information consists of:

* Your National Police Certificate dated 24 July 2015
* Supervision Order Progress Report by Dr Michael Davis, dated 27 May 2015
* County Court of Victoria Ruling dated 16 August 2011
* Psychiatric Assessment Report by Dr Lester Walton dated 17 September 2013
* County Court of Victoria, Reasons for Judgment, dated 8 November 2013
* Neuropsychological Assessment Report, Dr Nathaniel Popp, dated 4 June 2014.

A copy of this information is attached. You are invited to comment on this information.

…

[22] The first attached document, being the applicant’s National Police Certificate dated 24 July 2015, included the following reference to one of the pending charges against the applicant –

|  |  |  |  |
| --- | --- | --- | --- |
| Court | Court Date | Offence | Court Result |
| Pending Charge | 13 May 2015 | Client solicit sex work services – public place | At the date of issue, this charge has not been determined by a court. This cannot be regarded as a finding of guilt against the  individual named above. |

[23] The second attached document, being the Supervision Order Progress Report by Dr Michael Davis dated 27 May 2015, XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. The first two pending charges, one of which was referred to in the National Police Certificate, related to the applicant allegedly soliciting sexual services on two separate occasions in November 2014. That conduct also gave rise to the applicant’s convictions for breaching his supervision order. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. The third pending charge related to the applicant allegedly assaulting his community services case officer, Shane l’Anson, on 5 August 2014. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.

[24] The other attached documents did not address the further criminal charges pending against the applicant.

[25] By a letter dated 19 September 2016, the officer of the Department informed the applicant and his representative that –

The department has information which has been received and which may be taken into account when making the decision whether to revoke the decision to cancel your visa under s 501CA of the Migration Act. This consists of advice of three pending charges which have not yet been determined by the courts. These are:

* Invite/solicit a person for sexual services on 14 November 2014
* Solicit sex work services in a public place on 13 May 2015
* Assault against your community corrections supervising officer in August 2014.

Reference to some of these pending charges is made in your National Police Certificate dated 24 July 2015 XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.

You are invited to comment on the pending charges. …

…

Any response that you make should be received by the department no later than 14 days from the date you are taken to have received this letter.

[26] The reference in the above letter to the second solicitation offence occurring on 13 May 2015 was a slip, as that was the court date that had been recorded on the National Police Certificate dated 24 July 2015. This was corrected by the Department in later correspondence of 5 December 2016, which is referred to below.

[27] By an email to the Department dated 20 September 2016, the applicant’s representative stated that –

We note that Mr. Williams has been invited to comment on three pending charges. **We respectfully submit that we have not been provided with sufficient particulars of these charges to be able to provide a response. We would greatly appreciate it if you could provide us with further information held by the Department in relation to all of these charges**, including but not limited to the Court that the matters are to be heard in and the Informant for each charge, so that we can obtain further information and instructions from our client.

We note that a response is due to be provided to the previous invitation to comment sent on 30 August 2016 by 27 September 2016. A response to the latest invitation to comment dated 19 September 2016 is due by 3 October 2016.

As the subject matters of both invitations to comment overlap, and in light of the seriousness of the information provided to comment on, we also request further time to be able to respond to both invitations to comment in the interests of natural justice.

[Emphasis added]

[28] By an email dated 21 September 2016, the officer of the Department informed the applicant’s representative that –

**The Department has no further information it is proposing to obtain or place before the revocation decision maker in relation to the pending matters**. You will note that reference is made to pending matters in some of the documents already sent to Mr Williams and it is for this reason that they have specifically been brought to your attention. These documents include his National Police Certificate dated 24 July 2015 XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.

In relation to an extension of time to respond, I am happy to provide 28 days from today. Should you require further time beyond this, please let me know at any time.

[Emphasis added]

[29] By an email dated 19 October 2016, the applicant’s representative sent to the Department written submissions and other documents in support of the applicant’s revocation request. In the written submissions, the applicant’s representative responded to the Department’s invitations to comment and, amongst other things, made representations about the three pending charges –

**Charge 1**

In relation to charge 1 as outlined in the invitation to comment, namely “invite/solicit a person for sexual services on 14 November 2014”. We submit that it is unclear what this alleged charge relates to, as we have not been provided with sufficient particulars. Furthermore, we have been unable to locate particulars of this charge in the Supervision Order Progress Report by Dr. Michael Davis or the police clearance certificate. XXX XXX XXX XXX XXX XXX XXX XXX,as pre however we are instructed that this conduct has been dealt with by way of charges and subsequent convictions for breaching his supervision order. We are instructed by Mr Williams’ criminal lawyer that she is not aware of this alleged pending charge against Mr. Williams and that he cannot be charged with further offences arising out of an incident that has already been dealt with by the Court. Accordingly, we submit that we are not in a position to comment further in relation to this alleged pending charge.

**Charge 2**

Regarding charge 2, namely “solicit sex work services in a public place on 13 May 2015”, we note that this charge is listed on Mr. Williams’ AFP check, which was obtained by the Department and is dated 24 July 2015. We further note that 13 May 2015 is recorded as the court date, not the date of offence, and that Mr. Williams was in custody in May 2015. Therefore, it is unclear whether this alleged charge is the same as charge 1. Furthermore, we are instructed by Mr. Williams’ criminal lawyer that she is not aware of such a charge against Mr. Williams. We note that we do not have sufficient particulars to be able to respond further to this charge.

**Charge 3**

In relation to charge 3, namely “assault against your community corrections supervising officer in August 2014”, we are instructed by Mr. Williams’ criminal lawyer that she is aware of this charge. However, we are instructed that this matter has been adjourned and the Court does not attend [sic] to hear this charge unless Mr. Williams’ immigration matter is resolved and he is released back into the community. While Mr. Williams’ criminal lawyer has requested a copy of the brief in relation to this charge, she has not received it to date. Therefore, we do not have access to the prosecution’s case and evidence in relation to this charge, and consequently we do not have sufficient particulars to respond to this charge.

We submit that, if the Department is to take these pending charges into consideration when making a decision in relation to Mr. Williams’ revocation application, further particulars need to be provided to Mr. Williams to enable him to adequately respond to the adverse information.

[30] By a letter dated 5 December 2016, the officer of the Department informed the applicant and his representative that –

In a letter dated 19 September 2016, you were provided with some details of two pending soliciting charges and an assault charge against you.

The information included that one of the charges was *solicit sex work services in a public place* on 13 May 2015. Your legal representative responded to this letter and questioned the date of the offending.

Enquiries made by the Department have clarified with the police that the date of the alleged offending for this particular pending charge was 8 November 2014, and the charge was activated on 13 May 2015.

The police informant also confirmed that the other pending charge against you of *invite/solicit a person for sexual services* relates to alleged conduct on 14 November 2014; this is not affected by the court considering the circumstances in the breaching of a supervision order matter.

You are invited to comment on this new information. …

[31] By an email to the Department dated 8 December 2016, the applicant’s representative stated that –

We note from the invitation to comment that the Department has made enquiries with the informant to obtain further information in relation to two of Mr. William’s pending charges. In order to respond to the invitation to comment, we require further information regarding the charges so that we can make necessary enquiries with the relevant third parties. **Accordingly, we respectfully request the contact details for the informant as well as any documentary evidence provided to the Department by the police, including charge sheets and police briefs.**

We note that this is an extremely serious matter and respectfully ask that our client is provided with additional time to be able to obtain the necessary information to respond. In light of our request for additional information and the necessary enquiries that our client will need to make regarding these charges, combined with the upcoming Christmas break, we kindly ask for a further 28 days from the original due date to provide our response. However, as our client will be making enquiries for information from third parties, we note that we may require additional time due to the holiday season.

[Emphasis added]

[32] By an email to the applicant’s representative dated 16 December 2016, the officer of the Department stated that –

The informants in relation to the soliciting matters are Stefan Boskovic and Emma Legg of St Kilda Police.

The informant in relation to the assault matter is Mark Deacon of Ringwood Police.

**As previously advised by email dated 21 September 2016, the Department has no further information it is proposing to place before the decision maker in relation to these matters, other than XXX XXX XXX XXX XXX contained in documents already provided to you**, specifically the National Police Certificate dated 24 July 2015 and the report of Dr Michael Davis dated 27 May 2015. This position remains unchanged.

In relation to your request for an extension of time to respond, I can confirm an extension until 16 January 2017. Please let me know should you need a further extension at that time.

[Emphasis added]

[33] By an email dated 13 January 2017, the applicant’s representative informed the Department that –

We have been in contact with Mr. Williams’ criminal lawyer, who has been making enquiries with the informants to obtain further information regarding the pending charges. We have been advised by the criminal lawyer that they have not yet received the requested documents from the informants and that a further extension will be required, particularly due to delays caused by the Christmas break. She has not at this stage been able to provide us with an indication from the informants as to when they expect to be able to provide us with the briefs.

