FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Le [2016] FCAFC 120

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| Appeal from: | *Le v Minister for Immigration and Border Protection* [2015] FCA 1473 |
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| File number: | QUD 87 of 2016 |
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| Judges: | **ALLSOP CJ, GRIFFITHS AND WIGNEY JJ** |
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| Date of judgment: | 9 September 2016 |
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| Catchwords: | **MIGRATION** – appeal from successful judicial review of Minister’s decision to cancel visa on character grounds pursuant to s 501(2) of the *Migration Act 1958* (Cth) – whether Australia’s non-refoulement obligations are a mandatory consideration in considering visa cancellation – notice of contention concerning accuracy of information before the Minister regarding respondent’s migration status– **Held:** primary judge erred in concluding that Australia’s non-refoulement obligations were a mandatory consideration under s 501(2) where an application for a protection visa can subsequently be made in Australia – appeal allowed and notice of contention dismissed. |
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| Legislation: | *Migration Act 1958* (Cth), ss 5, 6, 6(2), 6(3), 6A, 9(1), 11ZF, 31, 35A, 48A, 48B, 48B(6), 82, 82(2), 109, 189, 195A, 195A(4), 196, 197C, 198, 198(6), 501, 501(1), 501(2), 501(6), 501(7), 501E, 501F, 502(2)  *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)  *Migration Reform Act 1992* (Cth)  *Migration Reform (Transitional Provision) Regulations 1994* (Cth), regs 3, 4  *Migration Regulations 1994* (Cth), reg 2.01(b), Schs 1, 2, Item 1128, cls 155.211(2), 155.511  *Convention Relating to the Status of Refugees 1951,* done at Geneva on 28 July 1951 and entered into in force 22 April 1954, as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967, Art 33 |
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| Cases cited: | *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513  *AZAFQ* *v Minister for Immigration and Border Protection* [2016] FCAFC 105  *COT15 v Minister for Immigration and Border Protection (No 1)* [2015] FCAFC 190; 236 FCR 148  *Cotterill v Minister for Immigration and Border Protection* [2016] FCAFC 61; 150 ALD 252  *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332  *Minister for Immigration & Multicultural & Indigenous Affairs v Huynh* [2004] FCAFC 47  *Minister for Immigration & Multicultural & Indigenous Affairs v Schwart* [2003] FCAFC 229  *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1  *NBNB* v *Minister for Immigration and Border Protection* [2014] FCAFC 39; 220 FCR 44  *Nguyen v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 757 |
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| Dates of hearing: | 19 May 2016 and 1 August 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 80 |
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| Counsel for the Appellant: | Ms K Stern SC with Mr S Richardson |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr G Stapleton on 19 May 2016  Mr A Byrne on 1 August 2016 |
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ORDERS

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|  | | QUD 87 of 2016 |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  Appellant | |
| AND: | TAM THI LE  Respondent | |

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| JUDGES: | ALLSOP CJ, GRIFFITHS AND WIGNEY JJ |
| DATE OF ORDER: | 9 September 2016 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Court of Australia of 24 December 2015 be set aside.
3. The notice of contention be dismissed.
4. The respondent pay the appellant’s costs of both this proceeding and the proceeding below, as agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The central issue in the appeal is whether the primary judge erred in finding that Australia’s non-refoulement obligations to the respondent were a mandatory consideration in exercising the Minister’s power under s 501(2) of the *Migration Act 1958* (Cth) (the ***Migration Act***) to cancel the respondent’s visa.
2. There is also a notice of contention dated 2 June 2016 which raises issues regarding the accuracy of information concerning the respondent’s migration status which was before the Minister when he cancelled her visa.

## Summary of background facts

1. The visa which was cancelled by the Minister on 27 July 2015 under s 501(2) of the *Migration Act* was a Class BB subclass 155 (Five Year Resident Return) visa (the **1994 visa**). The Minister was told by his Department that Ms Tam Thi Le did not hold any other Australian visa.
2. In broad terms, the Minister was empowered under s 501(2) to cancel a visa if:
3. the Minister reasonably suspected that the visa holder did not pass the “character test” as defined; and
4. the visa holder did not satisfy the Minister that the visa holder passed the “character test”.

The “character test” was defined in s 501(6) as including the situation where a person has “a substantial criminal record”. That concept was defined in s 501(7) to include a person who has been sentenced to a term of imprisonment of 12 months or more. It was common ground that Ms Le had a substantial criminal record, which included the fact that on 22 December 2011 she was convicted of trafficking in dangerous drugs in 2007 (when she was on parole) and was sentenced to eight years imprisonment. This was not her only criminal conviction.

1. It will be necessary to say something more later about Ms Le’s migration status. At this broad introductory level, it is sufficient to note that Ms Le is a citizen of the Socialist Republic of Vietnam (**Vietnam**)and that she arrived in Australia on 3 October 1984 on a K4011 Refugee (Vietnamese) Permit. Before arrival she had been assessed by Australian officials overseas as a refugee for the purpose of the *Convention Relating to the Status of Refugees 1951,* done at Geneva on 28 July 1951 and entered into force on 22 April 1954, as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967 (***Refugees Convention***) and she was granted permanent residence on arrival. Significantly, to date, she has neither sought nor been granted a “protection visa” within the meaning of s 35A of the *Migration Act*.
2. Since her arrival in Australia, Ms Le travelled twice to Vietnam and returned to Australia.
3. After being convicted in Queensland in 2000 of trafficking in dangerous drugs (for which she was sentenced to eight years imprisonment), Ms Le was notified in March 2004 that consideration was being given to cancelling her visa under s 501 on character grounds. The Minister’s delegate decided in May 2007 not to cancel her visa. As part of the decision-making process leading up to that decision, two “International Obligations and Humanitarian Concerns Assessments” were undertaken by Departmental officers on 29 July 2004 and 10 November 2006. Both assessments concluded that: (a) there had been a significant change in Vietnam since the time Ms Le had been assessed as a refugee; and (b) returning Ms Le to Vietnam would not engage Australia’s non-refoulement obligations.
4. A consideration of whether or not Ms Le’s visa should be cancelled arose for a second time in 2014, prior to her release on parole in September 2014 relating to her second conviction in December 2011 for trafficking in dangerous drugs. In considering whether or not to cancel Ms Le’s visa on that occasion, the Minister had before him a detailed Issues Paper prepared by his Department and multiple attachments, which included evidence and submissions which were provided by or on behalf of Ms Le.
5. The statement of reasons provided by the Minister in conjunction with his cancellation decision included express consideration of such matters as the nature and seriousness of Ms Le’s criminal conduct, mitigating factors, the risk of her re-offending, Ms Le’s ties to Australia and the best interests of minor children. Paragraphs 46 to 48 of the statement of reasons relate to the Minister’s consideration of international non-refoulement obligations. Given their central relevance in the appeal, it is desirable to set them out in full:

46. Ms LE arrived in Australia as a refugee in 1984 and was granted permanent residence on arrival.

47. I note that when she was last considered for visa cancellation, which commenced in 2004 Ms LE made claims that required assessment in relation to Australia’s international non-refoulement obligations. The Department completed an international obligations assessment on 29 July 2004 and another on 10 November 2006, both of which found that cancellation of Ms LE’s visa would not result in a breach of Australia’s international non-refoulement obligations.

48. Ms LE has not made any claims in relation to the current character consideration process that require assessment in relation to Australia’s international non-refoulement obligations, however she is able to make a valid application for another visa. I note that Ms LE is not prevented by s48A of the Migration Act from making an application for a Protection visa. Thus it is unnecessary to determine whether non-refoulement obligations are owed to Ms LE for the purposes of determining whether her visa should be cancelled.

## Primary judge’s reasons summarised

1. In the Court below, the applicant (i.e. the respondent in the appeal) pressed four of five grounds of judicial review in her amended originating application dated 10 December 2015. It is unnecessary to say anything further concerning the first three grounds of judicial review because each was dismissed by the primary judge.
2. The Minister’s appeal relates to the primary judge’s acceptance of what was raised in ground 5 below, which was in the following terms:

The Respondent’s decision was affected by jurisdictional error because:

(a) The respondent wrongly considered (i) that Australia did not have non-refoulement obligations in respect of the Applicant because the Applicant had not made any claims for protection in response to the Respondent’s Notice of intention to cancel her visa; and or (ii) the Applicant would not be prevented from later making an application for a protection visa outside of the Migration Zone; and or

(b) The Respondent failed to address the mandatory consideration that being whether Australia had continuing obligations to the Applicant under the Convention relating to the Status of Refugees (1951) (**Convention**) as a result of the Applicant being a person determined by the Minister in or about 1984 to have the status of a refugee under the Convention, and accordingly, a person to whom an entry permit was granted.

1. Ground 5 related to [46] to [48] of the Minister’s statement of reasons for his cancellation decision (see [9] above).
2. The primary judge noted that, although the precise position was unclear, Ms Le had been granted permanent residence in Australia upon her arrival on 3 October 1984. His Honour found that Ms Le had been granted both a BF Subclass 155 (Resident Return) visa on 16 December 1991, which entitled her to leave Australia and return (the **1991 visa**), and the 1994 visa. His Honour described it as “common ground” that the ultimate foundation for Ms Le’s permanent residency was the initial acceptance by Australia in 1984 that she was a refugee for the purposes of the *Refugees Convention*.
3. The primary judge held that the Minister fell into jurisdictional error when he concluded that it was unnecessary to determine whether Australia owed Ms Le non-refoulement obligations in the absence of a relevant claim by Ms Le. His Honour’s reasoning in relation to this matter may be summarised as follows:

(a) When in 1984, Ms Le was accepted as a refugee under the *Refugees Convention* (which underpinned her lawful residence in Australia), she acquired under international law an accrued right of non-refoulement to Vietnam, subject to the qualifications in Art 33 of the *Refugees Convention* (which creates an exception to the prohibition on refoulement where there are reasonable grounds for regarding the refugee to be a danger to national security or, having been convicted of a particularly serious crime, the refugee constitutes a danger to that community).

(b) Section 197C of the *Migration Act* (which was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the ***2014 Amendment Act***))does not negate the Minister’s obligation to address whether the cancellation of a visa under s 502(2) would lead to a breach of a non-refoulement obligation. Indeed, the primary judge reasoned that, if anything, the presence of s 197C and the fact that the duty to remove a person under s 198(6) is no longer qualified by the need to consider non-refoulement before removal “supports a conclusion that there is such an obligation when the Minister is exercising a cancellation discretion under s 501(2)” (at [54]).

(c) His Honour found that this construction of the legislation was supported by [1142] of the Explanatory Memorandum to the Bill which introduced the *2014* *Amendment Act*:

Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in s 198 of the Migration Act. For example, Australia's non-refoulement obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act …

(d) The Full Court’s decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Huynh* [2004] FCAFC 47 (***Huynh***) was distinguishable because the visa applicant there had not been determined to have the status of a refugee for the purposes of the *Refugees Convention*.

(e) The primary judge noted that Lee J had adopted a similar approach to *Huynh* in *Nguyen v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 757 (***Nguyen***), in particular at [60], where Lee J held:

If the applicant had been assessed by the UNHCR to be a refugee within the meaning of that term as used in the Convention, then Australia, having accepted the applicant for re-settlement and as a contracting party to the Convention, would have to have given regard to whether Australia's obligations to the applicant continued under the Convention before it took any step to return the applicant to Vietnam. It followed that the foregoing question was a material consideration in determining whether to cancel the applicant's visa preparatory to refouling the applicant to Vietnam.

1. The primary judge’s core reasoning for upholding ground 5 is reflected in [64] of his Honour’s reasons for judgment:

None of this need though be the subject of further consideration in the present case. That is because the Minister, as para 48 of his reasons evidences, has proceeded on the legally erroneous basis that it was unnecessary for him to consider them, because Mrs Le had made no claims in this regard in the submission made on her behalf to him. She did not have to. She already had the benefit of a prior determination by Australia that she was a refugee. Of this the Minister was aware and found as a fact. The relevant consideration was whether she still enjoyed that status and, even if so, whether by cancelling her visa and rendering her an unlawful non-citizen subject to the duty of removal a non-refoulement obligation would be violated or whether her case fell within a qualification to that obligation. A corollary of the potentially adverse consequences which might follow for Mrs Le from a decision by the Minister which took into account these matters was that she was entitled to an opportunity to be heard in respect of them prior to the Minister's making his decision. He did not include this subject in the opportunity which he afforded her because, erroneously, he did not consider that he had to.

## The grounds of appeal

1. The Minister’s notice of appeal contained the following five grounds of appeal:

1. The primary Judge erred by finding that the question whether or not the respondent still enjoyed her status as a “refugee”, as defined by Art 1(A)(2) of the *Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967* (**Refugee Convention**), was a mandatory relevant consideration for the appellant (Judgment at [64]). His Honour ought to have found that determining the respondent’s refugee status was not a relevant consideration for the appellant in exercising the discretion conferred on him by s 501(2) of the *Migration Act 1958* (Cth) (**Act**), as there were no current claims for protection before the appellant and the respondent could validly make an application for a protection visa pursuant to s 36(2)(a) of the Act.