We appreciate your understanding to date and kindly request a further extension of 28 days to respond to this information. We would also greatly appreciate it if the response to the latest invitation to comment dated 11 January 2017 could be extended to be due on the same date to reduce overlap of responses.

[34] By an email dated 16 January 2017, the officer of the Department informed the applicant’s representative that “[a] further extension of time to respond to all letters is approved, which will mean a response is due by COB 13 February 2017”.

[35] By an email dated 10 February 2017, the applicant’s representative informed the Department that –

We have been advised by our client’s criminal lawyer that they are yet to receive the briefs in relation to two of the three pending charges despite numerous attempts. We enclose written confirmation of these attempts to obtain the required information from the informants.

We understand that it is important that this matter is resolved efficiently. However, as we have not yet been able to obtain the required information in relation to two of the pending charges, we are unfortunately not in a position to provide a response at this time. We would greatly appreciate it if you could provide us with a further 28 days to respond to the invitations to comment, in light of the seriousness of the matter and the difficulties in obtaining information from third parties.

[36] That email attached an email from the applicant’s criminal lawyer’s office to the applicant’s representative also dated 10 February 2017, which stated that the applicant’s criminal lawyer’s office had requested a copy of the police briefs from each of the respective Victoria Police informants, but had only succeeded in obtaining one of the briefs from Constable Boskovic. The email stated that the police brief was enclosed, and on the face of the email, it appears that it was in fact attached, but it is not in evidence before the Court.

[37] By an email to the applicant’s representative dated 13 February 2017, the officer of the Department stated that –

I have discussed your request for a further extension of time with my manager. In view of previous extensions granted and the need to finalise Mr Williams’ request for revocation of visa cancellation, and given the information available in relation to pending charges contained in documents already sent to Mr Williams, I am not able to approve a further extension of time of 28 days.

Please provide any further response you wish to make by COB 21 February 2017.

[38] Separately to the correspondence between the applicant’s representative and the Department, by an email dated 17 February 2017, the applicant’s representative provided an update and sought further information from the applicant’s criminal lawyer –

We have been advised by the Department that they will give us a final extension to 21 February 2017. This means that we will need to respond on the basis of the information that we have to date. However, if the informants respond to you in the future, it would still be helpful to have a copy of the additional briefs if a decision hasn’t been made yet.

We have reviewed the brief that you have received and were wondering if you could provide us with some clarification. We understand that Simon has previously been convicted of breaching his supervision order as a result of two instances where he solicited sex services in St. Kilda. These incidents appear to have also led to the outstanding soliciting charges (one of which was the subject of the brief that you sent through to us). We just wanted to clarify whether it is possible to have two charges arising out of the same incident (ie. A soliciting charge and a breach of supervision order charge) or whether the soliciting charges can be challenged on the basis that he has already received convictions in relation to those events. This is a matter beyond our expertise so we would be grateful if you would be able to assist us.

…

[40] By an email dated 21 February 2017, the applicant’s representative informed the officer of the Department that –

We confirm, as mentioned in our previous email dated 10 February 2017, that despite numerous requests to obtain the remaining two briefs in relation to the soliciting charge (Informant Emma Legg) and the assault charge (Informant Mark Deacon) we have not been successful in obtaining these. We confirm that we have still not obtained these briefs.

Consequently, we respectfully submit that we do not have sufficient information to respond to the invitations to comment, particularly in light of the seriousness of this matter and its importance to Mr. Williams’ revocation matter.

Accordingly, we wish to advise that we are not in a position to respond at this stage.

If more information has been received by your Department in relation to these charges, we kindly request that our client is advised of this and provided an opportunity to comment.

[41] Following that email, the applicant and the Department did not exchange any further correspondence before the Assistant Minister made the non-revocation decision on 14 March 2017. As set out at [13] above, the Assistant Minister’s statement of reasons recorded his consideration of the further criminal charges pending against the applicant in making the non-revocation decision.

1. The fact that the Department had the brief was disclosed to the appellant only by its (mistaken) placement into the court book at an early stage in the preparation of the application. This led to evidence being led before the primary judge about the material. There was a dispute in the evidence as to whether Victoria Police had served the appellant with the brief in relation to the assault charge. The primary judge resolved this by finding that the police brief in relation to that charge had *not* been served on the appellant by the police. The evidence otherwise revealed that the Department had the police brief in relation to the assault charge, but did not provide it to the Minister and that the Department did not have either police brief in relation to the two solicitation charges. The appellant, on the other hand, had the police brief in relation to one of the solicitation charges, but did not have it in relation to the other nor in relation to the assault charge.
2. The conduct of the Department in not providing the appellant with the police brief that it did have was explained in evidence by the responsible officer with carriage of the matter in the department: Ms Muscat. At J[48] the primary judge set out her explanation, which included the fact that the police had told her that the appellant had been served with the brief:

Ms Muscat gave the following account –

1. On 26 August 2016, Ms Muscat sent an email to Senior Constable Mark Deacon of Victoria Police seeking information about the assault charge pending against the applicant. Ms Muscat referred to her earlier communications with Senior Constable Deacon in relation to the matter, and requested a copy of any document with details of the assault charge pending against the applicant, and which could be disclosed to him. Ms Muscat explained to Senior Constable Deacon that “we [the Department] are unable to place material before the revocation decision maker [the Assistant Minister] unless it has been released to the client [the applicant] and he has been given an opportunity to comment on it”.
2. On 1 September 2016, Senior Constable Deacon responded to Ms Muscat’s email and confirmed that there was an assault charge pending against the applicant. Senior Constable Deacon attached a copy of the police brief in relation to that assault charge, and stated that “he [the applicant] should have seen an original [of the police brief] from when it was served on him.”
3. After receiving the assault charge police brief, Ms Muscat, in consultation with her manager at the Department, decided not to use the police brief in the revocation review process. That is, Ms Muscat decided not to put the police brief before the Assistant Minister for his consideration in making the decision whether to revoke the cancellation of the applicant’s visa. Consequently, Ms Muscat considered that the Department was not required to provide a copy of the police brief to the applicant and invite him to comment on it. Ms Muscat explained that the main reason why she decided not to use the police brief was that XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX in Dr Davis’s report, which had been provided to the applicant for comment. Ms Muscat stated that an additional reason was that it was not clear to her what Victoria Police had already released to the applicant, and she noted that Victoria Police had previously advised the Department in respect of other revocation requests that some information was not to be released to the public, including to the person making the revocation request.
4. Ms Muscat confirmed that she did not provide a copy of the police brief to the applicant or his representatives at any stage in the revocation review process.
5. Ms Muscat explained that she prepared the material that went before the Assistant Minister for his consideration in deciding whether to revoke the cancellation of the applicant’s visa, and that she did not include a copy of the police brief in that material. Ms Muscat further explained that she prepared a draft of the Assistant Minister’s reasons for not revoking the cancellation of the applicant’s visa, and that the Assistant Minister made the non-revocation decision by signing a copy of those draft reasons, without making any amendments.

## The primary judge’s consideration

### Ground 1: procedural fairness

1. At J[76], the primary judge set out the general principles as to procedural fairness, as follows:

The principles for assessing the content of the common law obligation to afford procedural fairness were not in dispute in this proceeding. The key principles may be briefly summarised as follows. Procedural fairness is concerned with, and requires, a fair procedure, and not a fair outcome: *SZBEL v Minister for Immigration* [2006] HCA 63; 228 CLR 152 at [25] (the Court). The statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires, and the question whether a procedure was fair is necessarily tied to the particular facts of the case: *SZBEL* at [26]. The obligation to afford procedural fairness includes a general requirement to give a person who is the subject of a decision the opportunity to put information and submissions to the decision-maker in support of an outcome that supports his or her interests, including “to rebut or qualify … adverse material from other sources which is put before the decision maker”: *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; 49 FCR 576 at 591-2 (the Court), cited with evident approval in *SZBEL* at [29] and in *BRF038 v Republic of Nauru* [2017] HCA 44; 91 ALJR 1197 at [59]. An opportunity should be afforded to comment on any adverse information that is “credible, relevant and significant to the decision to be made”: *Kioa v West* [1985] HCA 81; 159 CLR 550 at 629 (Brennan J). As those passages from *Alphaone* and *Kioa v West* suggest, the requirement to provide an opportunity to comment on adverse information is usually limited to adverse information that is before the decision-maker, such that it can be significant to the decision to be made. The Court in *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 259 CLR 180 considered that general requirement at [83] –

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person. Ordinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry.