2. The primary Judge erred by finding that the question whether or not, on the facts, cancellation of the respondent’s visa will lead to a breach of Art 33 of the Refugee Convention, being the non-refoulement obligation, was a mandatory relevant consideration for the appellant (Judgment at [56] and [64]). His Honour ought to have found that determining whether cancellation of the respondent’s visa would be a breach of a non-refoulement obligation was not a relevant consideration for the appellant in exercising the discretion conferred on him by s 501(2) of the Act, as there were no current claims for protection before the appellant and the respondent could validly make an application for a protection visa pursuant to s 36(2)(a) of the Act.

3. In the alternative to paragraphs 1 and 2, the primary Judge erred in finding that the appellant proceeded on a legally erroneous basis that it was unnecessary for him to give consideration to the issue whether cancellation of her visa would lead to a violation of non-refoulement obligations under article 33 of the Refugee Convention (Judgement at [64]). His Honour ought to have found that the appellant gave consideration to that question in paragraphs 46 to 48 of his reasons.

4. The primary Judge erred by finding that the appellant was required, when exercising his discretion under s 501(2) of the Act, to do more than he did at paragraphs 46 to 48 of his reasons. In effect, his Honour imposed an obligation upon the appellant to make independent factual inquiries in circumstances where there was nothing before the appellant to suggest the respondent had a current well-founded fear of persecution for a Refugee Convention reason.

5. The primary Judge erred in finding that the appellant considered that it was unnecessary for him to determine whether Australia had any ongoing non-refoulement obligation in the absence of a claim in this regard by the respondent (Judgment at [41] and [64]). His Honour ought to have found that paragraph 48 of the appellant’s reasons revealed that the appellant relied upon the fact that no current claim to refugee status or relating to a well-founded fear of persecution were made together with the fact that the respondent could make an application for a protection visa pursuant to s 36(2)(a) of the Act, making it unnecessary for the appellant to consider, in exercising the discretion conferred on him by s 501(2) of the Act, whether Australia owed any non-refoulement obligations to the respondent.

1. In her outline of written submissions, the respondent stated that these five grounds of appeal raised one issue; namely, whether, before cancelling her visa, it was mandatory for the Minister to consider whether a consequence of the cancellation decision might be to violate her rights not to be refouled back to Vietnam and to breach Australia’s obligations not to refoule her. It is appropriate to consider and determine the appeal on this basis.
2. Before doing so, it is convenient to say something more about the uncertainties in the evidence relating to the history of Ms Le’s migration status.

### Ms Le’s migration status

1. Perhaps reflecting the considerable passage of time since Ms Le arrived in Australia on 3 October 1984, there was some uncertainty in the evidence regarding the history of her migration status. The Court directed the parties to provide supplementary submissions to explain the respondent’s migration status. They did so, however, as will emerge, some doubt remains.
2. The Minister initially claimed that Ms Le was given the 1991 visa. The Minister subsequently contended that Ms Le may not in fact have been granted the 1991 visa (see further below). The Minister also submitted that, because of the operation of s 82(2) of the *Migration Act* (the terms of which are set out in [37] below), Ms Le may not have held any other visa apart from the 1994 visa.
3. Despite the difficulties referred to above, it is necessary to attempt to trace the history of Ms Le’s migration status. That is partly because, under ground 2 of the notice of contention, Ms Le contended that the Minister did not know what he was doing or was not properly informed about what he was doing in terms of the nature and details of the visa or permission he was cancelling.
4. Ms Le arrived in Australia on 3 October 1984 on a K4011 Refugee (Vietnamese) Permit. She was granted permanent residence on arrival which necessarily meant that, at that time, she must have been given an entry permit. This permitted her to remain in Australia indefinitely (see s 6(3) of the *Migration Act* as then in force). There is no copy of that permit in the Court Book.
5. The *Migration Act*, as in force in 1984, provided in s 9(1) that if an immigrant who was the holder of any entry permit left Australia, “the entry permit has no force or effect in relation to him upon or after his re-entry into Australia” (after amendments were made in 1989 this provision was replaced by s 11ZF, which was to similar effect).
6. Under the *Migration Act* then in force, s 6 had the effect that an immigrant who entered Australia without an entry permit became a prohibited immigrant. There was a power under s 6(2) for an officer to grant an immigrant an entry permit. Under s 6(3) an entry permit could permit the holder to enter Australia or to remain in Australia or both. Under s 6A, an entry permit could not be granted to an immigrant after his or her entry into Australia unless, inter alia, the person was the holder of a temporary entry permit which was in force and the Minister had determined, by instrument in writing, that the person had the status of a refugee within the meaning of the *Refugees Convention*. The Minister accepts that this provision has no application to Ms Le because she was granted an entry permit on arrival in Australia.
7. The Minister did not dispute that Ms Le was granted permanent residence on arrival in Australia on the basis of her refugee status. He also accepted that she was assessed by a Departmental officer overseas and was determined to be a refugee for the purposes of the *Refugees Convention*.
8. Ms Le’s entry permit did not entitle her to leave Australia and to return. For that she needed another visa.
9. As noted above, the Minister originally claimed that, on 16 December 1991, Ms Le was granted the 1991 visa. In his supplementary submissions filed after the initial hearing, the Minister stated that Ms Le may not in fact have been granted the 1991 visa. The Minister was unable fully to explain the Department’s records relating to the 1991 visa, but it was submitted that the information relating to the 1991 visa may have been a manual entry made on the computerised record keeping system. The Minister further submitted that even if Ms Le had been granted the 1991 visa, it would have become a Transitional (Permanent) Visa in September 1994 and, under s 82(2) of the *Migration Act*,it would have ceased to have effect on 16 December 1994 when the 1994 visa was granted. (It might be noted at this point that it may be unnecessary to resort to s 82(2) for this outcome because the Department’s records indicate that the 1991 visa expired in its own terms on 16 December 1994).
10. The Department’s records of Ms Le’s movement details indicated that Ms Le had been granted a Class BF 155P000 visa and the term of that visa was stated to be from 16 December 1991 to 16 December 1994 (i.e. the day on which the 1994 visa was granted). In contrast with the Department’s records regarding the 1994 visa, the records did not identify any application made by Ms Le in respect of the 1991 visa and there were several other aspects of the Department’s records relating to the 1991 visa which were unclear and unexplained by the evidence. As will emerge below, it was submitted on behalf of Ms Le that the 1991 visa may have been granted on 16 December 1994 in order to ensure her eligibility for the 1994 visa. Ms Le’s counsel candidly acknowledged that this was speculative.
11. The Minister accepted that, despite various amendments to the *Migration Act* in 1989 (the details of which need not be set out), the entry permit which was granted to Ms Le on 3 October 1984 remained the source of her right to remain lawfully in Australia, at least up until the commencement on 1 September 1994 of significant amendments introduced by the *Migration Reform Act 1992* (Cth) (the ***1992 Reform Act***). Related regulations in the form of the *Migration Regulations 1994* (Cth) (the ***Migration Regulations***) and the *Migration Reform (Transitional Provision) Regulations 1994* (Cth) (the ***Transitional Regulations***) also commenced on that date.
12. One of the key reforms was that visas replaced both entry permits and entry visas as the sole authority to travel to, enter and/or remain in Australia. The concept of an “entry permit” was replaced by the term “visa”.
13. The *Migration Regulations* introduced the concepts of “permanent visa” and “transitional visa”. A “permanent visa” was one which gave the visa holder permission to remain in Australia indefinitely and might carry with it a permission to travel to and enter Australia. The term “transitional visa” applied to visas and entry permits which had been granted before 1 September 1994, which were then converted automatically as at that date to transitional visas.
14. The conversion of Ms Le’s original entry permit to a Transitional (Permanent) Visa which permitted her to remain indefinitely in Australia was brought about by reg 4 of the *Transitional Regulations*. The phrase “permanent entry permit” was defined in reg 3 of the *Transitional Regulations* to mean an entry permit the effect of which is not subject to a limit as to time. The class of “Transitional (Permanent) Visa” was prescribed by reg 2.01(b) of the *Migration Regulations*. It was prescribed as a separate class of visa for the purposes of s 31 of the *Migration Act* and was not a visa to which either Schs 1 or 2 of the *Migration Regulations* applied.
15. If, after 1 September 1994, Ms Le wanted to travel overseas and return to Australia she had to obtain an appropriate visa because her Transitional (Permanent) Visa simply permitted her to remain indefinitely in Australia. All classes of visa were set out in either the *Migration Act* or in the *Migration Regulations*. Schedule 1 of the *Migration Regulations* specified many classes of visa. Item 1128 in Sch 1 specified a Class BB Subclass 155 (Five Year Resident Return) visa. Schedule 2 contained provisions concerning subclasses of visas. It specified primary criteria which had to be satisfied either at the time of visa application or at the time of decision. Clause 155.21 specified the criteria to be satisfied at the time of application for a Subclass 155 Five Year Return visa. Clause 155.211(2) provided:

(2) The applicant meets the requirements of this subclause if the applicant:

(a) is, or was immediately before going overseas, an Australia permanent resident; and

(b) was an Australian permanent resident for a period of, or periods that total, not less than 2 years in the period of 3 years immediately before the application for the visa.

1. “Australian permanent resident” was defined in reg 1.03 to mean a non-citizen who, being usually resident in Australia, is the holder of a permanent visa. “Permanent visa” was defined in reg 3 of the *Transitional Regulations* to mean, relevantly, a visa granted on or after 1 September 1994 that permits the holder to stay in Australia indefinitely. Accordingly, a Transitional (Permanent) Visa was a “permanent visa” within this definition. Presumably, that is how Ms Le was eligible to be granted the 1994 visa.
2. It should also be noted that Item 1128 of Sch 1 fell within Pt 1 of that Schedule, which expressly dealt with “permanent visas”. Accordingly, the particular resident return visa which was granted to Ms Le in 1994 was also a permanent visa.
3. Clause 155.511 of Sch 2 to the *Migration Regulations* provided that a permanent visa which, relevantly, permitted the holder to travel to and enter Australia, was in effect for a period of five years from the date of grant.
4. As at 16 December 1994, when Ms Le was granted the 1994 visa, s 82 of the *Migration Act* was relevantly in the following terms:

**82. When visas cease to be in effect**

(1) A visa that is cancelled ceases to be in effect on cancellation.

(2) A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.

…

(8) A visa to remain in, but not re-enter, Australia that is granted to a non-citizen in Australia ceases to be in effect if the holder leaves Australia.

(9) This section does not affect the operation of other provisions of this Act under which a visa ceases to be in effect (such as sections 173 and 174).

(10) For the purposes of subsections (5), (6) and (7), “particular date” includes:

(a) the date an event, specified in the visa, happens; or

(b) the date the holder ceases to have a status specified in the visa or the regulations.

1. As at 16 December 1994, s 5 of the *Migration Act* defined “substantive visa” as follows:

“substantive visa” means a visa other than a bridging visa or a criminal justice visa.

1. Ms Le’s Transitional (Permanent) Visa was a substantive visa, as also was her 1994 visa. Hence, as noted above, the effect of s 82(2) was that any other existing visa ceased to be in effect when the 1994 visa was granted on 16 December 1994.
2. Accordingly, from 16 December 1994, Ms Le held **only** the 1994 visa. This was the visa which was cancelled by the Minister on 27 July 2015.

## Disposition of the appeal

1. For the following reasons, we respectfully consider that the primary judge erred in holding that the issue of Australia’s obligation not to refoule Ms Le was a mandatory consideration in the particular circumstances of Ms Le’s case when the Minister was considering whether or not to exercise his discretion to cancel her 1994 visa under s 501(2) of the *Migration Act*. In our view, this was not a mandatory relevant consideration under s 501(2) in circumstances where it remained open to Ms Le to make an application in Australia for a protection visa, at which point compliance with Australia’s non-refoulement obligations (and the prospect of her indefinite detention) would have to be considered by the Minister. It is critical to this analysis that, as the Minister acknowledged in both [48] of his statement of reasons and in his submissions to the Court, there is no legal impediment to Ms Le applying in Australia for a protection visa.
2. This analysis is consistent with the Full Court’s approach in both *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513 (***Ayoub***) and *COT15 v Minister for Immigration and Border Protection (No 1)* [2015] FCAFC 190; 236 FCR 148 (***COT15***).
3. In *Ayoub*, as in Ms Le’s case, the visa which was cancelled was not a protection visa. When Mr Ayoub’s visa was cancelled under s 501(2), the Minister noted Mr Ayoub’s claim that he was afraid of being removed to Lebanon because there was a dangerous situation there and the country was on the brink of civil war. The Minister said in his statement of reasons for the cancellation decision that the existence of a non-refoulement obligation did not preclude the cancellation of Mr Ayoub’s visa because “Australia will not necessarily remove a person, as a consequence of cancelling their visa, to a country in which a non-refoulement obligation exists”.
4. The Full Court rejected the contention that the primary judge had erred in not accepting Mr Ayoub’s claim that this passage revealed jurisdictional error. The Full Court noted that the effect of s 501E of the *Migration Act* was that, notwithstanding the cancellation of Mr Ayoub’s visa under s 501, Mr Ayoub was not prevented from making an application in Australia for a protection visa. The Full Court emphasised the importance of the statutory scheme which, in the case of a person in Mr Ayoub’s circumstances, separated the consideration of cancelling his visa under s 501 from the possible future exercises of other statutory powers, including those relating to the determination of a valid application for a protection visa, at which point the Minister would be obliged to consider any non-refoulement obligations as well as the prospect of indefinite detention should it arise.
5. The significance to be attached to these separate steps in the statutory scheme is reflected in [19] of the Full Court’s decision in *Ayoub*,in which the Court clarified the effect of the earlier decision of a differently constituted Full Court in *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1(***NBMZ***)(emphasis added):

*NBMZ*, however, is no authority for the more generally-expressed proposition that the Minister must take into account when exercising the discretion conferred by s 501 the prospect that a claimant may be exposed to “indefinite detention” at some future point of time dependent both upon possible future applications that may or may not be made and upon future, potentially adverse, exercises of the discretion. The task of the Minister in the present proceeding was to resolve the more confined question of the manner in which the discretion conferred by s 501 should have been exercised. **Future exercises of discretion and statutory power are to be resolved when they arise. The fact that the prospect remains open to Mr Ayoub by reason of s 501E to make a future application for a protection visa perhaps provides some support for a conclusion that it is at that future point of time that the prospect of “indefinite detention” may have to be confronted**.

1. Nothing in *Ayoub* casts doubt on the correctness of the central finding by Allsop CJ and Katzmann J in *NBMZ* at [17] that, in considering whether or not to refuse a protection visa under s 501(1) of the *Migration Act* to a person who had been assessed as having the status of a refugee for the purposes of the *Refugees Convention*, the Minister is obliged to take into account the legal consequences of his decision (and, to similar effect, see Buchanan J at [177]).
2. Significantly, in *NBMZ*, the appellant had been assessed as a refugee for the purposes of the *Refugees Convention* and had applied for a protection visa. The Minister exercised his discretion under s 501(1) to refuse that application. By operation of s 48A of the *Migration Act* (and subject to the Minister’s discretion under s 48B) the appellant was precluded from lodging in Australia a fresh application for a protection visa. As a person who was an unlawful non-citizen, the appellant had to be detained (s 189) and removed from Australia as soon as reasonably practicable (s 198). Under s 195A, the Minister had a discretion to grant a detainee a visa where the Minister thought that it was in the public interest to do so (whether or not a visa application had been made), but as each member of the Full Court in *NBMZ* pointed out, there was no reference in either the Department’s briefing paper or in the Minister’s statement of reasons to the possibility or willingness of the Minister to contemplate granting the appellant a visa under that provision. The Full Court found that, in these circumstances, the matter should be determined on the hypothesis that the appellant would be indefinitely detained and any question of a visa being granted under s 195A was a matter of speculation. Thus it was in those particular circumstances that the Full Court found in *NBMZ* that the Minister was obliged, in considering the exercise of his power under s 501(1), to take into account the legal consequences of his decision to refuse the protection visa on character grounds, which consequences included the prospect of the appellant being detained indefinitely in Australia.
3. *Ayoub* was applied by a differently constituted Full Court (North, Collier and Flick JJ) in *COT15*, which involved the cancellation of a visa by the Minister’s delegate. In *COT15*, the relevant power which was exercised was not that under s 501(2), but rather that under s 109 of the *Migration Act*. The effect of that provision was to permit a visa to be cancelled if incorrect information had been provided. The visa which was cancelled was not a protection visa. In challenging the delegate’s decision in the MigrationReview Tribunal, the appellant claimed that his life would be threatened if he was returned to Afghanistan and that this would also amount to a breach of Australia’s non-refoulement obligations. The Tribunal affirmed the delegate’s decision to cancel the appellant’s visa, being satisfied that the appellant’s claims could be addressed in any subsequent protection visa application. The Federal Circuit Court of Australia dismissed the appellant’s judicial review application, holding that non-refoulement obligations were not a mandatory consideration and that, in any event, the Tribunal had considered them.
4. On appeal, the Full Court rejected the appellant’s central contention that Australia’s non-refoulement obligations were a mandatory consideration in the exercise of the power under s 109. The Full Court applied *Ayoub* and emphasised that Australia’s non-refoulement obligations could be raised in a subsequent protection visa application and would need to be determined on that occasion. At [38], the Full Court stated:

The same reasoning [i.e. as in *Ayoub*]is applicable in the circumstances of the present case. That reasoning is reflected in the decision of the Tribunal. The subject matter, scope and purpose of the Act do not require the Tribunal to take into account as a mandatory consideration the non-refoulement obligations of Australia when determining whether to cancel a visa. The Act contemplates that those obligations will be considered in the context of a protection visa application.