1. Turning to the legal framework, being the statutory framework of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth), the first point made by the primary judge was that s 501CA(3) required the Minister to give particulars of the information relevant to the *cancellation* *decision*, and not information that might be relied on in deciding whether to revoke the cancellation decision. This, however, his Honour said, did not exhaust the Minister’s obligations in relation to fairness. The primary judge quoted, and agreed with, a passage from the judgment of Tracey J in *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430 at [42], as follows:

It does not follow that, in all cases, the Minister will accord procedural fairness simply by complying with the requirements of s 501CA(3). Once the invitation to make representations is extended to a visa holder it falls to a visa holder, if he or she wishes to do so, to provide information and submissions to the Minister in an effort to persuade the Minister that a revocation decision should be made… It will not, normally, be necessary for the Minister to afford a further opportunity to the applicant to deal with particular issues. If, however, the Minister becomes aware of information which is personal to the applicant and which might lead the Minister to disbelieve some critical information supplied by the applicant, it may be necessary for the Minister to expose that information to the applicant and give the applicant the opportunity of responding to it before making a decision.

1. At J[80], the primary judge expressed his conclusion as follows:

On the particular facts of the present case, I consider that the applicant was afforded procedural fairness in the revocation review process. I have reached that conclusion by reference to the totality of the circumstances of the revocation review process, summarised above, and in light of the Assistant Minister having recorded his limited consideration of the further criminal charges pending against the applicant in his statement of reasons for making the non-revocation decision.

1. The primary judge’s reasoning as to the affording of procedural fairness was set out in J[81]–[83] as follows:

[81] The applicant was put on notice that the pending charges may be taken into account by the person making the decision whether to revoke the cancellation of his visa, and he was provided with an opportunity to comment on all of the adverse information that was before the decision-maker. As detailed above, by a letter dated 30 August 2016 (see [[21](#_bookmark1)] above), the Department provided the applicant with a copy of the National Police Certificate and Dr Davis’s report, XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX, and advised him that the information contained in those documents, amongst others, “may be taken into account when making the decision whether to revoke the decision to cancel your visa”. Further, by a letter dated 19 September 2016 (see [[25](#_bookmark2)] above), the Department brought the potential relevance of the pending charges to the applicant’s attention, setting out each of the pending charges and noting that they had not yet been determined by the courts, and stated that XXX XXX XXX XXX XXX XXX XXX XXX XXX was contained in the National Police Certificate and Dr Davis’s report, which had already been provided to the applicant. The subsequent correspondence between the applicant’s representative and the Department, summarised above, made clear that the applicant was on notice of the potential relevance of the pending charges. Further, it is not disputed that no additional material in relation to the pending charges was before the Assistant Minister for his consideration in making the non-revocation decision. The evidence of Ms Muscat, the officer of the Department with carriage of the applicant’s revocation request, made clear that while the Department obtained a copy of the assault charge police brief during the revocation review process, it was not put before the Assistant Minister for his consideration in making the non-revocation decision. The applicant also made clear during this proceeding that he does not allege that the Assistant Minister did not truly make the non-revocation decision himself, in the sense of impermissibly deferring to anyone else in his fact finding or opinion formation in making the non-revocation decision.

[82] It is apparent that in undertaking the revocation review process, the Department formed the view that it was only srequired to put to the applicant for comment the same material that it would put before the Assistant Minister, and it deliberately did not put the assault charge police brief to the applicant or before the Assistant Minister. That the Department formed that view is understandable. The general requirement to put adverse information, as it is framed in the leading cases of *Kioa v West*, *Alphaone* and *SZSSJ* in the passages referred to above, is limited to a requirement to put adverse information that is before the decision-maker, such that it can be significant to the decision to be made. That general requirement provides guidance to administrative decision-makers and persons who assist those decision-makers, such as the Assistant Minister and the officers of his Department in this case.

[83] However, that general requirement is not a comprehensive statement of what will be required in all cases, and the question whether a procedure was fair is necessarily tied to the particular facts of the case. The applicant submitted that in the particular circumstances of this case, it was not sufficient that he was invited to comment on the same material that went before the decision-maker. The applicant submitted that he could not make an informed choice, in light of considerations about his privilege against self-incrimination in potential criminal proceedings, about what comment to make, if any, in relation to the pending charges, until he knew more about the material that Victoria Police proposed to use to prosecute him for those charges. That position is understandable and the applicant’s representative conveyed that position to the Department during the revocation review process. However, the applicant’s position did not have the effect of indefinitely extending the obligation to afford procedural fairness. In my view, adopting the language of the High Court in *SZSSJ* at [82], the revocation review process was “reasonable in the circumstances” and it did not “so constrain the opportunity of the [applicant] to propound his … case for a favourable exercise of the power to amount to a practical injustice.” The applicant was afforded a sufficient opportunity to comment on the pending charges so as to discharge the obligation to afford procedural fairness.

1. At J[84], the primary judge dealt with the submissions as to how the procedure could have been made fair. The primary judge did so because he considered that to do so “provide[s] a perspective from which to assess the procedure that was in fact adopted”. The then applicant’s submissions had been set out at J[64], and described three ways in which procedural unfairness could have been avoided, as follows:

… *First*, the Assistant Minister could have made his decision whether to revoke the cancellation of the applicant’s visa without having regard to the pending criminal charges. Instead, the Assistant Minister at [91]-[93] of his statement of reasons, set out at [[13](#_bookmark0)] above, expressly placed “limited weight” on the two solicitation charges, and noted the assault charge. *Second*, the Department could have provided the applicant with a copy of the assault charge police brief, which it knew the applicant was seeking to obtain. Instead, the Department engaged in correspondence with the applicant’s representative which counsel for the applicant characterised as “careful”, in which the Department avoided suggesting that it had a copy of the police brief, but also avoided denying it. *Third*, the Department could have provided the applicant with more time to obtain the police briefs himself, so that he could make an informed comment to the Department in relation to the pending charges. The applicant submitted that there was no particular urgency for the decision whether to revoke the cancellation of his visa to be made, and that there was no statutory authority to impose a deadline for the applicant to comment on the pending charges, given that reg 2.52(2)(b) of the *Migration Regulations* was directory rather than mandatory in the jurisdictional sense, and the timeframe prescribed in that regulation had already elapsed. Instead, despite the applicant’s representative’s clear correspondence to the Department explaining that the applicant required the police briefs to comment on the pending charges, and the known fact that the applicant’s representative was actively making enquiries to obtain the police briefs but had not yet received them, the Department refused to further delay and the Assistant Commissioner proceeded to make the non-revocation decision.

1. At J[84] the primary judge said the following about these three suggested options:

… In respect of the first suggested option, it is not to the point to suggest that the Assistant Minister could have made the decision whether to revoke the cancellation of the applicant’s visa without having regard to the pending charges. The Assistant Minister did have regard to the pending charges, and that suggestion goes to outcome, in the sense of the content of the decision, rather than procedure. In respect of the second suggested option, the applicant conceded that there was no specific obligation for the Department to notify him that it had obtained a copy of the assault charge police brief, or provide him with a copy of it. Dr Davis’s report, which was provided to the applicant, XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. The studied obscurity in the Department’s correspondence, by which the Department avoided suggesting that it had a copy of the police brief, but also avoided denying it, did not assist to achieve the overarching objective to afford the applicant a fair procedure. However, it also did not result in procedural fairness being denied. Finally, in respect of the third suggested option, the applicant suggested that he should have been granted more time to obtain a copy of all of the police briefs before any decision whether to revoke the cancellation of his visa was made. Such an assessment about what amount of time was required to provide a fair procedure is necessarily a matter of fact and degree that involves evaluative judgment. As emphasised by the Minister, the applicant was given approximately six months between the issue of the pending charges being raised with the applicant and the matter being determined. The Department granted the applicant several extensions to the deadline to comment on the pending charges and then, after the deadline for the final extension lapsed, the Assistant Minister proceeded to make the non-revocation decision. The reasonableness of that period of time is informed by the statutory setting, which included the ordinary 28 day timeframe for a person to make representations seeking revocation under reg 2.52(2)(b) of the *Migration Regulations*. In my view, in all of the circumstances, the applicant was afforded sufficient time to comment on the pending charges, and the revocation review process was a fair procedure.

### Materiality if procedurally unfair

1. The primary judge then turned to the question of materiality on the hypothesis that there was a failure to afford procedural fairness, saying at J[85]:

Further, even if I had found that there was a breach of the obligation to afford procedural fairness in the revocation review process in the manner alleged by the applicant, I do not consider that any such breach would have been material. The question for the Assistant Minister under s 501CA(4)(b)(ii) of the Act was whether there was “another reason” to revoke the cancellation of the applicant’s visa, which carried sufficient weight or significance so as to satisfy the Assistant Minister that the cancellation of the applicant’s visa “should be” revoked: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 at [64] (Colvin J). Assuming that a denial of procedural fairness was established, the applicant would bear the onus of proving as an ordinary question of fact that if procedural fairness had been afforded, that could realistically have resulted in a different decision: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at [45]-[46] (Bell, Gageler and Keane JJ). To this end, the applicant submitted that if the revocation review process had been fair, there was a realistic possibility that the Assistant Minister would have revoked the cancellation of his visa. That enquiry requires a hypothetical analysis of what the consequences of a fair procedure would have been, in circumstances where I have found that procedural fairness was afforded. Again, the applicant’s suggested options for avoiding procedural unfairness provide a perspective from which to undertake the analysis. As stated above, the applicant’s first suggested option is not to the point because it goes to outcome, rather than procedure. Under the applicant’s second and third suggested options, even taking the applicant’s case on what a fair procedure required at its highest, I do not consider that the applicant proved that there was a realistic possibility that the Assistant Minister would have revoked the cancellation of his visa. On the assumption that the applicant had a copy of the assault charge police brief during the revocation review process, the applicant has not established what representation he would have made in respect of the pending assault charge. Dr Davis’s report, which was provided to the applicant for comment and which was before the Assistant Minister, XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. In relation to the pending solicitation charges, the police briefs for those charges are not before the Court. However, as with the assault charge, Dr Davis’s report XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. Further, the applicant’s representative did have access to one of the solicitation charge briefs during the revocation review process. Noting that the police briefs for those charges are not before the Court, I am not satisfied in all of the circumstances that having copies of the two additional briefs could have realistically resulted in a different outcome. It must be emphasised that with respect to all of the pending charges, the Assistant Minister’s statement of reasons referred to the fact that those charges were “pending” and that they “have not yet been determined by a court”. The Assistant Minister’s reasons stated that he gave “limited weight” to the pending solicitation charges and that those pending charges arose from the same circumstances as the applicant’s convictions for non-compliance with his supervision order. In relation to the pending assault charge, the Assistant Minister’s reasons only went as far as noting that the alleged behaviour was consistent with some of the applicant’s earlier violence-related conduct. That reasoning was limited to the fact that there were further charges pending against the applicant, and it was informed by Dr Davis’s report XXX XXX XXX XXX XXX XXX XXX XXX. Having regard to XXX XXX XXX XXX XXX XXX XXX XXX Dr Davis’s report that was before the Assistant Minister, and the limited reliance by the Assistant Minister on the fact of the pending charges, which acknowledged that they had not been determined by a court, I am not persuaded that the applicant has established that there was a realistic possibility of a different outcome if, as he contends, the Minister was required to give him more time to pursue enquiries.

### Ground 2: most recent information

1. The primary judge accepted that the Assistant Minister had constructive knowledge of the police brief in relation to the assault charge. The primary judge rejected the submission based on what Mason J had said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 44–46, as to the requirement to take into account the most up to date information, on the basis that the comments of Mason J were made in the context of a mandatory consideration. The primary judge said at J[88]:

… As advanced by the Minister, that limitation was identified by Kiefel and Bennett JJ in *Huynh* at [80], where their Honours stated that “[t]he factor being considered, to which the material is relevant, must be essential to the exercise of the discretion before any obligation to examine the most recent and accurate information can arise. That is to say it must partake of the nature of a relevant consideration in the sense we have discussed.” The High Court refused an application for special leave in that case, including on that issue, on the basis that there were insufficient prospects of success in an appeal: *Huynh v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCATrans 968. In the present case, the assault charge pending against the applicant was not an essential consideration in the Assistant Minister’s decision whether to revoke the cancellation decision, and therefore this form of error is not made out.

1. On the hypothesis, in the alternative, that the pending assault charge was an essential consideration the primary judge said at J[89]:

*Second*, even if the pending assault charge was an essential consideration so as to require the Court to consider this ground further, it cannot be said that the material before the Assistant Minister was “incomplete, inaccurate or misleading” in the sense contemplated by Mason J in *Peko-Wallsend* because it did not contain the assault charge police brief. The information contained in Dr Davis’s report XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. That formulation of Mason J in *Peko- Wallsend* that the material not be “incomplete, inaccurate or misleading” should not be treated as if it were a statute, which defined the principle in precise and definite terms: *Papaconstuntinos v Holmes a Court* [2012] HCA 53; 249 CLR 534 (French CJ, Crennan, Kiefel and Bell JJ). As noted by Kiefel and Bennett JJ in *Huynh*, the same principle has been put in other ways in other decisions of this Court. In *Tickner v Bropho* [1993] FCA 208; 40 FCR 183 at 199, Black CJ held that there may be an improper exercise of power if there is material known to be readily available which is likely to be of critical importance in the decision, and it is not utilised. In the present case, the fundamental point is that I do not consider that the Assistant Minister was disadvantaged in his decision-making because he did not consider the assault charge police brief, and therefore this ground is not made out.

### Materiality if the assault charge police brief should have been considered by the Assistant Minister

1. The primary judge addressed this question of materiality at J[90] as follows:

Further, even if I had found that the Assistant Minister erred by not acting on the most current material available to him, I do not consider that the applicant has established that any such error would have been material. As stated above, the applicant accepted that he was required to establish materiality for this error to be jurisdictional. That is, the applicant was required to prove as an ordinary question of fact that if the error was not made, that could realistically have resulted in a different decision: *SZMTA* at [45]-[46] (Bell, Gageler and Keane JJ). Assuming that this form of error was established, I am not persuaded that if the Minister had considered the assault charge police brief, there was a realistic possibility that he would have revoked the cancellation of the applicant’s visa. As stated above, the information contained in Dr Davis’s report XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX, and I do not consider that the Assistant Minister was disadvantaged in his decision-making because he did not consider the police brief. Further, in considering the pending assault charge, the Assistant Minister in his statement of reasons only went as far as noting that the alleged behaviour was consistent with some of the applicant’s earlier violence-related conduct. There is nothing in the assault charge police brief that would have called that reasoning into question.

## The amended notice of appeal

1. The appellant, through his pro bono counsel, Ms Brenker, gave notice of a proposed amended notice of appeal on 1 March 2021 which accompanied submissions filed on that date and a later document on 12 August 2021. Counsel sought, and was granted at the hearing, leave to further amend the notice of appeal. The grounds of that further amended document were as follows:
2. The Court below erred in finding that the decision of the respondent was not affected by jurisdictional error because the respondent did not comply with an implied condition on the lawful exercise of power, being that he afford procedural fairness to the appellant.

**Particulars**

The appellant was not afforded procedural fairness because:

1. the appellant was deprived of an opportunity to be heard by the Department’s withholding of the fact it had relevant information in the form of a police brief in its possession and that the police brief contained no more or different exculpatory or adverse information than the appellant already had in his possession;
2. the invitation to comment provided to the appellant was not real or meaningful;
3. it was unreasonable for the Department to refuse more time for the appellant to make inquiries to obtain police briefs relating to adverse information before the Minister;
4. the above failures were a material denial of procedural fairness.
5. The Court below erred in finding that the decision of the respondent was not affected by jurisdictional error because the respondent did not comply with an implied condition on the lawful exercise of power, being that he act on the basis of the most current information available to him.

**Particulars**

1. There was an implied condition on the Minister’s lawful exercise of power to act on the basis of the most current information available to him.

ia. That implied condition is not limited to material to be considered in assessing a mandatory relevant consideration.

1. That implied condition was breached because the Department did not put before the Minister a copy of a police brief about a pending assault charge against the appellant.
2. Without the police brief, the material before the Minister regarding the pending assault charge was incomplete, inaccurate or misleading.
3. The Minister’s breach of the implied condition was material. .

## The Assistant Minister’s Decision

1. Before coming to the appellant’s arguments, it is appropriate to pay careful regard to the terms of the Assistant Minister’s decision and to some of the important information that was before him. This is so because the appellant’s complaints focus on not being told about the existence of, being misled in some way about, and the Minister not taking into account, a police brief about an assault charge, which as will be seen was relatively minor in nature and to which the Assistant Minister only gave limited regard.
2. The following is derived from the Assistant Minister’s reasons and from material that was before him.
3. The appellant came to Australia from Sri Lanka in 1988 aged nine years. Unlike his siblings the appellant has not become a citizen.
4. On 4 February 2009, the appellant (then 29) was convicted in the County Court of Victoria of rape and assault, for which crimes he received concurrent sentences of five years (with three and a half years non-parole) and one year, respectively. The offending had occurred eight and a half years earlier in September 2000 in St Kilda. He stood two trials for the charges; was convicted at both; successfully appealed both; and, before the third trial (second re-trial) he pleaded guilty to the offences.
5. The offending involved the rape and assault of a sex worker. It was described in the Assistant Minister’s reasons at [55]–[58] (AMR [55]–[58]) as follows:

[55] In 2000, Mr WILLIAMS retained the services of the victim who was a sex worker. She agreed to perform oral sex for payment of $40. Mr WILLIAMS took her in his car to a secluded car park and refused to pay the $40 before having sex and got into the back seat of the car with the victim. He forcibly removed her underwear and placed his hands 'forcibly' around her throat, threatening to strangle her (the common assault count). He then raped her by placing his penis in her vagina and threw $40 at her.