1. Another relevant Full Court decision is *Cotterill v Minister for Immigration and Border Protection* [2016] FCAFC 61; 150 ALD 252 (***Cotterill***). At first glance, it might appear to be inconsistent with some aspects of *Ayoub* and *COT15*. On closer analysis, however, we consider that there is no material inconsistency. The reasoning and outcome in *Cotterill* reflect the particular circumstances of that case.
2. The Full Court in *Cotterill* was constituted by North, Kenny and Perry JJ. Justice North delivered a separate judgment and upheld the appeal on grounds which included, but went beyond, the single ground which was upheld in the joint judgment of Kenny and Perry JJ.
3. Justice North held that the Minister’s decision to cancel an absorbed person visa under s 501(2) was vitiated by the following three jurisdictional errors:
4. the Minister’s finding that the appellant posed a risk of reoffending lacked an evident and intelligible justification and, since this finding was critical to the Minister’s decision to cancel the visa, that decision was unreasonable in a legal sense because it lacked any rational support;
5. the Minister’s finding that the appellant had caused his victims to suffer serious harm, which was integral to the Minister’s reasoning to cancel the visa, lacked any factual basis, which rendered the cancellation decision unreasonable in a legal sense; and
6. the Minister had failed to consider the possibility that, because of the appellant’s health problems, it might not be possible to remove him from Australia which raised the possibility that he might be indefinitely detained and this gave rise to a jurisdictional error by analogy with *NBMZ*.
7. Justices Kenny and Perry allowed the appeal in *Cotterill* on the basis of the third ground alone. Their Honours made reference in [135] of their joint reasons for judgment to “other troubling aspects of the Minister’s decision”, as indicated in North J’s reasons, but they found it unnecessary to explore these aspects further. Their Honours held that the real possibility that the appellant might suffer indefinite detention if his visa was cancelled was a mandatory relevant consideration in the particular circumstances of that case. The Minister had failed to consider that mandatory consideration.
8. Justices Kenny and Perry referred to both *NBMZ*and *NBNB* v *Minister for Immigration and Border Protection* [2014] FCAFC 39; 220 FCR 44 (***NBNB***). *NBNB* was handed down on the same day as *NBMZ*. It was heard by the same Full Court (i.e. Allsop CJ, Buchanan and Katzmann JJ). *NBNB* concerned a group of people who had been determined to be refugees but whose applications for protection visas had been refused by the Minister under s 501(1) because of the character test. The Full Court held that the Minister had failed to consider the legal consequences of his visa cancellation decisions, namely that the appellants faced indefinite detention, and that, following *NBMZ*, this amounted to jurisdictional error.
9. In *Cotterill*, Kenny and Perry JJ referred at [123] to *NBMZ* as supporting their Honours’ conclusion that the possibility that the appellant might suffer indefinite detention if his visa was cancelled was a mandatory consideration. Their Honours described *NBMZ* as involving a decision by the Full Court that “… in making a decision under s 501(1), the Minister’s failure to consider that the visa applicant would face indefinite detention if a visa were refused constituted jurisdictional error”.
10. In *Cotterill*, Kenny and Perry JJ found that, because of the operation of ss 189, 196 and 198 of the *Migration Act*, there was a possibility in the particular circumstances of that case of the appellant being detained indefinitely. Their Honours noted (at [131]) that the appellant’s ill-health was the factual circumstance which created the possibility that removal might not be “reasonably practicable” for the purpose of s 198. This did not mean that the circumstances in *Cotterill* were relevantly different from those in *NBMZ* (where the relevant factual circumstance was that the prospect of the appellant obtaining a visa under s 195A which would bring an end to his immigration detention was “at best, a matter of speculation”: at [4] per Allsop CJ and Katzmann J). Justices Kenny and Perry stated in *Cotterill* at [132]:

As indicated in [123] above, *NBMZ* is authority for the proposition that, in exercising power under s 501(1) or (2), the Minister must take into account the legal consequences of a decision under the *Migration Act*. If indefinite detention is in prospect as a legal consequence of a proposed decision, the Minister must take this consideration into account. It is immaterial that the factual circumstances giving rise to that legal consequence are different.

1. The different factual circumstances between those in *NBMZ* (and in *NBNB*) and those in *Cotterill* did not affect the Minister’s obligation to take into account as a mandatory consideration the prospect of indefinite detention as a legal consequence of the Minister’s decision under either s 501(1) or (2) of the *Migration Act*. In *Cotterill* (at [133]), Kenny and Perry JJ raised that in *NBMZ* that prospect was “virtually certain” on the facts of that case, whereas in *Cotterill* the material before the Minister, including that relating to the appellant’s ill-health which could affect him travelling, indicated that there was “a real possibility” that his removal would not be reasonably practicable (as referred to in s 198). Consequently, the appellant faced the prospect of indefinite detention because of the operation of ss 189, 196 and 198 of the *Migration Act*. Kenny and Perry JJ concluded at [133]:

The Minister was obliged in this case as in *NBMZ* to take into account that the material before him disclosed that the appellant’s indefinite detention was in prospect if he cancelled the appellant’s visa, as a consequence of ss 189, 196 and 198 of the *Migration Act.*