[56] The Judge noted that the victim was working to try to earn money to support a heroin habit and this made her more vulnerable than most and the law should protect people in her situation. A victim impact statement before the Court indicated that the victim was 'profoundly affected' by Mr WILLIAMS' conduct and had to relive the experience through two trials. The Judge found that the victim suffered emotionally and psychologically and 'that suffering may be expected to last for some time if not indefinitely'.

[57] The sentencing Judge described Mr WILLIAMS' offending as 'abhorrent and repugnant' and 'very serious'.

[58] I note that in sentencing the Judge commented on the 'community's disgust with this type of offending' and that no sentence other than a term of imprisonment was appropriate. The Judge noted that the length of delay in the matter coming to court, a period of over eight years as a result of appeals by Mr WILLIAMS, justifies a sentence which would be much more lenient than would otherwise have been imposed.

1. In October 2010, the appellant was convicted in the Magistrate’s Court of what were described in submissions as the “driving offences”. The appellant was on parole, having been released on parole on 5 February 2009, having spent already nearly four years on remand at the time of his sentence. The offences in 2010 involved the motor vehicle, but can be better described as a serious road rage episode in which the appellant used his vehicle as a weapon. At AMR [65] the episode was described by the Assistant Minister as follows:

The available information indicates that the above convictions arose from a road incident. In August 2009, Mr WILLIAMS was following another vehicle in an intimidating manner while driving his own car. The other driver stopped his car and walked to Mr WILLIAMS to ask what his problem was. Mr WILLIAMS drove into the victim's vehicle and reversed. He then drove forward again and struck the victim's car and the victim, who was thrown up and over and landed on the ground. Mr WILLIAMS then left the scene quickly, at times driving on the wrong side of the road. The victim received a number of injuries.

1. The convictions and punishment were described in the AMR [64] as follows:

* Reckless conduct endanger serious injury, four months of imprisonment to be served by way of an intensive correction order, licence disqualification nine months
* Drive in a manner dangerous, four months of imprisonment to be served by way of an intensive correction order, licence disqualification six months
* Fail to stop vehicle after an accident, four months of imprisonment to be served by way of an intensive correction order, licence disqualification for three months.

1. In May 2011, the appellant was convicted of behaving in an offensive manner in a public place involving urinating in public. The offence was committed whilst he was on an intensive corrections order. In August 2013 the appellant was convicted of minor shoplifting charges.
2. Further offending occurred in March 2015, but to appreciate its significance and its relationship to the assault and other charges that were pending at the time of the decision of the Assistant Minister not to revoke the cancellation decision, it is necessary to return to 2009.
3. In September 2009 (seven months after being granted parole by the sentencing Judge in February 2009) the appellant’s parole was revoked by the Adult Parole Board following “incidents with the Office of Corrections and [the appellant’s] rape fantasies”. This quotation comes from the County Court judgment of Judge Pullen on 16 August 2011 in which the judge made a supervision order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). It should be noted that the evidence before the Court in 2011 included a report of a consultant forensic psychologist, Dr Michael Davis, and of a clinical neuropsychologist, Dr Nathaniel Popp. The judgment of Judge Pullen was before the Assistant Minister. The reasons of Judge Pullen included the following at paragraphs [176]–[177]:

[176] In addition, I have an assessment by Dr Davis that SR's future risk of committing a relevant offence is moderate to high. Dr Popp concurred with that assessment. Both were challenged regarding their conclusions, however maintained that assessment. Dr Walton and Ms Warren also acknowledged risk but did not quantify it. It was apparent based on their Reports testing using recognised risk assessment tools was limited.

[177] I am conscious that SR's only offending between 2000 and this Application involved non-sexual offending, however in my opinion the circumstances of that recent offending involved a similar background to the rape and assault offences dealt with by his Honour Judge Lacava. SR continued to present with a sense of entitlement, poor judgment and lacking insight.

1. It is to be noted that the judge also referred to Dr Davis’ view as to what might be called the minor offending at [47]:

Dr Davis described SR's convictions, as underscoring feelings of entitlement and poor judgment, such also being referrable to the road incident and 'urination'. Regarding the latter, whilst Dr Davis regarded that offending as a trivial and non-sexual offending, such underscored SR's feelings of wanting what was best for him, making a judgment call, not thinking it through, reflecting emotional immaturity, exceedingly poor insight and judgment, and rigidity of thinking.

1. The conditions of the supervision order required the appellant not to go to specific areas of St Kilda or to solicit sex from sex workers.
2. The Assistant Minister referred to the judgment of the County Court in 2011 at AMR [78]–[79] as follows:

[78] On 16 August 2011, the County Court of Victoria made a final Supervision Order in relation to Mr WILLIAMS. Such an order is made where an offender poses an unacceptable risk of committing a relevant offence if the Supervision Order is not made and the offender is in the community. The Court considered all the evidence in determining the risk of Mr WILLIAMS' sexual re-offending and was satisfied that he 'poses an unacceptable risk of committing a relevant offence if a Supervision Order is not made'.

[79] The ruling of the County Court of Victoria on 16 August 2011 sets out at length the evidence, including from psychologist and psychiatrist reports, and reasons for the finding. The Court noted that although Mr WILLIAMS had not committed any sexual offending since 2000 up to the date of hearing, he continued to present with a sense of entitlement, poor judgment and lacking insight.

1. The supervision order was reviewed in 2013 and continued. The appellant was thereby under orders not to visit certain areas of St Kilda where sex workers were likely to be found or to solicit sex from sex workers.
2. The Assistant Minister referred to the evidence before the County Court in 2013 at the review hearing and to the findings at AMR [81]–[83] as follows:

[81] In a report dated 17 September 2013, prepared for the two-year Supervision Order review hearing, consultant psychiatrist, Dr Lester Walton, indicates that Mr WILLIAMS is an unreliable source of information which created uncertainty about any diagnostic conclusions based on information he provided. His finding also included that Mr WILLIAMS had a 'chronic anxiety disorder on a background of non-specific personality disorder'. Dr Walton was of the view that Mr WILLIAMS' 'entrenched psychiatric conditions' were 'unlikely to change for the foreseeable future which implies continuation of much the same level of risk at present. He opined that Mr WILLIAMS had made no discernible progress in his social skills development and that he should continue mood stabilising medication. Given Mr WILLIAMS' lack of therapeutic progress, Dr Walton was ambivalent about the benefits of continued supervision but opined that it would be an 'overly bold call' to cease supervision completely.

[82] On 8 November 2013, the Country Court heard the application for review of the Supervision Order and its findings included noting:

* Mr WILLIAMS' breaches of the Supervision Order by going to Fitzroy Street in St Kilda; his failure to keep an appointment; and incidents involving shop theft
* His reluctance to engage in sexual offending programs
* His sometime denial of his sexual offending
* The unreliability of his self-reporting
* His lack of empathy for his victims
* The assessment by Dr Michael Davis that his overall risk of sexual re-offending was moderate to high
* The conclusions drawn in Dr Walton's report
* The report of Ms Dann, Mr WILLIAMS' speech pathologist, which indicated he was likely to make only minimal improvements in his communication skills if speech therapy continued.

[83] In deciding to continue the Supervision Order the Judge noted that Mr WILLIAMS had not been tested in the community without supervision for the last 13 years. The Judge concluded there was a "high degree' of probability that SR [Mr WILLIAMS] poses an unacceptable risk'.

1. In March 2015 the appellant was convicted in the County Court of four counts of failing to comply with the supervision order and sentenced to 5 and 3 months imprisonment, partly cumulative, for the respective pairs of charges: going to specific areas of St Kilda on two occasions (on 8 and 14 November 2014) and soliciting sex from a sex worker on two occasions on those dates.
2. The conduct of the appellant in the solicitation of the sex workers also formed the basis of two separate charges which, as at the date of the Assistant Minister’s decision, had not been heard, and to which the Assistant Minister referred in AMR [91] and [92] referred to by the primary judge at J[13] and referred to at [6] above.
3. The Assistant Minister described one aspect of the events of 8 November 2014 at AMR [62] as follows:

In relation to the incident on 8 November 2014, Mr WILLIAMS is said to have 'accidentally' locked the sex worker's belongings, including all of her clothes and money, in his car and that he did not have spare car key. She was forced to wait naked until the police arrived. The report notes that the woman was distressed by the incident and reportedly said 'I was panicked when I was with him. I didn't know were (sic) I was and it was dark. I'm still shaking from the experience'.

1. During 2014 Dr Popp assisted the Victorian Department of Justice with management and treatment of the appellant. The Assistant Minister referred to Dr Popp’s views in this regard at AMR [84]–[85] as follows:

[84] A neuropsychological report dated 4 June 2014, by Dr Nathaniel Popp was prepared to assist the Department of Justice with the case management and treatment of Mr WILLIAMS. Dr Popp assessed Mr WILLIAMS' current cognitive and neurobehavioural functioning. His report includes further background to Mr WILLIAMS' interaction with prostitutes, and attempts at interacting with women and asking them, unsuccessfully, for sex. Dr Popp concluded that Mr WILLIAMS has marked cognitive difficulties in all domains of function. He also expressed concerns that given Mr WILLIAMS' complex situation, there was no oversight or coordination of his treatment and this could compound and entrench Mr WILLIAMS' problem. Dr Popp expressed the view that it was important that Mr WILLIAMS' treatment was coordinated, with treaters and stakeholders meeting to formalise a plan to address his risk of sexual recidivism.

[85] With regard to sex offender treatment, Dr Popp was of the view that one-on-one long term treatment with a single practitioner was required, but acknowledged that this will prove 'an extraordinarily challenging' process for the practitioner.

1. Earlier, in August 2014, the appellant had allegedly assaulted his then specialist case manager. This was the pending assault charge to which the Assistant Minister referred at AMR [91] and [93] and referred to by the primary judge at J[13], as to which see [6] above.
2. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX a report of Dr Davis of May 2015 which was prepared for the 2015 review of the supervision order which was before the Assistant Minister and to which he made reference. The appellant and his advisors were provided with this report of Dr Davis.
3. Before referring to the use made by the Assistant Minister of the report of Dr Davis, the following is important for context. Dr Davis had been examining and reporting on the appellant since 2010, having produced three earlier reports (in August 2010, July 2011 and April 2013). XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.
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1. The report of Dr Davis was plainly of great significance to the Assistant Minister in the decision as reflected at AMR [86]–[89] as follows:

[86] Dr Michael Davis reviewed Mr WILLIAMS and prepared a progress report dated 27 May 2015 in relation to the Supervision Order. Dr Davis' report indicates that:

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1. The structure of the Assistant Minister’s reasons were such as to commence with the considerations that told in favour of revocation: the best interests of the appellant’s nieces who were minors, the strength and nature and duration of his ties to the community and the effect on the appellant and his family of return to Sri Lanka. These matters, in particular the effect on his parents and family, were described in such a way as to leave no doubt that the likely devastating consequences on his parents (selling everything they had built in 29 years of life in Australia and returning with their son to the country they fled) were clearly confronted by the Assistant Minister: cf *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 at 630 [3].
2. No complaint of any kind was made about the way the Assistant Minister had treated these matters.
3. The gravamen of what outweighed all these considerations was the risk to the Australian community. In dealing with that question the Minister considered the offending and history of the appellant, Dr Davis’ report, Dr Popp’s report, as well as referring to other evidence that had been before the Courts over the years about the appellant.
4. After dealing with Dr Davis’ report the Assistant Minister referred to the revocation of parole in September 2009 (see [31] above), saying at AMR [90]:

I note in relation to parole that Mr WILLIAMS was released to parole from court in February 2009. His parole was cancelled on 18 September 2009 and he was returned to custody due to an alleged assault on his community corrections officer and concerns of expressions of rape fantasies. On 8 June 2010, Mr WILLIAMS was re-released to parole and completed the remainder of his parole without incident on 1 December 2010.

1. It is against the background of the above offending and psychological evaluation that the Assistant Minister came to the three unheard charges: the alleged assault of the case worker in August 2014 and the two solicitation charges arising from the events of 8 and 14 November 2014 at AMR [91]–[93] set out at [6] above.
2. The Assistant Minister also referred to and gave “limited weight” to another alleged assault, saying at AMR [94] the following:

Similarly, I have given limited weight to the reported alleged assault on a Detention Services Officer while Mr WILLIAMS was at Maribyrnong Immigration Detention Centre, as again, the alleged behaviour is consistent with some of Mr WILLIAMS' violence-related conduct.

1. The Assistant Minister then from AMR [96]–[114] developed and explained why balancing all matters he was not satisfied that there was another reason to revoke the original decision to cancel the visa. Though long, it is necessary to set these paragraphs out:

[96] I note also that the ongoing treatment that Mr WILLIAMS has received since 2004 has not prevented Mr WILLIAMS from re-offending and causing harm to members of the community. I note also the expert opinions expressed above which refer to the difficulty in effectively treating Mr WILLIAMS and the questions raised about the efficacy of treatment to date. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.

[97] It is submitted that Mr WILLIAMS' family in Australia are *'central to his ongoing welfare*'. It is submitted that his family play a pivotal role in ensuring he undergoes treatment. His family believe it is unlikely he will continue treatment in Sri Lanka putting him at severe risk of re-offending in that country. I accept that Mr WILLIAMS' family are a considerable support to him and encourage his continued access to treatment. I note, however, that Mr WILLIAMS has continued to offend in Australia despite his family's support and despite treatment. While some of his offences have been relatively minor, I consider others to have been very serious and note they have resulted in harm to members of the Australian community.

[98] Mr WILLIAMS has received two previous warnings about visa cancellation. He was sent a letter dated 22 December 2010, notifying him of a decision not to cancel his visa and warning him about the consequences of further offending. He signed an acknowledgment of this warning on 13 January 2011.

[99] In 2012, Mr WILLIAMS was again considered for visa cancellation and a decision was made not to cancel his visa. On 4 April 2012, he was sent a sent a letter through his authorised recipient advising him of this decision and warning him about the consequences of further offending.

[100] I note that Mr WILLIAMS has continued to offend despite these warnings and despite supervision when he has been living in the community.

[101] I note evidence that Mr WILLIAMS has multiple breaches of judicial orders. He has convictions for four counts of breaching his Supervision Order. I note also that he breached parole in 2009 by further offending. He was placed on an intensive corrections order as a result of convictions in October 2010, and breached that when he committed a further offence. I consider that this history is indicative of the inability of judicial orders to exercise control over Mr WILLIAMS' behaviour when he is living in the community. I have also noted the references in the medical reports to his behaviour towards personnel employed by the Victorian Department of Corrective Services and consider that his attitude shows a disregard for authority.

[102] I have taken into account the mitigating circumstances regarding Mr WILLIAMS' offending, the support he has from family in Australia and the treatment he has obtained in his attempts to address his psychiatric problems. Notwithstanding these factors, I also give weight to the failure of supervision and a broad range of treatment, in addition to two Departmental warnings, to curb his offending. I note that Mr WILLIAMS has convictions for multiple breaches of judicial orders, including parole, an intensive corrections order and a Supervision Order.

[103] While the County Court of Victoria was of the view in 2009 that Mr WILLIAMS' prospects of rehabilitation were '*reasonably good*', that has not been borne out by time and Mr WILLIAMS has continued to engage in criminal behaviour that has caused harm to the members of the community. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX.

[104] For these reasons, I find that there is a high likelihood that Mr WILLIAMS will re-offend if he is returned to the community. I find that similar sexual or violence-related offending could result in physical or psychological harm to a member or members of the Australian community.

**CONCLUSION**

[105] I considered all relevant matters including (1) an assessment of whether the person has made representations in accordance with the invitation for the purposes of s501CA(4)(a); (2) an assessment of whether I am satisfied that the person passes the character test (as defined by section 501) for the purposes of s501CA(4)(b)(i); (3) an assessment of whether I am satisfied that there is another reason why the original decision should be revoked for the purposes of s501CA(4)(b)(ii); and (4) all evidence available to me, including evidence provided by, or on behalf of, Mr WILLIAMS.

[106] I concluded Mr WILLIAMS has made representations in accordance with the invitation.

[107] I am not satisfied that Mr WILLIAMS passes the character test (as defined by section 501).

[108] In considering whether, in light of Mr WILLIAMS’ representations, I was satisfied that there is another reason why the original decision should be revoked, I gave primary consideration to the best interests of Mr WILLIAMS’ nieces and have found that their best interests would be served by the revocation of the mandatory visa cancellation decision.

[109] In addition, I have considered the length of time Mr WILLIAMS has lived in Australia, some 28 years, and the consequences of my decision for his other family members.

[110] On the other hand, in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the very serious nature of the crimes committed by Mr WILLIAMS, particularly his rape offence, which is of a sexual nature and involved violence.

[111] Further, I find that the Australian community could be exposed to great harm should Mr WILLIAMS reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr WILLIAMS.

[112] I am cognisant that where great harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr WILLIAMS, than I otherwise would, because he has lived in Australia for most of his life, and from a very young age.