1. We do not understand their Honours’ analysis of *NBMZ* in either [123] or [132] of *Cotterill* to suggest that, in exercising the power under s 501(2), the Minister must in **every** such case take into account the prospect of indefinite detention as an aspect of the legal consequences of such a decision. In our view, it is significant that *NBMZ* involved a refusal to grant a protection visa on character grounds. It may be inferred that the appellant there was prevented by s 48A from making a fresh visa application in Australia and there was a finding by Allsop CJ and Katzmann J that the possibility of the appellant obtaining a visa under s 195A was simply a matter of speculation. The facts in *Cotterill* do not suggest that there was any factual basis for the appellant in that case to make an application for a protection visa either in Australia or elsewhere. The prospect of his indefinite detention in Australia related to his ill-health and not to Australia’s non-refoulement obligations.
2. Finally, reference should be made to another Full Court decision which was handed down after judgment was reserved in this appeal. In *AZAFQ* *v Minister for Immigration and Border Protection* [2016] FCAFC 105, the Court (Allsop CJ, Robertson and Griffiths JJ) dismissed an appeal in which it was claimed that the primary judge erred in not accepting that the Minister had failed to take into account the mandatory consideration of the appellant’s possible indefinite detention when the Minister decided to cancel the appellant’s visa under s 501(2) on character grounds. The cancelled visa was not a protection visa and it was common ground that the appellant there was not prevented from applying in Australia for a protection visa even though his earlier visa had been cancelled. The Full Court observed at [69] that the consideration of any such future protection visa application by the appellant would require the Minister to conduct an up to date assessment as to whether Australia owed the appellant protection obligations under the *Migration Act.* At [70], the Court added that the appellant’s right to apply for a protection visa meant that “the legal and factual consequences of the cancellation of the appellant’s visa do not necessarily include removal from Australia or indefinite detention”.
3. To sum up, we do not consider that there is any material inconsistency in the Full Court decisions referred to above. These decisions illustrate the potential complexity of the issues. There is a potentially wide range of factual circumstances which can arise when consideration is being given to the exercise of the significant powers in ss 501(1) and (2). Those factual circumstances may relate to the individual’s personal circumstances, which can themselves vary enormously. The matter is further complicated by the possibility that the individual’s legal status as an unlawful non-citizen (which necessarily flows from the cancellation decision and the operation of s 501F) might change because, for example, the person has a right to apply for another visa, including a protection visa. The consideration of any such subsequent protection visa application will require an assessment of Australia’s non-refoulement obligations and the prospects of the person being detained indefinitely. Another relevant factor is whether, at the time of considering the exercise of the powers in s 501(1) or (2), there is any material which is relevant to the likelihood of the Minister exercising his or her personal powers under provisions such as s 195A to grant the person a visa (even in the absence of a visa application) which would have the effect of bringing to an end that person’s detention and displace the duty to remove the person under s 198. Another relevant matter is the operation of s 197C of the *Migration Act*, which makes plain that Australia’s non-refoulement obligations are not a relevant consideration when an officer comes to discharge the statutory duty imposed by s 198 to remove an unlawful non-citizen as soon as reasonably practicable. Necessarily, therefore, to the extent that that issue is material it must be addressed at an earlier stage in the decision-making process.
4. All these factors have a bearing upon the issue whether Australia’s non-refoulement obligations and the prospect of indefinite detention are mandatory considerations at the time when consideration is being given to the exercise of the powers in s 501(1) or (2). Given the inherent complexity of the matter, it would be unwise to be overly prescriptive in summarising the relevant legal principles, however, the Full Court decisions referred to above support the following non-exhaustive summary of some of the relevant principles:
5. in determining whether or not to exercise the powers in s 501(1) or (2) of the *Migration Act*, the decision-maker must take into account the legal consequences of the decision made under either of those provisions;
6. those legal consequences may include the prospect of the affected person being held in indefinite detention because of the operation of ss 189, 196 and 198 of the *Migration Act*;
7. the test is whether, on the basis of all the material which is before the decision-maker at the time of considering whether or not to exercise the powers in s 501(1) or (2), there is at least a real possibility that the person’s removal from Australia would not be reasonably practicable with the consequence that the person faces the prospect of indefinite detention by operation of ss 189, 196 and 198 of the *Migration Act*;
8. the factual circumstances which can give rise to the prospect of indefinite detention can vary considerably – for example, that real possibility may exist because Australia owes the person protection obligations and there is no other country to which the person can be removed consistently with Australia’s non-refoulement obligations. Or there may be some other reason which is personal to the individual concerned as to why that real possibility exists, such as the state of the person’s health, which affects the duty under s 198(6) to remove the person as soon as reasonably practicable;
9. in determining whether or not to exercise the powers in s 501(1) or (2) of the *Migration Act*, Australia’s non-refoulement obligations and the prospect of indefinite detention are not mandatory considerations in circumstances where it is open to the person whose visa has been refused or cancelled on character grounds to apply in Australia for a protection visa or some other visa (which visa application the decision-maker is legally bound to consider and determine) and the consideration of the visa application must involve regard being paid to the prospect of indefinite detention if the visa is refused;
10. this position is generally unaffected by the presence in the *Migration Act* of various provisions which confer personal powers on the Minister to “lift the bar” (such as s 48B) or to grant a visa to a detainee which would have the effect of changing the detainee’s status from being an unlawful non-citizen (such as s 195A). There is no legal duty on the Minister to consider whether to exercise such a personal power, whether he or she is requested to do so by any person or in any other circumstances (see, for example, ss 48B(6) and  195A(4)). Hence there is no assurance that the Minister will even consider whether or not to exercise such a personal power, with the consequence that there is no assurance that any consideration will subsequently be given in a relevant case to Australia’s non-refoulement obligations or the prospect of indefinite detention. This difficulty may be overcome in a case where, at the time consideration is being given to the exercise of the powers under s 501(1) or (2), there is some material which indicates the real possibility of the Minister exercising his or her personal powers in favour of the affected person; and
11. the position is also different where, in a case such as *NBMZ*or *NBNB*, the person whose visa application has been refused or whose visa has been cancelled under s 501(1) or (2) respectively is prevented by the *Migration Act* from applying in Australia for a protection visa. In such a case, the Minister’s obligation to consider the legal consequences of a decision in the circumstances under either of those provisions will include consideration of Australia’s non-refoulement obligations and the prospect of indefinite detention, where those matters are relevant to the person’s particular circumstances.
12. The primary judge’s approach is inconsistent with these principles and, in particular, with the Full Court’s decisions in *Ayoub* and *COT15*. His Honour did not refer to either of these decisions in his reasons for judgment. Senior counsel for the Minister said that *Ayoub* was drawn to his Honour’s attention. *COT15* was handed down only two days before his Honour published his judgment and it may well be that he was unaware of it.
13. The primary judge attached particular significance to the fact that it was common ground that Ms Le is a person who had been determined to have the status of a refugee for the purposes of the *Refugees Convention*. His Honour relied on this fact in distinguishing *Huynh* and in applying Lee J’s decision in *Nguyen*.
14. In *Nguyen*, the Minister had cancelled Mr Nguyen’s existing visa under s 501(2). Mr Nguyen had been assessed by the Office of the United Nations High Commissioner for Refugees(UNHCR) to be a refugee for the purposes of the *Refugees Convention*. He had then been accepted for resettlement in Australia. Significantly, the visas held by both Mr Nguyen and Ms Le were **not** protection visas within the meaning of s 35A of the *Migration Act*. There is no apparent reason why Mr Nguyen, like Ms Le in the present case, could not have applied in Australia for a protection visa after his then existing visa was cancelled. If that be the case, we consider that Lee J was wrong to conclude that the Minister fell into jurisdictional error in cancelling Mr Nguyen’s visa because the Minister did not have regard to Australia’s protection obligations to Mr Nguyen. Those obligations were not a mandatory consideration in the decision-making process relating to s 501(2) if, notwithstanding the cancellation of his existing visa, Mr Nguyen had the right to apply in Australia for a protection visa. Australia’s protection obligations and the prospect of Mr Nguyen being detained indefinitely would have been mandatory considerations in the context of the determination of any such protection visa application.
15. For these reasons, the primary judge erred in concluding, in the particular circumstances relating to Ms Le, that Australia’s non-refoulement obligations were a mandatory consideration in the exercise of the Minister’s power under s 501(2). That is because it was open to Ms Le to apply for a protection visa and to put before the Minister any material relating to whether Australia owed protection obligations to her, whether her removal to Vietnam would be in breach of Australia’s non-refoulement obligations or whether there was some other reason personal to her as to why there was a real possibility that she might be held in immigration detention indefinitely.