[113] In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr WILLIAMS represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed the best interests of his minor family members, as a primary consideration, and any other considerations as described above. These include his lengthy residence and bonds from a very young age, any contribution he has made to the community through employment, his familial ties to Australia, and the hardship Mr WILLIAMS, his family and social networks will endure in the event the original decision is not revoked.

[114] Having given full consideration to all of these matters, I am not satisfied, for the purposes of s 501CA(4)(b)(ii), that there is another reason why the original decision to cancel Mr WILLIAMS’s visa should be revoked. Accordingly, I have decided not to revoke the original decision to cancel Mr WILLIAMS’s Class BB, Subclass 155 Five Year Resident Return visa.

1. The whole of the Assistant Minister’s decision, the seriousness of the offending of the appellant in 2000 and 2010, but most importantly the content of the psychological reports consistently since 2009 on any view form the background to the legal assessment of the asserted unfairness as complained by the appellant and of the factual question of materiality of any legal error.

## The appellant’s submissions and consideration thereof

1. The alleged denial of procedural fairness was addressed in argument in essentially two ways: first, that the Department misled the appellant and his advisors by not telling him that they had in the Department’s possession the police brief in relation to the assault charge; secondly, that in the circumstances more time should have been given to deal with the unheard charges by allowing the appellant’s advisors time to obtain the police briefs.

### Ground 1: the failure to provide the appellant with the police brief

1. The appellant submitted that he lost the opportunity to make representations to the Minister with respect to the assault charge as a result of misleading conduct by the Department involving the police brief. In making this submission, counsel for the appellant drew an analogy between cases such as *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 and *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966. It was submitted that, due to the Department’s failure to provide the appellant with the police brief, or inform the appellant that it contained no new adverse or exculpatory information, the appellant refrained from taking an opportunity to be heard which was available to him.
2. The unfairness was said to have arisen not because the appellant lacked sufficient information to comment, nor because the police brief contained any new, exculpatory information, but rather due to the very nature of the brief itself: counsel for the appellant submitted that a police brief is unique insofar as it is the source of a charge, and is thus a crucial document to which an accused must have access in order to defend themselves.
3. Counsel for the appellant further submitted that, as a result, the invitation to make representations was neither real nor meaningful in circumstances where the Department was aware that the appellant considered himself unable to make representations on the pending charges without access to the police brief, and yet failed to disclose that brief to the appellant.
4. The central difficulty with the first way of putting the matter is twofold: first, the correspondence reveals no misleading at all. True it is that no disclosure was made, that the document was held, but no representation of any kind was made by the Department that was in any way misleading or false and only able to be corrected by the disclosure that the Department held the police brief. In oral argument, counsel for the appellant submitted that the misleading conduct inhered in an implied representation, which arose from the fact that the Department had the name of the informant, which could only be found in the police brief itself. In revealing the name of the informant to the appellant’s legal representatives three months after the Department’s acquisition of the police brief, following a significant period of time in which the appellant, through his legal representatives, had made multiple attempts to obtain the brief, it was submitted that the Department implied that it had more information as to the charges, which in turn prompted the appellant’s legal representatives to continue to request further particulars. Counsel for the appellant submitted that it was in this context that the appellant’s lawyers were misled into continuing to make requests for the briefs, and by doing so, into omitting to make representations on the basis of the information that the appellant did possess, namely, what was contained in the Davis Report.
5. Ms Kenny, the then legal representative of the appellant, gave evidence. She gave no indication in her affidavit of having been misled. Her evidence was that without the brief she was not in a position to obtain instructions and respond.
6. The departmental officer who prepared the documentation for the Assistant Minister did not provide the police brief to the Minister. She thus saw no call to provide it to the appellant: see [10] above.
7. There was no doubt that the alleged assault in August 2014 was a consideration relevant to the revocation decision: it was mentioned; but it was not central. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX .
8. There was no basis to consider that the appellant was not able to deal with the events of August 2014 without any substantive unfairness to him. As Ms Brenker submitted, the submissions that he could have put were to the effect that the exchange between the appellant and Mr  l’Anson, the case officer, were minor and not of any seriousness and not amounting to an assault, or if it was an assault, it was trivial. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. There is no reason why it could not have been dealt with in a submission. The additional matters that Ms Brenker identified in the police brief were minor XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX: that is, that the charges were minor, were dealt with under s 23 of the *Summary Offences Act 1966* (Vic) and that the victim did not receive any injuries.
9. Whilst the correspondence exchange set out exhaustively by the primary judge (at [8] above) and the evidence of Ms Muscat does not reveal any cogent or indeed any sensible reason for not giving the appellant’s advisors the assault police brief, it is not possible to discern a reason why the police brief had to be handed over to avoid unfairness. The document was not to be placed before Assistant Minister. The appellant was aware of what had occurred on the day XXX XXX XXX XXX XXX XXX XXX. He had months to put a submission on that the scuffle was minor and should be discounted as trivial. The principles summarised by the primary judge at J[76] (see [11] above) did not demand that a document that was not to be put before the decision-maker and that contained little more than what was contained in other documents XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX, had to be handed over to the appellant’s advisors to avoid procedural unfairness.
10. The only question is whether, given the appellant’s legal advisor’s clear statements that they could not put any submission without the brief, the Department was obliged to tell them that they had it or to give it to them. I am not prepared to conclude that this is the case. There was nothing preventing the appellant’s lawyers addressing all the material they had, XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX and to submit that the matter was a minor scuffle, and if felt necessary, reserve their position upon the obtaining of the police brief. The appellant was on notice of all matters and all material which were to be before the Assistant Minister and which were to be taken into account. There was no real or practical unfairness in addressing the material that was before the appellant.
11. In her thorough submissions, Ms Brenker sought to divide the adverse information into that dealing with sexual crime and that dealing with (other) violence. In this manner, she sought to elevate the importance of the assault charge as one of the few non-sexual violence factors and one which was important as displaying a continuity of violence which began with the assault in 2000 (that accompanied the rape). On the appellant’s submission, the assault charge was an essential link in a “chain” of violent conduct, spanning from 2000 to 2016. Ms Brenker submitted that, in light of the two decisions by the Minister (through his delegate) not to cancel the appellant’s visa: first, following the rape conviction on 22 December 2010; and secondly, following the imposition of the supervision order on 2 April 2012, the 2014 assault was a necessary event in the timeline in order to establish a pattern of violent conduct. The appellant submitted that, once the 2014 assault charge was taken out of that timeline, there was no longer a chain of violent conduct: it was possible to demonstrate that the appellant no longer demonstrated violent tendencies. I do not consider that to be a fair or appropriate overall characterisation of the appellant’s offending and psychological makeup, nor of his risk to the community. The assault charge can be seen to be minor; XXX XXX XXX XXX XXX XXX; but it is the totality of the offending, the propensity for repetition because of the psychological state of the appellant, and the disregard of others in his self-entitlement which clearly ran through the material before the Assistant Minister and through his reasons. Given what the Departmental officer had and had not given the Assistant Minister, the content of the Davis report, the lack of further important information in the police brief, the lack of any misleading conduct by the Department, and the length of the time the advisors had the Davis report and other relevant material, I see no practical unfairness in not providing the police brief or saying that the Department had it.
12. For the same reasons, I do not consider that there was any unfairness in refusing to allow the appellant further time to put further submissions once the relevant police briefs had been obtained.
13. In so concluding I would only say that if the Department adopts a policy of never giving information to someone in the appellant’s position because that particular document is not to be given to the decision-maker, notwithstanding calls by the subject of the decision for the information, the margin between fairness and unfairness may become very slender, or non-existent, in a given case.
14. Whilst I have expressed my views in my own words, the effect of them is that I agree with the reasoning of the primary judge.

#### Materiality if procedurally unfair

1. The question of materiality of any failure to afford procedural fairness (should the above analysis be wrong) requires the application of the views of the majority in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441. Was there a realistic possibility that the decision in fact made could have been different had the failure to afford procedural fairness not occurred, decided as a question of fact in which the applicant for judicial review bears the onus of proof: *MZAPC* at [2], [27]–[60]. The enquiry is as to a counterfactual and is backward looking and concerns what the decision-maker did in the particular case: *MZAPC* at [37]. The nature of the question of proof was discussed at [38]–[40].
2. Ms Brenker submitted that as a matter of principle from the reasons of the majority, it was not necessary for the appellant to prove more than historical fact, nor was it necessary for the appellant to prove what would have been done by way of submissions had the failure not occurred: that is, had the appellant been given time and had put submissions on the police brief to the assault charge. It is unnecessary to answer this as a question of principle. Here, it can be inferred that submissions would have been made directed to the proposition that what had occurred in August was a minor scuffle and not an assault and if it were an assault it was so minor as to not warrant being given weight.
3. The difficulty is that looking at the material available to the Assistant Minister concerning the appellant, the risk he plainly posed, looking at the whole of the decision, recognising the importance and weight given to all the factors addressed in the reasons (about which reasons no complaint was made) and approaching the matter from the perspective of a fair-minded decision-maker, there is, in my view no realistic possibility that the outcome could have been different. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXX. All the other factors: the past violent sexual crime, another (very serious) past act of violence (the so-called “driving incident”), the careful and consistently expressed psychological assessments that the appellant posed a risk of violent sexual crime to which the community was exposed, could not conceivably be realistically affected by submissions on a relatively minor event which was given little weight and which was discussed in the material before the decision-maker. This is so even if the assault charge was “taken out of the timeline”: there was not a sufficient gulf between the various acts of violence (sexual or physical) nor sufficient evidence of contrition or remorse, such that no chain of violent conduct, or no significant risk to the community, could be made out in its absence.