## Disposition of the notice of contention

1. The notice of contention as filed raised four grounds. Only the following two grounds were pressed:
2. The Minister cancelled the incorrect visa.
3. The Minister cancelled the correct visa, but based his decision on incorrect or incomplete information, making his decision procedurally unfair or legally unreasonable.
4. Ground 1 turns primarily on the uncertainty as to whether or not Ms Le was ever granted the 1991 visa. The uncertainty related to the fact that the Department’s records indicated that the 1991 visa had been granted to her, but the Minister backed away from that position during the course of the appeal. Ms Le submitted that it appeared to be “common ground” that the 1991 visa never existed. It was further submitted that it was not certain that she held the 1994 visa when that particular visa was purportedly cancelled by the Minister. Ms Le submitted that her precise migration status was unclear and that there were significant uncertainties on that subject in the Issues Paper which was before the Minister when he decided to cancel her 1994 visa.
5. The contentions advanced on Ms Le’s behalf in relation to this matter, which were somewhat convoluted, may be summarised as follows:

* it was common ground that Ms Le held a Transitional (Permanent) Visa from 1 September 1994. No mention is made of that visa in the Issues Paper which, instead, advised the Minister that Ms Le had been granted both the 1991 visa and the 1994 visa;
* the Minister now accepts that the 1991 visa never existed even though the Department’s records show that the 1991 visa was granted to Ms Le. It was suggested by counsel that one possible explanation for the records indicating that the 1991 visa was granted at apparently the same time as the 1994 visa was granted was to ensure that Ms Le met the criterion in cl 155.211(2) for the grant of the 1994 visa;
* the grant of the 1991 visa was unlawful because Ms Le did not apply for it and she did not meet the relevant eligibility criteria – this unlawfulness infected the 1994 visa;
* if both the 1991 and 1994 visas were unlawful, Ms Le left Australia on 22 December 1994 as the holder of a Transitional (Permanent) Visa. The issue then arises as to whether s 82 of the *Migration Act* operated and whether the Transitional (Permanent) Visa had a return or re-entry facility;
* if the Transitional (Permanent) Visa carried with it a right to re-enter (which is unclear) Ms Le exercised that right when she twice returned to Australia from Vietnam and continued to hold the Transitional (Permanent) Visa;
* if there was no return facility attached to that particular type of visa, it should be assumed that the Transitional (Permanent) Visa sprang back into effect when Ms Le was permitted to re-enter Australia on both those occasions; and
* if it be the case, therefore, that Ms Le now holds a Transitional (Permanent) Visa, this was not the visa which was cancelled by the Minister – instead, he cancelled the 1994 visa, which involved jurisdictional error.

1. For the following reasons, these contentions should be rejected. As Ms Le’s counsel candidly acknowledged, it was a matter of speculation as to why the Department’s records state that Ms Le was granted the 1991 visa. The primary judge found that the 1991 visa had been granted to Ms Le. If Ms Le wanted to put that matter in issue she should have raised it below. There is no evidence to suggest that she did. In any event, assuming in Ms Le’s favour that the 1991 visa never existed, the primary judge also found that the 1994 visa existed. This was the visa which Ms Le apparently used to travel twice to and from Vietnam in 1994 and 1995. No issue was raised below by Ms Le concerning the validity of this visa. Even if she were permitted to challenge its validity in the appeal, we are not satisfied that any sufficient basis has been established for doubting the validity of the 1994 visa. In particular, we are not satisfied that its validity would be affected if the 1991 visa did not exist or was itself invalid.
2. If it be the case that, as at 16 December 1994, Ms Le still held a Transitional (Permanent) Visa, it would have ceased to be of effect upon the grant to her that day of the 1994 visa by operation of s 82(2).
3. Accordingly, for these reasons, the Minister did not cancel the incorrect visa. He cancelled the 1994 visa which was the only visa held by Ms Le at that time.
4. As to ground 2, Ms Le claimed that the Minister’s decision to cancel the 1994 was procedurally unfair or unreasonable in the legal sense because it was based on incorrect or incomplete information. The incorrect or incomplete information was identified as including the fact that Ms Le had been granted a Transitional (Permanent) Visa, as well as the confusion and uncertainties created by the Issues Paper concerning Ms Le’s precise migration status. Another deficiency in the Issues Paper was said to be the failure to advise the Minister as to when and how Ms Le had ceased to have the status of a refugee. It was submitted that had the Minister been properly advised about Ms Le’s Transitional (Permanent) Visa, his decision may well have been different. In support of Ms Le’s claim of unreasonableness in the legal sense, reference was made to *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1. It was also contended that, as a matter of procedural fairness, the Minister should have been advised by his Department concerning the allegedly unlawful conduct in respect of the purported grant of the 1991 and 1994 visas.
5. There appears to be some confusion in Ms Le’s reliance on both procedural unfairness and unreasonableness in a legal sense in respect of ground 2. That is reflected in the submission which was made on her behalf to the effect that the errors and omissions in the Issues Paper amounted to “the denial of procedural fairness [which] is not legally unreasonable (sic)”.
6. For the following reasons none of the matters complained of in support of ground 2 give rise to either procedural unfairness or unreasonableness in the legal sense.
7. It may be accepted that the provision of erroneous or incomplete information by the Department which is placed before the Minister, which information is material to the Minister’s decision to refuse to grant or cancel a visa under s 501(1) or (2), may involve jurisdictional error (see, for example, *Minister for Immigration & Multicultural & Indigenous Affairs v Schwart* [2003] FCAFC 229, where the Minister, acting upon Departmental advice, cancelled a visa which the visa holder did not in fact hold). But that is far removed from the circumstances of the present case. For the reasons given above, the Minister was correctly advised by the Department that the 1994 visa was Ms Le’s only visa and it was that visa which was cancelled (the Minister’s cancellation decision also triggered the operation of s 501F(3), which had the effect that, where a person’s visa has been cancelled under s 501 and the person holds another visa (which relevantly is not a protection visa), the Minister is taken to have decided to cancel that other visa).
8. As to the complaint regarding the failure to advise the Minister as to when and how Ms Le ceased to have the status of a refugee, any such omission was not material in the circumstances here where, for the reasons given above, Australia’s protection obligations were not a mandatory consideration when the Minister was considering to cancel Ms Le’s 1994 visa under s 501(2).
9. The Department’s failure to refer to Ms Le’s Transitional (Permanent) Visa in the Issues Paper does not involve jurisdictional error in circumstances where, by operation of s 82(2), that particular visa ceased to be of effect when the 1994 visa was granted.
10. As is evident from what we have said above in relation to the 1991 visa, there are some unexplained matters in relation to the relevant entries in the Department’s records, but none of those is of such a magnitude or significance as to constitute unreasonableness in the legal sense.
11. For these reasons, the notice of contention should be dismissed.

## Conclusion

1. The appeal should be allowed and the notice of contention should be dismissed. The respondent must pay the Minister’s costs of these proceedings and the proceedings below, as agreed or assessed.

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| I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and the Honourable Justices Griffiths and Wigney. |

Associate:

Dated: 9 September 2016