### Ground 2: the failure to take into account the police brief

1. The Assistant Minister had constructive knowledge of the police brief for the assault charge. He did not read it because it was not before him.
2. There can be no suggestion that the brief was a mandatory consideration to be taken into account in the sense discussed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 440; 162 CLR 24.
3. In such circumstances, on the authority of the majority (Kiefel and Bennett JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505) there was no error in failing to have regard to the brief.
4. There was no submission that to make the decision without having regard to the police brief was legally unreasonable. That is hardly surprising because the brief contained no information of any material kind that could not be obtained from the material that was before the Assistant Minister, in particular Dr Davis’s report.
5. The appellant submitted that *Huynh* was in conflict with a later Full Court authority: *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431 approving Rares J in *SZJTQ v Minister for Immigration and Citizenship* [2008] FCA 1938; 172 FCR 563. The appellant submitted that these decisions found a free-standing principle that a decision-maker must also look to the most up-to-date information in decision-making. The cases stand for no such general principle.
6. Both *SZJTQ* and *MZYTS* concerned a decision of the Tribunal that had considered out of date country information in the task of assessing whether an applicant had a well-founded fear of persecution. In *SZJTQ,* Rares J found that the Tribunal had erred in its task of assessing whether a well-founded fear of persecution existed by not relying on the most up-to-date country information and that the Tribunal did not give genuine, proper or realistic consideration to the claims because of that failure. The essential point to remember is that the assessment of the well-founded fear must, as a matter of statutory context, and as a result of the nature of the statutory task, be made by reference to the present situation. In *SZJTQ,* the up-to-date information contradicted earlier information that was relied upon. The expression of the matter by Rares J at 573–574 [36]–[42] (which was approved by the Full Court in *MZYTS*) should not be taken out of context. His Honour distinguished the two matters discussed by Mason J in *Peko-Wallsend* at 44–46: relevant information and the most up to date information. What Rares J said however (at 573 [40]) was that in the context of assessing whether a well-founded fear of persecution was held:

If the decision-maker has actual notice of a recent and significant matter affecting the question whether the applicant for a protection visa has a well-founded fear of persecution in his or her country of origin, the subject-matter, scope and purpose of s 36(2)(a) require the decision-maker to base his or her decision, as to whether the fear claimed is well-founded, on that information: *Peko-Wallsend* 162 CLR at 45. This is not to say that the decision-maker is obliged to find that the applicant in fact has satisfied him or her that the applicant, for example, has a religious belief as claimed simply because the latest information actually available to the decision-maker (ie before him or her) supports a conclusion of persecution of adherents of that religion in the applicant's country of origin. Rather, it is to say that in evaluating the claimed fear, the most recent information is relevant and must be considered.

1. His Honour then said at 573–574 [42] the following:

Again, the decision-maker must not simply defer to the recent material because it is recent, for that would be to abjure the statutory function of arriving at his or her own state of satisfaction. The tribunal must be able to assess and weigh country information in forming its own ultimate conclusion on that information. And, there is no unqualified obligation for the tribunal to search out country information which it does not already have before it. The potential sources of such information are vast and of varying degrees of relevance, reliability, (im)partiality and utility. The recent material may not be cogent, full, accurate or satisfactory. But those characterisations could only be arrived at as part of the decision-maker evaluating the recent material in the performance of his or her function of basing the decision on the most recent *and accurate* material that the decision-maker has at hand: *Peko Wallsend* 162 CLR at 45.

1. The Full Court in *MZYTS* (Kenny, Griffiths and Mortimer JJ) in dealing with the same problem agreed with Rares J’s analysis at [36]–[42] at 452 [75]. But it is to be noted that their Honours had earlier in their judgment made clear at 442 [31] that this was not some free standing legal principle:

Before both the Federal Magistrates Court and this Court the asserted error in the Tribunal's decision was often described as a “failure to consider more recent information”. That description might suggest as a corollary some kind of freestanding legal obligation on the Tribunal to consider the most recent information. In our opinion, while those descriptions may explain the path leading to error, the error itself is a failure to perform the statutory task imposed on the Tribunal by the relevant provisions of the Migration Act.

1. The task was to assess the *present* fear of persecution, and in order to understand whether it was *now* well-founded, that required regard to be had to up-to-date information if there was to be a real review under the statute: see *MZYTS* at 442–444[32]–[36]. The task had miscarried. What was said in agreement with Rares J at [75] and following must be understood in that light.
2. Whether or not *Huynh* is fully reconcilable in all the circumstances with *MZYTS* need not be considered. But neither case is a basis for a proposition of the kind propounded here: that there is a principle that the most up-to-date information must always be looked at by a decision-maker in any given decision. It is the statutory context and the circumstances of the decision which may make it so, as was in the case of *SZJTQ* and *MZYTS*. It is not the position here where the police brief did not contradict any particular material that was relied upon and contained immaterial additions, at best, to the stock of information upon which the decision-maker made his decision.
3. Ground 2 therefore fails.
4. The appeal should be dismissed with costs.

## Suppression order

1. Following the hearing, the Minister made submissions, and put on an affidavit, seeking orders to suppress any reference to the content of the report of Dr Davis. The Court made interlocutory orders to this effect, until further order, on 1 September 2021. This was because the first supervision order, made on 16 August 2011, was imposed by the County Court of Victoria pursuant to s 9 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (**SSO Act**). At that time, s 182 of the SSO Act provided by subsection 1 that a person must not publish or cause to be published any evidence given in a proceeding, or the content of any report or other document put before the court in a proceeding under the Act. At the date of the hearing on the first suppression order, counsel appearing on behalf of the Victorian Department of Justice sought an order pursuant to s 183 of the SSO Act to permit publication of the evidence and reports tendered in that proceeding, her Honour Judge Pullen declined to make such an order at [194] of the judgment.
2. The supervision order commenced on 16 August 2011, and was to remain in force for five years. The first review of the order was to take place in 2013, with subsequent reviews every two years. The supervision order was confirmed by the County Court pursuant to s 73 of the SSO Act on 8 November 2013. An application to renew the supervision order was made on 20 June 2015, which was accompanied by the Davis Report. The application was adjourned *sine die* on 20 August 2021. No application for renewal has been heard since.
3. The SSO Act has since been repealed by the *Serious Offenders Act 2018* (Vic). Pursuant to the transitional provisions of that Act, the SSO Act continues to apply in respect of an application for renewal of a supervision order made under the SSO Act but not determined before the commencement of the 2018 Act.
4. By s 28(3) of the SSO Act, the Act applies to an application for renewal as if it were an application for a supervision order. The Davis Report states that it was a progress report made for the purposes of the SSO Act. The content of that report was put before the Court in the relevant sense. The Minister submitted that although the supervision order would by now have expired, the proceeding for renewal remains on foot, albeit in abeyance.
5. The transitional provisions of the 2018 Act do not, however, continue the operation of the SSO Act in respect of applications heard and determined. Thus, while the reports of Dr Walton and Dr Popp were tendered in the appeal book, neither were filed in support of the 2015 application for renewal of the supervision order, and thus the publication of the content of either report is not barred by s 182 of the SSO Act.
6. The appellant did not oppose the orders sought by the Minister. No submissions were put as to the operation of s 79 of the *Judiciary Act 1903* (Cth). I am, however, prepared to make the orders sought, which will be effected by the redaction from the publicly available terms of the judgment of the Full Court all references to the content of Dr Davis’ Report. The parties will be provided with an unredacted version of the judgment for their own purposes and with a draft redacted version for their consideration for approval for publication.

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| I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop. |

Associate:

Dated: 19 October 2021

REASONS FOR JUDGMENT

WHITE J:

1. I agree with the order proposed by the Chief Justice and with his reasons.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice White. |

Associate:

Dated: 19 October 2021

REASONS FOR JUDGMENT

ROFE J:

1. I have read the reasons for decision of the Chief Justice and agree with his Honour’s reasons and the proposed order.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Rofe. |

Associate:

Dated: 19 October 2021